NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0809

TOMMY AUBERT

VERSUS

DAVID GUIDRY, JAMES DIES D/B/A JIMMY'S TOWING & RECOVERY AND WESTPORT INSURANCE COMPANY

PMc
BMF
RCW
FJB

Judgment Rendered: JUL 29 2010

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On Appeal from the Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket No. 149,416

Honorable George J. Larke, Jr., Judge Presiding

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

McCLENDON, J.

In this personal injury suit, the defendants appeal a trial court judgment granting the plaintiffs' motion for additur following a jury verdict. The plaintiffs answered the appeal. For the reasons that follow, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

This matter arises from a low-speed rear-end automobile accident that occurred on October 15, 2005, in Terrebonne Parish. The accident occurred when a tow truck owned by the defendant, James Dies d/b/a Jimmy's Towing and Recovery, and operated by the defendant, David Guidry, rear-ended a Ford Expedition owned and operated by the plaintiff, Tommy Aubert. Aubert filed a petition for damages on September 21, 2006, against Dies, Guidry, and Westport Insurance Company, the insurer of the tow truck, alleging that he was entitled to damages for personal injuries, medical expenses, and loss of wages. An amended petition was filed on February 22, 2007, adding Aubert's wife as plaintiff and adding additional claims for loss of consortium for her and their two minor children.

A three-day jury trial was held, concluding on April 24, 2008. The jury returned a unanimous verdict allocating fault of 70% to defendants and 30% to Aubert. The jury also made the following damage awards to Aubert:

Past physical pain and suffering:	$10,000.00
Future physical pain and suffering:	-0-
Physical disability, impairment, and inconvenience:	$3,000.00
The effect of plaintiff's injuries and inconvenience on the normal pursuits and pleasures of life:	$15,000.00
Mental anguish:	-0-
Loss of past income:	$11,500.00
Impairment of future earning capacity:	$18,500.00
Past medical expenses:	$56,000.00

Future medical expenses:	-0-
TOTAL	$114,000.00

Additionally, plaintiff's wife and his two minor children were each awarded $5,000.00 for loss of consortium by the jury.

Thereafter, plaintiffs filed a Motion for Judgment Notwithstanding the Verdict or Alternatively for a New Trial and/or Additur as to both liability and damages. Following a hearing on July 11, 2008, the trial court granted plaintiffs' motion for additur and increased the general damages award to Aubert from $28,000.00 to $100,000.00 Otherwise, the motion was denied. Defendants appealed and plaintiffs answered the appeal.[1]

ASSIGNMENTS OF ERROR

In their appeal, defendants assign the following as error:

1. The jury did not abuse its discretion in awarding general damages of $28,000.00 to the plaintiff.
2. The trial court abused its discretion in granting plaintiffs' motion for additur to increase the general damages award to $100,000.00.

Plaintiffs also answered the appeal, asserting:

1. The additur granted by the trial court was improperly low.
2. The jury erred in finding that plaintiff was 30% at fault.
3. The jury erred in failing to award the full amount of damages.
4. The trial court should have granted a judgment notwithstanding the verdict (JNOV).
5. The decision of the jury was impacted by errors of law and constituted a compromise or quotient jury verdict.

[1] On August 13, 2008, the trial court signed a judgment granting the motion for additur filed by plaintiffs and ordering that defendants file a written acceptance or refusal of the additur within ten days. It was also ordered that should the additur not be accepted, a new trial would be ordered. On September 18, 2008, defendants filed their motion for appeal. On May 29, 2009, a rule to show cause was issued by this Court asking whether the appeal should be dismissed because the record did not contain a signed judgment in accordance with the jury verdict and because the conditional nature of the trial court's August 13, 2008 judgment remained pending. We also asked whether the judgment of August 13, 2008 was a proper judgment with the required specificity as to the amount of damages awarded. On November 2, 2009, this panel issued an interim order ordering that the appellate record be supplemented with a new judgment correcting the deficiencies as set forth therein. On December 2, 2009, a consolidated judgment was signed by the trial court correcting the deficiencies and which included a verification of the acceptance of the additur by the defendants.

