

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0210

**LUCILLE GRAY, INDIVIDUALLY & O/B/O
HASE GRAY, III**

VERSUS

**SAFECO INSURANCE COMPANY OF AMERICA, GEICO GENERAL
INSURANCE COMPANY & ZACHARY DEAN TALBOT**

Handwritten initials and numbers: PNC, 228, JMM

Judgment Rendered: NOV 01 2013

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 585,573

Honorable R. Michael Caldwell, Judge Presiding

*** * * * ***

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*** * * * ***

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

In this personal injury case, the plaintiff appeals a judgment of the trial court rendered in conformity with a jury's verdict. The plaintiff contends that the jury awarded inadequate general damages and that the trial court erred in failing to grant her motion for judgment notwithstanding the verdict or, alternatively, for a new trial or additur. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On January 28, 2009, the plaintiff, Lucille Gray, was operating her vehicle traveling west on Interstate 10 in Baton Rouge. She was stopped in traffic, when she looked in her rear-view mirror and saw the vehicle of the defendant, Zachary D. Talbot, about to hit her. Mr. Talbot's vehicle hit Ms. Gray's vehicle, which then hit the vehicle in front of her. However, the air bag in Ms. Gray's vehicle did not deploy. Ms. Gray was transported by ambulance to the emergency room at Our Lady of the Lake Hospital and was released later that day.

On December 15, 2009, Ms. Gray filed suit against Mr. Talbot, his automobile liability insurer, Safeco Insurance Company of America, and GEICO General Insurance Company, Ms. Gray's underinsured motorist coverage provider, asserting that as a result of the accident she sustained injuries to her shoulder, arm, neck, and back.¹ Thereafter, Ms. Gray filed a motion for partial summary judgment on the issue of liability, and, on May 10, 2011, a judgment in favor of Ms. Gray and against the defendants was signed by the trial court on the issue of liability alone, reserving for trial all issues involving damages.

The matter proceeded to trial before a jury on July 24, 25, and 26, 2012. Following the presentation of evidence by Ms. Gray, the defendants moved for a directed verdict on her claim regarding future surgery, alleging that Ms. Gray had not established the cost of future surgery with sufficient specificity. The trial court granted the motion as to future cervical surgery, but not as to other future

¹ Ms. Gray also filed suit on behalf of her minor child, Hase Gray, III, to recover damages for loss of consortium as a result of the accident. This claim is not an issue in Ms. Gray's appeal.

medical costs. After deliberating, the jury concluded that Ms. Gray sustained damages that were caused by the accident of January 28, 2009. The jury awarded Ms. Gray past medical expenses in the amount of \$36,000.00, future medical expenses in the amount of \$10,000.00, past and future physical pain and suffering in the amount of \$5,000.00, and past and future mental pain and anguish in the amount of \$4,000.00, for a total damages award of \$55,000.00. The jury declined to make any award for disfigurement or for past and future loss of enjoyment of life. Judgment was signed on August 14, 2012, in accordance with the jury verdict, and, on August 15, 2012, Ms. Gray filed a motion for judgment notwithstanding the verdict (JNOV) or, alternatively, for a new trial or additur, asserting that the award for general damages was abusively low. Following a hearing, the motion was denied. On October 31, 2012, judgment was signed denying the motion, and Ms. Gray devolutively appealed.

DISCUSSION

General Damages

In her appeal, Ms. Gray initially asserts that the injuries she sustained to her cervical spine as a result of the subject accident have caused her constant pain and have altered her work and other daily activities. Further, she contends, her pain continues to get progressively worse. Therefore, Ms. Gray avers that the jury committed reversible error and/or abused its discretion by awarding inadequate general damages. On the other hand, the defendants contend that Ms. Gray did not suffer from the claimed injuries to the extent she has alleged. The defendants also assert that the award of general damages was based on credibility determinations and that a reasonable interpretation of the evidence exists to support the award in all respects.

