

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0153

BURGESS, INC.

VERSUS

PARISH OF ST. TAMMANY

Judgment Rendered: OCT 25 2017

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On Appeal from the  
Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany  
State of Louisiana  
Trial Court No. 2005-10435

The Honorable Scott Gardner, Judge Presiding

\* \* \* \* \*

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\* \* \* \* \*

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

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**PENZATO, J.**

This is an appeal by Plaintiff, Burgess, Inc. (Burgess), of an order dismissing its claims against St. Tammany Parish (the Parish) on grounds of abandonment. For the reasons set forth below, we affirm the trial court.

**FACTS AND PROCEDURAL HISTORY**

Burgess is the owner of several tracts of unimproved and residential property in Cypress Park subdivision (Cypress Park) in Lacombe, Louisiana. Cypress Park was developed in the 1950's, but many lots remain undeveloped and owned by Burgess. Burgess claims that as other subdivisions were developed in the area, drainage problems were created for Cypress Park. The area where Cypress Park is located has experienced drainage and flooding problems for decades. In 2004, in order to improve the drainage, the Parish dug canals, many of which were dug across lots owned by Burgess. Burgess asserts that the Parish did not have its permission to dig the canals across its property and did not expropriate the property. After the Parish dug the canals, the federal government changed the flood maps for the subdivision, causing it to be harder to develop land in the subdivision. Additionally, part of the subdivision was designated a "floodway," meaning that only structures which did not impede the flow of water, such as those on stilts, could be built. The Parish then put a moratorium on new construction in Cypress Park due to drainage issues, which was renewed every six months until November 2010. Burgess filed suit on January 27, 2005, which was amended twice, and sought damages from the Parish for an inverse condemnation and public taking of property, loss of opportunity to sell the lots, expenses to obtain surveys and drainage studies, and other damages. The Parish denied liability.

It is undisputed that formal discovery requests were last served and filed in the record on February 3, 2012. The record does not contain answers to this discovery by the Parish, nor a motion to compel by Burgess. The Parish filed an

ex parte motion and order of abandonment on March 1, 2016, alleging that abandonment took place by operation of law pursuant to La. C.C.P. art. 561. The trial court signed an order of dismissal for abandonment, dismissing the suit without prejudice, on March 7, 2016.<sup>1</sup> Thereafter, Burgess filed a motion to set aside dismissal, attaching a multitude of correspondence and documents. On September 8, 2016, the trial court held a hearing on the motion to set aside dismissal, and after taking the matter under advisement, denied that motion. The trial court issued written reasons for the denial, and signed a judgment in accordance therewith on September 13, 2016. It is from this judgment that Burgess appeals.

### **ASSIGNMENT OF ERROR**

Burgess asserts that the trial court erred in holding that the suit was abandoned, and in refusing to set aside its dismissal for abandonment.

### **LAW AND DISCUSSION**

#### **Abandonment**

The controlling provision in this case, La. C.C.P. art. 561, provides, in pertinent part:

A. (1) 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, ....

(3) This provision shall be operative without formal order, but, on ex parte motion of any party or other interested person by affidavit which provides that no step has been timely taken in the prosecution or defense of the action, the trial court shall enter a formal order of dismissal as of the date of its abandonment. The sheriff shall serve the order in the manner provided in Article 1314, and shall execute a return pursuant to Article 1292.

(4) A motion to set aside a dismissal may be made only within thirty days of the date of the sheriff's service of the order of dismissal. If the trial court denies a timely motion to set aside the dismissal, the clerk of court shall give notice of the order of denial pursuant to

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<sup>1</sup> A dismissal of an action on the grounds of abandonment may only be made without prejudice. See *Argence, L.L.C. v. Box Opportunities, Inc.*, 2011-1732 (La. App. 4 Cir. 5/23/12), 95 So. 3d 539, 541.

Article 1913(A) and shall file a certificate pursuant to Article 1913(D).

