NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0220

BRIDGET GILMORE

VERSUS

ALLSTATE INSURANCE COMPANY, GEICO INDEMNITY COMPANY, KIMBERLY FUMAR and WILLIAM GILMORE

consolidated with

NO. 2013 CA 0221

WILLIAM GILMORE

VERSUS

ALLSTATE INSURANCE COMPANY, GEICO INDEMNITY COMPANY and KIMBERLY FUMAR

Judgment Rendered: DEC 27 2013

* * * * *

On Appeal from
22nd Judicial District Court,
In and for St. Tammany Parish,
State of Louisiana
Trial Court No. 2010-11107 c/w 2010-12742

The Honorable Reginald T. Badeaux, III, Judge Presiding

* * * * *

David H. Kennedy Metairie, Louisiana	Attorney for Appellants, Allstate Ins. Co. & Kimberly Fumar
Jesse L. Wimberly, III Jesse L. Wimberly, IV Mandeville, Louisiana	Attorneys for Appellee, Bridget Gilmore
Shawn Rogers Mandeville, Louisiana	Attorney for Appellee, William Gilmore
Alejandro Cobar Metairie, Louisiana	Attorney for Appellee, Geico Indemnity Company

* * * * *

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

CRAIN, J.

Kimberly Fumar[1] and Allstate Insurance Company appeal a judgment of the trial court in favor of Bridget Gilmore and William Gilmore, challenging both the trial court's liability determination and the amount of damages awarded. Bridget Gilmore has answered the appeal seeking to have the amount of damages awarded to her increased. We affirm.

FACTS

This litigation stems from a motorcycle/vehicle collision that occurred during the early afternoon of October 17, 2009, at the intersection of Highway 59 and Florence Road in St. Tammany Parish. That portion of Highway 59 consists of a northbound lane and a southbound lane divided by a center turn lane, with drainage ditches along each side of the roadway. William Gilmore was driving his Harley Davidson motorcycle with his wife, Bridget, riding behind him as his passenger. The Gilmores were traveling southbound on Highway 59 behind a 2008 Chrysler Pacifica driven by Kimberly Fumar. As Fumar turned right onto Florence Road, the motorcycle collided with Fumar's vehicle. Both William and Bridget Gilmore were injured.

William and Bridget Gilmore each filed suits for damages against Fumar and her insurer, Allstate. They also sued their own uninsured motorist insurer, Geico Indemnity Company. Additionally, Bridget Gilmore named William Gilmore and his liability insurer (also Geico) as defendants, but later dismissed her claims against William Gilmore. The suits were consolidated and proceeded to a bench trial, with both plaintiffs stipulating that their damages did not exceed $50,000.00. The trial court accepted the Gilmores' account of the accident and found Fumar to

---

[1] Kimberly Fumar testified at trial that she is now known as Kimberly Armond. However, she is referred to herein as Fumar, as she was identified in pleadings and the trial court's judgment.

be one hundred percent at fault in causing the accident. The trial court awarded Bridget Gilmore damages in the amount of $44,750.29, and William Gilmore damages in the amount of $18,918.79. Fumar and Allstate now appeal. Bridget Gilmore has answered the appeal, seeking to have the damages awarded to her increased to $49,750.29, to conform to the trial court's written reasons for judgment.

LIABILITY

Fumar contends the trial court erred (1) in failing to apply the presumption of fault attributable to a rear-ending motorist to William Gilmore, (2) in finding Fumar at fault in causing the accident, and (3) in failing to assign any fault to William Gilmore.

As with other factual determinations, the fact finder is vested with much discretion in its allocation of fault. An appellate court should only disturb the fact finder's allocation of fault when it is clearly wrong or manifestly erroneous. *See Hebert v. Rapides Parish Police Jury,* 06–2001, 06–2164 (La. 4/11/07), 974 So. 2d 635, 654–56 (on rehearing). Where two or more permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *See Walley v. Vargas,* 12–0022 (La. App. 1 Cir. 9/21/12), 104 So. 3d 93, 112; *Wainwright v. Leary,* 623 So. 2d 233, 237 (La. App. 2 Cir.), *writ denied,* 629 So. 2d 1127 (La. 1993).

