I'm Sure Glad We're Done... or Are We?

How to Win (or Lose) Your Case After You Have Won (or Lost):

Additur, Remittitur, JNOV and New Trial

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You lost your case or the jury verdict was way out of line. You know you should have won. The judge knows it, too. The jury just didn't "get it." They certainly didn't get it right. You need to fix it. But what do you do? What do you file? What are your client's rights?

Luckily for you, in Louisiana, you have a few options.

Remittitur and Additur

The statutory tools available to the Louisiana practitioner seeking to correct an erroneous or deficient verdict are not always clearly written. One of the articles that *is* clearly written, however, is Louisiana Code of Civil Procedure art. 1814, providing for remittiturs and additurs, which states, in pertinent part:

> If the . . . verdict is so excessive or inadequate that a new trial should be granted for that reason only, [the court] . . . may indicate to the party or his attorney within what time he may enter a remittitur or additur [which may] be entered *only with the consent* of the plaintiff or the defendant as the case may be, *as an alternative to a new trial* . . . (emphasis added.)

Where the court indicates an intent to order a new trial or, as an alternative, to grant a remittitur or additur, the opponent has the option of agreeing to the additur or of obtaining a new trial.

Remittiturs and Additurs: Standard for Granting and Scope of Relief

To determine whether an additur is proper, the court must determine whether the jury abused its discretion.[1] The court is allowed to grant a motion for additur only if it believes that the jury award was so inadequate as to justify a new trial on that issue alone.[2] The decision whether to grant an additur is proper only if granting a new trial solely on the issue of damages would also be proper.[3] In other words, if the jury's award is within its range of discretion, an additur is improper. A judgment granting an additur is proper when the jury awards an amount that is lower than the lowest reasonable amount. The purpose of art. 1814 is to serve judicial efficiency by allowing the parties to avoid a possibly unnecessary new trial.[4]

The scope of the remedy provided under art.1814 is balanced. The mover's remedy is to recover only such an amount as is the least/most a reasonable jury could have awarded. If the opponent disagrees with this, he is entitled to a new trial instead. It is as simple as that.

Judgment Notwithstanding the Verdict (JNOV)

Not nearly so clearly written is La. C.C.P. art. 1811, which, in pertinent part, reads:

> A. (1) Not later than seven days . . . 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. 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 . . . .
>
> C. (1) If the motion for a judgment notwithstanding the verdict is granted, the court shall also rule on the motion for a new trial, if any . . . and shall specify the grounds for granting or denying the motion for a new trial.
>
> (2) If the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court orders otherwise.
>
> (3) If the motion for a new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.
>
> D. The party whose verdict has been set aside on a motion for a judgment notwithstanding the verdict may move for a new trial . . . .
>
> E. If the motion for a judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to

a new trial in the event the appellate court concludes that the trial court erred in denying the motion for a judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this Article precludes the court from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted.

JNOV: Standard for Granting Relief

Noting that art. 1811 does not on its face provide a standard for application, the Supreme Court jurisprudentially established one:[5]

> The grounds upon which the district court may grant a JNOV are not specified in Article 1811; however, this court has set forth the standard to be used in determining when a JNOV is proper as follows: A 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. 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.[6]

Acting on a case-by-case basis, the jurisprudence has formulated the standards to be applied:

► Generally, the same standard applies to a JNOV as to a directed verdict.[7]

► The evidence and all reasonable inferences from the evidence should be considered in the light most favorable to the party opposing the motion.[8]

► The motion should be granted only if the facts and inferences are so strong that the court believes that reasonable people could not rule in favor of the opponent.[9]

► The motion should be denied if the record contains "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions."[10]

► A JNOV may not be granted where there is conflicting evidence.[11]

► A preponderance of the evidence in favor of the moving party is insufficient grounds for granting a motion for a JNOV.[12]

► Both the trial judge and the appeals court are prohibited from making credibility determinations when considering a motion for a JNOV.[13]