(5) An appeal of an order of dismissal may be taken only within sixty days of the date of the sheriff's service of the order of dismissal. An appeal of an order of denial may be taken only within sixty days of the date of the clerk's mailing of the order of denial.

The underlying policy of the abandonment article seeks to prevent protracted litigation that is filed for purposes of harassment or without a serious intent to hasten the claim to judgment. Abandonment is not a punitive measure, but is designed to discourage frivolous lawsuits by preventing plaintiffs from letting them linger indefinitely. *Wilkerson v. Buras*, 2013-1328 (La. App. 1 Cir. 8/12/14), 152 So. 3d 969, 974, *writ not considered*, 2014-2138 (La. 11/26/14), 152 So. 3d 894.

Because dismissal is the harsh, the law favors and justice requires that an action be maintained whenever possible so that the aggrieved party has his day in court. Thus, any action or step taken to move the case toward judgment should be considered. If the plaintiff has clearly demonstrated before the court during the prescribed period that he does not intend to abandon his lawsuit, dismissal is not warranted. *Wilkerson*, 152 So. 3d at 974.

Abandonment is self-executing; it occurs automatically with the passing of three years without a step being taken by either party. La. C.C.P. art. 561 (A)(1) and (3). *Compensation Specialties, L.L.C. v. New England Mutual Life Insurance Company*, 2008-1549 (La. App. 1 Cir. 2/13/09), 6 So. 3d 275, 278, *writ denied*, 2009-0575 (La. 4/24/09), 7 So. 3d 1200. Whether or not a step in the prosecution of a case has been taken in the trial court for a period of three years is a question of fact subject to a manifest error analysis on appeal. *Hutchison v. Seariver Mar., Inc.*, 2009-0410 (La. App. 1 Cir. 9/11/09), 22 So. 3d 989, 992, *writ denied*, 2009-2216 (La. 12/18/09), 23 So. 3d 946, *citing Brown v. Kidney and Hypertension Associates, L.L.P.*, 2008-0919 (La. App. 1 Cir. 1/12/09), 5 So. 3d 258, 264. On the

other hand, whether a particular act, if proven, precludes abandonment is a question of law that we review by simply determining whether the trial court's decision was legally correct. *Hutchison*, 22 So. 3d at 992, *citing*, *Brown*, 5 So. 3d at 264.

Louisiana Code of Civil Procedure article 561 has been construed as imposing three requirements on plaintiffs. First, plaintiffs must take some "step" toward the prosecution of their lawsuit. A "step" is the taking of formal action 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, the step must appear in the record of the suit. Third, the step must be taken within the legislatively prescribed time period; sufficient action by *either* plaintiff or defendant will be deemed a step. *Tessier v. Pratt*, 2008-1268 (La. App. 1 Cir. 2/13/09), 7 So. 3d 768, 772, *citing* *Clark v. State Farm Mutual Automobile Insurance Company*, 2000-3010 (La. 5/15/01), 785 So. 2d 779, 784.

There are two jurisprudential exceptions to the abandonment rule: (1) a plaintiff-oriented exception, based on *contra non valentum*, that applies when the failure to prosecute is caused by circumstances beyond the plaintiff's control; and (2) a defense-oriented exception, based on acknowledgement, that applies when the defendant waives his right to assert abandonment by taking actions inconsistent with an intent to treat the case as abandoned. *Wilkerson*, 152 So. 3d at 975, *citing* *Clark*, 785 So. 2d at 784-85; *Compensation Specialties*, 6 So. 3d at 279-80. With regard to the defense-oriented exception, the conduct or actions of the defendant which are inconsistent with the intent to treat a case as abandoned and which result in the waiver of the right to assert abandonment may occur either before or after the abandonment period has accrued and serves to recommence the abandonment period running anew. *Hutchison*, 22 So. 3d at 994.

