Missouri Court of Appeals

Southern District

Division One

RICKY LEE GRIFFITTS, Plaintiff-Appellant, v. OLD REPUBLIC INSURANCE COMPANY, BNSF RAILWAY COMPANY, and JAMES M. CAMPBELL, Defendants-Respondents.	)	No. SD34753 **Filed: Sept. 19, 2017**

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Jason Brown

AFFIRMED

This appeal is from the last of a series of related cases, and we begin with a brief overview. Ricky Lee Griffitts ("Plaintiff") was rear-ended ("the collision") by James M. Campbell ("Campbell"),[1] an employee of BNSF Railway Company ("BNSF"). Campbell, who was intoxicated at the time, was driving a Chevy Silverado leased by BNSF ("the Silverado"). Plaintiff sued Campbell and BNSF for negligence in Greene County circuit court case no. 0931-CV04244 ("Case #1"). BNSF removed the case to the

[1] Respondent James M. Campbell did not file a brief in this appeal.

U.S. District Court for the Western District of Missouri, which ultimately found that Campbell was not acting within the course and scope of his employment at the time of the collision and entered summary judgment in favor of BNSF on Plaintiff's *respondeat superior*-based claim.[2]

Plaintiff then filed a negligence suit solely against Campbell in Greene County circuit court case no. 1131-CV03896 ("Case #2"). BNSF and its insurer, Old Republic, filed a motion to intervene in Case #2 for the purpose of seeking a stay of the case until a ruling could be made in a pending declaratory judgment action brought by BSNF and Old Republic seeking to determine what, if any, duty they owed to Campbell arising from Plaintiff's negligence suit against Campbell. Plaintiff voluntarily dismissed Case #2 prior to any rulings being entered by the trial court.

In December 2012, Plaintiff filed his third negligence suit against Campbell in Greene County circuit court case no. 1231-CV17408 ("Case #3"). BNSF and Old Republic again moved to intervene in an attempt to stay the case. The trial court eventually denied those motions, and, after a bench trial, entered a $1.475 million judgment in favor of Plaintiff against Campbell.[3] After that judgment went unsatisfied for 30 days, Plaintiff filed the instant equitable garnishment case against BNSF and Old Republic (collectively, "Defendants") pursuant to section 379.200 on the ground that Campbell was an insured under the omnibus clause of the insurance policy issued to BNSF by Old Republic ("the Policy").[4]

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[2] Plaintiff filed a "STATUS REPORT" in the federal case stating that "Plaintiff has failed to perfect service [as to Campbell] within the time frame required by the Rules of Civil Procedure."

[3] Issues related to BNSF and Old Republic's unsuccessful attempt to intervene in Case #3 following entry of judgment against Campbell are not relevant to this appeal. *See* ***Griffitts v. Campbell***, 426 S.W.3d 684 (Mo. App. S.D. 2014).

[4] An omnibus clause is simply "[a] provision in an automobile-insurance policy that extends coverage to all drivers operating the insured vehicle with the owner's permission." *Black's Law Dictionary* (10th ed.

The equitable garnishment was tried to the court, which was tasked with deciding the factual dispute about whether Campbell had BNSF's permission to use the Silverado at the time of the collision. That question of fact was answered in the negative when the trial court entered its November 10, 2016 judgment in favor of Defendants.[5]

In six points relied on, Plaintiff timely appeals. Finding no merit in any of his points, we affirm.[6]

Applicable Governing Law & Principles of Review

"In an equitable garnishment action brought directly against an insurer, the plaintiff must prove that a judgment was obtained against an insurance company's insured during the policy period and that the injury is covered by the policy." ***Taylor v. Bar Plan Mut. Ins. Co.***, 457 S.W.3d 340, 344 (Mo. banc 2015) (citing section 379.200). "The requirement of 'permissive use' of a motor vehicle in an omnibus or non-owned vehicle clause of an automobile insurance policy to limit liability coverage is a question of fact which may be satisfied by a showing of either express or implied permission." ***State Farm Mut. Auto. Ins. Co. v. Scheel***, 973 S.W.2d 560, 567 (Mo. App. W.D. 1998). The person seeking coverage has the burden of proving that coverage exists. ***Id.*** at 568.

