

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0459

consolidated with

2006 CA 0460

RICHARD BAGWELL, FATHER OF JOHN BAGWELL

VERSUS

**RALPH JAVINS, DALE MORRIS FRANCES, AND SOUTHERN
FARM BUREAU CASUALTY INSURANCE COMPANY**

consolidated with

**DAWN LEONARD CREEL, AS TUTRIX OF AND ON BEHALF OF
HER MINOR CHILD, STORMY MARIE LEONARD**

VERSUS

**FRANCIS DALE MORRIS AND ROBERT MORRIS,
INDIVIDUALLY, AND d/b/a MORRIS FARMS, INC., RALPH
JAVIUS AND SOUTHERN FARM BUREAU CASUALTY
INSURANCE COMPANY**

Judgment rendered: December 28, 2006

**On Appeal from the 18th Judicial District Court
Parish of West Baton Rouge, State of Louisiana
No. 30,913 *consolidated with* 31,213; Division "A"
The Honorable James J. Best, Judge Presiding**

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**Counsel for Plaintiffs/Appellants
Dawn Leonard Creel
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**Counsel for Defendants/Appellees
Southern Farm Bureau Casualty
Insurance Company, Robert
Morris, Francis Dale Morris**

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

Hughes, J. concurs.

READ
9/2/06

DOWNING, J.

Dawn Leonard Creel, as tutrix of and on behalf of her minor child, Stormy Marie Leonard,¹ appeals a judgment entered pursuant to her suit for the wrongful death and survival² of Stormy's father, John Bagwell, in an automobile accident. Defendant, Southern Farm Bureau Casualty Insurance Company (SFB), answered the appeal. For the following reasons we affirm the judgment of the trial court.

PERTINENT FACTS AND HISTORY

This suit arises from a pre-dawn accident on September 28, 1999. Mr. Bagwell drove his pick-up truck into the side of a Mack truck pulling a large tractor-trailer, which was crossing his lane of travel while turning left from a driveway onto Louisiana Highway 620. Mr. Bagwell apparently did not see the truck in his lane. The record reflects that he died almost instantaneously on impact.

After the trial, the trial court entered judgment consistent with the jury's verdict. The judgment ruled that the Mack truck driver, Ralph Javius's³ negligence was a cause-in-fact of the accident; that Mr. Bagwell's negligence was also a cause-in-fact of the accident; that each party was 50% at fault in causing the accident; that Stormy suffered damage as a result of the accident; and that fair compensation for her damages were as follows:

Loss of love, affection, and companionship, grief and anguish (past, present and future)	\$100,000.00
Loss of services and support (past, present and future, Until Stormy reaches age 18)	\$ 30,000.00

¹ Richard Bagwell, the father of John Bagwell, and Dawn Leonard Creel, as tutrix of Stormy Marie Leonard, both filed suit for survival damages and wrongful death. These suits were consolidated, and Ms. Creel was subsequently confirmed as the proper plaintiff.

² At the close of the case, the trial court dismissed Ms. Creel's survival action by directed verdict. This matter is not on appeal.

³ The caption incorrectly refers to Mr. Javius as Ralph Javins.

The judgment then decreed judgment in favor of Ms. Creel and against SFB in the amount of \$65,000.00 plus interest from date of demand. The judgment deferred to a subsequent proceeding the assessment of costs.

From this judgment, Ms. Creel appeals, asserting five assignments of error, summarized as follows:

1. The trial court erred in allowing the jury to see re-enactment videos that did not accurately depict the movement and visibility of the tractor-trailer that caused Mr. Bagwell's death.
2. The trial court erred in failing to have Mr. Javius located for rebuttal or in failing to grant a new trial to allow Ms. Creel to rebut the evidence of the defendants' accident reconstructionist.
3. The trial court erred in limiting Stormy's economic damages, allowing them to extend only until her eighteenth birthday.
4. The jury erred in finding Mr. Bagwell to be 50% at fault where the evidence clearly shows that Mr. Javius's tractor-trailer obstructed Mr. Bagwell's lane of travel.
5. The jury erred in awarding an abusively low amount of general damages to Stormy.

