NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL

STATE OF LOUISIANA

FIRST CIRCUIT

2008 CA 0069

DAWN DOBSON

VERSUS

TRACI SNEIDER AND ALLSTATE INSURANCE COMPANY

Judgment rendered: DEC 2 3 2008

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On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Number 2003-10870; "G"
The Honorable Larry J. Green, Judge Presiding

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Allstate Insurance Company
(Liability Insurer of Defendant
Traci Sneider)

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, J.J.

DOWNING, J.

The facts giving rise to this suit began when Dawn Dobson stopped her vehicle in the car pool lane at an elementary school, and was "tapped" from behind by a vehicle driven by Tracy Sneider. Ms. Dobson, claiming to be severely injured, filed suit against Ms. Sneider, and her insurer, Allstate Insurance Co. Although the trial court found in favor of Ms. Dobson, it only awarded her $536.73, plus interest.[1] Ms. Dobson appealed the judgment contending that the trial court erred in not awarding general damages.

We have been favored by the learned trial judge's considered and fully explained written reasons for judgment which are hereby incorporated.

After reviewing the record, we conclude that the trial court did not abuse its discretion in making the award. The cost of this appeal is assessed to the plaintiff/appellant, Dawn Dobson. The judgment of the trial court is affirmed in accordance with Uniform Court of Appeal Rule 2-16.2(5).

AFFIRMED

[1] Judgment was rendered only against Allstate Insurance Company because Ms. Sneider was not served.

DAWN DOBSON **NUMBER 2003-10870 DIV. "G"**

22ND JUDICIAL DISTRICT COURT

VERSUS

PARISH OF ST. TAMMANY

TRACI SNEIDER &
ALLSTATE INSURANCE COMPANY **STATE OF LOUISIANA**

DEPUTY CLERK

REASONS FOR JUDGMENT

This matter was tried to the Court on May 10, 2007 after having been continued from a previous setting on March 27, 2006.[1] The automobile accident giving rise to this litigation occurred five years prior to trial, at approximately 8:30 a.m. on March 14, 2002 in the parking lot of Woodlake Elementary School. Plaintiff, Dawn Dobson and defendant Traci Sneider were both in the "drop-off" line at the school. Ms. Sneider was dropping off her son while Ms. Dobson had been called by the principal's office to pick up her daughter Sara who was ill. Plaintiff was in front of Ms. Sneider in line.

While not present at the accident scene, the Court is very familiar with the setting described by the parties, with vehicles in bumper to bumper, slow moving traffic for the protection of children like seven year old Sara. Ms. Dobson maintained that she was stopped and was hit from the rear. Ms. Sneider testified that she was watching her son exit the vehicle and not certain whether she moved forward or if Ms. Dobson moved back. Plaintiffs testified that a teacher, Mr. Blake, was in charge of "traffic control" on that day and was a witness to the events. Mr. Blake did not testify nor did anyone else, who was at the school that day, other than the parties and Sara.[2] After hearing the testimony of all the witnesses on the issue of liability it appears that the accident more than likely was caused by the fault of Ms. Sneider.

[1] This fact is significant insofar as plaintiff's request to hold the matter open for further discovery and deposition testimony, which request was denied by the Court.

[2] While plaintiff issued subpoenas to Mr. Blake and the School principal, those subpoenas were not requested until shortly prior to trial. On the morning of trial, plaintiff's counsel had not yet checked the returns on the service of those subpoenas and apparently had not even called the witnesses to see if they were available. Similarly, plaintiff requested subpoenas to several doctors who had left the state many months, if not years before the trial. At trial, plaintiff requested that the record remain open so that she could secure the deposition of those doctors. The time to do so was in the five years prior to trial, not at the last minute.

One of the overriding principals of tort law is plaintiff's burden of proving the four elements of negligence analysis: duty owed, breach of the duty, proximate cause and damage by a preponderance of the evidence; or, as expressed in Article 2315 of our Civil Code, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." In the case at bar, while plaintiff met her burden of establishing that defendant, more probably than not, owed a duty and breached same, or, in other words, fault, on behalf of Ms. Sneider, the Court finds that plaintiff failed to prove any damages requiring repair as a result, other than those associated with her emergency medical treatment immediately thereafter.