Further, extrajudicial efforts, such as informal correspondence between the parties, have uniformly been considered insufficient to constitute a step for purposes of interrupting or waiving abandonment. *Compensation Specialties*, 6 So. 3d at 282.

The Parish asserts that even before this lawsuit was filed, it was attempting to resolve the drainage issues in Cypress Park. Gina Campo, the Chief Administrative Officer for the Parish, testified that as of November 1, 2004, the Parish had filed a hazard mitigation plan to obtain grant funding to address the drainage issues in Cypress Park. The flooding history was included in the grant application. Furthermore, the Parish held a meeting regarding the grant application on March 31, 2005, four weeks prior to being served with the present lawsuit. The Parish asserts that throughout the entire history of the parties, there were two objectives: settlement of the litigation and resolution of the drainage issues.

Burgess claims that within six months of the suit being filed in 2005, the Parish began work to correct the drainage problem. The Parish drew up a set of seven detailed engineering drawings showing the plan to fix the damage caused. In 2009, the Parish applied for a federal grant to fund curative work in Cypress Park. Also in 2009, the Parish requested to purchase certain lots from Burgess so it could construct additional drainage works. The Parish also obtained a jurisdictional determination (sometimes called a “wetlands determination” or “wetlands delineation”) from the Army Corps of Engineers, which was ultimately received in May 2011.

The Parish characterizes all of its actions as informal settlement negotiations and cites numerous cases that hold that informal settlement negotiations are insufficient to constitute a step for purposes of interrupting or waiving abandonment. *See Chevron Oil Co. v. Traigle*, 436 So. 2d 530, 533 (La. 1983);

*Clark*, 785 So. 2d at 790; *Louisiana Dep't. of Trans. & Dev. v. Oilfield Heavy Haulers, L.L.C.*, 2011-0912 (La. 12/6/11), 79 So. 3d 978, 982-83. Burgess maintains that there were numerous actions of the Parish that were either a step in the prosecution of the lawsuit or that the Parish waived its right to plead abandonment. Burgess asserts that the Parish's actions were not settlement negotiations, but an acknowledgment that the Parish was indebted to Burgess and characterizes the Parish's actions as an unconditional tender of performance, just as in *Clark*. We must review the actions of both parties during the three-year abandonment period, beginning February 3, 2012, to determine if any step was taken sufficient to interrupt the abandonment period. We must further determine if any post-abandonment actions of the Parish were sufficient to waive abandonment.

#### **Actions of the Parties During the Abandonment Period**

On June 14, 2012, counsel for Burgess met with Parish officials to discuss issues from the litigation. Notes from the meeting indicate that the Parish was planning to make drainage improvements in Cypress Park and that the Parish had requested FEMA to change the flood maps as part of the response to this suit. At the time, the Parish was planning to apply for grant money to purchase some lots from Burgess to construct additional drainage work. When the grant fell through, the Parish decided that it would determine if it could fund and construct some of the drainage work with its own work crews.

Paul Carroll, who was a drainage engineer for the Parish, testified that he worked on two projects involving Cypress Park. One was the Cypress Bayou pond, which was constructed sometime in 2012 to benefit Cypress Park and other neighborhoods, and one was the Cypress Park drainage project, which was never constructed. The Cypress Park drainage project was to address flooding issues in Cypress Park that were not resolved by the Cypress Bayou pond. In December 2012, Carroll had a meeting with other Parish employees and representatives from

FEMA and the Governor's Office of Homeland Security and Emergency Preparedness pertaining to the Cypress Park drainage project and flood mapping.

In 2013, the Parish pursued the federal grant application and, in anticipation of the grant being approved, offered Burgess an agreement (the "Voluntary Participation Form") where the Parish would purchase certain lots to construct the new drainage works. Burgess accepted and signed the Voluntary Participation Form on June 14, 2013, and returned it to the Parish. The Voluntary Participation Form specifies that the program is voluntary and dependent upon funding being authorized. It was not a final, binding agreement or unconditional because Burgess was able to opt out of the program for payment at any time prior to the closing. In April 2013, the Parish grants coordinator offered to meet with local residents to explain the proposed drainage project.

