NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 0396

JOEY ROUSSE
VERSUS
TRITON BOAT COMPANY, L.P. AND H&H MARINE, INC.

CONSOLIDATED WITH

NUMBER 2008 CA 0397

TERRI E. McCREARY
VERSUS
TRITON BOAT COMPANY, L.P.

Judgment Rendered: October 31, 2008

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, Louisiana
Trial Court Number 95,976 c/w 95,066

Honorable Jerome J. Barbera, III, Judge

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Donald F. Harang, Jr. Larose, LA	Attorney for Plaintiff – Appellee Joey Rousse
Errol J. King Layna S. Cook Daniel P. Guillory Baton Rouge, LA	Attorneys for Defendant – Appellant Triton Boat Company, L.P.
Terri E. McCreary Cut Off, LA	In Proper Person Plaintiff – Appellee

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Parro, J., concurs.

WELCH, J.

Defendant, Triton Boat Company, L.P. (Triton), appeals a judgment notwithstanding the verdict finding the plaintiff, Joey Rousse, free from fault and increasing a jury's medical expense and general damage awards. We affirm in part, reverse in part, reinstate the jury's medical expense award and render judgment on general damages.

BACKGROUND

On January 15, 2002, Mr. Rousse purchased a Triton 18-foot boat with an aluminum center console, Model 1860, from H&H Marine, Inc. On May 3, 2002, Mr. Rousse was navigating the boat in a waterway commonly known as Superior Canal in Lafourche Parish. In order to get a better view to steer the boat through a set of pilings, Mr. Rousse attempted to pull himself up from a seated position using the boat's steering wheel. However, as he did so, the center console housing the steering wheel broke free from its attachments to the boat and collapsed into his lap. The boat collided with two sets of pilings and came to rest in the marsh. The impact caused Mr. Rousse to fall from his seat onto the bottom of the boat, where he hit his back on a running light bar.

Mr. Rousse filed this lawsuit against Triton on April 7, 2003, asserting a cause of action under the Louisiana Products Liability Act, La. R.S. 9:2800.51 *et. seq.*[1] Specifically, Mr. Rousse charged that the boat was unreasonably dangerous in construction, composition, and design. He asserted that he injured his back in the collision and was required to undergo two lumbar surgeries because of the accident. In his lawsuit, Mr. Rousse sought to recover medical expenses associated with both surgeries, as well as damages for pain and suffering and loss of enjoyment of life.

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[1] Terri McCreary, a passenger in Mr. Rousse's boat at the time of the collision, also filed a lawsuit against Triton. Ms. McCreary's attorney withdrew from the litigation in January of 2004, and Ms. McCreary testified at trial that she "dropped" her lawsuit.

Triton did not dispute the fact that a problem existed in the center console mounting hardware on Mr. Rousse's boat. Triton admitted that all of the consoles on the 1860 model boats should have been mounted with both rivets and a set number of screws; however, some of the consoles on those model boats, for some unknown reason, were mounted only with rivets. Triton did not dispute Mr. Rousse's claim that the center console of his Triton 1860 was mounted with only rivets. Triton did, however, charge that Mr. Rousse was negligent for failing to operate his boat in a safe manner.

During the three-day jury trial, Mr. Rousse and Terri McCreary, a passenger in his boat, testified. Mr. Rousse offered the deposition testimony of his treating physician and the medical bills incurred in connection with both lumbar surgeries. During Mr. Rousse's case-in-chief, the parties stipulated that Joey Hutchinson, the owner and manager of H&H Marine, Inc., the Triton dealer that sold Mr. Rousse the boat in question, would have testified that no modifications were made to the boat from the time H&H Marine, Inc. received it until the time Mr. Rousse purchased the boat. Triton did not offer any independent testimonial or documentary evidence at trial, relying on its stipulation regarding Mr. Hutchinson's testimony.

Following the conclusion of trial, the jury returned a verdict finding the boat unreasonably dangerous in construction or composition and that the unreasonably dangerous condition of the boat caused Mr. Rousse's injuries and damages. The jury further found that Mr. Rousse was negligent, his negligence was a cause of the accident, and assessed fault 50% to Mr. Rousse and 50% to Triton. Thereafter, the jury awarded Mr. Rousse $25,000.00 for past and future pain and suffering and mental anguish, along with $22,450.00 for medical expenses, but declined to award any sum for loss of enjoyment of life.

