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Abandonment—Focusing on Drafters’ Intent to Answer Who and What Can Prevent Abandonment

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Abandonment—Focusing on Drafters’ Intent to Answer Who and What Can Prevent Abandonment

*Stephen Cox**

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INTRODUCTION

Suppose that a plaintiff files suit on January 1, year 0, in a Louisiana state court. The defendant files an answer on January 15, year 0. Suppose further that the parties conduct discovery that ends on December 15, year 0. The parties attend a scheduling conference on December 15, year 0, where the district court sets the matter for trial on January 1, year 2. The plaintiff on December 15, year 1, however, files an unopposed motion for continuance of the trial requesting it to be set at a later date without specifying a date. On January 1, year 2, the district court grants the motion for continuance and does not set a date. Neither party conducts any activity in the action until the plaintiff on December 14, year 4, files a motion requesting the district court to set the matter for trial.

In this situation, the defendant will file a motion to dismiss on the basis of abandonment, arguing that the last step taken by either party was the scheduling conference held on December 15, year 0.¹ Accordingly, the plaintiff's motion on December 20, year 4, falls beyond the three-year abandonment period and should not be considered. The plaintiff will counter-argue that the last step taken in the action was either the unopposed motion for continuance of the trial on December 15, year 1, or the district court's order granting the motion for continuance on January 1, year 2. Therefore, the action is not abandoned because three years have yet to elapse since either of those actions were taken.

Under current jurisprudence, the question of whether the suit is abandoned involves two questions and depends largely on which Louisiana circuit court of appeal has appellate jurisdiction. The first question is whether a district court's order granting a motion for continuance constitutes a step in the prosecution or defense of the action, and the second question is whether a motion for continuance, without a

1. See LA. CODE. CIV. PROC. art. 561(A)(1) (2023) (providing 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); see also *id.* art. 561(A)(3) (stating that on an ex parte motion of any party by affidavit, provided 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).

specified date, constitutes a step in the prosecution or defense of the action. The holdings of the Louisiana First, Second, Third, and Fifth Circuit Courts of Appeal provide that a motion for continuance without a date is not a step in the prosecution.² In contrast, the Louisiana Fourth Circuit Court of Appeal holds that a motion for continuance without a date is a step in the prosecution, while also implying that a court is a party who can take a step by granting the motion for continuance.³ Hence, whether a plaintiff or defendant would be successful depends on which Louisiana appellate court has jurisdiction over the district court's action.

This split of authority has severe consequences for a plaintiff, and especially for a defendant, for numerous reasons. First, the split undermines the legislature's goal to bring clarity to this area of the law by outlining a process for when a party's failure to actively pursue his or her case should come to an end and be declared abandoned.⁴ The original purpose of the abandonment article was to put an end to the prevailing practice of plaintiffs interrupting prescription against a defendant by filing suit but then allowing the suit to hang perpetually over the head of a defendant unless the defendant forces the issue to judgment.⁵ The Louisiana Fourth Circuit Court of Appeal jurisprudence erodes that purpose and reinstates the old practice by holding that a plaintiff's motion for continuance without a date is a step.⁶ Second, the split demonstrates the various courts' broadening interpretations of who is considered a *party*

2. See *Hutchison v. Seariver Mar., Inc.*, 22 So. 3d 989, 994 (La. Ct. App. 1st Cir. 2009) (finding a "joint motion to indefinitely extend or continue deadlines previously established d[oes] not constitute a step"); *Provenza v. City of Bossier City*, 324 So. 3d 246, 252 (La. Ct. App. 2d Cir. 2021) (holding "that the plaintiffs' filing of the motion to continue in this case, without date, does not constitute a step in the prosecution of the case that prevented abandonment"); *Taylor v. Dash Equip. & Supplies, Inc.*, 258 So. 3d 909, 916 (La. Ct. App. 3d Cir. 2018) (stating that a "motion [that] d[oes] not request the court to set a new trial date is not considered a step in the prosecution of a case since an indefinite continuance is not intended to hasten the matter to judgment"); *First Bank & Trust v. Proctor's Cove II, LLC*, 287 So. 3d 888, 897 (La. Ct. App. 5th Cir. 2019).

3. See *Fischer v. Chad Rogers, Cuvee, L.L.C.*, 280 So. 3d 1199, 1205 (La. Ct. App. 4th Cir. 2019) (stating "[i]n summary, this [c]ourt holds that where a trial date has been selected and the matter is proceeding toward that trial date, an order continuing trial qualifies as a step in the prosecution of the case, the date on which the three-year period for abandonment commences anew").

4. See generally *Lockhart v. Lockhart*, 37 So. 860, 860 (La. 1905).

5. *Augusta Sugar Co. v. Haley*, 112 So. 731, 732 (La. 1927).

6. *Fischer*, 280 So. 3d at 1205.

within the meaning of Louisiana Code of Civil Procedure article 561.⁷ The Fourth Circuit's holding implies that the court is a party whose actions can prevent abandonment since it finds that a district court order is a step.⁸ Early jurisprudence correctly held that the interpretation of party should be narrowly construed to only include actions taken by either the plaintiff or defendant.⁹ The abandonment article focuses on the parties' failure to take a step and does not provide that a district court's activity amounts to a step.¹⁰ Finally, a source of tension furthering the divide between the various courts is the two jurisprudentially created policies a district court must balance when determining whether an action is abandoned.¹¹ For example, the Fourth Circuit holding relies on the liberal policy of allowing actions to proceed while the Second Circuit holding relies on the prescriptive-based policy of removing actions from crowded dockets that are not being pursued.¹²

To fix the uncertainty and inequity surrounding the inconsistent application of abandonment, the Louisiana Supreme Court must redefine the parameters of abandonment by narrowing and realigning the court's role to embody the original spirit and legislative purpose behind the abandonment article. Louisiana's abandonment article has been riddled with exceptions, including an exception to abandonment's before-the-court rule, which is a rule requiring that all activities alleged to be a step must appear in the court record.¹³ These exceptions have effectively

7. *See* *Gravlee v. Gravlee*, 79 So. 3d 1169, 1174 (La. Ct. App. 3d Cir. 2011) (citing *Am. Eagle, Inc. v. Empls.' Liab. Assur. Corp., Ltd.*, 389 So. 2d 1339 (La. Ct. App. 1st Cir. 1980)) (stating the steps in the prosecution or defense of the case need not be made by the party); *but see* *Martin v. Nat'l City Mortg. Co.*, 261 So. 3d 144, 147 (La. Ct. App. 2d Cir. 2018) (stating "[a]ctions taken by courts do not interrupt the abandonment period because they are not actions in the prosecution or defense of the action taken by the parties in the trial court as required by [] article 561").

8. *Fischer*, 280 So. 3d at 1205.

9. Roger H. Doylet, *The Abandonment of A Suit—Its Effect on Prescription*, 22 TUL. L. REV. 504, 509 (1948) (citing *Seligman v. G. A. Scott & Bro.*, 134 So. 771, 772 (La. Ct. App. 2d Cir. 1931)) (providing early jurisprudence held that actions taken by a person other than the plaintiff or defendant could not prevent abandonment).

10. LA. CODE. CIV. PROC. art. 561(A)(1) (2023).

11. *See* *Clark v. State Farm Mut. Auto. Ins. Co.*, 785 So. 2d 779, 787 (La. 2001).

12. *Fischer*, 280 So. 3d at 1205; *Provenza v. City of Bossier City*, 324 So. 3d 246, 252 (La. Ct. App. 2d Cir. 2021).

13. *Melancon v. Cont'l Cas. Co.*, 307 So. 2d 308, 312 (La. 1975). *See generally* *Clark*, 785 So. 2d at 789.

expanded the court's role beyond what the legislature intended. Instead, the legislature placed an affirmative duty on the parties, not the court, to make certain that their cases are not abandoned by their own failures to take a step in the prosecution or defense of the case for three years.¹⁴ The Louisiana Supreme Court must accept writ on the next abandonment case with which it is presented, seizing the opportunity to reaffirm Louisiana's deep civilian tradition to adhere to legislative intent.¹⁵ In Louisiana, legislation is a primary source of law, whereas jurisprudence is merely a persuasive, secondary source used to guide the court in the absence of legislation.¹⁶ Hence, the Louisiana Supreme Court should give effect to what the legislature intended when it created the abandonment article, which will require the Court to reinforce the old and forgotten principles behind the article.

Part I of this Comment begins with a discussion of the reasons behind the legislature's enactment of Louisiana's abandonment article and discusses the interpretation of that article through early jurisprudence. Part II introduces the current abandonment article, defines words in that article which play an important role in its application, and discusses the prescription-based exceptions as well as the two competing abandonment policies. Part III discusses the current circuit split over whether a motion for continuance without a date constitutes a step in the prosecution to prevent abandonment. Part IV urges the Louisiana Supreme Court to accept writ on the next abandonment case involving a court granting a motion for continuance without a date to determine whether such action is sufficient to prevent abandonment. Specifically, the proposal suggests that the Louisiana Supreme Court should revert to earlier courts' narrow interpretation of the article's legislative purpose because that interpretation best supports the spirit of the legislature in creating an abandonment article.

