

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0488

SALLY DOBYNS

VERSUS

UNIVERSITY OF LOUISIANA SYSTEM,
UNIVERSITY OF LOUISIANA AT LAFAYETTE

JUDGMENT RENDERED: JUN 18 2019
12-dn

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge • State of Louisiana
Docket Number 607,915 • Section 27

The Honorable Todd W. Hernandez, Judge Presiding

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PLAINTIFF—Dr. Sally Dobyns

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ATTORNEYS FOR APPELLEE
DEFENDANT—The Board of
Supervisors for the University of
Louisiana System

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BEFORE: GUIDRY, WELCH, THERIOT, CHUTZ, AND LANIER, JJ.

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MT.
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WELCH, J.

This action commenced with a suit for damages filed by the plaintiff, Dr. Sally Dobyms, against her former employer and the defendant herein, the Board of Supervisors for the University of Louisiana System on behalf of The University of Louisiana at Lafayette (the “Board”), wherein Dr. Dobyms alleged disability-based harassment and denial of accommodations in violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101-11217, and the Louisiana Employment Discrimination Law (“LEDL”), La. R.S. 23:301, *et seq.*, and retaliation in violation of the ADA and the Louisiana whistleblower statute, La. R.S. 23:967. Following a jury trial, the jury rendered its verdict in favor of Dr. Dobyms and against the Board on her retaliation claim and awarded damages to Dr. Dobyms in the amount of \$25,000.00. In this appeal, Dr. Dobyms challenges the trial court’s ruling which granted the Board’s motion to dismiss her claim for attorney’s fees with prejudice.¹

Before Dr. Dobyms filed a motion for attorney’s fees as the prevailing party pursuant to the ADA and La. R.S. 23:967(B), the Board filed a motion to dismiss Dr. Dobyms’s claim for attorney’s fees, which Dr. Dobyms opposed.² Following a hearing, the trial court took the Board’s motion under advisement and thereafter issued written reasons on July 18, 2017, granting the Board’s motion to dismiss Dr. Dobyms’s claim for attorney’s fees with prejudice.³ The trial court signed a judgment in accordance with its written reasons on September 18, 2017, granting

¹ In a related appeal, the Board challenged the trial court’s September 18, 2017 judgment rendered in accordance with the jury’s verdict, which we affirmed. *See Dobyms v. Univ. of Louisiana Sys.*, 2018-0811 (La. App. 1 Cir. 4/12/19), ___ So. 3d ___, 2019 WL 1577935.

² The Board filed its motion on April 7, 2017. Dr. Dobyms filed her opposition on June 2, 2017.

³ Dr. Dobyms filed a motion for new trial and/or reconsideration on September 5, 2017, requesting that the trial court reconsider its reasons comprising its written ruling on the Board’s motion to dismiss her claim for attorney’s fees. The trial court denied Dr. Dobyms’s motion for new trial and/or reconsideration in an order signed on September 13, 2017. *See Thurman v. Thurman*, 521 So. 2d 579, 581 (La. App. 1 Cir. 1988) (written reasons do not carry the finality of a judgment because such reasons are considered interlocutory rulings, which may be substantially revised by a trial judge at his discretion prior to the rendition of a final judgment).

the Board's motion to dismiss Dr. Dobyns's claim for attorney's fees, dismissing the claim with prejudice, and ordering each party to bear their own respective costs on the motion.⁴ The September 18, 2017 dismissal-of-attorney's-fees judgment decreed:

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss Plaintiff's Claim for Attorney Fees be and is hereby **GRANTED**, dismissing Plaintiff's claim for attorney's fees with each party to bear their own respective costs on that Motion.

The trial court signed another judgment on September 18, 2017, on the jury verdict, damages award, attorney's fees, and costs.⁵ The September 18, 2017 verdict-form judgment decreed:

IT IS ORDERED, ADJUDGED AND DECREED that Judgment in accordance with the Jury Verdict be and is hereby rendered in favor of Plaintiff, Sally Dobyns, and against Defendant, the Board of Supervisors for the University of Louisiana System for unlawful retaliation.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be a judgment against Defendant and in favor of Plaintiff for compensatory damages in the amount of Twenty Five Thousand and No/100 Dollars (\$25,000.00) together with legal interest from the date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the determination of the amount of attorney's fees and costs to which Plaintiff may be entitled is excluded from this Final Judgment, which is a final judgment in all other respects, and that this Court shall retain jurisdiction to determine the issue of attorney's fees and costs.

On September 21, 2017, the trial court signed another judgment on the jury verdict, damages award, court costs, and the Board's motion to dismiss Dr. Dobyns's claim for attorney's fees.⁶ The September 21, 2017 judgment decreed:

⁴ The September 18, 2017 dismissal-of-attorney's-fees judgment was submitted by counsel for Dr. Dobyns.

⁵ The September 18, 2017 verdict-form judgment was also submitted by counsel for Dr. Dobyns.