This Court has presided over countless personal injury trials during its many years on the bench. While each new case presents unique facts and circumstances, many precepts remain the same. In this case, as in others, the demeanor and credibility of witnesses are critical in an analysis of the ultimate issues left for its decision.[3] Those factors are difficult to evaluate from a review of the written record, but in this case, they were significant. After listening to Ms. Dobson's testimony, and reviewing the sparse medical evidence properly offered by plaintiff, which was effectively refuted by defendant, the Court finds that plaintiff failed to satisfy her burden to establish that she was injured in the accident of March 14, 2002.

Both drivers testified that the contact between the vehicles was minimal. Mr. Joseph S. Crowe, plaintiff's step-father and the owner of the vehicle she was driving, carefully inspected the vehicle shortly thereafter. He checked the rear bumper and undercarriage and found only a smudge on the back bumper. All parties agreed that there was no damage to the plaintiff's vehicle. Photos taken two weeks later confirm this fact.

Ms. Dobson tearfully testified that she felt immediate pain after the collision, was shaking, had trouble walking, and could not move. After inspecting the damage, it was some ten minutes before she was able to calm herself enough to park her car to go into the principal's office to retrieve her daughter. Once in the principal's office she required an additional thirty minutes before she was able to drive her daughter the two blocks to home.

Once home, Ms. Dobson had to sit in the car an additional ten minutes to assure herself

[3] Ms. Dobson testified at trial and told her family physician, Dr. Eliosoff that she was a psychic and often spoke to people who had died in her house. On September 22, 1999, she complained to Dr. Eliosoff that she had been having an exacerbation of her lower back pain precipitated by driving over the Causeway because of the "bumps."

that she would not fall while walking from the car to the house.[4] The pain was so bad she asked her daughter to get her medication. After waiting approximately one-half hour, she concluded that she needed medical treatment. Because her stepfather could not leave work to take her to the emergency room, she called an ambulance. Curiously, despite her severe pain, Ms. Dobson testified that before calling for medical assistance, she called her attorney. Because of her long-standing back and neck condition, it was reasonable for her to seek medical treatment to ascertain that no new injury had occurred.

For many years prior to the accident, Ms. Dobson suffered with chronic back and neck pain. She had been diagnosed with depression, found to be disabled by Social Security, and was morbidly obese.[5] All of the medical records offered by plaintiff and defendant confirm that Ms. Dobson's pain was chronic and long standing. In order to prevail, she needed to establish that any pain, discomfort or other complaints thereafter were as a result of the accident and not just a continuation of what she had previously experienced and would continue to experience even if the accident had not occurred. The Court finds that she failed in that regard.

According to Lakeview Regional Medical Center's records, plaintiff arrived at the Emergency Room by ambulance at 10:40 a.m., less than two hours after the accident. The Emergency Room physician's notes read in pertinent part, "tingling all over, especially her lower extremities... She has chronic lower back pain. She is being treated in a pain clinic. They are considering a morphine pump. There was no damage to her car...She was just jolted. She feels like her whole body was jolted. There was no damage at all to her car... She had an MRI a year ago of her neck which shoed (sic) a bulging disc at C5 and C6. She also had a CT myelogram in September of her lower spine and that showed degenerative joint disease but no herniated disc. The patient has numbness bilaterally. She normally has numbness below the knees, now it is up to mid thigh." The doctor's notes regarding his differential diagnosis state "This is a patient with a very minor motor vehicle accident. There was no damage at all to her car.. . Because of the increased pain and pain out of proportion to her exam, I will go ahead and get a repeat MRI of her cervical spine."

[4] Plaintiff admitted to several "falls" prior to the accident in question, at least one of which resulted in medical treatment.

[5] Her weight at one time exceeded 400 pounds. In 1999 she underwent gastric by-pass surgery.

While the ER doctor read the cervical MRI as showing some increased changes since the imaging done earlier, defendant successfully refuted this change through the deposition testimony of Dr. Monroe Laborde who opined, after reviewing the actual films, that the change was minimal, and probably a result of patient positioning, instead of a worsening of her pre-accident condition. Records from Lakeview going back as far as 1996 confirm a diagnosis of early degenerative disc disease of the lumbo-sacral spine; in 1997, a compressed disc at L4-5 with arthritis of the back; in 1998, back and neck pain with a complete cervical and lumbar diagnostic workup ordered by Dr. John Logan of the Spine Treatment Center with a diagnosis of cervicalgia[6] and backache; 1999, severe back and neck pain since 1994; 2001, back pain with cervicalgia, pain in posterior cervical region since March 1994, pain between shoulders and both legs...,constant, throbbing, stabbing, improved by nothing.

