FRANCES ARMSTRONG, ON BEHALF OF THE MINOR, R.D.	*	**NO. 2012-CA-1683**
VERSUS	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
ABRAHAM JOHNSON AND CLEAR CHANNEL BROADCASTING, INC. A/K/A WQUE 93.3 A/K/A 93 RADIO STATION	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-2185, DIVISION "E-7"
HONORABLE MADELEINE LANDRIEU, JUDGE

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JAMES F. MCKAY III
CHIEF JUDGE

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(Court composed of Chief Judge James F. McKay III, Judge Edwin A. Lombard, Judge Paul A. Bonin)

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REVERSED AND REMANDED

In February of 2000, Frances Armstrong filed suit against Clear Channel Broadcasting, Inc. a/k/a WQUE 93 and its disc jockey, Abraham Johnson, alleging that Mr. Johnson molested her minor daughter while in the course and scope of his employment with the radio station. On May 2, 2002, Mrs. Armstrong confirmed a default judgment against Mr. Johnson in the amount of $2,500,000.00. Thereafter, supplemental and amending petitions added defendants Louisiana Insurance Guaranty Association (in place of Reliance Insurance Company, Clear Channel's now-insolvent primary insurance carrier), and Texas Pacific, Clear Channel's excess carrier.

On October 11, 2007, Mrs. Armstrong filed a motion to examine judgment debtor against Mr. Johnson. The motion was heard on November 30, 2007. Thereafter, Mr. Johnson made periodic payments on this judgment.

On December 1, 2010, Texas Pacific filed a motion to dismiss based on abandonment. The trial court granted Texas Pacific's *ex parte* motion for dismissal on December 2, 2010. Mrs. Armstrong filed a timely motion to set aside the dismissal, arguing that certain actions taken by Mr. Johnson constitute an acknowledgement that is sufficient to toll the running of abandonment.

Specifically, on April 16, 2008, Mr. Johnson sent a letter to Mrs. Armstrong's counsel agreeing to pay $150,000.00 in satisfaction of the default judgment rendered against him. Between May 15, 2008, and April 15, 2009, Mr. Johnson made five partial payments totaling $1,800.00.

Mrs. Armstrong argued before the trial court that Mr. Johnson and Clear Channel are solidary obligors because Mr. Johnson was acting within the course and scope of his employment with Clear Channel when the incident occurred. Thus, she maintains that Mr. Johnson's payments constitute an acknowledgement that is imputable to Clear Channel and Texas Pacific. The trial court rejected that argument, finding that the payments did not constitute an acknowledgement because Mr. Johnson paid in accordance with a judgment rendered against him. Mrs. Armstrong's motion to set aside the dismissal was denied on May 5, 2011. It is from this judgment that Mrs. Armstrong appeals.

Initially, this Court dismissed Mrs. Armstrong's appeal without prejudice on July 5, 2012, due to deficiencies in the record.[1] Mrs. Armstrong was given additional time to pay the estimated costs of the appeal. The present appeal, which now includes a complete trial court record, was filed on December 4, 2012.

In her first assignment of error, Mrs. Armstrong asserts that the trial court erred in failing to recognize that Mr. Johnson's periodic payments interrupted the abandonment period to the credit of the other solidary obligors.

Whether an action has been abandoned is a question of law. *Eweni v. Skate World, Inc.,* 2012-0338, p. 2 (La. App. 4 Cir. 7/18/12), 100 So.3d 862, 864, *writ denied*, 2012-1869 (La. 11/9/12), 100 So.3d 839. This Court has held that with

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[1] *Armstrong v. Johnson*, 2001-1379, (La. App. 4 Cir. 7/5/12), 97 So.3d 548.

regard to suits that have been deemed abandoned, the standard of review of the appellate court is simply to establish whether the lower court's interpretive decision is correct. *Escoffier v. City of New Orleans*, 2006-1005, p. 2 (La. App. 4 Cir. 4/11/07), 957 So.2d 216, 218 (citing *Meyers ex rel. Meyers v. City of New Orleans*, 2005-1142, p. 2 (La. App. 4 Cir. 5/17/06), 932 So.2d 719, 721).

The procedure governing abandonment is set forth in La. C.C.P. art. 561. An action is considered abandoned when the parties fail to take any step in the prosecution or defense of the matter in the trial court for a period of three years. La. C.C.P. art. 561(A)(1). While no formal order is required, a party may file an *ex parte* motion to obtain an order of abandonment. La. C.C.P. art. 561(A)(3).