DISCUSSION

Aubert testified that on October 15, 2005, he left his dentist's office following an appointment and was on his way to the pharmacy. He stated that as he approached an intersection, traffic was congested and he stopped, waiting for the traffic light to turn green. Aubert testified that he was stopped and remained stopped, when his vehicle was hit from behind.

Guidry testified, however, that when Aubert began to move after the traffic light turned green, Guidry "started to roll behind him." Guidry testified that he "was barely letting off the clutch when [Aubert] hit the brakes." Guidry stated that he never saw Aubert's brake lights.

Dawn Celestin, the state trooper who investigated the accident, had no specific recollection of the accident investigation. At trial, she testified according to her report and stated that Guidry told her that plaintiff let his foot off the brakes to move forward and then hit the brakes again, causing Guidry to hit Aubert's vehicle. Aubert told her that he was stopped, proceeded forward, then stopped again to let another vehicle merge onto the roadway from a driveway since traffic was backed up, at which time he was hit by Guidry. Guidry received a citation; Aubert did not. Trooper Celestin noted very minor damage to the tow truck's front bumper and minor damage to Aubert's rear bumper.

Aubert went to an Urgent Care facility the following day, complaining of pain in his neck, right shoulder, and lower back. He testified that he had no prior neck or back problems. Aubert was given pain medication. He attempted physical therapy for his symptoms, but stated that the therapy did not help.

Aubert was referred to Dr. David W. Aiken, Jr. Dr. Aiken testified by video deposition and was qualified as an expert in orthopedic surgery. He testified that he first saw Aubert on July 17, 2006. Aubert gave Dr. Aiken a history of an automobile accident in October 2005, when his vehicle was rear-ended. Thereafter, Aubert stated, he began to feel pain in the lower back, shoulders, right arm and neck. Dr. Aiken ordered cervical and lumbar spine MRIs. The MRI of the neck revealed a large disc rupture on the right side at C5-6. Dr. Aiken

was of the opinion that Aubert was a good candidate for surgery and referred him to Dr. Rand Voorhies.

Dr. Voorhies, qualified as an expert in neurosurgery, also testified by video deposition. He stated that Aubert gave him a history of a motor vehicle accident in October 2005. Aubert indicated that by the next day he developed neck stiffness and pain and numbness down his right arm. Aubert told Dr. Voorhies that he had no such problems prior to the accident. Dr. Voorhies reviewed the June 2006 cervical MRI, which showed disc herniations at the C5-6 and C6-7 levels. He testified that the herniation at C5-6 "was the big problem," but that C6-7 was also a bad disc. He testified that although Aubert had a "significant physical impairment," he did not show significant secondary effects in terms of psychological or emotional distress, and he was handling the problem quite well. Dr. Voorhies also found no symptom magnification by plaintiff, calling him a "very straightforward patient." The decision was made to operate not only on the very symptomatic disc at C5-6, but also at C6-7, because of the increased stress and strain on the neighboring disc.

An anterior cervical discectomy and fusion at C5-6 and C6-7 was performed by Dr. Voorhies on November 24, 2006, and went "extremely well." Aubert continued to do well postoperatively and, in January 2007, requested permission to go back to work. Dr. Voorhies authorized plaintiff's return to work with restrictions. In February 2008, finding Aubert to be at maximum medical improvement, Dr. Voorhies assigned him a whole person impairment rating of 15%.

Aubert returned to Dr. Aiken after the surgery, in January 2007, complaining of low back pain with tenderness and muscle spasm. Aubert planned to return to work in February 2007, and Dr. Aiken advised Aubert to take his pain medication, rest, and avoid heavy lifting and bending. When Dr. Aiken saw Aubert again in April 2007, plaintiff was having constant lower back pain and stated that his back pain was making him miserable. Aubert also indicated to Dr. Aiken that he was experiencing intermittent neck pain.

