SUPREME COURT OF THE UNITED STATES

Application No. 23A30

Appendix to 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

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APPLICANT/APPELLANT/PLAINTIFF
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v.

ANN LANGE
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APPENDIX A:
TRIAL COURT JUDGMENTS IN THIS CASE[1]

1

Ninth Judicial Court (Alexandria, LA) No. 248,025-E

Order following a brief hearing in open court. Considering the foregoing, the affidavits attached, and the record of this proceeding, this case is dismissed as abandoned effective March 10, 2021, without prejudice. All of the motions filed in 2021, after the effective date of the abandonment, are also dismissed as improperly filed in this abandoned proceeding.

Order signed this 11th day of October 2021.

/S/ Judge Patricia E. Koch

2

Ninth Judicial Court (Alexandria, LA), No. 248,025-E

[Proposed] Order

The above and foregoing Opposition to Designation of Record by Non-Party Crowell and Owens considered, **IT IS ORDERED** that Crowell & Owens, which has never filed a motion to intervene in this case, is not allowed to designate any portion of the record on appeal. Crowell & Owens is a non-party which will not be affected by the threshold issue of whether this case should be restored to the

[1] For succinctness, parties shown on the cover are omitted along with a limited amount of routine information immaterial to this appeal. Where feasible, formatting, such as bold lettering, reflects the original document, but otherwise has been altered for consistency. Proposed orders are included when the judgment was handwritten on an order needed for reference.

docket in the Ninth JDC. However, by trying to "gum up" the appeal, Crowell & Owens has intruded where it does not belong and caused both the court and the plaintiff/appellant unnecessary work.

Accordingly, Crowell & Owens shall be cast with the expense of this Opposition and costs in the amount of $_____.

So ordered in Alexandria, Louisiana, on December 3, 2021.

[Judgment]

Denied. This matter is an appeal with all decisions to be determined by the 3rd Circuit.

/S/

Judge Patricia E. Koch Filed: 12/3/21

3

Ninth Judicial Court (Alexandria, LA), No. 248,025-E

[Proposed Order]

1. On reconsideration, the denial of the proposed order signed on Dec. 5, 2021 is hereby revoked and this order, granted. Specifically:
2. Crowell & Owens has never filed a motion to intervene in this case and never filed a timely appeal of the discovery order with which Crowell & Owens, it is alleged, has only partially complied.
3. Crowell & Owens therefore is not permitted to intervene in the appeal of this case.
4. For the same reasons, Crowell & Owens is not permitted to expand the record on appeal.
5. Crowell & Owens is to reimburse the plaintiff/appellant for the expense of opposing

its unwarranted attempt to intervene after the appeal was under way.

[Judgment]

These requests are Denied. However, the appeal may move forward in the previous judgment. Anything new must be held while appeal is in process.

/S/ Patricia Koch, Judge

Date: 12-15-21

4

Ninth Judicial Court (Alexandria, LA), No. 248,025-E

[Proposed Order]

After consideration of the facts presented and previous orders in this case, it is hereby ORDERED, ADJUDGED, AND DECREED that the plaintiff's Motion to Supplement Record is granted. The documents which the plaintiff submitted on Jan. 21, 2022 are now part of the record in this case and promptly will be conveyed to the appeal clerk of this court.

Since among these documents is plausible proof during 2018-2021 of the plaintiff's intent to prosecute this case as well as evidence of exceptions to Article 561, and since the plaintiff avows that he has never been served by a sheriff or constable with a copy of the Order of Abandonment, the defendant is hereby ruled into court on _____ to show why the Order of Abandonment should not be set aside.

Dated: _____

Signed,

_____

(printed) Honorable Judge Ninth JDC
701 Murray Street
Alexandria, LA 71301

[Judgment]

Denied: the attempt to supplement is not a manner in which evidence not heard or introduced in court is allowed.

