

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NO. 2005 CA 2471**

**TOBY LEONARD**

**VERSUS**

**LOUIS ROUCHER, AUDUBON INSURANCE COMPANY, HILDA TRASKE,  
AND AIG NATIONAL INSURANCE COMPANY, INC.**

*Judgment Rendered: December 28, 2006*

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**Appealed from the  
18th Judicial District Court  
In and for the Parish of Iberville, Louisiana  
Case No. 59,095**

**The Honorable Alvin Batiste, Judge Presiding**

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Toby Leonard**

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**BEFORE: KUHN, GAIDRY, AND WELCH, JJ.**

*EJG  
JAW  
JAW*

**GAIDRY, J.**

In this personal injury case, defendant appeals the judgment notwithstanding the verdict (JNOV) rendered by the trial court after a jury trial, increasing the jury's awards to plaintiff for his trip and fall injuries. We affirm.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff, Toby Leonard ("Toby"), was injured when he fell into a hole while attempting to stop a fight between his brother-in-law and sister-in-law on property owned by his wife's now-deceased uncle, Louis Roucher.

Toby subsequently filed this suit for his injuries resulting from the accident. Following a jury trial held on February 23 and 24, 2005, the jury found that Louis Roucher had failed to maintain the premises in a reasonably safe condition, that Roucher knew or should have known about the hole on the property, and that Roucher's failure to maintain the premises, combined with Toby's own negligence, caused Toby's injuries. The jury determined that Roucher and Toby were each fifty percent at fault in causing Toby's injuries. The jury awarded general and special damages to Toby as follows:

|                         |             |
|-------------------------|-------------|
| Past Pain and Suffering | \$8,000.00  |
| Past Lost Wages         | \$21,000.00 |
| Past Medical Expenses   | \$2,000.00  |
| Future Medical Expenses | \$2,000.00  |

Toby filed alternative motions for judgment notwithstanding the verdict (JNOV) and for a new trial. The trial judge granted the JNOV and increased the jury awards for general damages from \$8,000.00 to \$100,000.00, past medical expenses from \$2,000.00 to \$32,532.29, and past lost wages from \$21,000.00 to \$94,853.29. The trial judge declined to adjust the jury's allocation of fault or the award for future medical expenses. He also denied Toby's motion for a new trial.

American International appeals this judgment, claiming that the increase in general damages, past medical expenses, and past lost wages constitutes an abuse of discretion, and seeking reinstatement of the jury's verdict.

Toby filed an appellate brief in which he argued that the jury erred in assigning fifty percent of the fault to him. However, since Toby did not file an appeal or file an answer to American International's appeal in accordance with La. C.C.P. art. 2133, we will not consider this assignment of error. *Kel-Kan Inv. Corp. v. Village of Greenwood*, 418 So.2d 669, (La. App. 2 Cir. 1982), *writ granted*, 420 So.2d 977 (La. 1982), reversed on other grounds, 428 So.2d 401 (La. 1983).

### DISCUSSION

Louisiana Code of Civil Procedure article 1811(F) provides that a motion for JNOV may be granted on the issue of liability or on the issue of damages or both. *Smith v. Lee*, 00-1079, pp. 2-3 (La. App. 5 Cir. 4/11/01), 783 So.2d 642, 644, *writ denied*, 01-1731 (La. 9/28/01), 798 So.2d 116. 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 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 in favor of 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 of factual questions should be resolved in favor of the non-moving party. See *Anderson v. New Orleans Public Service, Inc.*, 583 So.2d 829 (La.1991), LSA-C.C.P. art. 1811 and *Davis v. Wal-Mart Stores, Inc.*, 00-445, (La. 11/28/00), 774 So.2d 84.

Appellate review of a JNOV is a two-part process. First the appellate court must determine whether the trial court erred in granting the JNOV, which is done by using the same criteria used by the trial judge in deciding whether to grant the motion. Second, 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*, 00-1023 (La. 4/3/01), 784 So.2d 627.

Toby testified that on the day of the accident, October 24, 2002, he was helping his wife and several of her family members load wedding decorations onto a trailer on Roucher's property. Toby's brother-in-law and sister-in-law began arguing, and the police were called. After the police arrived, the argument continued, and Toby ran across the property towards his brother-in-law in an attempt to keep him away from his sister-in-law. As he ran towards his brother-in-law, he fell into a large hole, breaking his fibula and tibia. Toby testified that when he fell there was a "pop" and "everything went black." When he was able to see again, he saw that his right foot was bent backwards and he felt a sharp burning pain in his right ankle. He attempted to stand up and put weight on his right leg, but he collapsed. Toby testified that he was unable to remember much about the next few days because of the pain medication he was given. During this time, Toby underwent surgery to have the bone set and a plate and screws inserted into it. For the first month after the accident, Toby was in a wheelchair and had to keep his leg elevated at all times due to the swelling and throbbing.

