NOT DESIGNATED FOR PUBLICATION

JULIE M. CHRISTY	*	**NO. 2003-CA-0147**
VERSUS	*	**COURT OF APPEAL**
ARON D. WASHINGTON AND ALLSTATE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-7012, DIVISION "B-15"
Honorable Rosemary Ledet, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

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

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AFFIRMED

Defendant, Allstate Insurance Company, appeals the trial court's judgment awarding plaintiff, Julie Christy, damages for personal injuries she received in an automobile accident. For the reasons that follow, we affirm.

FACTS AND PROCEEDINS BELOW

On May 5, 1999, at the intersection of Canal Street and Carrolton Avenue in New Orleans, a vehicle driven by Aron Washington collided with a vehicle driven by the plaintiff, Julie Christy. Julie Christy was driving a vehicle owned by James Walter, the father of Julie's friend, Tammy, who was also riding in the car.

On May 5, 2000, Julie Christy filed suit against Mr. Washington, whose vehicle was uninsured, and Allstate Insurance Company ["Allstate"], as the uninsured /underinsured motorist ["UM"] carrier of James Walter and also of Julie herself, by virtue of a policy issued to her father, Jerome Christy. A bench trial was held September 18, 2002. On November 22, 2002, the trial court rendered judgment in favor of Julie Christy against Aron Washington and Allstate as the insurer of both James Walter and Jerome Christy; the court awarded a total of $122, 088.06 in damages, which

included $80,000 in general damages and $42, 088.06 in medical expenses.

As reflected in written reasons for judgment, the trial court found that the sole cause of the accident was the fault of Mr. Washington in disregarding the red signal light at the intersection where the collision occurred. The trial court specifically noted that it found the testimony of Julie Christy and her passenger, Tammy Walter, to be more credible than that of Mr. Washington with regard to how the accident had occurred. In addition, the trial court found that the accident aggravated Julie Christy's preexisting back injury and necessitated the cervical neurotomy that was performed on her on October 29, 1999. Finally, the trial court concluded, based on the evidence, that Julie Christy was a "resident relative" of her father's household within the terms of his Allstate policy and therefore was not excluded from coverage under that policy.

Allstate appealed the judgment, raising three assignments of error: (1) the trial court committed manifest error by finding that the Allstate policy issued to Jerome Christy provided UM coverage to Julie Christy; (2) the trial court erroneously relied upon an affidavit of Julie Christy that was not submitted into evidence; and (3) the trial court committed manifest error by

finding that Julie Christy's surgery was necessitated by the May 5, 1999 accident.

INSURANCE COVERAGE

The first two assignments of error relate to the trial court's finding that Julie Christy qualified as an insured under her father's Allstate policy. The policy was introduced into evidence. In Part V, the section dealing with uninsured motorist coverage, it states that "Insured persons" include "You [the policyholder] and any resident relative." The definitions section of the policy further provides:

> "Resident"-- means the physical presence in your household with the intention to continue living there. Unmarried dependent children, while temporarily away from home will be considered residents, if they intend to live in your household.

At the time of the accident, Julie Christy was a twenty-six year old student at Delgado College in New Orleans. She testified at trial that for about eight or nine months prior to the accident, she had been living in an apartment on Iberville Street in New Orleans because it was close to school. However, she also testified that although she had moved in and out of several apartments during the years 1998 to 2001, she "lived" with her father and grandmother at her father's home on

Yale Street in Metairie. She stated that she received her mail at the Yale Street address and that it was where she always went when she had to move back home. Finally, she testified that the vehicle she regularly used for work and school in 1999 was a Ford Taurus owned by her father and insured under his Allstate policy.

Apparently at the beginning of trial, Allstate contended for the first time that Julie was excluded from UM coverage under her father's policy because she was not a "resident relative." The trial court allowed the parties to brief this issue in post-trial memoranda. Attached to the plaintiff's memorandum was the affidavit of Julie Christy in which she swore to additional facts that supported her contention that she was a resident of her father's household for purposes of insurance coverage. In its reasons for judgment, the trial court mentioned two of these facts (that Julie returned to her father's home on weekends and that she kept personal belongings there).

In this court, Allstate argues that Julie failed to prove she was afforded coverage and as an adjunct, argues that the trial court erroneously relied on Julie's affidavit, which was never placed in evidence, to determine that coverage existed. In response, the plaintiff asserts that the exclusion of coverage is an affirmative defense that

was waived because it was not raised in the defendant's answer, and alternatively, that the evidence presented at trial was sufficient to prove Julie was a resident of her father's household within the terms of the policy.

