

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 0662

MARION D. BATTALORA AND CHARLES BATTALORA

VERSUS

RONALD FICKLIN, AS SHERIFF OF ST. HELENA PARISH, ET AL.

Judgment Rendered: December 23, 2009

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of St. Helena, Louisiana
Trial Court Number 18,213

Honorable Bruce C. Bennett, Judge

Walter Landry Smith
Baton Rouge, LA

Attorney for
Plaintiffs – Appellees
Marion D. Battalora and
Charles Battalora

Timothy R. Richardson
John F. Weeks, II
New Orleans, LA

Attorneys for
Defendant – Appellant
Ronald Ficklin, Sheriff

Lana Crump
Bradley C. Myers
Katie D. Bell
Baton Rouge, LA

Attorneys for
Defendant – Appellee
Town of Greensburg

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

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

*JAW
V GW by [signature]*

WELCH, J.

In this appeal, defendant, Ronald Ficklin, in his official capacity as Sheriff of St. Helena Parish, challenges a judgment rendered in favor of Marion D. Battalora and Charles Battalora, awarding them wrongful death and survival action damages. We find that the trial court committed manifest error in its fault allocation, reallocate fault *de novo* and affirm the survival and wrongful death awards.

BACKGROUND

At approximately 8:15 p.m. on June 30, 2002, 19-year old Joshua Battalora (Josh) was riding his father's motorcycle westbound on Louisiana Highway 10 towards its intersection with Under the Hill Road in St. Helena Parish, Louisiana. Joshua Barnes, who was driving on Under the Hill Road, entered Highway 10 without yielding the right of way to westbound traffic, turned left into the westbound lane of Highway 10, and struck the motorcycle head-on. Josh died as a result of the injuries sustained in the accident. Thereafter, Barnes was charged with driving while intoxicated, vehicular homicide, and failure to yield at the intersection. The DWI and vehicular homicide charges were based on the results of an intoxilyzer test, administered approximately two hours after the accident, showing Barnes had a blood alcohol level of .109. Barnes pled guilty to vehicular homicide and failing to yield, and he was sentenced to serve 20 years in prison, all of which was suspended except one year, and was ordered to pay restitution to Josh's parents.

It is undisputed that prior to the fatal accident, St. Helena Parish Sheriff's Deputy Johnny Lee pulled Barnes over on a traffic stop, had a face-to-face encounter with him, and did not investigate whether Barnes had been drinking. It is also undisputed that minutes before the fatal accident, Officer Quincy Hodges, with the Town of Greensburg's police department, followed behind Barnes'

vehicle briefly and did not stop Barnes' vehicle.

Josh's parents, Marion and Charles Battalora, filed this lawsuit on June 26, 2003, seeking wrongful death and survival action damages against Barnes, his automobile insurer, National Automotive Insurance Company, and Ronald Ficklin, in his capacity as Sheriff of St. Helena Parish (hereinafter "Sheriff"). Plaintiffs charged that the accident was caused by the negligence of Deputy Lee, whom, they urged, should have known of Barnes' intoxicated condition or should have had reason to suspect intoxication and nevertheless released Barnes to continue driving in an intoxicated condition. Plaintiffs also added the Town of Greensburg as a defendant on the basis that Officer Hodges failed to detain Barnes prior to the wreck. Plaintiffs alleged that proper observation and police work by Deputy Lee and Officer Hodges would have revealed Barnes' intoxication or would have given the officers reason to suspect intoxication, and testing would have confirmed Barnes' intoxication prior to the fatal collision. They also asserted that Barnes was at fault based on his failure to yield the right of way and driving while intoxicated.

Prior to trial, plaintiffs settled with Barnes' insurer, and thereafter dismissed Barnes from the litigation. Trial proceeded against the Sheriff and the Town of Greensburg. At trial, numerous facts were heavily contested, including whether Barnes consumed alcohol prior to the stop by Deputy Lee, the amount of alcohol consumption by Barnes, the time at which Barnes consumed the alcohol, the time of the stop by Deputy Lee, and whether Deputy Lee or Officer Hodges should have suspected that Barnes had been drinking or was intoxicated when they encountered him prior to the accident. Defendants also contested the admissibility of the results of an intoxilyzer test administered to Barnes.

After considering conflicts in the testimony, making credibility determinations and weighing the evidence, the trial court made three crucial findings of fact on the major points disputed in this case. First, the court found that

prior to the stop by Deputy Lee, Barnes consumed a portion of a fifth of Seagram's Blue Beast Gin, a pre-mixed alcoholic beverage, and an entire pint of Seagram's gin. Second, the court found as a fact that Deputy Lee stopped Barnes approximately one hour before the accident.

