23-833

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Application No. 23A30

Petition for Writ of Certiorari
On appeal from the Louisiana Supreme Court CIVIL DOCKET NO. 2022-C-01794
And the Ninth Judicial District Court Rapides Parish (Alexandria, LA) CIVIL SUIT NUMBER: 248,025-E

LAWRENCE KINGSLEY, PRO SE
APPLICANT/APPELLANT/PLAINTIFF
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v.

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APPLICATION FOR WRIT OF CERTIOARI

Issues on Appeal

1. Should this case be allowed to conflict with both federal and state cases which hold that a nonparty cannot intervene in a case without adherence to FRCP 24 or corresponding state rules, and now, on the basis of this case, can any nonparty start filing papers in a case at will?
2. Should this case establish a new rule that it now OK to intervene in a case after it has been dismissed?
3. In the Supreme Court's own words, has the court of last resort "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"?
4. Specifically, does the lack of due process and equal protection of the laws, in derogation of the appellant's right to access to the court, raise a federal question that merits certiorari:
   A. Because this case upends a long tradition of federal and state cases which hold that issues cannot be raised for the first time on appeal. (As an unauthorized intervenor and an admitted nonparty, Crowell & Owens has asserted claims which were never part of the original litigation.)
   B. Because there was a rush to judgment before contrary evidence was considered—namely, that the factual basis of the Order of Abandonment was

spurious?

C. Because the trial court refused to follow the statutory process by which the appellant could rule the appellee into court to show why the Order of Abandonment should not be set aside.[1] (Here and below superscripts denote endnotes.)

D. Because the trial court misconstrued or ignored supplemental records that should have been dispositive?

E. Because the court below failed to follow binding precedents about a defense-oriented waiver of abandonment?[2]

F. Because for succession cases there is a statutory exemption to abandonment when discovery has been served on all parties, and, as result of unresolved discovery, when undue restraint on the appellant implicates the doctrine of *non contra valentem*?

G. Because both the appellee's former and current counsels were allowed to remain contumacious before the alleged period of abandonment.[3]

H. Because other orders of the court were never enforced, including an award of sanctions and attorney's fees issued before the alleged period of abandonment?

I. Because there is a consensus of Louisiana courts that, alone, intent to hasten the case to judgment is sufficient to prevent abandonment?[4]

J. Because the appellee and her two sets of counsels have gotten away

not only with contumaciousness, but with fraud and insult to the Civil Code far worse than the technical infraction of which the appellant, however unjustly, was accused?

K. Because, as for the above reasons, there was undeniable evidence of the appellee's ill practices within the definition of the Louisiana Code of Civil Procedure 2004(A) ("A final judgment obtained by fraud or ill practices may be annulled")?

L. Because a Supervisory Writ should have been issued that would have left no doubt about the foregoing?

M. Because the foregoing facts, especially in combination with each other, are so unusual that an alternative explanation for them must be considered as well: discrimination against the appellant on the basis of his *pro se* status and/or age?

Rule 29.6 Statement

The appellant notes that the appellee has no corporate identity. In compliance with § 5(c) of this rule, a notarized affidavit of service accompanies this appeal. The U.S. Solicitor, and Attorneys General of both Louisiana and the U.S. have been served with copies of this Petition.

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Wenar v. Leon L. Schwartz, Sup.1907, 120 La. 1, 44 So. 902.

Young v. Laborde, 576 So.2d 551, 552, La.Ct.App. 4th Cir. 1991.

Other Authority

12 La. Civ. L. Treatise, Tort Law § 27:58 (2d ed.).

Schilling, III, Edwin C. "Availability of the Ex Parte Motion in Louisiana," *Louisiana Law Review* (June, 1968), 552-568.

Shapiro, David L. "Some Thoughts on Intervention before Courts, Agencies, and Arbitrators," *Harvard Law Review*, 81 (Feb.,1968), 721-772.

Westlaw annotation of LSA-C.C.P. Art. 561.

Westlaw annotations re: Article 3492.

Westlaw annotations re: Article 3492.

List of All Proceedings in this Case With
Associated Opinions and Orders

Kingsley v. Lange, Louisiana Ninth Judicial Court, 248,025-E, Order of Abandonment, Oct. 12, 2021.

Kingsley v. Lange, Louisiana Third Circuit Court of Appeal, CA-22-73, Denial of Appeal, Nov. 2, 2022.

Kingsley v. Lange, Louisiana Supreme Court, 2022-C-01794, Denial of Application for Writ of Certiorari, Feb. 14, 32023.

Kingsley v. Lange, Louisiana Supreme Court, 2022-C-01794, *Kingsley v. Lange*, Denial of Application for Reconsideration, April 25,2023.

Kingsley v. Lange, SCOTUS, Application No. 90859, Motion for Enlargement of Time for Filing Writ of Certioari, granted July 3, 2023.

The Feb. 14, 2023 and April 25, 2023 rulings by the Louisiana Supreme Court, which sustain the previous decisions in this case, comprise the judgments for which certiorari is sought.

April 25 was the date on which this court of last resort denied a motion for reconsideration.

On July 13, 2023 Justice Alioto extended until Sept. 22, 2023 the time for filing this application. Then on Nov. 13, 2023 SCOTUS returned the appellant's timely filed documents for correction, making Jan. 12, 2024 the new deadline for this submission. Mailing receipts [previously submitted] show compliance with this date, though corrected copies have followed.

Basis for Jurisdiction

SCOTUS Rule 10 provides the jurisdictional basis for this proceeding.

