NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1486

STACEY R. STEVENS, INDIVIDUALLY, AND AS THE NATURAL TUTRIX OF JOHN BRADLEY STEVENS, III, AND CIERA FANNY EVANS

VERSUS

GRACE CHEN, M.D., MARK PORTACCI, M.D., CARY SHARP, M.D., AND LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY

DATE OF JUDGMENT: JUN - 8 2012

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 63401, PARISH OF IBERVILLE
STATE OF LOUISIANA

HONORABLE ALVIN BATISTE, JUDGE

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Whipple, J. dissents and assigns reasons.

Disposition: AFFIRMED.

Guidry, J. concurs in the result and assigns reasons.

KUHN, J.

Plaintiffs-appellants, Stacey R. Stevens, individually and as the natural tutrix of her minor children, John Bradley Stevens, III and Cierra Fanny Evans, appeal from a judgment of the trial court dismissing their claims against defendant, Dr. Cary Sharp, as abandoned. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 30, 2006, plaintiffs, the surviving spouse and surviving minor children of John Stevens, II, filed a petition for damages, wrongful death, and survival action against defendants, Dr. Grace Chen, Dr. Mark Portacci, Dr. Cary Sharp, and their insurer, the Louisiana Medical Mutual Insurance Company. Therein, plaintiffs alleged that the defendants' medical malpractice caused the death of John Stevens, II, on July 17, 2002.[1] In the petition, plaintiffs requested service on Dr. Sharp.

Plaintiffs deposed Dr. Sharp on April 6, 2006. At that time, counsel for Dr. Sharp noted on the record that, "Dr. Sharp has yet to be served with a petition in this case, so we are giving this deposition without waiving any exceptions, declinatory, dilatory, peremptory, that we may have to the suit, and with that reservation, we will go forward." On May 12, 2006, when plaintiffs took the deposition of Dr. Chen, counsel for Dr. Sharp was present and made an appearance on the record. Counsel for Dr. Sharp was also present and made an appearance on the record at the deposition of Dr. Portacci taken on June 16, 2006. At that time, counsel for Dr. Sharp urged the same reservation on the record that was previously set forth at Dr. Sharp's deposition.

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[1]Prior to filing the underlying suit, plaintiffs sought review of their medical malpractice claims through the State of Louisiana Patients' Compensation Fund. As to Dr. Sharp, the Medical Review Panel found that the evidence did not support the conclusion that he failed to meet the applicable standard of care as charged in the complaint.

By letter dated June 19, 2006, counsel for plaintiffs made a second request to the Clerk of Court for the 18th Judicial District Court to have Dr. Sharp served with plaintiffs' petition, providing a different service address than the initial address provided in their petition. A return service citation indicated that on June 27, 2006, service was attempted, but that there was "no answer at the door."

Thereafter, plaintiffs' claims against Dr. Chen were dismissed pursuant to a judgment approving a settlement agreement on September 13, 2007, and a subsequent order by the trial court on September 25, 2007, dismissing plaintiffs' claims against Dr. Chen with prejudice. On September 2, 2010, counsel for plaintiffs sent another letter to the Clerk of Court with a third service request for Dr. Sharp, providing yet another address. Dr. Sharp ultimately was served with plaintiffs' petition on September 13, 2010.

On September 30, 2010, Dr. Sharp filed a "Motion to Dismiss for Abandonment," contending that for a period of over three years, from the time of Dr. Portacci's deposition on June 16, 2006, until service of this lawsuit was made upon Dr. Sharp on September 13, 2010, there had been no formal step in the defense or prosecution of this case by any party, thereby rendering the matter abandoned as a matter of law, pursuant to La. C.C.P. art. 561.

Plaintiffs opposed the motion, contending that Dr. Sharp had continuous knowledge of the medical malpractice claim and lawsuit filed against him as shown by: (1) Dr. Sharp's participation in the medical review panel proceeding; (2) Dr. Sharp's appearance at his deposition on April 6, 2006; (3) his participation through counsel in Dr. Chen's deposition on May 12, 2006, and Dr. Portacci's deposition on June 16, 2006; (4) the acknowledged receipt of plaintiffs' global settlement demand and declination to participate in settlement negotiations by counsel for Dr. Sharp; (5) the filing of the petition to approve settlement with Dr.

Chen, LAMMICO, and the PCF in the suit record on September 13, 2007; and (6) the filing of the motion to dismiss claims against Dr. Chen and LAMMICO in the suit record on September 21, 2007, which was signed by the trial court on September 25, 2007. Plaintiffs particularly challenged Dr. Sharp's characterization of Dr. Portacci's June 16, 2006 deposition as the last "step" taken in this proceeding before it was allegedly abandoned, citing several steps that they contend interrupted the abandonment period. Specifically, in opposing the motion to dismiss this matter as abandoned, plaintiffs cited: (1) a letter from plaintiffs' counsel dated June 19, 2006, requesting that service be made on Dr. Sharp, which was filed in the suit record; (2) the petition for approval of settlement and proposed judgment, which was filed in the suit record and signed by the trial court on September 13, 2007; (3) the motion and order to dismiss the claims against Dr. Chen and LAMMICO, which were filed into the record on September 21, 2007, and signed by the trial court on September 25, 2007; and (4) a letter from plaintiffs' counsel dated September 2, 2010, requesting service on Dr. Sharp.

The matter was heard before the trial court on November 9, 2010. At the conclusion of the hearing, the trial court granted Dr. Sharp's motion to dismiss for abandonment. A written judgment, granting Dr. Sharp's motion to dismiss and formally dismissing plaintiffs' claims against Dr. Sharp without prejudice, was signed by the trial court on December 9, 2010. On January 18, 2011, plaintiffs filed a motion to set aside the order of dismissal pursuant to La. C.C.P. art. 561(A)(4), which was denied by the trial court after a hearing on April 26, 2011. Judgment was signed accordingly by the trial court on May 25, 2011.

Plaintiffs now appeal the May 25, 2011 judgment of the trial court, contending that the trial court erred in: (1) granting Dr. Sharp's motion to dismiss for abandonment when formal steps in the prosecution and defense of this case

occurred between June 19, 2006, and June 19, 2009, that were effective as to Dr. Sharp, even though he had not yet been served; and (2) denying plaintiffs' motion to set aside the dismissal.

DISCUSSION

Whether or not a step in the prosecution of a case has been taken in the trial court for a period of three years is a question of fact subject to a manifest error analysis on appeal. ***Hinds v. Global International Marine, Inc.***, 10-1452 (La. App. 1st Cir. 2/11/11), 57 So.3d 1181, 1183. Contrariwise, whether a particular act, once proven, precludes abandonment is a question of law that we review by simply determining whether the trial court's interpretive decision is correct. ***Jackson v. BASF Corporation***, 04-2777 (La. App. 1st Cir. 11/04/05), 927 So.2d 412, 415, writ denied, 05-2444 (La. 3/24/06), 925 So.2d 1231.

Louisiana Code of Civil Procedure article 561, which governs the abandonment of actions, provides, in pertinent part, as follows:

> A. (1) An action ... is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years ...
>
> * * * * *
>
> (3) This provision shall be operative without formal order, but, on ex parte motion of any party or other interested person by affidavit which provides that no step has been timely taken in the prosecution or defense of the action, the trial court shall enter a formal order of dismissal as of the date of its abandonment. The sheriff shall serve the order in the manner provided in Article 1314, and shall execute a return pursuant to Article 1292.
>
> (4) A motion to set aside a dismissal may be made only within thirty days of the date of the sheriff's service of the order of dismissal. If the trial court denies a timely motion to set aside the dismissal, the clerk of court shall give notice of the order of denial pursuant to Article 1913(A) and shall file a certificate pursuant to Article 1913(D).
>
> (5) An appeal of an order of dismissal may be taken only within sixty days of the date of the sheriff's service of the order of dismissal. An appeal of an order of denial may be taken only within sixty days of the date of the clerk's mailing of the order of denial.

* * * * *

> B. Any formal discovery as authorized by this Code and served on all parties 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.

Thus, in order to avoid abandonment, La. C.C.P. art. 561 imposes three requirements: (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. Further, sufficient action by either plaintiff or defendant will be deemed a step. ***Louisiana Department of Transportation and Development v. Oilfield Heavy Haulers, L.L.C.***, 11-0912 (La. 12/6/11), 79 So.3d 978, 981.

A "step" is a formal action before the court intended to hasten the suit towards judgment or is the taking of formal discovery. See ***James v. Formosa Plastics Corporation of Louisiana***, 01-2056 (La. 4/3/02), 813 So.2d 335, 338.

