CYNTHIA COCKERHAM	*	**NO. 2002-CA-0818**
VERSUS	*	**COURT OF APPEAL**
VELMA BANKS AND ALLSTATE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-5789, DIVISION "H-12"
Honorable Michael G. Bagneris, Judge
* * * * * *

JUDGE

JOAN BERNARD ARMSTRONG

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones and Judge David S. Gorbaty)

GORBATY, J., DISSENTS, WITH REASONS.

CHARLES E. COTTON
CATRICE A. JOHNSON
636 NORTH BROAD STREET
NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

NAT G. KIEFER, JR.
TIMOTHY P. FARRELLY
KIEFER & KIEFER
2121 AIRLINE DRIVE
SUITE 508
METAIRIE, LA 70001

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED. _

Cynthia Cockerham, plaintiff herein, and Velma Banks, defendant herein, were involved in an automobile accident. Cockerham sued, alleging the negligence of Banks, and Banks answered, alleging the negligence of Cockerham. Cockerham named appellant Allstate as Banks' s insurer.

Cockerham testified at trial that she was on her way back to work at Cox Cable on Canal Street at 4:30 p.m. on Thursday, April 9, 1998. She stopped at a stop sign on Miro Street and waited to turn onto Canal Street. She was alone in the car and denied talking to any one at the time. Banks came out of a parking lot adjacent to a small strip mall and hit the left side of her car while she was still stationary. A police officer arrived and gave Banks a ticket. Cockerham went home because she "was not able to go to work." She started feeling pain immediately in her middle and lower back. She took Tylenol and several hot baths over the weekend. She hired a lawyer, and went to see Dr. Dwight McKenna the following Monday. A report by Dr. McKenna showed that he treated her from April 13 to September 3, 1998. Cockerham said he gave her muscle relaxers and she received heat treatments from him two to four times a week. The heat

treatments lasted from thirty to forty-five minutes. She was pain free at the time of trial. The parties stipulated the medical bill was $2,005.00.

Banks testified that right before the accident she had driven her granddaughter to retrieve a forgotten purse at a nail shop. The granddaughter talked to someone in the street and then got back into the car. Banks pulled the car forward and began to turn right. At that point, Cockerham hit her car as she was turning. Up until that point, Cockerham's car had been two car lengths behind the stop sign. Banks said Cockerham was "leaning over speaking to someone standing on the outside of the curb." She said "The young lady was still talking to a young man when I pulled up there. And evidently, the conversation broke and she pulled on off not realizing I was there." Banks said her car was hit on the passenger side "behind the wheel." Banks admitted to paying a ticket for making an illegal turn.

A review of the photographs submitted reveals very minor damage to Cockerham's left front fender behind the bumper and in front of the front wheel well. Banks's car appears to have sustained minor damage to the right side of the front bumper and the right front fender along its length and continuing behind the front wheel well.

Dr. McKenna's report shows he diagnosed Cockerham with acute

parathoracic strain and acute lumbosacral strain. She visited his office forty-two times between April 13, 1998 and September 3, 1998. The police report was submitted into evidence. It stated, in pertinent part:

> Driver of vehicle No. 1 (Banks) stated she was traveling westbound on No. Miro Street, upon reaching Canal Street, she attempted to execute a right turn into Canal from No. Miro Street when vehicle #2 (Cockerham) struck vehicle No.1. Driver of vehicle No. 2 stated she was to the far right before executing a right turn off of No. Miro Street onto Canal St. when vehicle No. 1 turned in front of her striking vehicle No. 2. Driver No.1 was citated (sic) for wide right turn …

Traffic court records established that Banks paid the ticket.

Also submitted at trial were insurance papers from Allstate establishing that Barry Lombard had paid the insurance premiums on the car Banks had been driving. The car was insured until April 12, 1998.

In her petition, Cockerham sought general damages of $10,000.00 and special damages of $2,005.00, representing the amount owed Dr. McKenna. The trial court granted damages in these exact amounts September 18, 2001. Only Allstate was named in the judgment. The reasons for judgment reflected that the trial court was aware that the limits of the insurance policy were $10,000.00. Allstate then filed a motion for new trial, citing the limits of the policy. The motion for new trial was denied September 28, 2001.

This appeal by Allstate followed.

In its first specification of error, Allstate argues that the trial court erred in finding Banks one hundred percent liable where the evidence clearly and convincingly established that both vehicles were attempting to turn right onto Canal Street.