This Court will affirm the judgment in an equitable garnishment action "unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it

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2014). The parties describe the Policy as a "fronting policy." A fronting policy is a policy "in which the insured's deductible is equal to the policy limits . . . essentially meaning the insured is self-insured." ***Am. Guarantee & Liab. Ins. Co. v. U.S. Fid. & Guar. Co.***, 668 F.3d 991, 993 n.2 (8th Cir. 2012). All statutory references are to RSMo 2016. All rule references are to Missouri Court Rules (2017).

[5] The judgment was accompanied by findings of fact and conclusions of law responsive to the parties' pre-trial request for such findings under Rule 73.01(c).

[6] Because the judgment failed to dispose of all claims, Plaintiff filed a motion to amend the judgment or dismiss Defendants' counterclaim and cross-claim on November 16, 2016. The court sustained Plaintiff's motion and entered an amended judgment on November 23, 2016, which dismissed Defendants' counterclaim and cross-claim, but "in all other respects" left the judgment "unmodified and in full force and effect."

erroneously declares or applies the law." ***McDonald v. Ins. Co. of State of Pa.***, 460 S.W.3d 58, 64 (Mo. App. W.D. 2015). The interpretation of an insurance policy is a question of law reviewed *de novo* with no deference owed to the trial court's interpretation. ***Kretsinger Real Estate Co. v. Amerisure Ins. Co.***, 498 S.W.3d 506, 510 (Mo. App. W.D. 2016). A claim that the trial court erroneously declared or applied the law is also reviewed *de novo*. ***Randall v. Randall***, 497 S.W.3d 850, 854 (Mo. App. W.D. 2016). In contrast, "[c]redibility of the witnesses and the weight to be given to their testimony is for the trial court, which is free to believe none, part, or all of the testimony of any witness[,]" and we must defer to those determinations. ***Coursen v. City of Sarcoxie***, 124 S.W.3d 492, 494-95 (Mo. App. S.D. 2004).

The Evidence

Viewed in the light most favorable to the judgment, and ignoring all contrary evidence, ***Kretsinger***, 498 S.W.3d at 510, the following is a summary of the relevant evidence adduced at trial. Campbell, a resident of Tennessee, was the foreman of a crew that traveled the central United States replacing worn railroad ties. BNSF provided Campbell a truck to use for his job. In early March 2009, Campbell asked for and received permission from his supervisor to use his work truck to commute between his home in Tennessee and a worksite in Springfield, Missouri. When at home, Campbell did not have permission to use the work truck for personal matters.

On March 14th, while in Tennessee, Campbell took his work truck to a body shop to have some damage repaired. BNSF provided the Silverado to Campbell as a replacement work vehicle while the work truck was in the shop. On March 16, 2009, Campbell, who had the day off from work, drove the Silverado from his Tennessee home

to Springfield. When Campbell arrived in Springfield, he parked the Silverado at his motel with the intention of leaving it there for the remainder of the day. At approximately 3:30 p.m., Campbell met up with others at the motel, where he ate barbecue, played video games, and drank beer, whiskey, and vodka.

After Campbell's drinking bout at the motel, Roy Donaldson ("Donaldson"), a co-worker and assistant foreman, along with another co-worker, escorted Campbell back to his room. Campbell was carrying a bottle of alcohol and was slurring his speech. Donaldson instructed Campbell to stay in his room, and Campbell soon fell asleep.

Later that evening, at around 8:30 p.m., Campbell awoke and left his motel room. He got into the Silverado and drove north on Glenstone Avenue, the street adjacent to the motel. Shortly thereafter, the collision occurred. Plaintiff was stopped at a stop light when the Silverado struck the rear of his vehicle, and the Silverado ultimately came to rest in the parking lot of an adjacent Ruby Tuesday's restaurant.

When police responded to the scene, Campbell admitted that he "recently" had been drinking, and he felt like he was under the influence of alcohol. The police arrested Campbell, and subsequent testing revealed that his blood alcohol content was 0.182%. Campbell ultimately pleaded guilty to felony leaving the scene of an accident and felony second-degree assault, and he was ordered to pay Plaintiff $45,000 in restitution. Campbell admitted at trial that he was not authorized to use the Silverado at the time of the collision. Additional evidence relevant to the disposition of each point will be set forth in our analysis below.

Analysis

Point 2 — Stare Decisis

For ease of analysis, we address Plaintiff's points out of order. Point 2 claims the trial court erroneously declared the law in "entering its amended judgment" because it did not "apply the doctrine of *stare decisis*" by failing to apply Missouri law and public policy as set forth in ***United Fire & Cas. Co. v. Tharp***, 46 S.W.3d 99 (Mo. App. S.D. 2001).