On the issue of whether Deputy Lee should have been aware that Barnes had been drinking during their encounter one hour before the accident, the court relied on the results of the intoxilyzer test and expert testimony based on a retrograde analysis to find that Barnes' blood alcohol level at the time of the stop was .170. At this level, the court stated, some impairment should have been detectable in the form of bloodshot eyes, slurred speech, unsteady gait, or uncontrolled swaying, and more likely than not, there was an observable loss of muscle control and major loss of balance. The court found that it was "incomprehensible" how Deputy Lee would not have noticed what must have been obvious signs of intoxication. The court also faulted Deputy Lee for failing to look for signs of intoxication during the stop after he checked Barnes' license, which bore a "restricted" demarcation and which should have alerted Deputy Lee that Barnes had a prior DWI conviction.

In assessing liability to the Sheriff, the court found that Barnes was intoxicated at the time of his stop by Deputy Lee and Deputy Lee should have observed and noted Barnes' intoxication, had probable cause to arrest Barnes, and should have prevented Barnes from further driving while drunk. The court concluded that, but for Deputy Lee's inaction, the accident would not have occurred and thus found Deputy Lee's negligent inaction was a substantial factor in causing the accident and resulting death. However, the court absolved the Town of Greensburg from liability, finding that Officer Hodges, who followed Barnes for about 15-20 seconds only minutes before the fatal crash, had no legal cause to stop Barnes or his vehicle. The court also found no comparative negligence on Josh's part, but failed to assess any fault to Barnes. Thus, the Sheriff was cast with 100%

fault for causing the fatal accident.

Regarding damages, the court found that the evidence demonstrated that Josh was airborne for approximately 30 feet before hitting the pavement which resulted in his death, and no doubt was aware of his impending death or injury, and awarded survival damages in the amount of \$25,000.00. Each of Josh's parents was awarded \$500,000.00 in wrongful death damages.

The Sheriff appealed, contending that the trial court committed legal error in admitting the test results and expert testimony based on those results and committed manifest error in finding that Deputy Lee was aware or should have been aware of Barnes' intoxication. The Sheriff also contends that the trial court erred in failing to even consider the obvious fault of Barnes and in failing to assign him all or most of the fault, and abused its discretion in entering the damage awards.

LIABILITY OF THE SHERIFF

Admissibility of Results of Intoxilyzer Test

The Sheriff contends, in two assignments of error, that the evidence was insufficient to support the trial court's liability determination. The Sheriff insists that without the results of the intoxilyzer test and expert testimony based on those results, there is no basis to support the trial court's finding that Deputy Lee should have known of Barnes' intoxication at the time of the stop. Moreover, the Sheriff posits, even if the results of the test were correct and were properly admitted, the record does not support the trial court's finding of liability on its part.

Prior to trial and continually throughout the trial, the Sheriff objected to the admission of the results of the Intoxilyzer 5000 test administered to Barnes two hours after the accident and expert testimony based on those results. Defendants challenged the accuracy of the test results on the basis that there were no logs or documents showing the machine had been regularly and routinely calibrated, the

date and time appearing on the printout of the intoxilyzer test administered to Barnes were wrong, and on an operational checklist completed in connection with the administration of the test, there was nothing filled out in a blank for “certification date.”

At trial, Officer Hodges, a lieutenant with the Town of Greensburg’s police department, testified regarding his administration of the Intoxilyzer 5000 test to Barnes. Officer Hodges, who was trained and certified to perform chemical tests for intoxication, including the Intoxilyzer 5000, testified that the Intoxilyzer 5000 he used to administer Barnes’ test was kept in the St. Helena Parish Sheriff’s office. According to Officer Hodges, the Louisiana State Police Department (State Police) was in charge of maintaining and calibrating the machine, and State Police officers came out periodically to calibrate the machine, although he had not personally observed the machine being calibrated. Officer Hodges also stated that a log of the State Police calibrations was kept on top of the machine at the Sheriff’s office. However, both the Sheriff and Town of Greensburg denied the existence of any log showing the dates on which the State Police calibrated the machine.

Officer Hodges investigated the fatal accident. During the course of that investigation, Officer Hodges asked Barnes if he had been drinking, and Barnes admitted he had “a beer.” Officer Hodges stated that because of this admission and because a fatality occurred as a result of the accident, after the accident scene had been processed, Barnes was brought to the police station for the administration of a breathalyzer test. According to Officer Hodges’ documentation, the test was performed at 10:10 p.m.