On September 4, 2014, the Parish reported to counsel for Burgess that its engineering department was at about 90% completion of the design phase of the drainage fix, and estimated the cost of the project to be \$1.08 million. The Parish also indicated that an engineer was to design the subsurface drainage, which would replace the canals the Parish initially dug as claimed in the petition.

In January 2015, the Parish was still performing engineering work to address the drainage problems in Cypress Park and completed more engineering drawings. As of both August 12, 2015, and December 21, 2015, the Parish was going forward with the drainage improvements in the area.

Leslie Bolner, an attorney for Burgess, testified that in 2014 and 2015, the Parish worked to have the federal government revise the flood maps and communicated regarding the flood maps with Burgess and its engineer. Burgess alleged in its First Supplemental and Amending Petition that its damages would include any re-classification of its property on federal flood maps.



Furthermore, during the three-year abandonment period, there were numerous items of correspondence that were exchanged by the parties. On August 29, 2012, counsel for Burgess requested by email from the Parish a copy of the wetlands delineation. As the Parish was preparing for a hurricane, the Parish's counsel directed her to the wetlands consultant hired by the Parish. Counsel for Burgess made this same request on November 26, 2012, and December 17, 2012. On December 18, 2012, the Parish counsel responded that another counsel was collecting the information requested. On January 2, 2013, counsel for Burgess again emailed the Parish requesting the wetlands delineation from the Army Corps of Engineers.

### **Post-Abandonment Actions**

Sometime in 2015, counsel for Burgess made an in-person request for the wetlands delineation during a meeting. Burgess ultimately obtained the wetlands delineation in March, 2016.

On March 5, 2015, the Parish issued its 2014 Annual Report and Stormwater Management Plan to the Louisiana Department of Environmental Quality indicating that the design phase of the Cypress Park drainage project was complete with the acquisition of needed easements projected for 2015 and the construction projected to commence in 2016.

The July 31, 2015 budget for the Parish included a \$100,000 provision to acquire easements and do design/study work to fix the drainage issues in Cypress Park. The Parish hired an outside surveyor to work on the Cypress Park drainage project, and the surveyor completed one set of surveys and drawings on August 7, 2015.

On September 1, 2015, Gina Campo, the Chief Administrative Officer for the Parish, approved the budgeting for servitude acquisition for the Cypress Park drainage project. On September 2, 2015, the Parish Engineering Department

requested approval to spend \$950,000 to correct the problems in Cypress Park, and the approval was granted on December 21, 2015.

On January 20, 2016, the Parish was hiring a surveyor to get a more complete survey for the design. In December 2015 and January 2016, the Parish discussed the hiring of the surveyor, an outside consultant to work on the Cypress Park drainage project.

### **Step in the Prosecution**

Under La. C.C.P. art. 561, a party takes a “step” in the prosecution or defense of a suit when he takes formal action, before the court and on the record, intended to hasten the matter to judgment. *City of Baton Rouge/Par. of E. Baton Rouge v. Smuggy’s Corp., Inc.*, 2014-0134 (La. App. 1 Cir. 10/16/14), 156 So. 3d 202, 205. Burgess claims that it made multiple requests for information which were tantamount to formal discovery and prevented abandonment, relying on *Louisiana Dep’t. of Transp. & Dev. v. Bayou Fleet, Inc.*, 2009-1569 (La. App. 1 Cir. 4/28/10), 37 So. 3d 1066, 1075, (*Bayou Fleet I*) writ granted, judgment rev’d sub nom. *Louisiana Dep’t of Transp. & Dev. v. Bayou Fleet, Inc.*, 2010-1215 (La. 7/2/10), 39 So. 3d 585, (*Bayou Fleet II*) and writ denied, 2010-1003 (La. 7/2/10), 39 So. 3d 587. At issue in *Bayou Fleet I* was whether correspondence between the parties concerning repair costs that the plaintiff had incurred were formal discovery. The defendant requested documentation of the plaintiff’s expenses. This court held that such correspondence was not served on all parties as required by Article 561 to prevent abandonment. *Bayou Fleet I*, 37 So. 3d at 1075. The Supreme Court reversed finding that the correspondence was tantamount to formal discovery of requests for production of documents, “[g]iven the unique facts and circumstances” of the case. *Bayou Fleet II*, 39 So. 2d 586. Although the Supreme Court did not elaborate on what those facts and circumstances were, there was an agreement between the parties that DOTD would not take any adverse action

