NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1042

MARIE BLANCHARD RADAU

VERSUS

WILLIE CHARLES RADAU, III

Judgment rendered: June 8, 2007

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On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, State of Louisiana
Suit Number 135,728
The Honorable David W. Arceneaux, Judge Presiding

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BEFORE: PARRO, PETTIGREW, DOWNING, HUGHES, AND WELCH, JJ.

Hughes, J., dissents with reasons in part and concurs in part.

Pettigrew, J. Concurs with Results and assigns Reasons

Welch J. concurs with out reasons.

Parro, J. concurs in part and dissents in part for the reasons assigned by Judge Hughes.

DOWNING, J.

Ms. Marie Blanchard, formerly Ms. Marie Blanchard Radau, appeals a judgment entered pursuant to La. R.S. 9:2801 that partitioned the community property acquired during her marriage to Mr. Willie Charles Radau and adjudicated the claims arising from their community regime. For the following reasons, we reverse in part, affirm in part, and remand for further proceedings.

After a marriage of nearly twenty years, Ms. Blanchard and Mr. Radau were divorced on August 9, 2002. In June 2003, Mr. Radau filed a petition for judicial partition of community property. Trial was held on six separate dates between December 11, 2003 and August 3, 2004, at which time the trial court took the matter under advisement. The trial court rendered judgment on March 30, 2005, which was filed into the record on May 2, 2005, together with 108 pages of reasons for judgment.

On May 10, 2005, Ms. Blanchard filed a motion for new trial. On July 11, 2005, the trial court ordered a new trial for reargument only on five of nineteen asserted issues. The trial court entered an amended judgment on October 14, 2005 granting Ms. Blanchard some of the relief she sought. The trial court also issued another 16 pages of reasons. Ms. Blanchard now appeals, asserting sixteen assignments of error, which we discuss herein.

DISCUSSION

First assignment of error: date of determination of community debt

Ms. Blanchard argues, citing no law or jurisprudence, that the trial court erred in valuing the community assets as of the date of the original trial while determining the total community debt as of the date of the new trial. Ms. Blanchard cites no law for this proposition, but argues that the

"bifurcation of the issues did not therefore present a comprehensive review of the total community debt picture as of the last date of trial."

Louisiana Revised Statutes 9:2801A(4)(a) provides that the court shall value the assets as of the time of trial on the merits, determine the liabilities, and adjudicate the claims of the parties. Here, the trial court did value the assets of the community as of the trial on the merits, but it granted a partial new trial on the post-trial rental income and expenses attributable to community immovable property to consider the effect or rental revenue and expenses after the date of the original judgment. The trial court then awarded all Ms. Blanchard's claimed expenses that directly related to the operation of these rental properties.

While certain values may have changed between the trial, the rendition of judgment, and the date of the new trial, it appears the trial court complied with the law in its valuation of community assets. Further, we cannot say the trial court abused its discretion in limiting the new trial in this regard to ensuring that proper credit was given for post-trial income and expenses.

This assignment of error is without merit.

Second assignment of error: Willie Radau's retirement account

Ms. Blanchard argues that the trial court erred in awarding to Mr. Radau the entirety of his Sheriff's Association Pension Plan since it is a community asset that should be partitioned. This argument, however, lacks merit. Louisiana Revised Statutes 9:2801A(4)(c) provides that "[t]he court shall allocate or assign to the respective spouses all of the community assets and liabilities. In allocating assets and liabilities, **the court may divide a particular asset or liability equally or unequally or may allocate it in its entirety to one of the spouses.**" (Emphasis added.) Here, while the trial

court did allocate Mr. Radau's pension plan to him, it also allocated Ms. Blanchard's pension plan to her. Further, it did a generally careful and thorough job of equally allocating the community assets and liabilities. We note Ms. Blanchard argued at trial that Mr. Radau's pension plan entitled him to receive income at a younger age than hers and may, therefore, have had more value, but she presented no evidence to support this contention.

