NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 2073

BRANDON MASON, ROBERT HORNSBY, CARLOS MOSES, REGINALD JARVIS, INDIVIDUALLY AND ON BEHALF OF REGINALD JARVIS, JR. AND REGANIYA JARVIS

VERSUS

JAMES RAY HILTON, JR., W.W. ADCOCK, INC., AND HARTFORD UNDERWRITERS INSURANCE COMPANY

Judgment Rendered: NOV 07 2013

RHP

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit No. 581,164

The Honorable Wilson Fields, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

In this automobile collision case, defendants, James Ray Hilton, Jr., W.W. Adcock, Inc., and Hartford Underwriters Insurance Company, appeal the trial court's granting of a judgment notwithstanding the jury's verdict in favor of plaintiff, Brandon Mason. For the following reasons, we reverse that judgment and reinstate the jury's verdict, together with the judgment of May 7, 2012, rendered in accordance with the jury's verdict.

FACTUAL AND PROCEDURAL BACKGROUND

On January 9, 2009, Mason was driving a vehicle with three passengers, Robert Hornsby, Carlos Moses, and Reginald Jarvis, southbound on North Acadian Thruway in East Baton Rouge Parish, when a vehicle driven by Hilton and owned by W.W. Adcock, Inc. attempted to turn left from the right southbound lane on North Acadian Thruway, causing a collision with a vehicle being driven by Mason. All of the occupants of Mason's vehicle originally filed suit against defendants. Hornsby, Moses, and Jarvis settled their claims prior to trial and dismissed all of the defendants with prejudice on March 10, 2010. The rights of Mason were reserved to proceed against the defendants. Prior to trial, Mason and the defendants stipulated that Hilton was 100% at fault for causing the automobile accident; that Hilton was in the course and scope of his employment with W.W. Adcock at the time of the accident; that Hartford had in effect a liability policy covering Hilton and W.W. Adcock at the time of the accident; and that the damages did not exceed the $1,000,000 policy limits.

A jury trial was held beginning April 10, 2012, on the issue of damages. The jury returned a verdict awarding Mason $106,259.56 for past medical expenses, $55,952.50 for future medical expenses, and $25,000 for loss of enjoyment of life. The jury did not award any damages for past, present and future physical or mental pain and suffering. The trial court signed a judgment in

accordance with the jury verdict on May 7, 2012. On May, 10, 2012, Mason filed a Motion for Judgment Notwithstanding the Verdict (JNOV). A hearing was held on the JNOV on August 6, 2012, and the trial court granted the JNOV.[1] The trial court signed the judgment on the JNOV on September 11, 2012, and awarded $125,000 for past, present, and future physical pain and suffering and $25,000 for past, present, and future mental pain and suffering, leaving the original award of $25,000 for loss of enjoyment of life as it was.

Defendants appeal both the September 11, 2012 judgment granting the JNOV and the May 7, 2012 judgment in accordance with the jury verdict. The defendants contend that the trial court erred in granting the JNOV, and alternatively, that the trial court award was excessive.

LAW AND ANALYSIS

JNOV Standard

Louisiana Code of Civil Procedure article 1811 allows a party to move for a JNOV. This court has recognized the established standard to be used in determining whether a JNOV has been properly granted:

> 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 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. This rigorous standard is based upon the principle that "[w]hen there is a jury, the jury is the trier of fact." (Citations omitted).

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[1] At the hearing on the JNOV, the trial court stated he was increasing the award for past and future physical pain and suffering to $225,000. The judgment signed by the trial court lists the amount as $125,000. Appeals are taken from judgments, not reasons for judgment. *Davis v. Farm Fresh Food Supplier,* 02-1401 (La. App. 1 Cir. 3/28/03), 844 So.2d 352, 353-54. Therefore, this court will only consider the judgment of the trial court.

Wood v. Humphries, 11-2161 (La. App. 1 Cir. 10/9/12), 103 So. 3d 1105, 1110, *writ denied*, 12-2712 (La. 2/22/13), 108 So. 3d 769 (quoting *Joseph v. Broussard Rice Mill, Inc.*, 00-0628 (La. 10/30/00), 772 So. 2d 94, 99).

The trial court must first determine whether the facts and inferences point so strongly and overwhelmingly in favor of the plaintiffs that reasonable jurors could not arrive at a contrary verdict. In other words, if reasonable persons could have arrived at the same verdict, given the evidence presented to the jury, then a JNOV is improper. *Wood*, 103 So. 3d at 1110.