against Bayou Fleet without providing thirty days written notice, which was not done. *Bayou Fleet I*, 37 So. 2d at 1073.

*Bayou Fleet II* does not stand for the proposition that correspondence between the parties requesting documents is formal discovery acting as a step in the prosecution. *Guillory v. Pelican Real Estate, Inc.*, 2014-1539 (La. 3/17/15), 165 So. 3d 875, 878 n.3, specifically limited *Bayou Fleet* to its facts finding that informal settlement negotiations were not a step in the prosecution. See *Jackson v. Moock*, 2008-1111 (La. App. 1 Cir. 12/23/08), 4 So. 3d 840, 844-45 (finding that informal discussions and correspondence scheduling depositions were insufficient to constitute steps in the prosecution of an action); *Miles v. Suzanne's Café & Catering, Inc.*, 2011-907 (La. App. 5 Cir. 3/27/12), 91 So. 3d 1107, 1111 (finding that informal requests for documents from a defendant do not constitute formal discovery and are not steps in the prosecution of the action for purposes of La. C.C.P. art. 561). The correspondence at issue in this case regards Burgess's attempt to obtain a wetlands delineation. In *Breaux v. Auto-Zone, Inc.*, 2000-1534 (La. App. 1 Cir. 12/15/00), 787 So. 2d 322, 326, *writ denied*, 2001-0172 (La. 3/16/01), 787 So. 2d 316, this court held that letters containing supplementary discovery responses did interrupt the abandonment period. However, in *Diez v. State, Dep't. of Transp. & Dev.*, 2009-1057, p. 4 (La. App. 1 Cir. 12/23/09), 2009WL4981278 (unpublished), *writ denied*, 2010-0912 (La. 4/5/10), 31 So. 3d 368, this court held that correspondence merely referencing discovery matters, explaining the availability of witnesses for depositions, and discussing dates to schedule a conference to discuss discovery matters were insufficient to constitute a step for purposes of interrupting or waiving abandonment.

*Breaux* also distinguished *Parson v. Daigle*, 96-2569 (La. App. 1 Cir. 12/29/97), 708 So. 2d 746, 748, where there was no formal discovery, but just a letter containing a question. Like *Parson*, the correspondence in this case

requesting the wetlands delineation is just a question. It is not in furtherance or in response to any previously sent discovery. The interrogatories filed on February 3, 2012, did not in any way refer to or involve the federal government and the wetlands delineation.

Burgess also relies on *State, Dep't of Transp. & Dev. v. Cole Oil & Tire Co.*, 36,122 (La. App. 2 Cir. 7/17/02), 822 So. 2d 229, 233-34, *on reh'g* (Aug. 8, 2002), *writ denied sub nom. State v. Cole Oil & Tire Co.*, 2002-2325 (La. 11/15/02), 829 So. 2d 436, an action by DOTD to expropriate land. During the three-year period of alleged abandonment, the counsel for Cole Oil wrote to DOTD's counsel requesting deposition dates, who responded he preferred to delay the depositions until after receiving Cole Oil's answers to interrogatories. DOTD's counsel also informed Cole Oil's counsel by letter that DOTD's appraiser was moving to another state and that another appraiser had asked to inspect the property, but was unable to gain access. Cole Oil's counsel responded that she believed the new appraiser had inspected the property and requested the results of the inspection. The trial court determined that the totality of the circumstances in the case revealed that DOTD was involved and was participating in this proceeding during the three-year period as evidenced by its correspondence to Cole Oil seeking responses to interrogatories before scheduling depositions and by its substitution of appraisers and subsequent inspection of the property. In addition, there was absolutely no evidence in the record that Cole Oil ever intended to abandon this action.