Accordingly, we find no error in this regard by the trial court.

Third assignment of error: mathematical errors

In this assignment of error, Ms. Blanchard argues that the trial court committed certain mathematical errors. The record shows, however, that the trial court corrected the errors complained of in the new trial. Accordingly, this assignment of error lacks merit.

Fourth assignment of error: post-trial income and expenses

In this assignment of error, Ms. Blanchard argues that the trial court erred "in failing to properly take into account post-trial rental income and expenses of Marie Blanchard." However, the record shows that in the new trial, the trial court was very deliberate and careful in considering income and in awarding all Ms. Blanchard's claimed expenses that directly related to the operation of these rental properties. Accordingly, we disagree with Ms. Blanchard's arguments.

We acknowledge Ms. Blanchard's arguments that she is allowed no compensation for her labor in continuing to operate the rental business. But as she acknowledged in brief, "She has managed the property for the benefit of both parties ... ." Although Mr. Radau may have been a beneficiary, her work protected the value of her assets.

Ms. Blanchard cites no law or jurisprudence favoring her argument; nor can we find any. Accordingly, we find no merit in this assignment of error.

Fifth assignment of error: Fournier note

Here, Ms. Blanchard argues that the trial court erred in making erroneous calculations regarding the Fournier note. The trial court did not grant a new trial regarding this note. She asserts that her claims in this regard are fully supported by her Exhibit P112 and her testimony.

However, the trial court credited only those expenses supported by evidence of "true and actual" payment. It disallowed or did not accept her other claims. The trial court was not manifestly erroneous in these rulings.

Accordingly, we find no merit in this assignment of error.

Sixth assignment of error: South Louisiana Bank Liability

In this assignment of error, Ms. Blanchard asserts that the trial court erred in making an incorrect calculation and determination of the South Louisiana Bank liability. We agree in part.

In its written reasons, the trial court said that it would allocate this debt in the amount of $6,370.21 to Ms. Blanchard because it lacked sufficient proof that she had paid it. However, in its final judgment it failed to do so. We conclude that this allocation is reasonable and is not manifestly erroneous. Accordingly, we will direct the trial court on remand to make this debt an obligation of Ms. Blanchard so that she will be primarily liable for its payment should demand be made.

However, the trial court's reasons and calculations in connection with the Fournier note show that sums in the correct amount were in Ms. Blanchard's possession and were subtracted from the proceeds of the

Fournier note to satisfy this obligation. Accordingly, no further monetary allocation or reimbursements are necessary.

This assignment of error has partial merit.

Seventh assignment of error: rental account accounting

In this assignment of error, Ms. Blanchard alleges that the trial court "erred in failing to properly characterize the rental account and erred as a matter of law in assessing a fiduciary obligation upon Marie Blanchard in performing this accounting." We disagree.

First, there is no evidence in the record that the trial court imposed any fiduciary duty on Ms. Blanchard. Again, she cites no law or jurisprudence from which we could imply such imposition.

Second, in extensive reasons, the trial court considered all the evidence introduced in connection with the rental account and determined what it reasonably concluded to be the rental income. Next, it computed the expenses associated with the rental property and supported by the record. It then ordered appropriate reimbursments and accountings.

Ms. Blanchard points to no specific error, and we conclude that the trial court was not manifestly erroneous in its findings or procedure.

This assignment of error lacks merit.

Eighth assignment of error: effect of prior judgment

Ms. Blanchard argues that the trial court erred in failing to consider the effect of a prior judgment regarding community debts in giving credit to Mr. Radau for funds he repaid to her. The court allowed Mr. Radau the credit "because the expenses about which she complained have been otherwise considered by the court and will be resolved by this community property partition."