Point 2 is not preserved for appellate review because it does not "[i]dentify the trial court ruling or action that" Plaintiff challenges. Rule 84.04(d)(1)(A); s*ee also* ***State v. Cmty. Alt. Mo., Inc.***, 267 S.W.3d 735, 747 (Mo. App. S.D. 2008) (a point that "does not identify a trial court ruling or action that is contended to be erroneous as required by Rule 84.04(d)(1)(A) . . . preserves nothing for this court's review"). "The error contemplated by Rule 84.04(d) in a court-tried case is not the judgment itself but the trial court's actions or rulings on which the adverse judgment is based[.]" ***Wheeler v. McDonnell Douglas Corp.***, 999 S.W.2d 279, 283 n.2 (Mo. App. E.D. 1999). By claiming the entire judgment as the error challenged, Plaintiff's point sets forth only an abstract statement of law divorced from any ruling of the trial court. Such abstract statements of law fail to comply with Rule 84.04(d). ***Shellenberger v. Shellenberger***, 931 S.W.2d 483, 484 (Mo. App. S.D. 1996).

Point 2 is denied.

Point 3 — Permissive Use

Point 3 also relies on ***Tharp*** in claiming that the trial court erroneously applied the law by finding "that a violation of a BNSF company rule terminated [Campbell's] status

as a permissive user of a BNSF provided vehicle under the Old Republic omnibus insuring clause[.]" Plaintiff argues that "Missouri law does not permit the violation of a company rule to terminate an employee's permission to use a company vehicle under an omnibus insuring clause."

Point 3 is unpreserved because the argument that follows provides no support for the claim raised in the point; instead, it makes a distinctly different claim. Point 3 asserts that the trial court erroneously applied the law because the violation of a company rule could never terminate an employee's permission to use a company vehicle. But the argument following the point claims instead that the specific rules relied on by the trial court were rules related to the *operation* of the Silverado, not to the *use* of the Silverado. In other words, rather than explaining why a company rule can never terminate permission to use a company vehicle, Plaintiff argues that because the particular BNSF rules entered into evidence at trial restricted the operation of the Silverado, and "there were no restrictions on the *use* of a BNSF company vehicle in evidence[,]" then Campbell had BNSF's permission to use the Silverado at the time of the accident.

Issues raised in the argument section of a brief that do not appear in the point relied on are not preserved for appellate review. ***Walton v. City of Seneca***, 420 S.W.3d 640, 648 n.9 (Mo. App. S.D. 2013). Similarly, when the argument provides no support for the issue actually raised in the point relied on, that issue is deemed abandoned. ***Russell v. Invensys Cooking & Refrigeration***, 174 S.W.3d 15, 22 n.5 (Mo. App. S.D. 2005). Further compounding the problem here is that once Plaintiff makes his analytical shift to argue that BNSF's rules relate only to the operation of the Silverado, not its use, Plaintiff wholly fails to identify the BNSF rules he claims the trial court improperly

interpreted. And even if Plaintiff had properly preserved and presented both of these claims of error, we would still find no misapplication of law because the trial court found, as a matter of fact, that Campbell was not using the Silverado with BNSF's express or implied permission at the time of the collision.

"[I]t is the public policy of Missouri to assure financial remuneration for damages sustained through the negligent operation of motor vehicles on the public highways of the state not only by the owners of such automobiles but also by all persons using such vehicles with the owner's permission." ***Windsor Ins. Co. v. Lucas***, 24 S.W.3d 151, 154 (Mo. App. E.D. 2000). That public policy is codified in Missouri's Motor Vehicle Financial Responsibility Law ("the MVFRL"). ***Id.*** As relevant here, the MVFRL requires that an "owner's policy of liability insurance . . . [s]hall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured[.]" Section 303.190.2(2). In other words, "[s]ection 303.190.2(2) requires coverage only for persons using the vehicle with the express or implied permission of the insured[.]" ***State Farm Fire & Cas. Co. v. Ricks***, 902 S.W.2d 323, 325 (Mo. App. E.D. 1995). If a person is using a vehicle without express or implied permission from the insured, the MVFRL does not require coverage. ***Id.***

Whether Campbell had the express or implied permission of BNSF to use the Silverado is a question of fact. ***Scheel***, 973 S.W.2d at 567; ***Ricks***, 902 S.W.2d at 324. Such permission may be given by a distinctly and directly stated affirmative representation (express permission) or arise from a course of conduct over time (implied permission). ***Ricks***, 902 S.W.2d at 324. The presence and scope of permission in a

particular case may be derived from both positive factors, such as express permission, and negative factors, such as an explicit restriction. ***Nautilus Ins. Co. v. I-70 Used Cars, Inc.***, 154 S.W.3d 521, 530-31 (Mo. App. W.D. 2005).