Date of Judgment in Question

As noted above, the judgment in question was entered by the Louisiana Supreme Court on April 25, 2023.

Date and Terms of the Extension of Time for Seeking a Writ

On July 13, 2023 Justice Alioto extended until Sept. 22, 2022 the deadline for the appellant's submission of this Petition for Certiorari.

Basis for Jurisdiction in this Court

SCOTUS Rule 10 and Article III of the U.S. Constitution provide the jurisdictional basis for this case.

Constitutional Provisions and Regulations Involved in this Case

Article III of the U.S. Constitution

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States, and between a State, or the Citizens thereof . . . .

Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifth Amendment

No person shall be . . . deprived of . . . property, without due process of law.

SCOTUS RULE 10

The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers . . .

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SCOTUS RULE 12

A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition.

FRCP 24. Intervention

. . . (c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Louisiana Code of Civil Procedure
Article 561

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, unless it is a succession proceeding:

(a) Which has been opened;

(b) In which an administrator or executor has been appointed; or

(c) In which a testament has been probated . . .

(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.

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. . . .

Louisiana Code of Civil Procedure Article 865

Every pleading shall be so construed as to do substantial justice.

Louisiana Code of Civil Procedure Article 966(C)(1)(a)

A contradictory hearing on the motion for summary judgment shall be set not less than thirty days after the filing.

Louisiana Code of Civil Procedure Article 5051

The articles of this Code are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves.

Louisiana Code of Civil Procedure Article 2004(A)

A final judgment obtained by fraud or ill practices may be annulled.

Louisiana Code of Civil Procedure Articles 1031(B) - 1032

Incidental demands are reconvention [counterclaims], crossclaims, intervention, and the demand against third parties. . . . An incidental demand shall be commenced by a petition.

Louisiana Code of Civil Procedure Article 1041

An incidental demand is not barred by prescription or peremption if it . . . is filed within ninety days of date of service of main demand . . . .

La. R. Dist. Ct. 9.8

(c) *Time between filing and hearing.* In cases other than juvenile and family law proceedings, no hearing on an exception or motion will be scheduled until at least fifteen calendar days after filing.

Louisiana Code of Civil Procedure Article 5032

All defenses, whether by exception or to the merits, made or intended to be made to any such claim, must be presented at one time and filed in the court of original jurisdiction prior to the time fixed for the hearing, and no court shall consider any defense unless so presented and filed.

.Concise Statement of the Case

The applicant/appellant/plaintiff Lawrence Kingsley brought the original case in a Louisiana's Ninth Judicial Court (Rapides Parish)[5] over the defendant/appellee's disloyalty, ruinous investing, and self-dealing when she was trustee of a testamentary trust of which he was sole beneficiary. He was represented by a series of counsels who each tacitly saw that the appellee had diminished the trust to the point that its remaining value was less than the attorneys' fees required to bring this case to trial. Each of the attorneys thus took a "bite" out of him and then withdrew before they risked disciplinary action for charging more than the remaining value of the trust. The appellant nonetheless continued to seek new counsel since early termination of the trust was not his only objective; he also sought damages for the appellee's *ultra vires* conduct and, at the time of the ruling in question, was waiting for the appellee to comply with discovery that had been ordered.

On Oct. 11, 2021 the trial court scheduled a hearing by video teleconference on the appellant's Second Motion for Contempt. This Motion arose from the failure of the opposing counsel to comply with two orders to deposit $3,000 of the appellant's inheritance in the court's registry, the appellee's failure to pay sanctions and attorney's fees that had been ordered, and the failure of an admitted nonparty, Crowell & Owens, to comply with a discovery order re: sums received from the appellee and payment of these sums to the court's registry. The appellee improperly had looted the appellant's trust for her shopping trips and legal

defense, as opposed to any normal or necessary purpose of the trust for which she could be indemnified as trustee. Crowell & Owens was her counsel at the time, but was replaced by her current counsel, Rodney Rabalais, Esq., before the litigation commenced.

The appellee ambushed the appellant at the Oct. 11 hearing. Via fax on Oct. 7, 2021 the appellee moved for an Order declaring the case abandoned, but, although the parties had been in active email communication with each other, did not serve the appellant until just before the Oct. 11 hearing. The court denied the appellant's oral motion to withhold judgment until he had time to prepare a written response. Without ever considering his Second Motion for Contempt, the ostensible subject of this hearing, the court ruled the case abandoned. The next day the judge confirmed her oral decisions in a written judgment, but never served it, as required, by deputy sheriff or, since the appellant was an out-of-state resident, by an alternative method like Certified Mail. None of the previous orders in this case were rescinded, but they no longer could be enforced in a dismissed case.

By a Motion filed on Jan. 21, 2022 the appellant again asked the court to set aside the Order of Abandonment and appended documentation showing that he always intended to prosecute his case. The trial court denied this Motion. On Dec. 11, 2021 he also sought a writ which would introduce attached evidence showing his continuing attempt to prosecute the case, but the trial count refused to sign this writ.

The appellant then filed a timely appeal to Louisiana's Third Circuit Court of

Appeal. Without seeking leave to intervene in this case and having no adverse judgment to defend, Crowell & Owens nevertheless, over the appellant's protest, designated the entire case as the record on appeal. As a result, the appellant had to pay the trial court $5 per page for every document copied by the trial court. Subsequently, however, Crowell & Owens never cited any of these records.

The only defendant in this case, Ann Lange, has not participated in the appeal except for a terse Opposition filed by her son. Crowell & Owens, though never formally granted status as an intervenor, has conducted the *entire* opposition to this appeal despite the appellant's objection, every step of the way, to this role.

