NOT DESIGNATED FOR PUBLICATION

ROBERT LEE	*	**NO. 2003-CA-0117**
VERSUS	*	**COURT OF APPEAL**
RELIANCE NATIONAL INDEMNITY INSURANCE	*	**FOURTH CIRCUIT**
COMPANY, BUILDERS TRANSPORT, INC., AND	*	**STATE OF LOUISIANA**
MICHAEL MILEY	*	
	*	

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CONSOLIDATED WITH: | **CONSOLIDATED WITH:**

ROBERT LEE | **NO. 2003-CA-0118**

VERSUS

CLARENDON NATIONAL INSURANCE COMPANY, OLD HICKORY TRUCKING, AND ALFRED LEONARD

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 98-15637, C/W 9815638, DIVISION "L-15"
Honorable Carolyn Gill-Jefferson, Judge

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Judge David S. Gorbaty

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(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge David S. Gorbaty)

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AFFIRMED

Following a jury trial, a judgment was rendered in favor of defendants, Alfred Leonard, Old Hickory Trucking, Inc., and Clarendon National Insurance Company. The trial court denied plaintiff Robert Lee's subsequent motion for new trial and/or judgment notwithstanding the verdict. Mr. Lee appeals the judgment arguing that the jury erred in finding defendant Alfred Leonard not negligent for the accident sued upon, and that

the trial court erred in not granting plaintiff's post-trial motions. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY:

On February 5, 1998, a collision ensued between an 18-wheeler being driven by Alfred Leonard and a taxi being driven by Robert Lee. According to Mr. Leonard, he was traveling west on St. Claude Avenue when he observed orange cones ahead in his lane of travel. Additionally, a trucker traveling ahead of him had contacted him by CB radio advising of construction on the roadway. Mr. Leonard testified that he activated his right turn indicator, checked very carefully in his side-view mirrors, and looked over his right front fender before slowly moving into the right lane. As he moved into the right lane, he felt a "bump," and saw a taxi to his right strike a car parked on the side of the road. Mr. Leonard testified that it was his belief that Mr. Lee was following him in the left lane prior to the accident, and attempted to pass Mr. Leonard's truck on the right to avoid being caught behind an 18-wheeler in traffic.

Mr. Lee testified that he had picked up a fare on Urquhart Street just prior to the time of the accident. He made a right hand turn onto Louisa

Street, another right onto St. Claude Avenue, and continued to travel in the right lane toward the central business district. He denied that he attempted to pass Mr. Leonard's truck, and insisted that he was actually traveling to the right and front of the truck just prior to the accident. In fact, he did not see Mr. Leonard's truck at all.

Mr. Lee was involved in a second automobile accident on June 22, 1998. On the same day that he filed the instant lawsuit, he filed suit with regard to the later accident. The cases were originally consolidated, but the trial court severed the cases when an insurance company involved in the second accident case filed for bankruptcy.

The instant case proceeded to trial, and was tried on July 15, 16, 17, 18, and 19, 2002. The jury returned special interrogatories, finding Mr. Leonard was not at fault for the accident in question. The trial court made the verdict the judgment of the court. Mr. Lee subsequently filed a motion for new trial and/or judgment notwithstanding the verdict, which the trial court denied. This appeal followed.

DISCUSSION:

In his first assignment of error, Mr. Lee claims the jury erred in finding Mr. Leonard not at fault for the accident in question.

In civil cases, the appropriate standard for appellate review of factual determinations is the manifest error-clearly wrong standard which precludes the setting aside of a trial court's finding of fact unless those findings are clearly wrong in light of the record reviewed in its entirety. *Cenac v. Public Access Water Rights Assn.*, 2003 WL 21480329 (La. 6/27/03), *citing Rosell v. ESCO*, 549 So.2d 840 (La. 1989). A reviewing court may not merely decide if it would have found the facts of the case differently, the reviewing court should affirm the trial court where the trial court judgment is not clearly wrong or manifestly erroneous. *Ambrose v. New Orleans Police Dep't Ambulance Serv.,* 93-3099, 93-3110, 93-3112, p. 8 (La. 7/5/94), 639 So.2d 216, 221.

Mr. Lee argues that Mr. Leonard had a duty to safely maneuver his truck into the right lane without endangering normal, overtaking or oncoming traffic. *Daigle v. Mumphrey*, 96-1891 (La.App. 4 Cir. 3/12/97), 691 So.2d 260. Thus, because Mr. Leonard admitted that he was changing lanes, the jury erred in finding him not negligent.

