NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2068

KANSAS CITY SOUTHERN RAILWAY COMPANY

VERSUS

WALTER WINBUSH, B & B TRANSPORT SERVICES, INC. AND CANAL INSURANCE COMPANY

Judgment Rendered: June 8, 2007

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 506,036, Division "E"

Honorable William Morvant, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

This appeal comes from an April 6, 2006 judgment that amended a judgment dated February 13, 2006. Plaintiffs-Appellants Walter and Devonne Winbush have appealed, alleging that the trial court committed an error of law by substantively amending an original judgment without the process of a motion for new trial or the parties' consent. For the following reasons, we annul and set aside the April 6, 2006 judgment and reinstate the original judgment dated February 13, 2006.

FACTS AND PROCEDURAL POSTURE

On the morning of March 28, 2002, a collision occurred in Baton Rouge between an 18-wheel truck driven by Mr. Winbush and a train owned and operated by Kansas City Southern Railway Company (KCS). Two lawsuits arose in the 19th Judicial District Court out of this accident. The first, a personal injury suit brought by Mr. Winbush against KCS, was numbered 495,730. The second, a property damage suit brought by KCS against Mr. Winbush and his employer, was numbered 506,036. The two cases were consolidated.

The following facts from the Winbush personal injury action are pertinent to the resolution of the Winbushes' appeal herein. Pursuant to

Louisiana Code of Civil Procedure article 970,[1] KCS made a timely offer of judgment to the Winbushes on May 13, 2005 that was not accepted. The Winbush personal injury action then went to trial in June 2005, after which a jury found in favor of KCS. In a judgment dated July 28, 2005 the trial court dismissed the Winbush personal injury action with prejudice at the Winbushes' cost. KCS subsequently filed a motion to tax costs, which was set for hearing on October 31, 2005. After that hearing, the trial court signed a judgment on November 28, 2005 that awarded $42,142.59 in costs to KCS. On December 5, 2005 the Winbushes filed a motion for new trial on this judgment, which was set for hearing on February 21, 2006.

In the interim, counsel for both parties signed a joint motion and order for final dismissal, which had been prepared by KCS counsel, filed on January 5, 2006, and signed by the trial court on February 13, 2006. When the parties appeared in court on February 21, 2006 to argue the Winbushes' motion for new trial regarding costs in the Winbush personal injury action, the trial judge expressed some confusion at the purpose for the hearing. According to the judge, he understood the "all-encompassing language" used in the joint motion and order for final dismissal to mean that both the Winbush personal injury action (and thus the open costs dispute) and the

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[1] Article 970, entitled "**Motion for judgment on offer of judgment**," reads in pertinent part as follows:

> A. At any time more than thirty days before the time specified for the trial of the matter, without any admission of liability, any party may serve upon an adverse party an offer of judgment for the purpose of settling all of the claims between them. The offer of judgment shall be in writing and state that it is made under this Article; specify the total amount of money of the settlement offer; and specify whether that amount is inclusive or exclusive of costs, interest, attorney fees, and any other amount which may be awarded pursuant to statute or rule....
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> C. If the final judgment obtained by the plaintiff-offeree is at least twenty-five percent less than the amount of the offer of judgment made by the defendant-offeror or if the final judgment obtained against the defendant-offeree is at least twenty-five percent greater than the amount of the offer of judgment made by the plaintiff-offeror, the offeree must pay the offeror's costs, exclusive of attorney fees, incurred after the offer was made, as fixed by the court.

KCS property damage action were to be dismissed. In response, KCS counsel allowed that the judgment could have been more artfully drafted, argued that it had only been intended to dismiss the KCS action, and offered to amend the judgment to reflect a more limited dismissal. Plaintiffs' counsel objected and pointed out that the Code of Civil Procedure precluded amendments of substance. The judge indicated that he would like the situation clarified and the hearing was concluded.

On March 30, 2006 KCS counsel submitted an ex parte motion to amend the February 13, 2006 judgment along with a newly drafted judgment limiting dismissal to the KCS property damage action. As noted above, counsel for the Winbushes had objected at the February 21, 2006 hearing. The Winbushes' counsel also wrote to the court twice stressing objection to the substantive amendment. Although the Winbushes sought to have the matter heard or at least submitted on briefs, the trial court signed the amended judgment on April 6, 2006. This appeal by the Winbushes followed.

LAW AND ARGUMENT

The Winbushes base their argument on Louisiana Code of Civil Procedure article 1951, which provides that "[a] final judgment may be amended by the trial court at any time, with or without notice, on its own motion or on motion of any party: (1) [t]o alter the phraseology of the judgment, but not the substance; or (2) [t]o correct errors of calculation." The substance of a final judgment, which the Winbushes argue is at issue here, may be changed only by a motion for new trial, action for nullity, or consent of the parties, but not by amendment. **Hebert v. Blue's Auto and Truck Parts**, 2000-2154, p. 4 (La. App. 1 Cir. 12/28/01), 804 So.2d 953, 955.

KCS argues, however, that the amended judgment of April 6, 2006 "changes only the phraseology of the February 13, 2006 judgment, not its substance." KCS notes additionally that it prepared the April judgment at the trial court's request for the purpose of clarifying that the February judgment was limited to the KCS property damage action. As such, KCS argues, the April judgment in the KCS property damage action did not affect the ongoing dispute over costs in the Winbush personal injury action.

