

**EMMA GIRON**

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**NO. 2000-CA-1028**

**VERSUS**

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**COURT OF APPEAL**

**SALVADOR PALMISANO, JR.,  
MELISSA PALMISANO AND  
THE ALLSTATE INSURANCE  
COMPANY**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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**APPEAL FROM  
ST. BERNARD 34TH JUDICIAL DISTRICT COURT  
NO. 80-403, DIVISION "C"  
Honorable J. Wayne Mumphrey, Judge Pro Tempore**

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**Judge Patricia Rivet Murray**

**\*\*\*\*\***

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

**ARMSTRONG, J., DISSENTS**

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## **AFFIRMED**

Emma Giron filed this suit against Salvador Palmisano, Jr., his daughter, Melissa Palmisano, and their auto liability insurer, Allstate Insurance Company (Allstate), for damages allegedly caused by an automobile accident. After a bench trial, the court rendered judgment in favor of the defendants, dismissing the claims because the plaintiff had failed to carry her burden of proof. Ms. Giron appeals, contending that the judgment is manifestly erroneous and that the trial court relied upon inadmissible evidence and the testimony of an unqualified witness. We affirm for the reasons that follow.

Ms. Giron testified that shortly after 1:00 p.m. on December 8, 1995, while in stop-and-go traffic on Judge Perez Drive in Chalmette, Louisiana, she was rear-ended by the vehicle behind her, owned by Salvador Palmisano and driven by Melissa Palmisano. Ms. Palmisano got out of her car, "crying and wailing," and ran forward, so Ms. Giron also got out. Although Ms. Giron experienced sharp shooting pains in her neck and left shoulder "almost immediately," she told both Ms. Palmisano and the police officer who arrived within minutes that she was uninjured. On December 21, 1995, Ms. Giron first sought treatment for injuries to her neck and shoulder arising

from this accident, and continued under a doctor's care as of the time of trial in June 1999.

Ms. Giron further testified that she believed her car was undamaged until she noticed some fluid leaking out two days after the accident. She asked a neighbor to check beneath her car and was told that "the shock is busted." However, when Ms. Giron took her car for an inspection by Allstate on December 27, 1995, she did not tell the adjuster that she believed her undercarriage had been damaged. On January 17, 1996, a defect in the right rear shock absorber was noted after her car was inspected by a local damage appraisal firm. A replacement shock absorber was ordered by a dealership in October 1996 and installed in June 1997.

Ms. Palmisano testified that she was traveling within the speed limit when the car in front of her suddenly changed lanes, revealing Ms. Giron's vehicle coming to a stop. Ms. Palmisano testified that she immediately "stomped" on her brakes and came to a sudden stop; she felt no impact with the vehicle ahead, and neither she nor the other driver was jostled or thrown about. When Ms. Palmisano looked forward, however, she saw Ms. Giron getting out of her car, so she got out too. Although neither car was damaged and no one was injured, Ms. Palmisano was upset and crying because this was her first accident. She admitted on the stand that she could not swear

her vehicle did not hit Ms. Giron's car, and that she may have told the investigating officer that she could not avoid the accident.

Although the investigating officer was subpoenaed by both parties, he failed to appear for trial. Therefore, the court permitted plaintiff's counsel to admit the officer's police report into evidence. This document shows that Ms. Palmisano had been following too closely, while Ms. Giron had no violations. The officer's narrative states as follows:

Driver of vehicle 2 [Ms. Giron] stated she glanced down due to a vehicle in front of her when vehicle 1 ran into her. Driver of vehicle 1 [Ms. Palmisano] stated she could not stop in time to avoid the accident. There was very minor damage to both vehicles.

Photographs of both vehicles, taken at Allstate's claims facility in Metairie, were also admitted into evidence by the court. The photos of Ms. Giron's 1995 Mitsubishi Galant were taken on December 27, 1995, while Ms. Palmisano's 1995 Dodge Neon was photographed on January 5, 1996. There is no visible damage to either car reflected in these photographs.