Officer Hodges testified that he performed a diagnostic on the test machine before he performed the test and it checked out “Okay.” A printout of the test results shows that the diagnostic test, performed at 19:46, confirmed that the machine was working. A blank air test was performed, which reported that the

blood alcohol content was zero. The printout shows that one minute later, the test was administered to Barnes, and a .109 blood alcohol content was recorded. Thereafter, a second blank air test was performed which again measured zero, and a second diagnostic test was performed by the machine confirming that the machine was working. Although the printout contains the wrong time, it is clear that the clock on the machine was actually working, as the printout shows that the testing started at 19:46 and was completed at 19:48.

Officer Hodges also testified that every time he used the Intoxilyzer 5000, he was required to fill out an "Intoxilyzer 5000 Operational Check List" provided by the State Police and did so in this case. Appearing in the record is the checklist showing that all procedures prescribed thereon had been followed in administering Barnes' test. In response to questioning by the court, Officer Hodges stated that he had previously arrested persons for DWI using the same Intoxilyzer 5000 to test them and that convictions had been obtained based on those test results. The record further reveals that the results of the intoxilyzer test were used as the basis for charging Barnes with DWI and vehicular homicide.

The trial court overruled the objections, finding that the intoxilyzer results were sufficiently reliable and accurate to be admitted into evidence even though there was no evidence of machine calibration, particularly in light of Barnes' own admissions of the amount of alcohol he had consumed. The court observed that there was evidence that the machine had been used regularly and routinely by the law enforcement defendants, who had relied on the results registered by that machine to pursue the prosecution and conviction of alleged DWI offenders. Additionally, the court noted that it would be unfair to place the burden on plaintiffs to affirmatively prove that the machine had been calibrated when the defendants, who should have been in possession of log books showing calibration dates, failed to produce those logs.

In challenging the admission of the test results, the Sheriff claims that plaintiffs were improperly relieved of their burden of proving the accuracy of the intoxilyzer results. The Sheriff also complains that the trial court erred in refusing to take judicial notice of and consideration of State Police rules for calibration, periodic testing, and record keeping for intoxilyzer tests published in the Louisiana Administrative Code, Title 5, Part 1, Chapter 55, §§ 501 and 511.

Generally, the trial court is granted broad discretion in its evidentiary rulings, and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. **Smith v. Smith**, 2004-2168, p. 14 (La. App. 1st Cir. 9/28/05), 923 So.2d 732, 742. Except as otherwise provided by law, all relevant evidence is admissible. La. C.E. art. 402. We find no abuse of the trial court's discretion in admitting the intoxilyzer results. Officer Hodges testified regarding his certification to perform breath alcohol content tests, the step-by-step procedure he utilized in performing the test on Barnes, and the results of the test. Clearly, a proper foundation was established for the admissibility of the test results. Moreover, as to the accuracy of the test results, the evidence suggested that the machine was functioning properly, as demonstrated by the favorable reading during the diagnostic tests, the fact that the machine recorded a zero on both air blank tests, and the machine's positive reading for alcohol when administered to Barnes, who admittedly consumed alcohol that day. Additionally, the evidence showed that Officer Hodges complied with the "check-list" protocol established for the administration of intoxilyzer tests by the State Police. The defense did not offer evidence to support its claim that the machine in fact was not properly calibrated or that Officer Hodges failed to follow proper safeguards to ensure the accuracy of the test results. Accordingly, we find no merit in this assignment of error.

Fault of Deputy Lee

Having concluded that the trial court did not err in allowing the results of the intoxilyzer results into evidence, we now examine the record to determine whether the trial court erred in finding liability on the part of the Sheriff. A trial court's liability determination is a finding of fact which may not be set aside on appeal in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Under the manifest error standard of review, in order to reverse a factual finding, this court must find that a factual basis does not exist for the finding and the record demonstrates the finding is clearly wrong. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). The issue to be resolved by this court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. *Id.* Where factual findings are based on determinations regarding the credibility of witnesses, those findings demand great deference. **Boudreaux v. Jeff**, 2003-1932, p. 9 (La. App. 1st Cir. 9/17/04), 884 So.2d 665, 671.

There were substantial conflicts in the evidence on a number of disputed issues at trial, including what time Deputy Lee stopped Barnes, whether Barnes consumed alcohol prior to the stop, and how much alcohol Barnes consumed. In challenging the trial court's fault determinations, the Sheriff admits the following facts are established, some of which, although contested at trial, are reasonably supported by the record and thus immune to attack under the manifest error standard of review: (1) the fatal accident occurred at 8:15 p.m.; (2) Barnes had been drinking alcoholic beverages earlier in the day; (3) Deputy Lee's traffic stop occurred approximately one hour before the accident, at which time he had a face-to-face conversation with Barnes that lasted from 10 to 15 minutes; and (4) the accident occurred when Barnes failed to yield at a stop sign and made an improper left turn directly into Josh's lane of traffic.

