

NOT DESIGNATED FOR PUBLICATION

**DORIS HARVEY, NICHOLAS  
PORTER, INDIVIDUALLY  
AND ON BEHALF OF NOLAN  
PORTER AND ALFRETТА  
HARVEY, INDIVIDUALLY  
AND ON BEHALF OF  
JOEKOBI HARVEY** \* \* \* \* \* **NO. 2012-CA-1131**  
**COURT OF APPEAL**  
**FOURTH CIRCUIT**  
**STATE OF LOUISIANA**

**VERSUS** \* \* \* \* \*

**IMPERIAL FIRE AND  
CASUALTY INSURANCE  
COMPANY AND COREY  
WASHINGTON**

APPEAL FROM  
FIRST CITY COURT OF NEW ORLEANS  
NO. 2008-52371, SECTION "B"  
Honorable Angelique A. Reed, Judge  
\* \* \* \* \*

**Judge Roland L. Belsome**  
\* \* \* \* \*

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Rosemary Ledet)

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**AMENDED AND AFFIRMED**

**JANUARY 23, 2013**

**NOT DESIGNATED FOR PUBLICATION**

In this appeal, Imperial Fire & Casualty Insurance Company (Imperial) seeks review of the judgment of the trial court awarding damages to the plaintiffs. For the following reasons, we amend the judgment and affirm as amended.

The plaintiffs, Doris Harvey, her daughter Alfretta Harvey, and Alfretta's children, Nicholas Porter, Nolan Porter, and Joekobi Harvey, filed a petition for damages alleging that they were injured as the result of an accident which occurred in the parking lot of Lowe's. The petition alleged that the defendant rear-ended the vehicle occupied by the plaintiffs as the plaintiffs traveled in the parking lot of Lowe's.

On the morning of trial, the individual claims of Alfretta Harvey were voluntarily dismissed; she remained a party only on behalf of her minor children. Defendant Corey Washington was also voluntarily dismissed since he was not the driver of the vehicle. Several stipulations were entered into prior to trial: 1) the vehicle insured by Imperial was driven by a permissive user, 2) the policy provided limits of \$10,000.00 per person/\$20,000.00 per accident, and 3) the plaintiffs' medical records were submitted and entered into evidence.

Doris Harvey testified that on September 5, 2007, she accompanied her daughter, Alfretta, to Lowe's. Mrs. Harvey stated that she was in the front passenger seat, and that Alfretta's minor children, Nicholas, Nolan, and Joekobi, were in the rear seat of the vehicle. She further testified that Alfretta parked the vehicle, and went inside of Lowe's. Mrs. Harvey and the children remained in the vehicle. While in the parked vehicle, Mrs. Harvey stated that another car backed into their vehicle causing a "jolt." She said that following the collision two men exited the other vehicle, approached Alfretta's parked vehicle, threatened her, and made her write a note. The note provided, "I Doris Back up at Lowe's Blue Chev Truck." Mrs. Harvey denied driving Alfretta's vehicle on the day of the accident. After the accident, Mrs. Harvey received three months treatment for injuries related to the incident.

On cross-examination, Imperial questioned Mrs. Harvey about her deposition testimony. During her deposition, she had testified that on day of the accident they had turned into Lowe's, Alfretta stopped in the parking lot, getting ready to turn, and they were rear-ended. Later in the deposition, Mrs. Harvey stated that she was driving the vehicle at the time of the accident, and that Alfretta was in Lowe's. She asserted that the men from the other vehicle threatened her while the grandchildren were in the car, and that she was afraid of the men. At that point in the deposition, Mrs. Harvey stated that she wrote what the occupants of the other vehicle told her to write on the note, but she adamantly denied driving Alfretta's vehicle. This was consistent with her responses to questioning at trial; Mrs. Harvey stated numerous times that Alfretta's vehicle was parked when someone hit it, and that she was threatened into writing a note.

During Nicholas' testimony, he stated that he was fourteen at the time of the accident, and nineteen at the time of trial. Nicholas revealed that the accident occurred while the vehicle was parked in the Lowe's parking lot. Nicholas confirmed that his grandmother was in the front passenger seat, and that he and his brothers were in the backseat. Nicholas also placed Alfretta inside of Lowe's at the time of the accident. He testified that once his mother parked the vehicle, the vehicle was not moved again. He claimed that he felt a "jerk" after being hit by the other vehicle and he received three months of treatment for his injuries. Nicholas recalled that the men that hit Alfretta's vehicle asked his grandmother to write a note. Nicholas did not know the provisions of the note.

Alfretta testified that she was not in the vehicle at the time of the accident in the Lowe's parking lot. Although she was named on the petition as a plaintiff, she claimed that she told the attorney she was not in the vehicle at the time of the accident. When Alfretta was questioned about her deposition testimony, Alfretta stated that she did not remember her deposition testimony wherein she stated that the vehicle was stopped when struck by another vehicle. During trial, Alfretta stated numerous times that the vehicle was parked, and that she was in Lowe's when the vehicle was struck. Alfretta testified that she spoke with the men after exiting Lowe's, and was informed that they did not see her vehicle as they backed up out of the parking spot. The trial court noted that Alfretta's deposition testimony was not consistent with her trial testimony.

Imperial submitted the deposition testimony of Troy Lawrence. Mr. Lawrence believed he was in the vehicle with Eric Washington not Corey Washington and recalled that their vehicle was at a stop when Alfretta's vehicle backed up into it. Mr. Lawrence stated that the accident was just a bump, and

resulted in a dent in the bumper. He testified that Mrs. Harvey was not threatened when she wrote the note in his presence. Mr. Lawrence stated that she was in the vehicle by herself. He further claimed that after a few moments Alfretta came out of Lowe's with her children.