Liability under the particular facts of a case is determined by the duty-risk analysis, which requires the plaintiff to prove (1) the defendant had a duty to conform her conduct to a specific standard of care, (2) the defendant failed to conform her conduct to the appropriate standard of care, (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries, (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries, and (5) actual damages. *Brewer v. J.B. Hunt Transport, Inc.*, 09-1408 (La. 3/16/10), 35

So. 3d 230, 240. If the plaintiff fails to establish any one of these elements, his claims must fail and he cannot recover. *Bellanger v. Webre*, 10-0720 (La. App. 1 Cir. 5/6/11), 65 So. 3d 201, 207, *writ denied*, 11-1171 (La. 9/16/11), 69 So. 3d 1149.

All motorists owe a general duty to observe what should be observed. *Mart v. Hill*, 505 So. 2d 1120, 1123 (La. 1987). Additional duties arise depending on the motorist's movements on the roadway in relation to other vehicles. A motorist making a right turn has a duty to make the turn as close as practicable to the right-hand curb or edge of the roadway. La. R.S. 32:101. Additionally, the right-turning motorist has a duty to make the turn only when her vehicle is properly positioned and the movement can be made with reasonable safety. La. R.S. 32:104A. Further, the right-turning motorist must signal the intention to turn for not less than one hundred feet before turning. La. R.S. 32:104B.

A motorist following behind another vehicle has a duty not to follow the leading vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway. La. R.S. 32:81A. A following motorist who collides with a leading vehicle is presumed to have breached this duty. *Brewer*, 35 So. 3d at 241. The following motorist may rebut the presumption of fault by establishing that he had his vehicle under control, closely observed the lead vehicle, and followed at a safe distance under the circumstances. *Anderson v. May*, 01-1031 (La. App. 5 Cir. 2/13/02), 812 So. 2d 81, 85. Additionally, if the following motorist establishes that he was suddenly confronted with an unanticipated hazard created by the lead vehicle that could not reasonably be avoided (a sudden emergency), then he will be adjudged free from fault for the ensuing rear-end collision. *Anderson*, 812 So. 2d at 86; *see also Brewer*, 35 So. 3d at 241. However, the rule of sudden emergency cannot be invoked by one who has not used due care to avoid the emergency. *Anderson*, 812

So. 2d at 86. The following motorist must exonerate himself from fault before he can completely avoid liability. *Matherne v. Lorraine*, 03-2369 (La. App. 1 Cir. 9/17/04), 888 So. 2d 244, 246.

William Gilmore testified that he was cautiously following the Fumar vehicle on Highway 59, keeping further back than normal because of lumber protruding from the rear of the Fumar vehicle.[2] He stated that he minded the Fumar vehicle's speed to keep from gaining on it. He explained that as they approached Florence Road, Fumar activated her *left* turn signal and moved her vehicle into the center turn lane, as if to turn left into the parking lot of the adjacent strip mall. Bridget Gilmore similarly testified that the Fumar vehicle signaled a left turn and moved into the center turn lane. As the motorcycle proceeded forward in the southbound lane, the Fumar vehicle suddenly turned to the right, in front of the Gilmores, toward Florence Road. William Gilmore testified that he took the only evasive action he could, which was applying the front and rear brakes, but was unable to avoid colliding with the rear quarter panel of the Fumar vehicle, between its rear-wheel and bumper.

The Gilmores' friends, the Ledets, were riding their motorcycle with the Gilmores and witnessed the accident. Lester Ledet testified that he was driving his motorcycle behind the Gilmores, with his wife, Kathy, riding as a passenger. Lester Ledet stated that the Fumar vehicle activated its left turn signal and moved left into the center turn lane, then turned to the right in front of the Gilmores. Kathy Ledet testified that she did not pay attention to the turn signal of the Fumar vehicle, but did see it move into the center turn lane and believed it was turning to the left. She testified that she was surprised to see it turn to the right.

