CHERYL GILTON WILLIAMS	*	**NO. 2001-CA-0615**
VERSUS	*	**COURT OF APPEAL**
REGIONAL TRANSIT AUTHORITY/TRANSIT MANAGEMENT OF SOUTHEAST LA., MARK WASHINGTON, SHELTER MUTUAL INSURANCE COMPANY, AND ALBERT J. TREPAGNIER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-16415, DIVISION "A-5"
HONORABLE CAROLYN GILL-JEFFERSON, JUDGE
* * * * * *

JAMES F. MCKAY, III
JUDGE
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(Court composed of Chief Judge William H. Byrnes III, Judge James F. McKay, III, Judge David S. Gorbaty)

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AFFIRMED

The appellants, Regional Transit Authority (RTA) Transit Management of Southeast Louisiana, Inc., Mark Washington, Shelter Mutual Insurance Co., and Albert Trepagnier, appeal the trial court's judgment in favor of the appellee/cross appellant, Cheryl Gilton Williams, who appeals the trial court judgment granting her a partial judgment notwithstanding the verdict (JNOV).

On October 16, 1997, Cheryl Williams, was a passenger on a RTA streetcar, operated by Mark Washington, an employee of RTA. The defendant Albert Trepaginer while driving his Lincoln Towncar, which was insured by Shelter Mutual Insurance Co., hit the streetcar at the corner of Carondelet Street and Poydras Street. At the time of the collision, Cheryl Williams was standing in the aisle in the front section of the streetcar holding on to a pole. As a result of the collision, she allegedly twisted her body and fell onto the lap of another passenger causing injuries to her cervical and lumbar areas of her spine. She left the scene without incident and without complaining of any injuries but alleges that she began feeling pain after walking a couple of blocks; she did not seek immediate medical

attention. On October 23, 1997, she consulted Dr. Isidore Brickman complaining of pain and tingling in her left leg and neck pain. On March 19, 1999, she consulted Dr. R. Vaclav Hamsa, complaining of severe neck pain and lower back pain. On June 29, 1999, she consulted Dr. Kenneth Vogel, who diagnosed her with herniated cervical and lumbar discs, which required surgical intervention and resulted in a lumbar fusion being performed.

On September 2, 1999, the plaintiff filed suit against the defendants seeking damages. The issues of liability and damages were bifurcated. The issue of liability was ruled in favor of the plaintiff and was affirmed on appeal. Only issues concerning the damage awards are on appeal before this Court. The damages aspect proceeded to trial by jury on September 28 and 29 and October 2 and 3, 2000. The jury reached a verdict finding causation between the accident and the plaintiff's injuries and awarded a total of $200,000, representing $66,000 in past medical expenses, $14,000 in future medical expenses, $60,000 for past and future pain and suffering, $12,000 in past lost wages, and $48,000 in lost earning capacity. On October 17, 2000, the plaintiff filed a motion for JNOV, which the trial court partially granted, increasing the award for past and future pain and suffering to $200,000 but

otherwise denied further relief to the plaintiff.

The defendants raise only one assignment of error, arguing that the trial court erred in increasing the jury's general damage award for past and future pain and suffering from $60,000 to $200,000.

La. C.C. Pro. art. 1811 (F) is the authority for a JNOV. This article provides that a motion for JNOV may be granted on the issue of liability or on the issue of damages or on both. The standard to be used in determining whether a JNOV has been properly granted has been set forth in our jurisprudence as follows:

> 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 men 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, which 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 (La. 11/28/00), 774 So.2d 84,89,. *citing* Smith v. Davill Petroleum Company, Inc. d/b/a/ Piggly

Wiggly, 97-1596 (La.App. 1 Cir. 12/9/98), 744 So.2d 23, 27, *quoting* Anderson v. New Orleans Public Service, 583 So.2d 829, 832 (La.1991). Seagers v. Pailet, 95-52 (La.App. 5 Cir. 5/10/95), 656 So.2d 700; Engolia v. Allain, 625 So.2d 723, 728 (La.App. 1 Cir.1993); Adams v. Security Ins. Co. Of Hartford, 543 So.2d 480, 486 (La.1989).

The standard of review for a JNOV on appeal is a two-part inquiry. In reviewing a JNOV, the appellate court must first determine if the trial court erred in granting the JNOV. After determining that the trial court correctly applied its standard of review as to the jury verdict, the appellate court reviews the JNOV using the manifest error standard of review. Anderson v. New Orleans Public Service, Inc., *supra*, at 832. In reviewing a judgment notwithstanding the verdict, the appellate court must determine if the trial court erred in granting it. *quoting* Anderson v. New Orleans Public Service, Inc., *supra*; Cormier v. McDonough, 96-305 (La.App. 3 Cir. 10/23/96), 682 So.2d 814, 816.

