



**In the Missouri Court of Appeals
Eastern District
DIVISION FOUR**

LAWRENCE MICKEY,)	No. ED98647
)	
Respondent,)	Appeal from the Circuit Court of
)	the City of St. Louis
vs.)	
)	
BNSF RAILWAY COMPANY and)	
SAFECO INSURANCE COMPANY OF)	Honorable John J. Riley
AMERICA,)	
)	
Appellants.)	Filed: June 11, 2013

Introduction

BNSF Railway Company (BNSF) and Safeco Insurance Company of America (Safeco) appeal the judgment of the Circuit Court of the City of St. Louis: (1) denying their motion for a finding that BNSF satisfied in full a judgment in favor of Lawrence Mickey (Plaintiff) on his negligence claim; and (2) granting Plaintiff’s motion for judgment on a supersedeas bond. The trial court entered judgment against Safeco, the surety on the supersedeas bond, for the unsatisfied portion of the judgment. BNSF and Safeco argue that the trial court erred because BNSF satisfied the underlying judgment in full by paying Plaintiff the judgment less an amount representing the portion of employment taxes Plaintiff allegedly owed under the Railroad Retirement Tax Act, 26 U.S.C. §§ 3201-3241 (“railroad employment taxes”).¹ We affirm.

¹ “RRTA tax is similar to the tax imposed by the Federal Insurance Contributions Act (FICA)” Chicago Milwaukee Corp. v. United States, 40 F.3d 373, 374 (Fed. Cir. 1994).

Factual and Procedural Background

Plaintiff worked for BNSF as a yard conductor and switchman for forty years. In 2008, Plaintiff filed a petition against BNSF pursuant to the Federal Employers' Liability Act (FELA), asserting that BNSF's negligence caused disabling injuries to Plaintiff's back, legs, knees, and feet. Plaintiff alleged that he suffered damages in the form of physical and emotional injury, medical expenses, and lost wages and benefits.

The trial court conducted a jury trial. During the jury instruction conference, Plaintiff proffered a general verdict form based on Missouri Approved Jury Instructions—Civil (MAI) 36.01. Plaintiff's proposed form contained the following sentence, to be completed if the jury found in Plaintiff's favor: "We, the undersigned jurors, assess the damages of Plaintiff Larry Mickey at \$_____ (stating the amount)." BNSF did not object to Plaintiff's verdict form on the basis that it failed to specify categories of damages. The trial court submitted Plaintiff's general verdict form to the jury. The jury rendered a verdict in Plaintiff's favor, and the jurors signed a verdict form providing that "the undersigned jurors[] assess the damages of [Plaintiff] at \$345,000." The trial court entered judgment on the verdict in Plaintiff's favor in the amount of \$345,000 plus costs and post-judgment interest. BNSF did not object to the form of the verdict or request any changes when the trial court entered its judgment.

BNSF appealed the judgment and filed a supersedeas bond in the amount of \$500,000, executed by BNSF as principal and Safeco as surety. BNSF raised various issues on appeal but did not challenge the form of the judgment. This court affirmed the judgment. Mickey v. BNSF Ry. Co., 358 S.W.3d 138 (Mo. App. E.D. 2011). After we issued our mandate, BNSF tendered to Plaintiff the judgment amount plus costs and interest but withheld \$12,820.80 for Plaintiff's

"RRTA tax is an employment excise tax on the employer and the employee." Id. "The employer pays both portions, withholding the employee's portion from his wages." Id.

portion of railroad employment taxes. Plaintiff returned the check, stating that the tendered amount was insufficient to satisfy the judgment.

Plaintiff filed a motion pursuant to Rule 81.11 alleging that BNSF refused to tender to Plaintiff the full judgment amount and requesting that the trial court enter judgment against Safeco on the supersedeas bond. In response, BNSF again tendered to Plaintiff the judgment amount less \$12,820.80, and BNSF and Safeco moved the trial court to find that BNSF fully satisfied the judgment and properly withheld the railroad employment taxes. BNSF and Safeco asserted that federal law required BNSF to withhold Plaintiff's portion of the railroad employment taxes from the judgment and pay the railroad employment taxes to the Internal Revenue Service.