The Sheriff also does not contest the trial court's factual determinations regarding the amount of alcohol consumed by Barnes prior to the stop. In its written reasons, the court made the following factual determinations: sometime between 10 and 11 o'clock on the morning of June 30, 2008, Barnes decided to go "joyriding" with Antonio Travis and Jonathan Callahan. During the course of the next several hours, the three friends consumed a fifth of Blue Beast Seagram's Gin, a pre-mixed alcoholic beverage, which is 25% alcohol, in various amounts. Thereafter, Barnes, Travis, and Callahan went to play basketball and returned several hours later to the local Quick Mart, where Barnes purchased a pint of Seagram's gin for his own personal consumption. Barnes drank the entire bottle straight from the bottle over the course of 15-20 minutes.

The Sheriff does contest the trial court's conclusion that Deputy Lee should have been aware of Barnes' intoxication at the time of the stop. On this issue, the record reveals the following: Deputy Lee, who worked for the Sheriff for 16 years, stopped Barnes, who was driving a green Camaro, about 23 miles from the site of the accident. Deputy Lee testified that he stopped Barnes' vehicle because one of the passengers in the vehicle had his feet hanging out the window and because Deputy Lee did not observe a temporary tag on the vehicle. Deputy Lee stated that Barnes told him they were "joyriding." He learned that Barnes had a temporary tag and instructed him to display it on the vehicle where he could see it. Deputy Lee denied having asked Barnes for his license, although he admitted that a hardship license indicated that a person may have a recent DWI conviction. Deputy Lee also testified that he never left his police vehicle and that Barnes came over to his vehicle and denied calling in the stop to the police station.

Deputy Lee testified that during the stop, Barnes did not appear to be impaired by alcohol in any way. He stated that Barnes had not been speeding, was not driving erratically, and was not swerving. He further stated that Barnes did not

stumble as he walked but was walking straight and talked normally. Deputy Lee testified that he was trained to look for signs of intoxication in drivers who are stopped, but admitted that he did not even try to make any observations about whether Barnes had been drinking or seemed to be intoxicated and did not ask Barnes whether he had been drinking.

Deputy Lee also admitted that he heard Officer Hodges radio a message that he was looking for a Camaro because the driver had been "hot rodding" in Greensburg, but insisted that the call came in after the stop. Deputy Lee stated that he called Officer Hodges and advised him that he had seen the Camaro and had stopped it earlier.

Deputy Melvin Battles, who worked for the Sherriff at the time of the accident, testified that he heard Deputy Lee's traffic stop of Barnes by Deputy Lee on the police radio as it was happening. Deputy Battles testified he heard on the police radio that the Greensburg Police department was looking for a Camaro because the driver had been driving recklessly. He also stated that he heard Deputy Lee call in Barnes' driver's license. It was revealed through Deputy Battles' testimony that the Sheriff's logs did not contain documentation of either the stop or Deputy Lee's call regarding the license. According to Deputy Battles, for every stop, the procedure followed was for the deputy to call in the license number, a dispatcher would run the license number through a database, call back the information to the deputy, and a card would be filled out documenting the stop.

Officer Hodges testified that he had a warrant for the arrest of Antonio Travis, who lived on Under the Hill Road. He stated that he notified the Sheriff's office he had a warrant for Travis in case they saw him and learned that Travis was in Barnes' Camaro. Officer Hodges testified that he spoke with Deputy Lee over the radio and learned that Deputy Lee pulled over the Camaro, but Travis was not in the vehicle. He testified that he thought this conversation occurred during

Deputy Lee's stop of the vehicle and estimated that it occurred 15 minutes before the accident.

Barnes testified that at the time of the accident, he was driving on a hardship license because of a recent DWI, and admitted he had been drinking that day, starting in the morning around 11:00 or noon. Barnes stated that he gave Deputy Lee his hardship license and Deputy Lee did not ask him why he was driving under a hardship license and did not ask him if he had been drinking. During his deposition, Barnes acknowledged that Deputy Lee called in his license over the police radio. Also during his deposition, Barnes stated that during the stop, Deputy Lee made a call over the radio indicating he had the "green Camaro" that was being sought. Barnes testified that Deputy Lee told him he stopped his vehicle because he was looking for someone who had been with Barnes earlier. According to Barnes, Deputy Lee got out of his police unit, had Barnes get out of his vehicle, and spoke with Barnes.

Barnes testified that he spoke "normally" with Deputy Lee after the stop, his speech was not slurred, and there was no reason for Deputy Lee to suspect that he had been drinking. He also stated that there were no alcohol bottles in his car. Barnes testified that he had a "high tolerance" for alcohol. He also stated that he did not drink any alcohol from the time of the stop until the time the test was administered at 10:10 p.m.