Mr. Rousse filed a motion for a judgment notwithstanding the verdict

(JNOV) and alternatively, a motion for a new trial on the issues of liability and damages. The trial court granted the JNOV request on both issues. With respect to liability, the trial court concluded that there was no evidence presented at trial of any fault on the part of Mr. Rousse, and entered judgment assigning 100% fault for the accident to Triton. The trial court increased the medical damage award to $79,587.55, the amount incurred in connection with two lumbar surgeries, increased the award for past, present, and future pain and suffering to $175,000.00, and awarded $25,000.00 for loss of enjoyment of life. In so doing, the trial court stressed that as a result of the accident, Mr. Rousse sustained a compression fracture to his back, knee and shoulder injuries, as well as a disc injury requiring extensive medical treatment including two surgeries. The court also conditionally granted Mr. Rousse's motion for a new trial in the event the JNOV determinations would be vacated or reversed on appeal.

This appeal, taken by Triton, followed. Mr. Rousse also appealed, but later waived his right to file a brief, and this court dismissed his appeal as abandoned. **Rousse v. Triton Boat Company, L.P.**, 2008-0396 (La. App. 1st Cir. 5/20/08)(unpublished).

JNOV

Louisiana Code of Civil Procedure article 1811(F) provides that a motion for a judgment notwithstanding the verdict may be granted on the issue of liability or on the issue of damages or both. The standard to be used in reviewing a JNOV, set forth in **Davis v. Wal-Mart Stores, Inc.,** 2000-0445, pp. 4-5 (La. 11/28/00), 774 So.2d 84, 89, is as follows:

> 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 jurors 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 men could not reach different conclusions, not merely when there is a preponderance of evidence for 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 or factual questions should be resolved in favor of the non-moving party.
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> The standard of review for a JNOV on appeal is a two part inquiry. In reviewing a JNOV, the appellate court must first determine if the trial court erred in granting the JNOV. This is done by using the aforementioned criteria just as the trial judge does in deciding whether or not to grant the motion. 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. (Citations omitted.)

LIABILITY

We first examine the trial court's granting of the JNOV on the issue of liability. In this appeal, Triton admits that Mr. Rousse's boat did have a defect in the center console in that it was fastened with only rivets, whereas it should have been fastened with rivets and screws. Thus, Triton does not challenge the jury's finding that the Triton 1860 was unreasonably dangerous in construction, or that the construction or composition of the boat was a cause of Mr. Rousse's injuries. Instead, it urges that the evidence demonstrates that Mr. Rousse's actions and inactions were a contributing cause of the accident, and therefore, because a reasonable jury could have allocated 50% fault to Mr. Rousse, the trial court erred in granting JNOV on the issue of liability.

Triton submits that the jury could have found Mr. Rousse negligent for three reasons. First, Triton argues, the jury could have concluded that the use of the boat's steering column by Mr. Rousse to pull himself up was an "ill-use" of the steering wheel that contributed to the center console's becoming detached. It cites Mr. Rousse's admission that he routinely pulled himself to a standing position using the steering wheel. Next, Triton maintains that the jury could have concluded that Mr. Rousse was approaching the pilings at too fast a rate of speed, citing Mr. Rousse's admission that he was in "full throttle" as he approached the

pilings. Lastly, Triton claims that Mr. Rousse implied during his testimony that he was not wearing a device known as a "kill switch" that would have automatically shut down the boat at the time of the accident, and that Mr. Rousse's failure to do so constituted negligence on his part.

The only evidence relating to the accident was presented through the testimony of Mr. Rousse and Ms. McCreary. Mr. Rousse testified that he was driving his boat at full throttle in the waterway heading toward his camp as the boat began to approach a set of pilings, which he estimated were 60-70 feet apart. Mr. Rousse testified that he routinely pulled himself up from a seated position using the boat's steering wheel to get a better view as the boat approached the pilings. On the day in question, as the boat approached the first set of pilings, Mr. Rousse attempted to pull himself up from a seated position using the steering wheel so that he could get a better view and to lower the throttle to slow the boat down to negotiate the pilings. As he did so, suddenly and unexpectedly, the console collapsed into his lap. Mr. Rousse estimated that in a matter of seconds, with the console still in his lap, the boat struck the first set of pilings. Mr. Rousse stated that while the console was in his lap, he attempted to turn the wheel toward the middle of the canal to avoid hitting anything else; however, it was too late. He threw the console off of him before the boat slammed into the second set of pilings. Mr. Rousse testified that the impact flipped him out of his seat, causing him to fall to the bottom of the boat, where he hit his back on a running light bar on the floor of the boat. The boat then headed for the marsh, and Mr. Rousse grabbed Ms. McCreary, and they jumped overboard. The two were picked up by Mr. Rousse's brother-in-law, who was following them in his boat. Mr. Rousse retrieved his boat and was able to tie the console back with a rope and drive the boat back to his camp.

