NOT DESIGNATED FOR PUBLICATION

TYRONE JOHNSON	*	**NO. 2015-CA-0973**
VERSUS	*	
		COURT OF APPEAL
PACARINI USA, INC., WILLIE "CATFISH" RICHARDSON, VAUGHN GAY AND RENEE "PEE WEE" FALVO	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2005-10948, DIVISION "B"
Honorable Regina H. Woods, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Daniel L. Dysart, Judge Joy Cossich Lobrano)
LOBRANO, J., CONCURS IN THE RESULTS.

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AFFIRMED

FEBRUARY 24, 2016

Plaintiff, Tyrone Johnson, appeals a trial court judgment dismissing his personal injury case as abandoned against defendants, Pacorini[1] USA, Inc. ("Pacorini"), and Vaughn Gay. For the following reasons, we affirm.

FACTS

Mr. Johnson filed the present tort suit on August 12, 2005, against his employer, Pacorini, and co-employee, Mr. Gay, for injuries allegedly sustained on January 20, 2005, while working as a longshoreman on the M/V Nickalason. Specifically, Mr. Johnson alleges that he was injured when a "t-bar", weighing 4000 pounds, rolled onto his right leg and ankle. Following the filing of the initial petition, the record shows the following filings:

February 15, 2006:	Mr. Johnson filed a motion for preliminary default against Pacorini and Mr. Gay.
July 21, 2006:	Pacorini answered the petition for damages.

[1] Misspelled "Pacarini USA, Inc." in the plaintiff's pleadings.

July 21, 2006:	Pacorini and Mr. Gay filed a subsequent answer to the original petition for damages.
August 1, 2006:	Order to file Mr. Johnson's first supplemental and amended petition naming Insurance Company of North America as an additional defendant.
September 26, 2006:	Insurance Company of North America answered Mr. Johnson's petitions.
October 31, 2006	Pacorini and Mr. Gay filed a peremptory exception of no cause of action.
March 1, 2007:	Mr. Johnson filed an opposition to the peremptory exception.
March 11, 2007:	Pacorini and Mr. Gay answered Mr. Johnson's first supplemental and amending petition.
May 21, 2007	Mr. Johnson filed a motion to dismiss Insurance Company of North America.
November 6, 2008:	A *subpoena duces tecum* was issued to Pacorini.
September 25, 2014:	Mr. Johnson filed a second supplemental and/or amended petition naming S. Cubed Pacorini Logistics, LLC as an additional defendant.
January 30, 2015:	Pacorini and Mr. Gay filed an *ex parte* motion to dismiss on the grounds of abandonment.
February 3, 2015:	Trial Court signed an order of dismissal on the grounds of abandonment.
February 10, 2015:	Mr. Johnson filed a motion for new trial.
March 3, 2015:	Pacorini and Mr. Gay filed an opposition to the motion for new trial.
March 13, 2015:	Trial Court judgment denied Mr. Johnson's motion for new trial.

March 19, 2015: Trial Court granted Mr. Johnson's petition for devolutive appeal.

Although not filed in the record, the parties agree that Mr. Johnson filed motions to set trial on July 1, 2009, and July 26, 2103.

On January 30, 2015, defendants filed an *ex parte* motion to dismiss on the grounds of abandonment and argued that Mr. Johnson failed to file any pleadings in this case between July 1, 2009 and July 26, 2013. On February 3, 2015, the trial court granted defendants' motion and dismissed, with prejudice, this matter on grounds of abandonment. Thereafter, the trial court denied Mr. Johnson's motion for new trial on March 13, 2015.

Mr. Johnson now appeals the judgment denying the motion for new trial signed on March 13, 2015, instead of the judgment deciding the merits of the case signed on February 3, 2015. Although no motion to dismiss has been filed, we will discuss this matter because an appellate court may dismiss an appeal on its own motion where there is no right to appeal. See La. C.C.P. art 2162. There is no right to appeal a judgment denying a new trial. See *Kirkeby - Natus Corp. v. Campbell*, 250 La. 868, 199 So.2d 904 (1967). Nonetheless, it is evident from Mr. Johnson's brief that he intended to appeal the final judgment signed on February 3, 2015, as his brief addresses issues concerning the merits of the final judgment. The jurisprudence is well settled that where a motion for appeal refers by date to the judgment denying a motion for new trial, but the circumstances indicate that the appellant actually intended to appeal from the final judgment on the merits, the appeal should be maintained as being taken from the judgment on the merits. *Smith v. Hartford Acc. & Indem. Co*., 254 La. 341, 223 So.2d 826, 828-829 (1969).