The purpose of La. C.C.P. art. 561 is the prevention of protracted litigation filed for purposes of harassment or without a serious intent to hasten the claim to judgment. See ***Chevron Oil Company v. Traigle***, 436 So.2d 530, 532 (La. 1983). Abandonment is not a punitive concept; rather, it balances two competing policy considerations: (1) the desire to see every litigant have his day in court and not to lose same by some technical carelessness or unavoidable delay; and (2) the legislative purpose that suits, once filed, should not indefinitely linger, preserving stale claims from the normal extinguishing operation of prescription. ***Louisiana Department of Transportation and Development***, 79 So.3d at 981.

Because dismissal is the harshest of remedies, any reasonable doubt about abandonment should be resolved in favor of allowing the prosecution of the claim and against dismissal for abandonment. ***Louisiana Department of Transportation***

and Development, 79 So.3d at 981-82. The intention of La. C.C.P. art. 561 is not to dismiss suits as abandoned based on technicalities, but only those cases where the plaintiff's inaction during the three-year period has clearly demonstrated his abandonment of the case. ***Louisiana Department of Transportation and Development***, 79 So.3d at 982.

In the instant case, we are presented with the following timeline of events:

- January 30, 2006 – Suit filed by plaintiffs.
- April 6, 2006 – Deposition of Dr. Sharp taken.
- May 12, 2006 – Deposition of Dr. Chen taken.
- June 16, 2006 – Deposition of Dr. Portacci taken.
- June 19, 2006 – Letter sent by plaintiffs to the clerk of court requesting service on Dr. Sharp.
- September 13, 2007 – Petition for approval of settlement with co-defendant, Dr. Chen, filed.
- September 21, 2007 – Plaintiffs' motion to dismiss claims against Dr. Chen filed.
- September 25, 2007 – Order dismissing claims against Dr. Chen rendered by the trial court.
- September 2, 2010 - Plaintiffs' letter to clerk requesting service on Dr. Sharp received on September 7, 2010 and filed of record on September 8, 2010.
- September 13, 2010 – Dr. Sharp served with plaintiffs' petition.
- September 30, 2010 – Motion to Dismiss for Abandonment filed by Dr. Sharp.

In support of his right to dismissal based on abandonment, Dr. Sharp maintains on appeal that "there was no action taken to advance the prosecution or defense and hasten the matter to judgment **as to Dr. Sharp** between June 19, 2006, and September 7, 2010." According to Dr. Sharp, plaintiffs' June 19, 2006 letter requesting service on Dr. Sharp, was the last "step" in the prosecution of this matter taken **as to him**. (Emphasis added.) Dr. Sharp argues that the petition for

approval of settlement and motion to dismiss plaintiffs' claims against Dr. Chen were ineffective as a step in the prosecution vis-à-vis Dr. Sharp, as he did not receive notice of these pleadings **and remained unserved at that time**.

In opposition, plaintiffs contend that the steps they took with respect to other defendants in the three-year period between June 19, 2006 and June 19, 2009 (*i.e.*, the September 13, 2007 filing of the petition for approval of a settlement involving certain of Dr. Stevens' co-defendants and the September 21, 2007 motion to dismiss the claims against Dr. Chen), clearly served to also interrupt the abandonment period against Dr. Sharp, even though, despite multiple attempts by plaintiffs to serve him, he remained unserved and declined to participate in the settlement. Plaintiffs contend that La. C.C.P. art. 561 makes no distinction between served and unserved parties with regard to whether or not steps were taken in the prosecution or defense of a matter.

We conclude that the present situation is governed by ***Murphy v. Hurdle Planting and Livestock, Inc.***, 331 So.2d 566 (La. App. 1st Cir.), writ denied, 334 So.2d 434 (La. 1976), in which this Court held that a step in the prosecution or defense of a case is ineffective as to **unserved** defendants.[2] Contrary to plaintiffs' assertions, ***Murphy*** has not been overruled, and remains the law of this circuit. Plaintiffs' contention that ***Murphy*** was overruled by the Supreme Court's decision in ***Bissett v. Allstate Insurance Company***, 567 So.2d 598 (La. 1990), ignores the fact that ***Murphy*** is factually distinguishable from ***Bissett***. Consequently, the decision in ***Bissett*** does not affect the continued viability of ***Murphy***.

