**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 2061

LINDA L. McCAULEY, WIFE OF/AND MICHAEL F. McCAULEY

VERSUS

AIG INSURANCE COMPANY, BFI WASTE SYSTEMS, LLC AND ANNETTE M. GRINNER

**Judgment Rendered:** DEC 2 8 2006

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. Number 504,573

Honorable William A. Morvant, Judge

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| Leonard J. Cline<br>Metairie, LA | Counsel for Plaintiffs/Appellants<br>Linda L. McCauley and Michael F. McCauley |
| Michael D. Meyer<br>New Orleans, LA | Counsel for Defendants/Appellee<br>BFI Waste Systems of Louisiana, LLC, Annette M. Grinner, and American Home Assurance Company |

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BEFORE: PARRO, GUIDRY, PETTIGREW, McCLENDON, AND HUGHES, JJ.

Pettigrew, J. concurs
Parro, J., dissents and assigns reasons.
McClendon, J. concurs and assigns reasons.

**GUIDRY, J.**

In this personal injury action, plaintiffs appeal the trial court judgment in favor of defendants. For the reasons that follow, we reverse and render.

**FACTS**

On December 23, 2002, Linda L. McCauley was traveling westbound on Goodwood Boulevard in Baton Rouge, east of the Goodwood and Airline Highway intersection. In this area, westbound Goodwood has three lanes: one left-turn lane, one left westbound lane, and one right westbound lane. Ms. McCauley was in the right westbound lane, approaching Airline. She estimated her speed between 15 and 35 miles per hour.

At the same time, a BFI garbage truck, driven by Annette M. Grinner and insured by American Home Assurance Company, was at the stop sign on the northbound service road on the east side of Airline. When the Goodwood traffic stopped for the red light, the BFI truck began to slowly cross Goodwood on the service road, intending to continue northbound on the service road. Ms. Grinner crossed the two eastbound Goodwood lanes, the median area, the westbound left-turn lane, and the left westbound lane. Ms. McCauley's car and the BFI truck collided in the right westbound lane and northbound service road intersection.

Ms. Grinner testified that, although she looked to the right several times as she crossed Goodwood, she did not see Ms. McCauley's vehicle before impact. Ms. McCauley testified that she saw the BFI truck when she was three or four car lengths from the intersection and the BFI truck had crossed into the left westbound lane. At that time, Ms. McCauley thought the BFI truck would stop because Ms. McCauley had the right-of-way. Ms. McCauley testified she was braking and saw the BFI truck, but could not stop in time to avoid the collision.

Ms. Terri Collins, stopped in the left westbound lane of Goodwood before the accident, witnessed the impact and testified at trial. Ms. Collins stated she observed the BFI truck stopped at the stop sign and then proceeding across the eastbound and westbound lanes of Goodwood. Ms. Collins described the BFI truck as a "big slow elephant," and Ms. Collins described Ms. McCauley's vehicle as traveling approximately 35 miles per hour. Ms. Collins stated the BFI truck was already in the right westbound lane when Ms. McCauley struck the BFI truck.

Ms. McCauley and her husband filed this suit against BFI, its insurer American Home Assurance Company,[1] and Ms. Grinner. Following a hearing, the trial court found the BFI truck had preempted the intersection, and Ms. McCauley had the last clear chance to avoid the accident. The trial court stated, "The testimony presented at trial clearly establishes that [the BFI truck] had preempted the intersection and almost completely traversed it prior to being struck by plaintiff's vehicle...." Accordingly, the trial court held plaintiffs failed to meet their burden of proof and rendered judgment in favor of defendants, dismissing plaintiffs' claims. It is from this judgment that plaintiffs appeal.

## LAW AND DISCUSSION

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 two-part test for the reversal of a factfinder's determinations requires: 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

[1] American Home Assurance Company was incorrectly identified as AIG Insurance Company in plaintiffs' petition.

erroneous). See Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). This test dictates that a reviewing court must do more than simply review the record for some evidence that supports or controverts the trial court's finding. Id. The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous.