It is well-settled that a judge or jury is given great discretion in its assessment of quantum, both general and special damages. Louisiana Civil Code Article 2324.1 provides: "In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury." Furthermore, the assessment of quantum, or the appropriate amount of

damages, by a trial judge or jury is a determination of fact, one entitled to great deference on review. **Guillory v. Lee**, 09-0075 (La. 6/26/09), 16 So.3d 1104, 1116; **Wainwright v. Fontenot**, 00-0492 (La. 10/17/00), 774 So.2d 70, 74.

The reviewing court must give great weight to factual conclusions of the trier of fact. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. **Id.** The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses, as compared with the appellate court's access only to a cold record, but also upon the proper allocation of trial and appellate functions between the respective courts. **Guillory**, 16 So.3d at 1116-17. Because the discretion vested in the trier of fact is so great, and even vast, an appellate court should rarely disturb an award on review. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993).

The role of an appellate court in reviewing a general damages award, one which may not be fixed with pecuniary exactitude, is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. Thus, before a court of appeal can disturb an award made by a fact finder, the record must clearly reveal that the trier of fact abused its discretion in making its award. Only after making the finding that the record supports that the lower court abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court. **Wainwright**, 774 So.2d at 74. Moreover, on review, an appellate court must be cautious not to re-weigh the evidence or to substitute its own factual findings just because it would have decided the case differently. **Guillory**, 16 So.3d at 1117. Reasonable persons frequently disagree about the

measure of damages in a particular case. 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 the appellate court should increase or reduce the award. **Youn**, 623 So.2d at 1261.

With these principles in mind, we look to the evidence in the record to determine if the jury's general damages award in this matter was contrary to the evidence or constituted an abuse of discretion. In support of her claim, Ms. Gray testified at trial, and the video depositions of Drs. Roy Kadair, Jorge Isaza, Rasheed Ahmad, and Darryl Peterson were played for the jury and introduced into evidence. Additionally, Ms. Gray's medical records and bills were introduced into the record. As part of their case, the defendants presented the testimony of Dr. Elizabeth Clubb and Ms. Gray's records from Baton Rouge Orthopaedic Clinic.

The record establishes that when Ms. Gray was transferred to Our Lady of the Lake Regional Medical Center after the accident by the Baton Rouge EMS Department, her complaint was of elbow pain. At the hospital, Ms. Gray complained of right elbow pain and pain radiating down her right arm with mild numbness. The hospital diagnosed Ms. Gray with "Elbow pain." Two days after the accident, on January 30, 2009, Ms. Gray went to see her primary care physician, Dr. Roy Kadair, complaining of bilateral pain in her shoulders. Ms. Gray had no complaints of pain in her neck or back at that time, and Dr. Kadair made no specific reference to neck pain in his notes. Dr. Kadair referred Ms. Gray to physical therapy.² He next saw Ms. Gray on February 16, 2009. Ms. Gray presented with pain in her right arm that she stated started three days after her last visit. Ms. Gray also had a different pain around the lateral part of her elbow, and she stated that she had intermittent numbness in her right arm. After determining that Ms. Gray had nerve symptoms in her right arm and that there was likely some neurological involvement in her neck, Dr. Kadair

² The records of Downtown Physical Rehabilitation from February 20, 2009 through May 22, 2009, indicate that Ms. Gray's complaints were of right arm pain and, specifically, right elbow pain with right elbow tingling into the hand as the result of the motor vehicle accident.

specifically asked Ms. Gray if the accident would likely lead to litigation. Ms. Gray responded affirmatively, and Dr. Kadair then ordered an MRI of her neck and an EMG nerve conduction study of her arm. He also requested that she undergo a neurological evaluation performed by either a neurologist or a neurosurgeon.

