NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1203

HERLISHA WILLIAMS, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, SAVIOS WALLS

VERSUS

PERMANENT GENERAL ASSURANCE COMPANY, VANTRICE MOORE, SAFEWAY INSURANCE COMPANY AND CAIN WALL, IV

Consolidated With
2006 CA 1204

VANTRICE MOORE, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINOR CHILD ZIPORIAH HALL, AND NATASHA REED

VERSUS

SAFEWAY INSURANCE COMPANY, YVONNE COLEMAN AND CAIN WALL IV

Judgment Rendered: May 4, 2007

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On Appeal from the City Court of Hammond, Seventh Ward
In and For the Parish of Tangipahoa
State of Louisiana
Docket No. 1-0108-0027 c/w 1-0209-0031

Honorable Grace Bennett Gasaway, Judge Presiding

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Richard McShan Amite, LA	Counsel for Plaintiffs/Appellees Herlisha Williams, Individually and on behalf of her minor child, Savios Wall
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Keith M. Borne Lafayette, LA	Counsel for Defendant/Appellant Safeway Insurance Company of Louisiana

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

In this personal injury suit, an insurer appeals the trial court's judgment in favor of coverage. Having thoroughly reviewed the evidence in the record before us and finding no manifest error in the factual determinations of the trier of fact, we affirm.

This suit arises out of an intersectional automobile accident on November 15, 2000, in Hammond, Louisiana, involving vehicles driven by Cain Wall, IV, and Vantrice Moore. Herlisha Williams and her minor child, Savios Wall, were passengers in the vehicle operated by Mr. Wall, and Ziporiah Hall and Natasha Reed were passengers in the vehicle driven by Ms. Moore.[1]

On August 17, 2001, Herlisha Williams, individually and on behalf of her minor child, Savios Wall, filed a petition for damages in the City Court of Hammond against Permanent General Assurance Company (PGAC), Ms. Moore, Safeway Insurance Company of Louisiana (Safeway), and Mr. Wall. It was asserted that the 1994 Toyota Camry driven by Ms. Moore was covered by an automobile liability insurance policy issued by PGAC, and that the 1988 Dodge Diplomat operated by Mr. Wall was covered by a automobile liability insurance policy issued by Safeway. Thereafter, on November 8, 2001, Ms. Moore, individually and as the natural tutrix of the minor child, Ziporiah Hall, and Natasha Reed filed a petition for damages against Safeway, Mr. Wall, and Yvonne Coleman.[2] Safeway answered both lawsuits, generally denying liability and asserting the affirmative defense of

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[1] The name of the minor child, Savios Wall has been spelled as both "Savios" and Savois" throughout this matter. For purposes of this opinion, we will use the name "Savios" as it was spelled in the petition.

[2] This petition was originally filed in the 21st Judicial District Court for the Parish of Tangipahoa, but the matter was transferred to the Hammond City Court on August 28, 2002.

material misrepresentation by Ms. Coleman when she added the Diplomat to her existing policy with Safeway. On September 16, 2003, upon the motion of Safeway, the cases were consolidated. Prior to trial, Mr. Wall and Ms. Coleman were dismissed from the lawsuit. Trial of the matter was held on October 23, 2003, and taken under advisement. On December 18, 2003, written reasons were rendered. The trial court determined that Mr. Wall entered the intersection at issue in contradiction of the traffic signal, causing the accident, and awarded damages to the plaintiffs. Judgment in favor of the plaintiffs and against Safeway was signed on April 11, 2006.

Safeway has suspensively appealed and assigns as error: 1) the trial court's failure to find that Ms. Coleman committed material misrepresentation when adding the 1988 Dodge Diplomat to her policy of insurance issued by Safeway, and 2) alternatively, the trial court's error in concluding that the 1988 Dodge Diplomat was being driven with the permission of Ms. Coleman.

An appellate court's review of factual findings in a civil appeal is governed by the manifest error-clearly wrong standard. In order to reverse a factual determination by the trier of fact, the appellate court must apply a two-part test: (1) the appellate court must find that a reasonable factual basis does not exist in the record for the finding; and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Stobart v. State, Dep't of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993). If the findings are reasonable in light of the record reviewed in its entirety, this court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Thus, where there are two permissible views of the evidence, the fact

finder's choice between them cannot be manifestly erroneous or clearly wrong. **Stobart**, 617 So.2d at 883.

Safeway denies coverage in this matter, alleging material misrepresentation by Ms. Coleman, in that the Diplomat was purchased by Ms. Coleman for her son, and that she failed to reveal this information to Safeway and failed to name Mr. Wall as an additional driver under the policy. Alternatively, Safeway denies coverage, claiming that Mr. Wall did not have permission to drive the car.

Louisiana Revised Statute 22:619A provides, in pertinent part:

> [N]o oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or void the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive.