► The trial court is also prohibited from substituting its judgment for the judgment of the jury.[14]

► A trial judge may not consider statements made by a juror in deciding a motion for JNOV.[15]

► The granting of a motion for JNOV is not an appropriate remedy merely because the trial judge finds that a preponderance of the evidence is in favor of the mover.[16]

► A trial court's authority to grant a JNOV is limited "to those cases where the jury's verdict is absolutely unsupported by any competent evidence."[17]

A motion for a JNOV requires a stringent test because it deprives the parties of their right to have all disputed issues resolved by a jury.[18]

The hurdle imposed by a motion for JNOV is higher than that required to reverse a case on the grounds of manifest or clear error on appeal. If reasonable people, in the exercise of impartial judgment, might have reached a different conclusion, then it was error for the trial judge to grant the motion. The trial judge is not entitled to interfere with the verdict simply because he believes another result would be correct.[19]

> 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.[20] Questions of fact should be resolved in favor of the non-moving party.[21] A judge is allowed to enter a JNOV only where the jury's verdict is absolutely unsupported by any competent evidence.[22]

Motion for New Trial

Far and away the most commonly used post-verdict motion is the motion for a new trial. As discussed above, it arises implicitly with the remittitur/additur motion and is routinely paired with the previously discussed JNOV.

The Code of Civil Procedure provides, in pertinent part:

Art. 1971. Granting of new trial

A new trial may be granted . . . to all or any of the parties and on all or part of the issues, or for reargument only . . . .

Art. 1972. Peremptory ground

A new trial shall be granted . . . in the following cases:

(1) When the verdict or judgment appears clearly contrary to the law and the evidence.

(2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.

Art. 1973. Discretionary grounds

A new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law.

> By its terms, art. 1972 (peremptory grounds) uses the mandatory language "shall," requiring a new trial "when the verdict or judgment appears clearly contrary to the law and the evidence," and art. 1973 (discretionary grounds) provides permissive language "may" whenever "a good ground" exists.[23]

New Trial: The Standard for a Granting or Denying

The motion for a new trial is applied by a less stringent test than a motion for a JNOV because its remedy is so less severe — a new trial. The parties maintain their right to have all disputed issues resolved by a jury.[24] In considering a motion for a new trial, unlike the JNOV, the trial court is free to evaluate the evidence without favoring either party, drawing its own conclusions and inferences and *evaluating the credibility of the witnesses* to determine if the jury has erred in giving too much credence to an unreliable witness.[25] A court may use its discretion and order a new trial whenever it is "convinced by its examination of the

facts that the judgment would result in a miscarriage of justice."[26] Although the trial court has much discretion in determining if a new trial is warranted, an appellate court can set aside the ruling of the trial judge in a case of manifest abuse of that discretion.[27]

The discretionary grounds described by art. 1973 contemplate circumstances other than those enumerated in art. 1972 and a court must articulate a reason why it is invoking art. 1973 when granting a new trial.[28]

In *Martin v. Heritage Manor House*,[29] the Supreme Court opined that:

> The fact that a determination on a motion for new trial involves judicial discretion, however, does not imply that the Trial Court can freely interfere with any verdict with which it disagrees. The discretionary power to grant a new trial must be exercised with considerable caution . . . the jury's verdict should not be set aside if it is supportable by any fair interpretation of the evidence.

When considering a motion for new trial under either La. C.C.P. arts.1972 or 1973, the trial court may evaluate the evidence without favoring either party. It may draw its own inferences and conclusions and evaluate witness credibility to determine whether the jury erred in giving too much credence to an unreliable witness.[30]

Cases: The "Easy" Ones

A trier of fact abuses its discretion in failing to award general damages when it finds that a plaintiff has suffered injuries causally related to the accident that required medical attention.[31]

In *Green v. K-Mart Corp*.,[32] the Supreme Court upheld the 3rd Circuit, finding that:

> Here, the court of appeal correctly determined that the jury abused its discretion in failing to award general damages while awarding a substantial amount for past and future medical expenses. In this case, the jury determined that plaintiff suffered injuries causally related to the accident which required medical attention, and is still suffering an injury that will, in fact, require medical attention in the future. Failing to make a general damage award in such circumstances was an abuse of discretion.

