NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1172

MARY HELEN BORCK

VERSUS

AMANDA REGISTER AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: February 10, 2012

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 547,879

Honorable Wilson E. Fields, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

KUHN, J CONCURS IN PART & DISSENTS IN PART AND WILL ASSIGN REASONS

GUIDRY, J. CONCURS IN THE RESULT

WHIPPLE, J.

In this automobile-bicycle collision case, defendants appeal the trial court's judgment, which, following a jury trial, granted plaintiff's motion for judgment notwithstanding the verdict, assessed one hundred percent fault to the defendant automobile driver, and increased the amount of damages awarded to plaintiff. For the following reasons, we amend in part and affirm as amended.

FACTS AND PROCEDURAL HISTORY

On the morning of March 2, 2006, plaintiff, Mary Helen Borck, was riding her bicycle on the sidewalk along Perkins Road in Baton Rouge, traveling against the flow of traffic. Defendant, Amanda Register, was traveling in her Jeep Cherokee on Valley Street, which comes to an end and forms a T-intersection with Perkins Road. At the time of the accident in question, the traffic signal controlling the intersection of Perkins Road and Valley Street was green for east and westbound traffic on Perkins Road and was red for traffic on Valley Street.

As Borck approached the intersection of Perkins Road and Valley Street, she observed that the traffic on Valley Street was controlled by a red light, the traffic on Perkins Road was controlled by a green light, and the vehicle driven by Register was completely stopped at the light on Valley Street, behind the white lines of the crosswalk. Based on her observations, Borck proceeded forward into the intersection, riding her bike into the crosswalk. However, after Borck entered the intersection, Register proceeded to make a right turn on red without ever looking to her right to ascertain whether anyone was in the crosswalk or whether her path was clear. Accordingly, Register's vehicle collided with Borck, striking her in the crosswalk. As a result of the accident, Borck sustained bodily injuries,

including a fracture to the tibial plateau of her left knee, lacerations on her left foot and bruises on her left arm.

Following the accident, Borck filed suit against Register and State Farm Mutual Automobile Insurance Company ("State Farm"), both in its capacity as Register's automobile liability insurer and as Borck's uninsured/underinsured ("UM") motorist insurer. A jury trial was held in this matter on March 22, 23, and 24, 2010, and following trial, the jury returned a verdict, finding Register 40% at fault and Borck 60% at fault in causing the accident and further assessing damages in the amount of $65,000.00 for future physical pain and suffering. The jury failed to award any amount of damages for past physical pain and suffering, mental anguish and distress, loss of enjoyment of life, past lost wages, past medical expenses or future medical expenses.

After the trial court entered judgment in accordance with the jury's verdict, Borck and Register and State Farm filed motions for judgment notwithstanding the verdict ("JNOV"). In support of her motion for JNOV, Borck contended that the jury's finding that Borck was at fault in causing the accident constituted legal error and, further, that the jury's failure to award Borck special damages and past and present general damages was legally erroneous. In support of their motion for JNOV, Register and State Farm averred that, assuming that the damage award was reasonable, the method by which the jury allotted all damages awarded to future physical pain and suffering "may be in error." Thus, Register and State Farm contended that the trial court should "clarify" the damage award by allocating and designating $32,708.31 of the amount awarded as past special damages and allocating and designating the remaining $32,291.69 of the damages awarded as past general damages.

Following argument on the cross-motions for JNOV, the trial court gave oral reasons for judgment, in which the court found merit to Borck's motion for JNOV, concluding that Register was 100% at fault in causing the accident and that Borck was entitled to damages in the amounts of $24,837.00 in past medical expenses, $7,500.00 in future medical expenses, $7,871.31 in lost wages, and $100,000.00 for past and future pain and suffering. Thus, by judgment dated April 5, 2011, the trial court granted Borck's motion for JNOV, denied Register and State Farm's motion for JNOV, and rendered judgment in favor of Borck and against Register and State Farm in the amount of $140,208.20.[1]

From this judgment, Register and State Farm, as Register's liability insurer, appeal, contending that:

(1) The trial court committed error when it rendered JNOV in favor of Borck, finding Register to be 100% at fault in causing the accident;

(2) the trial court erred when it refused to include a proposed jury instruction on Baton Rouge City Ordinance 11:23(a), which provides that no person shall ride a bicycle on a sidewalk within a business district; and

(3) the trial court committed legal error in entering JNOV and increasing the damages awarded to Borck to $140,208.20.

State Farm also appealed in its capacity as Borck's UM insurer.

[1]In the judgment, the trial court awarded a lump sum of $140,208.20 in damages, rather than delineating separate elements of damages awarded. The court further ordered that State Farm's liability as Register's liability insurer was limited to its policy limits of $100,000.00, together with legal interest as set forth in the judgment, and that State Farm's liability as Borck's UM carrier was limited to its policy limits of $22,500.00, together with legal interest.

Although numbered differently, it asserted the same assignments of error as presented by Register and State Farm in its capacity as Register's liability insurer. For ease of discussion, the assignments of error will be referred to as numbered in State Farm and Register's brief.

DISCUSSION

Proposed Jury Instruction
(Assignment of Error No. 2)

In this assignment of error, Register and State Farm contend that the trial court erred in refusing to give the jury an instruction on Baton Rouge City Ordinance 11:23(a), which provides that no person shall ride a bicycle upon a sidewalk within a business district. We address this assignment of error first because *de novo* review may be required where the jury was erroneously instructed and the error contributed to the verdict. See Wooley v. Lucksinger, 2009-0571 (La. 4/1/11), 61 So. 3d 507, 574.