Dr. Charles Walker testified that Toby suffered a complex comminuted distal tibia fracture and a long oblique distal fibular shaft fracture. Dr. Walker performed surgery on Toby's leg after the accident, and continued to treat him until May 13, 2003, when Toby discontinued treatment because he no longer had insurance. At the time of his last visit, Toby still had some loss of movement in his foot, which Dr.

Walker felt would equate to approximately a four percent whole-body impairment. Dr. Walker also testified that Toby had a minimally increased potential to develop arthritis in his right ankle due to the break.

After discontinuing treatment with Dr. Walker, Toby began treating at the VA Hospital. Records from the VA Hospital indicate that Toby was still having significant ankle pain and swelling a few months before trial. He consulted an orthopedist to discuss removing the hardware in his leg, but it was determined that the hardware was not causing his problems and removing it would not provide any relief.

At the trial, approximately two and a half years after the accident, Toby testified that his leg still hurts every day, and that his leg “locks up” and causes excruciating pain about three times a day. At the time of trial, Toby still had a scar on his leg from the surgery.

Prior to the accident Toby worked as a pipefitter and set-up foreman. This job had a number of physical requirements, including lying flat on his back, working on scaffolding, climbing, moving around structures, and crawling around and over pipes.

Toby testified that he did not get paid while he was injured because he did not have disability insurance, but he did receive approximately \$1300.00 per month in disability income from the military for thyroid and dermatological conditions. After six months of medical leave, he was laid off from his job as a pipefitter. When Dr. Walker released him to go back to work in May of 2003, Toby signed back on with his labor union, but was never contacted about a job. Toby began taking classes at Baton Rouge Community College after the accident, but testified that he later quit because of stress and because the vocational rehabilitation counselor at the VA told him that they would no longer pay for the classes.

Louis Lipinski, a vocational rehabilitation counselor, evaluated Toby and concluded that he would be unable to return to his previous employment as a pipefitter. Economist Dr. Randy Rice calculated Toby's lost wages from the date of the accident to the date of trial to be \$94,653.00.

Vicky Leonard, Toby's wife, testified that Toby was in a lot of pain after the accident and that he became very depressed. She had to find a job to help alleviate their financial problems stemming from his inability to work, although she had not worked for five years prior to the accident due to an injury of her own, and they have had to accept financial help from her parents. She also testified that she and Toby lost their health insurance when he lost his job.

The evidence at trial was uncontradicted that Toby's medical bills totaled \$32,532.29. The jury apparently took insurance payments made on Toby's behalf into account in awarding only \$2,000.00, despite being instructed by the court not to do so. Because reasonable persons could not have differed as to the proper amount of that award, the trial court was correct in granting the JNOV and increasing the award for past medical expenses.

We disagree with the trial court that evidence regarding the amount of Toby's past lost wages was uncontradicted. Dr. Randy Rice calculated Toby's lost wages from October 24, 2002, the date of the accident, until the trial in February 2005, to be \$94,653.00. However, Dr. Walker's records show that he released Toby to return to work on May 14, 2003, seven months after the accident and almost two years before the trial. Toby testified that Dr. Walker released him in May of 2003 to return to work because he asked him to so he could get back to work to support his family. Clearly the jury calculated Toby's past lost wages on the seven-month period between the accident and his release to return to work, rather than the time between the accident and the trial. Based upon Dr. Walker's release for Toby to return to

work, we believe that reasonable men could differ on the appropriate amount of lost wages, and as such, the trial court erred in granting JNOV on this item of damages.

Given that the jury found that Louis Roucher was negligent and that his negligence caused Toby's injuries, the jury's general damages award was grossly inadequate. Reasonable minds could not differ on this issue and the judge did not err in granting the JNOV. Further, after evaluating the evidence in the record regarding the extent of Toby's injuries and the effect it has had on his life, while we might have awarded more than the trial court did, we find no manifest error in the trial court's award of \$100,000.00 in general damages.

### **DECREE**

The portion of the judgment of the trial court granting JNOV and increasing the jury awards for past medical expenses and general damages is affirmed. The portion of the judgment of the trial court granting JNOV and increasing the jury award for past lost wages is reversed. Costs of this appeal are to be borne by appellant, American International.

**AFFIRMED IN PART AND REVERSED IN PART.**