MICHAEL MAXWELL	*	**NO. 2000-CA-2408**
VERSUS	*	**COURT OF APPEAL**
MRS. LEO PALAZZO, AND LAFAYETTE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 94-1183, DIVISION "A"
HONORABLE CAROLYN GILL-JEFFERSON, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr., Judge Michael E. Kirby)

SUSAN G. LANG
530 NATCHEZ STREET
SUITE 250
NEW ORLEANS, LA 70130
COUNSEL FOR PLAINTIFF/APPELLEE

PETER M. MEISNER
SULLIVAN, STOLIER & RESOR
909 POYDRAS STREET
SUITE 2600
NEW ORLEANS, LA 70112

COUNSEL FOR DEFENDANT/APPELLANT

Defendants, Josephine Palazzo and Lafayette Insurance Company, appeal the trial court's judgment finding them liable for injuries suffered by plaintiff, Michael Maxwell. Plaintiff also appeals the judgment, which found him 60% at fault for the accident that caused his injuries.

Plaintiff filed a petition for damages against the defendants on January 24, 1994, claiming that he sustained injuries on April 20, 1993 while working on the chimney of a house on Kerlerec Street in New Orleans. According to the petition, Mrs. Palazzo was the owner of the property and Lafayette Insurance Company was the liability insurer for the property. Plaintiff contends that defendants are strictly liable for his damages.

The following testimony was presented at trial. Josephine Palazzo testified that she is the owner of two adjacent apartment buildings located at 621-23 Kerlerec Street and 627 Kerlerec Street. She resides in one of the apartments at 627 Kerlerec. She stated that she managed both of these properties. She testified that plaintiff's employer, K & G Construction, which was owned by her son's brother-in-law, had performed previous

repair work on her properties. Mrs. Palazzo stated that the fireplaces in the apartment building at 621-623 Kerlerec had been closed off for more than thirty-five years, so the chimney on that building had no real use. She said her late husband closed off the fireplaces and capped the chimney when they bought the property thirty-five to forty years ago and no work had been performed on the chimney since that time.

Mrs. Palazzo said that in April 1993, the cap of the chimney on the apartment building at 621-623 Kerlerec blew off in a storm. She said she called several roofing companies after the storm, but all were too busy to work on her property right away. She testified that she never asked plaintiff to fix the chimney cap. She further stated that she never asked him to go onto her roof for any reason. Mrs. Palazzo testified that she was not at home on April 20, 1993. She claimed to have no knowledge of what plaintiff was doing on her roof. She said that after the storm but before April 20, 1993, she could see from the street that bricks were missing from the chimney. After April 20, 1993, she said a lot more bricks were missing and part of the chimney had collapsed.

Dr. Jo Plunkett, an expert in internal medicine at Ochsner Clinic,

testified that she first saw plaintiff on July 23, 1998. She reviewed plaintiff's medical records from earlier visits with other physicians at Ochsner Clinic. Plaintiff had been treated in the Ochsner emergency room on July 7, 1998, and was diagnosed with alcoholic neuropathy and blackout. He gave a history of long-term alcohol abuse and problems with short-term memory loss. Dr. Plunkett could not pinpoint how long plaintiff had suffered blackouts associated with alcohol abuse.

The next witness was Robert Winkles. Mr. Winkles testified that in March and April 1993, plaintiff hired him to perform repair work on the property located at 621-623 Kerlerec Street. He said plaintiff hired him to replace window screens and paint window frames. He said he recalled a conversation in which Mrs. Palazzo mentioned to plaintiff that she was having problems with the chimney cap being off, and she asked him if he could fix it. She said if he could not fix it, she would need to hire a roofer. Shortly after that testimony, Mr. Winkles said that Mrs. Palazzo did not mention the chimney cap being off. Mr. Winkles said that plaintiff went onto the first floor roof to get a closer look at the chimney on the second floor roof. He never heard any further discussions between plaintiff and

Mrs. Palazzo regarding replacement of the chimney cap. He stayed inside the apartment building while plaintiff was on the roof, so he did not see plaintiff near the chimney that day. He stated that the date of that discussion between plaintiff and Mrs. Palazzo was the last day that he worked at the Palazzo property. Mr. Winkles said that to the best of his knowledge, plaintiff had never done any roofing work prior to the accident.

