

**ROSLYN DAVIS AND
MURPHY DAVIS**

VERSUS

**DR. EDWARD LAZARUS AND
SHEILA FONTENOT, CRNA**

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NO. 2004-CA-0582

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

TOBIAS, J., CONCURS IN THE RESULT AND ASSIGNS REASONS.

I respectfully concur in the result.

This case has an unusual set of procedural defects that should preclude this court for the present from ruling upon the trial court's granting of the motion for judgment notwithstanding the verdict ("JNOV").

La. C.C.P. art. 2087D states that "[a]n order of appeal is premature if granted before the court disposes of *all* timely filed motions for new trial or judgment notwithstanding the verdict. The order becomes effective upon the denial of such motions." [Emphasis supplied.]

The trial court rendered a judgment on 15 October 2003 that granted both the plaintiffs' motions for JNOV and new trial. Then, on 5 December 2003, the trial court rendered an amended judgment that I find should only be read as superseding *in its entirety* the 15 October 2003 judgment. The 5

December 2003 judgment granted the motion for JNOV *but is entirely silent* with respect to the motion for new trial.

La. C.C.P. art. 1811C states:

(1) If the motion for a judgment notwithstanding the verdict is granted, *the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed and shall specify the grounds for granting or denying the motion for a new trial.* If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment.

(2) *If the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court orders otherwise.*

(3) If the motion for a new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. [Emphasis supplied.]

I do not find that the two judgments (of 15 October and 5 December 2003) can be read together for I find that the 5 December 2005 judgment clearly demonstrates that the trial court has not ruled upon the motion for new trial in this case; the court withdrew its ruling on the motion for new trial in its 5 December 2003 judgment. The present appeal is therefore, in my view, premature until the trial court rules upon that motion for new trial. I therefore think that the majority errs in presently reviewing the trial court's granting of the JNOV.

However, I find that I am bound by the Louisiana Supreme Court's ruling in *VaSalle v. Wal-Mart Stores, Inc.*, 01-0462 (La. 11/28/01), 801 So.2d 331, which holds that if the motion for JNOV has been improperly granted and the trial court fails to rule upon a motion for new trial that was coupled with the motion for JNOV, judicial economy dictates that the appellate court should rule upon the motion for new trial. *Id.* at pp. 17-18, 801 So.2d at 342. Because I find the majority's analysis that the trial court erred in granting the JNOV is correct as a matter of law, although in my view prematurely decided, I am required to concur in the result.

Given my druthers and following La. C.C.P. arts. 1811 and 2087, I would (1) vacate the trial court's 5 December 2003 judgment, (2) remand the case to the trial court to render a new judgment on the motion for JNOV, and (3) remand the case to the trial court for a formal ruling upon the motion for new trial, either (a) granting it, (b) conditionally granting it by following the mandate of La. C.C.P. art. 1811C, or (c) denying it. Upon so ruling on both the motions for JNOV and new trial, the appeal would be ripe for consideration.