In the instant matter, the jury after hearing the testimony of various treating physicians resolved the issue of causation linking Ms. Williams' cervical and lumbar injuries to the accident and awarded full past medical

expenses in the amount of $66,000.

Dr. Vogel testified that on September 15, 1999, he performed a posterior lumbar titanium caged fusion on Ms. Williams, where a section of her of laminae at L-5-S1 was removed and the disc was excised. Two titanium cages were sunk into the vertebrae and filled with bone chips and platelets. He also performed a neurotomy at two levels, L5-S1 bilaterally and L4-5 bilaterally to preclude future problems with facet joint pain.

Dr. Hamsa testified that Ms. Williams sustained a herniated disc at the C5-6 level and a herniated or bulging disc at the C4-5 level, although there may have been some pre-existing arthritis in her cervical spine. He also noted that facet blocks in the cervical region were unsuccessful.

Ms. Williams testified that her lumbar pain became so severe that she suffered a sensation of paralysis in her left leg, which prompted her to accept the lumbar surgery, that Dr. Vogel recommended and which has resulted in some resolution of her lumbar problems. Moreover, both Drs. Vogel and Hamsa opined that Ms. Williams had incurred significant permanent whole-body disability in the range between 15% to 26%.

Clearly, the trial court did a review of the jury verdict, the entire

record and concluded that no reasonable jury could have awarded only $60,000 for past and future pain and suffering given the weight of the evidence that Ms. Williams experienced severe and permanent injuries. Therefore, we find that the trial court applied the proper standard of review to the jury verdict; there is no error in the trial court's granting the JNOV.

Having determined that the motion for JNOV was properly granted, we must now determine if the trial court abused its vast discretion in its award of $200,000 for general damages. As the Louisiana Supreme Court explained in Reck v. Stevens, 373 So.2d 498, 501 (La.1979),

> We elaborated on the methodology of appellate review of awards for general damages in Coco v. Winston Industries, Inc., 341 So.2d 332 (La.1977). We there stated:
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> > We do re-emphasize, however, that Before a Court of Appeal can disturb an award made by a trial court that 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. It is never appropriate for a Court of Appeal, having found that the trial court has abused its discretion, simply to decide what it considers an appropriate award on the basis of the evidence.
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> Thus, the initial inquiry must always be directed at whether the trier court's award for the particular injuries and their effects

> upon this particular injured person is, a clear abuse of the trier of fact's "Much discretion," La.Civ.C. art. 1934(3) in the award of damages. It is only after articulated analysis of the facts discloses an abuse of discretion that the award may on appellate review, for articulated reason, be considered either excessive, or insufficient. Only after such determination of abuse has been reached, is a resort to prior awards appropriate under Coco for purposes of then determining what would be an appropriate award for the present case.

Therefore, this Court should resort to prior awards only if it is determined that the trial court has abused its discretion. The trial court determined that the jury award was inadequate and did an independent assessment of the damages based on the evidence and testimony presented to the court and concluded that the jury award for past and future pain and suffering should be increased to $200,000. Ms. Williams presents to this Court a long litany of case law on quantum issues concerning similar injuries in an attempt to show that the trial court abused its discretion in increasing the award by an inadequate amount. The defendant also cites a list of cases with similar injuries to that of Ms. Williams and reiterates various excerpts from the testimonies of Ms. Williams treating physicians to prove small discrepancies in her complaints and prognoses. After a careful review of the entire record it is evident that the jury related causation for Ms. Williams' injuries to the accident. It is also clear that the

jury's $14,000 future medical expense award anticipated that Ms. Williams would require some form of future medical intervention. The jury award of $60,000 for future pain and suffering cannot be reconciled with findings and testimonies of various medical expert witnesses and is not supported by a review of the record evidence. The trial court's judgment increasing the jury's general damage award was not an abuse of discretion and we find no error in its judgment.

The plaintiff/appellee/cross appellant raises various other issues for this Court's review, concerning the inadequate jury awards for past lost wages, and insufficient hospitalization expenses for projected cervical surgery. The trial court though partially granting the JNOV found that the jury verdict as it related to future hospitalization expenses and past lost wages was correct and did not disturb its verdict.

Ms. Williams argues that the trial court should have increased the amount of the jury award for past wages. In Chapman v. Regional Transit Authority, 95-2620 (La.App. 4 Cir. 10/2/96), 681 So.2d 1301, 1307, we recognized the legal principle for an award of lost wages. Under Louisiana jurisprudential law, wage losses may be established by any proof which reasonably establishes the claim, including the plaintiff's own reasonable

testimony. Buras v. United Gas Pipeline Co., 598 So.2d 397, 402 (La.App. 4th Cir.1992). This award may be supported by the plaintiff's detailed and uncorroborated testimony. Craig v. Burch, 228 So.2d 723 (La.App. 1 Cir.1969). The Third Circuit has provided that while claims for past lost wages must be established with some degree of certainty, they need not be proven with mathematical certainty, but only by such proof as reasonably establishes the plaintiff's claim. Veazey v. State Farm Mut. Auto Ins., 587 So.2d 5 ,7 (La.App. 3 Cir.1991).

In the instant matter, the jury awarded past lost wages from the date of the surgery, September 15, 1999, to the time of the trial. At the time of the accident, Ms. William was employed by Mt. Carmel Academy as a custodian performing general cleaning activities and earning approximately $300.00 per week. She worked until the date of her surgery but has not been employed since. The jury heard testimony of Ms. Williams' various physicians concerning the job restrictions placed on her. They heard testimony from her former employer, Sister Theriot, concerning her duties. The jury assessed the credibility of these witnesses and others and determined that $12,000, was the appropriate amount to award the plaintiff.

The trial court reviewed this award and obviously concluded that there was no error in the jury's assessment. The trial court was not in error in refusing to increase the jury's award. Accordingly, this assignment of error is without merit.

Ms. Williams also argues that the trial court erred in not disturbing the jury award of $14,000, in future medical expenses.

The manifest error rule governs the review of awards for special damages. 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 (La.1989); Arceneaux v. Domingue, 365 So.2d 1330 (La.1978). Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly wrong. Rosell, *supra* at 845; Watson v. State Farm Fire & Casualty Ins. Co., 469 So.2d 967 (La.1985); Arceneaux, *supra* at 1333. Where the factfinder's conclusions are based on determinations regarding credibility of the witnesses, the manifest error standard demands great deference to the trier of fact, because only the trier of fact can be aware of

the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Rosell, *supra* at 844. The reviewing court must always keep in mind that if a trier of fact's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even if convinced that if it had been sitting as trier of fact, it would have weighed the evidence differently. Stobart v. State, Through DOTD, 617 So.2d 880 (La.1993); Housley v. Cerise, 579 So.2d 973 (La.1991); Sistler v. Liberty Mutual Ins. Co., 558 So.2d 1106 (La.1990). For the reviewing court, the issue to be resolved is not whether the trier of fact was wrong but whether the factfinder's conclusions were reasonable. Stobart, *supra* at 883; Theriot v. Lasseigne, 640 So.2d 1305 (La.1994).

This Court held in Hoskin v. Plaquemines Parish Government, 97-0061 (La. App. 4 Cir. 12/1/97), 703 So.2d 207, that the proper standard to determine whether a plaintiff is entitled to future medical expenses is a proof by a preponderance of the evidence that the future medical expenses will be medically necessity. When a need for future medical care is established by the evidence but the cost is uncertain, a reasonable award may be made.

Stiles v. K Mart Corporation, 597 So.2d 1012, 1013 (La.1992). In the instant matter the jury determined that the plaintiff was entitled to $14,000 in future medical expenses.

In his testimony, Dr. Vogel felt that there would be a resolution of the plaintiff's lumbar problem post-surgery and the plaintiff was discharged in March of 2000. He also opined that the patient would be 80-90% pain free by two years post-surgery. Although Dr. Hamsa felt that Ms. Williams' cervical problems were not resolved, by Dr. Vogel's lumbar fusion surgery, he did not totally discount that cervical surgery was out of the question. It is abundantly clear from the record that some future medical intervention will be necessary to resolve Ms. Williams' cervical problems, whether it be through a cervical fusion or bilateral facet blocks in the neck. The jury heard four days of live testimony during which they were able to see firsthand the witnesses' body language and evaluate their demeanor. The preponderance of the evidence obviates the serious potential that medical intervention will be necessary and that expenses will be incurred by the plaintiff in the future.

In the instant matter, the trial court granted the plaintiff's JNOV after

a review of the record. We have already concluded that the JNOV was properly granted. Clearly, the trial court did not find that the jury award of $14,000, for future medical expenses was unreasonable in light of the testimony and evidence presented to the trier of fact, the jury. We find no error in the trial court's judgment.

For the forgoing reasons, we affirm the judgment of the trial court.

AFFIRMED