Here, other than complaining that Mr. Radau stole the returned $1,600.00 pursuant to a court order, Ms. Blanchard does not identify the underlying expenses at issue, and she fails to show that the trial court did not otherwise consider and resolve those issues as it said. She points to no evidence in the record to support her assertions in this regard. Louisiana Uniform Rules – Courts of Appeal, Rule 2-12.4 requires that argument in brief "shall include a suitable reference by volume and page to the place in the record which contains the basis for the alleged error." The rule continues to state that the "court may disregard the argument on that error in the event suitable reference to the record is not made."

After carefully reviewing the exhibits and testimony contained in the record, we conclude that Ms. Blanchard has failed to demonstrate that the trial court erred regarding the credit it gave Mr. Radau in this regard.

This assignment of error is without merit.

Ninth assignment of error: First USA account

The trial court ordered Ms. Blanchard to pay Mr. Radau $3,350.00 "representing funds she received after the community property regime terminated for which Mr. Radau is not liable on his credit card account . . . ." On review of the record, we conclude the trial court did not err in making this ruling.

This assignment of error is without merit.

Tenth assignment of error: Ford Aspire

Here, Ms. Blanchard argues that Mr. Radau converted an automobile bought for the use of one of their children for his personal use. The trial court, however, disallowed this claim finding that there was no documentary evidence the automobile was ever titled in his name, that the evidence did not establish when the alleged conversion took place, or that he benefited

financially from the conversion. The trial court found that any funds derived from the sale of the Ford Aspire was used for the benefit of their daughter to acquire a 2003 Neon automobile. Ms. Blanchard acknowledged in testimony that their daughter was in possession of the vehicle at the time of trial.

While some of the evidence may have been subject to two views, we conclude the trial court was not clearly wrong in concluding Ms. Blanchard failed to prove this claim.

This assignment of error is without merit.

Eleventh assignment of error: allowed reimbursements

Here, Ms. Blanchard argues that the trial court erred in calculating her reimbursement entitlements. She complains that the trial court treated her reimbursement claims differently from those of Mr. Radau, resulting in mathematical error.

We disagree. The trial court's extensive written reasons fully explain the basis for reimbursements it ordered. Its findings are not manifestly erroneous. It only ordered 100% reimbursement on charges incurred after the termination of the community.

This assignment of error is without merit.

Twelfth assignment of error: disallowed reimbursements

Again citing no law or jurisprudence, Ms. Blanchard argues that the trial court erred in excluding certain debts claimed by her as community debts paid by her.

She first argues that the trial court erred in excluding from consideration items allegedly valued at $7,146.57 because they were not included on Ms. Blanchard's amended sworn detailed descriptive list. The trial court ruled in its reasons for judgment that it would consider those items

raised only by the pleadings and excluded consideration of the alleged items. Specifically, the trial court stated, "To the extent evidence was introduced beyond the items listed for claims on Mrs. Radau's sworn detailed descriptive list, as amended, the court will disregard the same, and consider only those claims asserted by way of pleadings."

This assignment of error has merit. While a trial court has broad discretion in adjudicating issues raised in a proceeding for partition of the community regime, **Smith v. Smith**, 95-0913, p. 10 (La.App. 1 Cir. 12/20/96), 685 So.2d 649, 655, we are aware of no principle of law that allows a factfinder to disregard properly admitted evidence. We conclude, therefore, that the trial court erred as a matter of law in failing to consider and properly weigh the following items of evidence, as detailed in its written reasons:[1]

AOL Online Service (not claimed on her list)	23.90
Cingular Wireless (partial)	5.12
Check 9000 on August 2, 2002	200.00
Payoff of house mortgage on December 17, 2002	4,750.00
Check 1152 to cash on 6/24/03	50.00
Check 1092 to cash on 8/15/03 (for grass cutting)	40.00
Check 1212 to Edward Lewis on 7/28/03 (for grass)	40.00
Check 1095 to Edward Lewis on 9/3/03 (Verret Street)	25.00
Check 1097 to Edward Lewis on 9/13/03 (Verret Street)	40.00
Check 1219 to Hibernia on 9/23/03	1,426.11
Check 1221 to Collection Bureau on 10/14/03	246.44
Unknown credit card paid February 24, 2003	300.00
Total:	$7,146.57