An appellate court reviewing a trial court's grant of a JNOV employs the same criteria used by the trial court in deciding whether to grant the motion. The appellate court must determine whether the facts and inferences adduced at trial point so overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary finding of fact. If the answer is in the affirmative, then the appellate court must affirm the grant of the JNOV. However, if the appellate court determines that reasonable minds could differ on that finding, then the trial court erred in granting the JNOV, and the jury verdict should be reinstated. *Id.*

Our initial inquiry is whether the evidence at trial so overwhelmingly supported an increase in general damages to Mason that reasonable jurors could not have concluded otherwise. If so, then the trial court was correct in granting the JNOV. However, if reasonable jurors in the exercise of impartial judgment might conclude from the evidence that Mason was entitled to general damages in the amount the jury awarded, then the trial court erred in granting the motion, and the jury's verdict should be reinstated. *See Gutierrez v. Louisiana Dep't of Trans. & Dev.*, 11-1774 (La. App. 1 Cir. 3/23/12), 92 So. 3d 380, 386, *writ denied*, 12-1237 (La. 9/21/12), 98 So. 3d 343.

Evidence as to Damages

The evidence at trial was that Mason was involved in two accidents prior to the January 9, 2009 accident (Hilton accident). In the first accident he injured his left shoulder and lower back, and in the second accident he injured his neck and back. For both of these accidents he was treated by Dr. Michael Goff, a chiropractor, and was released from treatment approximately one month before the Hilton accident. Mason suffered neck, back, and a right knee injury in the Hilton accident. Mason testified that he also treated with Dr. Goff following the Hilton accident, but that the treatment took longer and the pain he suffered was worse than the previous two accidents. With the previous two accidents, Mason only took over-the-counter medication for his pain. Following the Hilton accident, he also treated with an orthopedist, Dr. Joseph Boucree, who prescribed pain medication and six steroid injections between 2010 and 2012. Mason did not begin taking prescription pain medication until January 21, 2011, two years after the Hilton accident. The jury awarded Mason past medical expenses of $106,259.56. They also awarded Mason future medical expenses of $55,952.50.

Dr. Boucree saw Mason beginning March 8, 2010, for neck and back pain with complaints of radicular pain in the upper and lower extremities. At the time, Mason was 29 years old. An MRI taken January 22, 2011, of Mason's back showed mild disc space narrowing at L5-S1. The majority of Mason's complaints were regarding his lower back, but his cervical spine evidenced multiple disc bulges. Dr. Boucree diagnosed Mason with cervical and lumbar strain, and explained that Mason had a soft tissue injury. As a result of Dr. Boucree's findings, Mason received three steroid injections by the time of Dr. Boucree's deposition in April 18, 2011. Dr. Boucree testified that Mason's neck improved with conservative management with Dr. Goff by February 14, 2011. However, Mason's lower back pain persisted, and Dr. Boucree determined that Mason would

need two to three steroid injections per year to manage that pain. Dr. Boucree testified that he did not see Mason until over a year after the Hilton accident, but agreed that, based on Mason's history, it was more likely than not that the lower back and neck pain were related to the Hilton accident.

Dr. Goff testified that he treated Mason for the two previous accidents with physical therapy, electrical stimulation, ultrasound, and spinal manipulation on both his cervical and lumbar spine, both of which fully and completely recovered before the Hilton accident. Although Dr. Goff had ordered an MRI in January 2008, Mason and Dr. Goff decided that, since Mason kept improving. they would not have the MRI performed. He treated Mason for symptoms in his cervical spine, lumbar spine, and right knee following the Hilton accident. After an MRI was performed in January 2010, Dr. Goff referred Mason to Dr. Boucree. Dr. Boucree referred Mason back to Dr. Goff to receive physical therapy treatment. Dr. Goff testified that Mason would have to live with his condition for life, and Dr. Goff was trying to help him maintain a good quality of life. Dr. Goff testified that an X-ray revealed objective findings that correlated with Mason's subjective complaints. Dr. Goff testified, that more probably than not, the Hilton accident was directly related to the aggravation of Mason's cervical and lumbar spine problems. Dr. Goff also testified that Mason suffered a right knee strain as a result of the Hilton accident. Dr. Goff believed that Mason would require chiropractic care once or twice a week in the future for the rest of his life.