Robert J. Cooper, a mechanical engineer, was accepted by the court as an expert in vehicular accident reconstruction. Mr. Cooper testified that based upon his review of the police report, the photographs of both cars, and Allstate's report that no damage was seen when Ms. Giron's vehicle was examined, the maximum acceleration factor imparted in this accident would

have been 2.1 Gs, which is less than that experienced in a sneeze or a cough. He further testified that if there had been enough force to damage a shock absorber, there would have been signs of the impact on the Galant's bumper because it consists only of "a plastic bumper cover over a styrofoam-type material ... attached to a rigid bar" of light aluminum. On cross, Mr. Cooper admitted that he had not visited the scene of the accident nor examined either vehicle, but relied solely upon Allstate's documents and photos in arriving at his opinion. He further testified that his estimate did not depend upon whether Ms. Giron's car was still moving or was stopped at the time of impact, if any occurred.

Based upon this testimony and evidence, the court found that Ms. Giron had failed to prove her case by a preponderance of the evidence. In its written reasons, the court specifically noted that while Ms. Giron testified that her car was hit by the following vehicle, the photographs corroborated Ms. Palmisano's testimony to the contrary. Therefore, the court explained, "the defendant's account of the accident was more likely to be correct, even by the slightest margin," requiring the dismissal of the plaintiff's claims.

In this appeal, Ms. Giron first contends that the trial court's determination is contrary to the "overwhelming preponderance" of the evidence. She notes that Ms. Palmisano's tearful demeanor and statements

to the police officer just after the incident contradict her later assertions that she did not believe her car had hit Ms. Giron's vehicle, and the police report establishes that, in fact, damage was evident on both cars. Given that Allstate's adjuster did not inspect or photograph the underside of the car, Ms. Giron asserts that the judgment for defendants must be reversed as manifestly erroneous.

Before a factfinder's verdict may be reversed, the reviewing court must determine from the record whether a reasonable factual basis exists for the verdict and whether the verdict is manifestly erroneous or clearly wrong. *Touchard v. SLEMCO Electric Foundation*, 99-3577, p. 5 (La. 10/17/00), 769 So.2d 1200, 1204 (on rehearing). As our Supreme Court has often stated:

When there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. Therefore, the issue for the reviewing court is not whether the trier of fact was wrong, but whether the fact-finder's conclusions were reasonable under the evidence presented. When a factfinder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong.

*Id.* (citations omitted). Moreover, "[t]he reviewing court must always keep in mind that 'if the trial court's ... findings are reasonable in light of the

record reviewed in its entirety, the court of appeal may not reverse, even if convinced that ... it would have weighed the evidence differently.'" *Fusilier v. Dauterive*, 2000-0151, p. 5 (La. 7/14/00), 764 So.2d 74, 78 (citations omitted).

In the instant case, the record, viewed as a whole, supports the trial court's determination that Ms. Giron failed to prove, by a preponderance of the evidence, that Ms. Palmisano's vehicle struck hers. Although Ms. Giron emphasizes that the police report states that both cars were damaged, this statement is contradicted by her testimony that she saw no damage to either vehicle immediately after the incident. In addition, despite having discovered that she discovered fluid leaking beneath her car just two days after the accident, Ms. Giron did not mention this when she took her car to the Palmisanos' insurer for inspection later that same month. Moreover, she offered no evidence to suggest that a rearend impact could cause a leak in a shock absorber. Given the totality of this evidence as well as Ms. Palmisano's explanation for her demeanor and statements on the scene, it was not unreasonable for the court to conclude that, in fact, the defendant's car had not struck the plaintiff's. Therefore, the judgment dismissing Ms. Giron's claims is neither manifestly erroneous nor clearly wrong.

In her second assignment of error, Ms. Giron argues that the trial court

erred in admitting the photographs into evidence. She maintains that because the photos were not provided in response to counsel's pretrial discovery request and because they were not authenticated at trial, her objection to their admissibility should have been sustained.

Although evidence may be excluded due to a party's failure to disclose it during discovery, *see, e.g., Landeche v. McSwain*, 96-0959, pp. 10-11 (La. App. 4th Cir. 2/5/97), 688 So.2d 1303, 1309, Ms. Giron's complaint regarding a discovery violation in this case is unsupported by the record. Plaintiff's discovery requests, which were filed with her initial petition, do not include a request for production of all trial exhibits, but only an interrogatory asking defendants to "list and describe" the evidence intended for use at trial. The defendants' responses to these requests, admitted into evidence in support of Ms. Giron's objection to the admission of the photographs, clearly discloses that the defense anticipated offering "[p]hotographs of both vehicles involved in the accident" as evidence at trial. Accordingly, there was no basis for the trial court to exclude the photographs as a sanction for a discovery violation.