In addition, the trial court noted that the counsel for both parties were in communication on a consistent basis, addressing a matter which presented continuing changes and difficulties, the moving of Cole Oil's pump and other facilities that were too close to the road. After receiving a cost estimate, the parties then learned that moving the pumps would place them too close to the

railroad tracks on the back of the property, which required obtaining additional cost information. During this time, apparently, Cole Oil was in danger of going out of business. The trial court recognized that counsel for Cole Oil *and* DOTD were actively seeking solutions to the problems presented in the case and stated, “we find that to dismiss this case as abandoned would fly in the face of the well-established policy considerations underlying the abandonment doctrine.” *Cole Oil*, 822 So. 2d at 234.

*Duplechian v. SBA Network Services, Inc.*, 2007-1554 (La. App. 3 Cir. 5/7/08), 2008WL2545280 (unpublished), distinguished *Cole Oil* noting that the correspondence before it did not constitute discovery of any kind. The correspondence inquired about the status of a proposed investigation into the contents of a computer and the status of a planned review of the computer’s hard drive. In *Moore v. Eden Garden Nursing Ctr.*, 37,362 (La. App. 2 Cir. 6/25/03), 850 So. 2d 998, 1001, the court also distinguished *Cole Oil* and held that a letter to follow up prior discovery did not constitute a specific discovery action or a waiver of abandonment.

Here, the request for a wetlands delineation and the responses as to where to obtain the document did not constitute discovery. Burgess never requested the wetlands delineation in formal discovery and these facts are more similar to those in *Duplechian*. This court has stated that “mere ‘contact’ with opposing counsel is insufficient to prevent abandonment of an action. A litigant must take some ‘step’ in the prosecution or defense of the case in the trial court that hastens the case toward judgment.” *Brown*, 5 So. 3d at 267. In *Hutchison*, 22 So. 3d at 996, the court reversed and ordered the dismissal be set aside because it found that the defendant had taken steps to “hasten the matter to trial and judgment.” None of the contact in this case between the parties was a step to hasten the case to

judgment. Therefore, nothing relied upon by Burgess was a step in the prosecution to interrupt the three-year abandonment period.

### **Waiver of Right to Plead Abandonment by Tacit Acknowledgment**

Finding that no step in the prosecution occurred to interrupt the three-year abandonment period, we must now determine if the defense-oriented exception based on acknowledgment applies by taking into account the actions of the Parish either before or after the abandonment period accrued. *See Hutchison*, 22 So. 3d at 994. Burgess relies on *Clark*, 785 So. 2d at 792, claiming that during the three-year abandonment period, the Parish made a tacit acknowledgment by performing acts of reparation or indemnity, making an unconditional payment, or lulling Burgess into believing the Parish would not contest liability, thereby interrupting the accrual of abandonment. Burgess claims that the Parish's acts of cooperation with it in order to find a drainage solution and the attempt to purchase the originally affected lots were evidence of acts of reparation. Burgess points to the (1) engineering designs and drawings that took place; (2) the budgeting by the Parish to repair the drainage problems in Cypress Park; (3) the hiring of an outside surveyor who completed a survey and drawings; (4) the Parish's offer to buy certain lots (which was never completed after the Parish failed to receive a grant); and (5) the Parish's work to change the FEMA flood maps. Burgess argues that all the work, budgeting, planning, design, and offer to purchase lots by the Parish were acts of reparation or an unconditional partial performance resulting in a tacit acknowledgement.

The Parish asserts that its duties include addressing drainage problems whether there is litigation or not. It further claims that it is trying to find a solution to the drainage problems in the Cypress Bayou area, not just one neighborhood.

Waiver by acknowledgement can occur before the accrual of the abandonment period and cause the period to begin anew. *Clark*, 785 So. 2d at

789. The issue in *Clark* was whether the defendant's pre-abandonment, unconditional tender pursuant to statute was sufficient conduct to constitute a waiver. The Supreme Court recognized that "extrajudicial efforts," such as informal settlement negotiations between the parties are insufficient to constitute a step for purposes of interrupting abandonment. *Clark*, 785 So. 2d at 790-91. However, an acknowledgment is "a simple admission of liability resulting in the interruption of prescription that has commenced to run, but not accrued, and may be made on an *informal basis*." *Clark*, 785 So. 2d at 792, quoting *Lima v. Schmidt*, 595 So. 2d 624, 634 (La. 1992) (emphasis added). Furthermore, "[a] tacit acknowledgment occurs when a debtor performs acts of reparation or indemnity, makes an *unconditional* offer or *payment*, or lulls the creditor into believing that he will not contest liability." *Clark*, 785 So. 2d at 792, quoting *Lima*, 595 So. 2d at 634 (emphasis added).

Burgess asserts that since a request for proposed scheduling dates was held to be an acknowledgment sufficient to waive abandonment in *Hutchison*, the Parish's actions of engineering, planning, permitting, and budgeting should be more sufficient than a single letter to constitute an acknowledgment. This court specifically stated in *Hutchison* that the case did "not involve an attempt to use informal correspondence between the parties to demonstrate that a step in the prosecution of the case has occurred that is sufficient to interrupt or waive abandonment." *Hutchison*, 22 So. 3d at 996. Instead, the defendant specifically requested proposed dates for pre-trial scheduling deadlines and a plaintiff responded by submitting a signed scheduling order on a form required by the trial court. The intent and purpose behind the actions of both parties was that a "scheduling order be entered to hasten the matter to trial and judgment." *Hutchison*, 22 So. 3d at 996.

We note some instances when an acknowledgment has been found. A defendant's monthly payments of workers' compensation benefits and medical expenses were deemed an acknowledgment and thus a continuing waiver of the right to plead abandonment. *Sterling v. Insurance Co. of Pennsylvania*, 572 So. 2d 835, 837 (La. App. 4 Cir. 1991). See also, *Young v. Laborde*, 576 So. 2d 551, 552-53 (La. App. 4 Cir. 1991) (finding no abandonment where defendant was vigorously prosecuting reconventional demand). The action of defense counsel in sending a letter to plaintiff's counsel requesting dates for a scheduling order were within the acknowledgment exception to the abandonment rule. *Hutchison*, 22 So. 3d at 995-96. The issuing of payments sent directly to health care providers of an injured plaintiff were held to be made unconditionally and thus constituted tacit acknowledgment of the plaintiff's claim sufficient to waive its right to assert the action was abandoned. *Boudreaux v. Simoneaud Grocery & Mkt., Inc.*, 2007-511 (La. App. 3 Cir. 12/19/07), 972 So. 2d 440, 443.

We find no facts here similar to any of the above cases. We agree with the trial court that even though there was engineering design work, surveys, and meetings that took place during the abandonment period, none of these resulted in an acknowledgment by the Parish. Furthermore, as to the offer to purchase the lots, it is undisputed that no purchase ever took place due to lack of grant funds. In any event, this was nothing more than informal settlement negotiations with regard to the litigation of the lots, which is insufficient to constitute a step to interrupt or waive abandonment. *Clark*, 785 So. 2d at 790. The trial court noted that even the attorneys for Burgess distinguished the litigation of the lots where the canals were dug from the overall drainage problems. The trial court recognized that "the Parish has exclusive authority and responsibility for drainage in unincorporated parts of the Parish." Furthermore, the Parish engineer at the time of the hearing established that the resolution of Cypress Park's drainage



problems would proceed regardless of whether there was any litigation. The informal meetings and exchanges of information were insufficient to constitute an acknowledgement by the Parish.