DISCUSSION

On appeal, Mr. Johnson argues that correspondence inquiring about whether there was any opposition to setting the case for trial sent to defense counsel on November 12, 2010, constituted "a step towards the prosecution" of the case. Mr. Johnson argues that he complied with Louisiana District Court Rule 10.1[2] when sending the November 2010 letter, and that defense counsel [Frederick T. Haas] responded on November 19, 2010, stating that he no longer practiced with the Montgomery law firm and had "not received any instructions from Pacorini that they want me to continue to represent them."

Contrarily, defendants argue that the correspondence sent by Mr. Johnson's counsel on November 12, 2010, was merely sent to inquire whether defense counsel had any opposition to filing a motion to set trial and to clarify which attorney was currently representing defendants. Further, defendants allege that the procedure for setting matters for trial is addressed in Louisiana District Court Rule

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[2] Louisiana District Court Rule 10.1, Motions to Compel Discovery, states as follows:

> (a) Before filing any motion to compel discovery, the moving party or attorney shall confer in person or by telephone with the opposing party or counsel for the purpose of amicably resolving the discovery dispute. The moving party or attorney shall attempt to arrange a suitable conference date with the opposing party or counsel and confirm the date by written notice sent at least five (5) days before the conference date, unless an earlier date is agreed upon or good cause exists for a shorter time period. If by telephone, the conference shall be initiated by the person seeking the discovery responses.
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> (b) No counsel for a party shall file, nor shall any clerk set for hearing, any motion to compel discovery unless accompanied by a "Rule 10.1 Certificate of Conference" as set forth below.

9.14, Appendix 9.14[3], not rule 10.1, and does not require that a letter be sent to opposing counsel to determine if there is any opposition to setting the case for trial. Defendants argue that if Mr. Johnson was inclined to set the case for trial, he simply needed to file a motion to set for trial or a motion for status conference.

The controlling statutory provision in this case is La. C.C.P. art. 561, which provides that an action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years. Abandonment 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 v. State Farm Mut. Auto. Ins. Co*., 00-3010, p. 6 (La. 5/15/01), 785 So.2d 779, 784. Once abandonment has occurred, action by the plaintiff cannot breathe new life

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[3] Louisiana District Court Rule 9.14, Fixing for Trial or Hearing; Scheduling Orders; Contact with Jurors, Appendix 9.14, states as follows:

> All cases that have been allotted and all proceedings in connection therewith may, at the discretion of the Division Judge, be set for trial upon written motion filed by the counsel seeking such trial. In this instance, the motion to set shall be accompanied by a certificate that all parties have answered or preliminary defaults have been taken against them, including third-party defendants, all depositions and discovery have been completed, all exceptions and preliminary matters have been disposed of, and the matter is ready for a pre-trial conference or to be set for trial.
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> Alternatively, after the completion of a sufficient amount of discovery that allows the lawyers/parties to reasonably anticipate the length of the trial, **any party may seek a status conference for the purpose of selecting a trial date appropriately in the future, as well as cut off dates for witness lists, expert reports, and discovery.** At this status conference, a date for a pretrial conference to occur shortly before trial may also be selected. The dates selected will be reduced to a scheduling order

into the suit. *Id*. at p.15, 789. In *State Farm Mut. Auto. Ins. Co.,* the Louisiana Supreme Court held that Article 561 has been construed as imposing three requirements on plaintiffs: (1) a party take some "step" in the prosecution or defense of the action; (2) the step must be taken in the proceeding and, with the exception of formal discovery, must appear in the record of the suit; and (3) the step must be taken within three years of the last step taken by either party. *Id.* at pp. 5-6, 784. A "step" in the prosecution or defense is defined as taking formal action before the court which is intended to hasten the matter to judgment, or the taking of a deposition with or without formal notice. *Id.* Under La. C.C.P. art. 561 (B), "[a]ny 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."

Whether or not a step in the prosecution of a case has been taken in the trial court for a period of three years is a question of fact subject to manifest error analysis on appeal. See *Hutchinson v. Seariver Maritime, Inc*., 09-0410, p.4 (La. App. 1 Cir. 9/11/09), 22 So.3d 989, 992. Under the manifest error standard of review, in order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Salvant v. State*, 05-2126, p.5 (La. 7/6/06), 935 So.2d 646, 650.

> signed the [sic] by parties and the court [emphasis added].

After a review of the record and jurisprudence, we find that Louisiana District Rule 10.1 is applicable to discovery disputes and does not address setting cases for trial. As defendants correctly point out, Louisiana District Court Rule 9.14, Appendix 9.14, sets out the procedure for setting matters for trial and does not require a letter be sent to opposing counsel to determine if there is any opposition to setting the case for trial. Thus, we do not find that the November 12, 2010, letter was mandated by law and that the correspondence constituted a step towards the prosecution of the case. Mr. Johnson's counsel could have easily filed a motion for a status conference with the trial court in order to have the parties appear and position the case for trial. Accordingly, we find that the trial court correctly determined that the lawsuit was abandoned for failure to take a step to prosecute from July 2009 until July 2013.

AFFIRMED