The Third Circuit Court of Appeal allowed the appellant to apply for a Supervisory Writ concerning the same supplemental records which the appellant was unable to obtain from the trial court via the post-trial writ. In the end, however, this Supervisory Writ and the appeal were denied, and so was a subsequent appeal to Louisiana' Supreme Court. This court of last resort also denied the appellant's Motion for Reconsideration on Feb. 4, 2023.

Following a timely Notice of Appeal on July 13, 2023, Justice Alito granted the appellant an extension of time for filing the instant Petition for Certiorari until Sept. 22, 2023.

The applicant is forced to proceed *pro se*, but until the final judgment in the trial court, he spent over $40,000 on prior counsels.

A summary of principal reasons for this appeal is found in *Morgan v. W. Baton*

Rouge Par. Sheriff's Dep't., 308 So. 3d 1168 (La. Ct. App. 1st Cir. 2020):

> [T]he jurisprudence has uniformly held that LSA-*C.C.P.* art. *561* is to be liberally construed in favor of maintaining a plaintiff's suit. Abandonment is not meant to dismiss actions on mere technicalities, but to dismiss actions which in fact clearly have been abandoned. *Paternostro v. Falgoust*, 2003-2214 (La. App. 1st Cir. 9/17/04), 897 So. 2d 19, 21, writ denied, 2004-2524 (La. 12/17/04), 888 So. 2d 870. Further, because dismissal is harsh, the law favors and justice requires that an action be maintained whenever possible so that the aggrieved party has his day in court. Thus, any action or step taken to move the case toward judgment should be considered.[6]

The appellant submits that each lower court, one affirming another, has misconstrued both the facts and law because he never abandoned this case. Abandonment under Louisiana case law has been held to be self-executing, but a decision on whether abandonment ever occurred is not. For a dispositive motion there should have been a proper hearing, as opposed to the rushed telephonic hearing for which he had no time to prepare. By springing the ambush, the appellee avoided not only in-depth rebuttal, but compliance with previous orders of the court.

Dismissal of this case, though otherwise without a specific ruling, similarly allowed her counsel, Att. Rabalais, to evade July 18, 2014 and Dec. 10, 2014 orders which both instructed him to deposit in the court's registry the remaining $3,000 of the retainer which the appellee fraudulently withdrew from the appellant's trust after her resignation as trustee.[7] Issued well before the alleged period of abandonment, these orders had nothing to do with abandonment.

The appellee and her counsel have filed nothing during this appeal except for a pro se Opposition by her son and power of attorney, Alan Lange. Opposition

otherwise has come entirely from an admitted nonparty, Crowell & Owens.[8] Crowell & Owens was the appellee's former counsel, but never represented her in this case and told the trial court three times that it is a nonparty. Crowell & Owens thus had no right to intervene, never filed a motion to intervene at any stage of this case, and never sought nor received declaratory judgment authorizing it to intervene.[9]

Among other errors, the trial court denied the appellant's motion to rule the appellee into court to show why the Order of Abandonment should not be set aside. The appellant first made an oral motion to this effect in open court and later, for the same purpose, filed a Motion to Supplement Record and for Contradictory Hearing.

Where Federal Question Was Raised

The appellant claimed violation of his constitutional rights in Argument 5 of his Application for Reconsideration in the court below, which noted "constitutional problems with Article 561 itself." Argument 6 of the same document submitted: "due process is difficult to perceive in this case."

Earlier, as in ¶ 28 of the Application for Rehearing in the state Third Circuit Court of Appeal, the appellant cited "constitutional questions which deserve a landmark decision."

Summary of Argument

1. Over the appellant's objections, the court below failed to exclude an admitted nonparty, Crowell & Owens, that was never granted status as an intervenor.

The permissiveness of the lower court in this respect has "contaminated" this appeal and constitutes reversible error. Unless remediated, this case will set a precedent that an outsider now can join someone else's case at will, misadvise the court, and escape sanctions.

2. The judgment in question unacceptably fails to decide whether reversal should ensue from Louisiana C.C.P. 2004(A), which states: "A final judgment obtained by fraud or ill practices may be annulled." The appellee's deliberate delay in serving the Motion for Abandonment (in order to ambush the appellant with it), contumaciousness about discovery and sanctions, fraudulent disbursements from the trust, and contumaciousness of her present and former counsels[10] all invite scrutiny under C.C.P. 2004(A).
3. The judgment of the court below overlooks or misapprehends important factual evidence showing that the appellant always intended to hasten the case to judgment. This evidence was attached both to the Motion to Supplement Record and for Contradictory Hearing and, on appeal, to the Application for Supervisory Writ. The denial of these efforts to set the record straight does not alter the fact that this evidence was available for review. Here is the overriding issue which should be determined on remand: whether there ever was abandonment in the first place.
4. The judgment in question misapprehends settled law that an opponent can waive the right to claim abandonment in any of three ways, all of which are present in this case. These waivers include an opponent's unconditional offer of

settlement which recognizes the validity of the litigation, undue restraints on the other side which implicates the doctrine of *non contra valentem*, and prolonged silence which lulls an opponent into belief that the proponent of an abandonment theory is not contesting the litigation.