I. WHAT IS ABANDONMENT?

Abandonment is a device that ends a party's interruption of prescription against another party.¹⁷ Throughout Louisiana's history, the Louisiana legislature enacted three different versions of an abandonment article.¹⁸ The first two versions of the article were found in the prescription

14. LA. CODE. CIV. PROC. art. 561(A)(1) (2023).

15. LA. CIV. CODE art. 2 (2023).

16. LA. CIV. CODE ANN. art. 1 cmt. b (2021).

17. Doylet, *supra* note 9, at 504.

18. See LA. CIV. CODE art. 3519 (1870); LA. CIV. CODE art. 3519 (1898); LA. CODE CIV. PROC. art. 561 (2023).

section of the Louisiana Civil Code to further the purpose for which the article served.¹⁹ The article remained in the Civil Code until 1960 when the legislature transferred the article to its current location, the Louisiana Code of Civil Procedure.²⁰ Importantly, the transfer did not change the article's prescriptive purpose, or roots, for which it originally served.²¹

A. The Need for the Creation of an Abandonment Article

The Louisiana legislature enacted the first abandonment article in the Louisiana Civil Code in 1870.²² The 1870 version provided that a plaintiff interrupted prescription against a defendant by citing the defendant.²³ The article failed, however, to define when the interruption of prescription ceased.²⁴ Therefore, an interruption of prescription would last as long as the suit lasted.²⁵ This meant that a defendant could be subject to stagnant and lingering litigation for 6 or even 16 years.²⁶ An unintended result of article 3518's failure to define when the interruption of prescription ceased was the creation of a rule that plaintiffs could place their suit in a so-called realm of imprescriptibility by merely filing suit.²⁷ Thus, the legislature's original intent was to nullify these effects for circumstances where plaintiffs voluntarily abandoned their suit.²⁸

Article 3519 (1870) accomplished the legislature's goal by making known when an interruption of prescription ended because a plaintiff

19. See *Charbonnet v. State Realty Co.*, 99 So. 865, 867 (La. 1923) (stating “[t]he cited act of the Legislature is an amendment to article 3519 of the Civil Code, which is found under section 5 of chapter 3, title 23, of that Code, treating of causes which interrupt prescription”).

20. *Clark v. State Farm Mut. Auto. Ins. Co.*, 785 So. 2d 779, 788 (La. 2001).

21. *Id.* at 787.

22. See LA. CIV. CODE art. 3519 (1870) (providing “[i]f the plaintiff in [a] case . . . abandons or discontinues [the action], the interruption shall be considered as having never happened”).

23. See *id.* art. 3518 (“A legal interruption takes place, when the possessor has been cited to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not.”).

24. Doylet, *supra* note 9, at 504.

25. *Id.*

26. *Id.*

27. Deborah J. Juneau & Gayla M. Moncla, *Abandonment: An Evolving Concept of Liberative Prescription*, 63 LA. L. REV. 341, 342 (2003).

28. Doylet, *supra* note 9, at 504.

voluntarily abandoned the suit.²⁹ According to the article, the effect this had on the interruption of prescription was that the interruption was considered never to have occurred.³⁰ Yet, a problem remained even with the creation of the article. Although the article addressed the effects of a plaintiff voluntarily abandoning the suit, the article failed to place any duty on a plaintiff to prosecute the case once suit had been filed.³¹ Hence, the “hallowed realm of imprescriptibility” was still obtainable.³² Without a duty to prosecute, plaintiffs could keep the suit imprescriptible as long as they did not voluntarily abandon the suit. Commentators viewed this gap in the law as something that allowed the plaintiff to subject the defendant to harassment by a suit that would not otherwise prescribe or be prosecuted to judgment.³³

To fill this gap, in 1898 the legislature amended article 3519 to include a second paragraph.³⁴ The addition provided that if a plaintiff, after interrupting prescription against the defendant, allowed five years to elapse without taking a step in the action, the action would be considered abandoned.³⁵ The purpose for the addition was to terminate the evils resulting from a plaintiff’s failure to prosecute suits and to once and for all put an end to the possibility of a plaintiff reaching the realm of imprescriptibility.³⁶ Scholars consider the 1898 amendment to be the first true abandonment article in Louisiana, since it placed a time frame on the plaintiff to prosecute the suit and used the language “steps in the prosecution,” which is included in the current abandonment article.³⁷

B. Early Jurisprudential Interpretation of the Article

In *Lockhart v. Lockhart*, the Louisiana Supreme Court found the 1898 amendment to article 3519 to be significant.³⁸ The Court reasoned that prior to the amendment, a court had no reason to outline the requirements

29. Juneau & Moncla, *supra* note 27, at 343.

30. *Id.*

31. *Id.*

32. *Id.* at 342.

33. *Id.* at 343.

34. *Id.*

35. See LA. CIV. CODE art. 3519 (1898) (“Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse, without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same.”).

36. Doylet, *supra* note 9, at 505.

37. See LA. CODE CIV. PROC. art. 561(A)(1) (2023).

38. *Lockhart v. Lockhart*, 37 So. 860, 860 (La. 1905).

for how a suit may be discontinued since that was accomplished when the plaintiff voluntarily withdrew the suit.³⁹ Abandonment, however, had no fixed rule.⁴⁰ Rather, before rendering a decision that a case was abandoned, a court was required to interpret the circumstances and conduct of the parties.⁴¹ The 1898 amendment brought certainty to this area of the law.⁴² By amending the article, the legislature made known when a suit was no longer pending because of the suit being abandoned for a plaintiff's failure to prosecute the suit within the legislatively ordained time frame.⁴³

In *Verrett v. Savoie*, the Louisiana Supreme Court paraphrased the article, providing a framework for how early courts viewed the certainty brought about by the 1898 amendment.⁴⁴ The Court provided that where a plaintiff discontinues the suit after interrupting prescription, the Court treats the interruption of prescription as if it never occurred.⁴⁵ Likewise, where a plaintiff "allows five years to elapse" from the date of an interruption before obtaining a final judgment and without taking any steps in the action, the Court treats this too as if the interruption of prescription never occurred.⁴⁶ When a plaintiff does either of the above, according to the *Verrett* Court, the defendant has a right to demand that the suit be dismissed, and it should then be dismissed from the docket of the court.⁴⁷

When a plaintiff allowed abandonment to occur, the Court found that the initial interruption of prescription occurring upon the filing of the suit

39. *See id.* ("It was unnecessary to declare under what circumstances a suit should be considered discontinued, because it was commonly understood that such a result is accomplished when the plaintiff appears in court and voluntarily withdraws it . . .").

40. *Id.*

41. *Id.*

42. *Id.*

43. *See id.* ("[T]he purpose of the General Assembly [was] to substitute certainty for uncertainty, and, it being known when a suit is no longer pending in a court because of its having been discontinued, to make it known when it is no longer pending in court because of its having been abandoned.").

44. *Verrett v. Savoie*, 141 So. 854, 855 (La. 1932):

If the plaintiff, having interrupted prescription by the filing of his suit and by the service of citation upon the defendant, either discontinues or abandons the suit, it will be considered as never having interrupted the prescription; and such an abandonment will be presumed if the plaintiff, at any time before obtaining final judgment, allows five years to elapse without taking any steps in the prosecution of his suit.

45. *Id.*

46. *Id.*

47. *Id.*

is considered never to have taken place.⁴⁸ The placement of article 3519 (1898) in the prescription section of the Louisiana Civil Code is how the courts arrived at this interpretation.⁴⁹ The courts found that a *pro subjecta materia*⁵⁰ reading of articles 3518 and 3519 necessitated a finding that because abandonment results in no legal interruption of prescription, the plaintiff occupies the position of a plaintiff that never filed suit against the defendant.⁵¹ Therefore, courts have always viewed abandonment as a form of liberative prescription different than prescription of the substantive claim.⁵² On the one hand, the prescriptive period for a claim begins to run from the time the action accrues and is interrupted by the filing of suit in a court of competent jurisdiction.⁵³ The abandonment period, on the other hand, begins to run from the time suit is filed and is interrupted each time a party takes a formal step toward the prosecution or defense of their case if within the abandonment period and from the last step taken by any party.⁵⁴ Thus, the abandonment, which results as a legal consequence of a plaintiff's failure to take any action in their suit during the abandonment period, merely bars a plaintiff's right to continue with the prosecution of that suit.⁵⁵ Abandonment does not, however, prevent the plaintiff from bringing another suit for the same cause of action; but, if the plaintiff does so, the question of whether the plaintiff's right of action is barred by prescription must be determined as if no suit had been brought.⁵⁶

48. *Losch v. Greco*, 136 So. 572, 573 (La. 1931).

49. *See Charbonnet v. State Realty Co.*, 99 So. 865, 867 (La. 1923) ("The cited act of the Legislature is an amendment to article 3519 of the Civil Code, which is found under Section 5 of chapter 3, title 23, of that Code, treating of causes which interrupt prescription.").

50. J.R. Trahan, *Successions & Donations*, 64 LA. L. REV. 315, 354 (2004) (defining *argument pro subjecta materia* as "an argument from 'subject matter.'").

51. *See id.* ("The amended article, when read in connection with the subject-matter of the section and of [sic] article 3518 immediately preceding it . . ."); *see also Losch*, 136 So. at 573 ("[I]ts effect is to leave a plaintiff in the same position that he would occupy if he had not instituted the suit.").

52. *See Melancon v. Cont'l Cas. Co.*, 307 So. 2d 308, 311 (La. 1975) (stating abandonment is "[b]oth historically and theoretically . . . a species of liberative prescription, separate and distinct from the prescription of the substantive claim itself.").

53. *Juneau & Moncla*, *supra* note 27, at 343.

54. *Id.*

55. *Losch*, 136 So. at 573.

56. *Id.* at 573–74.

Consider a breach-of-contract action, which is subject to a liberative prescriptive period of ten years.⁵⁷ In such a scenario, it is possible to have an action abandoned in year five of that period of prescription and then brought again before the liberative prescription of ten years passes.⁵⁸ The effect courts give to abandonment, therefore, is that when abandonment occurs, the plaintiff must restart the article 3518 process. The article 3518 process involves citing and serving a defendant, which interrupts the prescriptive period for the underlying cause of action.⁵⁹ The Court's rationale, therefore, was that since the interruption of prescription done by the original article 3518 process is declared never to have occurred, the plaintiff must restart it all over again.

The Louisiana Supreme Court declared in *Evans v. Hamner* that abandonment is self-operating and does not require a court declaration to be effective.⁶⁰ In *Hamner*, the plaintiff argued that it was necessary for the defendant to take some action to have the suit stricken from the docket of the court as abandoned.⁶¹ The *Hamner* Court disagreed, finding it unnecessary for the defendant to have the suit stricken from the docket to give effect to the abandonment that had already occurred.⁶² The Court's rationale was that a plaintiff's inaction during the legislatively prescribed time period in and of itself causes the original interruption of prescription to cease and be declared never occurring.⁶³ Where a plaintiff takes no action for five years in the suit, it becomes abandoned for that reason alone without the necessity of a defendant appearing in court to have it declared

57. LA. CIV. CODE art. 3499 (2023).

58. See Juneau & Moncla, *supra* note 27, at 343 ("It is possible that a suit may have abandoned and, yet, the substantive claim has not prescribed, especially where the prescriptive period for the cause of action is greater than the abandonment period.").