Dr. Aiken assessed plaintiff with an 8% permanent partial impairment. He was also of the opinion that plaintiff's back problems, in the neck and lower back, were consistent with the accident. He further stated that although the MRI of the lower back was normal, Aubert had continued complaints of pain, muscle spasm, increased pain with motion, and the need for medication. Dr. Aiken felt that if Aubert's back worsened, surgery might be possible in the future. However, the only current objective abnormality in the lower back was the muscle spasms experienced by plaintiff.

Defendants' independent medical examiner was Dr. Anthony S. Ioppolo. Dr. Ioppolo testified by video deposition. He testified that he saw Aubert on June 14, 2007. He took Aubert's medical history of lower back and neck pain resulting from an automobile accident. The MRI of Aubert's lumbar spine showed no evidence of herniations or compressed nerves, and Dr. Ioppolo saw nothing that he could attribute to trauma. Dr. Ioppolo was of the opinion that Aubert's lower back pain was degenerative in nature.

Aubert testified that he had been employed as a full-time custodian for the parish school board since 1989, and was currently the head custodian at an elementary school. Plaintiff also testified that he cleaned offices four nights a week for his father's janitorial business and had done so since 1978. Aubert stated that because of his back problems, he relied on his assistants to help him with the school board position and that his brother helped him in the cleaning business. However, he could no longer work extra jobs as he had in the past. Aubert testified that although he was still in pain, he took medication at night to avoid drowsiness and that he worked despite the pain. He also stated that until the accident, with the exception of some dental problems, he had been healthy his entire life.

In their appeal, defendants argue that the jury did not abuse its discretion in awarding $28,000.00 in general damages and, therefore, the trial court erred in granting plaintiffs' motion for additur. Plaintiffs assert in their answer to the appeal that the additur, although proper, was inadequate and unreasonably low.

Louisiana Code of Civil Procedure article 1814 provides for remittitur or additur as an alternative to a new trial as follows:

> If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the issue of quantum is clearly and fairly separable from other issues in the case. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

Comment (b) to the above quoted article states that the purpose of this legislation is to serve judicial efficiency by allowing the parties to avoid a possibly unnecessary new trial and then to seek appellate review of the correctness of the judgment reformed by additur or remittitur. **Accardo v. Cenac**, 97-2320, p. 7 (La.App. 1 Cir. 11/6/98), 722 So.2d 302, 306. An appeal of a judgment reformed by additur is allowed by LSA-C.C.P. art. 2083B, by either the party seeking the reformed judgment or the party adversely affected by the reformed judgment.[2] **Accardo**, 97-2320 at p. 8, 722 So.2d at 307.

The role of the appellate court, and the trial court in a jury trial, is not to replace or second guess the jury and determine what the court thinks is an appropriate award of damages. The jury, or fact finder, has much discretion in the award of damages. LSA-C.C. art. 2324.1; **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1260 (La. 1993); **Temple v. State ex rel. Dept. of Transp. and Dev.**, 02-1977, p. 13 (La.App. 1 Cir. 6/27/03), 858 So.2d 569, 579. The determination of an appropriate award is fact intensive, and dependent on the particular injury to the particular plaintiff under the particular circumstances. **Youn**, 623 So.2d at 1261.

However, a trial court may offer an additur if the court finds that the jury award was so inadequate that the jury abused its discretion and a new trial

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[2] Article 2083B provides:

> In reviewing a judgment reformed in accordance with a remittitur or additur, the court shall consider the reasonableness of the underlying jury verdict.

should be granted. Thus, the decision to offer an additur rests on whether the grant of a new trial would be proper. **Temple**, 02-1977 at p. 13, 858 So.2d at 579. In other words, if the jury's award is within its range of discretion, an additur is not proper. **Accardo**, 97-2320 at p. 9, 722 So.2d at 307.