In this case, the trial court made extensive findings of fact, including that Campbell had neither express nor implied permission from BNSF to use the Silverado at the time of the collision. Plaintiff does not challenge the factual basis for that finding. Instead, he argues that BNSF's rules relate only to the operation of a company vehicle, as defined in ***Weathers v. Royal Indem. Co.***, 577 S.W.2d 623, 627 (Mo. banc 1979), not to the use of the vehicle, thus "failing to recognize and apply the operation/use distinction."

An "omnibus clause protect[s] any person *using* the vehicle with the permission of the named insured whether or not the actual operation of the vehicle is within the framework of that permission." ***Allstate Ins. v. Sullivan***, 643 S.W.2d 21, 23 (Mo. App. E.D. 1982). And an insurance policy that provides less protection "is contrary to the public policy of this state." ***Id.*** The terms "use" and "operation" have distinct meanings under Missouri law. "Use is said to involve [the vehicle's] employment for some purpose or object of the user. Operation of the vehicle, on the other hand, is said to involve the driver's direction and control of its mechanism for the purpose of propelling it as a vehicle." ***Weathers***, 577 S.W.2d at 627.

The Policy provided coverage for all vehicles BNSF "lease[d], hire[d], rent[ed] or borrow[ed,]" and the omnibus clause extended coverage to "[a]nyone else while using with [BNSF's] permission a covered 'auto'" that BNSF owned, hired, or borrowed.[7] The

[7] The trial court noted that "permission" is not defined in the Policy, so it assigned the following dictionary definition: "The Webster's Dictionary definition of permission includes the simple definition of 'the right or ability to do something that is given by someone who has the power to decide if it will be allowed or permitted;' the full definition includes the 'art [sic] of permitting' or 'formal consent: authorization.'"

trial court noted two BNSF rules related to alcohol usage that it believed deprived Campbell of permission to use the Silverado: Maintenance of Way Operating Rule 1.5 ("MOW 1.5") and Section 3.1 of BNSF's Policy on the Use of Alcohol and Drugs ("Section 3.1").

MOW 1.5, which was in effect at the time of the collision, states:

> The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

Section 3.1, which was also in effect at the time of the collision, states:

> While on BNSF property, on duty, or operating BNSF work equipment or vehicles, no employee may:
>
> • Use or possess alcohol;
>
> . . . .
>
> • Report for duty or remain on duty or on property when his or her ability to work safely is impaired by alcohol, controlled substances or illegally obtained drugs;
>
> • Report for or remain on duty or on property with a blood or breath-alcohol concentration greater than or equal to 0.02%;
>
> • Report for or remain on duty or on property while exhibiting symptoms of alcohol or illicit or illegally obtained drugs.

The trial court concluded, based on MOW 1.5 and Section 3.1, that Campbell had neither express nor implied permission from BNSF to use or operate the Silverado at the

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"When interpreting insurance policy language, courts give a term its ordinary meaning unless it plainly appears that a technical meaning was intended." ***Mendenhall v. Prop. & Cas. Ins. Co. of Hartford***, 375 S.W.3d 90, 92 (Mo. banc 2012). The word "permission" as used in the omnibus clause of the Policy does not appear to have a technical meaning and the parties have not cited us to any place in the record or case law stating otherwise. "Therefore, the standard English dictionary definition governs." ***Id.***

time of the collision. Before reaching this conclusion, the trial court found that "[c]ompliance with the alcohol polic[i]es was a foundational pre-condition to any extent of permission Campbell had to use the Silverado[,]" and "Campbell was not authorized to get into, on, use or operate the Silverado . . . with alcohol on his breath or in his system."

We find no misapplication of law in the trial court's analysis and conclusions. The clear language of BNSF's alcohol rules prohibited Campbell from using the Silverado for any purpose at the time of the collision. Campbell knew that he had to comply with BNSF's alcohol rules, and he acknowledged that he had no authority to use or even access the Silverado due to his intoxication. Thus, when Campbell accessed the Silverado in the parking lot of his motel room, he was doing so without the permission of BNSF and was therefore not an insured under the omnibus clause in the Policy.

