NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0706

BETTY WILEY AND JOHN WILEY

VERSUS

ALLSTATE INSURANCE COMPANY, DAVID L. MORGAN, USAGENCIES, LINDA R. DAVIS, CLARENDON NATIONAL INSURANCE COMPANY, DARIN S. BORDELON, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, RODOLFO CERDA, AND TRUCKS FOR YOU, INC.

Judgment Rendered: October 23, 2009

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2006-11280, Division "D"

Honorable Peter J. Garcia, Judge Presiding

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

Welch, J. concurs

HUGHES, J.

In this appeal, Allstate challenges both the trial court's liability determination and its allocation of fault. For the following reasons, we amend the judgment, and, as amended, affirm.

FACTS AND PROCEDURAL HISTORY

On June 27, 2005 Betty Wiley was driving west along I-12 in St. Tammany Parish with her husband, John Wiley, riding in the passenger seat. Ms. Wiley was driving in the far left lane of the interstate and began slowing her vehicle from approximately 70 mph to approximately 30 mph due to some visible traffic congestion ahead. At the same time, Darin Bordelon was driving his truck in the lane adjacent to Ms. Wiley's. Mr. Bordelon attempted to change lanes in front of Ms. Wiley and impacted the front right side of her vehicle. Mr. David Morgan was traveling behind Ms. Wiley and hit Ms. Wiley from behind. Mr. Morgan was also struck from behind by a fourth vehicle, driven by Linda Davis.

Suit was filed as a result of injuries sustained in the accident. Prior to trial, the Wileys reached a settlement agreement with all defendants except for Allstate, the insurer of Mr. Morgan. Following the conclusion of a bench trial, defendants, Rodolfo Cerda and Truck For You, Inc. were dismissed by summary judgment. The trial court found Mr. Morgan to be 90% at fault for the accident and awarded Mr. Wiley general damages of $29,000.00 and special damages of $12,016.67, and Ms. Wiley general damages of $9,000.00, special damages of $4,228.06, and property damages of $3,500.00.

This appeal followed. Allstate alleges that the trial court committed manifest error in finding Mr. Morgan 90% at fault for the accident, and that the trial court abused its discretion in the amount of damages awarded to the plaintiffs. Allstate further alleges that although the trial court assessed Mr. Morgan with only

90% of the fault, the language of the judgment indicates that Mr. Morgan was cast for 100% of the amount of the damages.

LAW AND ANALYSIS

A trial court's liability determination is a finding of fact and a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The supreme court has announced a two-part test for the reversal of a factfinder's determinations: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). See also **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). Thus, 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. **Stobart v. State, Department of Transportation and Development**, 617 So.2d at 882. Where factual findings are based on determinations regarding the credibility of witnesses, the trier-of-fact's findings demand great deference. **Boudreaux v. Jeff**, 2003-1932, p. 9 (La. App. 1 Cir. 9/17/04), 884 So.2d 665, 671; **Secret Cove, L.L.C. v. Thomas**, 2002-2498, p. 6 (La. App. 1 Cir. 11/7/03), 862 So.2d 1010, 1016, writ denied, 2004-0447 (La. 4/2/04), 869 So.2d 889. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. **Rosell v. ESCO**, 549 So.2d at 844.

LIABILITY ASSESSMENT

Only the Wileys testified live at the trial regarding the facts of the accident. Mr. Morgan's testimony was taken by deposition and admitted into evidence. According to Mr. Morgan, he was traveling west along I-12 when he saw the traffic congestion ahead. He slowed down to 25-30 miles per hour and was traveling at that speed for approximately half a mile. He testified that he was traveling 5-6 car lengths behind Ms. Wiley's vehicle and that Ms. Wiley stopped her vehicle suddenly because a truck swerved from the right lane and hit the front of her vehicle.

The Wiley's testified that Ms. Wiley was driving her vehicle at the time of the accident and that Mr. Wiley was riding as a guest passenger. Because of the slowing traffic ahead, Ms. Wiley reduced her speed to 25-35 miles per hour. Both Mr. and Ms. Wiley testified that a truck moved from the right lane into their lane and that it hit the front of their vehicle. However, both Mr. and Ms. Wiley stated that the front impact and the back impact occurred at the same time.

Louisiana Revised Statute 32:81 imposes a duty on a motorist not to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the preceding vehicle, the traffic conditions, and the condition of the roadway. In a rear-end collision, the following motorist is presumed to have breached this duty and he bears the burden of proving that he was not negligent. **Phipps v. Allstate Ins. Co.**, 05-651, p. 4-5 (La. App. 5 Cir. 2/27/06), 924 So.2d 1081, 1084. While the following motorist may assume that the preceding vehicle is being driven with care and caution, he must drive at an appropriate speed and must maintain an interval between the two vehicles as would enable him to avoid a collision with the preceding vehicle under circumstances which should reasonably be anticipated. **Id.** at p. 5.

