NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0790

ANTHONY N. GRAPHIA

VERSUS

DOUGLAS WOOLFOLK AND USAA CASUALTY INSURANCE COMPANY

Judgment Rendered: FEB 14 2007

* * * * * * * * * *

On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 452,506, Division "F," Section 22

Honorable Timothy E. Kelley, Judge Presiding

* * * * * * * * * *

Harry L. Shoemaker, III
Baton Rouge, LA

Counsel for Plaintiff/Appellant
Anthony N. Graphia

Paul Marks, Jr.
Stephen Dale Cronin
Baton Rouge, LA

Counsel for Defendants/Appellees
Douglas Woolfolk and USAA
Casualty Insurance Company

* * * * * * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

J. V. Pettigrew, J. - Concurs and assigns Reasons

HUGHES, J.

This appeal arises from a judgment in an automobile accident case in favor of the defendants. Plaintiff appeals. For the reasons that follow, we reverse.

FACTS AND PROCEDURAL HISTORY

On March 30, 1998 Douglas C. Woolfolk rear-ended Anthony N. Graphia in an automobile accident on Old Hammond Highway in Baton Route, Louisiana. Mr. Graphia filed the instant lawsuit, alleging that injuries to his property and his person resulted, and naming as defendants Mr. Woolfolk and his insurer, USAA Casualty Insurance Company (USAA).

Following an August 22, 2005 jury trial, the jurors returned the following responses on the jury verdict form:

> 1. Do you find that Douglas Woolfolk was at fault in causing the accident, which is the subject matter of this lawsuit?
>
> Yes 10 No 2
>
> (If your answer to this question is **Yes**, go to Question 2. If your answer to this question is **No**, go to Question 8, then sign and date the Verdict Form, and notify the bailiff that you have a verdict.)
>
> 2. Do you find that the fault of Douglas Woolfolk was a legal cause of the injuries, if any, to Anthony N. Graphia?
>
> Yes 2 No 10
>
> (If your answer to this question is **Yes**, go to Question 3. If your answer to this question is **No**, go to Question 8, then sign and date the Verdict Form, and notify the bailiff that you have a verdict.)
>
> * * *
>
> 8. Number of jurors who Agree 10 Disagree 2

In conjunction with the jury's verdict, the trial judge signed a judgment on September 22, 2005 dismissing plaintiff's demands.

Thereafter, plaintiff filed the instant appeal, asserting the following assignments of error:

1. The [trial] court erred in allowing into evidence hearsay testimony, indeed double hearsay, from Ourso, USAA's employee damage appraiser, that there was "documentation" stating that Graphia had been in another accident.

2. The trial court erred in accepting Ourso as an expanded expert in the field of forces and their effects on various automobiles, metallurgy, physics, accident reconstruction, etc. without proper and lawful foundation and qualification as required under [LSA-C.E. art. 702]. Moreover, the trial court erred in allowing Ourso to give expert opinion testimony which was unreliable, speculative, unscientific, and unfairly prejudicial in violation of all the requirements for experts set out in [LSA-C.E. art. 702] and under the *Daubert and Foret* [sic] cases.

3. The trial court erred in allowing unreliable, hearsay evidence against Graphia when it accepted into evidence documents, photographs, and other materials which defense counsel had obtained directly from the internet.

4. The trial court erred in excluding from evidence Dr. Joseph Turnipseed's medical records and medical bills.

5. The jury verdict and the trial court's final judgment incorporating the jury verdict were manifestly erroneous and clearly wrong in finding [that] Woolfolk was at fault in causing the accident in question but that his fault was not a legal cause of the injuries to Graphia.

LAW AND ANALYSIS

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, through**

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, through 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, pp. 6-7 (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.

However, when the trial court commits legal error, which interdicts or taints the fact-finding process, the manifest error standard is not applicable. **Levy v. Bayou Indus. Maintenance Services, Inc.**, 2003-0037, p. 7 (La. App. 1 Cir. 9/26/03), 855 So.2d 968, 974, writs denied, 2003-3161, 2003-3200 (La. 2/6/04), 865 So.2d 724, 727.

In the instant case, plaintiff objected to the following interchange between defense counsel and the USAA adjuster:

> **Q.** ...did it come to your attention later that [plaintiff] had been in another accident?
>
> **A.** There was documentation that stated that.

