

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 2139

TEREZ BOSTON AND HERMAN DELCO, JR.

VERSUS

ZURICH AMERICAN INSURANCE COMPANY,
JEFFERY'S TRUCKING SERVICE, INC. AND MORRIS SLOAN

Judgment rendered June 6, 2014.



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Appealed from the
16th Judicial District Court
in and for the Parish of St. Mary, Louisiana
Trial Court No. 122470
Honorable Paul J. Demahy, Judge

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SERVICE, INC. AND MORRIS
SLOAN

* * * * *

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

PETTIGREW, J.

In this action for damages arising out of an automobile accident, defendants, Zurich American Insurance Company, Jeffery's Trucking Service, Inc., and Morris Sloan, appeal the trial court's granting of a judgment notwithstanding the jury's verdict (JNOV) in favor of plaintiff, Herman Delco, Jr. For the following reasons, we reverse that judgment, in part, and reinstate the jury's verdict, together with the judgment of October 5, 2012, rendered in accordance with the jury's verdict.

FACTS AND PROCEDURAL HISTORY

On November 16, 2009, Terez Boston was driving a 2005 Chevrolet Malibu in an easterly direction in the left lane of U.S. Highway 90 near its intersection with Berwick South Road, in St. Mary Parish. As Ms. Boston approached the intersection of Highway 90 and Berwick Road South, she stopped her vehicle to allow two sheriff's units, with emergency lights activated, to cross the highway. After Ms. Boston stopped her vehicle, she was struck from behind by a 2004 International 8000 tractor truck with a trailer attached, owned by Jeffery's Trucking Service, Inc. ("Jeffery's"), and being operated by Morris Sloan. At all times pertinent hereto, Mr. Sloan had been travelling in an easterly direction on Highway 90, following behind the Boston vehicle. Herman Delco, Jr. was a passenger in the Boston vehicle at the time of the collision.

As a result of the injuries sustained in the accident, Ms. Boston and Mr. Delco (sometimes referred to collectively as "plaintiffs") filed a petition for damages against Jeffery's, its insurer, Zurich American Insurance Company, and Mr. Sloan (hereinafter collectively referred to as "defendants"). The matter proceeded to a jury trial on August 13, 2012. At the conclusion of the evidence, the jury rendered a verdict awarding damages as follows:

Terez Boston

Past medical expenses:	\$15,843.39
Future medical expenses:	\$1,970.00
Physical and mental pain, suffering and disability, past and future:	\$10,000.00

Past loss of earnings:	\$2,800.00
Future loss of earnings:	\$-0-
Loss of enjoyment of life:	\$20,000.00
Total:	\$50,613.39

Herman Delco, Jr.

Past medical expenses:	\$18,942.46
Future medical expenses:	\$-0-
Physical and mental pain, suffering and disability, past and future:	\$12,500.00
Past loss of earnings:	\$10,813.00
Future loss of earnings:	\$-0-
Loss of enjoyment of life:	\$8,000.00
Total:	\$50,255.46

A judgment in conformity with the jury's verdict was signed by the trial court on October 5, 2012.

Thereafter, plaintiffs filed a motion for JNOV, arguing that they had established the causal link between Mr. Delco's back surgery and the accident, and that there was no evidence in the record to support the jury's refusal to award Mr. Delco the cost of the surgery. Plaintiffs further asserted that the awards made to each of them for their respective injuries did not meet the minimal awards decreed by this court "for the injuries sustained and proven to be caused by the accident in question by the plaintiffs." Finally, plaintiffs maintained that the jury's failure to award Mr. Delco loss of future wages and/or loss of earning capacity was contrary to the evidence presented. In a judgment signed April 4, 2013, the trial court denied Ms. Boston's JNOV and granted Mr. Delco's JNOV to increase his award for past medical expenses to \$159,353.81, the amount of past medical expenses originally argued for before the jury. In all other respects, Mr. Delco's JNOV was denied.

It is from this judgment that defendants have appealed, assigning the following specification of error for our review:

The Trial Court abused its discretion and erred in granting the JNOV and concluding that the jury did not have an evidentiary and legal basis for its award of past medical expenses to Mr. Delco. Such conclusion was an abuse of the Court's discretion and usurped the right of the jury to decide the issues presented at trial.^[1]

Mr. Delco answered the appeal, asking that the damage award be modified to increase the general damage award to no less than \$250,000.00 and to award no less than \$587,806.00 for future lost earnings, bringing the total damage award to \$997,159.81.²

JUDGMENT NOTWITHSTANDING THE VERDICT

A JNOV is a procedural device authorized by La. Code Civ. P. art. 1811, by which the trial court may modify the jury's findings to correct an erroneous jury verdict.

Article 1811 states, in pertinent part:

A. (1) Not later than seven days, exclusive of legal holidays, after the clerk has mailed or the sheriff has served the notice of judgment under Article 1913, a party may move for a judgment notwithstanding the verdict. ...

(2) A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

B. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or render a judgment notwithstanding the verdict.

Article 1811 does not set out the criteria to be used when deciding a motion for JNOV.

However, the Louisiana Supreme Court has established the standard to be used in determining whether a JNOV is legally called for, stating:

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 motion 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

¹ The April 4, 2012 judgment as it relates to Ms. Boston is final and is not before us on review.

² Because we find the trial court erred in granting the JNOV in favor of Mr. Delco, we do not reach the merits of the arguments he makes in his answer to the appeal.

different conclusions. 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.

Joseph v. Broussard Rice Mill, Inc., 2000-0628, pp. 4-5 (La. 10/30/00), 772 So.2d 94, 99 (citations omitted).

In reviewing a JNOV determination, this court must first decide whether the trial court erred in granting the JNOV. A JNOV is proper only when the trial court determines that reasonable minds could not reach a contrary verdict. Neither the trial court nor this court can substitute its evaluation of the evidence for that of the jury unless the jury's conclusions totally offend reasonable inferences from the evidence.

Templet v. State ex rel. Dept. of Transp. and Development, 2000-2162, p. 6 (La. App. 1 Cir. 11/9/01), 818 So.2d 54, 58. Thus, in the instant case, this court must ask whether the facts and inferences point so strongly and overwhelmingly in favor of a finding that Mr. Delco's back surgery was causally related to the accident in question that no reasonable juror could have reached a different verdict on the issue. If the answer to this question is in the affirmative, the trial court was correct in granting the motion. If, however, reasonable persons in the exercise of impartial judgment might reach a different conclusion, then it was error to grant the motion, and the jury verdict should be reinstated. **Simoneaux v. Amoco Production Co.**, 2002-1050, p. 11 (La. App. 1 Cir. 9/26/03), 860 So.2d 560, 567, writ denied, 2004-0001 (La. 3/26/04), 871 So.2d 348.

When contemplating a JNOV, the trial court is prohibited from weighing evidence, making credibility determinations, drawing inferences therefrom, or substituting its own factual conclusions for those of the jury. Additionally, questions of fact should be resolved in favor of the non-moving party. **Templet**, 2000-2162 at 6, 818 So.2d at 58. The trial court is not entitled to interfere with the verdict simply because it disagrees with it. **Davis v. Wal-Mart, Inc.**, 2000-0445, pp. 12-13 (La. 11/28/00), 774 So.2d 84, 95. This rigorous standard is based on the principle that "[w]hen there is a jury, the jury is the trier of fact." **Joseph**, 2000-0628 at 5, 772 So.2d at 99.

Based on our review of the record, we find that the trial court erred in granting Mr. Delco's JNOV to increase his award for past medical expenses. The facts and inferences do not point so strongly and overwhelmingly in favor of Mr. Delco that reasonable jurors could not have arrived at different conclusions. Reasonable men, in the exercise of impartial judgment, could differ as to whether Mr. Delco's back surgery was caused by the accident in question. While Mr. Delco testified and presented medical evidence to support his assertion that his back surgery was necessitated by the accident that occurred on November 16, 2009, the defendants presented evidence attacking Mr. Delco's credibility and questioning the issue of causation that the jury was free to consider and rely on in rendering its verdict.

Dr. Rand Voorhies, the neurosurgeon who performed Mr. Delco's back surgery, testified by videotaped deposition before the jury. Dr. Voorhies indicated that he performed surgery on Mr. Delco's L5-S1 disc on September 8, 2011. From studying the MRI of Mr. Delco's lumbar region, Dr. Voorhies knew that his L5-S1 disc was bulging, had some bilateral stenosis, and was pinching a nerve. However, during the surgery, Dr. Voorhies discovered that Mr. Delco also had a herniated disc. When asked about Mr. Delco's previous diagnostic studies that showed "degenerative" conditions at L5-S1 such as spurring, Dr. Voorhies acknowledged same and stated that "degenerative" is a "description which best describes an appearance" that "can result from either aging, trauma or a combination of both."

With regard to causation, the following colloquy occurred between counsel for defendants and Dr. Voorhies:

Q. I know you were very, very cautious whenever you were asked about causation in saying that his symptoms were caused by the accident.

A. You were listening very carefully.

Q. Very carefully. That's very important.

A. Yes, sir.

Q. So what you're saying what he's complaining to me about, those symptoms I believe is related to this accident?

A. Correct.

Q. I have some clinical findings based upon diagnostic testing that shows that he has some problems at L5-S1.

A. Correct.

Q. I'm not saying to you that that actual condition was caused by this accident, but I'm saying that condition is producing these problems and that his problems started after this accident.

A. Well, if you're asking me can I be certain that the anatomic abnormalities all resulted from the accident? No, I can't because I don't have tests before the accident.

Q. Yeah. I understand that. So while you were cautious, you're willing to say that his symptoms started, and the reason why you're willing to say that is 'cause he told you his symptoms started.

A. Exactly correct.

Q. All right. So that means for this jury to find that, the jury has to believe that he is truthful to you.

A. Correct.

Q. The patient is truthful to you.

A. That is correct.

Q. For you to say that, you've got to assume that that patient is truthful to you.

A. That is correct.

Defense counsel went on to show Dr. Voorhies, and the jury, the many inconsistencies in the record with regard to Mr. Delco's testimony, all of which went to Mr. Delco's credibility. Dr. Voorhies replied in the affirmative when asked, "And your whole opinion as to what is related to this accident is based upon [Mr. Delco] telling you that it all started with this accident?" Thus, it is clear that Mr. Delco's credibility played an important role in the jury's decision not to award him the medical expenses associated with the September 8, 2011 back surgery performed by Dr. Voorhies.

Once in deliberations, the jury in this case requested that they be allowed to see the "board of expenses for Herman Delco." The trial court noted as follows with regard to this request: "The board they're asking for was ... used as a demonstrative aide but was never entered into evidence. It's my understanding that the parties agree to allow the plaintiff to enter this into evidence and submit a smaller copy of it for the Clerk's

record. Is that correct?" To which respective counsel both agreed. Thus, it is clear that the jury carefully considered the evidence concerning Mr. Delco's medical expenses.

The jury could have reasonably inferred that, although Mr. Delco certainly sustained injury in the November 16, 2009 accident, his credibility was a factor to be considered in determining whether to award the total amount of expenses as reported to them, *i.e.*, \$159,353.81. Reasonable jurors could have differed on whether the September 8, 2011 back surgery performed by Dr. Voorhies was causally related to the accident. The jury could have reasonably inferred that Mr. Delco's complaints of pain and injury to Dr. Voorhies were exaggerated, and, thus, surgery was not medically necessary. The jury was presented with considerable evidence regarding Mr. Delco's medical treatment following this accident. Yet, the jury chose to only award past medical expenses in the amount of \$18,942.46, an amount that represents medical expenses that were incurred prior to the surgery. Considering all of the evidence before us on review, and the reasonable inferences to be drawn therefrom in favor of defendants, we cannot say that the jury's verdict is one that reasonable people could not have reached. Therefore, the trial court erred in granting Mr. Delco's JNOV. Accordingly, we conclude that the JNOV granted by the trial court should be reversed, in part, and the original judgment rendered by the trial court in conformity with the jury's verdict should be reinstated.

CONCLUSION

For the above and foregoing reasons, we reverse the April 4, 2013 judgment of the trial court to the extent that it granted Mr. Delco's JNOV to increase his award for past medical expenses to \$159,353.81 and reinstate the trial court's October 5, 2012 judgment, which was rendered in conformity with the jury's verdict. All costs associated with this appeal are assessed against Herman Delco, Jr.

APRIL 4, 2013 JNOV REVERSED IN PART; OCTOBER 5, 2012 JUDGMENT REINSTATED.