In ***Bissett v. Allstate Insurance Company***, 567 So. 2d 598 (La. 1990), the Supreme Court adopted the dissenting opinion in ***Bissett v. Allstate Insurance***

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[2] See also ***Bridges v. Wilcoxon***, 34,600 (La. App. 2d Cir. 5/9/01), 786 So.2d 264, 268 (Abandonment is not interrupted as to an **unserved** defendant against whom no timely steps have been taken, even if steps are taken by or against a served defendant).

Company, 560 So. 2d 884, 886-87 (La. App. 1st Cir. 1990), and reversed this Court's decision in that case, which had upheld the dismissal of a lawsuit as abandoned with respect to defendant, Renee Hegwood Sparks. In that dissenting opinion, Judge Melvin J. Shortess concluded that the taking and filing into the record of a witness' deposition was sufficient to interrupt the abandonment period against Sparks, even though she was unserved at the time the deposition was taken and filed. See ***Bissett***, 560 So. 2d at 887. In his dissenting opinion, Judge Shortess specifically distinguished this Court's previous opinion in ***Murphy*** from the situation presented in ***Bissett***, as follows:

> Unlike *Murphy*, where the "step" consisted merely of a motion to set the case for trial by an attorney who had not previously appeared for plaintiffs, here [the unserved defendant] was actually served with a motion for deposition, was physically present at a deposition with counsel, and was questioned at length about the facts of the accident at issue. Although her deposition may not constitute a general appearance under LSA-C.C.P. art. 7, it was clearly a step in the prosecution of the action.....

Bissett, 560 So.2d at 887.

Thus, a distinction was made between the "step" in ***Murphy***, which did not sufficiently advance the prosecution of the case, and the "step" at issue in ***Bissett***, which affirmatively moved the case forward as to the defendant and, therefore, constituted a "step" in the prosecution or defense of the case.

The present case is identical to ***Murphy*** in that the actions relied upon by the plaintiffs as "steps" interrupting abandonment as to Dr. Sharp failed to advance the prosecution of the case against him. In arguing that the abandonment period was interrupted as to Dr. Sharp, plaintiffs rely on the filing of a petition for approval of a settlement with several co-defendants and a motion by plaintiffs to dismiss their claims against those co-defendants. Dr. Sharp was not served with notice of these pleadings, nor was any other specific step taken that affected him. Under La. C.C.P. art. 561(A)(1), a step is the taking of formal action intended to hasten the

suit toward judgment. ***Tessier v. Pratt***, 08-1268 (La. App. 1st Cir. 2/13/09), 7 So.3d 768, 772. In the instant case, despite plaintiffs' reservation of their rights against Dr. Sharp in the petition for approval, these pleadings did nothing to move the case forward with respect to him so as to hasten it to judgment. Rather than advancing the prosecution as to Dr. Sharp, these pleadings merely maintained the *status quo* with respect to him. When no steps are timely taken in the prosecution of a suit as to an **unserved** defendant, then abandonment is not interrupted as to that defendant, even if steps are taken by or against a served defendant. ***Murphy***, 331 So.2d at 568; ***Bridges***, 786 So.2d at 268.

Plaintiffs cite ***Dorsey v. Consolidated Freightways, Inc.***, 00-0772 (La. 5/26/00), 762 So.2d 628, and ***McCandless v. Poston***, 540 So.2d 1210 (La. App. 2d Cir. 1989), in support of their contention that the petition for approval of settlement and motion to dismiss constituted steps effective against Dr. Sharp. However, a careful review of these reported cases gives no indication that they involved an **unserved** defendant such as Dr. Sharp. Moreover, the language in ***Dorsey*** that plaintiffs depend upon to support their argument does not constitute binding authority, since it is contained in a concurrence and not the majority opinion.[3]

In the instant case, the actions relied upon by the plaintiffs did not constitute steps interrupting the abandonment period against Dr. Sharp within the contemplation of La. C.C.P. art. 561(A)(1), since the actions did not hasten this suit to judgment against him. Accordingly, we find that the trial court acted properly in granting Dr. Sharp's motion to dismiss for abandonment and in denying plaintiffs' motion to set aside the dismissal.

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[3] Plaintiffs also cite jurisprudence from other jurisdictions in support of their contention that steps taken against one defendant are effective as to all other defendants, even those that have not been served. However, we disagree with the rationale of these cases to the extent that they hold that a step against one defendant is also effective as to an unserved defendant against whom it does not advance the prosecution or defense of the case.