Plaintiff argues that BNSF's alcohol rules are analogous to rules that attempt to withdraw permission to use a vehicle when the driver goes over the speed limit, drives negligently or carelessly, rear-ends another vehicle, runs a stop sign, or drives in a distracted manner. Plaintiff is correct that such rules would not serve to revoke previously given permission to use an insured vehicle because, per ***Weathers***, they relate only to the operation of the vehicle (*i.e.*, they "involve the driver's direction and control of [the vehicle's] mechanism for the purpose of propelling it as a vehicle"). 577 S.W.2d at 627. In contrast, MOW 1.5 and Section 3.1 do not relate to Campbell's direction and control of the Silverado's mechanism; instead, they govern whether Campbell had permission to use the Silverado *at all* when he approached it in the motel parking lot.

Finally, Plaintiff argues that ***Tharp*** mandates a contrary result because it is neither legally nor factually distinguishable from the instant case and is representative of the

distinction that Missouri cases have drawn between a restriction based upon the use of a vehicle and the operation of a vehicle — a distinction that Plaintiff insists the trial court failed to apply. In ***Tharp***, the driver ("Driver") worked for a lighting company. 46 S.W.3d at 101-02. While installing lights at a drugstore, Driver met Angela, a female employee of the store. At the end of the workday, Driver and his supervisor left the drugstore with Angela and a friend of hers. ***Id.*** at 102. The foursome drove around in Angela's friend's vehicle and bought some whiskey. ***Id.***

Later, Angela's friend drove the group back to the drugstore. ***Id.*** Driver and Angela left the store in a van owned by the lighting company. After Driver and Angela attended a party, they were involved in an accident in the company van. ***Id.*** Driver had express permission to drive the van after working hours, but the lighting company's insurer argued that Driver was not a permissive user of the van at the time of the accident due to a company rule that "'prohibited [employees] from drinking while engaged in the work of the company.'" 46 S.W.3d at 102, 106. We rejected that argument and held that Driver was a permissive user of the van at the time of the accident despite his violation of the company's alcohol rule. ***Id.*** at 107.

Tharp is distinguishable from this case because the employer's alcohol rule in ***Tharp*** was materially different from the rule at issue here. The rule in ***Tharp*** only "prohibited [employees] from drinking *while engaged in the work of the company*." ***Id.*** at 102 (emphasis added). That rule, unlike BNSF's alcohol rules, says nothing about permission to use company vehicles. Under the alcohol rule in ***Tharp***, because Driver was not engaging in work for the company at the time he was using alcohol, the rule did not bar Driver from using the van.

Further, the issue in ***Tharp*** focused on whether alcohol use while operating a company vehicle with the apparent knowledge of the employee's supervisor served to revoke previously-given express permission to use the van. Once again, the issue in this case is materially different: whether Campbell's intoxication with knowledge of company rules that prohibited him from accessing company property while having alcohol in his system denied him permission to use the Silverado. As the trial court noted, unlike ***Tharp***, "Campbell agreed at trial that he did not have BNSF authority to even ***get into*** the Silverado after he had been drinking alcohol." Moreover, the trial court found no evidence that any practice or course of conduct by BNSF supported a finding of implied consent for Campbell or any other BNSF employee to access a company vehicle after consuming alcohol.

None of these factual findings are challenged on appeal, and they are all supported by the record. The trial court did not misapply the law in finding that Plaintiff was using the Silverado without BNSF's permission at the time of the collision. Point 3 is denied.[8]

Points 4 through 6 —Issues Immaterial to the Outcome

We consider Points 4, 5, and 6 together because they each fail for the same reason: even if we were to rule each of them in Plaintiff's favor, he would not be entitled to any relief. Included in its extensive findings of fact, the trial court found that Campbell was "on his way either to Ruby Tuesday's to drink more alcohol, or, to a liquor