/S/

Patricia Koch 1-21-22

5

Third Circuit Court of Appeal

APPEAL FROM THE

NINTH JUDICIAL DISTRICT COURT PARISH OF RAPIDES, NO. 248025

HONORABLE PATRICIA EVANS KOCH, DISTRICT JUDGE

JONATHAN W. PERRY JUDGE

[May 11, 2022, Docket 22-154]

APPEAL DISMISSED. APPELLANT PERMITED TO FILE APPLICATION FOR SUPERVISORY WRITS. [Opinion listed below in Appendix B.]

6

Third Circuit Court of Appeal

Docket 22-73 consolidated with Docket 22-417,

Nov. 2, 2022

. . . APPEAL FROM THE

NINTH JUDICIAL DISTRICT COURT PARISH OF RAPIDES,

NO. 248025 HONORABLE PATRICIA EVANS KOCH,

DISTRICT JUDGE

ELIZABETH A. PICKETT JUDGE

. . . AFFIRMED. [Opinion listed below in Appendix C.]

7

Third Circuit Court of Appeal Docket 22-73 consolidated with

Docket 22-417 REHEARING ACTION:

December 29, 2022

. . . Appealed from Rapides Parish Case No. 248025.

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by Lawrence Wilson Kingsley has this day been **DENIED**.

8

Louisiana Supreme Court No. 2022-C-1794

IN RE: Lawrence Kingsley – Applicant Plaintiff,

Applying For Writ Of Certiorari . . . Court of Appeal,

Third Circuit Number(s) 22-72 c/w 22-417

February 14, 2023

Writ application denied.

/S/

[Signed with initials of seven members of the court.]

Louisiana Supreme Court

No. 2022-C-1794

IN RE: Lawrence Kingsley – Applicant Plaintiff, Applying For Writ Of Certiorari . . .

Court of Appeal, Third Circuit, Number(s) 22-72 c/w 22-417.

April 25, 2023

Application for reconsideration denied.

/S/

[Signed with initials of seven members of the court.]

Appendix B:

Louisiana Third Circuit Court of Appeal May 11, 202

Opinion Docket 22-154[2]

PERRY, Judge

This court on its own motion ordered pro se Plaintiff-Appellant, Lawrence Wilson Kingsley ("Kingsley"), to show cause why the appeal in the above captioned case should not be dismissed as having been taken from non-appealable, interlocutory orders. For the reasons stated herein, we dismiss the appeal.

This case arises from Kingsley's "Petition to Declare Trust Terminated" filed in 2013. On October 11, 2021, the trial court signed an order dismissing the case as abandoned effective March 10, 2021, with prejudice. The trial court also ordered that all motions filed after the effective date of the abandonment were also dismissed as improperly filed in the abandoned proceeding. Notice of judgment was mailed to the parties on October 12, 2021. Kingsley filed a timely "Motion and Order for Devolutive Appeal" on November 8, 2021, which is before this court in docket number 22-73. The appeal was lodged in this court on February 7, 2022. Meanwhile, the appellant filed two post-judgment "motions," the rulings of which he now appeals in the present docket number. Kingsley filed the first "motion" and order on December 14, 2021, titled "Notice of Intent to Seek Writ and Request for Expedited Consideration." Kingsley states therein that he seeks a writ granting the relief for

[2]Docket 22-154, the appellant's "parallel" appeal, arose when the trial court refused to issue a writ in support of evidence that disproves the appellee's theory of abandonment. The appellant never had an opportunity to present this evidence because of the appellee's ambush motion. This evidence, showing that the case was never abandoned at all, is also a pillar of the case at bar, Third Circuit Docket No. 22-73, and best stated there. Like the trial court, the Third Circuit also declined to issue a supervisory writ.

which he prays for [sic] in his proposed Order. In Kingsley's proposed Order, he sought the trial court's reconsideration of its denial of the December 3, 2021, Order, an order prohibiting the intervention of Crowell & Owens ("Crowell"), a law firm that allegedly performed work on behalf of the Lawrence Wilson Kingsley Trust, in the appeal and from expanding the record on appeal, and an order for Crowell to reimburse Kingsley for the expense of opposing its unwarranted attempt to intervene in the appeal. In a handwritten ruling dated December 15, 2021, the trial court stated: "These requests are denied. However, the appeal may move forward on the previous judg. [sic]. Anything new must be on hold while appeal is in process."