After thoroughly reviewing the evidence, we agree that no reasonable jury

could have found Mr. Rousse 50% at fault in causing the accident, and therefore, the trial court properly granted the JNOV on the issue of liability. Triton bore the burden of proving comparative negligence by a preponderance of the evidence. **Bergeron v. K-Mart Corporation**, 540 So.2d 406, 408 (La. App. 1st Cir.), writs denied, 544 So.2d 408, 412 (La. 1989). Triton failed to meet its burden of proving comparative fault. There simply was no evidence from which a jury could find that pulling oneself up from a seated position with the help of the steering wheel was unreasonable. Furthermore, even if the boat was in full throttle as Mr. Rousse approached the pilings, Mr. Rousse testified that he was attempting to raise himself up to slow the boat's speed when the console collapsed into his lap. And although Triton relies on Mr. Rousse's admission that there was a kill switch on his boat, Triton offered no evidence to show that the use of a kill switch would have prevented this accident. In short, there was no evidence presented to the jury from which the jury could find that when confronted with the sudden and unexpected collapse of the boat's steering column, Mr. Rousse's conduct fell below the standard of reasonable care. Under the circumstances of this case, we find no manifest error in the trial court's assignment of 100% fault for this accident to Triton.

MEDICAL EXPENSES

In its second assignment of error, Triton attacks the trial court's granting of the JNOV on the issue of medical expenses. At the outset of the trial, Mr. Rousse introduced medical expenses totaling $79,587.55, and the parties stipulated that the expenses were incurred by Mr. Rousse. Of this amount, approximately $22,448.16 involved medical expenses incurred shortly after the accident and in connection with Mr. Rousse's first lumbar surgery performed in March of 2003, within one year of the accident. The remaining amount, $57,139.39, was incurred in connection with a second lumbar surgery performed in October of 2006, more than

three years after the first surgery.

In awarding medical expenses in the amount of $22,450.00, the jury obviously awarded only those expenses incurred shortly after the accident and associated with the first lumbar surgery, but declined to award costs associated with the second surgery. Triton submits that the trial court erred in granting the JNOV to include the cost of the second surgery, urging that a reasonable jury could have concluded that the second surgery was not related to the accident. We agree.

Mr. Rousse testified that in the course of the accident, he fell onto the floor of the boat and struck his back on a running light bar. He stated that he also injured his knee and shoulder in the accident. That day, Mr. Rousse went to the Terrebonne General Medical Center's emergency room, where he received pain medication. One month after the accident, Mr. Rousse visited Dr. Carl E. Lowder, a neurosurgeon. Mr. Rousse related that he had been involved in a boating accident and experienced increasing neck, shoulder, and back pain thereafter. Dr. Lowder ordered an MRI, which revealed a compression fracture of the L1 vertebrae and a small left herniation at the L5-S1 vertebrae. Dr. Lowder noted that a compression fracture generally causes significant back pain, but typically heals without surgical intervention within three to four months. He testified that it was fair to say that to a reasonable medical probability the L1 compression fracture was caused by the trauma sustained by Mr. Rousse in the boating accident.

Dr. Lowder advised Mr. Rousse to return in six months. Mr. Rousse returned in February of 2003 complaining of increasing radiating leg pain over the previous few months, pain in his buttocks and calf, and numbness in his foot. Dr. Lowder suspected the disc protrusion at the L5-S1 level was pinching a nerve and was the source of Mr. Rousse's pain. Dr. Lowder ordered another MRI, which revealed a larger disc protrusion at the L5-S1 level. Dr. Lowder performed a discectomy on March 18, 2003, during which he found a moderately large

herniated disc and nerve root impingement at the L5-S1 level. Dr. Lowder believed that, based on the history and the development of the injury over time, the left nerve root injury at L5-S1 correlated to the trauma Mr. Rousse sustained in the boating accident. Dr. Lowder added that at the time he operated on Mr. Rousse, he believed the compression fracture had resolved. He also felt that the surgery was very successful in terms of relieving Mr. Rousse's leg and buttock pain, noting that following the surgery, Mr. Rousse reported that the numbness had resolved and the leg pain had decreased, although he continued to report neck and low back pain. Dr. Lowder opined that the left nerve root injury at L5-S1 was related to the trauma Mr. Rousse experienced in the boating accident.

Over three years after the first surgery, in June of 2006, Mr. Rousse returned to Dr. Lowder complaining of left and right leg radiating pain. An MRI was taken that month, which revealed post-operative changes at the L5-S1 level, a central and to the right L5-S1 disc herniation, and a moderate narrowing due to arthritis at the L4-5 level. Mr. Rousse elected to undergo a second surgery. Dr. Lowder performed a bilateral L5-S1 laminotomy discectomy, during which he removed arthritis and nerve roots from both sides of the disc and removed the right herniated disc, as well as a laminotomy at the L4-5 level, removing arthritis from that area of the lumbar spine.