In *Ezzell v. Miranne*,[33] the plaintiff was awarded future damages, yet no award was given for future pain and suffering. On appeal, the 5th Circuit held that the jury abused its discretion in not making a general damages award for future pain and suffering after awarding future lost wages.

The "Hard" Ones: Reducing Damages

In *Forbes v. Cockerham*,[34] the 1st Circuit (also discussing the standard for a JNOV and new trial) was asked to reduce a plaintiff's damages. Appellant argued that an extensive list of prior case results showed the award in *Forbes* was excessive. The court rejected that approach, finding it well-settled law that only *after* a finding that the jury had abused its discretion could resort be made to prior cases, and then only for the purpose of establishing the highest reasonable award. The *Forbes* court found the jury had not abused its discretion, so the court refused to look at prior judgments.

Increasing Damages

In *Guillory v. Lee*,[35] the Louisiana Supreme Court was presented with plaintiff's request to increase damages. The jury had awarded only $10,000, allowing nothing for loss of enjoyment of life. The trial court granted a new trial. Defendant appealed. Turning to the specific evidence of the case, the Court found evidence the jury may have relied on to conclude plaintiff had not suffered a loss of enjoyment of life. Expressly noting that the award was clearly on the lower end, the Court found the jury had not abused its discretion and reversed the trial court's granting of a new trial.

In *Rachal v. Brouilette*,[36] the 3rd Circuit refused to decrease an award of compensatory damages which was "three and one-third times higher" than the largest award for the death of a parent, and, at the same time, increased the award of exemplary damages finding it "unreasonably low:"

> Plaintiff argues that the award of exemplary damages, $100,000, was unreasonably low. We agree and increase the award to $500,000. The purpose of exemplary damages is to punish the defendant and deter future similar behavior. These damages are regarded as a fine or penalty for the protection of the public interest. . . . The following factors are considered in determining whether the award is too high or low: (1) the nature and extent of the harm to the plaintiff; (2) the wealth or financial situation of the defendant; (3) the character of the conduct involved; (4) the extent to which such conduct offends a sense of justice and propriety; and (5) the amount necessary to deter similar conduct in the future. *Id.* The amount of exemplary damages is the result of a fact-intensive inquiry into the case. These awards should only be disturbed if the damages are such that "all mankind at first blush would find [them] outrageous." (Citations omitted.)

Other Cases

The trial court properly granted a motion for a new trial after the jury found landowners liable to their neighbor for damages to his bell pepper crop caused by the defendant's negligently spraying herbicide. The testimony of the landowner, field inspector and meteorology expert indicated spraying occurred on a day when the wind would not have carried fumes to the neighbor's field. Spraying was done in a manner to avoid affecting neighboring fields. Other neighboring fields were not affected by spraying, and experts testified that they could not tell whether damage to bell peppers was the result of spraying herbicide. Thus, the court concluded that the evidence did not support a verdict against the defendant and that the jury had abused its discretion.[37]

Where a plaintiff slipped and fell on a banana on the defendant's premises but still found for the defendant, the court of appeal affirmed the finding that the trial court cannot freely interfere with a verdict

merely because it disagrees.[38]

In a case in which the jury found the defendant 100 percent at fault but awarded only $3,000 in damages — the award reflected only the plaintiff's lost wages and medical expenses, accounting for none of the plaintiff's pain and suffering — the court held that the jury could not find injury and 100 percent fault on the defendant, and then award nothing for pain and suffering. The jury's omission of a general damage award was clearly contrary to the law and the evidence so a new trial was properly granted.[39]