We agree with plaintiff/appellant that this statement constituted inadmissible hearsay. The USAA claims adjuster did not testify that he had

any personal knowledge that the plaintiff had had a prior accident. Nor was there any proof offered to bring this statement within the business record exception (LSA-C.E. art. 803(6)) to the prohibition of hearsay contained in LSA-C.E. art. 802. Further, it was apparent that the statement was elicited to establish the proof of the matter asserted as proscribed by LSA-C.E. arts. 801(C) and 802. The plaintiff had called the USAA claims adjuster as a witness during the presentation of his case-in-chief to establish the cost estimated by USAA necessary for the repair of his vehicle. During the presentation of the defendants' case, the USAA adjuster was re-called and questioned as to whether he would have been able to distinguish between damage caused by the accident at issue and damage that might have been caused by any other accident; he responded that it would have been "impossible for [him] to separate it." The adjuster was also asked whether he knew of any pre-existing damage to the portion of the vehicle covered by his initial repair estimate at the time he made the estimate; he responded that he did not. Immediately thereafter, the adjuster was asked whether he later learned that plaintiff had been involved in a subsequent accident, as quoted above.

One possible purpose for such testimony could have been in defense of a claim for penalties for failure to timely pay the claim; however, plaintiff did not seek penalties in this case. In brief to this court, USAA asserts the following justification: "any documentation reflecting a previous accident would be important for the performance of [the adjuster's] work duties as the sole appraiser for USAA ... in determining what damage (if any) was caused by the March 30, 1998 accident." We find this argument unpersuasive. Even if the statement had been relevant for such a purpose, it would have been inadmissible under LSA-C.E. art. 403, which provides,

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or waste of time."

The defendants produced no evidence in this case to establish that the plaintiff and/or his vehicle had been involved in a prior accident, which could have caused the substantial damage to the rear of plaintiff's vehicle. Further, no witness identified what "documentation" of a prior accident USAA actually possessed. Moreover, neither USAA's file nor the "documentation" at issue was introduced into evidence. We reject USAA's contention that plaintiff's failure to object to other testimony (i.e., as to the lack of damage to the defendant's vehicle, and the presence in two medical records that listed March 9, 1998 as the accident date) justified the admission of the statement at issue.

In the absence of any reliable, affirmative proof that the plaintiff had been involved in a prior accident, which caused the damage complained of, this witness's bald assertion that he had "documentation" of such an accident would have impermissibly influenced the jury. Although the admission of hearsay testimony is subject to a harmless error analysis, we do not find the improperly admitted testimony to be harmless in this instance. See **Clement v. Graves**, 2004-1831, p. 14 (La. App. 1 Cir. 9/28/05), 924 So.2d 196, 204-5.

Under most circumstances, when an appellate court finds legal error in a judgment and the record is complete, an independent review is conducted and judgment is rendered on the merits. However, in some cases, the weight of the evidence is so nearly equal that a first-hand view of witnesses is essential to a fair resolution of the issues. An appellate court

must itself decide whether the record is such that the court can fairly find a preponderance of the evidence from the cold record. Where a view of the witnesses is essential to a fair resolution of conflicting evidence, the case should be remanded for a new trial. **Certified Capital Corp. v. Reis**, 2003-2525, pp. 4-5 (La. App. 1 Cir. 10/29/04), 897 So.2d 128, 131, writ denied, 2004-2876 (La. 1/28/05), 893 So.2d 79 (citing **Ragas v. Argonaut Southwest Ins. Co.**, 388 So.2d 707, 708 (La. 1980), and **Gonzales v. Xerox Corp.**, 320 So.2d 163, 165 (La. 1975)). See also **Norfolk Southern Corp. v. California Union Ins. Co.**, 2002-0369, p. 27 (La. App. 1 Cir. 9/12/03), 859 So.2d 167, 188, writ denied, 2003-2742 (La. 12/19/03), 861 So.2d 579.

After careful review of the record, we find that serious issues of credibility with respect to the fact witnesses exist herein and that a first-hand view of the witnesses is essential to a fair resolution of the issues. This case essentially turns on the resolution of contradictory testimony. Most striking is the directly oppositional testimony of the plaintiff, who testified that his vehicle sustained damage as a result of the accident at issue, and the defendant, who testified that the damage to the rear end of the plaintiff's vehicle was "old" and was not caused by the accident. Therefore, we will remand the case for a new trial. Furthermore, remand will allow, in the interests of justice, introduction of evidence of a "prior accident" if one, in fact, did occur. Having so concluded, we find it unnecessary to address plaintiff/appellant's remaining assignments of error.

CONCLUSION

For the reasons assigned herein, the judgment of the trial court dismissing the suit of Anthony N. Graphia is reversed, and the matter is remanded for a new trial. All costs of this appeal are to be borne by

defendants/appellees, Douglas Woolfolk and USAA Casualty Insurance Company.

REVERSED AND REMANDED.

ANTHONY N. GRAPHIA

VERSUS

USAA CASUALTY INSURANCE COMPANY

NUMBER 2006 CA 0790

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

PETTIGREW, J., concurring.

In addition to the reasons given by the majority for this reversal and remand, I am also of the opinion that it was error on the part of the trial court to allow the property damage appraiser to testify in the field of forces and their effects on various automobiles. There was no foundation established under **Daubert** and **Foret** jurisprudence for him to do so.