Judgment rendered June 24, 2009
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 44,467-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

MARJORIE ROSE — Plaintiff-Appellee

versus

FREDDIE ROSE — Defendant-Appellant

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Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 07-1404

Honorable C. Wendell Manning, Judge

* * * * *

DONALD L. KNEIPP — Counsel for Appellant

JIM NORRIS — Counsel for Appellee

* * * * *

Before STEWART, CARAWAY and DREW, JJ.

CARAWAY, J.

An ex-wife sued her former husband for the damages she sustained as the result of a physical altercation between the couple during their marriage. The parties elected at the time of trial not to transcribe the testimony and the trial court ruled in favor of plaintiff. Following an unsuccessful motion for new trial, this appeal occurred. On the minimal record before us, we affirm.

Facts

The petition of Marjorie Rose ("Marjorie") alleged that on March 2, 2007, her husband, Freddie Rose ("Freddie"), became angry at her when she reached for a checkbook to determine what he had done with certain funds. Marjorie alleged that Freddie grabbed her arm in an attempt to retrieve the checkbook from her. She claimed that as she attempted to retreat, Freddie grabbed her from behind and threw her down on the floor and began to beat her with his hands. Defendant ceased hitting his wife when he obtained the checkbook from her. Marjorie alleged that as a result of the altercation, she suffered physical injuries including contusions and bruises to her right maxilla. She also claimed to have suffered significant pain and emotional distress from the incident. Marjorie's suit prayed for medical expenses, property damage, damages for past, present and future physical pain and suffering, mental anguish and distress, and the aggravation of a pre-existing condition.

Trial of this matter took place on May 15, 2008. The court minutes show that Freddie represented himself in proper person because his retained counsel had been allowed to withdraw from the case on April 9, 2008. The

minutes also indicate that "the parties declined to have the testimony/proceedings recorded by a Court Reporter." The trial court rendered judgment on May 27, 2008, as follows in relevant part.:

> [E]vidence was adduced on the merits of the petition for damages filed by MARJORIE ROSE; and the court after considering the law and finding the evidence to be in favor thereof, for the lengthy oral reasons assigned:
>
> IT IS ORDERED ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, MARJORIE ROSE, and against defendant, FREDDIE ROSE, in the full sum of THIRTY THOUSAND TWO HUNDRED THIRTY-TWO AND 02/100 DOLLARS ($32,232.02), together with legal interest from the date of judicial demand, April 19, 2007, until paid.

The court also assessed Freddie with expert witness fees and court costs.

On June 5, 2008, Freddie filed a motion for new trial through his newly-retained counsel on the grounds that he was unrepresented at the taking of the deposition of one of the expert witnesses submitted into evidence by Marjorie. Freddie also argued that the damage award was excessive and that he did not have the opportunity to adequately question Marjorie's treating physician.

After a hearing on the motion on September 30, 2008, the trial court rejected the request for new trial and rendered oral reasons as follows:

> The shock and the horror of being chased down in her home by this man, battered and struck in the face and about her body. Thrown to the ground first. How she feared for her life. She did not know of his intent. Would he kill her? The physical bruising that she sustained, not just for a day or two days or three days or a week, but for several weeks. The still visible signs, the mental anguish, the embarrassment. All of that I well articulated on the record when I gave my reasons for judgment. So the quantum I felt was fair and reasonable based upon the totality of the evidence presented here in court. Not based on

> whatever Dr. Yeager said in his deposition. But based upon the testimony of the Plaintiff and the other live witnesses including her family members. Based upon that testimony the quantum was reasonable.
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> * * * * *
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> What I received from your client, Mr. Rose, were inconsistencies in his testimony. A total lack of credibility. A denial of any guilt. A denial of every how many times he struck her. Although the physical evidence, that is the photographs of the bruising showed multiple strikes. Where he said he may have hit her once. Total lack of credibility. Considering all factors I felt the quantum was certainly proper in this case.

Following the judgment denying Freddie's motion for new trial, this appeal ensued. Freddie argues error in the trial court's admission into evidence of an expert witness's deposition, the amount of damages awarded and the denial of the new trial motion.

Discussion

We will initially address the issue raised by Marjorie in brief regarding the jurisdiction of this court to hear the appeal. She claims that Freddie's motion for appeal solely urged review of the October 8, 2008 judgment denying his motion for new trial which is a non-appealable judgment.

Appeals are favored in law, must be maintained whenever possible, and will not be dismissed for mere technicalities. *Parfait v. Transocean Offshore, Inc.,* 07-1915 (La. 3/14/08), 980 So. 2d 634; *Smith v. Hartford Accident and Indem. Co.,* 254 La. 341, 223 So. 2d 826 (1969); *Fruehauf Trailer Co. v. Baillio,* 252 La. 181, 210 So. 2d 312 (1968); *Kirkeby-Natus Corp. v, Campbell,* 250 La. 868, 199 So. 2d 904 (1967). Any doubt concerning the validity of the appeal should be resolved in favor of the

appellant to the end that an appeal can be sustained. *Smith, supra; Fruehauf, supra; Kirkeby-Natus Corp., supra*.

The denial of a motion for new trial is an interlocutory judgment which does not cause irreparable injury and is not appealable. *Brister v. Continental Ins. Co.,* 30,429 (La. App. 2d Cir. 4/8/98), 712 So. 2d 177; *Hayes v. Hayes,* 607 So. 2d 3 (La. App. 2d Cir. 1992). However, when the motion for appeal refers to a specific judgment denying a motion for new trial yet the appellant exhibits a clear intention (from his brief, argument and evidence as a whole) to appeal instead the judgment on the merits, then the appeal should be considered. *Smith, supra; Fruehauf, supra; Kirkeby-Natus, supra; Brister*, *supra*; *Hayes, supra*.