Nevertheless, when a jury awards an amount that is lower than the lowest reasonable amount, additur becomes proper. Once additur is determined to be proper, the amount awarded on additur should be raised only to the lowest reasonable amount; raising the amount awarded any higher than that is an abuse of the trial judge's discretion. **Accardo**, 97-2320 at p. 9, 722 So.2d at 307-08. The appellate standard of review for the grant of a new trial on grounds involving the trial court's discretion is the same abuse of discretion standard. **Temple**, 02-1977 at p. 14, 858 So.2d at 580.

Accordingly, we must determine whether the jury's award of general damages was within its range of discretion. If the award was not within the jury's range of discretion, then the trial court did not abuse its discretion in granting additur. Furthermore, in reviewing the award of additur, we must determine if the amount awarded by the trial judge was the lowest amount that a jury could have reasonably awarded. See **Accardo**, 97-2320 at p. 9, 722 So.2d at 308.

In the present case, the trial court found that the damages awarded to the plaintiffs were inadequate in some respects. The jury awarded Aubert $10,000.00 for past physical pain and suffering, $3,000.00 for physical disability and impairment, and $15,000.00 for the effect of the injuries and inconvenience. The jury awarded nothing for mental anguish or future pain and suffering. Thus, the total amount of general damages awarded by the jury was $28,000.00 in general damages. The trial court found this award low for a two-level cervical fusion. Although recognizing that there was little, if any, testimony by the plaintiff regarding his pain and suffering associated with the surgery, the trial court found the general damages award to be "ridiculously low" and "not reasonable." Accordingly, the trial court granted the additur, raising the general

damages award to $100,000.00, the lowest amount it believed could reasonably be awarded.

Both parties appealed the reformed judgment reflecting the additur. The defendants contend that the jury award of $28,000.00 in general damages was supported by the law and evidence and was not an abuse of discretion. The plaintiffs maintain that, even with the trial court's grant of additur, the award of general damages was unreasonably low.

Following a thorough review of the record, we agree with the trial court and conclude that a general damages award of $28,000.00 for the two-level cervical fusion was abusively low. The record contains a description of the anterior cervical discectomy and fusion performed by Dr. Voorhies. In scraping out the bad discs, Dr. Voorhies discovered very large posterior osteophytes, which required "quite a bit of delicate drilling." Bone grafts were implanted and anchored in place with a plate and permanent screws. Dr. Voorhies stated that although Aubert did very well with his surgery, he did have a two-level fusion, with the resultant stress on the other levels in his neck, and he will never have a normal neck. We conclude that an award of only $28,000.00 under these circumstances was an abuse of the jury's discretion, such that the trial court was proper to conclude that a new trial was warranted with respect to these elements of the damage award.

Further, after a thorough review of the record, we cannot say that the trial court abused its discretion in increasing the general damages award to $100,000.00. While this amount was clearly on the low end, the trial court could only raise the amount to the lowest amount supported by the jurisprudence. See **Accardo**, 97-2320 at p. 9, 722 So.2d at 308. Accordingly, plaintiffs' and defendants' assignments of error regarding the additur are without merit.

Plaintiffs also assert in their answer to the appeal that the trial court erred in failing to make any award for Aubert's future medical expenses and pain and suffering regarding his lower back. At the July 11, 2008 hearing, the trial court found no error on the part of the jury in failing to award damages for future back

surgery. The court determined that the evidence established that there was a question as to whether Aubert would need surgery on his lower back and stated that the jury felt that he probably did not need it.

The testimony showed that although Aubert was suffering from lower back pain, Dr. Aiken could not definitively say that surgery was required. The MRI of June 2006 was normal showing no abnormalities. However, Dr. Aiken stated that an MRI in the future might show something different. Defendants' expert, Dr. Ioppolo, was of the opinion that Aubert's lower back pain was more likely degenerative in nature, rather than related to a traumatic event. After reviewing the record before us and finding a reasonable factual basis for its conclusion, we can find no manifest error in the implicit factual determination by the jury that Aubert's lower back pain was either unrelated to the accident or that the need for lower back surgery was not proven.

