TOSHEI A. WOODS	*	**NO. 2000-CA-1876**
VERSUS	*	**COURT OF APPEAL**
AUDUBON INSURANCE GROUP	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-13472, DIVISION "L-15"
Honorable Max N. Tobias, Judge

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Judge Steven R. Plotkin

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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer, and Judge Patricia Rivet Murray)

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AFFIRMED

This case arises out of a claim for insurance proceeds made by plaintiff, Toshei A. Woods, against defendant, Audubon Insurance Company, her insurer. The question at trial was the nature and extent of the damages sustained to Ms. Woods' home and furnishings due to two separate instances of water intrusion. The trial court awarded the plaintiff $793.89 for structural damages resulting from the second incident, and $2,000.00 for furniture/fixture/equipment damages. It is from this judgment that the plaintiff now appeals.

STATEMENT OF THE FACTS

On June 7, 1998, the plaintiff, Toshei A. Woods, suffered structural and personal property damage to her home when a ceiling collapsed due to a clogged air conditioning condenser pan. Ms. Woods suffered further damage to her property on June 10, 1998, when a pipe burst beneath the kitchen sink causing flooding. At the time of both incidents, Ms. Woods carried an insurance policy covering the losses with the defendant, Audubon Insurance Company. She filed two claims with Audubon, on June 8 and June 10, 1998. On June 10, Audubon sent Frank Krantz from Servicemaster in an effort to salvage the carpet. Mr. Krantz removed some carpet from the

downstairs area, vacuumed excess water, and installed several large fans in an attempt to minimize damage from the flooding.

Ms. Woods agreed with Audubon's estimate of structural damage for the first loss, however she disagreed with the estimate for the second loss. She also claimed that the estimates were wrong in that they failed to take into account damages sustained to the furniture/fixtures. In compliance with Audubon's request, she submitted in writing an estimate of all damage. Nolan Allain, Audubon's representative, inspected the premises on June 8, 9, and 12, 1998. Mr. Allain took photographs of the structural damage as well as of the allegedly damaged furniture, which had been removed to the garage while the floor was being repaired. Mr. Allain testified that the bedroom furniture, allegedly damaged in the first incident, was not in the garage or the house, and that the dining room set, which had been damaged in the second incident, was still in the dining room.

Mr. Allain returned to Ms. Woods' home in November of 1998 to inspect the structural repairs and the supposedly water-damaged furniture. Ms. Woods told Mr. Allain that the damaged furniture had been disposed of, and that the furniture currently in the house belonged to her sister. Mr. Allain testified that the furniture he saw was in fact the same furniture that he had seen in the garage previously- the same furniture that had allegedly

been damaged and then discarded.

Audubon valued the second claim at $5,131.11, which Ms. Woods contends is less than the actual loss suffered or the $14,325.00 paid for repairs. Consequently, Ms. Woods filed a claim for breach of the insurance contract due to the failure to properly adjust and fairly compensate her for the losses from the two incidents. The trial court awarded Ms. Woods an additional $739.89 for structural damages, which did not include the cost of installing new hardwood floors, as well as $2,000.00 for furniture/fixture/equipment damages.

FIRST ASSIGNMENT OF ERROR

Ms. Woods first asserts that the trial court erred in deducting the cost of installing a hardwood floor in calculating the costs of repairs attributable to the water loss from the June 10, 1998 incident.

An appellate court cannot set aside a trial court's finding of fact unless the trial court judgment was manifestly erroneous or clearly wrong. Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989); Arceneaux v. Domingue, 365 So.2d 1330, 1333 (La. 1978). Thus, even though an appellate court may feel that its evaluations of credibility and inferences of fact are more reasonable than those of the trial court, unless the trial court's evaluations were unreasonable, the appellate court may not disturb them. Griffin v.