SFB answered the appeal, raising four assignments of error, summarized as follows:

1. The jury erred in assessing only 50% fault against Mr. Bagwell.
2. The trial court erred in allowing Ms. Creel's economic expert to testify regarding Mr. Bagwell's gross wages to support a loss of support claim.
3. The jury's award of \$30,000.00 for loss of support is not based on facts to be found in the record.
4. The trial court erred in not assessing 50% of the jury costs and meals to Ms. Creel.

DISCUSSION

First Assignment of Error

In support of her first assignment of error, Ms. Creel argues that the videos prepared by SFB's expert are unduly prejudicial because they do not accurately depict what they purport to represent. She argues that a newer,

brighter truck with new reflective tape was used in the videos. She asserts that the truck did not pull into the highway in the same speed and manner as in the accident. She argues that the jury was prejudiced and misled because the videos implanted a vision in the jury's mind that a highly visible trailer was the only possible scenario for the accident.

Here, however, we cannot agree that the jury was unduly prejudiced. The determination of whether videotapes are admissible is largely within the discretion of the trial court. **Olivier v. LeJeune**, 95-0053, p. 10 (La. 2/28/96), 668 So.2d 347, 351. Here, the videos were introduced to show the visibility of the truck. No testimony was elicited that the videos represented the speed and manner of the accident. All witnesses were available for cross-examination. Ms. Creel was not precluded from presenting rebuttal witnesses. The trial court in no way limited her from making any argument to the jury she deemed appropriate. *See Id.* We see no evidence that the videos implanted a prejudicial image in the jury's mind that Ms. Creel did not have the opportunity to address.

Accordingly, Ms. Creel's first assignment of error is without merit.

Second Assignment of Error

In her second assignment of error, Ms. Creel argues that the trial court erred in failing to have a witness located who was inadvertently released from his subpoena or, alternatively, in failing to grant a new trial to allow Ms. Creel the opportunity to rebut the evidence presented by SFB's accident reconstructionist.

First, we note that the established rule in this circuit is that the denial of a motion for new trial is an interlocutory and non-appealable judgment

absent a showing of irreparable harm.⁴ **Carpenter v. Hannan**, 01-0467, p. 4 (La.App. 1 Cir. 3/28/02), 818 So.2d 226, 228, citing **Morrison v. Dillard Department Stores, Inc.**, 99-2060, p. 2 (La.App. 1 Cir. 9/22/00), 769 So.2d 742, 744. The Louisiana Supreme Court, however, has instructed us to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits, when it is clear from appellant's brief that the appeal was intended to be on the merits. **Carpenter**, 01-0467 p. 4, 818 So.2d at 228-229. Thus, we are to review the judgment on the merits and not the judgment denying a new trial.

Mr. Javius had been inadvertently released from his subpoena after his testimony in Ms. Creel's case. Even so, the night before Ms. Creel's counsel was to present his rebuttal case, he met with Mr. Javius, the driver of the tractor-trailer with which Mr. Bagwell collided. Mr. Javius agreed to appear the next morning. Later that evening, Mr. Javius spoke with his former employer, who informed him that since he was no longer under subpoena, he was not required to appear. When Mr. Javius did not appear the next morning, the trial court issued a writ of attachment to bring Mr. Javius to court. Mr. Javius could not be found that morning.

Mr. Javius's rebuttal testimony was to have been to the effect that he drove the tractor-trailer faster than was represented on the videos, supporting Ms. Creel's argument that Mr. Bagwell had a reduced time to react. He was also to rebut the distance between Mr. Bagwell's vehicle and the tractor-trailer when the tractor-trailer first entered the highway.

After Mr. Javius failed to appear, the parties returned to court. The trial court inquired whether Ms. Creel's counsel had any rebuttal evidence.

⁴ However, by 2005 La. Acts No. 205, effective January 1, 2006, La. C.C.P. art. 2083 was amended to remove the longstanding provision that interlocutory judgments that "may cause irreparable harm" are appealable. An interlocutory judgment is now appealable only when expressly provided by law. Accordingly, the denial of a new trial is not generally appealable.

Her counsel replied, “I don’t think it’s necessary, Your Honor.” He did not request a continuance, object to Mr. Javius’s absence, or in any other way preserve his request for Mr. Javius’s presence and testimony.