On cross examination, Dr. Goff testified Mason did not get the first MRI he ordered in January, 2008, because Mason was getting better. However, Dr. Goff's records indicated he was getting worse and was involved in a second accident. Dr. Goff also admitted that his records show Mason had the same complaints of neck, back, and right knee pain for all three accidents. Furthermore, Dr. Goff's diagnoses appeared to have been the same for all three accidents, cervical and

lumbar strain. Dr. Goff testified on re-direct that the Hilton accident aggravated a pre-existing condition of Mr. Mason.

Dr. Randolph Rice, an economist, testified that the total future medical cost to Mason for chiropractic care and injections would be $916,770. Dr. Rice admitted on cross examination that he figured the cost of three injections a year in the future, and did not take into account that Mason may not need any injections.

Dr. Stephen Wilson, a board certified orthopedic surgeon, testified on behalf of the defendants. After reviewing the medical records of Mason and the depositions of Drs. Goff and Boucree, Dr. Wilson suggested that Mason undergo an independent medical examination (IME). Dr. Wilson believed Mason should have recovered sooner from the Hilton accident and was getting a little too much treatment. Dr. Wilson actually did perform the IME of Mason and rendered a report on October 19, 2010. Mason told Dr. Wilson that he was a weightlifter and continued to lift weights even after the Hilton accident. Mason's physical examination was normal, and Dr. Wilson found no abnormalities to his back, neck, or lower extremities. Dr. Wilson also found Mason's right knee to be normal with the normal range of motion. Dr. Wilson noted that Mason seemed to embellish the pain of some things he was asked to do that should not have hurt. Dr. Wilson reviewed the MRI taken of Mason and testified that Mason had disc bulging from the second cervical disc to the sixth cervical disc, as well as facet arthritis. The lower back showed some bulging and foraminal stenosis at L2, L3, and L4. Dr. Wilson testified that the findings on the MRI were normal for a person after the age of 20, that is, showing some bulging of the discs with some facet arthritis. Dr. Wilson testified that Mason sustained a soft tissue injury to his right knee, neck, and lower back. He found no objective findings for Mason's continued subjective complaints, and believed the Hilton accident aggravated a pre-existing degenerative condition in his neck and back. Dr. Wilson testified that a patient's

symptoms from the type of injury sustained by Mason should return to pre-injury status in eight to twelve weeks. Dr. Wilson also testified that Mason had reached maximum medical improvement at the time of the IME and he could continue with any activity he was performing prior to the Hilton accident. Therefore, Dr. Wilson testified that Mason did not need any further chiropractic, medical, or surgical treatment.

James Ray Hilton, Jr., testified that on the day of the accident, he was returning to his office. In order to avoid the scene of a wreck, he attempted to turn left onto another street. Mr. Mason was in his own lane and coming beside Hilton, so when Hilton attempted to turn left, the vehicles struck sides. Hilton testified that four men got out of the vehicle driven by Mason after the accident. An ambulance came to the scene of the accident, but no one left in it.

On cross examination, Mason admitted that all of the treatments he received from Dr. Goff were the same for all three accidents, except that the treatments after the Hilton accident lasted longer. When questioned about working out with weights after the Hilton accident, Mason testified that he told Dr. Wilson he was still exercising, but not with weights. In his direct testimony, Mason stated that he played basketball, a sport he had played at the college level, once or twice every two to three months after the Hilton accident. Mason denied he played basketball immediately after the Hilton accident, but did admit he would play basketball once or twice every three months. He denied that any doctor told him to stop playing basketball after the Hilton accident.

The jury awarded the full amount of past medical expenses, but less than 20% of the future medical expenses requested and only $25,000 in general damages. The trial court granted the JNOV, increasing the general damages to $175,000.

