

**CYNTHIA AND CHARLES
REED INDIVIDUALLY AND
ON BEHALF OF THEIR
MINOR CHILDREN**

VERSUS

**MAYER FINKLESTEIN AND
XYZ INSURANCE COMPANY**

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NO. 2001-CA-1015

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COURT OF APPEAL

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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BYRNES, J., DISSENTS WITH REASONS:

I respectfully dissent based on my conclusion that the trial court erred in denying the defendant, Mayer Finklestein's motion to dismiss.

Under La. C.C.P. art. 561, statute governing abandonment of an action, the policy favoring prevention of protracted litigation is balanced against the policy favoring maintenance of an action whenever possible so as to afford an aggrieved party his day in court. *Bridges v. Wilcoxon*, 34,660 (La. App. So.2d 2 Cir. 5/9/01), 786 So.2d 264. Any action taken by a party that is alleged to be a step in the prosecution or defense of a suit must appear in the court record. *Lewis v. City of New Orleans*, 99-795 (La. App. 4 Cir. 11/17/99), 748 So.2d 522, *Skrzysinski v. Swift Independent Packing Co.*, 517 So.2d 230 (La. App. 3 Cir. 1990); *Melancon v. Continental Casualty Co.*, 307 So.2d 308 (La. 1975). A party takes a step in the prosecution or defense

of a suit when he takes **formal action**, before the court **on the record**, intended to hasten the matter to judgment. *Bridges, supra; Gallagher v. Cook*, 34,158 (La.App.2d Cir.12/15/00), 775 So.2d 79. However, the plaintiff's intention to take a step in the prosecution of her claim without a step actually being taken is insufficient. *Picone v. Lyons*, 94-2428 (La.App. 4 Cir. 4/26/95), 653 So.2d 1375, *writ denied*, 95-1506 (La.9/29/95), 660 So.2d 852.

In *Gallagher, supra*, the Second Circuit found that correspondence filed in record evidencing parties' willingness to participate in mediation neither served to interrupt the tolling of the three-year abandonment period nor relieved the patient of his obligation to take a step, on the record, to hasten an asserted medical malpractice action to judgment, although the parties may have attempted to schedule a time and place for mediation, given that such a mediation never occurred.

This is a court of record. In the present case, no one has filed an affidavit saying that part of the record is missing. Neither party has filed an affidavit that says that a hearing on the motion for summary judgment was held on September 26, 1997. The party attempting to prove that there is in fact something missing in the record has the burden of proof.