59. Today, the effect would be the plaintiff must restart the article 3462 process to re-interrupt prescription.

60. See LA. CODE CIV. PROC. ANN. art. 561 cmt. a (2021) (providing that "no action need be taken by defendant to have the action dismissed upon its abandonment").

61. *Evans v. Hamner*, 24 So. 2d 814, 816 (La. 1946).

62. *Id.*

63. See *id.* at 817 ("When the five years of inaction on the part of the plaintiff have expired, the suit becomes as ineffectual so far as it may have interrupted prescription as if the interruption had 'never occurred.'" (citing *Charbonnet v. State Realty Co.*, 99 So. 865 (La. 1923); *Losch v. Greco*, 136 So. 572 (La. 1931); *Succession of Bonnette*, 176 So. 398 (La. 1937))).

abandoned.⁶⁴ The comments to Louisiana Code of Civil Procedure article 561 retain the *Hamner* principle.⁶⁵

The 1870 and 1898 versions of the abandonment article directly addressed only a plaintiff's step in the prosecution.⁶⁶ In 1960, the substance of article 3519 was transferred to the Code of Civil Procedure article 561 with two modifications.⁶⁷ First, the new article expressly stated that abandonment is self-operative.⁶⁸ Second, the article made possible for both parties to take a step rather than focusing only on whether the plaintiff took a step, hence, codifying the defense-oriented waiver exception.⁶⁹ Therefore, old jurisprudence is still valuable to consider when any court is faced with an abandonment issue.

II. THE CURRENT ABANDONMENT ARTICLE AND ITS KEY WORDS

The current abandonment article is Louisiana Code of Civil Procedure article 561, and it imposes three requirements on plaintiffs to avoid abandonment of their suit.⁷⁰ First, the plaintiff must take some *step* toward the prosecution of the lawsuit.⁷¹ *Step* is defined as taking some formal action before the court that intends to hasten the suit toward judgment or taking a deposition with or without formal notice.⁷² Second, the step must be taken in the proceeding and, except for formal discovery, must appear in the record of suit.⁷³ This requirement is the before-the-court rule.⁷⁴ Third, the step must be taken within the legislatively prescribed time period from the last step taken by either party; sufficient action by either the plaintiff or the defendant will be deemed a step.⁷⁵ Therefore, with these three requirements in mind, applying the article in practice requires an understanding of key words in the article.

64. *Id.* at 816.

65. *See* LA. CODE CIV. PROC. ANN. art. 561 cmt. a (2021) (providing that “no action need be taken by defendant to have the action dismissed upon its abandonment”).

66. *Clark v. State Farm Mut. Auto. Ins. Co.*, 785 So. 2d 779, 787 (La. 2001).

67. *Hercules Offshore, Inc. v. Lafayette Par. Sch. Bd., Sales & Use Tax Dept.*, 157 So. 3d 1177, 1182 (La. Ct. App. 3d Cir. 2015).

68. *Id.*

69. *Id.*

70. *Clark*, 785 So. 2d at 784.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See* discussion *infra* Part II.A.3.

75. *Id.*

A. *The Key Words in the Current Abandonment Article*

Article 561 begins by providing that an action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for three years.⁷⁶ Moreover, the article expressly provides that abandonment is operative without formal order.⁷⁷ Hence, the district court's duty on the date the case is abandoned is to enter a formal order of dismissal.⁷⁸ Lastly, any formal discovery, whether filed in the record or not, including a deposition, is deemed a step.⁷⁹ To fully grasp the courts' application of abandonment, the following words within the language of Louisiana Code of Civil Procedure article 561 must be elaborated: "step, in the trial court, discovery, operative without formal order, and parties."⁸⁰

1. *Who is a Party?*

A *party* is defined as "[s]omeone who takes part in a transaction,"⁸¹ as well as "anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment."⁸² Early jurisprudence held that only the actions of the plaintiff and defendant were to be considered in determining whether an action was abandoned because the article considers only a plaintiff or defendant as parties.⁸³ Current jurisprudence is split on the issue of who can be a party within the meaning of article 561. For example, the Louisiana Third Circuit Court of Appeal, in *Gravlee v. Gravlee*, found that a step could be taken by an individual other than a party to the action.⁸⁴ The *Gravlee* court

76. LA. CODE CIV. PROC. art. 561(A)(1) (2023).

77. *See id.* art. 561(A)(3) ("This provision shall be operative without formal order . . .").

78. *See id.* (providing that "the trial court shall enter a formal order of dismissal as of the date of its abandonment.").

79. *See id.* art. 561(B) (providing that "[a]ny formal discovery . . . whether or not filed of record, including the taking of a deposition with or without formal notice, shall be deemed to be a step in the prosecution or defense of an action.").

80. *See id.* art. 561.

81. *Party*, BLACK'S LAW DICTIONARY (11th ed. 2019).

82. *Id.*

83. *See* Doylet, *supra* note 9, at 509 (citing *Seligman v. G. A. Scott & Bro.*, 134 So. 771, 772 (La. Ct. App. 2d Cir. 1931)) ("Action taken by a person other than the plaintiff or the defendant will not serve to prevent abandonment.").

84. *See* *Gravlee v. Gravlee*, 79 So. 3d 1169, 1174 (La. Ct. App. 3d Cir. 2011) (citing *Am. Eagle, Inc. v. Emps.' Liab. Assur. Corp., Ltd.*, 389 So. 2d 1339 (La. Ct. App. 1st Cir. 1980)) (stating that "the steps in the prosecution or defense of the case need not be made by the party[]").

reasoned, as did the First Circuit Court of Appeal cited therein, that where a nonparty step ensures a benefit to all of the parties in the action, it should be considered a step made in the prosecution or defense of the case.⁸⁵

In contrast, the Second Circuit Court of Appeal, in *Martin v. National City Mortgage Company*, found that the words *prosecution* and *defense* in article 561 make them the parties who can take steps.⁸⁶ Thus, the court held in *Martin* that an action taken by a court could not interrupt abandonment because the article focuses only on actions taken by the parties when determining abandonment.⁸⁷ Additionally, the Louisiana First Circuit Court of Appeal in *Hardy v. A. Wilbert's Sons, L.L.C.* was presented with the issue of whether a district court's signing of a case management order interrupted the abandonment period.⁸⁸ The First Circuit emphasized in its holding that the signing could not be considered a step because the alleged action was not taken by a party to the suit.⁸⁹

As evidenced by the jurisprudence, the meaning of *party* as it pertains to who may take a step to prevent abandonment is subject to debate. The result reached by the Louisiana Second Circuit Court of Appeal aligns with early jurisprudence's narrow definition of just the plaintiff or defendant.⁹⁰ The result reached by the Louisiana Third Circuit Court of Appeal makes the *party* reference language in article 561 to the prosecution or defense meaningless.

2. What is a Step?

Article 561 does not define *step*, but the jurisprudence defines a *step* as “a formal action before the court” that is “intended to hasten the suit toward judgment or . . . the taking of formal discovery.”⁹¹ For example, requesting a scheduling order is a step, as is an order of partial dismissal

85. *Id.*

86. *Martin v. Nat'l City Mortg. Co.*, 261 So. 3d 144, 147 (La. Ct. App. 2d Cir. 2018).

87. *See id.* (“Actions taken by courts do not interrupt the abandonment period because they are not actions in the prosecution or defense of the action taken by the parties in the trial court as required by [] article 561.”).

88. *Hardy v. Wilbert's Sons, L.L.C.*, 970 So. 2d 1063, 1066 (La. Ct. App. 1st Cir. 2007).

89. *See id.* (“[P]laintiffs did not demonstrate that the relied-upon action was taken by a party to the instant lawsuit.”).

90. *See* Doylet, *supra* note 9, at 509 (citing *Seligman v. G. A. Scott & Bro.*, 134 So. 771, 772 (La. Ct. App. 2d Cir. 1931)) (“Action taken by a person other than the plaintiff or the defendant will not serve to prevent abandonment.”).

91. *La. Dep't of Transp. & Dev. v. Oilfield Heavy Haulers, L.L.C.*, 79 So. 3d 978, 981 (La. 2011).

to less than all defendants.⁹² However, a step is neither a motion for contempt filed by a party, nor a court order granting a party the right to take a step.⁹³ Thus, the key to a procedural move being considered a step is that the action must be necessary to moving the case forward.⁹⁴ Accordingly, a rule the Louisiana Supreme Court created was that a step is “something more than a mere passive effort to keep [a] suit on the [court’s docket]”; rather, it is an “active measure taken [], intended and calculated to hasten the suit to judgment.”⁹⁵ This rule strives to uphold the original legislature’s intent of forcing a plaintiff to pursue the claim to judgment rather than allowing it to linger over the defendants’ heads forever.⁹⁶ In other words, only formal moves before the court, and not extra-judicial acts done *in pais*,⁹⁷ are steps in the prosecution or defense of the case within the meaning of the article.⁹⁸

Furthermore, a step taken by one party prevents abandonment as to all the parties, even when the parties are not solidarily liable.⁹⁹ In all cases, regardless of party status, a step taken must occur within three years of the last step taken by either party to prevent abandonment.¹⁰⁰ Therefore, the

92. See *McCandless v. Poston*, 540 So. 2d 1310, 1312 (La. Ct. App. 2d Cir. 1989); see also *Hutchison v. Seariver Mar., Inc.*, 22 So. 3d 989, 996 (La. Ct. App. 1st Cir. 2009) (“The ultimate purpose of a scheduling order is to hasten the matter to judgment by selecting deadlines for the parties to conclude all pretrial matters.”).

93. See *R.L. Lucien Tile Co. v. Solid Rock Co.*, 215 So. 3d 710, 716 (La. Ct. App. 4th Cir. 2017); *London Livery, Ltd. v. Brinks*, 3 So. 3d 13, 16 (La. Ct. App. 4th Cir. 2008).