Dr. Lowder was unable to distinguish whether Mr. Rousse's complaints of back pain were caused by the L5-S1 herniation or the L4-5 arthritic condition. He stated that he did not believe the arthritis at L4-5 could have been caused by the boating accident, but added that the condition could have been pre-existing and may have become symptomatic after the accident. Dr. Lowder related the right-sided problem at L5-S1 level to the boating accident based on the history provided to him by Mr. Rousse and his belief in Mr. Rousse's credibility. Dr. Lowder opined that Mr. Rousse received as much medical benefit from the surgeries as is

possible.

In granting the JNOV on the issue of medical damages, the trial court relied on Dr. Lowder's testimony relating the second surgery to the accident and Dr. Lowder's belief in the credibility of his patient, the fact that there was no evidence that Mr. Rousse sustained another accident, and the absence of a competing medical evaluation or examination. In support of its argument that the jury reasonably could have declined to award medical expenses associated with the second surgery, Triton focuses on the fact that Mr. Rousse did not seek additional medical treatment following the first surgery for over three years, as well as the absence of medical evidence linking the disc herniations to the accident with certainty. Triton also urges that the jury obviously had some doubts as to Mr. Rousse's credibility in refusing to award medical expenses associated with the second lumbar surgery. Mr. Rousse, on the other hand, relies on the testimony of Dr. Lowder and the fact that no witness contradicted his testimony in support of his assertion that there was no basis in the record for the jury to have rejected Dr. Lowder's opinions.

In order to grant the JNOV on medical damages, the trial court was required to find that a reasonable jury could only have concluded that the second surgery was causally related to the boating accident. The trial court may not substitute its own evaluation of the evidence for that of the jury unless the jury's conclusions totally offend reasonable inferences from the evidence. **Forbes v. Cockerham**, 2005-1838, p. 10 (La. App. 1st Cir. 3/7/08), 985 So.2d 86, 97. As trier of fact, the jury was not required to accept the testimony of Dr. Lowder as decisive merely because Triton failed to produce an expert witness. See **Galloway v. Gaspard**, 340 So.2d 579, 582 (La. App. 1st Cir. 1976). Moreover, the jury was entitled to accept or reject the opinion of Dr. Lowder, in whole or in part. See **Green v. K-Mart Corporation**, 2003-2495, p. 5 (La. 5/25/04), 874 So.2d 838, 843.

Upon reviewing the record, we conclude that a reasonable jury could have awarded medical expenses associated with the first lumbar surgery and could have declined to award those associated with the second lumbar surgery. The first surgery, performed within a year of the accident, was undertaken to repair a left-sided herniation at the L5-S1 level and to relieve Mr. Rousse's left leg radiating pain. His treating physician described that surgery as a success. Three years after that surgery, Mr. Rousse sought treatment again for back and leg pain. It was then determined that Mr. Rousse had a right-sided herniation at the L5-S1 level and arthritic problems at the L4-5 level, two conditions that were not revealed in the MRIs taken in connection with the first surgery. The second surgery was undertaken to repair the right-sided herniation and the arthritic condition. We believe that the jury could have reasonably believed under these facts that the second surgery was not sufficiently causally related to the boating accident. Therefore, we conclude that the JNOV on the medical expense award was improper.

GENERAL DAMAGES

In reviewing the granting of the JNOV on the general damage award, we must first determine whether reasonable minds could not differ that the award was abusively low. The jury awarded $25,000.00 for pain and suffering and entered a sum of zero on the loss of enjoyment of life element of general damages. In entering the JNOV, the trial court concluded that even without considering the second surgery, the general damage award was so low as to be unreasonable. We agree.

The evidence demonstrated, and the jury obviously found, that Mr. Rousse sustained a spinal back compression fracture and a left-sided lumbar disc injury requiring surgical intervention as a result of the boating incident. Under these circumstances, the $25,000.00 general damage award was woefully inadequate,

and we find that the trial court correctly granted the JNOV to increase the general damage award.