The trial court entered an order and judgment granting Plaintiff's motion and denying the motion of BNSF and Safeco. The trial court stated: "[BNSF] did not raise in this Court at any time an issue regarding the taxability of the judgment or of [BNSF's] potential liability to the Internal Revenue Service for taxes on all or part of the damages, and this Court entered a judgment for the full amount of the verdict." The trial court stated that it had "no authority to find that the judgment in this case has been satisfied upon payment by [BNSF] to plaintiff of less than the full amount of the judgment plus post-judgment interest." The trial court concluded that BNSF had not satisfied the judgment in full and that Plaintiff was entitled to enforce the judgment against Safeco as BNSF's surety. The trial court entered judgment against Safeco in the amount of \$12,820.80 plus post-judgment interest. BNSF and Safeco appeal.

Standard of Review

We review a trial court's ruling on a motion for entry of satisfaction of judgment "the same as any other judge-tried case, under the standard set forth in Murphy v. Carron, 536 S.W.2d

30, 32 (Mo. banc 1976).” McLean v. First Horizon Home Loan, Corp., 369 S.W.3d 794, 799 (Mo. App. W.D. 2012) (quotation omitted). Accordingly, this court will affirm the judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976).

Discussion

Before considering the merits of the appeal, we address Plaintiff’s request in his brief that we: (1) dismiss the appeal on the ground that BNSF and Safeco failed to comply with the briefing requirements of Rule 84.04; and (2) find that BNSF is not a proper party to the appeal.

“Whether to dismiss an appeal for briefing deficiencies is discretionary, and that discretion is generally not exercised unless the deficiency impedes disposition on the merits.” State ex rel. Mo. Energy Dev. Ass’n v. Pub. Serv. Comm’n, 386 S.W.3d 165, 169 n.1 (Mo. App. W.D. 2012). “A brief impedes disposition on the merits where it is so deficient that it fails to give notice to the court and the other parties as to the issue presented on appeal.” Id. Because we are able to discern the issues presented on appeal, we elect to review the appeal. See, e.g., Comp & Soft, Inc. v. AT & T Corp., 252 S.W.3d 189, 194 (Mo. App. E.D. 2008).

Plaintiff contends that because the appeal concerns “a judgment against Safeco,” BNSF is not a proper party to the appeal. Plaintiff neither cites authority to support this argument, develops the argument, nor requests any specific action by this court. Nonetheless, we address the argument because “[i]f a party does not have standing, we must dismiss the appeal.” Underwood v. St. Joseph Bd. of Zoning Adjustment, 368 S.W.3d 204, 207 (Mo. App. W.D. 2012).

Section 512.020 provides that generally, “[a]ny party to a suit aggrieved by any judgment of any trial court in any civil cause” may appeal. Mo. Rev. Stat. § 512.020.² “A party is ‘aggrieved’ when the judgment operates prejudicially and directly on his personal or property rights or interest.” In re Knichel, 347 S.W.3d 127, 130 (Mo. App. E.D. 2011) (quotation omitted). An aggrieved party may appeal from “any special order after final judgment in the cause.” Mo. Rev. Stat. § 512.020(5). “The circuit court’s ruling on a Rule 74.11(c) motion is an appealable special order after final judgment.” McLean, 369 S.W.3d at 799 n.3. Rule 74.11(c) provides: “If a judgment creditor who has received satisfaction of a judgment fails to acknowledge such satisfaction immediately, any interested person may apply to the court where the judgment was entered for an order showing satisfaction.” Rule 74.11(c).

Here, BNSF, as a judgment debtor, moved the trial court to find that it fully satisfied the judgment. The trial court denied the request, finding that BNSF had not satisfied the judgment in full and that Plaintiff was entitled to enforce the judgment against Safeco as BNSF’s surety. Thus, BNSF was aggrieved by the trial court’s decision and was entitled to appeal the ruling. BNSF challenges the ruling on appeal, stating in its joint brief with Safeco that “the trial court erred in entering judgment against the surety on the supersedeas bond *as BNSF had already satisfied judgment . . .*” (emphasis added). Therefore, we conclude that BNSF has standing to appeal.

In their sole point on appeal, BNSF and Safeco claim that the trial court erred in entering judgment on the supersedeas bond because BNSF satisfied the judgment by paying the judgment amount less Plaintiff’s portion of railroad employment taxes. More specifically, BNSF and Safeco argue that federal law required BNSF to withhold and pay Plaintiff’s portion of the

² All statutory references are to RSMo 2000 as supplemented unless otherwise indicated.

railroad employment taxes because the judgment constituted pay for “time lost.” Plaintiff counters that: (1) after this court issued its mandate affirming the judgment, the trial court had no jurisdiction³ to amend the judgment to specify that BNSF could withhold the railroad employment taxes; and (2) Plaintiff owed no railroad employment taxes on the judgment.

“[C]ourts have inherent power to enforce their own judgments and should see to it that such judgments are enforced when they are called upon to do so.” SD Invs., Inc. v. Michael-Paul, L.L.C., 157 S.W.3d 782, 786 (Mo. App. W.D. 2005) (quotation omitted). “However, this power has significant limitations.” Id. “The trial court’s inherent enforcement power applies to the judgment as originally rendered; the trial court’s power to modify a judgment ceases when the judgment becomes final.” Id. (quotation omitted). “Where the judgment of the trial court has definitely determined the rights of the parties and has been affirmed, any subsequent orders or adjudications in the cause must be confined to those necessary to execute the judgment.” In re Marriage of Bullard, 18 S.W.3d 134, 138 (Mo. App. E.D. 2000) (quoting Papin v. Papin, 475 S.W.2d 73, 76 (Mo. 1972)). “[I]n Missouri a judgment may be satisfied only by payment in full with accrued interest and costs except where a valid release is given or where there is a lawful agreement otherwise providing.” Keith v. Burlington N. R.R. Co., 889 S.W.2d 911, 925 (Mo. App. S.D. 1994).

Here, the trial court entered judgment in Plaintiff’s favor in the amount of \$345,000 plus costs and post-judgment interest. BNSF appealed, and we affirmed the judgment.

Following our affirmance, the trial court’s authority was limited to issuing orders necessary to execute the judgment. Pursuant to Rule 81.11, Plaintiff moved the trial court to

³ Although Plaintiff uses the term “jurisdiction,” under J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009), a more accurate description of his argument is that the trial court lacked “authority” to amend the judgment. See, e.g., Guidry v. Charter Commc’ns, Inc., 308 S.W.3d 765, 768 n.2 (Mo. App. E.D. 2010).

enter judgment against Safeco on the supersedeas bond,⁴ alleging that BNSF had not tendered the full judgment amount. In its motion for satisfaction of judgment filed in response to Plaintiff's motion, BNSF conceded that it withheld \$12,820.80 from the amount tendered so that BNSF could remit to the Internal Revenue Service Plaintiff's portion of railroad employment taxes allegedly owed. BNSF did not assert in its motion that Plaintiff either released BNSF from its obligation to pay the full amount or agreed that BNSF could satisfy the judgment in any other manner. Therefore, the trial court did not err in finding that BNSF failed to satisfy the judgment in full. Given BNSF's nonperformance of its obligation to satisfy the judgment, the trial court did not err in entering judgment against Safeco as BNSF's surety on the supersedeas bond in the amount of \$12,820.80 plus post-judgment interest.

BNSF and Safeco, along with the United States as amicus curiae,⁵ argue that BNSF satisfied the judgment by fulfilling its obligation under federal law to withhold Plaintiff's portion of railroad employment taxes from the judgment amount and remit the railroad employment taxes to the Internal Revenue Service. In particular, BNSF, Safeco, and the United States assert that: (1) pay for "time lost" is taxable under the Railroad Retirement Tax Act; and (2) in the instant case, the full judgment amount constituted pay for "time lost" pursuant to 45 U.S.C.

⁴ "A supersedeas bond is a form of surety contract under which one party (the surety), assures a second party (the creditor), of payment or performance by a third party (the principal)." State ex rel. Mo. Highway & Transp. Comm'n v. Morganstein, 703 S.W.2d 894, 898 (Mo. banc 1986). "The liability of the surety is secondary in the sense that it arises only upon nonperformance of the underlying promise by the principal." Id. "In general, the obligation of a surety is both measured and limited by the principal's obligation." Id. "By entering into a supersedeas bond, the surety submits to the jurisdiction of the trial court, and the liability may be enforced on motion for judgment thereon, without the necessity of an independent action." Rule 81.11.

