NOT DESIGNATED FOR PUBLICATION

ALVIN LANGSFORD, JR., INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, ALEX MICHAEL	*	**NO. 2002-CA-0865**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
WILLIAM J. FLATTMAN, III AND SOUTHERN UNITED FIRE INSURANCE COMPANY	*	
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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 90-825, DIVISION "D"
Honorable Kirk A. Vaughn, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes,III, Judge Dennis R. Bagneris Sr., and Judge David S. Gorbaty)

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AFFIRMED IN PART, AMENDED IN PART AND REMANDED IN PART

This appeal arises from a judgment in favor of plaintiffs-appellees, Alvin Langsford Jr., ("Langsford") and his minor son Alex Michael, and against defendant-appellant, Southern United Fire Insurance Company, ("Southern") for damages incurred by the Langsford as a result of an automobile accident.

FACTS

On February 25, 2000, Langsford and his minor son Alex Michael, who was a passenger, were parked on the corner of Lloyds Avenue in the Parish of St. Bernard, Louisiana. Langsford was preparing to start his vehicle when he was rear-ended by another vehicle driven by William J. Flattman, III, ('Flattman"). Langsford and his son both sustained injuries, which required medical attention and were taken to the hospital.

On June 20, 2000, Langsford filed a lawsuit on his and his son's behalf against Flattman and his insurer, Southern. After a trial on the merits, the trial court ruled in favor of Langsford and against Flattman and his insurer, Southern for damages they sustained as a result of the automobile

accident. The trial court found liability and awarded Langsford Thirty-Two Thousand Three One and 43/100($32,301.43) Dollars, with legal interest and costs from the date of demand in Damages and Expert Witness Fees of $500.00 for the testimony of Dr. Gessner. Further, the trial court dismissed the claim Langsford filed on behalf of his minor son, Alex Michael Langsford. Southern and Langsford appeal the judgment of the trial court.

SOUTHERN UNITED FIRE INSURANCE COMPANY'S APPEAL

On appeal, Southern contends that the trial court erred in admitting into evidence and considering the settlement offer in order to find that they breached their duty of good faith, and awarding judgment in excess of the policy limit. Southern argues that it never breached its duty of good faith in not settling for the policy limit prior to trial. It contends that there was never any reasonable basis to determine the insured's exposure or an opportunity to obtain authority to settle prior to trial.

EXCESS JUDGMENT LIABILITY

Courts have consistently noted that an insurer's excess judgment liability is inherently a question of fact. *Smith v. Audubon Insurance Company*, 95-2057, pp. 7-8 (La.9/5/96); 679 So.2d 372, 376-377; *Cousins v. State Farm Mutual Automobile Insurance Company*, 294 So.2d 272, 275

(La.App. 1st Cir.1973), *writ denied*, 296 So.2d 837 (La.1974). A court of appeal may not set aside a trial court's finding of fact in the absence of manifest error. *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989).

The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong but whether the factfinder's conclusion was a reasonable one absent manifest error. *Stobart v. State, Through Department of Transportation and Development*, 617 So.2d 880, 882 (La.1993). Where the trier of fact has a choice between more than one reasonable view of the evidence, his choice of one or the other of these cannot be wrong. *Banks v. Industrial Roofing & Sheet Metal Works, Inc.*, 96-2840, p. 8 (La.7/1/96); 696 So.2d 551, 556.

A liability insurer, in the absence of bad faith, is generally free to settle or to litigate at its own discretion, without liability to its insured for a judgment in excess of the policy limits. *Smith, supra.at* p.7-9. However, 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. *Smith, supra.at* p.7-8.

In fact, our brethren in the First Circuit Court of Appeal have stated, "[t] he insurer is the champion of its insured's interests. The interests of the

insured are paramount to those of the insurer, and the insurer may not gamble with the funds and resources of its policyholders." *Maryland Casualty Company v. Dixie Insurance Company*, 622 So.2d 698, 701 (La.App. 1st Cir.1993), *reh'g granted in part on* other grounds, 622 So.2d 704, writ denied, 629 So.2d 1138 (La.1993) (*citing Cousins v. State Farm Mutual Automobile Insurance Company*, 294 So.2d 272, 275 (La.App. 1st Cir.1974), *writ denied*, 296 So.2d 837 (La.1974)). As such, a liability insurer owes its insured the duty to act in good faith and to deal fairly in handling claims. *Smith, supra. at* p.8.

An insurer, as a professional defender of lawsuits, is held to a higher standard than an unskilled practitioner, and what may be neglect on the part of the latter may well constitute bad faith on the part of the insurer. *Maryland*, *supra.at* 701; *Keith v. Comco Insurance Company*, 574 So.2d 1270, 1277 (La.App. 2nd Cir.1991), *writ denied*, 577 So.2d 16 (La.1991).

Courts have long held that this duty, arising from a fiduciary relationship established by the insurance contract, can subject insurers to liability for an excess judgment when the insurer fails to deal in good faith with a claim against its insured. See *Smith*, 95-2057 at 8-9; 679 So.2d at 376-377 (*citing intermediate state court and federal court decisions that*

have held insurers liable for excess judgments against an insured). As such, a cause of action for an insured against his insurer for dealing in bad faith when handling a claim does not rest solely on this statute. *Smith v. Audubon Insurance Company*, 94-1571, p. 5 (La.App. 3rd Cir.5/3/95), 656 So.2d 11, 14, *writ granted*, 95-2057 (La.11/17/95), 663 So.2d 724, *rev'd on other grounds*, 95-2057 (La.9/5/96), 679 So.2d 372.

It is true that failure to settle a claim for serious injuries within the policy limits is not, in itself, proof of bad faith. *Smith, supra*. In *Cousins* the court has set forth six factors to be considered in determining whether an insurer acted in bad faith: (1) probability of the insured's liability, (2) the adequacy of the insurer's investigation of the claim, (3) the extent of damages recoverable in excess of policy coverage, (4) the rejection of offers in settlement after trial, (5) the extent of the insured's exposure as compared to that of the insurer, and (6) the nondisclosure of information between the insurer and insured. *Cousins, supra*. at 275.

In consideration of the *Cousins* factors, we do not find the trial court holding Southern for the excess judgment clearly wrong. The record provides ample support for the reasonableness of a finding of liability. Although, Southern argues that there was no indication that the claim would exceed the policy limit because the medical documents that were provided

showed that Langsford discontinued treatment in December 2000. However, the evidence presented at trial showed that Langsford continued treatment after December 2000 and that the medical expenses as of December 2000 amounted to $7,524.88.

The trial court stated in its reasons for judgment in pertinent part;

> …….Considering the facts presented, the Court finds that Southern breached its duty of good faith in their failure to settle. Plaintiff has carried his burden in this respect. Plaintiff incurred more than $7,000.00 in special damages as a result of the accident. In light of these special damages alone, it is clear that the total damages would exceed policy limits. There was no tender of the policy until the day of trial…

Accordingly, we find that for the trial court was reasonable in awarding an excess judgment against Southern. We find that the trial court did not err in finding that Southern acted in bad faith. Therefore, we affirm the trial court's judgment.

Southern's second argument is whether the trial erred in failing to find that Langsford fail to adhere to their duty of discovery and their duty to supplement discovery.

A trial court is endowed with the inherent power to enforce its lawful pre-trial orders and to attach sanctions for non-compliance and is vested with much discretion in selecting the appropriate sanctions. *Allwein v. Horn*, 558 So.2d 810 (La.App. 5th Cir.1990). Where a party fails to follow a court's

pre-trial order, the burden is on that party to show why he failed to so comply. *Id.* However, once a party fails to comply with pre-trial orders, it is incumbent upon the party who is aggrieved by this non-compliance to file a motion to compel discovery or a motion for contempt.

In the instant case, the trial court issued a case management order on November 14, 2000. The discovery cutoff date was set for June 29,2001. Further, the trial court ordered that the plaintiff provide the defendant with an itemized list of all damages claimed, a list of exhibits and documents which may be introduced and copies of these documents if not previously exchanged and a description of any further evidence which may be offered, at least 21 days prior to the trial date.

On June 22, 2001 Langsford filed its pre-trial order. Langsford filed an amended pre-trial order on July 26,2000. On July 12, 2001, Southern filed its pre-trial order. The record is devoid of any motion to compel or a motion for contempt that was filed by Southern. Further, there is no evidence which would indicate that Southern objected to the admission of Langsford's medical records, which Southern contends were not disclosed through discovery. Also, the record is devoid of any evidence that was provided by Southern to support its contentions that Langsford failed to comply with the rules of discovery.

Accordingly, we find no error in the trial court's admission of Langsford's evidence for medical treatment beyond December 2000.

Southern's third assignment of error is whether the trial court erred in finding it breached its duty of good faith because "it was clear that the total damages would exceed the policy limits."

After reviewing the record in its entirety, we find that Southern clearly acted in bad faith in handling this claim. The accident was obviously due to Flattman's negligence and this fact should have been obvious to Southern from the police report, the independent witness, Karonda Guice, and Flattman's statement with the adjustor assigned to investigate the claim. Although, Southern contends that they initially had some reservation regarding Flattman being one-percent liable based on Flattment's statements.

Accordingly, we find no error in the trial court's conclusion that Southern

breached its duty of good faith because "it was clear that the total damages would exceed the policy limits."

ANSWER TO APPEAL FILED BY LANGSFORD

In his answer to Southern's appeal, Langsford asserts that the trial court erred in not awarding damages for future surgery. Langsford argues that the damages awarded by the trial court are too low considering the

extent of his injuries and the necessity for future surgery.

Dr. Ralph Gessner, an Orthopedic Surgeon, testified that he referred Langsford to Dr. George, a Neurosurgeon, because of his disc problems in his neck and back. Dr. Gessner stated that Langsford saw Dr. George who informed him that he was too young for surgery. However, Dr. Gessner opined that Langsford is "more likely than not going to have some kind of surgery. He testified that he would need an anatomical fusion discectomy, which would cost approximately $15,000.00 not including the hospital bill that would add on another $10,000.00 for a total of $25,000.00.

Accordingly we find that the trial court erred in not awarding future medicals of $25,000.00. We amend the judgment to add $25,000.00 for future medicals. The damages in all other aspect are affirmed.

Langsford contends that the trial court erred in not awarding him penalties and attorney fees for the arbitrary and capricious refusal to settle the claim prior to trial as mandate by LSA-R.S. 22:658 and LSA-R.S.22: 1220.

We hereby remand this matter to the trial court for the sole purpose of consideration of this issue regarding penalties and attorney fees for arbitrary and capricious refusal to settle the claim prior to trial as mandate by LSA-R.S. 22:658 and LSA-R.S.22: 1220.

CONCLUSION

Accordingly, the trial court's judgment is affirmed in part and remanded in part on the issue of penalties and attorney fees as mandate by LSA-R.S. 22:658 and LSA-R.S.22: 1220.

AFFIRMED IN PART, AMENDED IN PART AND REMANDED IN PART