Once a trial court has determined a JNOV is warranted because reasonable minds could not differ that the award was abusively low, it must determine the proper amount of damages. In so doing, the trial court is not bound by the constraints imposed on appellate courts by **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1976) of raising the award to the lowest point reasonably within the discretion afforded that court. **Griffin v. Louisiana Sheriff's Auto Risk Association**, 99-2944, p. 30 (La. App. 1st 6/22/01), 802 So.2d 691, 711, writ denied, 2001-2117 (La. 11/9/01), 801 So.2d 376. Rather, it is empowered to render a *de novo* award based on its independent assessment of damages. Once this court concludes that the trial court properly granted the JNOV, typically, this court reviews the trial court's award of damages using the manifest error standard of review under the **Coco** restraints. **Griffin**, 99-2944 at pp. 30-31, 802 So.2d at 711.

However, in this case, we have found error in the trial court's conclusion that the evidence demonstrated the second surgery was necessitated by the accident. This erroneous conclusion no doubt influenced the amount of the court's general damage award. Because the trial court's judgment on quantum is interdicted by error, the abuse of discretion standard will not be followed, and this court will undertake an independent evaluation of the record and exercise our own discretion to fix a *de novo* quantum award. See **Suhor v. Gusse**, 388 So.2d 755, 758 (La. 1980); **Levy v. Bayou Industrial Maintenance Services, Inc.**, 2003-0037, p. 7 (La. App. 1st Cir. 9/26/03), 855 So.2d 968, 974, writs denied, 2003-3161, 2003-3200 (La. 2/6/04), 865 So.2d 724, 727; **Sneed v. RTA/TMSEL**, 2003-1532, p. 5 (La. App. 4th Cir. 2/25/04), 869 So.2d 254, 258.

As noted above, Mr. Rousse sustained a spinal compression fracture and disc

injury as a result of the accident. He complained of back pain and radiating leg pain to his treating physician a month after the accident and continued to complain of such pain until he underwent disc surgery nine months after the accident. According to Dr. Lowder, the surgery confirmed that nerve root impingement resulting from the disc injury was the source of Mr. Rousse's complaints of radiating leg pain. Mr. Rousse had five months of follow-up visits following his surgery, which Dr. Lowder termed a "success." Considering that Mr. Rousse suffered a back fracture and a disc injury in the accident, underwent surgery, and that Mr. Rousse's complaints of pain were corroborated by the medical evidence, we feel an award of $125,000.00 for pain and suffering and loss of enjoyment of life is appropriate under the circumstances. Therefore, we amend the trial court's general damage award and render judgment in the amount of $125,000.00.

CONDITIONAL NEW TRIAL

Triton assigns as error the trial court's judgment conditionally granting Mr. Rousse's motion for a new trial should the court's JNOV determinations be vacated or reversed on appeal. This court concluded that the trial court improperly granted the JNOV on the issue of medical damages, and the question thus becomes whether Mr. Rousse is entitled to a new trial on this issue.

In **Forbes**, 2005-1838 at pp. 49-52, 985 So.2d at 120-122, this court discussed at length the propriety of a trial court's decision to grant a conditional new trial in the event a JNOV is reversed on appeal. Therein, this court noted that the jurisprudence widely holds that when a jury's verdict was reasonably supported by the evidence presented at trial, the alternative request for a new trial should also be denied or reversed on appeal. Applying that longstanding principle in **Forbes**, this court found that the trial court abused its discretion in granting an alternative motion for a new trial on a liability issue on the basis that the jury's verdict was reasonable, and there were no other peremptory or discretionary grounds upon

which a motion for a new trial could have been granted under La. C.C.P. arts. 1972 and 1973. **Forbes**, 2005-1838 at p. 52, 985 So.2d at 122.

Since we have concluded that the jury's decision not to award medical expenses associated with the second surgery is supported by the evidence, and because there are no other procedural grounds upon which a motion for a new trial could have been granted, we hold that the trial court abused its discretion in granting the alternative motion for a new trial as it pertains to the issue of medical damages. Accordingly, we reverse the conditional grant of a new trial on the issue of medical expenses, reinstate the jury's award of $22,450.00, and render judgment in that amount.

CONCLUSION

For the foregoing reasons, those portions of the judgment increasing the medical damage award to $79,587.55 and alternatively granting the motion for a new trial are reversed, the jury's medical damage award of $22,450.00 is reinstated, and judgment is hereby rendered in that amount. The general damage award in the amount of $200,000.00 is amended, and judgment is rendered in the amount of $125,000.00. In all other respects, the judgment appealed from is affirmed. Costs of this appeal are assessed to appellant, Triton Boat Company, L.P.

JUDGMENT NOTWITHSTANDING THE VERDICT AFFIRMED IN PART, REVERSED IN PART; JUDGMENT CONDITIONALLY GRANTING NEW TRIAL REVERSED; JUDGMENT RENDERED ON REINSTATED JURY VERDICT; GENERAL DAMAGE AWARD AMENDED AND RENDERED.