Plaintiffs further contend that the jury erred in finding Aubert 30% at fault when, according to law and well-established jurisprudence, the following driver in a rear-end accident is presumed to be at fault and must prove a lack of fault to avoid liability. The trial court found no error in the jury's allocation of fault.

The assessment of percentages of fault is a factual determination. **Magee v. Pittman**, 98-1164, p. 12 (La.App. 1 Cir. 5/12/00), 761 So.2d 731, 742, writ denied, 00-1694 (La. 9/22/00), 768 So.2d 31, and writ denied, 00-1684 (La. 9/22/00), 768 So.2d 602. We must give great deference to the allocation of fault as determined by the trier of fact. **Fontenot v. Patterson Ins.**, 09-0669, p. 22 (La. 10/20/09), 23 So.3d 259, 274. We are also aware that the allocation of fault is not an exact science, or the search for one precise ratio, but rather an acceptable range, and that any allocation by the fact finder within that range cannot be clearly wrong. **Id**. The allocation of fault is within the sound discretion of the trier of fact and will not be disturbed on appeal in the absence of manifest error. **Great West Cas. Co. v. State ex rel. Dept. of Transp. and Dev.**, 06-1776, p. 7 (La.App. 1 Cir. 3/28/07), 960 So.2d 973, 977-78, writ denied, 07-1227 (La. 9/14/07), 963 So.2d 1005. Only after making a

determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the award. **Fontenot**, 09-0669 at p. 22, 23 So.3d at 274.

Thus, in order to reverse a fact finder's determination of fact, an appellate court must find from the record that a reasonable factual basis does not exist for the finding and that the record establishes that the finding is clearly wrong. **Stobart v. State through Dept. of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993). Further, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. **Huddleston v. Ronald Adams Contractor, Inc.**, 95-0987 (La.App. 1 Cir. 2/23/96), 671 So.2d 533, 536.

Louisiana Revised Statutes 32:81 imposes a duty on a motorist not to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the preceding vehicle, the traffic conditions, and the condition of the roadway.[3] In a rear-end collision, the following motorist is presumed to have breached this duty and he bears the burden of proving that he was not negligent. **Phipps v. Allstate Ins. Co.**, 05-651, pp. 4-5 (La.App. 5 Cir. 2/27/06), 924 So.2d 1081, 1084.

The law has established a rebuttable presumption that a following motorist who strikes a preceding motorist from the rear has breached the standard of conduct prescribed by La. R.S. 32:81A and is therefore liable for the accident. **Daigle v. Humphrey**, 96-1891 (La.App. 4 Cir. 3/12/97), 691 So.2d 260, 262. The rule is based on the premise that a following motorist whose vehicle rear-ends a preceding motorist either has failed in his responsibility to maintain a sharp lookout or has followed at a distance from the preceding vehicle which is insufficient to allow him to stop safely under normal circumstances. A following motorist may rebut the presumption of negligence by proving the following things: (1) that he had his vehicle under control, (2) that

[3] Louisiana Revised Statutes 32:81A provides that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway."

he closely observed the preceding vehicle, and (3) that he followed at a safe distance under the circumstances. **Chambers v. Graybiel**, 25,840 (La.App. 2 Cir. 6/22/94), 639 So.2d 361, 366. writ denied, 94-1948 (La. 10/28/94), 644 So.2d 377. The following motorist may also avoid liability by proving that the driver of the lead vehicle negligently created a hazard that he could not reasonably avoid. **Daigle**, 691 So.2d at 262; **State Farm Mutual Automobile Insurance Co. v. Roerner**, 426 So.2d 205, 209 (La.App. 4 Cir. 1982), writ denied, 433 So.2d 154 (La. 1983).

