NOT DESIGNATED FOR PUBLICATION

LAWRENCE E. COTTON	*	**NO. 2005-CA-1378**
VERSUS	*	**COURT OF APPEAL**
SAFEWAY INSURANCE COMPANY OF LOUISIANA	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2003-56918, SECTION "A"
Honorable Charles A. Imbornone, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., and Judge Edwin A. Lombard)

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JUNE 7, 2006

REVERSED

The defendant, Safeway Insurance Company of Louisiana (Safeway), appeals a judgment rendered in favor of the plaintiff, Lawrence E. Cotton (Mr. Cotton), in connection with an automobile insurance claim. For the reasons assigned, we reverse.

FACTS AND PROCEDURAL HISTORY:

Mr. Cotton was the titled owner of a 2000 Buick Park Avenue automobile, which Safeway insured. On June 26, 2003, the vehicle was stolen. It was later recovered by the New Orleans Police Department and was declared a total loss by Safeway. Safeway denied Mr. Cotton's request for payment under the policy because of a material misrepresentation made as to the true owner and operator of the vehicle. Safeway claimed that Eddie Williams (Mr. Williams), who was not listed on the policy, was the true owner and regular driver of the vehicle. Mr. Williams did not reside with Mr. Cotton, but was a close family friend, often referred to as Mr. Cotton's "nephew."

On November 24, 2003, Mr. Cotton filed suit against Safeway. On May 3, 2005, judgment was rendered in favor of Mr. Cotton in the amount

of $15,190.00 (the stipulated value of the vehicle). The trial court found that Mr. Cotton did not misrepresent the facts and was the owner of the vehicle. Penalties and attorneys' fees were not assessed against Safeway based on the trial court's finding that Safeway was given cause to question the ownership of the vehicle. Safeway appealed, asserting that the trial court erred in concluding that Mr. Cotton did not commit a material misrepresentation.

STANDARD OF REVIEW:

An appellate court may not set aside a district court's finding of fact in the absence of manifest error or unless it is clearly wrong. *Stobart v. State, Through DOTD*, 617 So.2d 880, 882 (La. 1993). When findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. *Rosell v. ESCO*, 549 So.2d 840, 844-45 (La. 1989) (citations

omitted).

On review, an appellate court must be cautious not to re-weigh the evidence or to substitute its own factual findings just because it would have decided the case differently. *Hornsby v. Bayou Jack Logging*, 2004-1297, p. 8 (La. 5/6/05), 902 So.2d 361, 366, citing *Ambrose v. New Orleans Police Dept. Ambulance Service*, 93-3099 (La. 7/5/94), 639 So.2d 216, 221. However, as clarified in *Ambrose*, the court's purpose in *Stobart* was not "to mandate that the district court's factual determinations cannot ever, or hardly ever, be upset." *Id*. Recognizing that great deference should be accorded to the fact finder, the court of appeal has a constitutional duty to review facts. *Id*. To perform its constitutional duty properly, an appellate court must determine whether the district court's conclusions were clearly wrong based on the evidence or are clearly without evidentiary support. *Id*.

LAW AND ANALYSIS:

La. R.S. 22:619 deals specifically with misrepresentations made in applications for insurance. Subsection A provides: "Except as provided in Subsection B of this Section and R.S. 22:692, and R.S. 22:692.1, no 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."

It is well established that an insurer must meet a three-tiered burden of proof in an action for denial of coverage for misrepresentation. First, it must be shown that the applicant's statements were false. Second, the insurer must establish that the misrepresentations were made with an actual intent to deceive. Third, the insurer must establish that these misstatements materially affected the risk assumed by the insurer. *Deutschmann v. Rosiere,* 2002-2002, p. 4 (La. App. 4 Cir. 4/9/03), 844 So.2d 1082, 1085, citing *Johnson v. Occidental Life Ins. of Cal*., 368 So.2d 1032 (La. 1979).

In the present case, it is undisputed that the 2000 Buick Park Avenue was titled and registered in Mr. Cotton's name. Mr. Cotton admitted, however, that Mr. Williams drove the Park Avenue most often while he drove the 2001 Buick Century, which he also owned.