Officer Hodges testified that he first observed Barnes when Barnes was travelling east on Highway 10 going toward Under the Hill Road, took a left to follow Barnes and followed Barnes for about a tenth of a mile for 15-20 seconds. He stated that Barnes was driving normally, at approximately 25-35 m.p.h., and did not violate any traffic laws. Officer Hodges testified that he did not have probable cause to make a stop of Barnes at that time.

Officer Hodges investigated the accident. During the course of that

investigation, Officer Hodges documented that Barnes exhibited a “slight level of impairment” and made a notation that Barnes’ balance was “unsure.” He testified that he asked Barnes if he had been drinking, and Barnes told him he had a beer. Officer Hodges stated that Barnes appeared nervous, was very quiet, and appeared to be in shock. He testified that he did not smell alcohol on Barnes’ breath, that Barnes was not falling, swaying, or stuttering, and that Barnes’ speech was not slurred. Officer Hodges testified that he did not suspect Barnes had been drinking and did not perform a field sobriety test on him. However, a state trooper investigating the accident performed the Horizontal Gaze Nystagmus field sobriety test, which was negative for alcohol use.

Officer Hodges processed the scene until around 10:00 p.m.; thereafter, he and the state trooper brought Barnes to the Sheriff’s department. Officer Hodges testified that during the interview, Barnes admitted that he drank a pint of gin, had started drinking early and stopped drinking around three or four o’clock, and did not drink any alcohol after the accident. Officer Hodges stated that he performed the breathalyzer on Barnes because a fatality was involved and Barnes admitted that he drank, and that he probably would not have given it to Barnes based on what he saw and observed at the scene.

In support of their claim that Deputy Lee should have known that Barnes had been drinking or was intoxicated at the time of the stop, plaintiffs presented the deposition of Dr. Alfredo Suarez, a pathologist. Dr. Suarez gave an opinion as to Barnes’ blood alcohol level at the time of the stop by Deputy Lee using a retrospective calculation. According to Dr. Suarez, if there is a known blood alcohol level at a particular time, the blood alcohol levels at times between the last alcoholic consumption before the test and the time of the test can be approximated using a retrospective calculation which is based on generally accepted rates of clearance of alcohol from the blood stream through metabolism and normal

physiological functioning. Dr. Suarez stated that he has testified regarding this extrapolation method in courts of law, which has long been generally accepted in the scientific, law enforcement, and forensic communities.

Dr. Suarez opined that because the analysis works backwards from a known blood alcohol level rather than forward from given details or assumptions of consumptions, factors such as the weight of the individual and the amount of food eaten do not significantly enter into the analysis. Dr. Suarez acknowledged that the extrapolation method has a potential rate of error of plus or minus 5%.

In rendering his opinion, Dr. Suarez relied on the results of the test, the police report, and a memorandum provided to him by plaintiffs' attorney setting forth various scenarios. The doctor was asked to render an opinion on the basis of the following facts and assumptions, including: (1) the intoxilyzer breath test showed a reading of .109 and was administered at 10:10 p.m., two hours after the accident occurring at 8:15 p.m.; (2) Deputy Lee took Barnes' driver's license from him as they stood face-to-face during the traffic stop; (3) there were three different versions of the time of the stop: Barnes stated that the stop was a couple of hours before the wreck; one officer said he heard the stop on the radio approximately 10-15 minutes before the wreck, and another said he heard the stop 30 minutes before the wreck; (4) Barnes drank a pint of gin; and (5) Barnes was adamant that he drank nothing following the traffic stop.

Dr. Suarez acknowledged that under the evidence provided to him, there were various factual scenarios as to the time of the accident, the amount of time before the accident and stop occurred, and the time of the alcohol test. Dr. Suarez made different calculations based on the different factual scenarios presented to him. In all of his calculations, Dr. Suarez used an elimination rate of 15 milligrams per hour, noting that it has been shown that the liver is able to metabolize between 15 and 20 milligrams of alcohol per hour.

In the first scenario, the doctor opined that if the test showing Barnes' alcohol level to be .109 was given at 10:10 p.m., the accident occurred at 8:15 p.m., and the stop occurred 30 minutes before the accident, Barnes' blood alcohol level would have been at .16 at the time of the traffic stop. He opined that this concentration is quite intoxicated and noticeably intoxicated to a close observer. Using this scenario, Dr. Suarez opined that at the time of the accident, Barnes' blood alcohol level was .14 at the time of the accident.

Dr. Suarez opined that the blood alcohol concentration would have been higher had there been longer time intervals before the testing and the traffic stop. Thus, he estimated that if the stop occurred three hours before the accident, as Barnes claimed, Barnes' blood alcohol level would have been approximately .19.