### **Post-Abandonment Waiver of Right to Plead Abandonment**

Unlike a plaintiff, whose post-abandonment actions cannot serve to revive an abandoned action, a defendant's post-abandonment actions can serve to waive his right to plead abandonment. Whether the defendant's action occurred before or after the abandonment period elapsed is a distinction without a difference. The timing of a defendant's conduct cannot be logically construed as altering its character insofar as whether it is sufficient to constitute a waiver of abandonment. Logic dictates that the same standard should apply regardless of whether the action occurred before or after the abandonment period elapsed. *Wilkerson*, 152 So. 3d at 975, citing *Clark*, 785 So. 2d at 789; *Satterthwaite v. Byais*, 2005-0010 (La. App. 1 Cir. 7/26/06), 943 So. 2d 390, 393.

This court has specifically stated:

This waiver exception to Article 561, however, has been applied only where, after the abandonment period has accrued, a defendant has taken steps that facilitated the **judicial** resolution of the dispute on the merits and were an expression of the defendant's willingness or consent to achieve judicial resolution of the dispute. Thus, the following post-abandonment actions by a defendant have been found to constitute a waiver: submission of a case for decision, participation in a status conference and signing a case management schedule, and the filing of an answer and reconventional demand. *Porter v. Progressive Specialty Ins. Co.*, 99-2542 (La. App. 1st Cir. 11/8/00), 771 So.2d 293, 295. Furthermore, an insurer's unconditional tender to a plaintiff to satisfy the statutory requirement of [La.] R.S. 22:658(A)(1), even though of an informal nature, has been held to constitute a waiver. *Clark*, 785 So.2d at 789 n. 15 and at 791. Other examples of post-abandonment conduct by defendants that have been held sufficient to waive abandonment include seeking security for costs and provoking or responding to discovery. *Clark*, 785 So.2d at 789 n. 15.

By comparison, a defendant's participation in post-abandonment settlement negotiations was found to reflect the defendant's intent to achieve a **non-judicial** resolution of the dispute, which, by definition, did not constitute a waiver of the right to plead

abandonment. *Porter*, 771 So.2d at 295. This ruling is in conformity with the jurisprudence that has held that extrajudicial efforts, such as informal settlement negotiations between the parties, are insufficient to constitute a step for purposes of interrupting or waiving abandonment. *Clark*, 785 So.2d at 790; *Succession of Wright*, 37,670 (La. App. 2nd Cir. 9/24/03), 855 So.2d 926, 929, *writ denied*, 03-2969 (La. 1/16/04), 864 So.2d 632.

*Satterthwaite*, 943 So. 2d at 393-94 (footnotes omitted). *See also*, *Wilkerson*, 152 So. 3d at 975.

For the Parish to have waived abandonment, after the abandonment period accrued, it would have had to take steps that facilitated a judicial resolution of the dispute on the merits and be an expression of its willingness or consent to achieve a judicial resolution of the dispute. *Smuggy's Corp.*, 156 So. 3d at 205; *Wilkerson*, 152 So. 3d at 975; *Satterthwaite*, 943 So. 2d at 393. Although the Parish did engage in designing, budgeting, and hiring a consultant after the abandonment period accrued, none of the activities by or correspondence of the Parish constitute a step to facilitate a judicial resolution of this dispute. Therefore, the Parish did not waive its right to assert abandonment due to any of its post-abandonment actions.

### **CONCLUSION**

For the above and foregoing reasons, the trial court's September 13, 2016 judgment denying the Motion to Set Aside Dismissal is affirmed. All costs of this appeal are assessed against Burgess, Inc.

**AFFIRMED.**