Ms. Gray returned to see Dr. Kadair approximately four months later, on June 16, 2009, for pre-operative clearance for an abdominalplasty, or tummy tuck, and liposuction scheduled with Dr. Elizabeth Clubb and unrelated to the accident. At that time, Dr. Kadair reviewed the test results with Ms. Gray. The MRI report showed a broad-based disc bulge at the C5-6 level that resulted in a mild to moderate degree of broad-based thecal sac encroachment. The C6-7 level showed a minor degree of broad-based disc bulge. The EMG, performed by Dr. William Gladney, showed right C6 mild denervation changes, probably related to a C6 radiculopathy on the right side. It was Dr. Kadair's opinion that Ms. Gray had disc bulging rather than a herniated disc, and he cleared Ms. Gray for the elective surgery. Dr. Kadair stated that if Ms. Gray had had an unstable neck from a herniated disc causing continuous pressure on a nerve root, he would not have approved her for the cosmetic surgery. Ms. Gray did not complain of neck or arm pain at that time.³

Ms. Gray was referred by her attorney to Dr. Jorge Isaza, an orthopedic spine specialist, who first saw Ms. Gray on March 23, 2009. Ms. Gray's chief complaint was of right arm pain, with numbness and tingling in her right arm and numbness in her right leg. She denied any neck pain. She also told Dr. Isaza that physical therapy failed to relieve her symptoms. On examination, Dr. Isaza noted decreased range of motion of Ms. Gray's cervical spine. He also noted that x-rays of the cervical spine showed that the normal curvature of the spine was straightened out a bit, indicating muscle spasms or pain in the neck. Upon review of Ms. Gray's MRI, Dr. Isaza noted a broad-based disc herniation at C5-6,

³ Ms. Gray also testified at trial regarding previous cosmetic surgery. She had breast reduction surgery in September 2008. Ms. Gray stated that after the breast reduction surgery, she no longer had pain from her bra straps in her upper back and shoulders. Despite the defendants' assertions of previous neck pain, Dr. Kadair believed that Ms. Gray's complaints of shoulder pain before the subject accident were related to her large breasts and were of a different nature than her cervical complaints after the accident.

but no cord compression was seen. There was also mild spurring on the left at C6-7. Based on the results of the MRI, EMG, and x-rays, Ms. Gray's complaints of right-sided pain were consistent with those objective findings. Given her history, Dr. Isaza's impression was that Ms. Gray was suffering from cervical strain, a disc herniation at C5-6, C6 radiculopathy on the right, carpal tunnel syndrome, and tennis elbow of the right arm. At that visit, Dr. Isaza referred Ms. Gray to Dr. Rasheed Ahmad for her hand and elbow.

Ms. Gray next saw Dr. Isaza on April 23, 2009, with continued complaints of numbness and tingling in the right arm and right leg, and of right-sided headaches. Again, she did not complain of neck pain.⁴ Ms. Gray first complained of neck pain to Dr. Isaza on June 10, 2009. Dr. Isaza continued conservative treatment following visits on September 23, 2009, February 25, 2010, June 8, 2010, and February 21, 2011. During her six-month follow-up visit on August 19, 2011, Dr. Isaza noted some changes in her reflexes. Dr. Isaza was concerned with cervical myelopathy, which is compression of the spinal cord, although he noted that there were no clear signs pointing to that. He wanted to keep a closer eye on Ms. Gray and wanted another MRI of the cervical spine.

Ms. Gray's next visit with Dr. Isaza was on December 15, 2011, at which time he discussed the MRI results. The MRI, performed on December 12, 2011, showed a slight spondylolisthesis at C4-5, the disc herniation at C5-6, slightly more right sided than left, with contact to the cord, but no evidence of spinal cord signal changes. On that date, Dr. Isaza discussed treatment options with Ms. Gray including surgical versus nonsurgical options. He noted that he needed to continue to monitor her symptoms closely and that it was okay to wait on any type of surgical intervention, but that Ms. Gray needed to let him know immediately if there were any changes. He believed that Ms. Gray had reached maximum medical improvement without surgery at that time.