This court has held that reliance upon an exclusion in an insurance policy is an affirmative defense that must be asserted in the defendant's answer. See La. Code Civ. Pro. art. 1005; *Pendleton v. Smith*, 95-1805, pp.5-6 (La. App. 4 Cir. 9/13/96), 674 So.2d 434, 437. In the instant case, however, Allstate did not rely upon a specific exclusion in the policy; rather, it contended that coverage was not extended to Julie Christy because she did not fit the policy's definition of persons to whom UM coverage was afforded—i.e., she was not a "resident relative" of the policyholder.

At trial, the plaintiff had the burden of proving that she was a resident of her father's household and therefore was afforded UM coverage within the terms of his policy. Whether a person is a resident of a particular household for purposes of UM coverage is a mixed question of law and fact. *Hamilton v. State Farm Mutual Insurance Company*, 364 So.2d 215 (La. App. 3d Cir. 1978).

In *Bearden v. Rucker*, 437 So.2d 1116 (La. 1983) the Supreme

Court considered the meaning of the phrase "resident of the same household" as used in an automobile insurance policy. The Court noted that a person may have only one domicile, but may have several residences; to maintain a residence a person needs only a place or premises which entitles him to return at his convenience without having to request permission of someone else. *Id*. at 1120. The Court further stated that the controlling test of whether persons are residents of the same household at a particular time, within the meaning of the insurance policy in question, is whether the absence of the party of interest from the household of the alleged insured is intended to be permanent or temporary, i.e., whether there is physical absence coupled with the intent to return. *Id.* at 1121. Applying this test, the court held that the policyholder's spouse, who was living apart from the policyholder during a legal separation, was nevertheless a resident of the policyholder's household for purposes of UM coverage.

Similarly, in *Martin v. Willis*, 584 So.2d 1192, 1194 (La. App. 2d Cir. 1991), the court noted that generally, the jurisprudence has held that children, though majors, remain residents of their parents' household even though they maintain temporary residences elsewhere. In *Manuel v. American Employers Insurance Company*, 228 So.2d

321(La. App. 3d Cir. 1969), the court found that a son, who was living in a rented apartment in order to be close to college and who attended college forty miles away from his father's home, was a resident of his father's household within the UM provisions of his father's policy; the court noted that the son kept possessions at his father's home, returned there on weekends and holidays, and maintained his permanent mailing address there.

In the instant case, we find that there is sufficient evidence in the record to support the trial court's determination that Julie Christy was a resident of her father's household within the terms of the Allstate policy. Julie Christy's testimony indicated that although she had several temporary residences during the years 1998 to 2001, she always returned to her father's home. She testified that at the time of the accident, she was living in an apartment because it was close to the college she attended. She continued to receive mail at her father's address. Her testimony, taken as a whole, is sufficient to establish that she intended for her father's home to be her permanent residence. Additionally, the evidence showed that the Jerome Christy's policy insured three vehicles, although there was only one other resident of his household besides himself and Julie; Julie further testified that the

car she regularly drove was owned and insured by her father. The fact that her father provided her car further supports the finding that Julie was a dependent major child temporarily living away from whom as described in the policy. Under these circumstances, we cannot say the trial court committed manifest error by finding that Julie was a "resident relative" within the terms of her father's policy.

Moreover, although the trial court may have improperly relied upon Julie Christy's affidavit in making this determination, we find that reliance to be immaterial in view of our conclusion that the evidence at trial was sufficient to support the trial court's finding without any consideration of the affidavit. Accordingly, we reject Allstate's first two assignments of error.

CAUSATION

In its final assignment of error, Allstate contends that the trial court committed manifest error by finding that the May 5, 1999 accident necessitated the neurotomy that Julie Christy underwent in October of the same year. Julie admittedly had a preexisting injury resulting from a 1996 automobile accident. Dr. Kenneth Vogel, a neurologist who testified at trial, first treated Julie on December 15, 1998 for shoulder, arm, low back and bilateral leg pain, which he then

related to the 1996 accident. Dr. Vogel continued to treat Julie through the time of trial, and he recommended and performed the neurotomy following the 1999 accident. Dr. Vogel testified that in his opinion, the second injury Julie received in the 1999 accident aggravated her preexisting condition to the extent that she needed the neurotomy several months later, but that it was impossible to say with medical certainty which accident caused (or, on a percentage basis, which played a larger role in causing) Julie to need surgery. Dr. Vogel's testimony was uncontroverted; he was the only medical expert who testified.

It is axiomatic that a defendant takes his victim as he finds him, and if the defendant's negligent action aggravates a preexisting injury, he must compensate the victim for the full extent of this aggravation. *Perniciaro v. Brinch*, 384 So.2d 392, 395-96 (La. 1980). In view of the evidence, we cannot say that the trial court's conclusion that the surgery was necessitated by the 1999 accident is manifestly erroneous, or that the trial court erred by awarding damages on this basis. We, therefore, reject this assignment of error.

CONCLUSION

Accordingly, for the reasons stated, we affirm the judgment of

the trial court.

AFFIRMED