Plaintiff testified that K & G Construction was his employer on April 20, 1993. He stated that he had done some previous repair work on Mrs. Palazzo's properties. According to plaintiff, Mrs. Palazzo asked him to replace a chimney cap that had come off during a storm on one of her rental properties. He stated that he climbed onto the lower roof to look at the chimney, which was on the second floor roof. Plaintiff said he gave Mrs. Palazzo a written estimate of the costs to replace the chimney cap and two bricks that had fallen off the roof, and she then authorized him to proceed with this work. Plaintiff attempted to perform this work a couple of days after Mrs. Palazzo agreed to the estimate.

On the morning of the accident, plaintiff climbed up onto the roof using an extension ladder. He said the man who was working with him has

since died. Once on the roof, plaintiff went straight to the chimney. He brought with him the chimney cap, a caulking gun and the bricks that had fallen off. He noticed that the chimney was missing a couple of bricks and did not have a cap on it. Plaintiff thought that, aside from those items, the chimney appeared to be intact.

He noticed that prior to the chimney cap coming off, it had been nailed into the mortar joints of the bricks. He saw nail holes in the mortar between the top and second row of bricks. Because there were cracks where the nails had been driven into the mortar joints underneath the top row of bricks, plaintiff decided to break the top row of bricks loose and throw them down the chimney because it was not being used. When he broke up the bricks on the top row of the chimney, none of the bricks on the next row moved. There were no other nail holes in the chimney after the top row of bricks had been removed. He stated that his intention in knocking off the top row of bricks was to make a flush surface to nail the chimney cap to the chimney.

Plaintiff testified that after he knocked off the top row of bricks from the chimney, he attempted to go to the other side of the chimney. In doing

so, he hugged the left side of the chimney and started stepping around to the other side. When he did that, the remainder of the chimney collapsed and he fell off the roof. He said the bricks broke free from the mortar and were each still intact. When asked if he could have secured himself in some way while working on the chimney, plaintiff answered that the only thing he could have tied something to was the chimney. He said he did not use a toe board or foam pads because he was not doing roofing work; the job he was performing involved only the chimney.

Plaintiff stated that when he fell off the roof, he hit the house next door (also owned by Mrs. Palazzo,) an air conditioning window unit and a metal fence before landing on the ground. He could not stand up after his fall. Plaintiff was subsequently transported by ambulance to Charity Hospital.

On cross-examination, plaintiff testified that at the time of the accident he was not drinking alcohol and he did not arrive at the job intoxicated. He said that he had never repaired a chimney prior to the accident, but he did build a chimney once. For that reason, he felt confident that he could repair the chimney at Mrs. Palazzo's apartment building and

felt that he was using the proper equipment to do this job. On the day of the accident, he saw that bricks were missing from the chimney before he got to the chimney. He said he was able to break off the top row of bricks with his hands and did not need any tools.

Plaintiff stated that most of the chimney remained intact after his accident. He said that he could have tied off a line to the bottom part of the chimney before he started this job, but he did not think tying a line would have prevented this accident because he still would have had to move around the chimney to tie the line. He stated he did not use toe boards, because he only uses toe boards when he does roofing work, and this was chimney work. Plaintiff said he fell from the roof because the bricks broke away in his hand, and not because he slipped. At his deposition, plaintiff said he was not sure if he slipped or if he fell because the bricks came loose in his hand. Plaintiff said he had done some roofing work prior to this accident.

On redirect examination, plaintiff testified that there were no nail holes or cracks in any part of the chimney other than the mortar beneath the top row of bricks. He said he never had another experience where brick walls or chimneys collapsed because of weakened mortar.