⁵ The United States moved for leave to file a brief as an amicus curiae and participate in oral argument in support of BNSF and Safeco. The American Association for Justice moved for leave to file a brief as an amicus curiae in support of Plaintiff. We granted the motions.

§ 231(h)(2). Section 231(h)(2) provides that for purposes of the Railroad Retirement Act of 1974:

. . . If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

45 U.S.C. § 231(h)(2) (2012) (emphasis added). Although the parties agree that the judgment constituted a payment by an employer with respect to a personal injury, they disagree as to whether the judgment can be construed as a payment that “include[d] pay for time lost.”

“FELA cases tried in state courts are subject to state procedural rules” Keith v. Burlington N. R.R. Co., 889 S.W.2d 911, 920 (Mo. App. S.D. 1994). Missouri’s procedural rules provide that “[t]he verdict of a jury is either general or special.” Rule 71.01. “Special verdicts, which . . . help the court determine the rationale of the jury, . . . produce a record of the actual findings of fact the jury made.” Children Int’l v. Ammon Painting Co., 215 S.W.3d 194, 199 n.6 (Mo. App. W.D. 2006). By contrast, “[a] general verdict is one by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant, and includes a verdict wherein the jury returns a finding of the plaintiff’s total damages and assesses percentages of fault.” Rule 71.01. “In every issue for the recovery of money only, or specific real or personal property, the jury shall render a general verdict.” Rule 71.02; Mo. Rev. Stat. § 510.230.

A general verdict form submitted to the jury may provide as follows: “We, the undersigned jurors, assess the damages of plaintiff (*state the name*) at \$_____ (*stating the amount*).” Mo. Approved Jury Instructions—Civil 36.01 (6th ed. 2002); Kansas City Power & Light Co. v. Bibb & Assocs., Inc., 197 S.W.3d 147, 152 (Mo. App. W.D. 2006). In a FELA

case, a general verdict in favor of the plaintiff does not specify individual items of damage such as pain and suffering, medical expenses, or lost wages. See Briggs v. Kansas City S. Ry. Co., 925 S.W.2d 908, 916 (Mo. App. W.D. 1996). Indeed, “[t]he sum included within the general verdict as compensation for . . . loss of wages is a matter forever relegated to the bosom of the jury.” Anglim v. Mo. Pac. R.R. Co., 832 S.W.2d 298, 309 (Mo. banc 1992).

“After a verdict has been received by the court and the jury discharged, a trial court has no authority to correct or amend it in matters of substance, only in mere matters of form.” Kansas City Power & Light Co., 197 S.W.3d at 155. For example, a trial court has authority to enter judgment against a bankruptcy trustee where it is the named plaintiff in a lawsuit concerning the bankruptcy debtors’ negligence claims, even when the jury rendered a verdict against the debtors. Stanton v. Hart, 356 S.W.3d 330, 333-36 (Mo. App. W.D. 2011). On the other hand, a trial court has no authority to “interpose[] its assessment of damages for that made by the jury.” Jordan v. Robert Half Pers. Agencies of Kansas City, Inc., 615 S.W.2d 574, 581 (Mo. App. W.D. 1981); accord Chapman v. New Mac Elec. Coop., Inc., 260 S.W.3d 890, 895-96 (Mo. App. S.D. 2008) (“Although designated a remittitur, the trial court’s judgment was actually an attempt to make an evidentiary ruling by way of a reduction in damages.”).