IT IS ORDERED, ADJUDGED AND DECREED that Final Judgment in accordance with the Jury Verdict be and is hereby rendered in favor of Plaintiff, Sally Dobyms, and against Defendant, the Board of Supervisors for the University of Louisiana System, in the amount of TWENTY-FIVE THOUSAND and NO/100 (\$25,000.00) DOLLARS, together with interest at 6% per annum from the date service was requested following the judicial demand until the date of this Final Judgment, as provided in R.S. 13:5112(C), and thereafter at the rate fixed by R.S. 9:3500.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Court Costs be and are hereby taxed against Defendant, the Board of Supervisors for the University of Louisiana System, and, in accordance with R.S. 13:5112(A) are hereby set at \$11,958.57.

In further consideration of Defendant's post-trial Motion to Dismiss Plaintiff's Claim for Attorney's Fees, argued on June 12, 2017 by Crystal Bounds for the Plaintiff and Patrick McIntire for the Defendant, and in accordance with written reasons issued on July 18, 2017:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss Plaintiff's Claim for Attorney's Fees be and is hereby GRANTED, dismissing Plaintiff's claim for attorney's fees with prejudice, and with each party to bear their own respective costs on that Motion, set as \$28.00 for Plaintiff and \$55.00 for Defendant.

Thereafter, Dr. Dobyms filed a motion and order for devolutive appeal,⁷ which provided, in pertinent part:

On September 21, 2017, a Final Judgment was Signed by the Court. A copy of same is attached hereto and made part hereof.

[...]

Sally Dobyms desires to appeal devolutively from the Final Judgment, namely, that portion of the Judgment which purports to fix costs and that portion of the Judgment which denied an award of attorney's fees to [Dr.] Dobyms.

The trial court's order of appeal, provided, in pertinent part:

⁶ The September 21, 2017 judgment was submitted by counsel for the Board.

⁷ Dr. Dobyms filed her motion and order for devolutive appeal on November 17, 2017.

IT IS HEREBY ORDERED that Sally Dobyms be granted a devolutive appeal in the above captioned matter regarding the Judgment Signed on September 21, 2017, namely, the portion thereof which purports to fix costs and that portion of the Judgment which denied an award of attorney's fees to Ms. Dobyms fixing costs, returnable to the Court of [Appeal], First Circuit, State of Louisiana, in accordance with the law.

After Dr. Dobyms's appeal was lodged with this court, the Board filed the motion to dismiss the appeal, arguing that the September 21, 2017 judgment was not the judgment of the trial court that dismissed Dr. Dobyms's claim for attorney's fees. The Board argues that Dr. Dobyms should have appealed from the September 18, 2017 verdict-form judgment. The Board further indicates that after Dr. Dobyms lodged her appeal, the trial court vacated its September 21, 2017 judgment, when it ruled on the Board's motion for new trial and judgment notwithstanding the verdict ("JNOV") of the September 18, 2017 verdict-form judgment and September 21, 2017 judgment.⁸

Dr. Dobyms opposes the Board's motion to dismiss the appeal. She argues that when the trial court signed her order of appeal, the trial court was divested of jurisdiction to vacate the alleged final judgment signed on September 21, 2017, and "essentially recast" one of the September 18, 2017 judgments as the final judgment on the merits.

APPELLATE JURISDICTION

Appellate courts have a duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue, and we are obligated to recognize any lack of jurisdiction if it exists. **Quality Envtl. Processes, Inc. v. Energy Dev. Corp.**, 2016-0171 (La. App. 1 Cir. 4/12/17), 218 So. 3d 1045, 1052-53. The Louisiana Code of Civil Procedure defines three types of judgments: an interlocutory judgment, which determines a preliminary matter in the course of an

⁸ The trial court vacated the September 21, 2017 judgment in a judgment signed on April 10, 2018, denying the Board's motion for new trial or JNOV.

action, but does not determine the merits (see La. C.C.P. art. 1841); a final judgment, which determines the merits of the case in whole or in part (see La. C.C.P. art. 1841); and a partial final judgment, which disposes of some, but not all, of the issues on the merits, and *in some instances* requires a designation of finality by the trial court for the purpose of an immediate appeal (see La. C.C.P. art. 1915). Different rules govern the appealability of these three types of judgments. See La. C.C.P. arts. 2083(A), 2083(C), and 1915(B). Our appellate jurisdiction extends to “final judgments.”⁹ See La. C.C.P. arts. 1841, 2081, and 2083(A); **Quality Env'tl. Processes**, 218 So. 3d at 1053.

It is well settled that when a trial court signs a judgment and then signs another, the second judgment is a nullity and without legal effect. See **Matter of Succession of Buhler**, 2017-0049 (La. App. 1 Cir. 2/22/18), 243 So. 3d 39, 44, writ not considered, 2018-0478 (La. 5/11/18), 241 So. 3d 1013, reconsideration denied, 2018-0478 (La. 6/15/18), 257 So. 3d 677 (citing **Bourgeois v. Kost**, 2002-2785 (La. 5/20/03), 846 So. 2d 692, 696 and **McGee v. Wilkinson**, 2003-1178 (La. App. 1 Cir. 4/2/04), 878 So. 2d 552, 554-55) and **Judson v. Davis**, 2011-0623 (La. App. 1 Cir. 11/9/11), 81 So. 3d 712, 722-23, writ denied, 2011-2747 (La. 2/17/12), 82 So. 3d 288. If a substantive change is not made pursuant to a contradictory motion for new trial filed by the parties or by the court on its own motion pursuant to La. C.C.P. art. 1971, by consent of the parties, or by a timely appeal, the subsequent amending judgment is an absolute nullity. See **Matter of Succession of Buhler**, 243 So. 3d at 44.