The next witness was Michael Palazzo, Josephine Palazzo's son. Mr. Palazzo testified that he is a certified financial planner and has an insurance license. He assisted his mother and her insurance agent after the accident. He had in his possession six written estimates for repairs from K & G Construction, but did not have the seventh estimate written by plaintiff for replacement of the chimney cap and bricks. He stated that a couple of weeks after the accident, he had a telephone conversation with plaintiff in which plaintiff described to Mr. Palazzo what happened to him on the day of the accident. Based on this conversation, Mr. Palazzo wrote a letter to his mother's liability insurer. In this letter, Mr. Palazzo wrote that "apparently [plaintiff] secured himself by ropes to the brick chimney." However, Mr. Palazzo could not recall at trial if plaintiff told him he had secured himself with a rope. He said he got the impression from plaintiff that he thought he was covered by workers' compensation insurance, but later learned that his employer had cancelled the workers' compensation policy.

According to Mr. Palazzo, plaintiff was seeking his help in getting Mrs. Palazzo's insurance to cover his medical bills for his injuries from the accident. Mr. Palazzo said plaintiff wanted him to ask his mother to say that

plaintiff had her approval and authorization to work on her roof at 621-23 Kerlerec. Mr. Palazzo stated that he told plaintiff that his mother was not going to say that because it would be insurance fraud. Mr. Palazzo testified that to the best of his knowledge, plaintiff did not have Mrs. Palazzo's approval to work on her roof. Mr. Palazzo claims that when he asked plaintiff why he got on the roof when he was only supposed to do interior and ground work at Mrs. Palazzo's properties, plaintiff told him that he wanted to surprise Mrs. Palazzo with the chimney repair because she was having trouble finding a roofer to fix the problem and he needed the money.

Mr. Palazzo said his mother told him she was going to hire a roofer after the chimney was damaged in a storm. He said his mother wanted to have the chimney removed, not repaired. He said to the best of his knowledge, his mother never hired K & G Construction to perform roofing work; she always used companies that specialized in roofing work.

On cross-examination, Mr. Palazzo said that in his letter to his mother's insurance agency, he stated that the bricks on the chimney dislodged, which caused plaintiff to fall. He said he made that statement because that is what plaintiff told him. The letter also stated that Mrs.

Palazzo told him that plaintiff was not authorized to be on her roof.

Josephine Palazzo was called to the witness stand again. She testified that she had never seen the estimate that plaintiff wrote for replacement of bricks and the chimney cap on the roof. She said she never asked plaintiff or any representative of K & G Construction to replace the bricks and chimney cap on her roof.

Kelly Golden, the owner of K & G Construction and plaintiff's employer, was the next witness. He identified a written estimate from K & G Construction for replacement of bricks and chimney cap on the roof of property owned by Mrs. Josephine Palazzo. He could not recall if this was work that Mrs. Palazzo wanted his company to do. He said he never told plaintiff to get on Mrs. Palazzo's roof and check the chimney. Mr. Golden said he had a conversation with Mrs. Palazzo about storm damage to her chimney, and she told him that she was going to hire a roofer to repair it. He understood that to mean that the roofing work was not going to be performed by K & G Construction. He said that he has never known Mrs. Palazzo to allow workers to go on her property without her being there. Mr. Golden stated that at the time of plaintiff's accident, plaintiff was not assigned by

him to work on Mrs. Palazzo's property.

Mr. Golden admitted that he and plaintiff sometimes drank alcohol while working. He said he has never seen plaintiff work on a roof. He stated that plaintiff resumed working with him six to eight months after the accident, but he worked only as a supervisor.

Mr. Golden testified that he could not recall his earlier deposition testimony, in which he stated Mrs. Palazzo wanted her roof repaired because the chimney was leaking and bricks were missing. When confronted with this deposition testimony, Mr. Golden stated that he was simply recounting what plaintiff told him about the events leading up to the accident. He also said that even though Mrs. Palazzo told him she wanted her roof repaired, she did not tell him that she wanted his company to do the repair work.

Following trial, the trial court rendered judgment in favor of plaintiff and against defendants. It also found that plaintiff was 60% at fault for the accident that caused his injuries. The trial court awarded plaintiff $175,000.00 for pain and suffering and $22,552.86 for past medical expenses plus court costs and interest from date of judicial demand. The court stipulated that this award is to be reduced by 60%, the percentage of

fault attributable to plaintiff.