In this case, the record discloses that the judgment on the merits was rendered on May 27, 2008. The judgment denying Freddie's new trial was signed by the trial court on October 8, 2008; notice of that judgment was mailed on October 14, 1998. Freddie's motion and order for devolutive appeal was granted by the trial court on December 8, 2008. Specifically Freddie moved for appeal of the judgment "rendered on September 30, 2008, signed on October 8, 2008, . . . denying defendant's Motion for New Trial in the above entitled and numbered cause." The order granting the appeal described the judgment in the same way.

While the order of appeal mentions only the judgment denying Freddie's motion for new trial, a review of the entire record before us shows Freddie's intent to appeal the merits of his case. The facts of this case are very similar to those involved in *Fruehauf, supra*. Like the present

appellant, the defendant there filed a motion for appeal urging that he was "aggrieved by the judgment rendered and signed on August 8, 1996, and that he desires to appeal devolutively therefrom." The August 8, 1996 judgment was a denial of defendant's motion for new trial. The court of appeal dismissed the appeal on the grounds that defendant had appealed a non-appealable judgment. The Louisiana Supreme Court reversed, finding that "the record affirmatively discloses that defendant felt aggrieved by the trial court's judgment of May 18, 1966 [the final judgment on the merits]" because the appellant could only be aggrieved by a money judgment rendered against him. In *Kirkeby-Natus Corp., supra*, the Supreme Court considered the fact that the only appealable judgment was a judgment on the merits in determining that an appellant intended to appeal from a judgment on the merits rather than denial of new trial.

Such factors are relevant here. Although Freddie specifically makes an argument regarding the error in the denial of his motion for new trial, he also raises issue with the excessiveness of the damages award and certain procedural actions of the trial court at the trial on the merits. While Freddie is precluded from appealing the denial of the motion for new trial, the remainder of his arguments on appeal relate solely to the trial on the merits. Thus, as a whole, the record shows that Freddie was aggrieved by the May 27, 2008 judgment, the only appealable judgment. The inclusion of only the new trial hearing transcript does not alter our view, because a transcript of the trial on the merits was not available. Considering these facts and that appeals are favored in the law, Freddie's appeal is maintained.

Regarding the merits of Freddie's claims, the record contains neither a transcript of the trial on the merits nor a narrative of facts. As noted above, the parties elected not to transcribe the trial on the merits. The photographic depictions of Marjorie's alleged injuries, the expert witness's deposition, the documentation of criminal charges against Freddie and a protective order are the only evidence from the trial in the appellate record.

La. Const. art. 1, §19, provides as follows:

> No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

Regarding the record on appeal, La. C.C.P. art. 2130 provides:

> A party may require the clerk to cause the testimony to be taken down in writing and this transcript shall serve as the statement of facts of the case. The parties may agree to a narrative of the facts in accordance with the provisions of Article 2131.

La. C.C.P. art. 2131 provides:

> If the testimony of the witnesses has not been taken down in writing the appellant must request the other parties to join him in a written and signed narrative of the facts, and in cases of disagreement as to this narrative or of refusal to join in it, at any time prior to the lodging of the record in the appellate court, the judge shall make a written narrative of the facts, which shall be conclusive.

The appellant has the duty to secure either a transcript of the trial or a narrative of facts; the inadequacy of the record is imputable to the appellant. *Steinhoff v. Steinhoff,* 03-24 (La. App. 3d Cir. 4/30/03), 843 So. 2d 1290; *Preuett v. Preuett,* 517 So. 2d 848 (La. App. 3d Cir. 1987). In the case of a lack of a transcript or narrative of facts in the appellate record, the judgment of the trial court is presumed to be supported by competent evidence.

Succession of Rock v. Allstate Life Ins. Co., 340 So. 2d 1325 (La. 1976); *Raia v. WWL-TV,* 247 La. 1095, 176 So. 2d 390 (1965); *Maurer v. Haefner,* 192 La. 929, 189 So. 579 (1939); *Williams v. Burnham*, 185 La. 791, 171 So. 33 (1936); *City of Shreveport v. Maroun,* 134 La. 148, 63 So. 857 (1913); *Simmons v. Yelverton,* 513 So. 2d 504 (La. App. 2d Cir. 1987); *Succession of Walker,* 276 So. 2d 372 (La. App. 2d Cir. 1973), *writ granted,* 279 So. 2d 691 (La. 1973), *affirmed,* 288 So. 2d 328 (La. 1974). Said another way, review is limited to determining whether the trial court correctly applied the law to the facts it found. *Steinhoff, supra.* An exception to this rule exists when the trial court has supplied extensive written reasons for judgment which the appellate court may consider in lieu of a transcript or a narrative of facts. *Simmons*, *supra*.

The partial trial record before us, which includes the photographs of the injuries to Marjorie, is insufficient to overcome the presumption of competent evidence in support of the trial court's judgment in this case. Moreover, as noted above in the trial court's oral reasons for denying Freddie's new trial, it is clear that the trial court accepted Marjorie's testimony that she experienced not only tremendous physical pain and suffering from the blow to her face for several weeks after the accident, but equal emotional trauma as the result of Freddie's actions. It is also obvious that the trial court rejected Freddie's trial testimony to the contrary. Such credibility determinations remain within the sound discretion of the trial court and are generally not disturbed on appeal. Nor is there anything before us regarding the procedural error claimed by Freddie, other than the

trial court's statement that he did not base his judgment on the deposition testimony. Without more, Freddie has failed to overcome the presumption that the judgment of the trial court is correct. On this record, the judgment of the trial court is affirmed. Costs of this appeal are assessed to appellant.

AFFIRMED.