JAMES DANUB STANSBURY	*	**NO. 2002-CA-0907**
VERSUS	*	**COURT OF APPEAL**
REGIONAL TRANSIT AUTHORITY, TRANSIT MANAGEMENT OF SOUTHEAST LOUISIANA, INC. AND MAMIE D. HAYES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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BYRNES, C.J., CONCURS IN PART AND DISSENTS IN PART:

I dissent in part based on my conclusion that the amount of the trial court's $80,000 general damage award to the plaintiff in the judgment notwithstanding the verdict ("JNOV"), cannot be reduced where the defendants, Regional Transit Authority and others (collectively "RTA"), did not appeal or answer the appeal.

La. C.C.P. art. 2133 provides:

> **Art. 2133. Answer of appellee; when necessary**
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> A. An appellee shall not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. In such cases, he must file an answer to the appeal, stating the relief demanded, not later than fifteen days after the return day or the lodging of the record whichever is later. The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment

> rendered against him in favor of the appellant and of which he complains in his answer. Additionally, however, an appellee may by answer to the appeal, demand modification, revision, or reversal of the judgment insofar as it did not allow or consider relief prayed for by an incidental action filed in the trial court. If an appellee files such an answer, all other parties to the incidental demand may file similar answers within fifteen days of the appellee's action.
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> B. A party who does not seek modification, revision, or reversal of a judgment in an appellate court, including the supreme court, may assert, in support of the judgment, any argument supported by the record, although he has not appealed, answered the appeal, or applied for supervisory writs.

A judgment cannot be changed in favor of an appellee who has neither appealed nor answered his adversary's appeal. *Jones v. Gillen*, 564 So.2d 1274 (La. App. 5 Cir. 1990), *writs denied* 568 So.2d 1080, 1081; *Arrow Const. Co., Inc. v. American Emp. Ins. Co.*, 273 So.2d 582 (La. App. 1 Cir. 1973).

In *U.S. Fidelity and Guar. Co. v. Hurley*, 96-1421, p. 9-10 (La. App. 4 Cir. 8/6/97), 698 So.2d 482, 487, this court stated:

> In its appellate brief, USF & G argues that Ms. Bryson should be held liable for one hundred percent of the damages because the fire was probably started by her guest, Mr. Stein. Alternatively, USF & G contends that as one of the two lessees present that night, she should have been cast in judgment for one-half of its losses. However, because USF & G filed neither an appeal

> nor an answer to Ms. Hurley's appeal, the judgment below cannot be modified in its favor. La.Code Civ. Proc. Ann. arts.2082, 2133; *Matthews v. Consolidated Companies, Inc.*, 95-1925 (La.12/8/95), 664 So.2d 1191; *Eubanks v. Hoffman*, 96-0629, p. 8 (La.App. 4th Cir. 12/11/96), 685 So.2d 597, 601. Finding that Ms. Bryson, one of three lessees, is liable under Civil Code article 2723 for at least one-third of the lessor's damages, we express no further views concerning the extent of her liability nor the viability of her claims against Ms. Hurley and Mr. Stein.

In *Saacks v. Saacks*, 97-570, 3-4 (La. App. 5 Cir. 1/27/98), 708 So.2d 1077, 1078-1079, *writ denied*, 98-0502 (La. 4/3/98), 717 So.2d 232, the Fifth Circuit noted:

> On appeal, Mrs. Saacks first argues that the trial judge erred in awarding her only 25% of the United Gaming, Inc. settlement funds, rather than 50% due her under the community. Second, she argues that the trial judge erred in refusing to declare two pieces of property to be community property. The properties are located in New Orleans, Louisiana on West Robert E. Lee Boulevard and at 800-808 Baronne Street and 834-36 Julia Street. Third, Mrs. Saacks asserts that the trial judge erred in requiring her to account for all of the community assets in her possession, while not requiring Mr. Saacks to do so. Fourth, she contends that the trial judge erred in declaring Mr. Saacks' gun collection to be his separate property.
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> We note at the outset that Mr. Saacks has neither answered the appeal nor filed a cross appeal. Nevertheless, Mr. Saacks raises specifications of error in his brief and requests this court to consider these pursuant to La. C.C.P. art. 2133(B) [FN1 omitted] and *Barr v. Smith*, 598

So.2d 438, 443 n. 2 (La.App. 2nd Cir.1992) on the basis that no modification of the judgment would result. He argues that if this court finds reversible error, as asserted by Mrs. Saacks, it should offset that error with those errors alleged by him. The errors alleged by Mr. Saacks, should these have merit, would result in a modification of the judgment before us, the effect of which would be a different distribution of the property than that which is contained in the judgment. However, he argues that this court should take notice that the parties have now liquidated these assets and, as such the liquidation has resulted in a "balance sheet." Thus, he asserts that the judgment before this court should be affirmed by allowing the alleged errors raised by him to offset any alleged errors raised by Mrs. Saacks. We disagree with such an analysis and find *Matthews v. Consolidated Companies, Inc.*, 95-1925 (La.12/8/95) 664 So.2d 1191, 1192, *rehearing denied*, 95-1925 (La.1/26/96) 666 So.2d 662 dispositive. The *Matthews* court explained:

> While a defendant who has not appealed or answered the appeal and who did not seek modification, revision or reversal of that judgment may assert in support of that judgment any argument supported by the record under La. C.C.P. art. 2133, *he may not obtain a modification of the judgment without appealing or answering the appeal* [emphasis added.]