Under all of the scenarios examined, Dr. Suarez opined, the smell of alcohol on Barnes' breath as he stood facing the officer making the traffic stop and handing him his license would have been detectable and more probably than not, some level of impairment in Barnes would have been detectable to an officer closely observing Barnes for signs of alcohol use or intoxication at the traffic stop. Moreover, he stated, under every scenario, Barnes would have been legally intoxicated at the time of the stop, and testing with an intoxilyzer would have confirmed the intoxication.

Dr. Suarez was asked at what point should someone definitely be able to determine another person is legally intoxicated. He stated that the effects of alcohol vary from person to person; thus, while you can observe signs of intoxication in some people, you cannot in others. He acknowledged that at a blood alcohol level of .109, it is possible that a person would not exhibit obvious symptoms of intoxication. Dr. Suarez stated that at a .14 blood alcohol level, most people are acting intoxicated and their ability to maneuver a vehicle would be substantially impaired; however, he acknowledged that while the individual would

know he was under the influence of alcohol, someone who does not know the person may not be able to tell if the person is under the influence of alcohol. At lower levels of alcohol concentration, Dr. Suarez stated, there is the most room for variance in behavior; however, as the level increases, getting closer to .2, the body's response to alcohol is basically the same for everyone. Dr. Suarez acknowledged that in order to have an opinion on the types of behavior Barnes would have exhibited at certain blood alcohol levels, one had to know about Barnes' drinking habits and how Barnes handled alcohol.

Plaintiffs also introduced several documents showing common symptoms people exhibit at various blood alcohol levels. According to these documents, at .10, effects include slurred speech and poor coordination. At .15, generalized effects include impaired balance, movement, coordination, and difficulty standing, walking, and talking. Like Dr. Suarez, defense expert Dr. Gary McGarrity acknowledged the existence of such generalizations, but stated that a person may or may not show these symptoms depending on his or her tolerance or lack of tolerance for alcohol.

Regarding his findings as to the accident, Officer Hodges stated that for Barnes' vehicle to be in the position it was, facing head-on in the west bound lane, Barnes had to have taken a left onto Highway 10 and entered the opposite lane of travel. Officer Hodges testified that there was no evidence that Josh did anything wrong when operating the motorcycle. He also acknowledged that Barnes never showed any remorse at the scene or at the police station. Officer Hodges arrested Barnes for failure to yield to the motorcycle which had the right-of-way and with vehicular homicide because of the .109 blood alcohol level, the fatality, and because Barnes was driving in the wrong direction in the westbound lane. Barnes pled guilty to vehicular homicide and failure to yield as a result of the accident and received a 20-year sentence, all but one year suspended, and served 6 months in

jail.

In rendering its liability determination, the trial court found that plaintiffs proved by a preponderance of circumstantial evidence that Deputy Lee was negligent and his negligent inaction was a substantial factor in causing the accident. The court concluded that based on the scientific evidence, Barnes' blood alcohol level would have been .170 at the time of the stop, and considering the aromatic nature of gin, the smell of alcohol on his breath should have been detectable to a police officer observing Barnes at the time of the traffic stop. More likely than not, the court stated, some level of impairment in Barnes would also have been detected in the form of bloodshot eyes, slurred speech, unsteady gait, uncontrolled swaying, or other physical manifestations of intoxication. The court stated that in particular, there should have been and more likely than not, there was an observable loss of muscle control and major loss of balance on the part of Barnes. The court further noted that a trained and competent officer would have been alerted by the hardship restriction on Barnes' driver's license to the possibility he had been drinking and would have affirmatively looked for these signs, especially during a conversation lasting 10-15 minutes. The court concluded that it is "incomprehensible" how Deputy Lee would not have noticed what must have been obvious intoxication, and attributed his failure to observe and note Barnes' intoxication to a lack of proper training, supervision, or judgment, an inability to properly read, and ignorance of proper police procedures. But for Deputy Lee's negligent inaction, the court concluded, the accident would not have occurred, and Deputy Lee's negligent inaction was a substantial factor in causing the accident and resulting death.

It is obvious from a review of this record that the trial court was called upon to make numerous credibility determinations regarding the conflicting evidence in this case, and it chose not to credit the testimony of Deputy Lee, whose version of

the events was contradicted throughout the trial by the evidence. Given the clear credibility problems with Deputy Lee's account of the events, the court chose not to credit Deputy Lee's assertion that Barnes exhibited no signs of having consumed alcohol during their 10-15 minute, face-to-face encounter, and instead, made inferences from the facts adduced at trial. While we are unable to say that the record supports the trial court's finding that Barnes must have exhibited severe balance problems, swaying, and slurred speech, we believe the record does reasonably support the imposition of liability on the Sheriff for Deputy Lee's complete failure to take any steps to ascertain whether Barnes had been drinking. The court found as a fact that Deputy Lee was aware that Barnes was driving on a hardship license, and Deputy Lee admitted that a hardship license should put a police officer on notice that the person had recently been convicted of driving while intoxicated. Moreover, Deputy Lee admitted he was aware that Officer Hodges had radioed a message that Barnes had been "hot rodding" in Greensburg, an activity which, according to Officer Hodges, is an indication that the person may have been drinking. The evidence suggests that this call came in prior to or during the stop of Barnes and not after the stop as Deputy Lee stated. Lastly, Dr. Suarez testified that the smell of gin on Barnes' breath at the time of the stop had to be detectable during Deputy Lee's face-to-face conversation with him.