---

[2] It is undisputed that the lumber was appropriately marked with a red flag and was clearly visible to Gilmore. It is not alleged that the lumber caused the accident.

In contrast, Fumar contends that Gilmore simply rear-ended her as she was turning onto Florence road. Fumar testified that she and her then-husband were returning home with a small load of lumber and that she was aware of the following motorcyclists, having seen them in her rear-view mirror. She explained that she activated her *right* turn signal as she approached Florence Road, which was the only road from which to enter her subdivision, and proceeded to turn right. She denied activating her left turn signal, moving to the center turn lane, or making a wide right turn. She testified that the motorcycle struck the rear of her vehicle as the right turn was nearly completed. Adam Fumar, her guest passenger at the time of the accident, corroborated her account.

The trial court found that all of the vehicles were traveling at a lawful speed and in a lawful manner. However, it credited the testimony of the Gilmores and Lester Ledet over that of the Fumars and found that the Fumar vehicle signaled a left turn. The trial court also credited the testimony of the Gilmores and the Ledets over that of the Fumars and found that the Fumar vehicle moved into the center lane before making what was effectively a wide right turn onto Florence Road. The trial court determined that the Fumar vehicle created a sudden emergency, explaining:

> The right-hand turn made by the [Fumar vehicle] put William Gilmore in a difficult position: to his left was the lumber jutting from the rear of the [Fumar vehicle]; to his right was a drainage ditch which dropped off steeply. While not exactly "between the devil and the deep blue sea," his available choices were not much better. The only place left for him to go was forward, standing hard on his brakes. Just before impacting the Fumar vehicle, Mr. Gilmore's motorcycle pitched onto the road; and then his front wheel struck the rear quarter panel of the Fumar vehicle.

Where a fact finder's determination is based on its decision to credit the testimony of one witness over another, that finding can virtually never be manifestly erroneous or clearly wrong unless objective evidence so contradicts 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. *Ryan v. Zurich American Ins. Co.*, 07-2312 (La. 7/1/08), 988 So. 2d 214, 222; *Graffia v. Louisiana Farm Bureau Cas. Ins. Co.*, 08-1480 (La. App. 1 Cir. 2/13/09), 6 So. 3d 270, 275. Fumar argues on appeal that physical evidence refutes the Gilmores' account and supports her version of what took place.

Louisiana State Trooper Jeremiah Bell responded to the scene and investigated the accident. He testified that when he arrived, he observed a motorcycle on its left side in the southbound lane of Highway 59 at the intersection with Florence Road. He photographed the scene and the damage to the Fumar vehicle. The photographs depict scuff marks on the Fumar vehicle between the right rear bumper and right rear tire. Additional photographs taken after the motorcycle was moved from the roadway indicate that the motorcycle's gas tank came to rest to the right side of the southbound lane.

Trooper Bell, who was not qualified as an expert, interpreted the scuff marks to mean that the motorcycle impacted the right rear corner of the Fumar vehicle as it was turning then traveled up along side of it. He did not see evidence that would indicate a perpendicular impact. However, Trooper Bell also testified that he did not witness the accident and could not determine from the skid marks on the street exactly where the Fumar vehicle was impacted. Further, Trooper Bell did not know whether the same evidence would result if the accident happened as the Gilmores described, with Fumar making a wide right turn and the motorcycle striking her vehicle at an angle. The objective evidence does not contradict the Gilmores' story so as to render it implausible.

Considering the foregoing, we find no manifest error in the trial court's determination that Fumar was at fault for creating a sudden emergency that caused the Gilmores' motorcycle to collide with her vehicle. We likewise find no merit to the defendants' contention that the trial court erred in failing to apply the

presumption of fault attributable to a rear-ending motorist. The trial court's conclusion that Fumar was one hundred percent at fault in causing the accident is reasonably supported by the record and will not be disturbed. *Cf. Duncan v. Kansas City Southern Railway Co.*, 00-0066 (La. 10/30/00), 773 So. 2d 670, 680, *cert. dismissed*, 532 U.S. 992, 121 S.Ct. 1651, 149 L.Ed.2d 508 (2001).