The second motion and order filed by Kingsley on January 21, 2022, is entitled "Motion to Supplement Record and for Contradictory Hearing." Kingsley sought to supplement the record with documents that he believed would be useful for his appeal. He also asked for reconsideration or a contradictory hearing as to why the order of abandonment should not be set aside. In its handwritten ruling of January 21, 2022, the trial court stated, "Denied: the attempt to supplement is not a manner in which evidence not heard or introduced in court is allowed."

On February 14, 2022, Kingsley filed a "Motion and Order for Second Devolutive Appeal," seeking review of the trial court's rulings of December 15, 2021 and January 21, 2022, detailed above. On that same day, the trial court granted Kingsley's second devolutive appeal.

Upon the lodging of the appeal, this court issued a rule to show cause why the appeal should not be dismissed as having been taken from non-appealable, interlocutory orders. Kingsley filed a timely response to the rule.

In his response, Kingsley explains that via the first of the two post-judgment orders, the trial court unreasonably denied his attempt to exclude an admitted non-

party, Crowell, when it never filed a motion to intervene in this case. In the second post-judgment order, Kingsley states that the trial court erred in denying his Motion to Supplement Record and for Contradictory Hearing wherein he sought crucial evidence for the appeal in docket number 22-73.

Kingsley argues the post-judgment orders are reviewable as part of his appeal in docket number 22-73. He maintains that it does not matter if the motions are considered interlocutory because they, nonetheless, can be considered as part of the decision in the initial appeal as to whether the order of abandonment should be overturned. Further, Kingsley asserts that the two orders arise from the same case with the same parties and share common issues of fact and law; thus, they have a common nexus of operative fact. Kingsley contends the two post-judgment orders, concerning evidence and the role of nonparty Crowell, relate to a period when the case was active, and thus, should be part of the initial appeal as opposed to being sequestered in a separate appeal. Kingsley explains that the present appeal became necessary when he realized the extent to which the order of abandonment had harmed him. Kingsley further argues that since an appellate court can only review documents which have been before the lower court, and since the surprise rush to judgment on October 11, 2021, prevented him from filing a written response to the motion for abandonment, an appeal or writ was the only way to introduce crucial evidence for the initial appeal.

Next, Kingsley argues that the orders in question are final. "A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment. A judgment that determines the merits in whole or in part is a final judgment." La.Code Civ.P. art. 1841. He asserts that in the dismissed case, there was no longer anything preliminary to determine via the post-judgment motions. Kingsley states that, in granting the motion for abandon-

ment, the trial court determined the fate of the entire case on the assumed merits of Appellees' allegations. The trial court then determined that there was no merit to Kingsley's attempt to set aside the order of abandonment, and in dismissing his second motion for contempt, also determined there was no merit to his claims about Crowell. As such, Kingsley maintains that the two post-judgment orders are final "because they slammed the door shut on reconsideration of the previous rulings."

In the event this court determines that the post-judgment orders are not final, appealable judgments, Kingsley asserts the trial court refused to set a return date for a supervisory writ application even despite reiterated requests by email, phone calls, and letters and because the return date cannot be ascertained from the record, he was unable to pursue a writ. As such, Kingsley argues he had to resort to seeking a new appeal of the orders. Kingsley then requests that this court convert the appeal to a writ application.

Lastly, Kingsley argues that issues about Crowell are collateral to the threshold issue in the appeal before this court in docket number 22-73, which is whether the order of abandonment should be overturned. He asserts that the "collateral order doctrine" as stated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26 (1949), allows appeals of interlocutory orders when they "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action. . ." Kingsley further explains that the collateral order doctrine is discussed in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992 (1994), as follows:

> The collateral order doctrine is best understood not as an exception to the "final decision" rule laid down by Congress in § 1291, but as a "practical construction" of it, *Cohen [v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26]; see, e.g., *Coopers & Lybrand* [v. *Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457-58 (1978)]. We have repeatedly held that the statute entitles a party to appeal not only from a district court

> decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945), but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of "achieving a healthy legal system," cf. *Cobbledick v. United States*, 309 U.S. 323, 326, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940), nonetheless be treated as "final." The latter category comprises only those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. See generally *Coopers & Lybrand*, [437 U.S. at 463, 98 S.Ct. at 2457-58].

Kingsley maintains that in keeping with *Digital Equipment Corp.*, the post-judgment motion about Crowell conclusively determines his attempt to exclude this would-be intervenor. Further, Kingsley asserts the trial court's refusal to exclude Crowell resolves, though adversely, the question of whether a non-party can continue until this point in the appeal. Lastly, Kingsley contends the orders render unreviewble the question of whether Crowell's pleadings should be stricken.

In opposition to Kingsley's response to the order to show cause, Crowell acknowledges that it is not a party to the trial court litigation. However, Crowell argues that it is a party to the appellate litigation because Kingsley has appealed the denial of his Second Motion for Contempt filed against Crowell in docket number 22-73. Because Kingsley appealed the denial of his Second Motion for Contempt, Crowell contends it did not have to intervene in the trial court litigation to be a party to the appellate litigation. Crowell notes that Kingsley has filed his brief in docket number 22-73 but did not brief the denial of the Second Motion. As such, Crowell contends the alleged error is deemed abandoned on appeal. See e.g., *Longino v. City of Oakdale*, 21-296 (La.App. 3 Cir. 11/2/21), 332 So.3d 753. In the

event this court agrees and the denial of the Second Motion for Contempt is abandoned on appeal, Crowell asserts that it need not participate in the appellate litigation any further. Further, Crowell maintains that a determination of abandonment on appeal moots the issues regarding the trial court's December 15, 2021, denial of Kingsley's proposed order to enjoin Crowell from interfering with the initial appeal.

Next, Crowell asserts that Kingsley seeks review of non-appealable, interlocutory orders and that neither order at issue herein determines the merits of the litigation. Instead, Crowell asserts that both orders were rendered after a final judgment. Crowell adds that the orders denied Kingsley's attempts to seek relief from the trial court for issues related to his initial appeal in docket number 22-73 over which this court has sole jurisdiction. Finally, Crowell argues that the trial court was divested of jurisdiction after Kingsley's motion for appeal was granted on November 7, 2021, and despite the trial court's attempts to convey this to Kingsley, he still seeks to appeal interlocutory rulings rendered after the final judgment.

Additionally, Crowell argues that the interlocutory orders at issue were rendered after the final judgment on appeal was rendered. In People of the *Living God v. Chantilly Corp.*, 207 So.2d 752, 753 (La.1968), the supreme court found that appellate courts could "consider the correctness of the prior interlocutory judgment" when considering an appeal from a final judgment. The ruling at issue in docket number 22-73 was rendered on October 11, 2021, and was devolutively appealed on November 7, 2021. The interlocutory orders at issue in the present appeal were issued on December 15, 2021, and January 21, 2022, after the final judgment on appeal in docket number 22-73.

We agree that the rulings before this court in Kingsley's present appeal are non-appealable, interlocutory rulings as neither ruling determines the merits of the litigation. Nonetheless, it might be argued that because Kingsley uses the word

"rehearing" in his pleading of December 14, 2021, we should construe this as motion for new trial because the Code of Civil Procedure does not recognize a motion for rehearing. See *Caldwell Par. Sch. Bd. v. La. Mach. Co.*, 12-1383, 12-1762 (La. 1/29/13), 110 So.3d 993, citing *Hargrave v. Delaughter*, 08-1168 (La.App. 3 Cir. 3/4/09), 10 So.3d 245. Even so, "the denial of a motion for new trial is generally a non-appealable interlocutory judgment" except when "the court may consider interlocutory judgments as part ofan unrestricted appeal from a final judgment." *Babineaux v. Univ. Med. Ctr.*, 15-292, p. 4 (La.App. 3 Cir. 11/4/15), 177 So.3d 1120, 1123 (citing *Occidental Prop. Ltd. v. Zufle*, 14-494 (La.App. 5 Cir. 11/25/14), 165 So.3d 124, writ denied, 14-2685 (La. 4/10/15), 163 So.3d 809)). In such instances, "[w]hen an appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him in addition to the review of the final judgment." *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 14-141, p. 5 (La.App. 1 Cir. 12/23/14), 168 So.3d 556, 562 n. 13, writ denied, 15-365 (La. 4/24/15), 169 So.3d 364. Nevertheless, we find these two rulings were rendered after the final judgment on appeal in docket number 22-73, and thus, are not reviewable on appeal of that final judgment.

The first ruling at issue was signed on December 15, 2021. Kingsley filed his motion to appeal on February 14, 2022, beyond the thirty-day period allowed for the filing of an application for supervisory writs. Uniform Rules—Courts of Appeal, Rule 4-3. The second ruling, however, was signed on January 21, 2022, within the thirty-day period for filing an application for supervisory writs. In the interest of justice, this court may permit a party to file a writ application when a motion for appeal is filed within thirty days of the trial court's ruling. *Rain CII Carbon, LLC v. Turner Indus. Group, LLC*, 4-121 (La. App. 3 Cir. 3/19/14), 161 So.3d 688. Accordingly, we exercise our discretion and construe the Motion and Order for Second Devolutive Appeal as a notice of intent to file for supervisory writs of the ruling signed on

January 21, 2022. The devolutive appeal in docket number 22-154 is hereby dismissed, and Kingsley is given until June 10, 2022, to file a properly documented application for supervisory writs of the ruling dated January 21, 2022, pursuant to Uniform Rules—Courts of Appeal, Rule 4-5. APPEAL DISMISSED. APPELLANT PERMITTED TO FILE APPLICATION FOR SUPERVISORY WRITS.

Appendix C:

Louisiana Third Circuit Court of Appeal Nov. 2, 2022 Opinion

[Docket] 22-73 consolidated with [Docket] 22-417

. . . APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT PARISH OF RAPIDES, NO. 248025

PICKETT, Judge.

In docket number 22-73, Lawrence Kingsley appeals the judgment of the trial court finding his suit was abandoned for failure to take any action for three years. In docket number 22-417, Mr. Kingsley has filed an application for a supervisory writ seeking reversal of the trial court's order denying his Motion to Supplement Record and for Contradictory Hearing, which was filed after the matter was deemed abandoned.

FACTS

This litigation began in July 2013, when Mr. Kingsley filed a petition seeking termination of a testamentary trust created in his mother's will. Mr. Kingsley was the beneficiary of the trust, and his sister, Ms. Ann Lange, was the originally named trustee, but subsequently resigned. Mr. Kingsley filed an amended petition alleging that Ms. Lange breached her fiduciary duties as trustee. Throughout the life of this case, the discovery process has been contentious.

Mr. Kingsley has sought financial records from Ms. Lange and her attorneys, Crowell & Owens, LLC. He continues to allege they failed to comply with court orders ordering the production of documents. Ultimately, though, the trial court issued a judgment on March 9, 2018, terminating the trust and

ordering all funds in the registry of the court paid to Mr. Kingsley. That judgment also stated, "All rights of either party are hereby reserved as they are related to any claims or defenses of the actions of the Trustee or Defense of the Trustee." Notice of this judgment was mailed to all parties on March 15, 2018.

No party appealed that judgment. No further proceedings appear in the record of this case until December 2020, when Mr. Kingsley's attorney filed a motion to withdraw. By an order dated December 21, 2020, the motion to withdraw was granted, and Mr. Kingsley was allowed to proceed in proper person. The next filing in the record is a Motion for Contempt filed by Mr. Kingsley on July 20, 2021. In it, Mr. Kingsley alleged that Ms. Lange and Crowell & Owens, LLC failed to comply with court orders dated December 4, 2014 and February 11, 2016. Mr. Kingsley filed a Second Motion for Contempt, alleging violations of the same court orders against the Ms. Lange and Crowell & Owens, LLC, and also seeking a temporary injunction prohibiting the sale of Ms. Lange's home in Texas. These matters were set for hearing on September 20, 2021, and then continued to October 11, 2021, on the motion of Crowell & Owens, LLC.

Alan Lange, Ms. Lange's son, filed a response to the contempt motions, acting as his mother's "agent with power of attorney." Crowell & Owens, LLC, also filed an opposition to the motions for contempt. Ms. Lange's attorney, Rodney Rabalais, filed a Motion for Ex Parte Order of Abandonment on October 7, 2021, arguing that the matter was abandoned by operation of La.Code Civ.P. art. 561, effective March 10, 2021, and seeking dismissal of all motions filed after that date. This motion was accompanied by an affidavit of

Mr. Rabalais.

At the hearing on October 11, 2021, the trial court found that the case was abandoned pursuant to La.Code Civ.P. art. 561. The trial court dismissed Mr. Kingsley's arguments that the abandonment motion was untimely filed or that Mr. Kingsley did not have adequate time to prepare to argue the motion at the hearing. The trial court signed an order dismissing the case as abandoned on October 11, 2021. The trial court also dismissed all motions filed after the effective date of the abandonment, March 10, 2021. Mr. Kingsley timely appealed this judgment, which is the issue presented to this court in docket number 22-73.

The writ application in docket number 22-417 is the result of the dismissal of Mr. Kingsley's appeal of two orders issued after the appeal was granted. See Kingsley v. Lange, 22-154 (La.App. 3 Cir. 5/11/22 (unpublished opinion). After his motion to appeal was granted, Mr. Kingsley filed an order asking the trial court to prevent Crowell & Owens, LLC from intervening in the appeal and opposing his motion to designate the record. The trial court denied that motion on December 15, 2021. Mr. Kingsley filed a second motion to supplement the record and for a contradictory hearing that was denied by the trial court on January 21, 2022. Mr. Kingsley filed a motion for appeal of these two rulings on February 14, 2022. This court dismissed the appeal as taken from interlocutory rulings. This court further determined that the delay for seeking an application for supervisory writs had run with respect to the December 15, 2021 order. We

did allow Mr. Kingsley to file an application for supervisory writs seeking review of the January 21, 2022 ruling of the trial court.

The appeal and writ application were subsequently consolidated by this court.

ASSIGNMENTS OF ERROR

In his pro se brief, Mr. Kingsley offers six arguments why the order of abandonment should be set aside:

1. Under ¶ B of Article 561, "Any formal discovery" served on all parties is a complete defense to the accusation of abandonment, and the lower court should have taken into account the discovery that was pending on Oct. 11, 2021.
2. Also as stated in C.C.P. Article 561, there is an exception to the three-year period of abandonment for succession cases, and the case at bar is the last chapter in succession of the appellant's mother.
3. Another exception to Article 561 applies when a defendant "waives [the] right to assert abandonment by taking actions inconsistent with an intent to treat the case as abandoned."
4. The facts of this case show that the appellant never abandoned it.
5. The trial court abused [its] discretion in denying the two post-judgment motions.
6. This case is ripe for a landmark decision addressing constitutional problems with Article 561 itself.

In the writ application, Mr. Kingsley argues that the trial court erred by

failing to grant his Motion to Supplement Record and for Contradictory Hearing, that the supplemental records should be allowed into evidence, and that Crowell & Owens, LLC, should not be allowed to intervene in this suit since it is not a party.

DISCUSSION

Louisiana Code of Civil Procedure Article 561(A)(1) provides:

> An action, except as provided in Subparagraph (2) of this Paragraph, 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.

Subsection (B) of Article 561 provides: "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."

In *Louisiana Department of Transportation & Development v. Oilfield Heavy Haulers, L.L.C.*, 11–912, pp. 5–6 (La. 12/6/11), 79 So.3d 978, 981–82, the supreme court discussed the purpose and history of abandonment, explaining:

> The purpose of Article 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 Co. 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. *Clark* [*v. State Farm Mut. Auto. Ins. Co.*], 00–3010, p[p]. 10–11 [(La. 5/15/01)]; 785 So.2d [779,] 787.
>
> Our jurisprudence has uniformly held Article 561 is to be liberally construed in favor of maintaining a plaintiff's suit. *Id.*, p. 8; 785 So.2d at 785. 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. *Id.*, p. 10; 785 So.2d at 787. The intention of Article 561 is not to dismiss suits as abandoned based on technicalities, but only those cases where plaintiff's inaction during the three-year period has "'clearly demonstrated his abandonment of the case.'" *Id.*, p[p]. 8–9; 785 So.2d at 785–86 (quoting *Kanuk v. Pohlmann*, 338 So.2d 757, 758 (La.App. 4 Cir.1976), *writ denied*, 341 So.2d 420 (La.1977)). For the purpose of determining abandonment, "the intent and substance of a party's actions matter far more than technical compliance." *Thibaut Oil Co., Inc. v. Holly*, 06–0313, p. 5 (La.App. 1 Cir. 2/14/07); 961 So.2d 1170, 1172–73.

The supreme court has held that, in order to avoid a finding that a case has been abandoned pursuant to Article 561, three requirements must be satisfied: (1) a party must take some "step" in the prosecution or defense of the litigation; (2) the step must be taken in the litigation and must appear in the record, unless it is formal discovery; and (3) that step must have been taken within three years of the last step taken by either the plaintiff or defendant. *Oilfield Heavy Haulers*, 79 So.3d 978. "[A]bandonment is self-executing; it occurs automatically upon the passing of three years without a step being taken by either party, and it is effective without court order." *Clark*, 785 So.2d at 784.

We review the trial court's finding of whether a step in the prosecution of a case has been taken as a factual finding subject to the manifest error standard of review. *Lyons v. Dohman*, 07-53 (La. App. 3 Cir. 5/30/07), 958 So.2d 771.

Whether that step precludes abandonment is a question of law, which the appellate court reviews by determining if the trial court's legal decision is correct. Id.

In his first argument, Mr. Kingsley does not point to any formal discovery that occurred in the three years after the judgment of March 9, 2018, which would preclude the finding of abandonment. Instead, he argues that the failure of Ms. Lange and Crowell & Owens, LLC, to comply with the discovery orders from 2014 and 2016 constitute a continuing obligation on the part of these parties. Alternatively, he argues that the failure to comply with these orders resulted in his inability to pursue his case and argues that doctrine of contra non valentem should apply to preclude abandonment. Mr. Kingsley cites no law to support these contentions. We note that the judgment of March 9, 2018, reserved to the parties the opportunity to litigate the issues raised by Mr. Kingsley. Mr. Kingsley's remedy was to file a motion to compel or a motion for contempt within the three-year period or else risk abandoning his action.

Next, Mr. Kingsley argues that this is a succession proceeding, as the underlying issue is the termination of a testamentary trust. In fact, this is not a succession proceeding as contemplated by Book VI of the Code of Civil Procedure. This is an ordinary civil suit brought by the beneficiary of a trust against the trustee seeking termination of the trust. The fact that the trust was created by testament does not make this case a succession proceeding. Mr. Kingsley's next argument is that Ms. Lange's "silence during all my motions before the motion for abandonment thus lulled me into thinking that the appellee was not contesting liability, and she thereby waived abandonment."

He cites *Clark*, 785 So.2d 779, but in *Clark* the supreme court held that an unconditional tender offer by a defendant constituted a waiver of abandonment. The court in *Clark* specifically held that informal settlement negotiations did not constitute a waiver of abandonment. Mr. Kingsley offers no legal support for his argument that a defendant's silence is sufficient to waive abandonment, as none exists.

In his fourth argument, Mr. Kingsley argues that the facts show he did not abandon this case. He argues that he made payments to his attorney, but that is not considered a step in the prosecution of the case. He also argues that he made payments to the court "on Jan. 20 and on Feb. 10, 2021." But there is no evidence of those payments in the record. If Mr. Kingsley erred and meant that he made payments in relation to the filings he made on January 20 and February 10, 2022, those payments are also not in the record, but would be insufficient to support his claim because they occurred outside the three-year period. He also argues that he attempted to find an attorney to replace his attorney who withdrew, but he relies on evidence never submitted in the trial court to support that claim. Of course, even if there were competent evidence in the record, such steps would not constitute a sufficient step in the prosecution of the case to avoid abandonment. He finally argues that his case was deemed abandoned because of a technicality, citing the "ambush" motion filed by Ms. Lange. Article 561 contemplates an ex parte motion to dismiss a case as abandoned. Further, the case is abandoned after three years of non-action, whether a motion is filed or not and without court order. *See Clark*, 785 So.2d 779.

For the reasons explained in our previous opinion in this matter, we will not review the trial court's ruling that Crowell & Owens, LLC should be prohibited

from participating in this appeal. We reject the arguments raised in his fifth assignment of error in his appeal brief and in his writ application that the trial court should have allowed him to supplement the record with evidence never presented to the trial court. "An appellate court may not consider evidence which is not part of the record, nor can it receive evidence to supplement the record." *Barnett v. Barnett*, 477 So.2d 1289, 1291 (La.App. 3 Cir. 1985).

To the extent that Mr. Kingsley raises an issue of the constitutionality of La.Code Civ.P. art. 561, that issue is not properly before this court.

> As stated by the Louisiana Supreme Court in *State v. Hatton*, 07–2377, p. 13 (La.7/1/08), 985 So.2d 709, 718, we are "not required to decide a constitutional issue unless the procedural posture demands that [we] do so." The party raising the issue bears the burden of proving a statute unconstitutional. *Id.* To do so, the complaining party must first raise the statute's unconstitutionality in the trial court, through specific pleadings which particularize the grounds for the claim. *Vallo v. Gayle Oil Co., Inc.*, 94–1238 (La. 11/30/94), 646 So.2d 859. Furthermore, the pleading attacking the statute's constitutionality must be served on the attorney general, affording him the opportunity to be heard on the issue. La. R.S. 49:257(C) and La.Code Civ.P. art. 1880.

Rapides Par Rapides Parish Police Jury v. Catahoula Duck Club & Lodge L.L.C., 09-64, pp. 4-5, (La.App. 3 Cir. 11/18/09), 24 So.3d 988, 991 (alteration in original), writ denied, 09-2778 (La. 2/26/10), 28 So.3d 279.

We find no error in the trial court's finding that Mr. Kingsley['s] case should be dismissed as abandoned.

CONCLUSION

The judgment of the trial court is affirmed.

Costs of this appeal are assessed to Mr. Kingsley.

AFFIRMED.