Weingarden, 99-1394 (La. App. 4 Cir. 1/26/00), 752 So.2d 308, 310. In other words, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong… [Where] a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong." Winston v. Flamingo Casino, 99-0209 (La. App. 4 Cir. 9/22/99), 746 So.2d 622, 625 (citations omitted). The issue before us now is whether the trial court's determination as to the amount of damages owed to Ms. Woods was clearly wrong.

The court below agreed with Ms. Woods that Audubon's payment of $4,631.11 for damages related to the June 10 incident was insufficient. The court examined Ms. Woods' claim for $14,325.00, which was allegedly the total amount paid to the contractor to perform the repairs. The court awarded Ms. Woods an increase in the amount of damages owed to her by Audubon, despite the argument made by Audubon that some of the repairs that were performed were unnecessary. However, the court also determined that the total amount claimed included the cost of installing new hardwood floors, which it decided should not be included in damages awarded to Ms. Woods. The court found that the former floor was tile, and thus replacement of that floor with hardwood was not an equivalent floor, and was therefore

unnecessary. The court found that the evidence as to whether the $14,325.00 total included the cost of the floor preponderated equally.

Having reviewed the record, we find that the trial court was not manifestly erroneous in its decision to deduct the cost of the new floor from the cost of repairs attributable to the water damage. Ms. Woods admits that the replacement of vinyl tile floors with hardwood was unnecessary- the only issue is whether the amount she claimed for repairs included the cost of installing the new floor or not. Ms. Woods submitted an invoice from her contractor in the amount of $14,325.00, for repairs done to her home as a result of the June 10 incident. She contends that that invoice did not include the price paid for installing the new floor. However, there was no evidence presented at trial that proved what repairs were included in that invoice. The invoice merely noted that it included “all repairs to wall, floors, cabinets.” Furthermore, the contractor, Ralph Edwards, did not create that invoice. Ms. Woods’ mother, Catherine Smith, who was handling the repairs for her daughter, gave the invoice to Mr. Edwards to sign. Ms. Smith claims to have paid Mr. Edwards $8,400.00 for the cost of installing the new floor separate from the $14,325.00 paid for the other repairs, however, there is no evidence of any such payment. Ms. Smith contends that a $5,000.00 check she submitted was in fact a payment to Mr. Edwards for the cost of the floor.

However, that check was drawn on her business account, along with several other checks from that account to Mr. Edwards written in conjunction with repairs he was performing for the business. The checks that were identified as having been issued solely for the payment of the June 10 water damage totaled only $10,750.00. Therefore, we agree that Ms. Woods has failed to prove that the $14,325.00 charged by Mr. Edwards did not include the cost of the new floor. The trial court was not manifestly erroneous in deducting $8,400.00 from the damages awarded to Ms. Woods.

SECOND ASSIGNMENT OF ERROR

In her second assignment of error Ms. Woods claims that the trial court erred in awarding her only $2,000.00 for personal property damage. We disagree.

There was no evidence presented at trial which proved the extent of the damage, if any, to any of Ms. Woods' furniture, other than the testimony of Ms. Woods and her mother. The trial court noted that the furniture was not destroyed, but was merely damaged. Both sides submitted photographs of the allegedly damaged furniture. Mr. Krantz, from Servicemaster, testified that he never noted any damage to or water lines on any of the furniture in the living room. Audubon also offered evidence showing that the furniture had not been discarded, but was in fact the same furniture in the

house following the repairs. Furthermore, Ms. Woods offered no evidence as to the original cost of the furniture, or the condition of the furniture prior to the two incidents. In any suit for damages, the plaintiff bears the burden of proving the monetary damages sustained. Gonzales v. Bordelon, 595 So.2d 761, 764 (La. App. 4 Cir. 1992). In the instant case, Ms. Woods has offered no evidence as to the cost of repairing the damaged furniture, or even as to the extent of the damage to the furniture. The trial court was not manifestly erroneous in awarding Ms. Woods $2,000.00 to cover the damages to her furnishings caused by the two incidents. Without any evidentiary support proving the actual extent of the damages, we agree with the trial court that $2,000.00 was a reasonable award.