The Emergency Room doctor contacted Dr. Jeffrey Oppenheimer who had seen Ms. Dobson for similar complaints, only eight days before the accident. Dr. Oppenheimer asked plaintiff to contact his office for an appointment. His progress notes from her visit of March 20, 2002 state "She is a known patient of mine with both cervical and lumbar problems." Dr. Oppenheimer's records were offered by plaintiff accompanied by a certification dated June 11, 2003. However, many portions of those records post date that certification and defendant objected to their introduction. Most notably are the Progress Note dated February 12, 2004 and "Report" of March 25, 2004. That February note confirms that Ms. Dobson had not sought treatment from Dr. Oppenheimer's office for 1 1/2 years. In the March 25, 2004 report the doctor related his concerns over the patient's mental state. "She continued to have fits of depression and seemed to have crying spells during all of our visits, so I was somewhat concerned about her psychological status..."

His concluding paragraph would be perplexing to the Court if it chose to accept it as properly introduced. That paragraph states "She never had neck problems prior to the accident, so based on her history I believe that the accident was the cause of her problems, within reasonable medical probability." Obviously Dr. Oppenheimer failed to review his own records in writing this report. His August 2001 records show a referral from Dr. Metoyer for "neck and back" for which he ordered both a lumbar and cervical workup. The March 20, 2002 visit notes confirm the pre-accident cervical complaints.

[6] Cervicalgia is cervical or neck pain.

Dr. Oppenheimer referred Ms. Dobson to Dr. Polopoli, a physiatrist[7] in June, 2002. In giving her medical history to Dr. Polopoli, she attributed all of her pain to the March 14, 2002 accident (Patient felt immediate neck pain), but failed to mention her previous cervical and lumbar complaints. Dr. Polopoli noted that she had previously undergone a course of physical therapy at Hollycrest Physical Therapy which made her pain worse.[8] Dr. Polopoli also referred her to physical therapy, at Audubon Physical Therapy.[9] One month later, on July 23, 2002 Dr. Polopoli stated "neck pain nearly resolved, shoulder pain much improved but continues with pain with increased activity, much improvement, patient now off all pain meds, has decrease in pain and increased function." On August 28, 2002, "neck pain totally resolved."

Perhaps if Dr. Oppenheimer had been called as a witness, he could have supported the ER doctor's conclusion that Ms. Dobson's diagnostic studies showed a change in her condition. However, he was not called, as he had moved out of state. It also appears from the record that no steps were taken to perpetuate his testimony prior to trial.[10] The rules of evidence control the introduction of medical records. Only certified records are properly before the Court. Had plaintiff chosen to obtain Dr. Oppenheimer's certified records as of 2004, or to perpetuate his testimony, defendant would have had an opportunity to cross examine the doctor as to the conclusions contained in his 2004 records. Plaintiff elected either by action or inaction not to produce Dr. Oppenheimer to support her complaints of increased neck and back pain.

Plaintiff introduced the records of the Gulf Coast Pain Institute and Dr. Rand Metoyer dating back to April 2000. Those records also establish that plaintiffs back complaints were long by everything and has yet to be relieved with any modality other than morphine in 1996...on April 26, 2000, the pain was from the top of her head to bottom of her feet." standing. "She complained of constant pain throughout the posterior body...pain precipitated by everything and

[7] A physiatrist is a medical doctor who practices physical medicine: the diagnosis and treatment of disease by use of physical agents, such as heat, cold, light, water, electricity, or mechanical devices.

[8] No records from Hollycrest PT were offered, so the Court is unsure whether that treatment was pre or post accident.

[9] No records from Audubon Physical Therapy were offered.

[10] A subpoena for Dr. Oppenheimer was requested shortly before trial which was returned as undeliverable due to the fact that the Doctor had moved out of state. Likewise a subpoena was requested for Dr. Eliosoff for which the return indicates that he moved to Canada two years before. The Court further notes that the records from Lakeview Regional offered by plaintiff were not certified and therefore, not properly admitted into evidence as part of plaintiffs proof. However, defendant introduced certified and complete copies of plaintiff's extensive Lakeview records which further support plaintiff's longstanding and ongoing treatment for back and neck pain.

has yet to be relieved with any modality other than morphine in 1996...on April 26, 2000, the pain was from the top of her head to bottom of her feet."