The jury listened to both Mr. Leonard's and Mr. Lee's versions of how the accident happened. There were no eyewitnesses to the accident. The jury chose to believe Mr. Leonard's version, and found him not negligent. Because the jury verdict is based on a credibility call, we are restrained from finding the jury's decision to be manifestly erroneous or clearly wrong. The trial court is in a much better position to evaluate live witnesses (as opposed to the appellate court who must review a cold record). Further, this principle of review is designed to ensure the proper allocation of trial and appellate functions between the respective courts. *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973).

After a careful review of the entire record, we are convinced that the jury was justified in its conclusions.

In addition to the testimony of the two individuals involved in this accident, the jury heard testimony from numerous physicians who treated Mr. Lee starting in 1992. It was clear from the physicians' testimony that Mr. Lee was less than candid with each of them when giving his medical history.

Dr. Lucas DiLeo first treated Mr. Lee in 1992 when he presented with

complaints of pains in his lower extremities. Mr. Lee related his problems to a shotgun blast he suffered when he was 19 years old. Dr. DiLeo saw Mr. Lee twice in 1993 for the same problems. In 1994, he saw Mr. Lee twice for the leg pains and once in December of 1994 for cervical pain. In January of 1995, Mr. Lee presented with inflammation in the cervical region. Mr. Lee had five visits in 1996, one in 1997 and one in 1998, with complaints of pain in the cervical region. Dr. DiLeo finally diagnosed him as having cervical fibromyositis and fibromyalgia. During the entire course of treatment beginning in 1992, Dr. DiLeo prescribed Soma for muscle relaxation and Darvon for pain. On cross-examination, Dr. DiLeo denied ever being told about automobile accidents in which Mr. Lee was involved in 1990 and 1991. However, it was Dr. DiLeo's opinion that the two automobile accidents were irrelevant to Mr. Lee's complaints because as Dr. DiLeo explained, fibromyalgia and fibromyositis are not caused by trauma.

On the day of the subject accident, a fellow taxi driver drove Mr. Lee to an attorney's office. After meeting with the attorney, Mr. Lee proceeded to an appointment with Dr. Stewart Altman. Dr. Altman testified that he had first seen Mr. Lee in 1990 following an automobile accident with complaints

of pains in the neck, back, shoulders and headaches. Mr. Lee had 7 visits in 4 months, and showed marked improvement. In 1991, Mr. Lee again saw Dr. Altman following an automobile accident. He again complained of neck, back and head pain. Dr. Altman prescribed medicine and physical therapy. At the time of this accident, Mr. Lee told Dr. Altman that he was fully recovered from the previous accident. He did not, however, tell Dr. Altman that he had been taking narcotic drugs prescribed by Dr. DiLeo for the past 6 years, including the time of the February 5, 1998, visit. On cross-examination, Dr. Altman was questioned about his knowledge of several other automobile accidents in which plaintiff was involved. He testified that he was not aware of them. Dr. Altman also testified that he had advised Mr. Lee to see Dr. Ralph Gessner, an orthopedist, in November of 1990, because Mr. Lee claimed he was not getting any better. He did not know if Mr. Lee followed his advice.

Dr. Andrew Kucharchuk, an orthopedic surgeon, testified that he first saw Mr. Lee on March 2, 1998, at the request of Mr. Lee's attorney. Mr. Lee gave him a history of being involved in an automobile accident on February 5, 1998. Mr. Lee told him that Dr. Altman also was treating him

and that he was taking Vicodin and Soma. Dr. Altman had diagnosed cervical and lumbar strains. Dr. Kucharchuk testified that Mr. Lee denied ever being injured prior to this accident, except for the gunshot incident, and denied being involved in any other automobile accidents. Following an MRI, which Dr. Kucharchuk felt indicated a mild to moderate protrusion at C/6-7, the doctor recommended that plaintiff have a nerve conduction study to rule out any nerve root damage. As far as he knew, Mr. Lee did have the test performed. It was Dr. Kucharchuk's opinion that Mr. Lee should continue with conservative treatment; no surgery was indicated at the time of his last visit.

Mr. Lee saw Dr. Wilmot Ploger, an orthopedist, for the first time on April 27, 1998. His new attorney set up the appointment for him. Mr. Lee gave a history of pains in his neck and back following an accident with an 18-wheeler. Mr. Lee told the doctor that Dr. Altman was treating him, and that he discontinued the recommended physical therapy because it caused him more pain. Mr. Lee told Dr. Ploger that he was currently taking medication prescribed by Dr. Altman, but denied taking any medication prior to the February 5 accident. Mr. Lee also denied any prior history of

injury to his neck or lower back. Dr. Ploger recommended an MRI of the lumbar spine, and suggested that Mr. Lee continue exercising to stretch his muscles. The doctor testified that at the time of this visit, he did not believe surgery would be necessary. He wanted to make a new assessment of plaintiff's condition following the MRI of the lumbar spine. If Mr. Lee was getting better, no action would be necessary. If his condition declined, he would recommend a different type of physical therapy and medication. He would recommend surgery only if Mr. Lee's symptoms worsened considerably.