Therefore, for the abovementioned reasons, we find that this assignment of error has no merit.

THIRD ASSIGNMENT OF ERROR

In her third assignment of error, Ms. Woods claims that Audubon was arbitrary and capricious in the treatment of her claim, thereby subjecting Audubon to penalties pursuant to LSA-R.S. 22:1220.

According to the provisions of LSA-R.S. 22:1220, an insurer owes a duty of good faith and fair dealing to his insured, thus giving the insurer "an affirmative duty to adjust claims fairly and promptly and to make a

reasonable effort to settle claims with the insured or the claimant, or both." Insurers will therefore be subject to penalty for "failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause." LSA-R.S. 22:1220(B)(5). Ms. Woods contends that Audubon acted arbitrarily and capriciously in ignoring the total amount of structural damage to the property, and by refusing to pay any damages for personal property.

LSA-R.S. 22:1220 is penal in nature, and should be strictly construed such as not to be invoked where the insurer has a reasonable basis for denying coverage. Jeanpierre v. Mikaelian, 97-1850 (La. App. 4 Cir. 2/25/98), 709 So.2d 915, 919. In order to assert a claim under LSA- R.S. 22 :1220(B), a plaintiff must allege that the defendant insurer knowingly committed one of the listed actions. Spear v. Thong Ngoc Tran, 96-1490 (La. App. 4 Cir. 9/18/96), 682 So.2d 267, 269. Penalties and attorney's fees will not attach if the insurer had a reasonable basis to deny the claim. Smith v. Audubon Ins. Co., 95-2057 (La. 9/5/96), 679 So.2d 372, 377. According to the court in Smith:

> The determination of good or bad faith in an insurer's deciding to proceed to trial involves the weighing of such factors, among others, as the probability of the insured's liability, the extent of the damages incurred by the claimant, the amount of the policy limits, the adequacy of the insurer's investigation, and the openness of communications

between the insurer and the insured.

Moreover, determining whether a particular decision was arbitrary or capricious is largely factual. Appellate courts must give great deference to trial courts regarding this issue. Block v. St. Paul Fire & Marine Ins. Co., 32-306 (La. App. 2 Cir. 9/22/99), 742 So.2d 746, 752.

We find that Audubon did have a reasonable basis for limiting Ms. Woods' damages. First of all, regarding the furniture, Mr. Allain, who visited Ms. Woods' residence on behalf of Audubon, did not note any damage to any furniture, other than water damage at the very bottom of the legs of the dining room table. Mr. Allain examined and photographed the furniture in the garage, and failed to note any significant damage to that furniture either. During his inspection of the damage from the first incident, Mr. Allain did not note any damage to any bedroom furniture- only damage to the ceiling. Furthermore, Ms. Woods failed to present any evidence to Audubon regarding the repair costs for the furniture. Audubon had no basis for determining with certainty the exact amount of its liability for damages. Finally, Audubon had evidence that the furniture was not damaged at all, and was in fact being used by Ms. Woods in her home following the structural repairs that were performed.

Regarding the structural damage, Mr. Allain again noted minimal

damage following both incidents. He testified that he did not see any watermarks on the baseboards or sheet rock. His estimated repairs included replacing the carpet and tiled floors and painting the baseboards. Audubon then paid Ms. Woods what it felt was a reasonable amount, in light of Mr. Allain's findings regarding the extent of damage sustained by Ms. Woods' property. Mr. Allain testified that just because the insured is unable to produce receipts does not mean that the claim will be denied. Each claim is examined based on the totality of the circumstances. Furthermore, as noted by the trial court, it is not even clear what work was actually performed and when. We do not find that Audubon acted in an arbitrary or capricious manner based on the circumstances and Mr. Allain's findings.

Thus, we hold that this assignment of error has no merit.

CONCLUSION

For the abovementioned reasons, we affirm the decision of the trial court.

AFFIRMED