Based on this statutory language, an insurer can rescind a contract of insurance if the insurer establishes: 1) the policy holder made a false statement in the insurance application which materially affects risk, and 2) the misrepresentation was made with an intent to deceive. When a policy is rescinded, it is invalidated from its inception. **Royal Maccabees Life Ins. Co. v. Montgomery**, 97-1434, pp. 7-8 (La.App. 1 Cir. 6/29/98), 716 So.2d 921, 925, writ denied, 98-2664 (La. 12/11/98), 730 So.2d 940. The burden of proof is on the insurer to prove materiality and intent to deceive. **Breaux v. Bene**, 95-1004, p. 4 (La.App. 1 Cir. 12/15/95), 664 So.2d 1377, 1380.

In determining the applicant's intent to deceive, courts look to the surrounding circumstances indicating the insured's knowledge of the falsity of the representation made in the application and his or her recognition of the materiality of the misrepresentation, or to circumstances which create a reasonable assumption that the insured recognized the materiality. Intent to

deceive is a factual determination, which should not be set aside absent manifest error. **Breaux**, 95-1004 at p. 5, 664 So.2d at 1380.

Ms. Coleman testified at trial that she owned a Grand Am, but that it was an older car that was giving her trouble. She did not have enough money to buy a newer car, so she bought the Diplomat to have a backup car. Ms. Coleman also testified that she paid the down payment and paid the monthly notes on the car. Additionally, she stated that she paid the insurance on the vehicle. With regard to permissive use of the vehicle, Ms. Coleman stated that Mr. Wall would drive the car occasionally with her permission, but that there were times he would take it without her permission. She testified that she did not remember if she gave him permission to use the car on the day of the accident.

Safeway asserts that Ms. Coleman's trial testimony regarding Mr. Wall's permissive use of the Diplomat was dramatically different from her deposition testimony, which, combined with the change in Mr. Wall's trial testimony from his deposition testimony, proved an intent to deceive by Ms. Coleman.[3]

In her deposition, Ms. Coleman testified that Mr. Wall drove the Diplomat approximately three times when she was in the vehicle. She further testified that she never let him drive the car when she was not in the vehicle with him. She also stated Mr. Wall did not ask her to use the car on the date of the accident, because she would have either been in the car with him or she would not have given him permission.

The evidence was undisputed that the Diplomat was purchased before Mr. Wall moved into Ms. Coleman's home. It is also undisputed that the car

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[3] Mr. Wall testified in his deposition that he owned the Diplomat with his mother and that it was purchased so he could use it for work. He also testified at his deposition that the vehicle was put in his mother's name because he did not have a driver's license. At trial, Mr. Wall testified that the Diplomat was owned by his mother.

remained at Ms. Coleman's. The title of the car and the insurance were in her name. Although there were clearly some contradictions in the testimony of Ms. Coleman, we do not find the deposition testimony and trial testimony to be so different or inconsistent that a reasonable fact finder could not accept it. As the trial court explained its reasons for judgment:

> The Court finds that the vehicle driven by Cain Wall was owned by Yvonne Coleman and was titled in her name. Ms. Coleman added the subject vehicle to her existing policy of insurance with Safeway, upon purchase, at a time when Cain Wall was not residing with her. There was no evidence that she gave incorrect or false information at the time the vehicle was added to the policy – no proof of misrepresentation. Regardless of who may have contributed to the purchase price of the vehicle, Ms. Coleman acquired title in her name and maintained the possession and use of the vehicle. Ms. Coleman is the record owner and there was no proof, direct or circumstantial, to convince the court that she did not believe herself to be the owner of the vehicle, thus, forming no basis for her to be able to make such an alleged material misrepresentation. Further, there was no proof that there was an intent to deceive, as required by statute, to defeat coverage. Ms. Coleman testified that she did allow Cain Wall to use the vehicle from time to time and the Court finds that the allowed use of the vehicle was in such a fashion that there was ongoing implied permission to use the vehicle.
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> The Court also finds that the testimony of Mr. Cain Wall was less than credible at trial. The many inconsistencies in his testimony were obvious to the Court and well pointed out by Attorney Borne. It should be noted, that this same lack of credibility was evident when he attempted to shift the blame for the accident at issue to the other driver herein. Despite the lack of truthfulness of Mr. Cain Wall, however, Safeway has failed to meet [its] burden of proof regarding the issue of material misrepresentation by Yvonne Coleman.

After a thorough review of the record in its entirety, and giving the required deference to the trial court's province as fact finder, we find there is sufficient evidence in the record to support the trial court's factual determinations, and the record, as a whole, does not establish that those factual determinations were clearly wrong. Accordingly, we affirm the

judgment of the trial court.[4] All costs of this appeal are to be borne by the appellant, Safeway Insurance Company of Louisiana.

AFFIRMED.

[4] We do not award sanctions under LSA-C.C.P. art. 863 against Safeway, as apparently requested by plaintiffs, Ms. Moore, Ziporiah Hall, and Natasha Reed. The ability to impose sanctions under Article 863 is limited to the trial court by the plain language of the article. We cannot address on appeal a request for sanctions arising from a brief filed in the appellate court. **Hampton v. Greenfield**, 618 So.2d 859, 862 (La. 1993).