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, 549 So.2d at 844; Arceneaux v. Domingue, 365 So.2d 1330, 1333 (La. 1978). However, 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 factfinder would not credit the witness's story, the court of appeal may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. Stobart v. State, Through DOTD, 617 So.2d 880, 882 (La. 1993); Rosell, 549 So.2d at 844-45.

Louisiana Revised Statute 32:123 sets forth the duty of a driver when approaching a stop sign. That statute provides in pertinent part as follows:

> A. Preferential right of way at an intersection may be indicated by stop signs or yield signs.
>
> B. Except when directed to proceed by a police officer or traffic-control signal, every driver and operator of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the cross walk on the near side at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right of way to all vehicles which have entered the intersection from another highway or which are approaching so closely on said highway as to constitute an immediate hazard.

Thus, Ms. Grinner had a duty to stop at the stop sign and yield to all vehicles entering the intersection that were approaching close enough to constitute a hazard. However, the trial court found Ms. Grinner did not breach this duty, relying on the doctrine of preemption of the intersection. To be successful, a motorist claiming preemption of an intersection while crossing a favored roadway must show she entered at a time when she had reasonable opportunity to complete the crossing without endangering or impeding the passage of a vehicle on the superior roadway. Williams v. Garner, 268 So.2d 56, 60 (La.App. 1 Cir. 1972). As explained in Price v. City of Slidell, 97-2066, pp. 8-9 (La.App. 1 Cir. 9/25/98), 723 So.2d 455, 460:

> In order to preempt an intersection, the motorist must show that he made a lawful entry, at a proper speed, after ascertaining that oncoming traffic was sufficiently removed to permit a safe passage and under the bona fide belief and expectation that he can negotiate a crossing with safety. He must show that he entered the intersection at a proper speed and sufficiently in advance of the vehicle on the intersecting street to permit him to cross without requiring an emergency stop by the other vehicle (citations omitted).

The trial court reached the conclusion that the accident was caused by Ms. McCauley's failure to perceive the BFI truck's preemption of the intersection and Ms. McCauley's failure to slow down and avoid the accident upon observing the BFI truck in her lane. The findings of the trier of fact are normally accorded much discretion. However, we find the objective evidence clearly contradicts the witness's story and the trial court's conclusions. A photograph introduced into evidence at the trial in this matter clearly shows damage to Ms. McCauley's vehicle on the driver's side front and the driver's door; there does not appear to be any damage to the front of Ms. McCauley's vehicle. In addition, the police officer who investigated the accident testified the BFI truck struck Ms. McCauley's

vehicle in Ms. McCauley's travel lane. Consequently, it is evident that Ms. McCauley's vehicle had already entered the intersection before the BFI truck, and the BFI truck struck Ms. McCauley's vehicle. As a result, the trial court's conclusion that the BFI truck had preempted the intersection, and in so doing assigning 100% fault to Ms. McCauley, is not reasonable in view of the evidence. Our review of the evidence requires a reapportionment of the fault.

A motorist is held to see that which with due diligence he should have seen. See Gonzales v. Xerox Corp., 320 So.2d 163, 164 (La. 1975). Ms. Grinner's failure to see Ms. McCauley's approach resulted in Ms. Grinner's entrance into the intersection without ascertaining that she could safely complete the crossing without impeding Ms. McCauley's passage on the superior roadway. It was error by the trial court to conclude Ms. Grinner had no fault in causing this accident.

Because we conclude the record establishes fault on the part of Ms. Grinner, we must apply the comparative fault factors announced in Watson v. State Farm Fire & Casualty Insurance Co., 469 So.2d 967, 974 (La. 1985), to apportion fault. When examining an accident using the Watson factors the court should consider: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought.

Application of these factors leads us to apportion the greater percentage of fault to Ms. Grinner. Although Ms. Grinner testified she looked to the right before proceeding across Goodwood, she stated she did

not see Ms. McCauley's vehicle prior to the collision. There was testimony at trial that there was nothing to impede Ms. Grinner's vision of the westbound travel lanes of Goodwood. Ms. Grinner simply failed to see Ms. McCauley's approach to the intersection. However, we also note testimony that Ms. McCauley failed to brake or significantly decrease her speed as she approached the intersection.