94. See *Sutton v. Adams*, 273 So. 3d 1276, 1279 (La. Ct. App. 4th Cir. 2019) (holding that “the filing of the opposition to the motion for sanctions is not considered a ‘step’ . . . because it did not move the defamation case to judgment”).

95. *Sliman v. Araguel*, 200 So. 280, 281 (La. 1941).

96. See *Augusta Sugar Co. v. Haley*, 112 So. 731, 732 (La. 1927) (stating “it is well known that the very purpose of the act was to put [sic] an end to the then-prevailing practice of filing suit to interrupt prescription, and then letting the suit hang perpetually over the head of the defendant unless he himself should force the issue . . .”).

97. See *in pais*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *in pais* as “[o]utside court or legal proceedings”).

98. M.M.H., *Pleading and Practice—What Constitutes Abandonment of Suit*, 3 LA. L. REV. 835, 835 (1941).

99. *La. Dep’t of Transp. & Dev. v. Oilfield Heavy Haulers, L.L.C.*, 79 So. 3d 978, 981 (La. 2011).

100. HON. MAX TOBIAS, JR. ET AL., *INTERRUPTION OF THE PRESCRIPTIVE PERIOD—FILING OF ACTION AS INTERRUPTING PRESCRIPTION—EFFECT OF ABANDONING SUIT—WHEN ABANDONMENT OCCURS—TAKING A “STEP”*, in 6 LA. PRAC. CIV. PRETRIAL § 6:132 (2021 ed.).

abandonment period begins to run again every time a party takes a step. Most abandonment litigation focuses on the determination of whether a particular action constitutes a step.¹⁰¹

3. What Does *in the Trial Court* Mean?

The terms *in the trial court*, or *before the court*, mean that a step must appear in the court record.¹⁰² The rationale for this rule is that a court must be certain that the claim is not seriously being pursued before dismissing the action as abandoned.¹⁰³ Without such a rule, the court in *State ex rel. Yazoo & M.V.R. Co. v. Edrington* believed the law in this area would return to chaos rather than certainty as the legislature had intended.¹⁰⁴ This rule, thus, requires that all activities alleged to be a step by either party must appear in the court record.¹⁰⁵ In so doing, examination of the record reveals the status of the litigation with certainty and without resort to extrinsic evidence.¹⁰⁶

Nevertheless, today's courts recognize two jurisprudential exceptions to the before-the-court rule with one exception included in the article itself. The two jurisprudential exceptions to the record requirement include a plaintiff-oriented exception¹⁰⁷ and a defense-oriented exception.¹⁰⁸ The two exceptions to the before-the-court rule are addressed below.¹⁰⁹ The exception to the record requirement contained in article 561 is a formal discovery exception.¹¹⁰

101. Doylet, *supra* note 9, at 512.

102. CATHERINE PALO, LOUISIANA SUMMARY JUDGMENT AND RELATED TERMINATION MOTIONS, *in* 22 LOUISIANA CIVIL LAW TREATISE § 6:17 (2021).

103. *Melancon v. Cont'l Cas. Co.*, 307 So. 2d 308, 312 (La. 1975).

104. *See State ex rel. Yazoo & M.V.R. Co. v. Edrington*, 11 Teiss. 288, 289 (Orleans App. 1914) (stating to consider anything done *in pais* as a step would “restore the whole matter to the same chaotic condition in which it was before”).

105. *Melancon*, 307 So. 2d at 312.

106. *Id.*

107. *See* PALO, *supra* note 102, *in* 22 LOUISIANA CIVIL LAW TREATISE, *supra* note 102, § 6:14 (“a plaintiff-oriented exception, based upon *contra non valentem*, that applies when failure to prosecute is caused by circumstances beyond the plaintiff's control”).

108. *See id.* (“a defense-oriented exception based upon acknowledgment that applies when the defendant waives his right to assert abandonment by taking actions inconsistent with intent to treat the case as abandoned”).

109. *See* discussion *infra* Part II.B.

110. *See* LA. CODE CIV. PROC. art. 561(B) (2023) (“Any formal discovery as authorized by this Code and served on all parties whether or not filed of record,

4. *How Does the Discovery Exception Operate?*

Louisiana Code of Civil Procedure article 1421 lists the authorized discovery methods¹¹¹ that prevent abandonment within the meaning of article 561.¹¹² Additionally, Louisiana Code of Civil Procedure article 1474(C)(4) specifically lists discovery methods along with a confirmation that the listed methods amount to steps in furtherance of litigation when conducted.¹¹³ Accordingly, these articles are the basis of discovery not being susceptible to the before-the-court requirement.¹¹⁴ However, there is an important caveat to this exception; if the requested discovery requires service, the discovery will not amount to a step unless service is properly completed and the certificate of service designating the manner of service is filed in the district court record.¹¹⁵

In *Koutroulis v. Centennial Healthcare Corp.*, the court was faced with the issue of whether a plaintiff's request for medical records from a nursing home, records that were not sent to the nursing home's attorney of record, amounted to a step in the prosecution of the action.¹¹⁶ The Louisiana Second Circuit Court of Appeal held that it did not.¹¹⁷ Although the requests were mailed directly to the nursing home, the plaintiff's attorneys' failures to either file the request in the record or serve the request on defendants' counsel of record prevented the request from being

including the taking of a deposition with or without formal notice, shall be deemed to be a step in the prosecution or defense of an action.”).

111. *See id.* art. 1421 (Including: “depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations . . . ; request for release of medical records; and requests for admission.”).

112. *Id.* art. 561(B).

113. *Id.* art. 1474(C)(4) (“The serving of any discovery materials pursuant to the provisions of this Article shall be considered a step in the prosecution or defense of an action for purposes of [a]rticle 561, notwithstanding that such discovery materials are not filed in the record of the proceedings.”).

114. *See id.* art. 561(B) (providing “[a]ny formal discovery as authorized by this Code and served on all parties *whether or not filed of record* . . . shall be deemed to be a step in the prosecution or defense of an action” (emphasis added)).

115. *See Johnson v. Am. Bell Fed. Credit Union*, 149 So. 3d 1267, 1269 (La. Ct. App. 2d Cir. 2014); *Koutroulis v. Centennial Healthcare Corp.*, 34 So. 3d 503, 504 (La. Ct. App. 2d Cir. 2010).

116. *Koutroulis*, 34 So. 3d at 505.

117. *Id.* at 507.

considered a step.¹¹⁸ Similarly, in *Johnson v. American Bell Federal Credit Union*, the Louisiana Second Circuit Court of Appeal found that when a method of discovery requires service and a certificate of service to be filed in the record, a plaintiff's failure to file the certificate in the record prevents the discovery conducted from being considered a step.¹¹⁹ Thus, the discovery exception exists in the discovery code articles and allows discovery to be considered a step *only* when its rules are fully satisfied. Therefore, a party must still be careful to follow the rules within the discovery section to avail itself of the discovery exception to abandonment.

5. *What is Operative Without Formal Order and is Abandonment Really "Self-Executing"?*

The language *operative without formal order* in article 561 means that abandonment occurs automatically upon the passing of three years without a step being taken by either party; in other words, abandonment is effective without a court order.¹²⁰ Therefore, this language does not require a defendant to file a motion to dismiss to have the case declared abandoned because the dismissal merely recognizes what has already occurred through operation of law.¹²¹ However, this was not always the rule.¹²² In *Hibernia Bank & Trust Co. v. J.M. Dresser Co.*, the court disagreed with a defendant's argument that Louisiana Civil Code article 3519 (1870) was self-operative and governed by peremption rather than prescription.¹²³ Hence, early court decisions held that article 3519 was not self-operative and required the defendant to move for dismissal of the suit after a lapse of five years.¹²⁴ However, in 1946, the Louisiana Supreme Court in *Evans v. Hamner* held that the abandonment article is self-operative, permitting

118. *See id.* ("Clearly this request cannot be considered a formal action before the court or a method of formal discovery authorized by the [C]ode of [C]ivil [P]rocedure.").

119. *Johnson*, 149 So. 3d at 1270.

120. PALO, *supra* note 102, in *LOUISIANA CIVIL LAW TREATISE*, *supra* note 102, § 6:13.

121. *Id.*

122. *Hibernia Bank & Trust Co. v. J.M. Dresser Co.*, 131 So. 752, 754 (La. Ct. App. Orleans Cir. 1930).

123. *Id.*

124. Jerry G. Jones, *Louisiana Practice—Waiver of Right to Claim Abandonment*, 16 LA. L. REV. 199, 200 (1955).

a defendant to take no action to have a case dismissed as abandoned when the required time had passed.¹²⁵

Whether the article is self-executing today appears to be up for debate because of two prescription-based exceptions recognized by the jurisprudence.¹²⁶ In *Melancon v. Continental Casualty Co.*, the Louisiana Supreme Court stated that the comments to article 561 suggest that for a defense-oriented waiver to be effective, the defendant's action must be within the abandonment timeframe.¹²⁷ Under this rationale, a defendant does not take a step that interrupts prescription when the action of the defendant occurs beyond the five-year period of inaction by a plaintiff.¹²⁸ Additionally, the action taken by the defendant must occur "in the trial court."¹²⁹ Therefore, a plaintiff cannot rely on extrinsic evidence to prove that a waiver has occurred.¹³⁰ Based on its interpretation of the law, the *Melancon* Court held that no action, by either the plaintiff or the defendant, beyond the five-year period can serve to revive an abandoned action because the interruption ends by operation of law.¹³¹

In 2001, the Louisiana Supreme Court in *Clark v. State Farm Mutual Automobile Insurance Co.* took aim at the *Melancon* Court on the grounds that the remarks made in the case were mistaken for several reasons.¹³² In *Clark*, the Court discussed the distinction between when a plaintiff's actions can serve to interrupt abandonment's timetable compared to when a defendant's actions can do the same.¹³³ A plaintiff, on the one hand, can do nothing post-abandonment of the action to revive the action.¹³⁴ A defendant, on the other hand, can take action post-abandonment that serves to waive the defendant's right to plead abandonment.¹³⁵ The *Clark* Court recognized the existence of situations arising outside of the record that tend to prove the defendant had an intent to treat the case as not abandoned,

125. LA. CODE CIV. PROC. ANN. art. 561 cmt. a (2021).

126. *Id.* art. 561 cmt. c.