In reasons for judgment, the court stated that it found that plaintiff had the authority to go on Mrs. Palazzo's roof. The court did not find Mrs. Palazzo's testimony that she did not authorize plaintiff to go on her roof to be credible because the other evidence and testimony belied this contention. Specifically, the court stated that it looked to the fact that it was uncontested that the chimney was damaged in a storm in April 1993. Mrs. Palazzo stated that she called other roofers, but none had come to perform the work before plaintiff's accident. Also, Mrs. Palazzo recognized every invoice from K & G Construction except the one in question.

The court also stated that it did not find Mr. Golden's testimony to be completely credible. Specifically, the court noted that Mr. Golden testified at trial that Mrs. Palazzo did not request that any work be done on the roof. However, the court found that Mr. Golden's trial testimony was impeached with his deposition testimony in which he stated that Mrs. Palazzo specifically requested that the roof be fixed because the chimney was leaking.

The trial court found that the fact that no checks written by Mrs.

Palazzo were made payable to K & G Construction or plaintiff in April 1993 did not establish that no work was performed in that month. The K & G Construction contract and Mrs. Palazzo's testimony established that checks were not issued until work was completed, and plaintiff's accident prevented the completion of this project. The court also noted that there was no testimony establishing that all of the contracts and checks for payment for work performed by K & G Construction were submitted into evidence. One of the exhibits established that Robert Winkles was performing work on Mrs. Palazzo's property in April 1993, so repair work was being performed on the property during that month.

The court found that the fact that the invoice for the chimney work was not signed by Mrs. Palazzo was not dispositive because several of the invoices were not signed, yet the work was obviously performed because Mrs. Palazzo issued checks to plaintiff. Mrs. Palazzo's testimony that she was always home when work was being performed was contradicted by plaintiff's testimony. The trial court obviously found plaintiff's testimony on this issue to be more credible.

The trial court also found that defendants are strictly liable for

plaintiff's damages because plaintiff proved by a preponderance of the evidence that 1) Mrs. Palazzo owned the building; 2) the chimney broke away, constituting a ruin; and 3) the risk of harm presented by the chimney was unreasonable. The court noted that while plaintiff had more than twenty years of experience in masonry repairs, roofing and roof level work, he was not a brick mason and did not know what the adhesive life of mortar was. It noted that the plaintiff testified that he had never seen mortar disintegrate as it did here, and that while the top row of bricks on the chimney broke off easily, the second row appeared solid and did not move when he knocked on them. The court found that Mrs. Palazzo had the incentive to repair the chimney because she believed that the missing cap and bricks were causing a leak. This incentive remained whether Mrs. Palazzo intended to repair or remove the chimney.

As to the ability of plaintiff to minimize his risk, the court found that there were safety precautions that plaintiff could have taken. It noted that plaintiff testified that tying a rope around the chimney would have caused it to collapse, but photographs taken after the accident showed that the chimney remained intact. The court also found that the magnitude of the

harm presented by the chimney was great compared to its utility. Mrs. Palazzo admitted that the chimney had not been used for at least thirty-five years. The trial court also found that the plaintiff fell because the bricks from the chimney came loose in his hands.

On the issue of plaintiff's comparative fault, the trial court found that plaintiff had at least some awareness of the danger of the situation. It noted that even though he was not a brick mason and had no knowledge regarding the adhesive life of mortar, plaintiff had several years of experience in roofing and roof level work. The court also pointed out that plaintiff's own testimony revealed that prior to the chimney collapsing, plaintiff saw nail holes in the mortar and cracks in the bricks, yet because the second row of bricks did not move when he knocked on it, he erroneously concluded that he could grab the chimney and use it for support while he moved around it.

Based on the above, the court concluded that plaintiff had a general awareness of the dangers of working on a roof and that he should have had a specific awareness of the danger of hugging this particular chimney. It found that the risk created by plaintiff was great. There was no evidence or testimony to indicate any extenuating circumstances that would have

required plaintiff to do what he did without proper thought. Therefore, the court assessed plaintiff's comparative fault at 60%.

On appeal, defendants argue that the trial court erred in finding that Mrs. Palazzo had given plaintiff permission or authorization to repair her chimney. The defendants also argue that the trial court erred in finding that the chimney in question constituted a "ruin" and in holding the homeowner liable for plaintiff's injuries because plaintiff was a professional repairman who had been hired to repair the chimney that caused him to fall. Alternatively, defendants argue that the trial court erred in limiting plaintiff's percentage of fault for the accident to 60%. Plaintiff argues that no fault should have been assigned to him.