CONCLUSION

For the reasons stated above, the judgment on appeal is affirmed. All costs of this appeal are assessed against the plaintiffs-appellants.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1486

STACEY R. STEVENS, INDIVIDUALLY, AND AS THE NATURAL TUTRIX OF JOHN BRADLEY STEVENS, III, AND CIERA FANNY EVANS

VERSUS

GRACE CHEN, M.D., MARK PORTACCI, M.D., CARY SHARP, M.D., AND LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY

GUIDRY, J., concurs in the result.

GUIDRY, J., concurring in the result.

As noted by the majority, this court held in Murphy v. Hurdle Planting and Livestock, Inc., 331 So. 2d 566 (La. App. 1st Cir.), writ denied, 334 So. 2d 434 (La. 1976) that a step in the prosecution or defense of a case is ineffective as to unserved defendants. Because Murphy has not been overruled, and therefore is still the law of this circuit, I am constrained to follow Murphy in affirming the trial court's judgment, granting Dr. Sharp's motion to dismiss for abandonment and denying plaintiffs' motion to set aside the dismissal.

STACEY R. STEVENS, INDIVIDUALLY, AND AS THE NATURAL TUTRIX OF JOHN BRADLEY STEVENS, III, AND CIERA FANNY EVANS

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FIRST CIRCUIT

NUMBER 2011 CA 1486

WHIPPLE, J., dissenting.

I respectfully disagree with the majority's opinion herein.

A "step" is a formal action before the court intended to hasten the suit towards judgment or is the taking of formal discovery. See James v. Formosa Plastics Corporation of Louisiana, 2001-2056 (La. 4/3/02), 813 So. 2d 335, 338. Moreover, a step by one party prevents abandonment as to all of the parties, even though they are not solidarily liable. Delta Development Company, Inc. v. Jurgens, 456 So. 2d 145, 146 (La. 1984).

Our jurisprudence has uniformly held that LSA-C.C.P. art. 561 should be liberally construed in favor of maintaining a plaintiff's suit. Louisiana Department of Transportation and Development v. Oilfield Heavy Haulers, L.L.C., ___ So. 3d at ___. For the purpose of determining abandonment, "the intent and substance of a party's actions matter far more than technical compliance." Thibaut Oil Company, Inc., v. Holly, 2006-0313 (La. App. 1st Cir. 2/14/07), 961 So. 2d 1170, 1172-1173.

In Bissett v. Allstate Insurance Company, 567 So. 2d 598 (La. 1990), the Louisiana Supreme Court adopted the dissenting opinion of The Honorable Melvin J. Shortess, rendered in this court's opinion in Bissett v. Allstate Insurance Company, 560 So. 2d 884 (La. App. 1st Cir. 1990), and held that action taken against served defendants, but not against unserved defendants, is nonetheless sufficient to interrupt abandonment claims as to unserved defendants. See Bissett v. Allstate Insurance

Company, 567 So. 2d 598 (La. 1990).[1] The Supreme Court's holding in Bissett ultimately dictated that the deposition of a witness filed into the record constituted a step in the defense of the action sufficient to interrupt the period of abandonment as to an unserved defendant, particularly where the unserved defendant was on notice of the lawsuit and, importantly, had already given a deposition with her counsel present. See also Bissett v. Allstate Insurance Company, 560 So. 2d at 887 (dissenting opinion by J. Shortess).

Further, in his dissenting reasons that were adopted by the Supreme Court, Judge Shortess specifically distinguished this court's previous opinion in Murphy v. Hurdle Planting and Livestock, Inc., 331 So. 2d 566 (La. App. 1st Cir.), writ denied, 334 So. 2d 434 (La. 1976), a case which Dr. Sharp now relies upon in his brief on appeal. In doing so, Judge Shortess noted as follows:

> Unlike *Murphy*, where the "step" consisted merely of a motion to set the case for trial by an attorney who had not previously appeared for plaintiffs, here [the unserved defendant] was actually served with a motion for deposition, was physically present at a deposition with counsel, and was questioned at length about the facts of the accident at issue. Although her deposition may not constitute a general appearance under LSA-C.C.P. art. 7, it was clearly a step in