According to his own testimony, Mr. Morgan had seen the heavy traffic congestion ahead. And while he claims to have been driving 5-6 car lengths behind the Wileys, they both testified that the front and rear collisions happened at the same time and that the rear collision was the "hardest." The trial court apparently chose to credit the Wileys' testimony over that of Mr. Morgan. It was reasonable to anticipate that Ms. Wiley would have to stop suddenly as a result of the heavy traffic just ahead. The trial court obviously believed that Ms. Wiley's sudden stop, for whatever reason, was not an unanticipated hazard that could not have been avoided by Mr. Morgan had he not been following too closely. Moreover, we note that in the **Phipps** case, cited above, the court found the rear vehicle to be 100% at fault for the accident. Considering the testimony and evidence in this case, we cannot say that the trial court was clearly wrong or manifestly erroneous.

Because we do not find that the trial court's finding of negligence or allocation of 90% fault on the part of Mr. Wiley is clearly wrong, we reject Allstate's argument that Mr. Wiley should be absolved from liability pursuant to the sudden emergency doctrine.[1] Under this doctrine, a motorist without sufficient time to weigh all the circumstances and whose actions did not contribute to the emergency cannot be assessed with negligence if a subsequent review of the facts discloses he may have adopted a safer, more prudent course of conduct to avoid an impending accident. **Keeth v. DOTD**, 618 So.2d 1154, 1159 (La. App. 2 Cir. 1993); **Hickman v. Southern Pacific Transport Co.**, 262 La. 102, 112-113, 262 So.2d 385, 389 (1972). However, the courts have refused to extend the sudden emergency doctrine to situations in which the party asserting the doctrine was also negligent. **Ducombs v. Nobel Ins. Co.**, 03-1704, p. 6 (La. App. 4 Cir. 7/21/04),

[1] Plaintiffs argue that the sudden emergency doctrine is an affirmative defense and must be specifically plead in the answer. However, this court has already squarely addressed this argument and determined otherwise. **McMullen v. Allstate Insurance Company**, 242 So.2d 921 (La. App. 1 Cir. 1970), writ denied, 257 La. 990, 244 So.2d 859 (La. 1971).

884 So.2d 596, 600, *citing* **Clement v. Griffin**, 91-1664, 92-1001, 93-0591, 93-0592, 93-0593, 95-0594, 95-0595, 95-0596, 95-0597, 95-0648 (La. App. 4 Cir. 3/3/94), 634 So.2d 412, 439, writs denied, 94-0717, 94-0777, 94-0789, 97-0791, 94-0799, 94-0800 (La. 5/20/94), 637 So.2d 478, 479, and **Wiley v. Safeway Ins. Co.**, 99-0161, pp. 4-5 (La. App. 3 Cir. 7/14/99), 745 So.2d 636, 639. Thus, this assignment of error is without merit.

DAMAGE AWARDS

Allstate next assigns error to the trial court's determination of general damages awards. In reviewing an award of general damages, this court is limited to a review for abuse of the trier of fact's vast discretion. Because of the great discretion vested in the trier of fact, an award of general damages should rarely be disturbed on appeal. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994); **Smith v. Goetzman**, 1997-0968, p. 14 (La. App. 1 Cir. 9/25/98), 720 So.2d 39, 47. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that an appellate court should reduce or increase the award. **Id.**

John Wiley

Mr. Wiley, a retired carpenter, testified that after the accident his knees, back, and neck began hurting. He was taken to Slidell Memorial Hospital by ambulance where he was examined and sent for x-rays and CT scans, which showed disc space narrowing, spurring, degenerative disk disease, degenerative facet joint disease, and a slight reversal of the cervical lordotic curvature "which may be secondary to muscle spasm." He was treated with pain medication and released to go home with instructions to follow up for further care.

On June 29, 2005 Mr. Wiley sought treatment at the Anthon Chiropractic Clinic. Over the course of the next four (4) months, Mr. Wiley received electrical muscle stimulation, hot packs, and chiropractic adjustments to the cervical, thoracic, and lumbar spine. He was seen seventeen (17) times and was eventually referred to an orthopedic surgeon for evaluation.

On October 19, 2005 Mr. Wiley was evaluated at the North Institute, where he was treated until March 24, 2006. At his initial visit, Dr. Logan ordered an MRI which was performed and revealed significant degenerative disk disease. On his final visit, Dr. Logan recommended that Mr. Wiley undergo cervical injection facet blocks in an attempt to obtain relief. Over the course of his treatment at the North Institute, Mr. Wiley was referred to and underwent physical therapy at both the North Institute and the Hammond Physical Therapy Clinic.

Although Dr. Logan testified that the findings on Mr. Wiley's MRI pre-existed the accident, Dr. Logan opined that the accident may have caused Mr. Wiley's degenerative disk disease to become symptomatic or at least aggravated the condition. Moreover, Dr. Logan testified that Mr. Wiley was probably still symptomatic as of the date of his deposition, February 8, 2007.