More than one year prior to the accident in question, Dr. Metoyer instituted a regimen of monthly facet injections at the lumbar and cervical levels. Her last visit with Dr. Metoyer was June, 2002 with little difference in pre and post accident complaints or treatment.

Ms. Dobson's family doctor, Dr. Eliosoff's records were also introduced. His treatment began in July, 1999 for complaints of back pain and headaches. His notes read as follows: "8-20-1999, she believes she is a psychic and sees relatives who have died in her house with peripheral vision and talks with them; 9-22-99, she has been having an exacerbation of her lower back pain precipitated by driving over the Causeway because of the bumps; 3-21-00, severe generalized pain all over the body, headaches, neck pain, pain in both shoulders and back and also numb discomfort, both legs and abdomen, chronic pain syndrome, consider MRI C-spine for cervical stenosis; 9-5-2001, I have not seen her for a year. She had been followed by Dr. McGuire in Slidell for her back pain. He gives her epidural injections. She has been referred to Dr. Oppenheimer, who is scheduling her for a myelogram in three weeks. She is also followed by Dr. Nadeau [sic], a psychiatrist.. . Her back pain, she feels, is intolerable; 2-22-02 she continues with chronic low back pain."

On his problem list and plan for this last visit, the doctor notes that because of her psychiatric disorder he would continue her Paxil and Wellbutrin despite her belief that she might be pregnant because "she is doing well psychiatrically and is at high risk for some psychiatric breakdowns which in turn would be more harmful to a fetus than would be the medications that she is on." On her visit of September 23, 2002 for chest pain which had begun a week earlier, she mentioned the motor vehicle accident. However, there is no further reference to the accident and the last visit to this physician was in early 2003.

Dr. Michael Madow's records were also offered, although they were not certified. Dr. Madow began offering psychiatric treatment to Ms. Dobson on July 27, 2000 for a chief complaint of "I have been feeling depressed in the past." She was diagnosed with major depression, rules out bipolar, personality (disorder?) NOS (not otherwise specified), radiculopathy and chronic pain, fear of other physical problems, level moderate too marked." Dr. Madow's records are sketchy and it appears he was only doing prescription monitoring for the

patient who was seeing Dr. Boutte as her psychologist.[2] Ms. Dobson saw Dr. Madow on roughly a monthly basis from 2000 into early 2002. The doctor's notes of April 1, 2002 mention the accident but also state that she was less depressed. Also, around that time the frequency of her visits with this physician decreased.

Defendants offered the certified records of John Boutee, Ms. Dobson's psychologist whose treatment spanned April 2000 until January 2001. His report of April 26, 2000 is entitled Psychological Pain Evaluation on referral from Dr. Metoyer. She described her pain to this healthcare provider as "from the top of my head to my knees since June of 1995. The pain is described as sharp, burning, aching, throbbing, pressure, numbness, spasms, tingling and stabbing sensations... severe to unbearable, constant, nine on a 10 point scale; almost everything exacerbates the pain and nothing provides relief." She related that her current medications included Lorcet, Lortab, Darvon, Darvocet, Vicodin, Ultram, Celebrex, Vioxx, Tylenol, Aspirin, Advil, Soma and Staydol. During the course of his treatment Dr. Boutte noted that Dr. Madow had also prescribed Paxil, Zydone, Trazadone, Neurontin, Ativan, and Wellbutrin. Dr. Madow's July 2000, notes mention that he was considering also prescribing either, Melatonin, Depakote or Buspar.

Plaintiff offered no medical testimony either live or by way of deposition, relying instead, on the introduction of portions of medical records. While plaintiff subpoenaed three doctors, Dr. Oppenheimer, Dr. Eliosoff and Dr. Metoyer, her letter requesting same was not mailed to the Court until April 25, 2007 and the subpoenas were not issued until April 27, 2007. Dr. Metoyer's subpoena was served on May 1, 2007 but since it was apparent at the beginning of the trial that the plaintiff had taken no steps to secure his appearance beyond the subpoena, it was not surprising that he did not appear. While plaintiff requested that the case be held open for later testimony or that bench warrants be issued for the appearance of her witnesses, at the urging of defendant who argued the untimeliness of the subpoenas, and in some instances, plaintiffs failure to previously identify her witnesses in pre-trial discovery, the Court refused to do so and ordered that the trial proceed[11]

[11] No records of Dr. Boutte were offered by plaintiff.