In reviewing the factual findings of a trial court, an appellate court is limited to a determination of manifest error. Hill v. Morehouse Parish Police Jury, 95-1100 (La. 1/16/96), p. 4, 666 So.2d 612, 614; Ferrell v. Fireman's Fund Ins. Co., 94-1252 (La. 2/20/95), 650 So.2d 742, 745; Stobart v. State through Dept. of Transp. and Development, 617 So.2d 880 (La. 1993); Arceneaux v. Domingue, 365 So.2d 1330 (La. 1978).

The evidence showed that Banks was pulling out of a parking lot into the street when the accident occurred. An officer at the scene cited her as in the wrong. A review of the photographs shows that the damage to the cars was consistent with Banks hitting the left front fender of Cockerham's car. To the extent there was a conflict between the testimony of Banks and Cockerham, the trial court chose to believe Cockerham.

When there is evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding, on review the appellate court should not disturb this

factual finding in the absence of manifest error. Stated another way, the reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts. Canter v. Koehring Co., 283 So.2d 716, 724 (La. 1973). The trial court was not clearly wrong-manifestly erroneous in allocating 100% of the fault to Banks.

In its second specification of error, Allstate argues that the trial court erred in awarding $10,000.00 in general damages and $2,005.00 in special damages where the plaintiff failed to prove by a preponderance of the evidence that her injuries and treatment were sustained as a result of the accident.

The plaintiff testified that she immediately suffered pain after the accident and could not return to work. After experiencing continued pain over the weekend and self-treating, she sought Dr. McKenna’s help at her

earliest convenience on the Monday following the accident. His report reflects that she had come to see him concerning her injuries suffered in the accident. In fact, the first sentence of his report reflects that the plaintiff had been involved in an accident days earlier and had been experiencing pain.

The plaintiff had the burden of proving causation. American Motorist Ins. Co. v. American Rent-All, Inc., 579 So.2d 429 (La. 1991). The trial court was not clearly wrong-manifestly erroneous in finding that the accident caused the complained of injuries.

In its third specification of error, Allstate argues that the trial court erred in awarding plaintiff $10,000.00 in general damages and $2,005.00 in special damages where the evidence showed that plaintiff was treated only from April 13, 1998 until September 3, 1998.

As noted by the trial court in its reasons for judgment, this court has specifically held that $2,500.00 per month in general damages is reasonable for back strain from a car accident. Dolmo v. Williams, 99-0169 (La. App. 4 Cir. 9/22/99), 753 So.2d 844. The plaintiff was treated by her doctor from April until September. The trial court did not abuse its discretion in setting the amount of general damages, and was not clearly wrong-manifestly erroneous as to the amount of special damages.

In its fourth and final specification of error, Allstate argues that the

trial court erred in awarding $10,000.00 in general damages and $2,005.00 in special damages in view of the fact that the court recognized in its reasons for judgment that Allstate had issued a policy of insurance which covered the car driven by the defendant up to the limit of $10,000.00 per person for bodily injury, and the judgment was in excess of the $10,000.00 policy limits.

The record reveals that the plaintiff made an offer to settle the case for $7,065.35. Allstate declined that settlement offer.

Cockerham argues that the trial court properly held Allstate liable in excess of the policy limit because Allstate declined to settle within the policy limits, and thus protect the reasonable interests of its insured, Banks, in the face of the above-described evidence as to liability, causation and damages.

> In the absence of bad faith, a liability insurer generally is free to settle or to litigate at its own discretion, without liability to its insured for a judgment in excess of the policy limits. William Shelby McKenzie & H. Alston Johnson, III, 15 Louisiana Civil Law Treatise-Insurance Law and Practice § 218 (1986). On the other hand, a liability insurer is the representative of the interests of its insured, and the insurer, when handling claims, must carefully consider not only its own self-interest, but also its insured's interest so as to protect the insured from exposure to excess liability. Holtzclaw v. Falco, Inc., 355 So.2d 1279 (La. 1978) (on rehearing). Thus, a liability insurer owes its insured the duty to act in good faith and to deal fairly in handling claims. Id.

Smith v. Audubon Ins. Co., 95-2057 (La. 09/05/96), 679 So.2d 372, 376.

Because the determination of whether a liability insurer should be held liable for a judgment in excess of its policy limits "is so fact-intensive, great deference must be accorded to the trier of fact". Smith, 679 So.2d at 377. We interpret this to mean that the trial court's determination should be accorded at least as much deference as is accorded under the clearly wrong-manifestly erroneous standard of review. See, e.g. Rosell v. ESCO, 549 So.2d 840, 844-45 (La. 1989). In view of the clear weight of the evidence as to liability, causation and damages, and the amount of the declined settlement offer, we cannot say that the trial court was clearly wrong-manifestly erroneous in determining that Allstate was properly subject to a judgment in excess of the policy limits.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRME

D.