DAMAGES

The trial court's judgment awards damages to William Gilmore in the amount of $18,918.79, and to Bridget Gilmore in the amount of $44,750.29. On appeal, Fumar challenges elements of those awards, as itemized in the trial court's written reasons for judgment. However, the judgment at issue sets forth an *in globo* award for each that is not itemized. Appeals are taken from judgments not written reasons for judgment. *Wooley v. Lucksinger*, 09-0571 (La. 4/1/11), 61 So. 3d 507, 572. Written reasons serve as an explication of the trial court's determinations, but do not alter, amend, or affect the final judgment being appealed. *Id.* The trial court is not required to itemize the damages it awards, and does not err in awarding damages *in globo*. *See Gray v. Holiday Inns, Inc.*, 99-1292 (La. App. 1 Cir. 6/23/00), 762 So. 2d 1172, 1176; *Smith v. Travelers Indem. Co. of Rhode Island*, 374 So. 2d 708, 712 (La. App. 1 Cir. 1979). Accordingly, we review each of the *in globo* awards as a total award to each plaintiff, considering Fumar's challenges to specific elements of those awards as challenging the total awards as abusively high.

Judgments awarding damages *in globo* are normally presumed to award all items of damages claimed. *See Valentine v. Wells*, 540 So. 2d 344, 345-46 (La. App. 1 Cir. 1988), *writ denied*, 546 So. 2d 178 (La. 1989). Both William and Bridget Gilmore sought damages including (1) medical bills, (2) past, present, and future physical pain and suffering, (3) past, present, and future emotional pain and suffering, (4) ecomonic loss, (5) diminution of earning capacity, and (6) loss of

enjoyment of life. Thus, the *in globo* awards to William and Bridget Gilmore presumably include these general and special damages.

General damages are intended to compensate an injured plaintiff for mental or physical pain and suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitely in terms of money. *See Thongsavanh v. Schexnayder,* 09–1462 (La. App. 1 Cir. 5/7/10), 40 So. 3d 989, 1001, *writ denied,* 10-1295 (La. 9/24/10), 45 So. 3d 1074. Mental anguish is a recognized component of a general damages award. *See Duncan,* 773 So. 2d at 682.

The trier of fact is accorded great discretion in assessing general damages, such that its award should rarely be disturbed on appeal. La. Civ. Code art. 2324.1; *Guillory v. Lee,* 09–0075 (La. 6/26/09), 16 So. 3d 1104, 1117; *Youn v. Maritime Overseas Corp.,* 623 So. 2d 1257, 1261 (La. 1993), *cert. denied,* 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). There is no mechanical rule for calculating general damages, and reasonable persons frequently disagree about their measure in a particular case. *See Youn,* 623 So. 2d at 1261; *Stockstill v. C.F. Industries, Inc.,* 94–2072 (La. App. 1 Cir. 12/15/95), 665 So. 2d 802, 817, *writ denied,* 96–0149 (La. 3/15/96), 669 So. 2d 428. The role of an appellate court in reviewing general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. *Wainwright v. Fontenot,* 00-0492 (La. 10/17/00), 774 So. 2d 70, 74. It is only when the award is less or more than a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff that an appellate court should alter the award. *Youn,* 623 So. 2d at 1261.

Additionally, a plaintiff may ordinarily recover reasonable medical expenses incurred as a result of an injury. *Mack v. Wiley,* 07-2344 (La. App. 1 Cir. 5/2/08), 991 So. 2d 479, 489, *writ denied,* 08-1181 (La. 9/19/08), 992 So. 2d 932. Past

medical expenses are special damages that are capable of being determined with reasonable mathematical certainty and, as such, must be proven by the person seeking them by a preponderance of the evidence. *Id.* When claims for the accrued medical expenses are supported by medical bills, these expenses should be awarded unless there is contradictory evidence or reasonable suspicion that the bills are unrelated to the accident. *Id.* As in the case of general damages, a fact finder is afforded great discretion in its assessment of quantum of special damages. *Travis v. Spitale's Bar, Inc.*, 12-1366 (La. App. 1 Cir. 8/14/13), ___ So. 3d ___, ___.