In the instant case, Mr. Saacks does not merely raise an "argument" supported by the record, but instead argues for a different apportionment of the assets. La. C.C.P. art. 2133; *Matthews v. Consolidated Companies, Inc.*, 664 So.2d at 1192. Should this court find merit in the alleged errors raised by him, the effect would be a modification of the partition judgment. . . .

In *Matthews v. Consolidated Companies, Inc.*, 95-1925 (La. 12/8/95), 664 So.2d 1191, the Louisiana Supreme Court found that a defendant who has not appealed or answered the appeal and who did not seek modification, revision or reversal of the judgment may assert in support of that judgment any argument supported by that judgment; however, the defendant may not obtain a modification of the judgment without appealing or answering the appeal. The appellate court could not reduce the plaintiff's damage award in the personal injury action although the plaintiff placed at issue the amount of the damage award.

In *Matthews, id.,* the plaintiff claimed that he was entitled to an increase in damages. The Louisiana Supreme Court stated:

> Since only plaintiff appealed, and defendants did not appeal or answer plaintiff's appeal, the total amount of damages awarded by the jury to plaintiff cannot be reduced by the appellate court because to so do would result in a modification in favor of the non-appealing defendant, contrary to Louisiana law. La.CCP art. 2133; *Jordan v. Travelers Ins. Co.*, 257 La. 995, 245 So.2d 151 (1971); *Williams v. City of Baton Rouge*, 252 La. 770, 214 So.2d 138 (1968); and *Britt Builders, Inc. v. Brister*, 618 So.2d 899 (La.App. 1st Cir.1993). While a defendant who has not appealed or answered the appeal and who did not seek modification, revision or reversal of that judgment may assert in support of that judgment any argument supported by the record under La.CCP art. 2133, he may not obtain a modification of the judgment without appealing or answering the appeal. [Emphasis added.]

> Accordingly, the court of appeal erred in reducing the damages judgment to an amount less than the trial court judgment when plaintiff was the only party who perfected an appeal. The writ application is granted summarily in part and the award of $45,671.99 in total damages plus expert witness fees as set forth in the trial court judgment is hereby reinstated. Further, the court of appeal implicitly rejected plaintiff's claim that he was entitled to an increase in damages over that awarded by the jury. We find no error in that conclusion and further find no merit in plaintiff's argument for an increase in damages. Therefore, the writ application is otherwise denied.

In *Succession of Doll v. Doll,* 593 So.2d 1239 (La. 1992), the Louisiana Supreme Court found that the issue of characterization of timber revenue and mineral bonuses could be considered on appeal of an action brought by an heir seeking the return of property to his father's succession, along with the revenues produced, even if the heir failed to seek a writ on the rejected claim, and failed to answer or oppose the writ application of the property owner. The heir did not seek reversal or modification of appellate court ruling where the ruling was favorable to the heir, and thus, the heir could assert any argument supported by the record. However, in the present case, the damage award was unfavorable to the defendant, RTA, and RTA did not argue that the damage award to the plaintiff/appellee should be decreased.

In *Bevpac Properties v. Stakelum,* 94-0395 (La. App. 4 Cir. 9/29/94),

645 So.2d 1170, *writ denied* 95-0107 (La. 3/10/95), 650 So.2d 1185, the defendant/appellant, Stakelum, appealed the judgment awarding $40,000 to the plaintiff and intervenors. This Court held that the appellees/plaintiffs who failed to appeal or answer the appeal were not entitled to affirmative relief although, in light of the trial court's error in estimating the amount of the setoff, the appellees would have been entitled to a net award which was more than the amount awarded by the trial court.

In *Thomas v. St. Charles Parish,* 613 So.2d 698 (La. App. 5 Cir. 1993), the plaintiff/car owner appealed, requesting an increase in damages. The appellate court could not reduce a $1,075 award to the automobile owner for loss of the auto's use caused by the wrongful seizure or conversion of the auto by the sheriff's office, where the sheriff's office did not appeal or answer the owner's appeal of the award.

In *Mackie v. Crown Zellerbach Corp.,* 444 So.2d 166 (La. App. 1 Cir. 1983), the appellate court was powerless to modify or change the judgment in the employee/appellee's favor and was limited to determining whether the evidence supported the conclusion that the employee's injury was job related where the employee failed to appeal or answer the appeal.

In *Roberts v. BE&K Const. Co.,* 27,116 (La. App. 2 Cir. 6/28/95), 658 So.2d 314, the court appeal declined to amend the judgment in respect to the

amount of the penalty imposed, where the workers' compensation claimant did not appeal or answer the appeal.

In the present case, only the plaintiff appealed the amount of the damage award. I would not decrease the damage award in favor of the RTA because the RTA did not appeal or answer the appeal. Accordingly, I would affirm the trial court's $80,000 general damage award on JNOV.