In support of its assertion that Mr. Williams was the actual owner of the vehicle, Safeway relied on the testimony of its claims manager Darrell Meche. Mr. Meche testified, relying on his notes taken from a telephone interview with Mr. Williams on June 2, 2003, that Mr. Williams claimed to be the true owner of the vehicle. He stated that Mr. Williams admitted the vehicle was garaged with him and that he paid the monthly note and insurance premium. Safeway also relied on the recorded statement made by

Mr. Williams to claims adjuster Shawn Briggs on July 18, 2003. According to the statement, Mr. Williams claimed the vehicle was actually his and that it was only in Mr. Cotton's name because he was going through a divorce and did not want his wife to acquire any of his assets.

Although called as a witness, Mr. Williams did not testify at trial due to a psychiatric condition and heavy use of pain medication. Mr. Williams' deposition testimony was introduced in lieu of his trial testimony. When questioned in his deposition, Mr. Williams denied telling Mr. Meche and Mr. Briggs that he was the actual owner of the vehicle and that he paid the monthly note and insurance premiums.

Mr. Cotton testified at trial that in spite of the fact that Mr. Williams drove the vehicle more than he did, he did not list Mr. Williams as a regular driver on the insurance application. Mr. Cotton could offer no explanation for his failure to name Mr. Williams, but admitted that the omission was in error. Mr. Cotton also testified that he knew Mr. Williams did not have a Louisiana driver's license and knew from his insurance agent that Safeway would not insure Mr. Williams for that reason. Moreover, Mr. Meche, based on his knowledge of Safeway's underwriting guidelines, testified that Safeway would not have accepted the policy had it known Mr. Williams was a regular driver of the vehicle and did not have a valid Louisiana driver's

license.

It was also demonstrated that in completing the insurance application, Mr. Cotton denied having any other vehicles in the household. He could not explain why he did not list the 2001 Buick Century that he owned and operated as his primary vehicle.

Considering Mr. Cotton's own admissions at trial, we conclude that Safeway carried its required burden of proof in denying coverage based on a material misrepresentation. The evidence presented by Safeway overwhelming demonstrated (notwithstanding the credibility issue of who paid the note and insurance premium on the vehicle) that Mr. Cotton failed to disclose that Mr. Williams, a non-licensed driver in the State of Louisiana, was a regular driver of the vehicle. Here, the evidence shows that at the time Mr. Cotton completed the application for insurance (May 30, 2003), Mr. Williams had been the primary driver of the vehicle for several years and had unlimited use of the vehicle.

Records introduced by Safeway revealed that prior to May of 2003, the vehicle was involved in at least five property damage claims, made on policies issued by other insurers, while Mr. Williams was the driver. Mr. Cotton claimed to have no knowledge of any prior accidents or insurance claims involving the vehicle. Mr. Cotton also stated he was unaware that

Mr. Williams took the vehicle to Atlanta, Georgia in October of 2000, where it was impounded in a towing yard and later retrieved by Mr. Williams' wife.

In a factually similar case, *Serie v. Safeway*, 97-196 (La. App. 3 Cir. 10/8/97), 702 So.2d 778, the Third Circuit Court found a material misrepresentation in connection with an application for automobile insurance. In *Serie*, Lee Ann Richard was the titled owner of a vehicle that was involved in an accident while driven by her unlicensed daughter Lisa. In her application for insurance, Lee Ann informed the insurer that only herself and her husband would be driving the vehicle and that the vehicle would be garaged at their home. Lisa was not named as a driver on the policy. Both Lee Ann and Lisa testified that Lisa never drove the vehicle except on the day of the accident. However, the insurer introduced testimony from the seller of the vehicle to show that Lisa actually purchased the vehicle, but put the title in her mother's name. The seller further stated that Lisa was the one who drove the vehicle from the lot. Testimony from Lisa's neighbor was also presented to show that the vehicle was kept at Lisa's home and that Lisa was often seen driving the vehicle. The court found that the insurer proved a material misrepresentation by a preponderance of the evidence. We reach the same result in the instant

appeal.

In conclusion, we find, after carefully considering the evidence, that Safeway carried its burden of proof that Mr. Cotton made a material misrepresentation with the intent to deceive Safeway in the application for the insurance contract, thus entitling Safeway to deny coverage. The trial court was clearly wrong in determining that no misrepresentation occurred. Accordingly, the judgment of the trial court is reversed and judgment is hereby rendered in favor of Safeway dismissing Mr. Cotton's claim.

REVERSED