Finding the apportionment of fault by the trial court clearly erroneous, we must raise or lower it to the highest or lowest point reasonably within the trial court's discretion. Clement v. Frey, 95-1119, pp. 7-8 (La. 1/16/96), 666 So.2d 607, 611. We, therefore, raise the fault allocated to Ms. Grinner to 80%, which we believe to be the lowest degree of fault that the trial court could reasonably have allocated to Ms. Grinner under the facts and circumstances of this case.

Considering our finding of trial court error in the allocation of fault, and since the record is complete, we will proceed to a determination and calculation of the damages to which Ms. McCauley is entitled. Gonzales, 320 So.2d at 165.

Ms. McCauley was seen in a local hospital emergency room on the day of the accident with complaints of pain in her right shoulder, stiffness in her neck, and lower back pain. Her emergency room diagnosis was cervical strain, soft tissue injury, and cervical lumbar strain. The record also contains the deposition testimony of Dr. John Nyboer, a specialist in physical medicine rehabilitation, who treated Ms. McCauley after the accident. His diagnosis of her injuries was cervical strain, lumbar strain, facet joint syndrome, and left hip tendonitis. Dr. Nyboer associated her symptoms and medical problems to the accident. He prescribed medication and physical therapy. Ms. McCauley's medical expenses as of March 21,

2005, totaled $17,049.50. Ms. McCauley testified she had $5,042.83 in lost wages, and her leg weakness and hip pain continued at the time of trial, twenty-eight months after the accident. However, plaintiffs stipulated their damages totaled less than $50,000.00. Accordingly, plaintiffs' damages are limited to $50,000.00, reduced in proportion to Ms. McCauley's negligence. La. C.C. art. 2323.

## CONCLUSION

Considering the evidence and testimony, both lay and medical, concerning the cause and extent of Ms. McCauley's injuries, judgment is entered in favor of plaintiffs, Linda L. and Michael F. McCauley, and against defendants, American Home Assurance Company, BFI Waste Systems of Louisiana, LLC, and Annette M. Grinner, in the amount of Thirty-Five Thousand and no/100 dollars ($35,000.00), plus legal interest from date of judicial demand until paid. Defendants, American Home Assurance Company, BFI Waste Systems of Louisiana, LLC, and Annette M. Grinner, are cast for all costs at both the trial and appellate levels.

**REVERSED AND RENDERED.**

**STATE OF LOUISIANA**

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**2005 CA 2061**

**LINDA MCCAULEY**

**VERSUS**

**AIG INSURANCE COMPANY, BFI WASTE SYSTEMS, L.L.C. ND ANNETTE M. GRINNER**

HUGHES, J., concurring.

I respectfully concur. Physical evidence is more persuasive than testimony as a general rule. While a different allocation of fault might be appropriate, I will concur with the result reached by the majority.

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**VERSUS**

**AIG INSURANCE COMPANY, BFI WASTE SYSTEMS, LLC AND ANNETTE M. GRINNER**

**BEFORE: PARRO, GUIDRY, PETTIGREW, McCLENDON, AND HUGHES, JJ.**

**PARRO, J., dissenting.**

After a trial on the merits, the trial court concluded that Ms. McCauley had failed to meet her burden of proof that Ms. Grinner was negligent in causing the accident. The trial court specifically found that the testimony presented at trial clearly established that Ms. Grinner had preempted the intersection and had almost completely traversed it prior to contact with Ms. McCauley's vehicle. I believe that there is a reasonable basis in the record for the factual findings of the trial court, and a review of the record indicates two permissible views of the evidence. Therefore, the trial court's choice between these views precludes a finding of manifest error, despite the physical evidence regarding the damage to Ms. McCauley's car. Accordingly, I respectfully dissent.

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**McCLENDON, J., concurring in part and dissenting in part.**

I concur with respect to the finding of fault on Ms. Grinner's part, but dissent with respect to the percentage of fault allocated to her, believing that the highest percentage of fault the trial court could reasonably have allocated to Ms. Grinner is 50%. See **Foley v. Entergy, Louisiana Inc.**, 2006-0983 (La. 11/29/06), ____ So.2d ____.