In consideration of these legal principles, we now review the *in globo* awards made to each plaintiff to determine if the trial court abused its discretion.

William Gilmore

The trial court awarded William Gilmore damages totaling $18,918.79. With regard to his other damages, the trial court explained:

> Immediately after the accident, Mr. Gilmore lay pinned beneath the motorcycle for some five minutes before he was freed. During that time he saw people gathered around his unconscious wife. When he was able to reach her side he saw that she looked "not right." He accompanied her in the ambulance to the hospital, fearing for her safety. As for his own injuries, he suffered head trauma and ligament damage to his foot. While the head trauma has resolved, the ligament damage lingers, giving him shooting pains almost daily. Mr. Gilmore's medical expenses totaled $3,918.79.
>
> . . . .
>
> Both the Gilmores testified that motorcycling and related activities were the main focus of their leisure and social hours. Now Mrs. Gilmore is frightened of motorcycle riding, and the couple's attendance at motorcycle rallies has sharply dropped off.

The trial court's summation of William Gilmore's injuries, continued pain, and the effects of the accident on his lifestyle, is supported by the record. It is undisputed that his medical expenses totaled $3,918.79. Considering this, we do not find that the total damage award of $18,918.79, is more than a reasonable trier

of fact could assess for the effects of this particular accident and injury to William Gilmore. Accordingly, we will not disturb the award.

Bridget Gilmore

The trial court awarded Bridget Gilmore damages totaling $44,750.29. After careful consideration, we find that this amount is supported by the medical records, the deposition of Dr. Kevin Plaisance, and the testimony adduced at trial regarding Bridget Gilmore's injuries.

The trial court explained in its written reasons:

> Bridget Gilmore's injuries were more severe [than William Gilmore's injuries]. She was thrown from the motorcycle in the accident and remembers coming to at the hospital. She suffered a severe concussion with approximately 30 minutes of unconsciousness, a torn chest muscle, a bruised left hip and tenderness in her neck in addition to various other contusions and bruises. She suffered much pain initially for more than a week, enough to make her nauseous, and she could not think clearly. She went to her family physician, Dr. Kevin Plaisance. Dr. Plaisance treated her both before and after the accident. He testified in his deposition that she had no physical complaints prior to the accident, but that afterwards she reported tenderness on her left chest wall and left hip pain. It was his opinion that her problems, including her mental acuity deficiencies from the concussion, were all caused by the accident. He treated her with over-the-counter anti-inflammatory medications, prescribed use of a TENS unit and ultrasound treatment, and sent her to physical therapy. With the physical therapists, Mrs. Gilmore treated for some sixteen non-continuous weeks, returning to therapy as the pain recurred. . . .
>
> Mrs. Gilmore testified that she feels she is not fully recovered. She is unable to exercise as much as she has in the past; this problem is aggravated by the fact that she is by profession a teacher of health and fitness. She finds that she can no longer show students how to exercise. Her neck remains stiff, and she complains of irritability and sleeplessness. . . .
>
> Both the Gilmores testified that motorcycling and related activities were the main focus of their leisure and social hours. Now Mrs. Gilmore is frightened of motorcycle riding, and the couple's attendance at motorcycle rallies has sharply dropped off.

After reviewing the record herein, we find no basis for reducing the damages awarded to Bridget Gilmore as Fumar asks.

ANSWER TO APPEAL

Bridget Gilmore has answered this appeal, pointing out that the judgment's *in globo* award to her of $44,750.29 is $5,000.00 less than the total of the amounts itemized in the trial court's written reasons. She requests that the judgment be amended to award her $49,750.29 in conformity with the written reasons for judgment.