In this matter, plaintiffs argue that there was no fault on the part of Aubert. However, the testimony was conflicting as to whether plaintiff stopped and remained stopped or whether he stopped, moved forward, and then stopped again. In this regard, the trial court stated:

> I've always had a problem taking any kind of decision away from the jury because I think they're the trier of fact and they made the right decision.
>
> And I can't disagree totally with the . . . jury's claim at this time as to fault especially. They split it 70/30.
>
> I know there's argument . . . that you felt it was a rear-end collision and there was no fault on your part. But I think what happened was the jury heard the testimony of the plaintiff, the state trooper, the defendant as to whether there was a start and stop or a stop. And I think that probably gave them some questions as to [the] fault issue, whether the plaintiff, Mr. Aubert, had started and then he stopped, causing a blockage on the road, whatever, and they felt there was some fault on the defendant.
>
> So I really can't see that they're wrong in their 70/30.
>
> * * *
>
> I'll leave the, the split of fault. I think - - I can't take that away from the jury. I think reasonable minds can come up with 70/30% split because of the facts.

We agree. After a thorough review of the record, we cannot say that the jury was clearly wrong in allocating 30% fault to Aubert.

Nor do we find merit in plaintiffs' argument that the trial court erred in failing to grant their motion for a judgment notwithstanding the verdict (JNOV). Plaintiffs seem to contend that because the trial court found the damages portion

of the jury's verdict unreasonable, it should have disregarded the entire jury verdict and conducted a *de novo* review as to all issues.

The trial court denied the motion for JNOV, concluding that a new trial as to damages only was warranted, thus offering the additur. The motion for new trial requires a less stringent test than for a JNOV in that such a determination involves only a new trial and does not deprive the parties of their right to have all disputed issues resolved by a jury. **Broussard v. Stack**, 95-2508, p. 16 (La.App. 1 Cir. 9/27/96), 680 So.2d 771, 781. The test for a JNOV is harsh because a finding that a verdict is not supported by any substantial evidence leads to a directed verdict terminating the action without resubmission to another jury. **Gibson v. Bossier City General Hosp.**, 594 So.2d 1332, 1336 (La.App. 2 Cir. 1991).

Based on our review of the record, we cannot conclude that the evidence pointed so strongly in favor of the plaintiffs that reasonable persons could not have reached different conclusions as to the other issues decided by the jury. Accordingly, we find no merit in plaintiffs' argument that the trial court erred in refusing to grant their motion for a JNOV.

Lastly, plaintiffs argue that because the jury responded unanimously to all answers to the jury interrogatories, despite the requirement that only nine of the twelve jurors had to agree to any answer, there is a clear indication that the jury compromised and "the jury verdict [was] a decision of consensus instead of a decision of conviction." Thus, they argue, the jury was "influenced by the majority" and disregarded the trial court's instructions. Accordingly, plaintiffs argue, the verdict should be granted no deference and we should be able to arrive at our own factual findings free from the tainted jury verdict.

A quotient verdict is one in which each of the jurors agree to submit a proposed damage award that is thereafter totaled and divided by twelve to reach an average. **McDaniel v. Carencro Lions Club**, 05-1013, p. 47 (La.App. 3 Cir. 7/12/06), 934 So.2d 945, 979, writ denied, 06-1998 (La. 11/3/06), 940 So.2d 671, citing **Ritchey v. Dees**, 540 So.2d 1265, 1269 (La.App. 3 Cir. 1989), writ

denied, 542 So.2d 1387 (La. 1989). Use of quotient verdicts is not favored because they preclude full deliberation on the issues and cause abandonment by some or all jurors of their conscientious convictions on material issues. **McDaniel**, 05-1013 at pp. 47-48, 934 So.2d at 979.

The trial court found no evidence to support plaintiffs' allegation that the jury compromised its damage awards. Nor, after a thorough review, do we find any evidence or indication whatsoever that the verdict of the jury was a quotient verdict. This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed equally between the plaintiffs and the defendants.

AFFIRMED.