The question to be addressed on appeal, then, is whether the April judgment represented a substantive change to the February judgment or simply corrected a drafting error in the February judgment. Well-settled jurisprudence interpreting Article 1951 holds that amendment to a judgment will be permissible if it "takes nothing from or adds nothing to the original judgment." **Tunstall v. Stierwald**, 2001-1765, p. 4 (La. 2/26/02), 809 So.2d 916, 920; **Villaume v. Villaume**, 363 So.2d 448, 450 (La. 1978); **Baptiste v. Southall**, 157 La. 333, 102 So. 420, 421 (La. 1924). In another sense, the question is whether the rights of a party are or would be directly affected by the amendment. **Hebert**, 2000-2154 at p. 4, 804 So.2d at 955.

More specifically, the supreme court has held that dismissal of a cause of action with prejudice by judgment is a matter of substance and that such a cause of action cannot be reinstated or revived by amendment without a new trial, consent, or appeal. **LaBove v. Theriot**, 597 So.2d 1007, 1010 (La. 1992). Along these lines, **Riddle v. Simmons**, 626 So.2d 811, 813 (La. App. 2 Cir. 1993), held as follows:

> Logically, a party cannot amend a *dismissed* petition....If nothing exists to amend, there can be no amendment and orders so allowing are ineffective. Indeed, granting leave for amendments under the present circumstances arguably would permit the trial court to make substantive changes in a final judgment, an impermissible procedure under LSA-C.C.P. Art. 1951. (citations omitted)

Here, we are presented with a "Joint Motion and Order for Final Dismissal" dated December 1, 2005. It bears the caption of the Winbush personal injury action; the consolidation with the KCS property damage action is indicated, but the KCS property damage action caption is not provided along with that of the Winbush personal injury action. This motion, signed by counsel for both parties, contains the following language: "the parties herein have settled, satisfied and compromised all of their respective differences...." While the enclosed order appears to refer more specifically to the KCS property damage action by using the singular "action" rather than "actions," it also refers plainly to the motion and is also captioned, like the motion, primarily with the Winbush personal injury action.

Based on the wording and appearance of these pleadings, including the presence of signatures of counsel for both parties, the trial court concluded that both actions were to be dismissed and signed the judgment on February 13, 2006. At the February 21, 2006 hearing, the judge stated as much: "[A]s far as I'm concerned the matter is done. There's nothing left to argue about...I assumed when I got it y'all had resolved this because of the all-encompassing language."

That hearing concluded with counsel for KCS proposing to send along an amended judgment; that judgment along with an ex parte motion to amend was filed on March 30, 2006. The motion and incorporated memorandum declared that KCS sought to correct a "clerical error" in the February judgment by specifically dismissing only the KCS property damage action while leaving the Winbush personal injury action, with its lingering costs dispute, open for resolution. Unlike the earlier joint motion

to dismiss, this document bore the signatures of counsel for KCS and for Mr. Winbush's employer and its insurer, but not of counsel for Mr. Winbush himself, thus there was no consent to the amendment. Clearly, the matter was not styled as a motion for new trial, nor was a hearing on this particular issue held. We believe this amounted to an improper substantive amendment of the prior judgment.

The jurisprudence instructs us that the April judgment must be declared an absolute nullity without legal effect. **McGee v. Wilkinson**, 2003-1178, p. 4 (La. App. 1 Cir. 4/2/04), 878 So.2d 552, 554; **Hebert**, 2000-2154 at p. 5, 804 So.2d at 956. The original February judgment may not have been drafted with the intent to dismiss the remaining open cost dispute in the Winbush personal injury matter along with the KCS property damage matter, but a written judgment based on a joint motion to dismiss may not be altered in its substance without proper procedure or consent. Our supreme court has long upheld "the integrity of written judgments as evidence and public record of the court's decree," a policy that encourages counsel and courts to give attention and care in drafting and composition. **Hebert v. Hebert**, 351 So.2d 1199, 1200 (La. 1977).

The usual remedy applied by an appellate court that finds an amendment made of substance in a judgment is to annul and set aside the amending judgment and reinstate the original judgment.[2] **Hebert v. Blue's Auto & Truck Parts**, 2000-2154 at p. 5, 804 So.2d at 956. The record is clear that KCS counsel was on notice of the original judgment's potential ambiguities as of the February 21, 2006 hearing. Once the matter came to

[2] We note as an aside that "reinstate" may not represent the exact activity at issue here. To reinstate, according to Black's Law Dictionary, is to "place again in a former state or position." A judgment that has been vacated may properly be reinstated, but here, where the amended judgment constitutes an absolute nullity, the original judgment must be understood as, in effect, never having been stripped of its "former state or position" as a binding decree of the trial court.

its attention, KCS counsel could have filed a motion for new trial, sought the Winbushes' consent to amend the judgment, or taken a timely appeal. They did none of these things, thus the February 13, 2006 judgment dismissing with prejudice both the Winbush personal injury action and the KCS property damage action was valid and final.[3]

CONCLUSION

For the above and foregoing reasons, the judgment of April 6, 2006 is annulled and set aside; the original judgment of February 13, 2006 is reinstated. Costs of this appeal are assessed to appellee, Kansas City Southern Railway Company.

JUDGMENT OF APRIL 6, 2006 ANNULLED AND SET ASIDE; ORIGINAL JUDGMENT OF FEBRUARY 13, 2006 REINSTATED.

[3] This ruling serves to effectively moot the companion appeal between these litigants, Walter and Devonne Winbush v. Kansas City Southern Railway, No. 2006-CA-2066. Please see our memorandum/summary report in that matter for clarification.