5. This case is ripe for a landmark decision about constitutional problems with Louisiana's C.C.P. Article 561 and its conflict both with federal jurisprudence and with common pleading standards like Louisiana's procedural Rule 9.8, which requires 15 days' notice of any motion. The Louisiana Civil Code is silent about any exemption of *ex parte* motions from this rule. There are untoward implications for due process if a litigant, especially one in frequent contact with the non-moving party, can blindside the latter by bringing an *ex parte* motion without a proper opportunity for rebuttal before or after the motion is decided.
6. In sum, there is unanimous agreement that state cases can raise a federal question when fundamental constitutional rights are infringed. Well-known examples include cases where minorities and women have been excluded from juries or when police take actions contrary to civil rights. In this case there should little doubt of these constitutional violations.

Argument

Argument 1. This case conflicts not only with state, but with federal jurisprudence which restricts circumstances under which a nonparty can intervene in a case.

In this case an admitted nonparty never granted status as an intervenor and never having the right to intervene unofficially replaced the appellee and conducted the entire appeal in its own name. The nonparty was Crowell & Owens, the real appellee's former counsel whose representation of her ended well before this case began. It is undeniable that Crowell & Owens never filed an appearance in this case. Alone, the unauthorized intrusion of a nonparty into someone else's appeal constitutes reversible error, and the failure of the court below to halt this shocking inversion of rules conflicts with predominant federal cases which define the procedure and permissible scope of intervention.[11] Surely, as a law firm, Crowell & Owens understood the requirements for intervention, but consciously ignored them. Crowell & Owens must have realized that a motion to intervene would have been denied, but nonetheless wanted to take measures to assure that on remand improprieties would not redound to itself for egging on the appellee, misadvising her, and withholding her fully executed settlement agreement—all meant to keep the litigation going and fees coming in.

This case should not become a precedent for the idea that anyone at will can intervene in a case whether or not the intended intervenor has the right to do so or complies with the procedure for intervention. SCOTUS Rule 12 clearly forbids a litigant's unauthorized intervention, and so do both Louisiana's Code of Civil Procedure Article 1032 and FRCP 24.

Town of Chester v. Laroe Estates, Inc., 581 U.S. 433, 137 S. Ct. 1645 (2017) explains:

> A litigant seeking to intervene as of right under Rule 24(a)(2) must meet the requirements of Article III standing if the intervenor wishes to pursue relief not requested by a plaintiff. To establish Article III standing, a plaintiff seeking compensatory relief must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U. S. 530 (2016), 136 S. Ct. 1540.

However, Crowell & Owens has not been injured at all and merely speculates that a remanded case would uncover skullduggery which the trial court had reason to suspect, but never adjudicated. While a threatened injury to Crowell & Owens has something in common with the appellee, who looted the appellant's trust under direction of Crowell & Owens, the third criterion for intervention articulated by *Town of Chester v. Laroe*, is inapposite for Crowell & Owens is unlikely to prevail in any scrutiny of its conduct in the original case.

The failure of the trial court and two appellate courts to restrain Crowell & Owens from interfering with this case (though never explicitly authorizing intervention) conflicts with a long tradition of cases holding, as stated by SCOTUS Rule 12, that "A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition."

Crowell & Owens never tried to intervene in the original litigation and intruded only in an appeal that at the outset was distinct from any issue about itself and focused only on whether the Order of Abandonment was justified.

This delay was fatal for any hope of intervention under the state procedure. Not only did Crowell & Owens fail to file the required petition for intervention, but

under Louisiana's C.C.P. Article 1041 the petition had to have been "filed within ninety days of date of service of main demand" in this case. That time was long since gone, and the trial court should have recognized that the clock had already run when Crowell & Owens designated the record on appeal. Also under Louisiana's C.C.P. Article 1091, an intervention can only be filed while the suit between the original parties is pending,[12] and the case was no longer pending because the trial court had ruled it abandoned. "*Branch v. Young*, LA Court of Appeal, Fifth Circuit (2014), 136 So.3d 343, held: "if the suit has terminated, no intervention therein is possible." The same appellate court which ruled against the appellant earlier decided in *Bankston v. Alexandria Neurosurgical Clinic*, LA Court of Appeal, Third Circuit (1994), 659 So.2d 507: "Claims of intervening party were dismissed along with those of plaintiff whose claims were dismissed with prejudice where intervening party did not intervene prior to filing of motion to dismiss by defendant."[13] The instant case is inconsistent with that ruling, but moreover conflicts with federal jurisprudence.

Under the criteria of FRCP 24 and corresponding Louisiana cases like *Rotstain v. Mendez*, U.S. Court of Appeals, Fifth Circuit (2021), 986 F.3d 931 2021 WL 359989, one may intervene if rights of the intended intervenor could be impaired by the litigation. But Crowell & Owens no longer had any relationship to the parties in this case and can shed no light on the question of abandonment. Nor will an ultimate decision about the appellee's liability impair any right of Crowell & Owens from whom no damages are sought. Although Crowell & Owens was

ordered to comply with a limited amount of discovery and to pay into the court's registry attorneys' fees which the appellee illegally withdrew from the appellant's trust, Crowell & Owens forfeited an opportunity to appeal theses orders within 30 days of their entrance, and later, by unauthorized intervention, should have been restrained from a "back door" appeal aimed not at asserting its rights, but at taking away the appellant's right to plead his grievances.

Even if Crowell & Owens, however unlikely, could overcome its forfeiture of appellate rights by never filing a timely appeal, a hearing about its contumaciousness would belong in a remanded case and is too remote to consider for the purpose of this appeal.