In *Morgan v. Belanger*,[40] the 1st Circuit refused to reverse the jury's apparent finding of lack of causation despite a treating physician's opinion that the accident did cause plaintiff's injury. The jury was free to discredit the plaintiff's testimony and that of his treating physician in light of totality of the evidence.[41] In accord, the 3rd Circuit has held that: "The jury was free to reject Mr. Simon's treating physician's diagnosis of thoracic outlet syndrome and also to reject the assertion that this condition would be a problem for the plaintiff in the future"[42] and:

> The jury or trial judge may accept or reject the opinion expressed by any medical expert, depending upon how he is impressed with the qualifications and testimony of that expert.[43]

The treating physician's testimony is not irrebuttable, as the trier of fact is required to weigh the testimony of all of the medical witnesses.[44]

Conclusion

Losing at trial is, no doubt, unfortunate, but Louisiana law invests three tiers of courts with the power, under appropriate circumstances, to rectify wrongful verdicts. In short, it ain't over until it's over.

FOOTNOTES

1. Ryals v. Louisiana Power & Light Co., 94-0050 (La. App. 5 Cir. 4/26/94), 636 So.2d 1064.

2. Fleischmann v. Hanover, 470 So.2d 216 (La. App. 4 Cir. 1985).

3. Temple v. State ex rel. DOTD, 02-1977 (La. App. 1 Cir. 6/27/03), 858 So.2d 569.

4. Accardo v. Cenac, 97-2320 (La. App. 1 Cir. 11/6/98), 722 So.2d 302; Art. 1814 Comment (b).

5. Smith v. State DOTD, 04-1317 c/w 04-1594 (La. 3/11/05), 899 So.2d 516.

6. Trunk v. Medical Center of Louisiana at New Orleans, 04-018 (La. 10/19/04), 885 So.2d 534, 537 (*citing* Joseph v. Broussard Rice Mill, Inc., 00-0628, (La. 10/30/00), 772 So.2d 94). *See also*, Smith v. State DOTD, 524 So.2d 25.

7. State, Dept. of Transp. and Development v. Wahlder, 554 So.2d 233 (La. App. 3 Cir. 1989), *determination sustained*, 558 So.2d 561 (La. 1990).

8. Robinson v. Fontenot, 02-C-0704 (La. 2/7/03), 837 So.2d 1280.

9. Thrash v. Maerhofer, 99-375 (La. App. 3 Cir. 11/18/00), 745 So.2d 1238.

10. Robinson v. Fontenot, 02-C-0704 (La. 2/7/03), 837 So.2d 1280.

11. Acosta v. Pendleton Memorial Methodist Hosp., 545 So.2d 1053 (La. App. 4 Cir. 1989); Alumbaugh v. Montgomery Ward & Co., Inc., 492 So.2d 545 (La. App. 3 Cir. 1986).

12. Boudreaux v. Schwegmann Giant Supermarkets, 585 So.2d 583 (La. App. 4 Cir. 1991); Doming v. K-Mart Corp., 540 So.2d 400 (La. App. 1 Cir. 1989).

13. Robinson v. Fontenot, 02-C-0704 (La. 2/7/03), 837 So.2d 1280; Thrash v. Maerhofer, 99-375 (La. App. 3 Cir. 11/18/00), 745 So.2d 1238.

14. May v. Jones, 675 So.2d 275 (La. App. 2 Cir. 1996); Acosta v. Pendleton Memorial Methodist Hosp., 545 So.2d 1053 (La. App. 4 Cir. 1989); Doming v. K-Mart Corp., 540 So.2d 400 (La. App. 1 Cir. 1989).

15. Hoyt v. Wood/Chuck Chipper Corp., 625 So.2d 504 (La. App. 1 Cir. 1993).

16. Thrash v. Maerhofer, 99-375 (La. App. 3 Cir. 11/18/00), 745 So.2d 1238.

17. Davis v. Lazarus, 04-C-0582 (La. App. 4 Cir. 4/12/06), 927 So.2d 456.

18. Martin v. Heritage Manor South Nursing Home, 00-1023 (La. 4/3/01), 784 So.2d 627; Templet v. State ex rel. Dep't of Transp. & Dev., 00-2162 (La. App. 1 Cir. 11/9/01), 818 So.2d 54.