Regarding the issue of whether or not Mrs. Palazzo authorized plaintiff to repair her chimney, the trial court was faced with conflicting testimony from plaintiff and Mrs. Palazzo. The court believed plaintiff's testimony that Mrs. Palazzo authorized him to perform the repair work, and did not believe Mrs. Palazzo's testimony that plaintiff attempted to repair her chimney without her knowledge or authorization. Where conflict exists in testimony, a trial court's reasonable evaluations of credibility and

reasonable inferences of fact should not be disturbed on appeal. Stobart v. State, through Dept. of Transp. and Development, 617 So.2d 880 (La. 1993). We find the trial court's credibility evaluations on the issue of authorization to be reasonable. Therefore, we find no merit in defendants' argument that the trial court erred in finding that Mrs. Palazzo authorized plaintiff to repair her chimney.

The issue of whether or not the chimney constituted a "ruin" is controlled by the strict liability articles, La. C.C. articles 2317 and 2322. At the time of plaintiff's accident, those articles provided as follows, in pertinent part:

La. C.C. art. 2317:

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody.

La. C.C. art. 2322:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

In this case, the trial court found that the chimney constituted a ruin because it collapsed when plaintiff grabbed onto it to move to the other side

of the chimney. The court found that the ruin was caused by Mrs. Palazzo's neglect in repairing the chimney, which she knew was in need of repair due to the bricks that fell off and the problem with the roof leaking in the area of the chimney. On the issue of a building owner's liability under C.C. art. 2322 for injuries caused by a "ruin," our Supreme Court stated in Olsen v. Shell Oil Co., 365 So.2d 1285 (La. 1978):

> The owner's fault is founded upon the breach of his obligation to maintain or repair his building so as to avoid the creation of undue risk of injury to others. The owner is absolved from its strict liability neither by his ignorance or the condition of the building, nor by circumstances that the defect could not easily be detected.
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> * * * * *
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> Under the terms of Article 2322, several requirements for the imposition of liability under the article must be met: (1) There must be a building; (2) the defendant must be its owner; and (3) there must be a "ruin" caused by a vice in construction or a neglect to repair, which occasions the damage sought to be recovered.

Id. at 1288-1289.

In this case, Mrs. Palazzo was the owner of the building in question. The record supports the trial court's finding that the chimney broke away, constituting a ruin, and that Mrs. Palazzo's neglect in repairing this condition caused plaintiff's damages. The trial court's finding on this issue

was not manifestly erroneous.

For defendants' argument that they should not be held liable for plaintiff's injuries because of plaintiff's status as a professional repairman, we are guided by the Louisiana Supreme Court case of Celestine v. Union Oil Co. of California, 94-1868 (La. 4/10/95), 652 So.2d 1299. In Celestine, the Supreme Court addressed the question of whether Louisiana law recognizes a "repairman" exception to an owner's strict liability for injury caused by a vice, defect or ruin on the owner's premises. The Court concluded that there is no per se exception of repairmen from the ambit of an owner's strict liability. Id. The Court stated that an owner is strictly liable to a repairman for injury caused by a vice, defect or ruin on his premises only where the building or defect therein poses an unreasonable risk of harm vis-à-vis the repairman. Id. Citing Entrevia v. Hood, 427 So.2d 1146 (La. 1983), the Celestine court stated that to recover under C.C. art. 2322 against an owner of a building, a plaintiff must prove that the building posed an unreasonable risk of injury to others and that he was damaged by virtue of this risk. Id. A plaintiff's status as a repairman is a significant factor in the determination of whether a risk is unreasonable. Id.

The trial court found that the risk of harm presented by the chimney was unreasonable and that plaintiff suffered damages as a result of this risk.

Therefore, the court found defendants strictly liable for plaintiff's injuries. Although plaintiff was experienced in masonry repairs, he did not know the adhesive life of mortar and had never seen mortar disintegrate as it did on the day of his accident. Also, the plaintiff thought the portion of the chimney below the top row of bricks was stable because it appeared solid when he knocked on it. Considering the facts and circumstances of this particular case, we find no error in the trial court's conclusion that the chimney presented an unreasonable risk of harm to plaintiff and that defendants are strictly liable for his injuries.