Ms. Creel suggests that no purpose would have been served by his making a motion for continuance. However, without such motion, or other objection, we have no basis to review the matter. When Ms. Creel’s counsel failed to contemporaneously object or otherwise preserve the issue for review, he waived this objection and cannot argue this alleged error for the first time on appeal. *See Bailey v. Bolton*, 98-2026, p. 2 (La.App. 1 Cir. 9/10/98), 755 So.2d 254, 255.

Accordingly, Ms. Creel’s second assignment of error is without merit.

Third Assignment of Error; Answer to Appeal Second and Third Assignments of Error

Ms. Creel argues that the trial court erred in limiting Stormy Leonard’s economic damages to extend only to her eighteenth birthday. SFB argues that the trial court erred in allowing Ms. Creel’s economic expert to testify regarding Mr. Bagwell’s gross wages. It also argues that the jury’s award for loss of support is excessive and not based on facts in the record.

Regarding Ms. Creel’s argument, her counsel cites no cases on point supporting the proposition that SFB should be liable for economic damages beyond her reaching the age of majority, barring an agreement, promise or other exigent circumstances, none of which are pled or argued here. Nor can we find any. Accordingly, we conclude the trial court did not err in limiting economic damages for Stormy until her eighteenth birthday.

Regarding SFB’s argument that the trial court should not have allowed testimony regarding Mr. Bagwell’s gross income, we note that the

trial court limited the testimony of Ms. Creel's expert to the gross amount available. The court did not allow testimony from this expert regarding what Mr. Bagwell would have given her or should have given her. Accordingly, we find no error on the part of the trial court in allowing the jury to know Mr. Bagwell's prospective gross wages.

Regarding the award of \$30,000.00 for Stormy Leonard's loss of support, we note that the jury heard evidence on which it could reasonably conclude that Mr. Bagwell would have provided this amount. Stormy was six years old when her father died. At that time, he was paying for her out-of-pocket medical expenses, her school and after-school needs not provided by her mother, and other expenses and gifts. The jury could have reasonably concluded that Mr. Bagwell would have continued to pay these expenses and that these expenses would increase somewhat as Stormy matured. We conclude that the award of \$30,000.00 is supported by the record and is not an abuse of the jury's discretion.

Accordingly, these assignments of error are without merit.

Fourth Assignment of Error; Answer to Appeal First Assignment of Error

Both parties contest the jury's allocation of fault. The evidence in the record, however, supports a finding of fault on both parties. "As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault; therefore, an appellate court should only disturb the trier of fact's allocation of fault when it is clearly wrong or manifestly erroneous." **Bergeron v. Williams**, 05-0847, p. 12 (La.App. 1 Cir. 5/12/06), 933 So.2d 803, 812. Based on the evidence presented to the trial court, we cannot say the jury was clearly wrong in apportioning 50% of the fault to both Mr. Bagwell and Mr. Javius.

Accordingly, these assignments of error are without merit.

Fifth Assignment of Error

Ms. Creel argues that the award of \$100,000.00 in general damages for Mr. Bagwell's wrongful death is abusively low and should be increased. However, the discretion vested in the trier of fact in fashioning an award of general damages is great, and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La.1993).

While we might have made a higher award had we been sitting as the trier of fact, after a thorough review of the record, we conclude that a general damage award of \$100,000.00 is not below that which a reasonable fact finder could assess under the circumstances of this case.

Accordingly, this assignment of error is without merit.

Answer to Appeal Fourth Assignment of Error

SFB argues that the trial court erred in failing to assess 50% of the jury costs and meals to Ms. Creel. We note, however, that these awards are not contained in the judgment before us; nor is any such judgment contained in the record. Only a minute entry shows these provisions. Since we have no judgment on appeal addressing these awards, we lack jurisdiction to decide them. *See* La. C.C.P. art. 2088.

Accordingly, we pretermitt discussion of this assignment of error.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are to be split equally between Dawn Leonard Creel, as tutrix of and on behalf of her minor child, Stormy Marie Leonard, and Southern Farm Bureau Casualty Insurance Company.

AFFIRMED