Since we are unable to determine with certainty which of these items "are considered as part of [Ms. Blanchard's] reimbursement claims elsewhere" in the reasons for judgment, we will remand this matter to the

[1] Nothing in the record suggests that the trial court did anything other than what it said it did: it disregarded evidence it previously admitted into the record. Accordingly, we do not address whether and under what circumstances a trial court may amend its prior evidentiary rulings; since no argument was made that the evidence was improperly admitted, we do not address whether a trial court in a civil case can disregard evidence it determines to have been improperly admitted; since the trial court did not weigh the evidence, we do not consider whether the evidence was given appropriate weight. We do conclude, however, that a factfinder must consider and weigh admitted evidence.

trial court with instruction for it to give proper weight to these items of evidence submitted by Ms. Blanchard for reimbursement and to amend the judgment accordingly.

Regarding her other claims for disallowed reimbursements, the trial court adequately explained its reasons for disallowing these claims. The trial court's findings are reasonable and supported by the evidence. Accordingly, we cannot conclude the trial court erred in disallowing these other reimbursement claims Ms. Blanchard addresses in this assignment of error.

This assignment of error has merit, as discussed above.

Thirteenth assignment of error: specific items of movable property

A) Antique pie safe

Ms. Blanchard argues that the trial court erred in finding an inflated value for this item and in finding that it was community property rather than her separate property. She argues that her mother and daughter testified that this item was a gift to her from her grandmother.

Regarding the valuation of this asset, Ms. Blanchard and Mr. Radau stipulated that they would accept the value assigned by the expert appraiser. The trial court assigned this value; therefore, it committed no error in this regard.

Regarding the purported testimony, we cannot find any testimony in the record reflecting that this antique pie safe was given to Ms. Blanchard as her separate property. Again, as throughout her appellate brief, she has failed to provide record references containing the bases for her alleged error.

This assignment of error is without merit.

B) Tricycle

The expert appraiser testified that he made a mistake in valuing this item at $435.00. He testified that the correct value should be $65.00.

This assignment of error has merit. We direct the trial court on remand to reflect in its judgment the correct valuation of $65.00.

C) Antique Brass Bell

While the appraiser did not see the bell at issue, he valued the bell at $275.00 based on his knowledge and experience. Based on Mr. Radau's testimony, the trial court found the item to be in Ms. Blanchard's possession. The trial court was not manifestly erroneous in its valuation or allocation.

This assignment of error lacks merit.

D) Dishes

The trial court valued two sets of dishes at $100.00. The record shows, and Mr. Radau acknowledges, that there is only one set of dishes. Accordingly, we will direct the trial court on remand to reflect in its judgment Ms. Blanchard's possession of one set of dishes valued at $100.00.

E) Gas Burner

Ms. Blanchard argues that her mother testified that this item was given to her as a gift and is, therefore, her separate property. We find no such testimony in the record. We again note the lack of appropriate reference in the record to indicate support for her contention. Accordingly, we conclude the trial court did not err in including this item as community property.

This assignment of error lacks merit.

F) Armoire

While Ms. Blanchard claims that this item is her separate property, we can find no evidence in the record to support this contention. Again, Ms. Blanchard's brief provides no record references pointing to evidence in support of her argument. Accordingly, we conclude the trial court did not err in finding this item to be a community asset.

This assignment of error lacks merit.

Fourteenth assignment of error: vehicle allowance to Mr. Radau

Here, Ms. Blanchard argues that the trial court erred "in allowing a vehicle payment allowance" to Mr. Radau "in spite of the clear provisions of a prior judgment in the same proceedings." In interpreting that judgment, however, the trial court concluded that "the judgment was not intended to prevent consideration of the community balance due each creditor with regard to each vehicle, later at the time of partition." It then noted that the stipulation between the parties contradicted a different interpretation and bolstered its interpretation.