Regarding the issue of plaintiff's comparative fault, we find no error in the trial court's assessment of that fault at 60%. Plaintiff had safety measures available to him that he chose not to use. Also, even after learning that the top row of bricks could easily be removed because of cracks in the mortar, plaintiff used the remainder of the chimney to support his weight as he attempted to move to the other side. We agree with the trial court's conclusion that plaintiff knew of the dangers of working on roofs and should have recognized the danger of "hugging" this particular chimney.

In addressing the issue of whether plaintiff could have tied a rope around the chimney as a safety measure, the trial court stated that photographs of the chimney taken after the accident were introduced into

evidence by the defendants and demonstrated that a large portion of the chimney remained intact following the accident. Plaintiffs correctly argue on appeal that these photographs were never actually introduced into evidence. However, during the plaintiff's testimony, he was shown these photographs and testified that almost the entire chimney remained intact after the accident and that he could have tied off a line to the chimney as a safety measure. Therefore, even though the trial court incorrectly stated that the photographs of the chimney were introduced into evidence, the plaintiff's own testimony established that he had safety measures available to him that he did not utilize. Furthermore, a trial court's reasons for judgment do not form a part of the judgment itself. Arbourgh v. Sweet Basil Bistro, Inc., 98-2218 (La.App. 4 Cir. 5/19/99), 740 So.2d 186. The record supports the portion of the judgment finding plaintiff 60% at fault.

Also, on the issue of plaintiff's fault, plaintiff argues that the trial court erred in admitting evidence on the issue of plaintiff's alcohol use. At trial, there was no evidence presented showing that plaintiff used alcohol on the day of the accident. Furthermore, there is nothing in the trial court's reasons to indicate that it considered plaintiff's alcohol use in its decision. This argument has no merit.

Turning now to the issue of quantum, we note that plaintiff testified

that he sustained a gash to the head that required over thirty stitches, fractured his left shoulder blade, shattered his right wrist, and received cuts, scrapes and bruises. He had surgery on his wrist a couple of days after the accident. Pins were inserted into his wrist and later removed. Following the surgery, plaintiff had his left arm in a sling for his shoulder injury and his right arm in a full cast for his wrist injury.

Dr. Harold Stokes, an expert in orthopedic surgery with a specialty in hand surgery, testified that he first saw plaintiff on July 1, 1993. Plaintiff consulted him for a second opinion regarding an injury to his right wrist. Plaintiff told him that he had already had surgery on his right wrist at Charity Hospital following the accident, and doctors at Charity were advising him to have a fusion of his wrist. In the surgical procedure performed at Charity, plaintiff had an open reduction and fixation for a fracture of the carpal scaphoid, which he described as a kidney or peanut shaped bone in the wrist near the base of the thumb.

Dr. Stokes reviewed x-rays that had been taken on June 10, 1993, and determined that the surgical procedure performed on plaintiff's wrist at Charity Hospital was unsuccessful and the fracture still existed. He recommended that plaintiff undergo a surgical procedure involving reduction of the scaphoid fracture with a radial styloidtomy and bone

graphing with screw fixation of the fracture.

The next time Dr. Stokes saw plaintiff was on March 24, 1994. Plaintiff's records from Charity Hospital indicated that he had undergone a second surgical procedure on his wrist in November 1993. That procedure consisted of bone graphing of his right carpal scaphoid. The pins in his wrist were removed in December 1993. In Dr. Stokes' opinion, this second surgical procedure at Charity was not successful.

At the time he saw plaintiff in March 1994, Dr. Stokes determined that plaintiff had permanent disability in his right wrist. At that point, Dr. Stokes felt that plaintiff had four options: 1) another effort at bone graphing, 2) a proximate role carpecmetomy, assuming no degenerative change in the distal regular articular surface, 3) an incision of the scaphoid and 4) arthrodeses or fusion of the wrist. He explained that the first three options were to try to preserve wrist motion and the fourth, the fusion, would eliminate motion but would also eliminate pain. Dr. Stokes felt that by March 1994, it was not possible for plaintiff to recover full use of his wrist.

