

**ARNEL FERNANDEZ &
DARNELL HARPER**

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NO. 2001-CA-0412

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**JANE DOE, OSCAR B.
THAMES AND ALLSTATE
AUTOMOBILE INSURANCE**

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STATE OF LOUISIANA

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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 99-58548, SECTION "B"
HONORABLE ANGELIQUE REED, JUDGE

JUDGE MICHAEL E. KIRBY

(Court composed of Judge Steven R. Plotkin, Judge Patricia Rivet Murray,
Judge Michael E. Kirby)

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Defendant, Allstate Insurance Company, appeals a First City Court judgment in favor of plaintiffs, Arnel Fernandez and Darnell Harper.

This case arose from a March 19, 1999 accident in which a car driven by Suzanne Kensar and owned by Oscar Thames collided with a vehicle occupied by the plaintiffs. The accident occurred in a parking lot on Chef Menteur Highway in New Orleans. At the time this lawsuit was filed, Kensar's identity was unknown, so the named defendants were Jane Doe, Oscar Thames and Allstate Insurance Company, Thames' insurer.

The following testimony was presented at trial. Darnell Harper testified that she and her cousin, Arnel Fernandez, were seated in a car in the parking lot of Cajun Seafood on Chef Menteur Highway on the evening of March 19, 1999. They ordered food and returned to the car to wait until their order was ready. Harper was in the driver's seat and Fernandez was in the passenger seat. Harper stated that they had been seated in the car in the parking lot for approximately fifteen minutes when another car hit their car. She did not see the other car when it hit their vehicle, but she felt the impact. She said the front left side of the other vehicle struck the back right side of the vehicle in which she was sitting.

Harper stated that after the impact, the woman driving the car that struck them started to drive off. She and Fernandez both jumped out of their car to try to get the driver of the other car to stop. The driver of the other car drove out of the parking lot without stopping. Harper was able to write down the license plate number of the other car, and got a good look at the driver and her vehicle. She then called the police.

Harper testified that she did not feel any injury at the time of the impact. She did feel pain in her left knee later that day. She sought treatment for her knee on March 29, 1999. She received medical treatment for her knee for four or five months. She did not recognize Suzanne Kensar at trial as the driver of the other car, stating that the driver of the car was much slimmer than Kensar. However, she noted that the accident occurred more than one year before the trial.

On cross-examination, Harper admitted that she did not hit her knee or any other part of her body on any part of her car at the moment of impact; rather, she hit her knee when she was getting out of the car. She said her cousin was the only other person in their car; there was not a man in the car with them.

Arnel Fernandez corroborated Harper's version of the accident. She described the driver of the other car as a thin, white woman with blond hair.

She said that after the impact, she hit her right knee on the car door as she was quickly getting out of the car to see who hit their car. She said she wrote down the license plate number of the other car as the driver of the car left the parking lot. Fernandez testified that she did not think that Suzanne Kensar was the woman who hit the car in which she was sitting. She said that she started to have neck pain a few days after the accident, and she sought medical treatment for her neck ten days after the accident. She received physical therapy for her knee and neck for approximately three months.

On cross-examination, Fernandez admitted that she did not sustain any injury at the point of the impact; she hurt her knee when she hit it on the car door as she was getting out of the car after the impact. She said she hurt her neck when she raised her head up fast from her reclined seat as she was trying to get out of the car after the impact. She was not sure whether the pain in her neck was caused by the impact itself or by the action of getting up too fast after the impact. She said she got out of the car quickly because someone had hit them and they wanted to find out what happened.

Suzanne Kensar testified that she was the driver of the car that hit the vehicle in which Darnell Harper and Arnel Fernandez were sitting. Kensar said that she was driving out of the parking lot when the other vehicle started

backing out of a parking space and hit her vehicle. She said she did not have enough time to stop before the collision occurred. She said the female driver of the car did not get out of the car after the impact, but a male passenger got out of the car and came running toward her car apparently drunk and screaming obscenities. She disputed the diagram of the accident scene in the police report. Kensar stated that she left the accident scene because she felt threatened by the actions of the male occupant of the other vehicle.

Following trial, the trial court found that the accident was the result of the negligence of the defendant; it found that Kensar hit the plaintiff's vehicle as she was backing out from her parking space. The trial court awarded plaintiff Arnel Fernandez \$4,500.00 for pain and suffering, \$525.00 for medical bills, plus court costs and interest from date of judicial demand. The trial court awarded plaintiff Darnell Harper \$5,500.00 for pain and suffering, \$1,045.00 for medical bills, plus court costs and interest from date of judicial demand. Allstate Insurance Company appeals that judgment.

On appeal, Allstate argues that the trial court erred in finding it liable for plaintiffs' injuries when the evidence established that both plaintiffs' injuries were a direct result of their actions after the impact rather than a result of the impact itself. A plaintiff must prove four elements under a duty/risk analysis in order to recover on a negligence theory: (1) the

defendant's conduct was the cause-in-fact of the resulting harm; (2) the defendant owed a duty of care to plaintiff; (3) the defendant breached that duty; and (4) the risk of harm was within the scope of protection afforded by the duty breached. Stroik v. Ponseti, 96-2897 (La. 9/9/97), 699 So.2d 1072.

Cause-in-fact is generally a "but for" inquiry: if the plaintiff probably would not have been injured but for defendant's substandard conduct, such conduct is a cause-in-fact. Freeman v. Julia Place Ltd. Partners, 95-0243, p. 4 (La.App. 4 Cir. 10/26/95), 663 So.2d 515, 518. We find, as the trial judge must have found, that plaintiffs would not have been injured getting out of their car quickly to get the license plate number of defendant's vehicle but for the defendant's leaving the scene of the accident without first identifying herself. Therefore, defendant's conduct was a cause-in-fact of plaintiffs' injuries.

Whether the defendant owed a duty to plaintiffs is a question of law. Harris v. Pizza Hut of Louisiana, Inc., 455 So.2d 1364 (La. 1984). La. R.S. 14:100 requires the driver of a vehicle involved in or causing any accident to stop at the scene of the accident, to give his identity and to render reasonable aid. This statute established a duty owed by the defendant to the plaintiffs.

The testimony of Suzanne Kensar established that she breached the duty owed to plaintiffs under La. R.S. 14:100. She admitted that she left the

scene of the accident.

Finally, we find, as the trial court must have found, that the risk of harm to plaintiffs was within the scope of protection afforded by the duty breached by the defendant. The duty on Kensar to not leave the scene of the accident in which she was involved encompassed the risk that the plaintiffs could be injured trying to gather information about her identity, such as her license plate number, while she was leaving.

Under the duty/risk analysis, the plaintiffs proved the defendant's liability for their damages suffered in the accident. The medical records submitted into evidence by plaintiffs established that Darnell Harper's knee injury and Arnel Fernandez's knee and neck injuries were the result of the accident of March 19, 1999. Therefore, based on the evidence presented at trial, we find no manifest error in the trial court's findings of fact and award of damages.

Accordingly, we affirm the judgment of First City Court in favor of plaintiffs and against Allstate Insurance Company.

AFFIRMED