Once the trial was concluded, the trial court rendered judgment in favor of the plaintiffs. The awards were as follows: Doris Harvey \$6,000.00 in general damages, and \$1,775.00 in special damages; Nicholas Porter \$5,000.00 in general damages and \$1,705.00 in special damages; Nicholas Porter on behalf of Nolan Porter<sup>1</sup>, \$4,000.00 in general damages and \$1,335.00 in special damages; and Lastly, Alfretta Harvey, on behalf of Joekobi Harvey, \$750.00 in general damages and \$820.00 in special damages. This appeal followed.

On appeal Imperial raises two assignments of error: 1) that the trial court was manifestly erroneous in its findings of fact regarding how the accident occurred and 2) the trial court erred in awarding \$21,385.00 against Imperial when the parties stipulated to \$20,000.00 in coverage.

#### STANDARD OF REVIEW

Appellate courts review both fact and law. However, it is well-settled that the applicable standard of review for a factual finding is the manifestly erroneous or clearly wrong standard. *S.J. v. Lafayette Parish School Bd.*, 2009–2195, p.13 (La. 7/6/10), 41 So.3d 1119, 1128. It is equally well-settled that an appellate court may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. Further, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or

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<sup>1</sup> The judgment erroneously names Nicholas Porter rather than Alfretta Harvey as suing on behalf of the minor Nolan Porter.

clearly wrong. *Cole v. State Department of Public Safety & Corrections*, 2001–2123, p. 13-14 (La. 9/4/02), 825 So.2d 1134, 1144, *citing Stobart v. State through Dept. of Transp. and Dev.*, 617 So.2d 880 (La.1993). As the *S.J.* Court stated, “[i]n applying the manifestly erroneous—clearly wrong standard to the findings ... appellate courts must constantly have in mind that their initial review function is not to decide factual issues de novo.” *Id.*, p.13, 41 So.3d at 1128, *quoting Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). Therefore, under this standard of review, in order to reverse a factfinder's determination, “an appellate court must undertake a two-part inquiry: (1) the court must find from the record that a reasonable factual basis does not exist for the finding of the trier of fact; and (2) the court must further determine the record establishes the finding is clearly wrong.” *Id.*, p.12, 41 So.3d at 1127. As the Louisiana Supreme Court concisely stated in *Rosell*, “[w]hen 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.” 549 So.2d at 844, *see also Sassone v. Doe*, 2011-1821, pp.3-4, (La. App. 4 Cir. 5/23/12), 96 So.3d 1243, 1246.

First, Imperial argues that the trial court committed manifest error in finding that the accident occurred when Mrs. Harvey and her grandchildren were seated in Alfretta’s parked vehicle. Imperial concluded that the numerous versions of how the accident occurred rendered Mrs. Harvey’s testimony unworthy of belief. In support of their argument that her story is internally inconsistent, Imperial cited to the facts set forth in the petition for damages, which states that Alfretta was driving at the time of the accident. Imperial also relies on Mrs. Harvey’s deposition testimony, which also stated that Alfretta was driving the vehicle when it was stuck. Additionally, Mrs. Harvey’s medical records and Mr. Lawrence’s

deposition testimony indicate that she was driving at the time of the accident, as evidenced by the note she signed.

Although Mrs. Harvey's testimony differed from her deposition, the trial court found her testimony at the time of trial to be credible. We agree that her testimony at trial differed from her deposition testimony. However, the transcript reveals that Mrs. Harvey's trial testimony was consistent in describing the accident and that account of the accident was corroborated by Nicholas Porter's testimony. Furthermore, she acknowledged that she wrote the note, but under duress and intimidation by the men in the other vehicle. As for the petition and medical record, neither was prepared by Mrs. Harvey.

The documentary evidence presented was itself contradictory, but the testimony given at trial was consistent except for Mr. Lawrence who testified *via* deposition.<sup>2</sup> The trial court decided to credit the testimony of Mrs. Harvey and Nicholas. From the record before this Court, we cannot say that the trial court was manifestly erroneous in its findings.

In the second assignment of error, Imperial argues that the trial court erred in awarding damages over the stipulated policy limits. The parties stipulated that Imperial's policy provided coverage in the amount of \$10,000.00 per person, \$20,000.00 per accident. The trial court awarded the plaintiffs a total of \$21,385.00, \$1,385.00 over the policy. Thus, this assignment of error has merit.

Accordingly we will reduce the amounts of general damages awarded *pro rata*. Subtracting the award for medical damages from the medical expenses leaves a total of \$14,365.00. Of the \$14,365.00, we will award Doris 38%

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<sup>2</sup> The driver of the other vehicle, Eric Washington, did not testify at all.



(\$5,458.70), Nicholas 32% (\$4,596.80), Nolan 26% (\$3,734.90), and Joekobi 4% (\$574.60). The award of medical damages will remain unchanged. *See Gonzales v. Bordelon*, 595 So.2d 761, 765 (La. App. 4 Cir. 1992).

Thus, the judgment of the trial court is amended to award Doris Harvey general damages in the amount of \$5,458.70; to award Nicholas Porter general damages in the amount of \$4,596.80; to award Alfretta Harvey, on behalf of Nolan Porter, general damages in the amount of \$3,734.90; and to award Alfretta Harvey, on behalf of Joekobi Harvey, general damages in the amount of \$574.60. In all other respects, the judgment of the trial court is affirmed.

**AMENDED AND AFFIRMED**