⁴ On that date, Dr. Isaza also ordered a second EMG that was conducted on April 27, 2009, by Dr. Gladney and had similar findings to the EMG of March 3, 2009. Dr. Gladney reported bilateral carpal tunnel syndrome, as well as "mild denervation right C6 – probable mild radiculopathy."

Ms. Gray saw Dr. Isaza again on February 27, 2012. Ms. Gray had the same complaints and had issues with increased activities. He noted that he had a long discussion with her about treatment options and indicated to her that surgery would be indicated only for intractable pain or progressive neurological weakness. While Ms. Gray was not happy with her pain, she did not feel it was at the point that she would consider surgical intervention. Ms. Gray's last visit with Dr. Isaza before trial was on May 2, 2012. She continued to have the same complaints of neck pain and right arm pain. Dr. Isaza concluded that it was more likely than not that Ms. Gray was going to require surgery in the future if she continued to develop progression of her symptoms on the cervical spinal cord. He also believed, considering the subject accident and finding that her pre-accident breast reduction surgery had alleviated her previous neck complaints, that it was more likely than not that her complaints of neck pain following the accident and her disc herniation and treatment were related to the automobile accident in January 2009. It was Dr. Isaza's opinion that Ms. Gray's symptoms have persisted and have not changed in nature, despite her cosmetic surgery procedures.

Dr. Rasheed Ahmad, a hand, elbow, and forearm specialist, first saw Ms. Gray on April 7, 2009. Ms. Gray had right hand and arm numbness. Upon examination, he diagnosed her with carpal tunnel syndrome and lateral epicondylitis, or tennis elbow. It was Dr. Ahmad's opinion that neither of these conditions was caused by the automobile accident. Dr. Ahmad next saw Ms. Gray on May 29, 2009. Ms. Gray did not have any numbness or right hand pain, but complained of pain in her right arm, described as a deep aching and throbbing pain. Upon examination, Dr. Ahmad did not think Ms. Gray had tennis elbow and thought her pain was coming from her cervical spine.

Dr. Ahmad did not make any note of any swelling in Ms. Gray's right thumb. He stated that unless Ms. Gray had pointed out the pain in a particular spot, he would not have examined her for deQuervain's tenosynovitis. Although Dr. Ahmad was of the opinion that deQuervain's can be caused by a direct blow,

he did not think that having your hands on something would cause it. Further, he stated that if deQuervain's syndrome was present it would manifest itself quickly, and not three months later. He stated that if the deQuervain's was caused by the subject accident, it would have been present when he saw Ms. Gray, and it would have made sense that Ms. Gray would have mentioned it since she was treated by Dr. Ahmad for deQuervain's in her left wrist two years earlier. It was Dr. Ahmad's opinion that Ms. Gray's right wrist and thumb problems were not related to the subject accident.

Dr. Darryl Peterson, a hand orthopedic surgeon, saw Ms. Gray on December 3, 2009, with complaints of right wrist pain. He diagnosed Ms. Gray with deQuervain's syndrome, which is inflammation of the tendons at the wrist at the thumb. Dr. Peterson found more swelling than in most presentations and he could see and feel the swelling. Ms. Gray was also in significant pain, which was consistent with what he saw. He also thought she might have a ganglion cyst, which is swelling of tissue. Ms. Gray's history was of an automobile accident and pain that was progressively getting worse. Dr. Peterson was of the opinion that Ms. Gray had a very advanced case of deQuervain's syndrome and that she needed surgery.

Surgery under general anesthesia was performed on December 11, 2009. Dr. Peterson described that a one to one-and-a-half inch incision was made, after which he released the tightness in the tendons and trimmed the swelling. There were no complications. Ms. Gray followed up with visits on December 30, 2009, January 13, 2010, February 15, 2010, and April 7, 2010. On her last visit, Ms. Gray reported minimal pain, although she stated that weather change did cause some aching. Dr. Peterson stated that the most common cause for deQuervain's syndrome is repetitive activity. It can also be caused by trauma. Based on Ms. Gray's history of having no wrist problems before the subject accident, and in contrast to Dr. Ahmad's opinion, Dr. Peterson opined that the January 28, 2009 accident caused Ms. Gray's hand injury and her need for surgery.