19. Davis v. Wal-Mart Stores, Inc., 00-0445 (La. 11/28/00), 774 So.2d 84, 95; Yohn v. Brandon, 01-1896 (La. App. 1 Cir. 9/27/02), 835 So.2d 580, 585, *writ denied*, 02- 2592 (La. 12/13/02), 831 So.2d 989.

20. Templet, 818 So.2d at 58.

21. Anderson, 583 So.2d at 832.

22. Boudreaux v. Schwegmann Giant Supermarkets, 585 So.2d 583 (La. App. 4 Cir. 1991).

23. La. C.C.P. art. 1973.

24. Broussard v. Stack, 95-2508 (La. App. 1 Cir. 9/27/96), 680 So.2d 771.

25. Hunter v. State ex rel. LSU Medical School, 05-0311 (La. App. 1 Cir. 3/29/06), 934 So.2d 760, *writ denied*, 06-0937 (La. 11/3/06), 940 So.2d 653.

26. Lamb v. Lamb, 430 So.2d 51 (La. 1983).

27. Hardy v. Kidder, 292 So.2d 575 (La. 1973); Hitkinan v. Wm. Wrigley, Jr. Co, 33,896 (La. App. 2 Cir. 10/4/00), 768 So.2d 812.

28. Burris v. Wal-Mart Stores, Inc., 94-0921 (La. App. 1 Cir. 3/3/95), 652 So.2d 558, *writ denied*, 95-0858 (La. 5/12/95), 654 So.2d 352; Johnson v. Missouri Pacific R.R. Co., 00-0980 (La. App. 3 Cir. 7/25/01), 792 So.2d 892, 897-898, *writ denied* (La. 12/7/01), 803 So.2d 33.

29. Martin v. Heritage Manor South, 00-1023 (La. 4/3/01), 784 So.2d 627.

30. Smith v. American Indem. Ins. Co., 598 So.2d 486 (La. App. 2 Cir. 1992), *writ denied*, 600 So.2d 685 (La. 1992).

31. Stewart v. Haley, 11-0584 (La. App. 1 Cir. 11/9/11), 2011 WL 5415175.

32. Green v. K-Mart Corp., 03-2495 (La. 2004), 874 So.2d 838.

33. Ezzell v. Miranne, 11-228 (La. App. 5 Cir. 12/28/11), 84 So.3d. 641.

34. Forbes v. Cockerham, 05-CA-1838, (La. App. 1 Cir. 3/7/08), 985 So.2d 86.

35. Guillory v. Lee, 09-C-0075 (La. 2009), 16 So.3d 1104.

36. Rachal v. Brouilette, 12-794 (La. App. 3 Cir. 3/13/13), 111 So.3d 1137.

37. Freeman v. Rew, 557 So.2d 748 (La. App. 2 Cir. 1990), *writ denied*, 563 So.2d 1154 (La. 1990).

38. Freeman v. Rew, 557 So.2d 748 (La. App. 2 Cir. 1990), *writ denied*, 563 So.2d 1154 (La. 1990).

39. Guillory v. National Union Fire Ins. Co., 95-1132 (La. App. 3 Cir. 1/31/96), 670 So.2d 326.

40. Morgan v. Belanger, 633 So.2d 173 (La. App. 1 Cir. 1993), *writ denied*, 634 So.2d 832 (La. 1994).

41. Williams v. Diehl, 625 So.2d 251 (La. App. 5 Cir. 1993).

42. Simon v. Lacoste, 05-550 (La. App. 3 Cir. 12/30/05), 918 So.2d 1102.

43. White v. Cumis Ins. Soc., 415 So.2d 574 (La. App. 3 Cir. 1982).

44. Freeman v. Rew, 557 So.2d 748 (La. App. 2 Cir. 1990), *writ denied*, 563 So.2d 1154 (La. 1990).

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