FRCP 24 and related cases also exclude intervenors whose interests are protected by an original party. First, Crowell & Owens has no interest in a dismissed case, for pending a successful appeal, the appellant's claims in the original litigation have been obliterated by the dismissal of this case. That is, Crowell & Owens has no interest which needs protection at this stage, and if the court is remanded, Crowell & Owens would retain the right to speak for itself in the full range of circumstances applicable to the original case. Meanwhile, the appellee's opposition to the appellant protects even the nebulous interests of Crowell & Owens, and she has been very successful in stopping the original case from going forward.

Another reason why the court below erred is that an intervenor is not permitted to delay the case, as Crowell & Owens has done with frivolous pleading which the

appellant had to answer and then await for adjudication.

Most importantly, except for maliciously trying to subvert this appeal, Crowell & Owens is immaterial to the threshold question of whether the appellant was given the right to show that he never abandoned this case.

In short, the *de facto* intervention by Crowell & Owens was improper, and all pleadings by Crowell & Owens should have been stricken merely on this basis. However, the appeal now has been "contaminated" by wildly erroneous pleadings by Crowell & Owens, which have interposed distortion, misdirection, and distractions, while causing unnecessary complication and work for three previous courts and the appellant. Already Crowell & Owens should be sanctioned for its pervasive interference with this appeal, and any further interference by Crowell & Owens will deepen its culpability. The appellee, too, would plead frivolously if she tries to dispute the statutory effect of SCOTUS Rule 12 and precedential relevance of cases which are unforgiving about the requirements for intervention.

Argument 2. The court below should have rendered a decision about the appellee's ill practices.

The court below erred in failing to apprehend the appellee's ill practices (e.g., ambush motion, contumaciousness, fraudulent disbursements from the trust, etc.), and under Louisiana own Code of Civil Procedure 2004(A) "A final judgment obtained by fraud or ill practices may be annulled." It made no sense to create a new order (dismissal) that vitiates prior orders in this case, as though they can be ignored for the convenience of one party or as though disobedience to orders will be

rewarded if it persists long enough. Instead, C.C.P. 2004(A) deserved consideration as a ready framework for just disposition of this appeal. The failure of the court below even to address this perspective is another indication of the lack of due process and equal protection of the laws.

Argument 3. The court below failed to apprehend cogent evidence showing that the appellant never abandoned this case.

The lower court's errors of substantive and procedural due process are underscored by incontrovertible facts to which the lower court was blind.

For example, in the trial court ample evidence of the appellant's attempt to hasten this case to trial was attached both to the Motion to Supplement Record and for Contradictory Hearing and to the Application for Supervisory Writ. The denial of these pleadings does not alter the fact that this evidence was presented for review and thus was part of the record.

In particular, this record documents not only (1) evidence of the appellant's endeavors to prosecute this case well within the alleged period of abandonment,[14] but (2) a defense-oriented waiver of abandonment. Louisiana jurisprudence has found that the defendant can waive the right to claim abandonment in three ways: by making an unconditional offer of settlement, which recognizes the validity of the litigation, through inaction which lulls the plaintiff into belief that the defendant does not intend to contest the litigation, and, according to the theory of *non contra valentem*, by taking steps which constrain the plaintiff from prosecuting the case. All

three types of waiver are found in this case. See Arguments 4-5 below.

However, the Motion for Abandonment was filed slightly over two months *before* the three year anniversary of the documented Dec. 7, 2018 payment to the appellant's former counsel, Att. Charles Riddle. Also within the alleged period of abandonment, the appellant made payments to the trial court on Jan. 20 and on Feb. 10, 2021. These payments were not charitable contributions, but rather implied a definite purpose in the courthouse—one which reasonably can be construed as advancement of the case.

Louisiana jurisprudence has held, as in *Jacobs v. Metzler-Brenckle*, La. Ct. App. 4th Cir. (2021), 322 So.3d 347, that merely the client's tender of payment to an attorney on outstanding debt waived abandonment of attorney's suit and prevented abandonment.[15] Failure to take payments into account "would be elevating form over substance in determining whether matter was abandoned." (Ibid.)

The appellant furthermore produced evidence of his diligent attempt to replace counsels who, even after the Dec. 7, 2018 payment, were not performing their duty. Mere replacement of counsels has been held insufficient to prevent abandonment, but the appellant's documented search for new counsel shows his intent to prosecute the case, and intent alone has been held decisive. "Generally, anytime a party provides notice of its intent to move the case along, the case cannot be considered abandoned." *P&J Contracting of Louisiana, L.L.C. v. Department of Education, Recovery School District*, 2020-674 La. App. 1 Cir. 12/30/20, 2020 WL 7770234 (La.

Ct. App. 1st Cir. 2020). "For purposes of determining abandonment of an action, the intent and substance of a party's actions matter far more than technical ompliance." *Provenza v. City of Bossier City*, La. Ct. App. 2d. Cir., 324 So.3d 246 (2021).

Even before the appellant realized that he had to replace non-performing counsels, his intent to prosecute the case is unmistakable when, on Oct.13, 2020 (nearly a year before the Order of Abandonment), he wrote his counsel:

> What is needed immediately is some type of activity in the current case before the court treats it as abandoned. Almost any activity will do, but would you please file something? Or have you decided that you will do nothing else to help me and that, to continue the case, I will have to retain new counsel? Even for that recourse I beg you to keep the case "alive" until new counsel can be found and caught up with all the pleadings.

There, of course, is a judicial consensus that cases should be decided on their merits rather than by technical operation of law.