Dr. Peterson believed the pain began with the accident and that typically the pain manifests within six to eight weeks. On cross-examination, he was shown Dr. Ahmad's deposition where Dr. Ahmad stated that Ms. Gray had no complaints on the thumb side of her right wrist in April or May of 2009, yet Ms. Gray indicated to Dr. Peterson on her first visit that she had problems with her wrist since the accident. However, she also indicated on that visit that her right wrist pain began in August 2009. Dr. Peterson's notes further indicated that Ms. Gray stated that she was not sure if the accident caused the wrist pain.

Dr. Elizabeth Clubb, an expert in the field of cosmetic surgery, testified at trial. Dr. Clubb testified that she first saw Ms. Gray in April 2008, approximately nine months before the accident, for breast reduction surgery. At that time, Ms. Gray was complaining of pain in her neck, and upper back. The surgery was performed in September 2008. Dr. Clubb saw Ms. Gray again in June 2009, approximately five months post-accident, for elective abdominoplasty and liposuction. Dr. Clubb stated that she was not given information regarding the January 2009 accident or Ms. Gray's cervical problems. Dr. Clubb testified that that information was significant as she would want to know a complete history, especially since a patient has to be turned several times with liposuction. Dr. Clubb testified that had she had the information, she would have referred Ms. Gray to an orthopedist or neurosurgeon to clear Ms. Gray for the surgery.

Ms. Gray suffered significant complications following her abdominoplasty. Dr. Clubb testified that Ms. Gray suffered a pulmonary embolus, or blot clot, the day following surgery when she stood up to get dressed to go home. Ms. Gray was aggressively treated with blood thinners, which caused hemorrhaging. As a result, Ms. Gray had to return to surgery, and she remained in the hospital for seven to eight days. Ms. Gray was not cleared to return to work until January 2010.

The jury considered all the testimony and documentary evidence presented at trial, including Ms. Gray's own testimony.⁵ Given that evidence, the jury could have reasonably found that while Ms. Gray was involved in the subject accident, she did not suffer injuries to the extent she has alleged and may have had a different appreciation of the severity of the injuries suffered as a result of the accident. Ms. Gray's initial complaints to EMS and at the hospital on the day of the accident were only of elbow pain. Her physical therapy from February through May 2009 was for right elbow pain. Further, Ms. Gray did not complain of neck pain until June 2009, five months after the accident. She also chose to proceed with elective cosmetic surgery in June 2009, and declined to tell her surgeon of any cervical problems. Nor did she tell Dr. Isaza that she was undergoing the cosmetic surgery. Further, when Ms. Gray went to Dr. Kadair for her pre-surgery clearance, she did not complain of any neck or arm pain at that time. With regard to her right wrist, Ms. Gray gave different dates as to when the pain began. She also failed to tell her doctors treating her for her right wrist problems of her prior similar problems in her left wrist, including the fact that she had been diagnosed with a severe case of deQuervain's syndrome in her left wrist in 2008. Moreover, Ms. Gray did not tell Dr. Isaza, her spine specialist, that she was involved in a later motor vehicle accident in December 2009, although Ms. Gray testified that it was minor and there were no injuries. Thus, based on its weighing of the evidence and credibility determinations, the jury reasonably could have concluded that Ms. Gray's complaints regarding her arm, neck, and upper back pain were either exaggerated or not related to the accident.