127. *See Melancon v. Cont'l Cas. Co.*, 307 So. 2d 308, 311 (La. 1975) (stating "the defendant had to take some formal step in the defense of the suit within the five-year period of plaintiff's inaction").

128. *Id.* at 312.

129. *See id.* (stating the rule that "any action taken by a party that is alleged to be a step in the prosecution or defense of the suit must appear in the court record").

130. *See id.* (providing that "even if an alleged waiver were of the sort that interrupts the running of the five-year period, extrinsic proof of such a waiver cannot be permitted").

131. *Id.*

132. *Clark v. State Farm Mut. Auto. Ins. Co.*, 785 So. 2d 779, 788 (La. 2001).

133. *Id.* at 789.

134. *Id.*

135. *Id.*

even if proven after the abandonment period has run.¹³⁶ Thus, the *Clark* Court ruled that the *Melancon* Court's ban on considering extrinsic evidence when determining whether a defendant has waived the right to plead abandonment was inconsistent with jurisprudence.¹³⁷ By ruling that *Melancon*'s statement was improper, a plaintiff is now able to point to evidence outside of the record to prove that a defendant has waived the right to plead abandonment, even after the abandonment period has run.¹³⁸ Justice Victory, in his dissent in *Clark*, strongly disagreed with the majority's holding, claiming the Court focused on the wrong issue and was eroding the record requirement.¹³⁹ Thus, Justice Victory is a proponent for the in-the-trial-court requirement even in the context of a waiver exception, which is what the *Melancon* Court upheld.

B. The Prescription-Based Exceptions to Abandonment

The first prescription-based exception focuses on whether plaintiffs can show that a failure to prosecute was caused by circumstances beyond their control.¹⁴⁰ This exception recognizes the well-established prescription exception policy that a party unable to interrupt prescription should not be penalized.¹⁴¹ In *Food Perfect, Inc. v. United Fire & Casualty Co.*, the Louisiana Supreme Court suggested that a plaintiff's failure to

136. *See id.* Specifically, the Court noted:

The timing of a defendant's conduct cannot logically be construed as altering its character insofar as whether it is sufficient to constitute a waiver of the right to plead abandonment. Logic dictates that the same standard for determining if action of the defendant results in waiver and thereby an interruption of abandonment should apply regardless of whether the conduct occurred before or after the abandonment period elapsed.

Id.

137. *See id.* ("That remark is inconsistent with the jurisprudence holding that an order of dismissal based on abandonment may be set aside based upon a showing that a cause outside the record prevented accrual of the years required for abandonment and recognizing as one such cause the prescription-based exception to abandonment of waiver.").

138. *Id.*

139. *See id.* at 795 (stating that "[t]he issue is not whether . . . [the] defendant can waive the right to claim abandonment[;] [t]he issue is whether the action constituting the waiver must be action taken 'in the trial court.'" (emphasis omitted)).

140. *Melancon v. Cont'l Cas. Co.*, 307 So. 2d 308, 311 (La. 1975).

141. *See id.* (stating "prescription[] does not run against one who is unable to interrupt it (contra non valentem agere nulla currit prescriptio)").

prosecute because of a natural disaster could be sufficient proof of circumstances beyond the plaintiff's control and could plausibly prevent the plaintiff from taking any step in the prosecution of the action.¹⁴² However, in that case, the Court held that a pro se litigant's candid admission that he was unaware of the applicable deadlines is insufficient to invoke the plaintiff-oriented exception.¹⁴³ The rationale being that it is not an excuse for a pro se litigant to be unaware of the procedural and substantive laws required to move the suit forward.¹⁴⁴ *Food Perfect, Inc.* demonstrates that there is a high bar for the plaintiff-oriented exception to apply. This is especially true since the Court was unwilling to apply the exception to a situation where a novice to the law does not understand time periods in the law and candidly makes that admission to the Court.¹⁴⁵

The second prescription-based exception focuses on whether the defendant has taken any action inconsistent with an intent to treat the case as abandoned.¹⁴⁶ The jurisprudence defines such an occurrence as the "waiver of the [defendant's] right to assert abandonment."¹⁴⁷ Additionally, the exception recognizes the well-established prescription exception of acknowledgment.¹⁴⁸ The prescription concept of acknowledgment, which formed the basis for the waiver exception, was set forth in the article following the abandonment article, which was Louisiana Civil Code article 3520 (1870).¹⁴⁹ The Louisiana Supreme Court in *Clark* stated that the test for whether the defendant has waived the right to plead abandonment is to examine the "qualitative effect of the defendant's conduct."¹⁵⁰ For example, a court has found that the defendant's filing of an answer, even after abandonment has occurred, is a waiver of the right

142. *Food Perfect, Inc. v. United Fire & Cas. Co.*, 106 So. 3d 107, 108 (La. 2013).

143. *Id.*

144. *See id.* (stating that "a pro se litigant assumes all responsibility for his own inadequacies and lack of knowledge of procedural and substantive laws").

145. *Id.*

146. *Melancon*, 307 So. 2d at 311.

147. *Clark v. State Farm Mut. Auto. Ins. Co.*, 785 So. 2d 779, 792 (La. 2001).

148. *See id.* (stating that 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." (emphasis omitted) (internal quotation omitted) (citing *Lima v. Schmidt*, 595 So. 2d 624, 634 (La. 1992))).

149. *See* LA. CIV. CODE art. 3520 (1870) ("Prescription ceases . . . to run whenever the debtor, or possessor, makes acknowledgment of the right of the person whose title they prescribed.").

150. *Clark*, 785 So. 2d at 792.

to assert abandonment.¹⁵¹ Additionally, where a defendant requests a signed scheduling order from a plaintiff on the form required by the trial court, there has been a waiver of the right to assert abandonment.¹⁵²

C. The Competing Abandonment Policies

Abandonment balances two equally sound but competing policy considerations: the desire for every litigant to have their day in court¹⁵³ and the legislative purpose that suits should not linger indefinitely once filed.¹⁵⁴ The former policy has led courts to hold that the abandonment article is to be liberally construed in favor of maintaining a plaintiff's suit.¹⁵⁵ The rationale for the liberal policy is that dismissal is a harsh remedy, requiring any reasonable doubt about abandonment should be resolved in favor of allowing the prosecution of the claim and against a dismissal for abandonment.¹⁵⁶ Therefore, under this policy consideration, a court will maintain a case where there is a failure to comply with technicalities and will only dismiss for abandonment when there is clear intention of abandonment.¹⁵⁷ The technical-compliance rule arose from this policy: that courts must now examine the intent of a party rather than compliance with the law.¹⁵⁸

151. *Gilbert v. Metro. Life Ins. Co.*, 321 So. 3d 1023, 1032 (La. Ct. App. 1st Cir. 2021).

152. *Hutchison v. Seariver Maritime, Inc.*, 22 So. 3d 989, 996 (La. Ct. App. 1st Cir. 2009).

153. *See Clark*, 785 So. 2d 787 (providing on the one hand, the desire to see every litigant have his day in court, and not to lose same by some technical carelessness or unavoidable delay).

154. *See id.* (providing “legislative purpose that suits, once filed, should not indefinitely linger, preserving stale claims from the normal extinguishing operation of prescription.”).

155. *La. Dep’t of Transp. & Dev. v. Oilfield Heavy Haulers, L.L.C.*, 79 So. 3d 978, 982 (La. 2011).

156. *Id.*

157. *See id.* (noting that “[t]he intention of [a]rticle 561 is not to dismiss suits as abandoned based on technicalities, but only those cases where plaintiff’s inaction during the three-year period ‘clearly demonstrated his abandonment of the case.’” (citing *Clark*, 785 So. 2d at 785–86; quoting *Kanuk v. Pohlmann*, 338 So. 2d 757, 758 (La. Ct. App. 4th Cir. 1976))).

158. *See id.* (stating that “[f]or the purpose of determining abandonment, ‘the intent and substance of a party’s actions matter far more than technical compliance.’” (citing *Thibaut Oil Co., Inc. v. Holly*, 961 So. 2d 1170, 1172–73 (La. Ct. App. 1st Cir. 2007))).

An example of the technical-compliance rule can be found in *Thibaut Oil Co., Inc. v. Holly*, where the Louisiana First Circuit Court of Appeal found that a faxed motion, though not in compliance with the requirements of Louisiana Revised Statutes § 13:850(A), was a step in the prosecution of the case.¹⁵⁹ The plaintiff in *Holly* faxed his motion to the clerk of court's office and opposing counsel but failed to file the original motion with the clerk of court's office five days following the original fax.¹⁶⁰ The district court found that the failure to follow proper procedure prevented the plaintiff's action from being considered a step, allowing the defendant's motion for dismissal to be granted.¹⁶¹ The First Circuit disagreed based on a finding that the clerk received the fax filing as well as opposing counsel, showing the plaintiff's clear intent to move the case forward.¹⁶² Thus, *Holly* provides a helpful example of the technical-compliance rule in action where a court declines to declare a case abandoned based on minor mistakes in following procedure.¹⁶³

The latter policy consideration of preventing lingering claims parallels those served by prescriptive statutes: promoting legal finality, barring stale claims, and preventing prejudice to defendants.¹⁶⁴ The prescriptive policy is said to promote the legislative intent behind the creation of the abandonment article and the judicial policy of finality.¹⁶⁵ Recall that the first abandonment article was in the prescription section of the Civil Code.¹⁶⁶ The legislature enacted and placed the article in the prescription section of the Code to expressly address the interruption of prescription issues with article 3518.¹⁶⁷ When the abandonment article moved from the Louisiana Civil Code to the Louisiana Code of Civil Procedure, the theory of the law and its application did not change, as the article following today's interruption-of-prescription article expressly mentions abandonment as a method for the interruption to be considered never to

159. See *Thibaut Oil Co., Inc.*, 961 So. 2d at 1172–73 (stating although “a filing may not be effective for its stated purpose, it may still amount to a step in the prosecution”).