We find no manifest error in the trial court's imposition of liability on the part of the Sheriff. In so doing, the trial court made numerous credibility findings, which were well within its discretion. Moreover, many of the crucial factual findings made by the trial court supporting the imposition of liability on the part of the Sheriff are not disputed in this appeal. We find that the record reasonably supports the trial court's conclusion that there were sufficient facts that were known to or should have been known by Deputy Lee to put him on notice that Barnes may have consumed alcohol, and Deputy Lee's complete failure to even

investigate whether Barnes may have been under the influence of alcohol at the time of the stop constitutes negligence that played a causative role in the ensuing accident.

Fault of Barnes

The Sheriff contests the trial court's failure to assess any percentage of fault to Barnes, an intoxicated driver whose intoxication, the trial court found, was a factual and legal cause of the accident. Plaintiffs contend that the trial court correctly cast the Sheriff with liability for the entire measure of damages under two theories. First, they urge that Barnes was an intentional tortfeasor whose fault should not be compared with the Sheriff, a negligent tortfeasor. Second, plaintiffs submit that the record provides a factual basis for finding that the Sheriff, Deputy Lee, and Deputy Lee's niece, a dispatcher, were each guilty of intentional or willful fault making the Sheriff liable for all of the damages under La. C.C. 2324(A), which provides that he who conspires with another person to commit an intentional or willful act is answerable, *in solido*, with that person, for the damage caused by such act.

There is no reasonable factual basis in this record to support plaintiffs' claim that the Sheriff, Deputy Lee, and a dispatcher were all intentional tortfeasors, and their argument based on La. C.C. art. 2324(A) clearly lacks merit. Moreover, similar arguments advanced to preclude the fault of one tortfeasor from being compared with the fault of another tortfeasor have been raised, and repeatedly rejected, in light of the 1996 amendments to La. C.C. art. 2323, by which Louisiana adopted a "pure" comparative fault system. **Landry v. Bellanger**, 2002-1443, p. 12 (La. 5/20/03), 851 So.2d 943, 952-953. Louisiana Civil Code article 2323(A) mandates that the degree or percentage of fault of all persons causing or contributing to an injury or death be determined. This provision shall be applied to any claim for the recovery of damages asserted under any law or

theory of liability. See **Kennedy-Fagan v. Estate of Graves**, 2007-1062, p. 8 (La. App. 1st Cir. 7/21/08), 993 So.2d 255, 263, writ denied, 2008-2079 (La. 11/10/08), 996 So.2d 1073. Since the adoption of the pure comparative fault system, it has been the law of this circuit that the fault of an intentional tortfeasor should be quantified along with the fault of negligent parties. **Louviere v. Louviere**, 2001-0089, 2001-0090, 2001-0091, 2001-0092, 2001-0093, 2001-0094, p. 18 (La. App. 1st Cir. 6/5/02), 839 So.2d 57, 70, writs denied, 2002-1877, 2002-1878, 2002-1879, 2002-1848, 2002-1868 (La. 10/25/02), 1150, 827 So.2d 1151, 1152.

In **Thomas v. Sheridan**, 2007-1291 (La. App. 1st Cir. 2/8/08), 977 So.2d 303 (unpublished), writs denied, 2008-0563, 2008-0566 (La. 5/9/08), 980 So.2d 691, 692, a deputy guarding an inmate during a hospital visit failed to properly handcuff the prisoner, who stole the deputy's gun, escaped, and held a nurse hostage. The nurse sued the Washington Parish Sheriff's Office, and judgment was entered against that Sheriff for 100% of the nurse's damages. In seeking to uphold the fault determination, the nurse argued that the Sheriff had a duty to prevent the intentional conduct of the other tortfeasor and claimed that such a situation was an exception to the rule that the fault of an intentional tortfeasor should be quantified with the fault of a negligent tortfeasor. This court noted that no such exception was found in the clear and unambiguous language of Article 2323, which required that the fault of every person responsible for a plaintiff's injury be compared regardless of the legal theory of liability asserted against each person. **Thomas**, 2007-1291 at p. 6. Therefore, this court held that it was legal error to fail to consider and quantify the inmate's fault. *Id.*

Similarly, we find that the trial court committed legal error in failing to consider or quantify Barnes' fault. Where, as here, the trial court commits legal error by applying the incorrect legal standard or principle, this court is required to make a *de novo* determination and render judgment on the merits. **Landry**, 2002-

1443 at p. 15, 851 So.2d at 954; **Louviere**, 2001-0089 at p. 20, 839 So.2d at 71.