By allowing the ambush motion, the trial court, prevented the appellant from developing and arguing contrary evidence. The issue is not whether a motion for abandonment can be filed on an *ex parte* basis, but whether abandonment ever occurred. The supplemental records noted above offer persuasive evidence that the appellant always intended to prosecute this case and that therefore there was no abandonment. The trial court's unwillingness to act on this evidence shows the biased, closed-mind thinking which failed to render due process in this case. It was found in *Racheal Duplechian v. SBA Network Services, 9nc., et al*, La. Ct. App. 3rd Cir., CA-0007-1554 (2008) that there are instances where an appellate court can speak for a lower court blind to obvious facts:

> An appellate court generally will not adjudicate issues not ruled upon by the trial court, but when the appellate court has all of the facts and testimony and is able to pronounce with certainty on the case, that appellate court should render such judgment on appeal as the trial court should have rendered at trial. *Kilbourne v. Hosea*, 19 So.2d 279 (La.App. 1 Cir. 1944). However, when an appellate court finds that the interests of justice dictate that further evidence is required for the proper adjudication of the case, then that appellate court should remand the case to the trial court for further proceedings. *Polizzi v. Thibodeaux*, 35 So.2d 660 (La.App.Orleans 1948).

Although we never got to testimony in a proper adversarial hearing, the appellee has never questioned the evidence submitted by the appellant, and it justifies reversal. However, the same resolution can be achieved if the court instead decides that "further evidence is required" and remands the case for this purpose.

Argument 4. The blindness of the court below to the doctrine of *non contra valentem* is another example of how the court below deprived the appellant of substantive due process.

The doctrine of *non contra valentem* derives from case law rather than statute and is well known in Louisiana jurisprudence, as in *Collier v. Washington*, W.D.La.2016, 551 B.R. 249 and *Metro Elec. & Maintenance v. Bank One Corp.*, 05–1045(2006), 924 So.2d 446.[16] *Hinds v. Global Intern. Marine, Inc.*, Court of Appeal of Louisiana, First Circuit (2011), 57 So.3d 1181, ruled:

> Two categories of causes outside the record that satisfy the jurisprudential exceptions to the abandonment rule are: (1) a plaintiff-oriented exception, based upon contra non valentem, that applies when failure to prosecute is caused by circumstances beyond the plaintiff's control; and (2) a defense-oriented exception based upon acknowledgement that applies when the defendant waives his right to assert abandonment by taking actions inconsistent with intent to treat the case as abandoned. (Quoted from Westlaw annotation of LSA-C.C.P. Art. 561).

One can debate whether pending discovery that was ordered tolls the three year clock for abandonment.[17] However, there should be no dispute about the related doctrine of *non contra valentem*, which establishes another, independent exception to the notion of abandonment.[18]

The appellee's contumaciousness about discovery prevented the appellant from either proceeding to trial or moving for summary judgment, obvious next steps at the time, since he needed information which both the appellee and Crowell & Owens withheld: it would have been foolish to weaken his case, as the appellee would have liked, by proceeding without this information. In this sense, the withheld discovery hobbled the appellee and is an excellent example of why the doctrine of *non contra valentem* provides one of the exceptions to abandonment. An opponent, especially an admitted nonparty, should not be able to delay the case and then turn around and impute responsibility for the delay to a legitimate party in the case. The court below overlooked these well-established principles in yet another example of how justice has been derailed in this case.

Argument 5. The court below deprived the appellant of due process by failing to observe instances in which the appellee waived abandonment.

There is settled law that a defendant can waive abandonment in at least two forms, both of which are present in this case.

Unconditional offer of settlement

The first of these forms is by making an unconditional offer of settlement which

acknowledges the validity of this case and thereby resets the clock about abandonment. This acknowledgement, which alone can waive abandonment, is a "simple admission of liability resulting in the interruption of prescription [period prescribed by the statute of limitation] that has commenced to run, but not accrued, and may be made on an *informal basis.*" *Lima v. Schmidt, supra*, emphasis included in original, bracketed gloss added.[19] The appellee, in fact, made an unconditional, though low-ball, offer of settlement on July 27, 2021 when her son and power of attorney, Alan Lange, offered $1,500 to settle the case. The argument is not that informal settlement negotiations themselves waive abandonment, but rather, as shown by multiple precedents, that the unconditional offer of settlement waives abandonment.[20]

Prolonged silence

Another means by which a defendant can waive abandonment is through prolonged silence which lulls the creditor into believing that the defendant will not contest liability—ironically, the same inactivity which, when applied to the opponent of abandonment, is held to justify finding of abandonment. Cases which subscribe to this view include *Burgess, Inc. v. Parish of St. Tammany*, La.Ct. App. 1st Cir., 2017 233 So.3d; quoting *Clark v. State Farm Mutual Insurance Company*, Supreme Court of Louisiana, No. 2000-CC-3010 (2001), 785 So.2d 779 and *Lima v. Schmidt,* 595 So.2d 624, 634 (La. 1992). Before the ambush motion and simple Opposition by her son two months earlier, the appellee filed nothing in this case for over seven years (going back to her Answer on March 10, 2014). The appellee

thereby lulled the appellant into believing that she would not contest liability and waived abandonment in this form as well as by recognizing and offering to settle the case. This background likely figured in her counsel's cunning about the ambush motion, which came as a bolt of lightning out of the calm.

Argument 6. This case is ripe for a landmark decision addressing constitutional problems with Article 561 itself.