[8] Missouri courts have upheld coverage denials for non-permissive users on multiple occasions. *See, e.g.*, ***Am. Standard Ins. Co. of Wis. v. Stinson***, 404 S.W.3d 303, 309 (Mo. App. E.D. 2012) (definition of insured including only permissive users was unambiguous in excluding non-permissive users from definition of insured); ***Nautilus***, 154 S.W.3d at 531 (finding that a driver was not covered under a business's policy because the driver was operating the vehicle outside the scope of the permission granted by the business); ***Ricks***, 902 S.W.2d at 325 ("Because [the driver] had no permission, express or implied, the MVFRL did not require the owner to have liability insurance which covered [the driver's] use of the vehicle").

store to purchase more alcohol" at the time of the collision. Plaintiff insists this finding was erroneous – that the trial court was required to find that "Campbell was traveling to a restaurant to get dinner at the time of the collision with [Plaintiff]" based upon judicial estoppel (Point 4); collateral estoppel (Point 5), and because substantial evidence did not support a finding that "Campbell was traveling to get more alcohol" (Point 6).

In the judgment, the trial court stated that "[t]he parties agree that the only way for [Plaintiff] to prevail in his action against BNSF and Old Republic is to establish that Campbell was a permissive user of the Silverado" at the time of the crash, "pursuant to the language of the [Policy]." Indeed, Plaintiff's counsel stated in closing argument that "the case turns on whether or not [Campbell's] violation of alcohol policy . . . eviscerates permission." In accordance with those admissions, the judgment found that "even were [sic] Campbell's purpose to go eat food, the [trial c]ourt finds his high degree of intoxication and clear breaches of the alcohol policies prohibited him from ***any*** use of the vehicle, regardless of his purpose or destination." The judgment further explained that "there are **no** permitted destinations or uses of a company vehicle if an employee has used alcohol. Rather, sobriety is a condition of permission."

This Court "shall [not] reverse any judgment unless it finds" that an error committed by the trial court materially affected the merits of the case. Rule 84.13(b). Similarly, to obtain reversal of a judgment based on a claim that substantial evidence does not support a particular factual finding, the challenged finding must be necessary to sustain the judgment. *See* ***Houston v. Crider***, 317 S.W.3d 178, 187 (Mo. App. S.D. 2010). Here, the trial court's factual findings demonstrate that Campbell did not have BNSF's permission to use the Silverado *at all* at the time the collision occurred because

he was impaired by alcohol. Whether Campbell intended to get alcohol or food was not a fact necessary to support the judgment. As a result, points 4, 5, and 6 are moot and will not be addressed.

Point 1 — Subject Matter Jurisdiction

Plaintiff's first point claims the trial court "erred in entering judgment in favor of [Defendants] because the trial court did not have subject matter jurisdiction in that the trial court received this case as the result of an improper application for change of judge filed by [Defendants] that was erroneously granted over [Plaintiff's] objection." Plaintiff argues that because the trial court improperly transferred the case to Division 22 of the Greene County circuit court, all actions taken in that division were a nullity. The following facts are relevant to the resolution of this point.

Plaintiff's petition for equitable garnishment was filed in March 2013 in Greene County circuit court. Campbell, a defendant in the action, filed an application for change of judge pursuant to Rule 51.05. The application was granted in December 2013, and the case was transferred to Division 23. Defendants also filed an application for change of judge based on Rule 51.05. Plaintiff filed a written objection to that application on December 9, 2013, arguing that the change was not permitted under Rule 51.05 because Campbell had already obtained a change of judge under that rule, thereby exhausting the right of all defendants to a change of judge as a matter of right.[9]

[9] "Rule 51.05 grants a party the absolute right to disqualify a judge once without cause or any showing of prejudice." ***State ex rel. Manion v. Elliott***, 305 S.W.3d 462, 464 (Mo. banc 2010). In pertinent part, Rule 51.05(d) states:

> Application for change of judge may be made by one or more parties in any of the following classes: (1) plaintiffs; (2) defendants; (3) third-party plaintiffs (where a separate trial has been ordered); (4) third-party defendants; or (5) intervenors. Each of the foregoing classes is limited to one change of judge, and any such change granted any one or more members of a class exhausts the right of all members of the class to a change of

Without stating any reason for its ruling, the judge of Division 23 entered the following order via docket entry: "MOTION FOR CHANGE OF JUDGE SUSTAINED." The case was then transferred to Judge Jason Brown in Division 22. Judge Brown thereafter presided over the case through the bench trial and entry of judgment. In February 2017, more than a month after the judgment became final for purposes of appeal, Plaintiff again filed a motion in Division 22 to transfer the case back to Division 23, alleging that Judge Brown never had jurisdiction over the case because the judge of Division 23 improperly sustained BNSF's motion for change of judge. Judge Brown denied Plaintiff's motion to transfer.[10]