In determining percentages of fault, a court must consider the nature of the conduct of all parties and the extent of the causal relationship between the conduct and the damages claimed. **Watson v. State Farm Fire and Casualty Insurance Co.**, 469 So.2d 967, 974 (La. 1985). In assessing the nature of the conduct of the parties, various factors may influence the degree of fault, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. **Clement v. Frey**, 95-1119, p. 8 (La. 1/16/96), 666 So.2d 607, 611.

After carefully reviewing and considering the **Watson** factors, we find that 50% fault should be assigned to Barnes. Barnes acted of his own will in consuming alcoholic beverages and driving in an intoxicated state. Barnes' failure to yield the right of way to Josh's motorcycle and his conduct in driving in the wrong direction on the roadway, substantial driving errors no doubt caused by his intoxication, caused the accident. Deputy Lee's failure to detect Barnes' alcohol consumption during a 15-minute conversation with Barnes one hour prior and his failure to stop Barnes from driving in an intoxicated condition contributed to the accident. Accordingly, we amend the judgment to cast the Sheriff liable for 50% of the damages awarded to the plaintiffs. See **Thomas** 2007-1291 at p. 10 (assessing 50% fault to Sheriff where deputy's negligence in managing a prisoner's custodial arrangement facilitated a hostage incident and 50% fault to the prisoner who stole the deputy's gun and held the plaintiff hostage).

DAMAGES

The Sheriff contests the award of \$500,000.00 to each of Josh's parents for

wrongful death damages. In reviewing an award of general damages, this court is limited to a review for abuse of the trier of fact's great discretion. Because of the vast discretion vested in the trier of fact, an award of damages should rarely be disturbed on appeal. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). 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 an appellate court should reduce or increase an award. *Id.*

The Sheriff argues that the wrongful death damage awards are excessive because there is no factual support for the trial court's conclusion that plaintiffs enjoyed a close and loving relationship with their son. We disagree and find no manifest error in that factual determination. As the record reasonably supports the trial court's factual determination that both plaintiffs had a close and loving relationship with their son, we find no abuse of the trial court's vast discretion in setting the wrongful death awards.

Lastly, the Sheriff challenges the \$25,000.00 survival damage award as excessive. The Sheriff argues that the evidence shows that Josh died immediately as a result of his impact with Barnes' vehicle, and therefore, there is no reason to suspect that he suffered any post accident pain or suffering, conscious or otherwise.

The survival action permits recovery for damages actually suffered by the deceased from the time of injury to the moment of death. **Sacco v. Allred**, 2002-0141, p. 11 (La. App. 1st Cir. 2/19/03), 845 So.2d 528, 538. Louisiana jurisprudence authorizes awards for pre-impact fear and apprehension of danger. See Reid v. State, Department of Transportation and Development, 25,778, p. 10 (La. App. 2nd Cir. 5/4/94), 637 So.2d 618, 625, writ denied, 94-1415 (La.

16/94), 642 So.2d 198. According to Officer Hodges, Josh's body came to rest 29 feet from the point of impact. The trial court concluded that during this time, Josh was no doubt aware of his impending death or injury. We find no manifest error in this determination and no abuse of the trial court's discretion in entering the survival damage award.

CONCLUSION

Based on the foregoing, the trial court's liability ruling as to the Sheriff and the trial court's damage awards are affirmed. However, the judgments entered in favor of Marion D. Battalora and Charles Battalora and against the defendant, Ronald Ficklin, in his official capacity as the Sheriff of St. Helena Parish are amended to reflect a 50% reduction in all amounts awarded for the percentage of fault attributed to Joshua Barnes. All costs of this appeal are to be shared equally by the parties, with defendant Ronald Ficklin, in his official capacity as the Sheriff of St. Helena Parish, being cast with costs in the amount of \$707.75.

JUDGMENT AMENDED AND AS AMENDED AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0662

MARION D. BATTALORA AND CHARLES BATTALORA

VERSUS

**RONALD FICKLIN, AS SHERIFF OF ST. HELENA
PARISH, ET AL.**



HUGHES, J., concurring in part and dissenting in part.

I concur in the modification of the judgment to account for the fault of Mr. Barnes. I respectfully dissent as to the percentages of fault and quantum.