160. *Id.* at 1172.

161. *Id.*

162. *Id.* at 1174.

163. *Id.* at 1173.

164. *Clark v. State Farm Mut. Auto. Ins. Co.*, 785 So. 2d 779, 785 (La. 2001).

165. See *id.* (“requiring that suits not be permitted to linger indefinitely, that legal process be expedited where possible, and that abandoned cases be removed from crowded dockets”).

166. LA. CIV. CODE bk. 5, ch. 3, tit. 23 (1898).

167. Doylet, *supra* note 9, at 505.

have occurred.¹⁶⁸ The comments to Louisiana Civil Code article 3463 cross-reference Louisiana Code of Civil Procedure article 561 as a method for an interruption of prescription to end.¹⁶⁹ Thus, the article's original foundation and purpose is based on the notion that an interruption of prescription, after a certain time, must come to an end and cannot last forever, which still holds true today based on the comments to the article.

The result of these two competing policies is the lack of a bright-line rule for courts to follow when faced with abandonment issues.¹⁷⁰ However, the real result of these two competing policies is that it has caused confusion when courts are faced with the abandonment issue, which has resulted in the various Louisiana circuit courts of appeal embracing either one policy or the other in its decisions.¹⁷¹ The prescription-based policy is the one that should be followed, however, for the very reason that abandonment is a species of prescription created by the legislature to address an interruption of prescription issue.

III. THE CIRCUIT SPLIT: THE LOUISIANA FOURTH CIRCUIT STANDS ALONE AGAINST ALL OTHER CIRCUITS

The Louisiana First, Second, Fourth, and Fifth Circuit Courts of Appeal are split on the issue of who and what can serve to prevent abandonment. The recent Louisiana Second Circuit Court of Appeal decision *Provenza v. City of Bossier City* highlighted the problem.¹⁷² In the case, the court referenced the Louisiana Fourth Circuit Court of Appeal

168. LA. CIV. CODE art. 3463 (2023).

169. See LA. CIV. CODE ANN. art. 3463 cmt. d (2021) (directing readers to, “[f]or the definition of ‘abandonment of suit,’ see C.C.P. Article 561”).

170. See *Clark*, 785 So. 2d at 787 (“Given the balancing function served by abandonment, ‘Louisiana’s jurisprudence tends to be inconsistent; *no bright lines exist.*”).

171. See *Provenza v. City of Bossier City*, 324 So. 3d 246, 258 (La. Ct. App. 2d Cir. 2021) (“[W]ithout the remedy offered by La. C.C.P. art. 561, such an action would allow an action to ‘hang perpetually over the head of the defendant unless he himself should force the issue’ and is contrary to the underlying policy of the abandonment article which seeks to prevent protracted litigation without a serious intent to hasten the claim to judgment.”). *But see* *Fischer v. Chad Rogers, Cuvee, L.L.C.*, 280 So. 3d 1199, 1205 (La. Ct. App. 4th Cir. 2019) (“Our jurisprudence also indicates that any reasonable doubt about abandonment should be resolved in favor of allowing the prosecution of the claim and against dismissal for abandonment.” (citing *La. Dep’t Transp. & Dev. v. Oilfield Heavy Haulers, L.L.C.*, 79 So. 3d 978, 982 (La. 2011))).

172. *Provenza*, 324 So. 3d 246.

as the only appellate court holding contrary to the other appellate courts.¹⁷³ Two issues presented within the holdings of the court have made matters confusing for abandonment and must be determined: (1) whether a court can be considered a party that may take a step; and (2) whether a motion for continuance without a date hasten, a matter to judgment, thereby allowing it to be considered a step.

A. The Louisiana Second Circuit Court of Appeal: Majority View

In *Provenza v. City of Bossier City*, the plaintiffs filed suit against the City of Bossier City in January 2011.¹⁷⁴ In February 2011, the defendants answered with a general denial, and on January 19, 2012, the defendants filed a motion to compel discovery.¹⁷⁵ On August 29, 2013, the plaintiffs filed a deposition notice of Pam Glorioso, which was taken on September 24, 2013.¹⁷⁶ On October 15, 2015, the district court signed a scheduling order setting the case for trial on April 19, 2016; however, on February 23, 2016, the plaintiffs filed a motion to continue the trial date, and the district court signed an order continuing the trial without referencing a new trial date, leaving the decision of a new trial date to be determined later.¹⁷⁷

On August 1, 2016, the plaintiffs filed a motion and order requesting a status conference to schedule a new trial date.¹⁷⁸ The status conference was held on August 24, 2016, and the trial court set the matter for trial on May 26, 2017.¹⁷⁹ On May 17, 2017, the plaintiffs filed another motion to continue the trial and requested it be reset at a later date.¹⁸⁰ The motion also recited that discovery was ongoing.¹⁸¹ This motion was not signed by counsel for the defendant, and notably the plaintiffs did not file a subsequent motion and order requesting another status conference to obtain a new trial date as had been done earlier.¹⁸²

173. *See id.* at 256 (providing that “the [F]ourth [C]ircuit has not decided the question in the same way as the other circuit courts that have dealt with the issue.”).

174. *Id.* at 250.

175. *Id.*

176. *Id.*

177. *See id.* (providing the trial date would be reset at a later date).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 250–51.

On May 11, 2020, the plaintiffs filed a deposition notice with the clerk of court.¹⁸³ The notice was physically filed into the record on May 12, 2020.¹⁸⁴ Following the plaintiff's filing, on May 20, 2020, the defendants filed an ex parte motion for an order of dismissal on the grounds of abandonment.¹⁸⁵ The defendants argued the last step taken was on August 24, 2016, when the latest scheduling order was signed by the trial court, and the suit was, therefore, abandoned on August 25, 2019, three years after that date.¹⁸⁶ Hence, the plaintiffs' deposition notice was allegedly too late, as the suit was already abandoned.¹⁸⁷ The plaintiffs relied upon jurisprudence from the Fourth Circuit to support their argument that the motion to continue the trial without a date was a step in the prosecution.¹⁸⁸ Furthermore, the plaintiffs maintained that the court must look at the record to determine whether the plaintiff intended to abandon the action.¹⁸⁹

The sole issue was whether the motion for continuance without date constitutes a step in the prosecution of the matter that would prevent abandonment.¹⁹⁰ The Louisiana Second Circuit Court of Appeal held that it does not constitute a step in the prosecution of the suit.¹⁹¹ The court reasoned that although the plaintiffs argued that their engagement in discovery showed a clear intent not to abandon the action, the plaintiff's failure to demonstrate that discovery was undertaken within the three-year abandonment period says otherwise.¹⁹² Furthermore, the Second Circuit affirmed the district court's ruling on the grounds that the ruling advanced the prescriptive purpose on which abandonment is based.¹⁹³ The court provided that holding otherwise would allow the matter to hang perpetually over the head of the defendant unless he himself should force

183. *See id.* at 251 (filing a "Notice of Article 1442 Deposition of the City of Bossier City and Subpoena Duces Tecum").

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 252.

189. *Id.*

190. *Id.* at 255.

191. *See id.* at 258 ("Accordingly, we hold that the plaintiffs' filing of the motion to continue in this case, without date, does not constitute a step in the prosecution of the case that prevented abandonment.").

192. *See id.* at 259 ("Abandonment is warranted where, as here, the plaintiffs' inaction during the three-year period clearly demonstrates the abandonment of the action.").

193. *See id.* ("to promote legal finality, bar stale claims, and prevent prejudice to the defendants").

the issue.¹⁹⁴ Thus, because one of the basic requirements of article 561 is that there be a *step* formally before the court that is intended to hasten the suit toward judgment or the taking of formal discovery, a continuance of a case, without date, even if the motion is joint or unopposed, does not hasten the suit toward judgment, making it not a step within the meaning of article 561.¹⁹⁵ Therefore, the court held dismissal of the case on the grounds of abandonment is warranted in such a situation.¹⁹⁶

B. The Louisiana First Circuit Court of Appeal: Majority View

Where the Second Circuit in *Provenza* held that an unopposed motion for continuance without a date will not prevent abandonment, the First Circuit held, in *Hutchison v. Seariver Maritime, Inc.*, that even a joint motion for continuance without a date is not a step preventing abandonment.¹⁹⁷ In *Hutchison*, the plaintiff filed a petition alleging injury against the defendant on February 16, 2001.¹⁹⁸ On April 3, 2001, the defendant filed an answer, and thereafter, in 2001 and 2002, the parties conducted discovery, including depositions.¹⁹⁹ On March 18, 2005, the plaintiff filed a scheduling order form into the record, which provided that the pretrial conference was scheduled for October 14, 2005.²⁰⁰ On August 29, 2005, Hurricane Katrina struck Louisiana, devastating New Orleans and surrounding areas.²⁰¹ Counsel for both parties were displaced as a result of the hurricane, and on October 12, 2005, the parties filed a joint motion to indefinitely extend the deadlines previously established in a March 18, 2005 scheduling order.²⁰² No other pleadings or filings appeared in the record until October 16, 2008, when the defendant filed a motion to dismiss the plaintiff's action based on abandonment.²⁰³

194. *Id.*

195. *Id.* at 258.

196. *Id.*

197. *See* *Hutchison v. Seariver Mar., Inc.*, 22 So. 3d 989, 994 (La. Ct. App. 1st Cir. 2009) (holding that “the joint motion to indefinitely extend or continue the deadlines previously established did not constitute a step in the prosecution of [the] case.”).