Plaintiff's step-father and daughter Sara, now twelve also testified. Young Ms. Dobson's composure was very calm and her responses carefully crafted which suggested that she had been reminded of the events of March 14, 2002, several times prior to trial. Her demeanor in describing what in her mother's mind was a life altering event did not lead to the conclusion that the accident had significant impact on this young child's life. This factor gives further reason for the Court to doubt the causal connection between the accident and her mother's pain thereafter, or any significant exacerbation of her pre-accident condition.

While plaintiff offered very little in the way of medical substantiation for the connection between the accident and her condition, the defense introduced the deposition of Dr. Monroe Laborde, in support of its contention that plaintiff's complaints were not accident related. Dr. Laborde has testified numerous times before the Court and his qualifications have been accepted in the field of orthopedics. He testified that it "takes a certain amount of energy to injure tissue and the energy of an accident is proportional to the amount of damage to the vehicle."

Plaintiff objected to Dr. Laborde's testimony being offered in any field beyond orthopedics, specifically, his testimony of the dynamics of rear end, whiplash type accidents and injuries. However, the Court notes that Dr. Laborde's first post-graduate degree was in Biomedical engineering and he has written extensively on the mechanical properties of the spine.

Even if the Court were inclined to grant plaintiff's requested limitations on Dr. Laborde's testimony, this Court has listened to orthopedists and neurosurgeons testify for many years about these same issues. Plaintiff doctors have enlightened this Court to the fact that a driver's failure to complain of pain at the scene of a rear end collision was the norm, and not the exception. Very simply stated, whiplash, acceleration-deceleration accidents generally cause delayed onset pain and the smaller the "bump," the smaller the effects. The Lakeview Emergency doctor confirmed this fact in his numerous references to the lack of damage to plaintiffs' car, which was out of proportion to her histrionic complaints, so very soon after the accident.

[12] Plaintiff also subpoenaed the school principal, Jean Kreiger, who was purportedly a witness to plaintiff's suffering immediately after the accident. Ms. Kreiger's subpoena was requested at the same time the medical witnesses and although served, Ms. Kreiger did not appear.

Doctor Laborde concluded that it was Ms. Dobson's psychological makeup which was the "cause" of her pre and post accident complaints. He testified that chronic pain is predominantly a psychological problem while acute pain is more often related to accidents and injuries. This is because psychological stress increases muscle tone which leads to chronic pain. Ms. Dobson's own offered medical records revealed that she had been diagnosed with depression prior to the accident, and had been undergoing psychiatric treatment with significant medication management.

Plaintiff sought to introduce a group of medical bills which she alleges were accident related. However only one, that of St. Tammany Hospital for a treatment date of May 20, 2002 were certified, and the Court has determined only those bills for treatment rendered on the date of the accident have been proven as causally related. The Lakeview bill of $536.73 is included in the certified records introduced by defendant and will be accepted as properly proven.

The Court is fully aware of and anticipates that plaintiff will urge the theory of the "eggshell" plaintiff in her almost certain appeal. While a defendant takes a plaintiff as he finds her, in this instance, Ms. Dobson failed to prove that she was in anyways worsened by the accident. She awoke on March 14, 2002 with numerous medical problems and did not establish, by a preponderance of the evidence that she went to sleep any the worse for the events of that day.

While it is a generally accepted precept that the prevailing party is entitled to costs under CCP Art 1920, in this case, plaintiff really has not prevailed. Further, while it is within the discretion of the Court to award costs in any equitable manner, even to a non-prevailing party, (Murphy v. Boeing Petroleum Services, Inc., 600 So 2d 823 (3rd Cir., 1992)) in this instance, the Court believes that it would be most equitable for each party to bear its own costs.

For these reasons, the Court finds that the plaintiff, Dawn Dobson is entitled to judgment against defendant, Allstate Insurance Company[13] in the amount of $536.73, plus interest, which represents the certified bills from Lakeview Regional Medical Center on the day of the accident.

[13] The record reveals that defendant Traci Shneider was never served and therefore, judgment against her would not be proper.

THESE REASONS FOR JUDGMENT DO NOT CONSTITUTE A WRITTEN JUDGMENT. Counsel for the defendant shall prepare a judgment consistent with these reasons within 10 days.

LARRY J. GREEN
JUDGE, DIVISION "G"

Thus done and signed in Covington, Louisiana on this 2 day of July, 2007.