Dr. John Watermeier first saw Mr. Lee on August 5, 1998, at the request of his attorney. Mr. Lee gave a history of good health until two recent automobile accidents, February 5, 1998, and June 22, 1998. He claimed that the first accident caused him pain in his neck that extended into his left shoulder and arm. It was Mr. Lee's opinion that the second accident exacerbated the pain. Dr. Watermeier agreed at that time that the first accident was the cause of plaintiff's complaints. On cross-examination, Dr. Watermeier testified that Mr. Lee claimed he had no prior neck pains or problems. The doctor did not know about the automobile accidents in 1990

or 1991, after which Mr. Lee complained of neck and shoulder pain, and was diagnosed by Dr. Altman with cervical strain. He did not know about plaintiff's lengthy course of treatment with Dr. DiLeo. Dr. Watermeier admitted that having this information would have tempered his opinion as to what caused plaintiff's complaints. Dr. Watermeier testified that Mr. Lee told him that he did not want any further conservative care.

Robert Lee testified that the accident in 1990 was not his fault. He first stated that he only treated with Dr. Altman for a couple of weeks, but then agreed with counsel that it was actually for 4 months. He again treated with Dr. Altman in 1991 for 6 to 8 weeks following another automobile accident. He first saw Dr. DiLeo in 1992 for pains in his legs, but admitted that in 1994, he complained to Dr. DiLeo about neck pain. When asked why he stopped seeing Dr. Kucharchuk after only two visits, he said that he did not feel that his worst problem was with his lower back. He wanted treatment for his neck pains, and he could not afford to have an MRI of his lower back. After deciding not to return to Dr. Kucharchuk, Mr. Lee also decided to change attorneys. His current counsel recommended that he see Dr. Ploger.

Mr. Lee admitted that he did not like Dr. Ploger because the doctor recommended conservative treatment. He wanted a doctor that was going to make the pains in his neck stop. Friends recommended Dr. Watermeier, and Mr. Lee had his attorney arrange an appointment. He liked Dr. Watermeier because the doctor wanted to run tests, gave him shots for pain and was generally more aggressive in his treatment methods. Mr. Lee denied demanding surgery.

The jury was made aware of the lawsuits filed by Mr. Lee following each of his automobile accidents, including the three accidents subsequent to the instant action. The jury also heard evidence that suggested Mr. Lee was not forthright with his own treating physicians, a suggestion that bore heavily on the jury's findings of credibility. It was revealed that Mr. Lee treated with Dr. DiLeo for several years, receiving pain and muscle relaxing medication, when he had no true objective signs of injury or other causation for his pain. The jury heard evidence that Mr. Lee had had numerous automobile accidents, and that he had filed suit with regard to most of them. Perhaps the most damning testimony came from Dr. Watermeier, who, after being told plaintiff's true medical history, admitted that he may have not

recommended surgery so quickly. Further, after learning of the prior accidents and complaints, Dr. Watermeier admitted that he was no longer sure that the February 5, 1998, caused Mr. Lee's complaints.

After reading the testimony and reviewing the evidence, we find that the record supports the jury's findings. The jury was in the best position to evaluate the demeanor, body language and tone of voice of each of the witnesses. We cannot say that the jury committed manifest error or was clearly wrong.

In his second assignment of error, Mr. Lee claims that the trial court erred in not granting his motion for new trial and/or judgment notwithstanding the verdict.

Louisiana Code of Civil Procedure art. 1811 B provides:

> If a verdict was returned 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. If no verdict was returned, the court may render a judgment or order a new trial.

The trial court accepted the verdict of the jury, and, therefore, had three options on how to proceed: 1) make the jury verdict the judgment of the court; 2) grant a new trial; or 3) grant a JNOV.

The granting of a JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the 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. If there is evidence opposed to the motion that is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion should be denied. *Anderson v. New Orleans Public Serv., Inc.,* 583 So.2d 829, 831 (La. 1991); *Scott v. Hosp. Serv. Dist. No. 1,* 496 So.2d 270 (La. 1986). In reaching its decision to grant or not grant the motion, 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.

As discussed above, there is ample support for the jury's verdict. Thus, the trial court, especially in light of the fact that it is not allowed to invade the jury's province and make its own credibility determinations, did not err in denying plaintiff's motion for new trial and/or judgment

notwithstanding the verdict.

Because we thus affirm the judgment of the trial court, we pretermit discussion of plaintiff's final assignment of error regarding damages.

AFFIRMED