198. *Id.* at 991.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

The First Circuit began with an evaluation of the record to determine whether the plaintiff's claim was indeed abandoned.²⁰⁴ The court found that the last action in the record was the October 12, 2005 joint motion to extend the discovery and pre-trial deadlines.²⁰⁵ The court then agreed with the trial court that the motion filed was a motion for continuance and not a motion to extend.²⁰⁶ This finding was based on the character of the motion.²⁰⁷ The character of the motion was an indefinite extension of the deadlines and not a request that the court set new deadlines.²⁰⁸ Thus, at some point in the future, the parties would actually have to request new deadlines, which the court held prevented the original request from constituting a step, even if jointly filed.²⁰⁹

C. The Louisiana Fourth Circuit Court of Appeal: Minority View

Against all other Circuits stands the position taken by the Fourth Circuit in *Fischer v. Chad Rogers, Cuvee, L.L.C.* where the plaintiff, Dr. Carrol I. Fischer, Jr., filed his original petition for damages on August 14, 2009.²¹⁰ On April 28, 2015, the parties attended a scheduling conference where trial was set on December 7, 2015.²¹¹ On September 28, 2015, Dr. Fischer filed an unopposed motion to continue trial without a date because the parties were negotiating a settlement.²¹² On September 29, 2015, the district court signed the order continuing trial.²¹³ On May 21, 2018, Dr. Fischer filed a motion to reset the trial, and the district court set a scheduling conference on August 15, 2018.²¹⁴ On August 6, 2018, Rogers filed an ex parte motion to dismiss the suit as abandoned arguing that three years had elapsed since the last step taken in furtherance of the prosecution of the case.²¹⁵ Rogers contended that the April 28, 2015 scheduling conference was the “last step” and that the September 28, 2015 motion to

204. *Id.* at 993.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *See id.* at 994 (holding that “the joint motion to indefinitely extend or continue the deadlines previously established did not constitute a step in the prosecution of [the] case.”).

210. *Fischer v. Chad Rogers, Cuvee, L.L.C.*, 280 So. 3d 1199, 1201 (La. Ct. App. 4th Cir. 2019).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

continue trial without date did not qualify as a step in furtherance of the prosecution of the case.²¹⁶ According to Dr. Fischer, the last step in the prosecution of the case was the district court's September 29, 2015 order continuing trial.²¹⁷

The Fourth Circuit found that a trial court order granting a motion for continuance without a date constitutes a step.²¹⁸ The court found it important that a trial date had been selected, thus concluding that the matter was on the path to eventual judgment, allowing for the order to constitute a step.²¹⁹ Therefore, the court held that three years had not passed from the date of the trial court order to when Dr. Fischer filed a motion to set the matter for trial allowing the case to proceed and not be dismissed as abandoned.²²⁰

The stance taken by the Fourth Circuit on the issue is wrong for two reasons. First, the Fourth Circuit did not uphold the jurisprudential interpretation of a step as something that hastens the matter to judgment.²²¹ The Fourth Circuit's reliance on the liberal policy consideration to allow actions to proceed rather than dismissing them allowed a plaintiff to continue an action that was clearly not being hastened to judgment. The majority view upholds the jurisprudential interpretation of a step by not allowing a motion for continuance without a date to be considered a step.²²² Second, the Fourth Circuit implicitly extended the interpretation of who can be considered a party within the meaning of Louisiana Code of Civil Procedure article 561 by finding a court's order granting a motion for continuance is a step.²²³ The majority view correctly does not even

216. *Id.* at 1201–02.

217. *Id.* at 1202.

218. *Id.* at 1205.

219. *See id.* (holding “that where a trial date has been selected and the matter is proceeding toward that trial date, an order continuing trial qualifies as a step in the prosecution of the case, the date on which the three-year period for abandonment commences anew”).

220. *See id.* (“[W]e find that the district court’s September 29, 2015 order continuing trial was a step in the prosecution of Dr. Fischer’s case, and three years had not yet elapsed from this step at the time Dr. Fischer filed his motion to reset for trial on May 21, 2018.”).

221. *See Sliman v. Araguel*, 200 So. 280, 281 (La. 1941) (providing a step is “something more than a mere passive effort to keep the suit on the [court’s docket]; it means some active measure taken by plaintiff, intended and calculated to hasten the suit to judgment”).

222. *Id.*

223. *See Fischer*, 280 So. 3d at 1205 (“In summary, this Court holds that where a trial date has been selected and the matter is proceeding toward that trial date,

consider the question of whether a court is a party because the article does not include such language. Thus, the Louisiana Supreme Court must accept writs on the next abandonment case presented to the Court and endorse the view taken by the majority of appellate courts.

IV. THE COURT MUST FOCUS ON THE PLAINTIFF AND DEFENDANT HASTENING THE MATTER TO JUDGMENT AND NO ONE ELSE

The Louisiana Supreme Court can endorse the majority view by defining who is a party in Louisiana Code of Civil Procedure article 561 and by redefining the meaning of a step. The word *parties* in article 561 should be narrowly construed to include only the actions of the plaintiff or the defendant and not the actions of the court.²²⁴ A step should not include a motion for continuance without a date for the very reason that such an action does not hasten the matter toward judgment, but rather it allows the action to linger indefinitely. The lingering of an action indefinitely is what the legislature sought to put an end to with the creation of an abandonment article.²²⁵ Hence, the Louisiana Supreme Court must reinforce the legislature's original intent because legislation is a primary source of law in Louisiana while jurisprudence is a secondary source.²²⁶ The legislature's will is expressed in the legislation written and should be enforced and upheld by the Louisiana Supreme Court.²²⁷

A. "*Parties*" Must be Narrowly Construed to Exclude Actions Taken by the Court

Although the definition of a *party* includes a person playing a role in the transaction or having a right to control the proceeding, the definition should not be interpreted as suggesting that a judge is a party.²²⁸ A judge is appointed "to decide litigated questions" and preside "in a court."²²⁹ Hence, *judge* is often used interchangeably with *court*.²³⁰ Louisiana Code

an order continuing trial qualifies as a step in the prosecution of the case, the date on which the three-year period for abandonment commences anew.").

224. LA. CODE CIV. PROC. art. 561(A)(1) (2023).

225. *Lockhart v. Lockhart*, 37 So. 860, 860 (La. 1905).

226. See LA. CIV. CODE ANN. art. 1 cmt. b (2021) ("According to civilian doctrine, legislation and custom are authoritative or primary sources of law.").

227. See LA. CIV. CODE art. 2 (2023) (providing "[l]egislation is a solemn expression of legislative will").

228. *Party*, BLACK'S LAW DICTIONARY (11th ed. 2019).

229. *Judge*, BLACK'S LAW DICTIONARY (11th ed. 2019).

230. *Id.*

of Civil Procedure article 561 instructs that a case 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”²³¹ The Fourth Circuit decision in *Fischer* implies that a court is a party within the meaning of Louisiana Code of Civil Procedure article 561 because the *Fischer* court concluded that a court’s action can serve as a step to prevent abandonment.²³² The Second Circuit Court of Appeal decision in *Martin*, however, plainly states that a court’s action cannot interrupt abandonment because a court is not a party within the meaning of article 561.²³³ The Third Circuit Court of Appeal in *Gravlee* went a step further than all other courts in who may be a party when the court found that nonparties to a suit could take steps in the prosecution or defense of a case.²³⁴ Therefore, the split among the circuits indicates that the text is not clear within the meaning of Louisiana Civil Code article 9, which provides: “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”²³⁵ However, with proper use of the civil law methodologies of interpretation, the courts should have arrived at the correct result—that a court is not a party.

Since “[l]egislation is the solemn expression of legislative will,”²³⁶ the starting point for interpreting any statute is the language of the statute itself because the text of the law is the best evidence of legislative intent.²³⁷ Louisiana Civil Code article 11 informs a court that generally words are to be given their prevailing, common meaning unless the word is a term of art, which should be given its technical meaning and prevail over the

231. LA. CODE CIV. PROC. art. 561(A)(1) (2023) (emphasis added).

232. See *Fischer v. Chad Rogers, Cuvee, L.L.C.*, 280 So. 3d 1199, 1205 (La. Ct. App. 4th Cir. 2019) (“This Court holds that where a trial date has been selected and the matter is proceeding toward that trial date, an order continuing trial qualifies as a step in the prosecution of the case, the date on which the three-year period for abandonment commences anew.”).

233. See *Martin v. Nat’l City Mortg. Co.*, 261 So. 3d 144, 147 (La. Ct. App. 2d Cir. 2018) (“Actions taken by courts do not interrupt the abandonment period because they are not actions in the prosecution or defense of the action taken by the parties in the trial court as required by [] article 561.”).

234. See *Gravlee v. Gravlee*, 79 So. 3d 1169, 1174 (La. Ct. App. 3d Cir. 2011) (stating that “the steps in the prosecution or defense of the case need not be made by the party”).

235. See LA. CIV. CODE art. 9 (2023).

236. See *id.* art. 2.

237. *Turner v. E. Baton Rouge Par. Sch. Bd.*, 252 So. 3d 990, 992–93 (La. Ct. App. 1st Cir. 2018).

common meaning.²³⁸ This article also promotes the method argument from grammar, which involves using established and accepted rules of grammar to give language its most plausible meaning; the interpreter should view the grammatical structure and arrangement of words in a text as intentional by the legislature.²³⁹

Applying the above principles to the case at hand, a court could not possibly be included in the definition of whose actions the article is focused on to prevent abandonment for a few reasons. First, *parties* is made in reference to putting on one's "prosecution or defense."²⁴⁰ The only persons, hence parties, that can put on a prosecution or defense are the plaintiff and the defendant, respectively. Using an *ab absurdum argument*, it is a logical absurdity to reason that the article is referring to a court as a party when the context of that reference is toward the persons who can put on a prosecution or a defense of the action.²⁴¹ A court cannot put on a prosecution or a defense when by the very common meaning of the word *judge*, which is used interchangeably with court, is a person appointed to decide the litigated issue.²⁴² A person appointed to decide a cause of action does not advocate for either side of the litigated question. Second, it is important that the step in the prosecution or defense be "in the trial court."²⁴³ The grammatical arrangement of these words suggest that the court is merely the place where the action must occur but not actually a person who must be active in the prevention of abandonment. Thus, based on Louisiana Civil Code article 9, one can conclude that a court is not a party.

However, if uncertainty persists for some, Louisiana Civil Code article 10 can be used to demonstrate that the conclusion is correct. Article 10 instructs courts to interpret ambiguous language in a manner that gives the

238. See LA. CIV. CODE art. 11 (2023) ("The words of a law must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the law involves a technical matter.").