This assignment of error lacks merit.

Fifteenth assignment of error: credit for payment of separate debts

Ms. Blanchard claims that she should be reimbursed for payment of certain separate debts she paid on behalf of Mr. Radau after the community terminated. The trial court, however, allowed a lesser amount based on the evidences he submitted. The trial court's findings were not clearly wrong.

This assignment of error lacks merit.

Sixteenth assignment of error: denial of new trial

Ms. Blanchard argues that the trial court erred in failing to grant a full new trial and in limiting the new trial granted to five specific issues. The established rule in this circuit, however, is that the denial of a motion for

new trial is an interlocutory and non-appealable judgment.[2] **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 have thoroughly reviewed the judgment on the merits according to the assignments of error raised.

This assignment of error lacks merit.

DECREE

For the foregoing reasons, we conclude that the trial court erred in failing to allocate the debt to South Louisiana Bank in the amount of $6,371.21. We conclude the trial court erred in disregarding properly admitted evidence, even though these items were not included in Ms. Blanchard's sworn detailed descriptive list, regarding certain of Ms. Blanchard's reimbursement claims. We conclude that the trial court erred in valuing the tricycle at issue and a set of dishes.

Except as affected by these errors, we affirm the judgment of the trial court. We remand this matter to the trial court with instruction to consider the evidence admitted that was disregarded because it was not included on Ms. Blanchard's sworn detailed descriptive list, giving such evidence its due weight. We also instruct the trial court to recalculate the value of the assets

[2] 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.

and liabilities of the community and to amend the partition judgment to properly allocate them, consistently with our holdings herein.[3]

Costs of this appeal are to be split equally between Mr. Willie Charles Radau and Ms. Marie Blanchard.

REVERSED IN PART; AFFIRMED IN PART; REMANDED FOR FURTHER PROCEEDINGS

[3] We seriously suggest that the parties consider the cost of further pursuing this litigation against the benefits to be obtained and consider settling their remaining disputes before they decide to fight to the last tricycle.

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HUGHES, J. dissenting.

I disagree with that portion of the report in this case that remands the matter to the trial court with directions to consider the evidence introduced by Mrs. Radau, though without objection, at the trial of her claim for reimbursement of expenses related to the management of community property, which the trial court refused to allow in his subsequent written reasons for judgment. Even though the trial court did not so rule *during* the trial, evidentiary rulings are clearly interlocutory under LSA-C.C.P. 1841. **Miller v. Upjohn Co.**, 461 So.2d 676, 677 (La. App. 1 Cir. 1984). A trial court may modify a prior interlocutory ruling at any time prior to rendition of a final judgment on the merits. **LeBlanc v. Aysenne**, 2005-0297, p. 2 n.2 (La. 1/19/06), 921 So.2d 85, 88 n.2. When a trial court later determines that a prior interlocutory ruling was erroneous and/or required a contrary holding, he may revise the interlocutory ruling either on motion of a party or of the court's own accord without formal motion. **VaSalle v. Wal-Mart Stores, Inc.**, 2001-0462 (La. 11/28/01), 801 So.2d 331, 334-35. See also

Davis v. Farm Fresh Food Supplier, 2002-1401, p. 3 (La. App. 1 Cir. 3/28/03), 844 So.2d 352, 354.

Where a party to a community property partition fails to include an item in the detailed descriptive list filed with the court, a trial court may refuse to consider such an item. See **Dupree v. Dupree**, 41,572 (La. App. 2 Cir. 12/20/06), ___ So.2d ___ (2006 WL 3741881). LSA-R.S. 9:2801 provides the procedure for judicial partitions of community property and settlement of claims after dissolution of the marriage. Time periods for filing detailed description lists and traversals are set forth in this statute. For good cause shown, the court may extend this time period. **Id.** The **Dupree** court noted that courts have allowed amendment of these pleadings at various stages and even on appeal, citing **Washington v. Washington**, 493 So.2d 1227 (La. App. 2 Cir. 1986), **Smith v. Smith**, 95-0913 (La. App. 1 Cir. 12/20/96), 685 So.2d 649. However the **Dupree** court considered the following in evaluating such an amendment:

> La. C.C.P. art. 862 states, in pertinent part, that "a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief." Also, La. C.C.P. art. 1154 states, in pertinent part, "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading."
>
> Our courts have held that despite the broad language in Article 862, a trial court cannot decide issues which the litigants have not raised. ... This court may only grant relief warranted by the arguments contained in the pleadings and the evidence. ... A judgment rendered beyond the pleadings is a nullity; however, a trial court has the discretion to allow enlargement of the pleadings to conform to the evidence. ... The opposing party must have "fair notice" that the controversy included the particular relief at issue in order for the enlargement of pleadings doctrine to come into play. ...
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> In **Gauthier v. Gauthier**, 2004-198 (La. App. 3 Cir. 11/10/04), 886 So.2d 681, writ not considered, 2004-3019 (La. 2/18/05), 896 So.2d 15, the ex-husband appealed the decision of the trial court which refused to grant him an extension to file

> his descriptive list of assets and liabilities. The Third Circuit Court of Appeal held that the trial court did not find good cause to grant an extension and, therefore, did not abuse its discretion in partitioning the community property according to the detailed descriptive list provided by the ex-wife. As a result, the ex-husband was denied certain reimbursement claims against the ex-wife. See also **Brimer v. Brimer**, 95-592 (La. App. 3 Cir. 11/2/95), 664 So.2d 622,[1] and **Mathews v. Mathews**, 457 So.2d 746 (La. App. 2 Cir. 1984), for similar results.

The **Dupree** court concluded that the trial court did not err in refusing to allow Mrs. Dupree to expand her pleadings through the introduction of evidence at trial to include items not previously included on her detailed descriptive list because Mr. Dupree did not have "fair notice" that she intended to place the items at issue in the partition proceedings, distinguishing prior jurisprudence.

At least one prior decision of this court upheld a trial court decision to disallow a claim for reimbursement by a spouse who had not listed the claim in his detailed descriptive list. See **Godwin v. Godwin**, 533 So.2d 1009 (La. App. 1 Cir. 1988), writ denied, 537 So.2d 1165 (La. 1989).

I believe that in the **Radau** case the trial court could reasonably have concluded that the parties had ample opportunity to present all claims for reimbursement in their detailed descriptive lists filed prior to trial and that Mrs. Radau's attempt to expand the pleadings during the trial did not present Mr. Radau with "fair notice" that the excluded claims were to be made. Obviously if Mr. Radau did not have advance notice of these additional claims for reimbursement, via inclusion in Mrs. Radau's detailed descriptive list, he would not have had an opportunity to prepare a defense in advance of

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[1] In **Brimer v. Brimer**, the Third Circuit indicated that the proper procedural vehicle to assert a claim of reimbursement not previously listed in a party's detailed descriptive list is via a motion to amend the detailed descriptive list; however, the party must first have filed a detailed descriptive list. The court further noted that a party is precluded from filing a detailed descriptive list under LSA-R.S. 9:2801 if not filed within the time period set forth in the statute.

trial, and was thus prejudiced by Mrs. Radau's failure to formally amend her detailed descriptive list to include these claims. Therefore, I would affirm the trial court's refusal to consider the reimbursement claims of Mrs. Radau raised for the first time during trial.

MARIE BLANCHARD RADAU

VERSUS

WILLIE CHARLES RADAU, III

NUMBER 2006 CA 1042

COURT OF APPEAL

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STATE OF LOUISIANA

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

PETTIGREW, J., CONCURS WITH THE RESULTS, AND ASSIGNS REASONS.

PETTIGREW, J., concurring.

Although I concur with the results of the majority's report, I note that footnote 3 of the majority's report is inappropriate and I therefore disagree with same.