Appellate courts review judgments, not written reasons for judgment. *Wooley v. Lucksinger*, 09-0571 (La. 4/1/11), 61 So. 3d 507, 572; *see also* La. Code Civ. Pro. art. 1918. The reasons, whether oral or written, form no part of the judgment, serving only as an explication of the trial court's determinations. *Wooley*, 61 So. 3d at 572. The reasons do not alter, amend, or affect the final judgment that is before the appellate court on appeal. *See Id.*

Mrs. Gilmore references Louisiana Code of Civil Procedure article 1951, which provides for the amendment of a final judgment by the trial court to alter the phraseology but not the substance of the judgment, or to correct an error of calculation.[3] Although Article 1951 authorizes correction of clerical errors, it does not authorize substantive amendments to the judgment. *Denton v. State Farm Mut. Auto. Ins. Co.*, 08-0483 (La. 12/12/08), 998 So. 2d 48, 52. Substantive amendments are not authorized by Article 1951, even if the alteration is made merely to express the trial court's actual intention. *McGee v. Wilkinson*, 03-1178 (La. App. 1 Cir. 4/2/04), 878 So. 2d 552, 554. For correction of a substantive error in a judgment, recourse must be had through a timely application for new trial or a timely appeal. *Hebert v. Hebert*, 351 So. 2d 1199, 1200 (La. 1977). On appeal, the alleged error of the trial court would be subject to the appropriate standard of

[3] Since this appeal was taken, Article 1951 was amended by 2013 Acts La. Acts, No. 78, §1, and now requires a hearing before a final judgment is amended, unless all parties consent or no opposition to the amendment is filed after notice of the requested amendment.

appellate review. Consequently, whether the alleged error can simply be corrected, or must be reviewed under the appellate review standard, turns on whether the error is clerical or substantive.

An amendment to a judgment that adds to, subtracts from, or in any way affects the substance of the judgment, is considered a substantive amendment. *McGee*, 878 So. 2d at 554. In contrast, clerical errors, including errors of calculation, leave no room for the exercise of any judicial function. *See State v. F.B. Williams Cypress Co.*, 61 So. 988, 994 (La. 1913) (explaining, "as the fact that apples fall to, and not from, the earth is established beyond judicial interference, so the facts that 2 + 2 = 4 and that a smaller number subtracted from a larger one leaves a certain, immutable remainder, the amount of which may be ascertained by the use of a mechanical device.").

We find that adding $5,000.00 to the *in globo* damage award involves a substantive change in the judgment. The judgment on appeal does not contain the calculation that is allegedly erroneous; rather, the written reasons for judgment differ from the *in globo* damages award stated in the signed judgment. We cannot conclude as a matter of immutable fact, and without resorting to the exercise of judicial discretion and interpretation, that the trial court intended to award $5,000.00 more than was included in the signed judgment. Accordingly, the judgment cannot simply be amended to conform to the written reasons as Mrs. Gilmore requests.

Having determined that the requested relief would result in a substantive amendment to the judgment, the damage award can be modified only after a determination that the trial court abused its discretion in awarding Mrs. Gilmore damages in the amount of $44,750.29. Considering Mrs. Gilmore's argument as challenging the trial court's damage award as being abusively low, we have already determined herein that the trial court's *in globo* damage award of

$44,750.29 to Mrs. Gilmore is supported by the medical records, the deposition of Dr. Kevin Plaisance, and the testimony adduced at trial regarding Mrs. Gilmore's injuries. Therefore, we cannot conclude that the trial court abused its discretion in rendering judgment awarding that amount, despite it being $5,000.00 less than was set forth in the written reasons.

Lastly, we recognize that under the authority granted by Louisiana Code of Civil Procedure article 2164, the "appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." Comment (a) to Article 2164 confirms the breadth of our authority by declaring that the "purpose of this article is to give the appellate court complete freedom to do justice on the record irrespective of whether a particular legal point was made, argued or passed on by the court below." Nonetheless, because the judgment does not reflect a clerical error, and because we do not find that the trial court abused its discretion in making the *in globo* damage award, we do not find that the amendment is warranted pursuant to the authority of Article 2164.

CONCLUSION

For the reasons set forth, the judgment of the trial court is affirmed. The relief requested in the answer to appeal is denied. Costs of this appeal are assessed to Kimberly Fumar and Allstate Insurance Company.

AFFIRMED.