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[1]The Supreme Court's holding in Bissett was also applied and distinguished by another panel of this court in Fleischmann v. Henderson, 2009-1395 (La. App. 1st Cir. 4/7/10) 34 So. 3d 1167 (unpublished opinion), where this court found that a motion for involuntary dismissal by the DOTD for insufficiency of service of process pursuant to LSA-R.S. 13:5107(D) was not a "step" in the prosecution of a case as contemplated by LSA-C.C.P. art. 561 so as to interrupt the tolling of the abandonment period as to co-defendants, Henderson and National Automotive Insurance Company ("NAIC"). In doing so, the majority noted:

> The failure of a plaintiff to have a party served is not moving the case forward to hasten the matter to judgment. Therefore, we conclude it follows that the action of that un-served party obtaining its dismissal from the lawsuit should not be considered a step in the prosecution as to the other defendants to preclude them from taking advantage of the abandonment statute.

Fleischmann v. Henderson, 2009-1395 at p. 3.

However, in so ruling, the majority distinguished the Fleischmann case from Bissett, noting that in Bissett, all of the defendants had continuously taken part in discovery, including giving depositions, whereas in Fleischmann, no action whatsoever occurred from the time the served defendants, Henderson and NAIC, answered the suit on September 25, 2002, until the DOTD filed its motion for involuntary dismissal on June 23, 2005. Fleischmann v. Henderson, 2009-1395 at p. 3.

the prosecution of the action, and she was clearly on notice of the lawsuit.

Bissett v. Allstate Insurance Company, 560 So. 2d at 887.

Bridges v. Wilcoxon, 34,660 (La. App. 2nd Cir. 5/9/01), 786 So. 2d 264, another case relied on by Dr. Sharp, is also distinguishable from the instant case. Unlike the involvement and participation by Dr. Sharp in the instant case, in Bridges, defendants State Farm and Southern Farm Bureau were not served with process until more than five years after the original suit was filed. Further, there was no showing in the record that those defendants were made aware that the plaintiffs were actively pursuing the lawsuit or were ever made aware of the litigation. See Bridges v. Wilcoxon, 786 So. 2d at 269. Moreover, I disagree with my Second Circuit colleagues' interpretation in Bridges of the Supreme Court's holding in Bissett to the effect that "if all defendants are served, action against one defendant interrupts abandonment as to all," but that "[s]uch is not the case with an **unserved** defendant." Bridges v. Wilcoxon, 786 So. 2d at 268 n.3. Instead, as set forth above, I again note that the Bissett Court found that the deposition of a witness filed into the record constituted a step in the defense of the action sufficient to interrupt the period of abandonment as to an **unserved defendant** where the **unserved defendant** was on notice of the lawsuit and had already given a deposition with her counsel present. See Bissette v. Allstate Insurance Company, 567 So. 2d at 598 and Bissett v. Allstate Insurance Company, 560 So. 2d at 887 (dissenting opinion by J. Shortess).

Here, plaintiffs filed a petition for approval of settlement on September 13, 2007, and a motion to dismiss the claims against Dr. Chen on September 21, 2007, with a specific reservation of rights against Dr. Sharp and his liability insurer, in the record of these proceedings within the three-year abandonment period. Moreover, and more importantly, in addition to conducting discovery, plaintiffs

made three attempts to effectuate service on Dr. Sharp. These actions are inconsistent with an intent by plaintiffs to abandon their claims. Cf. Hinds v. Global International Marine, Inc., 2010-1452 (La. App. 1st Cir. 2/11/11), 57 So. 3d 1181, 1185. Moreover, Dr. Sharp had participated in the underlying medical review panel proceedings, had been deposed in the instant suit, and made an appearance through counsel on the record in the depositions of Drs. Chen and Portacci. Thus, Dr. Sharp was clearly aware of and was participating in the ongoing litigation of this matter.

Considering the applicable jurisprudence above, and mindful that LSA-C.C.P. art. 561 must be liberally construed in favor of maintaining a plaintiff's suit and that the intention of LSA-C.C.P. art. 561 is not to dismiss suits as abandoned based on technicalities, but only those cases where a plaintiff's inaction during the three-year period has clearly demonstrated his abandonment of the case, Louisiana Department of Transportation and Development v. Oilfield Heavy Haulers, L.L.C., ___ So. 3d at ___, I would find that plaintiffs' actions constituted steps sufficient to interrupt the three-year period for abandonment as to the unserved defendant, Dr. Sharp.

Accordingly, for these reasons, I disagree with the majority's opinion and would reverse the May 25, 2011 judgment of the trial court and remand the matter for further proceedings.