Besides being misapplied in this case, Article 561, which provides for abandonment after three years of alleged inactivity, has inherent problems of its own. For one, Article 561 can deprive the party against whom it is enacted of the constitutional right of due process and access to the courts, for under its *ex parte* and self-executing provisions, a party can be judged and shut out of court before having a proper opportunity to defend oneself. Where there were egregious discovery violations, a motion for further contempt at bar, and testimony about the facts of the case yet to be admitted, it was inherently unfair to the appellant to allow a dispositive motion to be heard without proper notice, preparation for rebuttal, and opportunity for written opposition before judgment was pronounced. As argued above, not only is there considerable doubt about the facts as argued by the appellee, but the appellant's strong defenses should not have been eclipsed in the rush to judgment. If a litigant can blindside an opponent by bringing an *ex parte* motion without a proper evidentiary hearing, judicial review is eroded to the point of being merely nominal.[21]

The root problem is that there is a conflict of Article 561 with Louisiana Rule

9.8, which requires 15 days' notice of any motion. The Civil Code is silent about any exemption of *ex parte* motions from this rule. (Paragraph "d" of this rule excludes the need for a proposed order or for summary judgment where an *ex parte* motion, as in this case, is permitted, but does not alter the 15 day requirement.) According to ¶ C of Rule 9.8, the movant shall state in the motion "the reasons why an expedited hearing is necessary." No such statement was included in the appellee's motion, and there never was any reason for *ex parte* shenanigans since the parties were known to each other and corresponding with each other during the alleged abandonment. There may be reason for an *ex parte* ruling when the proponent of abandonment cannot locate the other side, but contact information for the appellant or his counsels was listed in every pleading.

The further point is that the appellee's motion was really a motion for summary judgment or motion to dismiss, but with none of the prescribed procedures for either.[24] It has been observed that Louisiana's jurisprudence about abandonment "tends to be inconsistent," and "no bright lines exist." *Young v. Laborde,* 576 So.2d 551, 552 (La.App. 4th Cir. 1991), cited by *Lee v. Commodore Holdings*, 931 So. 2d 1092 (La. Ct. App. 2006).[25]

One bright line that that a landmark ruling could establish would stop ambush motions in abandonment cases. Ambush motions are always disfavored, but are particularly onerous when they leave an opponent as the sole expositor of the case and thereby, as here, free to distort it. The court simply could rule that a movant seeking an order of abandonment must ask for a separate hearing on this issue,

with proof of 15 days notice to the other side. Otherwise, by attending a hearing in the same case on a different issue, the movant will always recognize the validity of the subject case (in respect to defense-oriented waiver of abandonment), and thereby reset the clock for presumption of abandonment. Arguably, but for a new ruling, that effect already has occurred.

Obviously, the appellant had no need to raise these issues before the ambush motion, but the requirement that constitutional issues had to be asserted in the trial court before there was need to do so is one of the reasons why the application of Article 561 can be unconstitutional. This statute provides, as here, for deprivation of due process without a fair hearing, one for which the non-movant can prepare and oppose with written citation to prevailing law. It is doubtful that the Legislature intended Article 561 to protect chicanery, as in the ambush motion, or to trump C.C.P. 865 ("Every pleading shall be so construed as to do substantial justice.") Where a litigant loses the right to be heard under accusation of abandonment, which may turn out be illusory, appeals are not the most productive way of determining constitutional rights.

Without means of assuring the opportunity for relief provided by Section A(4) of Article 561, the protections of Rule 9.8, liberal construction of rules (re: Articles 865 and1551), constitutional rights of due process, equal protection of laws, and access to the courts can perish in a case like the one at bar. So, too, can the principle that, whenever possible, cases should be decided on their merits, not by technicalities.

On the other hand, this appeal is not dependent on a new landmark ruling

since other arguments in this Application provide ample justification for reversal.

Conclusion

Affirmation of the judgment in question impliedly has affirmed misconduct of the appellee, contumaciousness or even thievery by her two sets of counsels, and the appellant's severe mistreatment by the trial court which rises to the level of a federal issue—namely, deprivation of due process and equal protection laws within the ambit of the Fourteenth Amendment. This outcome, needless to say, is unjust.

This case should be remanded to the trial court, and because of the flagrantly prejudicial rulings at bar, the clerk of court should be instructed to assign the case to a new judge.

Dated: Lancaster, PA
Jan. 8, 2024

Respectfully submitted,

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ENDNOTES

1. Crowell & Owens never produced discovery that was ordered, and Att. Rodney Rabalais ignored two orders to deposit $3,000 of the appellant's inheritance in the court's registry. Even though the case was dismissed, the withheld discovery would have been useful for this appeal. There was no dispute that Att. Rabalais owed the $3,000.

2. See Arguments 2-4 below.

3. "Parish" is the Louisiana name for "county."

4. Other representative cases expressing this view include *Savoie v. Larmarque Ford, Inc.*, 16-221 La. App. 5 Cir. 12/7/16, 2016 WL 7132200 (La. Ct. App. 5th Cir. 2016) and *Talen v. Rhino Rhencovators, LLC*, 288 So. 3d 117 (La. 2020). Here and below all citations are regularized, as by using italics for underlined case names, printing blue hyperlinks in black lettering, and changing capitalized case names to mixed upper and lower case characters.

5. To this day Att. Rabalais remains in violation of the Dec. 10, 2014 and July 18, 2014 orders and has pocketed $3,000 of the appellant's inheritance. The Dec. 10, 2014 order required "all partnerships—e.g., the appellee's current and previous law firms—that had received trust funds to deposit these amounts in the court's registry and to grant the appellant access to accounting statements about his trust. This information was needed not only for trial, but for preliminary pleadings and subsequent appeals. The appellee was sanctioned $1,500 when she failed to comply with the discovery order and ordered to reimburse $500 of attorney's fees incurred by the appellant. Like Att. Rabalais, she never paid these sums.

