NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2066

WALTER AND DEVONNE WINBUSH

VERSUS

KANSAS CITY SOUTHERN RAILWAY COMPANY AND ITS EMPLOYEE, PATRICK LEVY

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. 495,730, Division "E"

Honorable William Morvant, Judge Presiding

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Stephen C. Carlton Scott E. Mercer Baton Rouge, LA	Counsel for Plaintiff/Appellant Walter and Devonne Winbush
Musa Rahman Baton Rouge, LA	Counsel for Intervenor/Appellee La. Workers' Compensation Corp.
Patrick A. Talley, Jr. Carl E. Hellmers, III Joseph E. Bearden New Orleans, LA	Counsel for Defendant/Appellee Kansas City Sou. Railway, et al
Alan J. Yacoubian New Orleans, LA	Counsel for Defendant/Appellee B & B Construction and Canal Insurance Company

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

This appeal arises out of an April 11, 2006 judgment denying a motion for new trial filed by plaintiffs-appellants Walter and Devonne Winbush.[1] The Winbushes' motion for new trial followed the trial court's November 28, 2005 judgment ordering the Winbushes to pay $42,142.59 in costs after their loss at the trial on the merits of this matter. For the following reasons, we find the November 28, 2005 judgment to have been rendered moot by a February 13, 2006 judgment that dismissed this case with prejudice as well as the companion case of Kansas City Southern Railway v. Walter and Devonne Winbush, No. 506,036, 19th Judicial District Court.

This lawsuit is a personal injury action brought by the Winbushes against Kansas City Southern Railway (KCS) after an accident between a KCS train and the 18-wheel tractor-trailer that Mr. Winbush was driving on the morning of March 28, 2002. A property damage action brought by KCS against Mr. Winbush and his employer was consolidated with this action on May 21, 2003. This action went to trial on June 13-16, 2005, at which time a jury found in favor of KCS. KCS had made a timely offer of judgment to the Winbushes pursuant to Louisiana Code of Civil Procedure article 970, which the Winbushes rejected.

Post-trial, KCS sought to recover costs from the Winbushes. After a hearing on KCS's motion to tax costs, the trial court issued a judgment taxing the Winbushes for $42,142.59 in costs. The Winbushes moved for a new trial, which was denied by judgment on February 21, 2006. The

[1] The supreme court has directed us to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits as well when it is clear from the appellant's brief that he intended to appeal the merits of the case. **Shultz v. Shultz**, 2002-2534, p. 3 (La. App. 1 Cir. 11/7/03), 867 So.2d 745, 746-47.

Winbushes have appealed from that judgment, arguing that a February 13, 2006 judgment effectively dismissed with prejudice both the KCS property damage action and this action. Pursuant to our opinion in No. 2006-CA-2068, also decided this date, we agree. Because the November 28, 2005 judgment assessing costs against the Winbushes was compromised and satisfied by the February 13, 2006 Joint Motion and Order for Final Dismissal, this appeal is moot and is dismissed. Each party is to bear its own costs. This memorandum opinion is issued in compliance with URCA Rule 2-16.1B.

APPEAL DISMISSED.