239. See generally *Turner*, 252 So. 3d at 992–93 ("Applicable rules of statutory interpretation instruct that unless clearly indicated otherwise by the context, the term *or* in a statute is disjunctive. That is, *or* does not mean *and/or*, but instead sets apart independent and exclusive alternatives." (internal quotations omitted) (emphasis added) (citing *Succession of Harlan*, 250 So. 3d 220 (La. 2018))).

240. LA. CODE CIV. PROC. art. 561(A)(1) (2023).

241. See MELISSA T. LONEGRASS & CLARE RYAN, *WESTERN LEGAL TRADITIONS: LOUISIANA IMPACT CASES AND READINGS* 177 (4th ed. 2021) (defining it as "[a]n interpretation that leads to 'absurd' (patently unreasonable) consequences ought to be resisted").

242. *Judge*, *supra* note 229.

243. LA. CODE CIV. PROC. art. 561 (2023).

language a meaning that serves the purpose of the law.²⁴⁴ This is known as *teleological interpretation*, which suggests that the interpreter will determine what the ultimate end or aim of the law is, its overarching purpose, and its social end; then, the interpreter will apply the law in a way consistent with that purpose.²⁴⁵ The purpose of the first abandonment article in 1870 was to define under what circumstances an interruption of prescription under Louisiana Civil Code article 3518 (1870) would come to an end.²⁴⁶ The article was necessary because prior to its enactment, interruption of prescription could last as long as the suit lasted,²⁴⁷ and there was no article on how or when that interruption ceased.²⁴⁸ The 1898 amendment to the abandonment article placed a duty on the plaintiff to pursue the claim to judgment,²⁴⁹ as the 1870 version of the article placed no duty on the plaintiff to prosecute the case once the suit is filed.²⁵⁰ Thus, the legislature amended the article to terminate the evils that resulted from failure to prosecute a suit.²⁵¹ Moreover, early Louisiana jurisprudence had a rule that actions taken by a person other than the plaintiff or the defendant could not prevent abandonment.²⁵² The logic for the early jurisprudential rule is that the legislature was only focused on the plaintiff and defendant moving a suit to judgment and no one else.

The interpretation that no person or court can be considered a party, other than the plaintiff or defendant whose step may prevent abandonment, is in line with the legislative purpose of article 561 and its predecessors. The article is entirely focused on the actions of the plaintiff and the defendant because it is they who can keep a case lingering and they who should be punished for allowing a case to linger indefinitely. The notion is furthered by recognizing that a court's only role in the abandonment process, according to the jurisprudence and article 561 itself, is to declare

244. See LA. CIV. CODE art. 10 (2023) (“When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.”).

245. LA. CIV. CODE ANN. art. 10 cmt. b (2021).

246. Juneau & Moncla, *supra* note 27, at 342.

247. Doylet, *supra* note 9, at 504.

248. *Id.*

249. See LA. CIV. CODE art. 3519 (1898) (“Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse, without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same.”).

250. Juneau & Moncla, *supra* note 27, at 343.

251. Doylet, *supra* note 9, at 505.

252. *Id.* (citing *Seligman v. G. A. Scott & Bro.*, 134 So. 771, 772 (La. Ct. App. 2d Cir. 1931)).

that which has already occurred by operation of law and grant an order of dismissal.²⁵³ Hence, it is error for any court to declare that it may be a party whose actions can be considered steps in the prosecution or the defense of the case to prevent abandonment because such a declaration goes against the language and the purpose of the article. The article has been and should always be solely focused on the actions of the plaintiff or the defendant to prevent their case from being abandoned.

B. A Motion for Continuance Without a Date Could Keep a Case Lingering Indefinitely, Going Against the Legislative Purpose for the Article

A motion for continuance without a date goes against the very purpose of article 561 because if deemed a step, it could allow cases to linger indefinitely, reopening the pathway to the realm of imprescriptability. Recall that a step is a formal action before the court intended to hasten the suit towards judgment.²⁵⁴ Further, a step is more than a passive effort to keep a suit on a court's docket; rather, it is an active measure taken, intended, and calculated to hasten the suit to judgment.²⁵⁵ The earliest court decisions recognized that certainty was brought to the law by requiring that after the passage of a certain amount of time, without a step by a party, the action would be considered abandoned according to the law.²⁵⁶ The certainty provided was originally for the defendant's benefit, but now, the law allows a plaintiff to benefit from a defendant's actions.²⁵⁷ This law, at its core, is a mechanism that prevents a plaintiff from allowing a suit to hang perpetually over the head of the defendant by never prosecuting it to judgment until the plaintiff sees fit or until the defendant forces the plaintiff to prosecute the suit to judgment.²⁵⁸

253. See LA. CODE. CIV. PROC. art. 561(A)(3) (2023) (stating "the [] court shall enter a formal order of dismissal as of the date of its abandonment"); PALO, *supra* note 102, in 22 LOUISIANA CIVIL LAW TREATISE, *supra* note 102, § 6:13.

254. La. Dep't of Transp. & Dev. v. Oilfield Heavy Haulers, L.L.C., 79 So. 3d 978, 981 (La. 2011).

255. Sliman v. Araguel, 200 So. 280, 281 (La. 1941).

256. Lockhart v. Lockhart, 37 So. 860, 860 (La. 1905).

257. See Verrett v. Savoie, 141 So. 854, 855 (La. 1932) ("The suit ought to be dismissed from the court's docket, and the defendant has the right to have it so dismissed." (citing *Lockhart*, 37 So. 860; *Teutonia Lona & Bldg. Co. v. Connolly*, 63 So. 63 (La. 1913); *Charbonnet v. State Realty Co.*, 99 So. 865 (La. 1923); *Losch v. Greco*, 136 So. 572 (La. 1931)).

258. Augusta Sugar Co. v. Haley, 112 So. 731, 732 (La. 1927).

Thus, that very purpose is undercut if courts hold that a motion for continuance without a date is a step in the prosecution because at what point does the case become abandoned—after two motions for continuance or is three the magic number? The only explanation for the Louisiana Fourth Circuit Court of Appeal in allowing these motions to count as a step is its overreliance on the jurisprudential liberal policy consideration in abandonment cases and not enough reliance on the true policy for which abandonment should hold in higher regard—the prescriptive basis on which abandonment finds its roots.

Although dismissal is one of the harshest remedies, the liberal policy requiring that all reasonable doubt about abandonment be resolved in favor of allowing the prosecution of the claim and against dismissal for abandonment should be restricted to only errors in technical formality.²⁵⁹ An inference can be drawn by the court that a party who errs in its filing does not intend to abandon its case, but the same is not true of a party attempting to drag a case out by continually filing motions for continuance without a date. In the former, the party is making an effort to move the case toward some activity in court, albeit the activity may not be the desired activity since there was an error in filing. In the latter, however, the party is trying to either buy time or delay moving the case toward some activity, which goes against the core policy of abandonment. Furthermore, the parties have complete power to prevent their cases from being abandoned. The parties must simply keep moving their case forward to judgment.

Consider, for example, that from January 1, 2021, to December 31, 2021, there were 2,621 civil and 578 probate cases filed in the Twenty-Sixth Judicial District Court.²⁶⁰ Without abandonment, or an active plaintiff, there is no mechanism to remove these cases from crowded dockets.²⁶¹ When a party keeps a case lingering without the desire to move it forward, it not only crowds court dockets, but also defies the prescriptive policy of legal finality.²⁶² Three years grants generous opportunities for a party to remain active in its case, and all non-activity in those years should allow article 561 to operate as intended by the legislature—to cease the interruption of prescription without court order.

When a party makes a motion for continuance without specifying a date and allows three years to pass without conducting discovery or making any formal moves to progress the action towards judgment, it

259. *Oilfield Heavy Haulers, L.L.C.*, 79 So. 3d 982.

260. Telephone Interview with Jill M. Sessions, Clerk of Court, Bossier Parish Clerk of Court (Jan. 14, 2022).

261. *Clark v. State Farm Mut. Auto. Ins. Co.*, 785 So. 2d 779, 787 (La. 2001).

262. *Id.* at 789.

should be at the party's peril. Abandonment is rooted in prescription both historically and theoretically.²⁶³ Perhaps courts have lost sight of this history due to the article being transferred from the prescription section of the Louisiana Civil Code to the Louisiana Code of Civil Procedure.²⁶⁴ Regardless, a court should not allow any action to escape the original legislative purpose of abandonment by clothing its rationale in a liberal policy consideration. Such a liberal policy consideration is contrary to the abandonment article's original purpose of preventing cases from lingering indefinitely. Therefore, a motion for continuance without a date should not be considered a step in the prosecution of the case to avoid abandonment.

CONCLUSION

Courts have broadened the interpretation of the abandonment article beyond its intended purpose. By doing so, the courts have created a backdoor for some plaintiffs to keep their suits alive indefinitely.²⁶⁵ The rule of abandonment demands certainty, which was the legislature's original intent when enacting the 1898 version of the article. Defendants should have certainty statewide to avoid the extra effort of determining whether a certain court will rule one way while another will not. Allowing liberal policy considerations to dictate that a motion for continuance without a date counts as a step is logical absurdity. The liberal policy considerations should be limited to true errors such as a technical formality error rather than laziness on the part of a party to keep pushing its case towards judgment. Abandonment is rooted in prescription and removing cases from crowded dockets.²⁶⁶ Thus, the prescriptive purpose upon which abandonment is rooted in should be given more weight when the court is faced with an abandonment issue. Finally, the only persons, or *parties*, who may take a step within the meaning of article 561 are the plaintiff or the defendant, not the court and not some other person who is not the plaintiff or the defendant in the action.

263. *Melancon v. Cont'l Cas. Co.*, 307 So. 2d 308, 311 (La. 1975).

264. LA. CIV. CODE bk. 5, ch. 3, tit. 23 (1898).

265. *See Fischer v. Chad Rogers, Cuvee, L.L.C.*, 280 So. 3d 1199, 1205 (La. Ct. App. 4th Cir. 2019).

266. *Clark*, 785 So. 2d at 787.