Similarly, Ms. Giron's claim that the photos were inadmissible because they "were not identified or otherwise authenticated" is without merit. While Article 901 of the Evidence Code provides that evidence must



be authenticated or identified prior to admission, this merely requires the proponent to show that the evidence is what it purports to be. *Malloy v. Vanwinkle*, 94-2060, p. 4 (La. App. 4th Cir. 9/28/95), 662 So.2d 96, 100. Moreover, a photograph need not be authenticated by the person who took the picture, but may be identified by any witness having personal knowledge of the thing depicted. *State v. Sterling*, 95-673, p. 5 (La. App. 5th Cir. 2/27/96), 670 So.2d 1316, 1319-20. In this case, both Ms. Giron and Ms. Palmisano testified at trial that the photos were of their vehicles and accurately depicted the appearance of the vehicles after the alleged accident. Thus, the photographs were properly authenticated and identified for admission into evidence.

Ms. Giron further argues that even if the photos of her car were admissible, the trial court erred in relying upon them because Allstate failed to photograph the undercarriage, where the damage caused by the impact may have been visible. However, this argument ignores the fact that it was the plaintiff's burden, not defendants', to submit evidence in support of the claim that Ms. Giron's vehicle sustained damage, albeit unseen, from this incident. As the photographs were clearly relevant to the factual dispute at hand and Ms. Giron was not refused the opportunity to produce contradictory evidence and argument on the issue, the court did not err in

relying on the photos in deciding this case.

Finally, Ms. Giron maintains that Mr. Cooper's testimony should not have been considered because it was not scientifically reliable and was not based upon facts established by the evidence at trial. In support of this argument, she emphasizes that the defendants failed to offer evidence to establish the expert's scientific reliability, as required by *Daubert* and *Foret*, and that he was paid for his testimony in this case as well as many others. Ms. Giron contends that in view of these deficiencies, the trial court's reliance on Mr. Cooper's testimony was unfounded.

Notwithstanding the requirements for admissibility established in *Daubert* and *Foret*, Ms. Giron's challenge to the reliability and relevance of the expert testimony comes too late. Mr. Cooper was named as an expected witness on defendants' November 1996 discovery responses, and a copy of his report was furnished to plaintiff's counsel at that time. Despite this timely notice, Ms. Giron failed to challenge the scientific reliability of his methodology or the relevancy and validity of the resultant opinion, either by pretrial motion or by an objection at trial. Moreover, after Mr. Cooper had been cross-examined on his qualifications and employment history, Ms. Giron's attorney offered no grounds for exclusion of the testimony, stating only, "That's all we have, Judge. We do not accept him as an expert.

Obviously it's Your Honor's call, but plaintiff does not stipulate to his expert status." Having failed to question the reliability, relevance and admissibility of Mr. Cooper's testimony either prior to or during the trial, Ms. Giron's argument that his opinion should not have been considered must fail. *Griffin v. Tenneco Oil Co.*, 625 So.2d 1090, 1095 (La. App. 4th Cir. 1993).

Furthermore, review of the testimony at issue fails to establish that any substantial prejudice resulted from the admission and consideration of that opinion in this case. The primary thrust of Mr. Cooper's testimony was that **if** an impact had occurred, the lack of visible damage to the vehicles indicated that the force of the impact was insufficient to cause Ms. Giron's claimed injuries. Because the factfinder ultimately concluded that no impact had occurred, Mr. Cooper's opinion became irrelevant to the outcome of this case. Similarly, because the plaintiff presented no evidence or testimony suggesting that a shock absorber can be damaged in the manner she claimed, Mr. Cooper's opinion rebutting this theory was superfluous. Accordingly, Ms. Giron has not established that the admission and consideration of the expert testimony requires reversal of the trial court's judgment. *Mitchell v. Popiwchak*, 95-1423, p. 8 (La. App. 4th Cir. 6/26/96), 677 So.2d 1050, 1055.

For the reasons assigned, the judgment below is affirmed.

**AFFIRMED**