6. Crowell & Owens told the trial court three times that it is a nonparty.

7. Denial of the appellant's attempt to exclude Crowell & Owens is not the same as a declaratory judgment granting Crowell & Owens status as an intervenor. Nor at any time has Crowell & Owens tried to cite any ruling establishing it as an intervenor.

8. As noted, Att. Rabalais has pocketed the remaining $3,000 of the appellant's inheritance which the trial court twice ordered him to deposit into the court's registry. (1R. 89, 102). Crowell & Owens has kept, but should have deposited

in the court's registry over $20,371 which the appellee illegally withdrew from the appellant's trust for her personal expenses. Crowell & Owens also pocketed all but $430 of the $2,664.56 which it held in escrow at the time of the appellee's resignation as trustee. The sanctions and attorney's fees which the appellee was ordered to pay the appellant, but never did were additional. Even without the sanctions and interest, the total of these sums surpassed the remaining value of the trust.

9. See, for example, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055 (1997) ("An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III"); *Diamond v. Charles*, 476 U.S. 54 (1986) ("A pediatrician did not have standing to defend the constitutionality of the Illinois Abortion Law of 1975 because he had no direct stake in the abortion process where his own conduct was neither implicated nor threatened by the Abortion Law"); *Crown v. Parker*, 462 U.S. 345, 103 S. Ct. 2392 (1983) (In exercising its discretion the district court considers "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties"); and *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 70 S. Ct. 322 (1950) ("it is hard to see why the exclusion of an intervenor from the case should be less final when it is based upon the evidence than when it is based upon pleadings. In either case, the lawsuit is all over so far as the intervenor is concerned"). See also David L. Shapiro, "Some Thoughts on Intervention before Courts, Agencies, and Arbitrators," *Harvard Law Review*, 81 (Feb., 1968), at 721-772.

10. See *High Tech Steel Products, LLC v. United States Environmental Services, LLC*, LA Court of Appeal, Fourth Circuit (2016), 191 So.3d 672.

11. See also *General Motors Acceptance Corp. v. Jordan*, App. 1 Cir.1953, 65 So.2d 627 ("An intervention could be filed only while suit between original parties was pending, and before judgment had been rendered in main demand"); and *Wenar v. Leon L. Schwartz*, Sup.1907, 120 La. 1, 44 So. 902 ("An intervention, especially if it adds new grounds, comes too late after trial").

12. Louisiana's Article 561 considers a case abandoned after three years of inactivity.

13. Quoted from Westlaw headnote.

14. See also Westlaw annotations re: Article 3492.

15. Article 561 provides for an exception to abandonment where discovery has

been filed and served on all parties. The court adopts the position of nonparty Crowell & Owens that the discovery had to be filed within the relevant three year period, but Crowell & Owens adds its own "proviso" to this rule, for Article 561 is silent about when the discovery has to be served. Any discovery with which the appellee did not comply, would seem to qualify for the statu-tory exception to abandonment. Because rules should be liberally construed and, as stated in C.C.P. Article 5051, "are not an end in themselves" and because courts should consider any "step" taken that moves the case toward judgment, any doubt about when qualifying discovery had to be served should not redound to the appellee's advantage.

16. *Contra non valentem* is short for Latin wording that means "prescription does not run against one who could not bring his suit." This doctrine arises where the opponent of abandonment is prevented from taking action through no fault of one's own. See, for example, *Metro Elec. & Maintenance v. Bank One Corp., supra.*

17. He needed to show, for example, that none of the payments which the appellee lavished on Crowell & Owens was for legitimate trust activities, as opposed to the defense of her misconduct for which the trust had no obligation to indem-nify her. The trial court already decided that $10,000 paid to her current counsel should be deposited in the court's registry, and her payments to Crowell & Owens are insignificantly different.

18. In Louisiana jurisprudence "prescription" is an idiomatic name for the idea that actions can be barred as result of inaction for a period of time. See James F. Shuey, "Legal Rights and the Passage of Time," *Louisiana Law Review* (Fall, 1980).

19. *Hinds v. Global Intern. Marine, Inc., supra,* underscores this point. The appellant also noted in Argument 3 of his Appeal Brief: any step that facilitates the judicial resolution of the dispute on the merits and expresses the defendant's willingness or consent to achieve judicial resolution of the dispute can be interpreted as a waiver of the right to plead abandonment. See *Compensation Specialties, L.L.C. v. New England Mut. Life Ins. Co.*, 6 So. 3d 275 (La. Ct. App. 1st Cir. 2009).

20. See "The French Revision of Prescription: A Model for Louisiana?" by Benjamin West Janke and François-Xavier Licari, *Tulane Law Review* (Nov. 2010), regarding problems with Louisiana's notion of the statute of limitation.

21. Paragraph "d" of this rule excludes the need for a proposed order or for

summary judgment where an ex parte motion, as in this case, is permitted, but does not alter the 15 day requirement.

22. For example, pursuant to Article 966(C)(1)(a), "A contradictory hearing on the motion for summary judgment shall be set not less than thirty days after the filing."

23. Edwin C. Schilling, III, "Availability of the Ex Parte Motion in Louisiana," *Louisiana Law Review* (June, 1968), 552-568, expands upon these problems, and 12 *La. Civ. L. Treatise, Tort Law* § 27:58 (2d ed.) discusses conflict of judicial and legislative rules.