Nevertheless, the jury chose to award Ms. Gray all of her medical expenses. She therefore asserts that her general damages award should be higher. However, the Louisiana Supreme Court has held that a jury does not abuse its discretion in awarding medical expenses but no general damages when the medical expenses were incurred to determine whether injuries were in fact

⁵ During deliberations, the jury sent a note to the trial court with several questions. In response, all of the documentary evidence was given to the jury by the trial court.

sustained. See **Wainwright**, 774 So.2d at 77. In **Wainwright**, the supreme court held that “the particular facts of each case are ultimately determinative” as to whether awards for different elements of damages in personal injury cases are inconsistent, and that “there is no bright line rule at work” in situations where special damages are awarded but no general damages are awarded. **Wainwright**, 774 So.2d at 76.

While general damages were awarded in this matter, the jury believed that an award of only \$5,000.00 for physical pain and suffering, past and future, and \$4,000.00 for mental pain and suffering, past and future, was appropriate and, furthermore, that Ms. Gray did not sustain disfigurement or a loss of enjoyment of life. As to her claim for disfigurement, Ms. Gray held up her wrist for the jury to see her scar. However, she did not stand up and her attorney even stated that it was hard to see from where she was. No photograph of her wrist or scar was introduced into evidence. Further, although Dr. Peterson related the deQuervain’s syndrome in Ms. Gray’s right wrist to the subject accident, Dr. Ahmad was of the opinion that it was not related. Ms. Gray also testified that one week after the accident she could perform all of her regular activities. Loss of enjoyment of life refers to detrimental alterations of the person’s life or lifestyle or the person’s inability to participate in the activities or pleasures of life that were formerly enjoyed prior to the injury. **McGee v. A C And S, Inc.**, 05-1036 (La. 7/10/06), 933 So.2d 770, 775. The jury could have reasonably believed that Ms. Gray simply failed to present sufficient evidence of disfigurement or loss of enjoyment of life. We cannot say that there was manifest error in the jury’s failure to award any damages for disfigurement or loss of enjoyment of life.

The jury did not differentiate whether the general damages awarded were for cervical or wrist injuries, or for both. While we recognize that the jury’s \$9,000.00 general damages award is on the lower end of what might be appropriate, the jury, based on the facts and circumstances of this case, could have reasonably concluded that Ms. Gray’s cervical complaints were simply not

related to the January 2009 accident. Although all of Ms. Gray's medical expenses were awarded, most of those expenses, besides those related to her wrist, were to determine the extent of the injuries, if any, sustained. Further, Ms. Gray suffered no complications from the surgery for the deQuervain's syndrome, and she recovered quickly with minimal pain, and there was a disagreement among experts regarding causation. The jury made credibility determinations and could have chosen not to believe Ms. Gray's testimony regarding the extent or cause of her injuries. Moreover, the jury may have determined that her pain was minimal when Ms. Gray chose to have elective surgery in June 2009, approximately five months post-accident. There were two permissible views of the evidence, and it is not our role to substitute our view of the evidence for that of the jury's. Considering the evidence in the record, the jury could have reasonably concluded \$9,000.00 was an appropriate general damages award. Thus, based upon the particular facts of this case, we cannot say that the award for general damages was an abuse of the jury's discretion.

Motion for JNOV, New Trial, or Additur

Ms. Gray also contends that the trial court erred in failing to grant her motion for JNOV or, alternatively, for new trial or additur.

A JNOV is a procedural device authorized by LSA-C.C.P. art. 1811, by which the trial court may modify the jury's findings to correct an erroneous jury verdict. A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. If there is evidence opposed to the motion that is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. In making this determination, the court should not evaluate the credibility of the witnesses and all reasonable inferences or factual questions

should be resolved in favor of the non-moving party. **Davis v. Wal-Mart Stores, Inc.**, 00-0445, p. 4 (La. 11/28/00), 774 So.2d 84, 89; **Cobb v. Mitchell**, 12-1032 (La.App. 1 Cir. 6/27/13), ___ So.3d ___.