Here, although Plaintiff sought damages for lost wages along with medical expenses and other damages, BNSF did nothing to ensure prior to the entry of the judgment that the judgment entered specify that a portion of the damages awarded to Plaintiff constituted “pay for time lost.” During the jury instruction conference, Plaintiff proffered a general verdict form based on MAI 36.01. Plaintiff’s proposed form contained the following sentence, to be completed if the jury found in Plaintiff’s favor: “We, the undersigned jurors, assess the damages of Plaintiff Larry Mickey at \$_____ (stating the amount).” BNSF did not object to the form on the basis

that it failed to specify categories of damages. Nor did BNSF proffer its own verdict form seeking a jury allocation of dollar amounts to specific damage categories or request the trial court to submit special interrogatories.⁶

The trial court submitted Plaintiff's general verdict form to the jury. The jury rendered a general verdict in Plaintiff's favor that properly did not specify what amounts it may have apportioned to various damage items. BNSF did not object to the form of the verdict. Likewise, BNSF did not request any changes when the trial court entered its judgment on the verdict. On direct appeal, BNSF did not challenge the form of the judgment. Because the judgment does not allocate any specific amount of damages to lost wages or "pay for time lost," we are unable to conclude that 45 U.S.C. § 231(h)(2) applies.

BNSF, Safeco, and the United States urge this court to follow two federal court decisions that certain judgments on non-FELA claims constituted wages subject to employment tax withholding. The cited cases are inapposite because they concerned wrongful termination claims in which the jury verdicts specified that the damages compensated the plaintiff for lost wages. See Noel v. N.Y. State Office of Mental Health Cent. N.Y. Psychiatric Ctr., 697 F.3d 209, 211 (2d Cir. 2012) (jury awarded the plaintiff "back and front pay"); Cheetham v. CSX Transp., No. 3:06-cv-704-J-PAM-TEM, 2012 WL 1424168, at *1, *4 (M.D. Fla. Feb. 13, 2012) (jury awarded "damages to compensate for loss of wages and benefits"), report and recommendation adopted sub nom. Cheetham v. CSX Transp., Inc., No. 3:06-CV-704, 2012 WL 2571247 (M.D. Fla. Mar. 7, 2012). Here, by contrast, the jury rendered a general verdict on Plaintiff's FELA claim for

⁶ By noting that BNSF failed to request submission of a more specific verdict form or special interrogatories, we do not intend to imply that BNSF had a right to the grant of such a request. We simply point out that the trial court was not given the opportunity prior to entry of the judgment to consider the issue.

damages based on disabling injuries, and the verdict did not specify that it included compensation for lost wages.

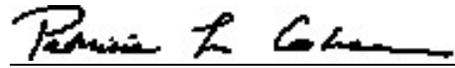
BNSF and Safeco also rely heavily on two unpublished trial court orders in FELA cases from other states to support their argument that BNSF properly withheld railroad employment taxes because the judgment constituted pay for “time lost.” As an initial matter, trial court orders from other states are certainly not binding and are rarely persuasive. See Craft v. Philip Morris Companies, Inc., 190 S.W.3d 368, 376 (Mo. App. E.D. 2005). In any event, Nielsen v. BNSF Railway Company is distinguishable because there, the jury specifically awarded the plaintiff damages for lost wages. No. 0807-10580 (Multnomah County, Or. Mar. 5, 2012). In Phillips v. Chicago, Central & Pacific Railroad Company,⁷ the trial court appeared to apportion damages to a specific category (“time lost”) after the judgment was final. No. 04781 LACV 098439 (Pottawattamie County, Iowa Apr. 12, 2013). As discussed above, we see no basis in Missouri law for such action.

Finally, we note that the trial court was not asked to and did not decide prior to entry of the judgment whether Plaintiff or BNSF owed railroad employment taxes on the judgment such that reduction of the judgment was appropriate. “To undertake to review an issue not having been decided by the trial court would be akin to rendering an advisory opinion, something appellate courts are wont not to do.” Pruitt v. Mo. Dep’t of Corr., 224 S.W.3d 630, 631 (Mo. App. W.D. 2007) (quotation omitted). Accordingly, we decline to address the parties’ arguments relating to whether the judgment was taxable. Point denied.

⁷ Pursuant to Local Rule 370(b), BNSF and Safeco cited the Phillips order in a letter to this court’s clerk after oral argument.

Conclusion

The judgment of the trial court is affirmed.

A handwritten signature in black ink, appearing to read "Patricia L. Cohen". The signature is written in a cursive style with a horizontal line underneath.

Patricia L. Cohen, Presiding Judge

Kurt S. Odenwald, J., and
Robert M. Clayton III, J., concur.