Mr. Wiley testified, and the history provided in the medical records indicates, that he also suffered from diabetes, high blood pressure, and had been diagnosed with prostate cancer. He was fighting the cancer with radiation and chemotherapy. He testified, and Dr. Logan's medical records indicate, that he was receiving some treatment at the Veterans Administration. At the time of trial, Mr. Wiley still suffered from pain in his neck from the accident. He stated that he used to enjoy doing yard work, but since the accident "it's real hard on me to do it." Prior to the accident, he was also able to do carpentry work, but testified that he can no longer do that work.

Under these circumstances, considering the testimony, evidence, and jurisprudence, we do not find that the award of $29,000.00 is unreasonable. While Dr. Logan testified that Mr. Wiley suffered from degenerative disk disease prior to the accident, Dr. Logan testified that after the accident, the condition became symptomatic. Whatever pain Mr. Wiley felt intermittently prior to the accident was aggravated. Moreover, Mr. Wiley was diagnosed with and fighting cancer at the time that he was also in pain for the injuries he sustained in this accident. In his deposition, Dr. Logan indicates that his notes reflect that Mr. Wiley had been told that the treatment he received as a result of the accident had worsened his cancer. Even so, Mr. Wiley actively attempted to gain relief from the pain for a period of nine months. He continues to feel pain and he is now unable to enjoy many of the activities he formerly was able to perform.

Betty Wiley

As a result of the accident, Ms. Wiley suffered injury to her back. She was taken by ambulance to Slidell Memorial Hospital at which time she was complaining of low back pain and left shoulder pain. She was x-rayed and treated with pain medication. She was then discharged to her home, but advised to return if her symptoms worsened. Because of continued pain, on June 29, 2005 Ms. Wiley sought treatment with Dr. Anthon, a chiropractor. At that time Ms. Wiley complained of neck pain, back pain, shoulder pain, and headaches. Ms. Wiley was treated with electrical muscle stimulation, hot packs, and chiropractic adjustments to the cervical, thoracic, and lumbar spine between June 29, 2005 and August 25, 2005, a total of fifteen visits. In his report, Dr. Anthon related her injuries to the accident. Ms. Wiley testified that, although she was never released from her chiropractic treatment, the treatment was "rough" and was causing her pain. She therefore quit seeing the chiropractor and stated that she still felt pain from the

injuries she received in the accident and that in fact her condition seems to be worsening over time.

Considering the testimony, evidence, and jurisprudence, we do not find that the trial court's award of $9,000.00 is unreasonable under these circumstances. Although Ms. Wiley treated for only two months, during that time she underwent fifteen painful chiropractic visits. Additionally, her testimony reveals that she was never officially released from her treatment, but that she felt that her treatment was actually increasing her pain. She testified at trial that she was still in pain.

JUDGMENT

Allstate alleges that the trial court erred in failing to reduce Allstate's liability for the damages assessed to 90%.[2] Specifically, Allstate argues that although it is only assessed with 90% fault for the accident, the written judgment reflects that it is liable for 100% of the damages.

The total amount of Mr. and Ms. Wiley's medical treatment was stipulated by the parties at the beginning of the trial to be $12,016.67 and $4,228.06, respectively. While the judgment finds that Mr. Morgan is 90% at fault for the accident, it also states that:

> Allstate Insurance Company is liable to John Wiley for general damages in the amount of $29,000.00 and special damages in the amount of $12,016.67 plus costs and judicial interest from the date of demand.
>
> Allstate Insurance Company is liable to Betty Wiley for general damages in the amount of $9,000.00, special damages in the amount of $4,228.06, property damage in the amount of $3,500.00 plus costs and judicial interest from the date of demand.

The record confirms that the amounts for which Allstate is cast in the judgment are 100% of the stipulated amounts for the special damages. It is thus

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[2]Although not separately briefed in the assignments of error challenging the trial court's findings, both parties addressed this issue at oral argument, pursuant to and as part of Allstate's general allegation, and assignment as error, that the trial court's awards in favor of plaintiffs constituted an abuse of discretion. Thus, we find this issue is properly before us for review. See **Nicholas v. Allstate Insurance Company**, 99-2522 (La. 8/31/00), 765 So. 2d 1017, 1022-1023.

apparent that the damage awards were not reduced by the fault attributable to other parties. We therefore conclude that the judgment must be amended to reflect that Allstate is liable only for an amount equal to 90% of all damages assessed by the trial court. We amend the judgment to read as follows:

> Allstate Insurance Company is liable to John Wiley for general damages in the amount of $26,100.00, or 90% of $29,000.00 and special damages in the amount of $10,815.00, or 90% of $12,016.67 plus costs and judicial interest from the date of demand.
>
> Allstate Insurance Company is liable to Betty Wiley for general damages in the amount of $8,100.00, or 90% of $9,000.00, special damages in the amount of $3,805.25, or 90% of $4,228.06, property damages of $3,150.00, or 90% of $3,500.00 plus costs and judicial interest from the date of demand.

CONCLUSION

For the reasons stated herein, the judgment of the trial court is amended to reflect that Allstate is liable for 90% of the damages, as more fully set forth above. The judgment is affirmed in all other respects. All costs of this appeal are assessed to Allstate.

AMENDED, AND AS AMENDED, AFFIRMED.