On September 18, 2017, the trial court signed a final judgment, submitted on behalf of Dr. Dobyms, on the jury verdict, damages award, attorney’s fees, and costs. Three days later, on September 21, 2017, the trial court signed a competing

⁹ Our supervisory jurisdiction extends to interlocutory judgments and non-certified partial final judgments and may be invoked via a timely-filed writ application. See La. Const. Art. 5, § 10; La. C.C.P. arts. 1841, 1915(B), 2201, and 2083(C); **O’Bannon v. Moriah Techs., Inc.**, 2017-0728 (La. App. 1 Cir. 3/29/18), 248 So. 3d 392, 398-99.

final judgment, submitted on behalf of the Board, also on the jury verdict, damages award, court costs, *and* the Board's motion to dismiss Dr. Doby's claim for attorney's fees. While the first two paragraphs of the September 18, 2017 verdict-form judgment are substantially the same as the first paragraph of the September 21, 2017 judgment, the September 21, 2017 judgment added substantive rulings, including an award of court costs and a ruling and award of costs on the Board's motion to dismiss Dr. Doby's claim for attorney's fees.

Because the final judgment rendered on September 21, 2017 reiterated and made substantive changes to the trial court's prior final judgment rendered on September 18, 2017, the September 21, 2017 judgment is an absolute nullity and without legal effect. See Matter of Succession of Buhler, 243 So. 3d at 44.

When a matter involves multiple final judgments, and an appellant asserts that she inadvertently specified the wrong judgment in her motion for appeal, the reviewing court must consider the following factors to determine the appellant's intent in seeking an appeal: (1) the appellant's assertions; (2) whether the parties briefed the issues on the merits of the final judgment; and (3) the language of the order of the appeal. See Phi Iota Alpha Fraternity, Inc. v. Schedler, 2014-1620 (La. App. 1 Cir. 9/21/15), 182 So. 3d 998, 1001.

Dr. Doby's motion and order for devolutive appeal specifically named the September 21, 2017 date as the appealed judgment. The trial court's order of appeal, drafted by counsel for Dr. Doby, specifically granted Dr. Doby an appeal from the "[j]udgment [s]igned on September 21, 2017" and provides additional insight into Dr. Doby's intent. In her brief in opposition to the Board's motion to dismiss her appeal, Dr. Doby acknowledges that she received the September 18, 2017 dismissal-of-attorney's-fees judgment, the September 18, 2017 verdict-form judgment, and the September 21, 2017 judgment at the same time. Dr. Doby made a mindful choice to appeal only the September 21, 2017

judgment, which was drafted by the Board, rather than appealing either or both of the judgments prepared by her counsel, including the September 18, 2017 verdict-form judgment, which expressly stated that it was a final judgment reserving the issue of attorney's fees to the trial court. It is clear from Dr. Doby's motion and order for devolutive appeal that she intended to appeal from the September 21, 2017 judgment. Moreover, this is not a matter where we can say that Dr. Doby's simply made a typographical error in referencing the date of the appealed judgment in her motion and order for devolutive appeal. While the parties briefed the issue of Dr. Doby's entitlement to attorney's fees, in this case, the Board also raised the issue of the propriety of this court's subject matter jurisdiction over the appeal.

Because Dr. Doby's devolutively appealed the absolutely null September 21, 2017 judgment, we lack jurisdiction to consider the merits of her devolutive appeal.¹⁰ See **Thiruvengadam v. Doe**, 2015-1458 (La. App. 1 Cir. 8/4/16), 2016 WL 4142081, at *2 (unpublished). Accordingly, we grant the Board's motion to dismiss the appeal, and dismiss the appeal. We issue this summary disposition in compliance with the Uniform Rules—Courts of Appeal, Rule 2—16.2(A)(1). All costs related to this matter are assessed to the plaintiff, Dr. Sally Doby's.

MOTION TO DISMISS GRANTED; APPEAL DISMISSED.

¹⁰ The trial court did not have jurisdiction to vacate the September 21, 2017 judgment once it granted Dr. Doby's an order of appeal because the jurisdiction of the trial court over all matters in the case reviewable under the appeal was divested, and that of this appellate court attached, on the granting of the order of appeal. See La. C.C.P. art. 2088. A final judgment may be amended by the trial court at any time to alter the phraseology of the judgment, but not the substance, or to correct errors of calculation. La. C.C.P. art. 1951. Instead, a substantive modification could only be accomplished in the trial court via a motion for new trial or an action of nullity. See La. C.C.P. arts. 1971, *et seq.* and 2001, *et seq.* However, the fact that the trial court vacated the September 21, 2017 judgment is immaterial because the judgment is an absolute nullity.