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitively in terms of money. *Boudreaux v. Farmer,* 604 So. 2d 641, 654 (La. App. 1st Cir.), *writs denied,* 605 So. 2d 1373 and 1374 (La. 1992). The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. *Jenkins v. State ex rel. Dep't of Transp. and Dev.,* 06-1804 (La. App. 1 Cir. 8/19/08), 993 So. 2d 749, 767, *writ denied,* 08-2471 (La. 12/19/08), 996 So. 2d 1133. Much discretion is left to the judge or jury in the assessment of general damages. LSA-C.C. art. 2324.1. In reviewing an attack on a general damage award, a court does not review a particular item in isolation, rather, the entire damage award is reviewed for an abuse of discretion, and if the total general damage award is not abusively low, it may not be disturbed. *Graham v. Offshore Specialty Fabricators, Inc.,* 09-0117 (La. App. 1 Cir. 1/8/10), 37 So. 3d 1002, 1017-18; *Smith v. Goetzman,* 97-0968 (La. App. 1 Cir. 9/25/98), 720 So. 2d 39, 48. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. *Youn v. Maritime Overseas Corp.,* 623 So. 2d 1257, 1261 (La. 1993), *cert. denied,* 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. *Coco v. Winston Indus., Inc.,* 341 So. 2d 332, 335 (La. 1976); *Moss v. State,* 07-1686 (La. App. 1 Cir. 8/8/08), 993 So. 2d 687, 704, *writ denied,* 08-2166 (La. 11/14/08), 996 So. 2d 1092.

In *Pitre v. Government Employees Ins. Co.,* 596 So. 2d 256 (La. App. 3 Cir.), *writ denied,* 600 So. 2d 685 (La. 1992), the court took into consideration the

entire damage award to the plaintiff, including special damages, in determining whether the award was unreasonable. "[A]lthough the awards for certain elements of damages may be inadequate or excessive if the *total* sum awarded is neither excessive or inadequate it must not be disturbed." *Id.* at 260-61. In *Smith,* this court relied on *Pitre* and held that the total general damage award was to be considered in determining if the trier of fact had abused its discretion. The plaintiffs had contested the general damage award for past and future mental anguish, loss of enjoyment of life, and inconvenience as abusively low. The court in *Smith* considered all of the general damages awarded, including $50,000 for pain and suffering and $25,000 for permanent disability, not just the $5,000 award for mental anguish, loss of enjoyment of life and inconvenience in holding that the jury did not abuse its vast discretion. *Smith,* 720 So. 2d at 48. In *Graham* although a jury did not award any damages for future physical and mental pain and suffering, the general damage award was not an abuse of discretion. The jury did award damages for past physical mental pain and suffering and loss of enjoyment of life. This court stated that a damage award is not reviewed in isolation. *Graham,* 37 So. 3d at 1018-19.

Both parties supported their respective positions on damages with ample evidence consisting of numerous fact and expert witnesses and several exhibits. The jury was required to evaluate the credibility of these witnesses and resolve any conflicting evidence, and, in doing so, the jury had the prerogative to accept or reject all or part of the testimony of any witness, including all or part of the testimony of any of the expert witnesses. *Fleniken v. Entergy Corporation,* 00-1824 (La. App. 1 Cir. 2/16/01), 780 So. 2d 1175, 1195-96, *writs denied,* 01-1268, 01-1305 and 01-1317 (La. 6/15/01), 793 So. 2d 1250, 1253 and 1254. Mason argues that the jury awarded him only loss of enjoyment of life and not physical or mental pain and suffering. This court does not review a particular item of general

damages in isolation, rather, the entire general damage award is reviewed for an abuse of discretion, and if the total general damage award is not abusively low, it may not be disturbed. *Graham,* 37 So. 3d at 1017-18.

This court does not find the $25,000 general damage award to Mason for loss of enjoyment of life to be abusively low. Considering the evidence presented at trial, we find that it was of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions. *See Strain v. Indiana Lumberman's Mut. Ins. Co.,* 00-2720 (La. App. 1 Cir. 2/20/02), 818 So. 2d 144, 149. The evidence at trial did show that Mason had a pre-existing injury which was aggravated by the Hilton accident. However, the defendants presented evidence that Mason may have embellished his injuries, and his recovery time should have been much shorter. Reasonable questions of fact should have been resolved in favor of defendants under the JNOV test. *Id.* Accordingly, we reverse the JNOV and reinstate the judgment on the jury verdict awarding $25,000 in general damages.

CONCLUSION

For the reasons noted above, we reverse the trial court's JNOV increasing Brandon Mason's general damage award to $175,000, vacate the judgment signed on September 11, 2012, and reinstate the May 7, 2012 judgment in accordance with the jury verdict.

JNOV JUDGMENT REVERSED AND ORIGINAL JUDGMENT REINSTATED.