"Jurisdiction is a question of law this Court reviews *de novo.*" ***Chamberlain v. Dir. of Revenue***, 342 S.W.3d 334, 338 (Mo. App. S.D. 2011). The Missouri Constitution controls the subject matter jurisdiction of Missouri circuit courts, and it provides that "circuit courts shall have original jurisdiction over all cases and matters, civil and criminal." Mo. Const. art. V, sec. 14; ***J.C.W. ex rel. Webb v. Wyciskalla***, 275 S.W.3d 249, 253 (Mo. banc 2009). "Application of this principle is simple: because this is a civil case, the circuit court had subject-matter jurisdiction, and therefore, the trial court had authority to hear the dispute." ***Chamberlain***, 342 S.W.3d at 339. Lest there be any doubt, Rule 51.01 explicitly states that nothing in Rule 51.05 "shall . . . be construed to extend or limit the jurisdiction of the courts of Missouri." Rule 51.01; ***City of Kansas***

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judge. However, no party shall be precluded from later requesting any change of judge for cause.

[10] Plaintiff filed a writ of mandamus with this court asking us to direct the trial court to transfer the case back to Division 23 on the ground that Judge Brown lacked jurisdiction to hear the case. We denied the requested writ in ***State ex rel. Griffitts v. Brown***, SD34874.

City v. Powell, 451 S.W.3d 724, 742 (Mo. App. W.D. 2014). Judge Brown had subject matter jurisdiction to hear and decide the case.[11]

Subject matter jurisdiction cannot be waived, but "if a matter is not jurisdictional but rather is a procedural matter required by statute or rule . . . then it generally may be waived if not raised timely." ***McCracken v. Wal-Mart Stores E., LP***, 298 S.W.3d 473, 476 (Mo. banc 2009). Plaintiff filed a general objection that claimed Defendants' motion for change of judge should have been denied because Campbell had already exercised the only right to a change of judge under Rule 51.05 available to the defendants in the case. The judge of Division 22 overruled that objection, and the case was transferred to Judge Brown in December 2013. Plaintiff then proceeded to prosecute the case in Division 23 before Judge Brown with no further mention of the issue for roughly three years. Only then -- after an adverse judgment had been entered against him and was final for purposes of appeal -- did Plaintiff assert for the first time that all actions taken by Judge Brown in the case were void such that the judgment would have to be vacated and the case transferred to start anew in Division 23.

The general rule is that "the trial court must be given the opportunity to correct error while correction is still possible." ***Douglass v. Safire***, 712 S.W.2d 373, 374 (Mo. banc 1986). Thus, even if we were to assume, without deciding, that the case was erroneously transferred to Judge Brown, Plaintiff waived his argument by failing to timely present it to the trial court. Objecting to Defendants' motion to transfer the case in

[11] Plaintiff cites ***State ex rel. Schwarz Pharma, Inc. v. Dowd***, 432 S.W.3d 764, 769 n.5 (Mo. banc 2014), a post-***J.C.W.*** case from our supreme court, for the proposition that "a change of judge and assignment of a judge is a matter of jurisdiction." The cited footnote actually states: "While Schwarz at times seems to suggest that improper venue deprives a court of jurisdiction, it has been recognized since at least ***State ex rel. DePaul Health Ctr. v. Mummert***, 870 S.W.2d 820, 822 (Mo. banc 1994), that venue is not jurisdictional."

2013 on the ground that the only change of judge by the defendants in the case allowed as a matter of right had already been exercised did not constitute an argument that any proceedings thereafter held before a different judge would be null and void. *See* ***Mayes v. St. Luke's Hosp. of Kansas City***, 430 S.W.3d 260, 268 (Mo. banc 2014) (the trial court must be presented with "the specific basis" for a litigant's opposition to a motion); *cf.* ***Heintz v. Hudkins***, 824 S.W.2d 139, 146 (Mo. App. S.D. 1992) ("[W]e hold that Plaintiff, by her conduct, waived any contention that Judge Dickerson was not the judge to whom the case was assigned").

Point 1 is also denied, and the judgment of the trial court is affirmed.

DON E. BURRELL, J. – OPINION AUTHOR

MARY W. SHEFFIELD, P.J. – CONCURS

GARY W. LYNCH, J. – CONCURS