Article 561 sets forth three requirements to avoid abandonment: (1) a party must take some "step" in the prosecution or defense of the action; (2) the step must be taken in the proceeding and, with the exception of formal discovery, must appear in the record of the suit; and (3) the step must be taken within three years of the last step taken by either party; sufficient action by either plaintiff or defendants will be deemed a step. *La. Dept. of Trans. & Dev. v. Oilfield Heavy Haulers, L.L.C.*, 2011-0912, pp. 4-5 (La. 12/6/11), 79 So.3d 978, 981 (citing *Clark v. State Farm Mut. Auto. Ins*. Co., 2000-3010, pp. 5-6 (La. 5/15/01), 785 So.2d 779, 784). It is well settled that a "step" is a formal action before the court intended to hasten the suit towards judgment or is the taking of formal discovery. *James v. Formosa Plastics Corp. of La*., 2001-2056, p. 4 (La. 4/3/02), 813 So.2d 335, 338.

However, article 561 is to be liberally construed in favor of maintaining a lawsuit because dismissal is the harshest of remedies. *Clark*, 2000-3010, p. 8, 785 So.2d at 785. Any reasonable doubt about abandonment should be resolved in favor of allowing the prosecution of the claim. *Id*. at p. 10, 785 So.2d at 787.

In *Clark*, the Supreme Court noted two jurisprudential exceptions to the abandonment rule, as follows: (1) a plaintiff-oriented exception based on *contra non valentem*, that applies when failure to prosecute is caused by circumstances beyond the plaintiff's control; and (2) 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. *Id*. at p. 7, 785 So.2d at 784-785. *See Food Perfect, Inc. v. United Fire and Casualty Co*., 2012-2492, p. 1, (La. 1/18/13), 106 So3d 107, 108.

Mrs. Armstrong argues that Mr. Johnson's payments constitute an acknowledgement, which is attributable to the remaining defendants. In support of her argument, Mrs. Armstrong relies on *Clark*, where the Supreme Court held that an insurer's pre-abandonment unconditional tender made outside of the record was a step in the prosecution or defense of the case indicating an intent to waive abandonment, because it relieved the insurer of potential penalties. *Clark*, 2000-3010, p. 22, 785 So.2d at 793.

In the instant case, Mr. Johnson and the other defendants are solidary obligors. But for the radio station's contest, Mrs. Armstrong's daughter would not have been molested by Mr. Johnson. A default judgment was taken against Mr. Johnson. Mr. Johnson executed a letter whereby he acknowledged a debt of $150,000.00. Mr. Johnson also made payments on this judgment. These are signs that the case was not abandoned. Clear Channel and its insurers were responsible for Mr. Johnson's actions which lead to this litigation and they are likewise bound by his actions as a co-defendant.

Mrs. Armstrong sets forth two additional assignments of error, to wit: 1) "Whether the Louisiana Insurance Guaranty Association is a set of laws enacted

for the protection of the public interest, and any contract or juridical act in derogation thereof is an absolute nullity"; and 2) "Whether the Law of the Case Doctrine, articulated by the Louisiana Supreme Court, binds the wide discretion of the trial court not to deviate therefrom."

We note, however, that these two assignments of error concern insurance coverage issues, which were previously litigated to a final judgment and are not germane to the legal issue before us. The scope of this appeal is limited to the single issue of whether Mrs. Armstrong's action is abandoned pursuant to La. C.C.P. art. 561. This is also the only issue considered below, as reflected in the trial court's reasons for judgment, as follows:

> There are two questions presented here: (1) whether the above activity [settlement agreement and payments] by and between plaintiff's counsel and defendant Johnson constitutes a "step in the prosecution" as to the other defendants in the suit, (2) whether the above activity is an "acknowledgement" by one defendant which constitutes a waiver by the other defendants of their right to asset abandonment.

Thus, it is evident from the record that the issues set forth in Mrs. Armstrong's final two assignments of error are raised herein for the first time on appeal. It is well settled that "[a]n appellate court generally finds it inappropriate to consider an issue raised for the first time on appeal when that issue was not pled, urged, or addressed in the court below." *Jones v. Department of Police,* 2011-0571, p. 8 (La. App. 4 Cir. 8/24/11), 72 So.3d 467, 472 (citing *Graubarth v. French Market Corp*., 2007-0416, p. 5 (La. App. 4 Cir. 10/24/07), 970 So.2d 660, 664). Because these issues are not germane to the case before us, and because they were not raised below, we decline to consider these additional arguments.

For the above and foregoing reasons, we find that the trial court erred in dismissing Mrs. Armstrong's motion to set aside the dismissal. Accordingly, we

reverse the judgment of the trial court and remand this matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED