

**IN RE; MEDICAL REVIEW
PANEL OF DICHELLE
WILLIAMS, TUTRIX FOR
DAN'ESIA WILLIAMS**

VERSUS

**EMSA LOUISIANA, INC., ET
AL.**

*** * * * ***

NO. 2011-CA-1579

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-14071, DIVISION “D-16”
HONORABLE LLOYD J. MEDLEY, JUDGE**

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**JAMES F. MCKAY III
JUDGE**

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**(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge
Rosemary Ledet)**

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REVERSED AND REMANDED

In this medical malpractice case, the plaintiff, Dichelle Williams, the mother and tutrix of Dan'esia Williams, appeals the trial court's granting of the Louisiana Patient's Compensation Fund's motion to dismiss on the grounds of abandonment. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

The facts giving rise to this case arise out of a medical malpractice action that Dichelle Williams brought against EMSA Louisiana, Inc. because of its failure to diagnose her minor daughter, Dan'esia, with meningitis. During the pendency of the medical review panel, the physician group and Ms. Williams settled for \$101,000.00.

On September 4, 2002, Ms. Williams filed a petition for approval of agreed settlement and demand naming the Louisiana Patient's Compensation Fund (PCF) as a defendant. The PCF answered this petition. Then, In January of 2003, Ms. Williams filed a first amending and supplemental petition seeking damages from

the PCF. The PCF answered the amended petition on May 16, 2003. Litigation and discovery proceeded with the last discovery filed in the court record in May of 2005.

On August 29, 2005, Hurricane Katrina wreaked havoc on the Greater New Orleans area. The plaintiff and her counsel, Marie Riccio Wisner, were both displaced as a result of Katrina. On April 17, 2006, the PCF served supplemental interrogatories on the plaintiff. However, plaintiff's counsel was not able to locate the plaintiff until 2007. The plaintiff further contends that she did not receive this discovery until April of 2007 by fax. Thereafter, discovery outside the record and negotiations to resolve the claim resumed and continued until 2009. This included telephone calls and email responses regarding the interrogatories. On August 18, 2010, the plaintiff answered the PCF's supplemental interrogatories.

On January 25, 2011, the PCF filed an ex parte motion to dismiss the plaintiff's action on the grounds of abandonment. The trial court granted this motion. Thereafter, on February 9, 2011, the plaintiff filed a petition to nullify and set aside judgment of abandonment, along with a request to set a rule on that pleading. The request for rule was denied. The plaintiff then filed a motion to vacate the order of dismissal on February 25, 2011. The matter came before trial court on March 18, 2011. On May 5, 2011, the trial court denied the plaintiff's motion to vacate. The plaintiff then filed a motion for a new trial which the trial court granted. On June 16, 2011, the trial court reheard the plaintiff's motion to

vacate. On August 10, 2011, the trial court again denied the plaintiff's motion to vacate its order of dismissal. The plaintiff now appeals.

DISCUSSION

On appeal, the issue before this Court is whether or not the plaintiff's cause of action had been abandoned.

In pertinent part, Louisiana Code of Civil Procedure Article 561 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." However, the article on abandonment of an action is to be liberally construed in favor of maintaining a plaintiff's suit. Mercadel v. Doyle, 2008-1189 (La.App. 4 Cir. 4/21/09), 11 So.3d 57. Any reasonable doubt about abandonment must be resolved in favor of maintaining a prosecution of the claim and against dismissal. Rosier v. Benoit, 2009-1557 (La.App. 3 Cir. 5/5/10), 37 So.3d 1093.

In the instant case, there was abundant contact between the parties by both telephone and email. This included both discovery issues and settlement negotiations. In fact, on February 27, 2009, the PCF's attorney informed plaintiff's counsel, Ms. Wisner, that he preferred "to receive discovery responses by email." Although this contact was not formally filed in the court below, it is very clear from her counsel's actions that the plaintiff had no intent of abandoning

her case. Based on the facts of this case, it is also very clear that the PCF was aware that plaintiff had no intention of abandoning this case.

Abandonment is not to be used to dismiss cases where a party has clearly demonstrated that it does not intend to abandon the action. Causey v. Caterpillar Machinery Corp., 2002-0746 (La.App. 4 Cir. 6/26/02), 822 So.2d 188. Two jurisprudential exceptions that allow abandonment to be defeated by matters not appearing of record or not involving formal discovery are: (1) exception based on contra non valentem, which applies where circumstances beyond a plaintiff's control prevent action, and (2) exception that arises from a defendant who has taken action inconsistent with the intent to treat the case as abandoned. Tessier v. Pratt, 2008-1268 (La.App. 1 Cir. 2/13/09), 7 So.3d 768. Although the plaintiff was displaced as a result of Hurricane Katrina, there is really no basis for a contra non valentem argument considering that plaintiff was located by her counsel before the abandonment period set in. However, the actions taken by the PCF's counsel in communicating with plaintiff's counsel with respect to informal discovery certainly gives the impression that the PCF at least tacitly recognized the plaintiff's actions as steps taken to move the case toward judgment. It is also clear that the plaintiff relied on this tacit approval.

Because of the parties' actions, there is more than a reasonable doubt about whether the case has been abandoned. This doubt should have been resolved in favor of the plaintiff and in keeping the action alive. Accordingly, the trial court erred in finding that the plaintiff's case was abandoned and dismissing the lawsuit.

CONCLUSION

For the above and foregoing reasons, the judgment of the trial court is reversed and this matter is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED