NOT DESIGNATED FOR PUBLICATION

YOLANDA GIBSON	*	**NO. 2000-CA-2575**
VERSUS	*	**COURT OF APPEAL**
DR. VICTOR BROWN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-13973, DIVISION "E-9"
HONORABLE GERALD P. FEDOROFF, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Max N. Tobias, Jr.)

JONES, J., CONCURS

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AMENDED; AS AMENDED AFFIRMED

In this medical malpractice action, the Louisiana Patient's Compensation Fund ("PCF") appeals from a jury verdict entered against Victor Brown, M. D., a qualified health care provider pursuant to La. R. S. 40:1299.41 *et seq.*, for medical malpractice committed by him. For the reasons set forth below, we amend and affirm the judgment as amended.

The plaintiff, Yolanda Gibson, first sought treatment from Dr. Brown on 2 July 1993 with complaints of a heavy menstrual flow, a history of a tubal ligation in 1989, and being desirous of a tubal reversal so that she could attempt to have another child. Dr. Brown recommended a dilation and curettage, laparoscopy, and tubal re-anastomosis, which recommendations Ms. Gibson accepted.

The procedures took place on 6 July 1993. Although the operation was successful, a Mayo No. 3 curved needle broke during closure of the incision and a fragment became imbedded in the plaintiff's abdominal wall. Dr. Brown could not find and, therefore, did not remove the needle

fragment.

The plaintiff filed a complaint with the PCF and a medical review panel convened on 19 June 1995. The panel found that Dr. Brown failed to comply with the appropriate standard of care as he did not make an effort to locate the broken needle. However, the panel found no evidence to indicate that the broken needle caused Ms. Gibson any damage. The plaintiff subsequently filed a civil suit against Dr. Brown for medical malpractice.

The matter was heard by a jury in April 2000. On 12 April 2000, the jury found that Dr. Brown was negligent and awarded the plaintiff $7,000,000.00 in general damages and $700,000.00 in future medical care. With the consent of the plaintiff's counsel articulated on the record, the trial judge struck the award for future medical care from the judgment. On 13 April 2000, judgment was entered against Dr. Brown for $7,000,000.00, subject to his limitation of liability as a qualified health care provider in the amount of $100,000.00, plus interest and costs. Thereafter, Dr. Brown filed a motion for new trial and/or remittitur. Upon notification of the judgment, the PCF intervened in the action and filed a motion for judgment notwithstanding the verdict ("JNOV") and alternatively for new trial or

remittitur.

The trial court clearly denied the motion filed by Dr. Brown, but was silent on the disposition of the motion filed by the PCF. In any event, the court stated in its 20 June 2000 judgment that: "[t]he verdict was certainly excessive, . . . the $500,000.00 plaintiff is entitled to is reasonable." By implication, the trial court recognized the validity of the PCF's motion for JNOV. Dr. Brown settled the judgment against himself; the PCF timely filed this suspensive appeal.

We must first address a procedural issue involving the PCF's motion for JNOV. La. C. C. P. art. 1811, which addresses motions for JNOV, provides in pertinent part:

> A. (1) [A] party may move for a judgment notwithstanding the verdict not later than seven days, exclusive of legal holidays, after the jury was discharged.
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> * * * * *
>
> F. The motion for a judgment notwithstanding the verdict may be granted on the issue of liability or on the issue of damages or on both issues.

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 persons could not arrive at a contrary result. 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. 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. *Anderson v. New Orleans Public Service, Inc.*, 583 So. 2d 829, 832 (La. 1991).

When reviewing the judgment of 20 June 2000, we conclude that the trial court effectively granted the JNOV on the issue of damages. Thus, when we review the general damage award, we apply the standard set forth by the Supreme Court in *Anderson, supra*, as follows:

> The appellate court, in determining whether the trial court erred in granting the JNOV as to quantum, once again uses the criteria set forth in *Scott, supra*, [496 So. 2d 270 (La. 1986)] i.e., could reasonable men in the exercise of impartial judgment differ as to the fact the jury award was either abusively high or abusively low.

Id. at 834.

Conversely, we interpret the 20 June 2000 judgment as denying the JNOV on the issue of liability. The refusal to render a JNOV can only be overturned if it is manifestly erroneous. *Peterson v. Gibraltar Sav. & Loan*, 98-1601, 98-1609 (La. 5/18/99), 733 So.2d 1198, *on rehearing in part*, 98-

1601, 98-1609 (La. 9/3/99), 751 So.2d 820; *Delaney v. Whitney National Bank*, 96-2144, 97-0254 (La. App. 4 Cir. 11/12/97), 703 So.2d 709; *writ denied,* 98-0123 (La. 3/20/98), 715 So.2d 1211.

The PCF presents three assignments of error. First, it argues that the trial court erred by failing to dismiss the jury and/or declare a mistrial based on the plaintiff's discriminatory use of peremptory challenges against Caucasian members of the jury panel. Second, it argues that the jury erred in finding that Dr. Brown's treatment fell below the applicable standard of case because the evidence showed that he properly searched for the needle fragment. Finally, the PCF argues that the award of general damages was excessive.

First, the PCF argues that, during jury selection, the plaintiff's counsel improperly used peremptory challenges to strike members of the venire based on their race. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614, 615, 111 S.Ct. 2077, 2080 (1991). However, the rule of this circuit is that when a party in a civil case wishes to seek appellate review of a *Batson/Edmonson* issue, the party must do so by an application for supervisory writs and not by

an appeal after the trial. *Phillips v. Winn Dixie Stores, Inc.*, 94-0354, p. 6 (La. App. 4 Cir. 2/23/95), 650 So. 2d 1259, 1263. *See also White v. Touro Infirmary,* 93-1617 (La. App. 4 Cir. 2/11/94), 633 So. 2d 755, 760; *Holmes v. Great Atlantic & Pacific Tea Co.*, 622 So. 2d 748, 760 (La. App. 4 Cir. 1993). We decline to reverse our precedent and, therefore, will not consider the merits of the issue.

The next assignment of error concerns the jury's finding of malpractice by Dr. Brown. The PCF complains that the uncontroverted evidence demonstrates that Dr. Brown searched for the needle fragment in compliance with the established standard of care. We briefly review the testimony and documentary evidence on the point.

The standard of care calls for Dr. Brown to make a thorough search for the needle fragment. This is first established by the medical review panel report introduced into evidence. This standard is also supported by the testimony of Ross Jacobson, M. D., and Stephen Cohen, M. D., both of whom testified that a search should be made for a needle fragment in both the peritoneum cavity and the abdominal muscle. However, while Dr. Brown testified that he searched both areas, the operative report reflects only

a search of the peritoneum cavity. Although the testimony establishes that an extensive search of the abdominal muscle could do substantial harm to the patient, the jury heard conflicting evidence on whether Dr. Brown conducted even an adequate search before closing the plaintiff. All expert witnesses who testified agree that the operative report is the best evidence of what occurs during an operation.

A jury's findings of fact are reviewed under the manifest error-clearly wrong standard. Based upon the jury's finding of malpractice, we conclude that the jurors did not believe Dr. Brown's testimony that he conducted an appropriate search of the abdominal muscle before deciding to leave the needle fragment in Ms. Gibson. When a finding is based on a credibility determination, the manifest error standard demands great deference to the fact-finder who has observed the witnesses' demeanor and tone of voice which weighs heavily in favor of the fact-finder's understanding of the testimony. *Nuckley v. Gail M. Woods, Inc.*, 94-2190 (La. App. 4 Cir. 4/26/95), 654 So. 2d 840, 842. Thus, this assignment error is without merit.

The PCF's final assignment of error is that the award of general damages, even capped at the statutory limit of $500,000.00, is excessive

because no objective evidence was presented that the needle fragment is causing any physical disability or pain.

The evidence shows that the needle fragment is imbedded in the plaintiff's abdominal rectus muscle where, in all probability, it will remain. The expert testimony was that the plaintiff's body would encapsulate the fragment in scar tissue and it should not migrate to another site. In addition, the fragment was not expected to cause any internal damage and the physicians all recommended that it remain in Ms. Gibson's body.

However, the experts also agreed that the needle fragment might cause some physical pain. Ms. Gibson testified that she has pain in her abdomen when she bends over or coughs too hard. She also testified that the pain interferes with her life and intimate relations with her husband. In addition, she testified that she experiences severe anxiety associated with the fact that the needle is in her abdomen. Finally, Ms. Gibson testified that her physician advised her not to have another baby because of the needle fragment.

We are therefore required to determine whether an award of $500,000.00 is abusively high under the *Anderson* standard in light of the

present case. While we appreciate the anxiety Ms. Gibson reasonably experiences knowing a needle fragment is lodged in her abdominal muscle, the evidence demonstrates that it is highly unlikely the fragment will migrate to another part of her body. Indeed, no evidence was presented that the fragment has moved for over seven years. Further, no competent medical evidence was presented that the fragment will ever cause her any injury. In fact, the testimony was that removal of the fragment would be more harmful to Ms. Gibson than to leave the fragment in place. Further, no objective evidence was presented that the needle fragment is causing Ms. Gibson any pain, although we acknowledge her testimony to the contrary, and, of course, all pain is subjective. However, we must also consider what the evidence establishes when determining an appropriate amount to award for general damages.

We find that Ms. Gibson underwent the surgery solely to have another child. Ms. Gibson testified that her treating physician advises that she should not bear any more children because of the needle fragment in her abdominal muscle. While this evidence was technically refuted at trial, conflicting evidence was heard and the fact-finder chose to credit the plaintiff's

understanding of her medical condition over the expert's testimony that a future pregnancy was not contraindicated. Thus, the fact-finder was within his vast discretion to award Ms. Gibson general damages based in large part on the advice not to have any more children due to the malpractice of Dr. Brown.

Accordingly, we conclude that $500,000.00 adequately compensates Ms. Gibson for her pain, suffering, and mental anguish as being the highest award over which reasonable minds would not differ. We, therefore, amend the judgment to award the plaintiff $500,000.00, together with judicial interest and costs, assessed against the PCF, subject to a credit of $100,000.00, plus judicial interest and costs, the amount paid by Dr. Brown. We assess all costs of this appeal to the PCF.

AMENDED; AS AMENDED AFFIRMED