Dr. Stokes next saw plaintiff on December 21, 1999. Plaintiff had undergone wrist fusion surgery in December 1994. In that procedure, the wrist joint was eliminated. A bone graph was placed in the entire wrist joint and fixation was accomplished with a plate and some screws. As a result of

this procedure, plaintiff will have no range of motion in his wrist. Dr. Stokes' opinion is that the December 1994 fusion surgery performed at Charity Hospital was successful. As of December 1999, plaintiff was still reporting pain in his wrist, especially with changes in the weather. Dr. Stokes stated that pain with weather changes is something he would expect with the condition of plaintiff's wrist as he saw it in December 1999.

Dr. Stokes determined that plaintiff has a thirty-five percent impairment of the right upper extremities as a result of this accident. His opinion was that plaintiff's wrist injury appeared to be related to the accident of April 20, 1993. Dr. Stokes said that plaintiff will be limited in his abilities to do construction work based of the impairment of his upper extremity. He stated that plaintiff can perform some types of construction work, but he will have limitations.

As noted by the trial court in reasons for judgment, Dr. Stokes' findings and opinions regarding plaintiff's injuries from the accident are as follows: 1) plaintiff has two scars on his right wrist; 2) plaintiff's right forearm is somewhat atrophied; 3) plaintiff has no range of motion in his right wrist and limited range of motion in his right thumb; 4) plaintiff continues to report pain in his wrist especially when the weather changes; 5) plaintiff has a permanent partial impairment rating of 35% of the right upper

extremity based upon the wrist fusion and the restriction and opposition of the thumb; 6) plaintiff may ultimately require the removal of the hardware from his right wrist; and 7) plaintiff cannot grip tools as well as he could prior to the accident, has a loss of strength in his forearm and upper arm and will have work limitations based upon his inability to bend his wrist. Considering the above, the trial court awarded plaintiff $175,000.00 for his pain and suffering, with this sum being reduced by 60%, the percentage of fault attributable to plaintiff. The trial court also reduced by 60% plaintiff's award of medical expenses of $22,552.86.

The defendants argue that the general damage award is excessive, and plaintiff argues that it is inadequate. We find no merit in either argument. The trial court's award is supported by the record and will not be disturbed by this Court.

Regarding his claim for lost income, plaintiff testified that he has not filed income tax returns since 1989. He said that since the accident, he is no longer able to turn his wrist. He said he had some documentation of the money he has earned since the accident. However, he was unable to produce any proof supporting his claim for lost income, and he admitted he could not say how much income he lost after the accident. He said he lost a couple of years of work and did not have time to build a clientele. Plaintiff said he

also loses money because he has to pay helpers for jobs that he used to be able to perform by himself. He did not have complete records of amounts he paid to these helpers. He said he worked on and off since September 1993 doing supervising work for his father's office supply business.

The trial court denied plaintiff's claim for lost wages, finding that he did not prove this claim by a preponderance of the evidence. The trial court noted in reasons for judgment that plaintiff offered no W-2 forms or tax returns to support his claim of lost income. It found plaintiff offered only his self-serving testimony to support his claim that he earned $500.00 per week prior to the accident.

The court also denied plaintiff's claim for loss of earning capacity, noting that plaintiff offered only his self-serving testimony and no documentation of past or current earnings to support this claim. Therefore, the court found that plaintiff did not establish this claim by a preponderance of the evidence.

Plaintiff argues that the trial court erred in failing to make an award for lost wages or for loss of earning capacity. Plaintiff is correct in arguing that documentary evidence is not essential to establish entitlement to awards for past wage loss or loss of future earning capacity. These items can be established by a plaintiff's testimony alone. Parker v. Delta Well Surveyors,

Inc., 2000-1121 (La.App. 4 Cir. 5/2/01), 791 So.2d 717. However, a review of the plaintiff's testimony on these issues supports the trial court's judgment denying awards for lost wages and loss of future earning capacity.

Accordingly, for the reasons stated above, the trial court's judgment is affirmed.

AFFIRMED