JAMES DANUB STANSBURY	*	**NO. 2002-CA-0907**
VERSUS	*	**COURT OF APPEAL**
REGIONAL TRANSIT AUTHORITY, TRANSIT MANAGEMENT OF SOUTHEAST LOUISIANA, INC., AND MAMIE D. HAYES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-10942, DIVISION "K-14"
Honorable Louis A. DiRosa, Judge Pro Tempore
* * * * * *
Judge David S. Gorbaty
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(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

BYRNES, C.J., CONCURS IN PART AND DISSENTS IN PART

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AFFIRMED IN PART; REVERSED IN PART; AND, RENDERED

James Stansbury appeals a judgment notwithstanding the verdict awarding him $155,000 for damages, and assessing his fault at 75% at fault and defendants, Regional Transit Authority (RTA), Transit Management of Southeast Louisiana, Inc. (TMSEL), and Mamie Hayes, fault at 25%. For the following reasons, we affirm in part, reverse in part, and, render.

FACTS AND PROCEDURAL HISTORY:

James Stansbury was injured on August 18, 1998, when he came into contact with an RTA bus while riding his bicycle on S. Carrollton Avenue. How Mr. Stansbury came into contact with the bus is the crux of the dispute between the parties. Mr. Stansbury claims that the bus came into the parking lane in which he was traveling, and struck him, causing him to flip over on his bike and to strike his head on the ground. RTA claims that Mr. Stansbury slapped at the bus as the bus passed him, causing him to lose control of his bicycle. RTA denies that the bus entered the parking lane

where Mr. Stansbury was traveling.

Mr. Stansbury claims that he suffered brain damage and injuries to his back, neck and shoulder as a result of the accident. RTA contends that Mr. Stansbury sustained minor injuries that resolved within a short time after the accident.

Following a four-day trial, the jury returned a verdict in favor of Mr. Stansbury awarding him $50,000 for past and future medical expenses, and $25,000 for physical injury, past and future physical and mental pain and suffering. The jury also found Mr. Stansbury to be 75% at fault for his injuries, and RTA 25% at fault. Plaintiff filed a motion for judgment notwithstanding the verdict, or, alternatively, a new trial. The trial court granted plaintiff's motion, increased the general damage award by $80,000, and left the remainder of the verdict intact.

Mr. Stansbury has appealed raising four assignments of error.

DISCUSSION:

In his first assignment of error, Mr. Stansbury claims that the trial court erred in not sustaining his objection to statements made by defense counsel during opening argument. Specifically, he claims that defense

counsel made reference to the fact that Mr. Stansbury refused to settle, thereby necessitating the jury trial and inconveniencing the empanelled jurors.

In his opening statement, defense counsel stated:

> If you get the opportunity over the next couple of days, you might want to go up to the 4th floor in the filing room. And you can look in there and see the files of cases – Well, pretty much as far as the eye can see. We have a lot of lawsuits that are filed in Orleans Parish. And most of those settle. The ones where we have to try them, where the attorneys and parties can't agree on who caused the accident, or sometimes they can't agree on that but they can agree on –

At that point, plaintiff objected and the trial court overruled the objection. Defense counsel continued:

> . . . I was saying, sometimes the parties can't agree on who caused the accident. Sometimes they can't agree on how injured a person was. Sometimes they can't agree on either of them. And that, in fact, is the situation here today.

During closing arguments, defense counsel stated:

> I told you when we got started that a lot of lawsuits are filed and most of them settle. Now you know why this one didn't. And I told you when we got started that sometimes the attorneys disagree about how the case came to be, how the accident happened. And I told you that we disagreed then and I tell you we disagree now.

> And I told you that sometimes the attorneys disagree about what was the level of injuries someone had and we disagreed then and we still disagree now.

Further into his closing argument, defense counsel stated:

> What about testing done? Now, Plaintiff's counsel seemed totally outraged that I would have Mr. Stansbury submit to another test. After all, Dr. Andrews gave a test, why shouldn't I just take her word for it? Well, Louisiana law allows us to obtain the opinions of other experts in cases. And I do that very frequently in my practice, because I have found in brain injury cases that I have handled, that sometimes there is such a thing as malingering. And the easiest way to find out if there is a brain injury, is to have someone else run the testing. And if the results come back and they are consistent and that tells you, hey, you may actually have a problem here, in which case, you know, we work toward settling the case.

Counsel for Mr. Stansbury raised an objection, which the trial court overruled.

Plaintiff argues that defense counsel's reference to the fact that the parties failed to settle is impermissible and unfairly prejudicial.

Louisiana Code of Evidence art. 408 A provides in civil cases:

> In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, anything of value in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to

> prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This Article does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations. This Article also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Applying this article to the statements made by defense counsel in his opening and closing arguments, we find no abuse of discretion in the trial court's refusal to sustain plaintiff's objections. In his opening statement, defense counsel did not make reference to settlement negotiations between the parties, but, rather, made a general statement that lawsuits can settle before trial if the parties can agree on liability and damages. However, in this case there was no agreement on any issue, and, therefore, the case was being tried. In his closing statement, defense counsel's comments reflected that **a defendant** would want to settle if independent medical evidence clearly established that he was at fault and that damages were viable. The comments did not reflect in any way on plaintiff's failure to settle thereby inconveniencing the jurors with a trial. Additionally, the jury was cautioned prior to deliberation that comments made during opening and closing

statements were not evidence and should not be considered as such in reaching a verdict.

We find no merit to this assignment of error.

In his second assignment of error, Mr. Stansbury claims that counsel for RTA used facts not in evidence during his closing argument. During his closing argument, defense counsel drew a diagram of the positions of the bus, plaintiff, and an eyewitness. While it is true that the diagram was based on testimony favorable to RTA, the jury was free to draw its own conclusions based on what it chose to accept as true. If the jury did not accept the testimony on which RTA relied, it could likewise not accept the diagram presented by defense counsel. Also, as previously stated, the jury was instructed that opening and closing statements are not evidence to be considered when reaching a verdict.

We find no merit to this assignment of error.

Mr. Stansbury claims in his third assignment of error that the trial court erred in refusing to reapportion fault in ruling on his motion for judgment notwithstanding the verdict.

In *Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So.2d 967, 974

(La. 1985), the Supreme Court enunciated the following six factors to be applied in comparing the degrees of fault: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) whether the capacities of the actors were superior or inferior; (5) whether any extenuating circumstances required the actor to proceed without proper thought; and, (6) the relationship between the actor's conduct and the harm to the plaintiff. *Maldonado v. Louisiana Superdome Comm'n*, 95-2490, pp. 9-10 (La.App. 4 Cir. 1/22/97), 687 So.2d 1087, 1093. Whether comparative fault applies in a given case is a factual determination governed by the manifest error standard of review; hence, "[o]nly if the apportionment of fault is found to be clearly wrong can an appellate court adjust the percentages." *Maldanado*, 95-2490, at p. 10, 687 So.2d at 1093 (citing *Clement v. Frey*, 95-1119, pp. 7-8 (La. 1/16/96), 666 So.2d 607, 610-11).

Mr. Stansbury claims that the testimony of the two witnesses to the accident, plaintiff and the person driving behind the bus, Sandra Mese, belies a finding of 75% fault by plaintiff. Mr. Stansbury testified at trial that

he was entirely within the parking lane of the street when an RTA bus began to pass him in the right travel lane. As the bus passed, it moved toward him in the parking lane. He put his left hand out near his face to shield himself from the encroaching bus. The next thing he remembered was having his clothes cut off of him in the ambulance on the way to Charity Hospital.

Ms. Sandra Mese testified that as she followed about twelve feet behind the bus, she noticed a young man on a bicycle apparently caught on the side of the bus, who was being flipped over and over while still on his bicycle. She saw the man's head strike the ground three or four times. At some point, the man fell loose from the bus, and landed in the intersection. Ms. Mese claimed that Mr. Stansbury was in the parking lane the entire time. She claimed that the wheels of the bus were in the travel lane, however, the body of the bus may have crossed over into the parking lane at some point.

Mark Mumme, a New Orleans Police Department officer called to investigate the accident, testified that he obtained a statement from Mr. Stansbury at Charity Hospital within one hour of the accident. Mr. Stansbury told him that he had put his hand out to slap the side of the bus because he thought the bus was going to hit him. As he did so, he lost

control of his bicycle and fell. The bus driver told Officer Mumme that she was traveling in the far right lane, and saw the plaintiff in the parking lane. She heard a noise as she crossed the intersection with Fountainebleu Drive, looked back, stopped the bus, and saw Mr. Stansbury on the ground. Officer Mumme inspected the bus and the bicycle and found no damage to either.

Our reading of the record reveals that there were no eyewitnesses as to how Mr. Stansbury became "attached" to the bus. Mr. Stansbury only remembers putting his hand up as the bus passed because he believed the bus was going to hit him. Ms. Mese assumed that Mr. Stansbury was caught on the bus, possibly on the advertisement sign. She did not notice Mr. Stansbury until he was being flipped on his bicycle. How Mr. Stansbury became entangled with the bus was a question to be answered by the jury after considering all the evidence.

Plaintiff's counsel also argues in brief that Mr. Stansbury had to squeeze between a car parked in the parking lane and the "overtaking" bus. However, the record does not include testimony that a car was parked in the parking lane. In fact, Ms. Mese claims that there could not have been a car in the parking lane because that is where she parked after witnessing the

accident. Mr. Stansbury makes no mention of a car in the parking lane. Regardless of whether a car was or was not in the parking lane, plaintiff's counsel's argument that under the "law of lanes," "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety," is not viable. A parking lane is not a driving lane. Therefore, if Mr. Stansbury was traveling in the parking lane, it was incumbent upon him to stop or travel to the right of any car parked in the lane to avoid a collision with a vehicle lawfully traveling in a lane of travel.

Based on our application of the *Watson* factors to the evidence presented and the manifest error standard, we cannot say the jury erred in assigning 75% fault to Mr. Stansbury. As such, we also do not find error in the trial court's determination that the jury acted reasonably in its apportionment of fault. See La. Code Civ. Proc. art. 1811. The trial court correctly denied JNOV on this issue.

In his final assignment of error, Mr. Stansbury argues that the trial court erred in increasing his general damage award by only $80,000. He claims that his life-altering damages warrant an award of $1,000,000. RTA

argues that the original jury verdict of $25,000 in general damages was proper, implying that the trial court erred in granting plaintiff's motion for JNOV. Mr. Stansbury contends that this Court cannot alter the judgment in favor of RTA because RTA did not answer the appeal or file a cross-appeal. However, because this Court is being asked to review the JNOV by plaintiff, we must review the granting of the JNOV using the mandatory two-prong inquiry.

In *Joseph v. Broussard Rice Mill*, 00-0628 (La. 10/30/00), 772 So.2d 94, the Supreme Court discussed the standards for determining whether a trial court properly granted a JNOV. The Court stated:

> La. Code of Civ. Proc. Art. 1811 controls the use of JNOV. Although the article does not specify the grounds on which a trial judge may grant a JNOV, in *Scott v. Hospital Serv. Dist. No. 1*, 496 So.2d 270 (La. 1986), we set for the criteria used in determining when a JNOV is proper. As enunciated in *Scott*, a JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons 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 persons could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motions should be denied if there is evidence opposed to the motion which is of

> such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. *Scott*, 496 So.2d at 274. In making this determination, the trial 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. *Anderson v. New Orleans Public Serv., Inc.*, 583 So.2d 829, 832 (La. 1991). This rigorous standard is based upon the principle that "[w]hen there is a jury, the jury is the trier of fact." *Scott*, 496 So.2d at 273; *Jinks v. Wright*, 520 So.2d 792, 794 (La.App. 3 Cir. 1987).

An appellate court reviewing a JNOV must use a two-part inquiry: First, the appeal court must determine if the trial court erred in granting the JNOV by using the criteria highlighted above. 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. *Martin v. Heritage Manor South Nursing Home*, 2000-1023, p. 6, fn. 7 (La. 4/3/2001), 784 So.2d 627, 632. However, in this case, because we find that the trial court erred in granting the JNOV, we do not reach the second prong of the inquiry.

There is ample record evidence to substantiate the jury's finding that Mr. Stansbury's general damages only warranted an award of $25,000. Whereas the jury was free to determine credibility of witnesses, both expert

and lay, a trial court deciding a JNOV is not free to do so. Therefore, the trial court had to find that the facts and evidence pointed so strongly in favor of Mr. Stansbury, that the jury was unreasonable in awarding general damages.

The evidence presented by plaintiff at trial was, not surprisingly, diametrically opposed to the evidence presented by defendants. Mr. Stansbury presented evidence that the head injury he sustained caused brain damage, which resulted in a change of personality and daily functioning. These changes have created an inability to maintain meaningful employment and personal relationships. There was evidence presented that plaintiff suffers from headaches, and has frequent nightmares about lying in a coffin. In addition to the brain injury, there was evidence that Mr. Stansbury sustained a herniated disc at L4-L5, dehydrated discs at L1-2 and L5-S-1, and a "crushed" disc at T-8. There was medical testimony that these types of injuries could weaken Mr. Stansbury's legs preventing him from being able to lift heavy loads. The disc injuries also caused muscle spasms and loss of sensation in his foot.

RTA presented medical evidence that Mr. Stansbury's brain injury

was minimal at best. The independent medical examinations indicated that Mr. Stansbury was faking his performance during various neuropsychological evaluations. The medical evidence presented by the defense supported a conclusion that Mr. Stansbury was malingering because the brain function deficits indicated in the testing did not correlate with the area of the brain allegedly injured in the accident.

In addition to medical evidence, RTA produced evidence through the testimony of former co-workers that Mr. Stansbury was an emotionally unstable person prior to this accident. According to co-workers from Home Depot, where plaintiff worked for approximately ten years, Mr. Stansbury was unkempt, disheveled, disorganized, and demonstrated poor social and organizational skills. There was evidence that he was eventually fired from Home Depot for threatening to kill his supervisor.

The jury was in the best position to evaluate the credibility of witnesses, and it was within the jury's function to assess that credibility. Although the trial court was also in a position to evaluate credibility, the standard for granting JNOV does not allow the trial court to consider credibility when ruling on a JNOV. After reading the entirety of the record,

we cannot say that the jury's general damage award of $25,000 was unreasonable. Therefore, it was error for the trial court to grant the partial JNOV increasing the general damage award.

The dissent agrees with Mr. Stansbury's position that because RTA did not answer the appeal, this Court cannot grant RTA affirmative relief. However, we cannot review a JNOV without applying both prongs of the two-part inquiry mandated by jurisprudence. In other words, we cannot "skip" to the issue of damages, the only issue plaintiff wishes us to address, without first determining if the granting of the JNOV was proper. Thus, we do not find that it was necessary for RTA to answer the appeal for us to reach our conclusion. We note that the cases cited by the dissent are either jury or judge awards; none of them involve judgments nothwithstanding the verdict. We believe the facts of this case to be *res nova*, and invite the Supreme Court to address this issue.

Accordingly, we reverse the granting of the JNOV and reinstate the jury's verdict in its entirety.

AFFIRMED IN PART; REVERSED IN PART; AND, RENDERED