The rigorous standard of a JNOV is based upon the principle that when there is a jury, the jury is the trier of fact. **Trunk v. Medical Center of Louisiana at New Orleans**, 04-0181 (La. 10/19/04), 885 So.2d 534, 537. Simply stated, if reasonable persons could have arrived at the same verdict given the evidence presented to the jury, then a JNOV is improper. **Cavalier v. State, ex rel. Dept. of Transp. and Development**, 08-0561 (La.App. 1 Cir. 9/12/08), 994 So.2d 635, 644. The standard to be applied by the appellate courts in reviewing the grant or denial of a JNOV is whether the trial court's findings were manifestly erroneous. **Marroy v. Hertzak**, 11-0403 (La.App. 1 Cir. 9/14/11), 77 So.3d 307, 317.

Considering all of the evidence and the reasonable inferences to be made therefrom in favor of Ms. Gray, we cannot say that the trial court was manifestly erroneous in refusing to grant her motion for JNOV. The evidence did not point so strongly in favor of Ms. Gray that reasonable persons could not have reached a different conclusion. In particular, given Ms. Gray's testimony and the medical records introduced into evidence, the jury was faced with conflicting testimony and credibility issues, which the jury resolved, in part, in her favor. Stated differently, given the record before us, we are unable to say that reasonable and fair-minded jurors in the exercise of impartial judgment could only reach the conclusions urged by Ms. Gray in support of her request for JNOV. Accordingly, we find no error in the trial court's denial of plaintiff's motion for JNOV.

Alternatively, Ms. Gray moved for a new trial. The motion for a new trial requires a less stringent test than a motion 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. **Id.** A new trial shall be granted if the jury verdict appears to be clearly contrary to the law and the evidence. LSA-C.C.P. art. 1972(1). Also, a trial court may grant a new trial if

there is some good ground therefor. LSA-C.C.P. art. 1973. When considering a motion for a new trial, the trial court has wide discretion. LSA-C.C.P. art. 1971.

However, it is well settled in this circuit that an appeal of a denial of a motion for new trial will be considered as an appeal of the judgment on the merits when it is clear from the appellant's brief that the appeal was intended to be on the merits. **Nelson v. Teachers' Retirement System of Louisiana**, 10-1190 (La.App. 1 Cir. 2/11/11), 57 So.3d 587, 589 n.2; **Carpenter v. Hannan**, 01-0467 (La.App. 1 Cir. 3/28/02), 818 So.2d 226, 228-29, writ denied, 02-1707 (La. 10/25/02), 827 So.2d 1153.

Additionally, the Louisiana Code of Civil Procedure provides a procedure for additur or remittitur of the verdict or judgment in cases tried before a jury when 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. See LSA-C.C.P. art. 1814. This procedure is connected with the procedures concerning new trials. **Guidry v. Millers Cas. Ins. Co.**, 01-0001 (La.App. 1 Cir. 6/21/02), 822 So.2d 675, 680.

In this matter, the trial court acknowledged in its oral reasons that this was a close question, but had to have found that reasonable minds could have reached the jury's conclusion, as it denied the motion. We must agree. The jury's findings were largely based on credibility determinations and weighing of conflicting evidence. Although the evidence was conflicting, two permissible views of the evidence existed, and the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. See **Rosell**, 549 So.2d at 844. The jury's verdict was supported by a fair interpretation of the evidence, and there was sufficient evidence heard by the jury that could have led it to conclude that Ms. Gray did not suffer injuries to the extent she alleged. Accordingly, we can find no abuse of the trial court's discretion in its judgment denying Ms. Gray's motion for new trial or additur.

CONCLUSION

For the above and foregoing reasons, the August 14, 2012 judgment of the trial court, rendered in accordance with the jury's verdict, is affirmed. The October 31, 2012 judgment of the trial court, denying plaintiff's motion for JNOV, new trial, and additur is also affirmed. Costs of this appeal are assessed against plaintiff, Lucille Gray.

AFFIRMED.