Louisiana Code of Civil Procedure article 1792(B) requires that a trial judge instruct the jury on the law applicable to the cause submitted to them. The trial judge is responsible for reducing the possibility of confusing the jury and may exercise the right to decide what law is applicable and what law it deems inappropriate. Wooley, 61 So. 3d at 573. The question considered on review is whether the trial judge adequately instructed the jury. See Adams v. Rhodia, Inc., 2007-2110 (La. 5/21/08), 983 So. 2d 798, 804.

Adequate jury instructions are those which fairly and reasonably point out the issues and which provide correct principles of law for the jury to apply to those issues. While the trial judge must correctly charge the jury, the trial judge is under no obligation to give any specific jury instructions that may be submitted by either party. However, if the trial court omits an

applicable, essential legal principle, its instruction does not adequately set forth the issues to be decided by the jury and may constitute reversible error. Adams, 983 So. 2d at 804.

Nonetheless, an appellate court must exercise great restraint before it reverses a jury verdict because of erroneous jury instructions. Trial courts are given broad discretion in formulating jury instructions, and a trial court judgment should not be reversed so long as the charge correctly states the substance of the law. Adams, 983 So. 2d at 804.

In the instant case, State Farm, in its capacity as Borck's UM carrier, submitted proposed jury instruction number 16, which provided as follows:

> Baton Rouge City Ordinance 11:23(a) states: **"No person shall ride a bicycle upon a sidewalk within a business district."** A business district is defined [in] the Code of City Ordinances, Title 11, Chapter 1 as meaning the "territory contiguous to and including a highway where within any six hundred (600) feet along such highway where buildings are in use for business or industrial purposes, including but not limited to hotels, banks or office buildings, railroad stations and public building[s] which occupy at least three hundred (300) feet of frontage on one side or three hundred (300) feet collectively on both sides of the highway. [Emphasis in original].

In declining to give the jury the proposed instruction, the trial court stated that defendants had not established through the evidence presented at trial that the requisite footage of business establishments existed in this area of Perkins Road. On appeal, defendants challenge this ruling, contending that the testimony of Borck and Register, as well as photographs of the area, were sufficient to establish that the area in question is a business district.

While both Borck and Register did testify as to certain businesses along Perkins Road, the testimony also established that the area on the other side of Perkins Road is strictly residential. Moreover, as noted by the trial court, no specific testimony or evidence was presented to establish that at

least 300 feet of frontage within that 600-foot area of Perkins Road were in use for business or industrial purposes.

Furthermore, and perhaps more importantly, Borck testified, and Register admitted, that the accident **did not occur on the sidewalk**. Rather, Borck was in the roadway, within the crosswalk, at the time that Register struck Borck with her vehicle. Thus, under the particular facts of this case, we cannot conclude that the trial court erred in refusing to give the requested jury charge, which incorporated ordinances that were not applicable or appropriate. Additionally, on review of the instructions as a whole actually given to the jury herein, we find the instructions given by the trial court adequately set forth the applicable law, including the duties of both Register and Borck. Accordingly, we find no merit to this assignment of error.

JNOV on Apportionment of Fault
(Assignment of Error No. 1)

In this assignment of error, Register and State Farm contend that the trial court erred in granting JNOV on the issue of fault and reapportioning 100% fault to Register. A JNOV is a procedural device authorized by LSA-C.C.P. art. 1811 where the trial court may correct a legally erroneous jury verdict by modifying the jury's finding of fault or damages, or both. See LSA-C.C.P. art. 1811(F); Adams v. Parish of East Baton Rouge, 2000-0424 (La. App. 1st Cir. 11/14/01), 804 So. 2d 679, 687, writ denied, 2002-0448 (La. 4/19/02), 813 So. 2d 1090. The standard to be used in determining whether a JNOV has been properly granted has been set forth in our jurisprudence as follows:

> A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not

> merely when there is a preponderance of evidence for the mover. If there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. In making this determination, the court should not evaluate the credibility of the witnesses and all reasonable inferences or factual questions should be resolved in favor of the non-moving party.

Davis v. Wal-Mart Stores, Inc., 2000-0445 (La. 11/28/00), 774 So. 2d 84, 89 (citations omitted).

In general, the standard of review of a JNOV on appeal is twofold. First, we must determine whether the jury verdict is supported by competent evidence and is not wholly unreasonable. To make this determination, we must, after considering all of the evidence in the light most favorable to the party opposing the motion, find that it points so strongly and overwhelming in favor of the moving party that reasonable persons could not arrive at a contrary verdict on the issue. Second, after determining that the trial court correctly applied its standard of review as to the jury verdict, the appellate court reviews the JNOV using the manifest error standard of review. Adams, 804 So. 2d at 687.

Thus, our initial inquiry in this case is: did the evidence overwhelmingly support Borck's contention that reasonable jurors could not have apportioned 60% fault to Borck and only 40% fault to Register. If so, then the trial court was correct in granting the JNOV, and we must then conduct a manifest error review of the trial court's independent apportionment of fault. See Cavalier v. State Department of Transportation and Development, 2008-0561 (La. App. 1st Cir. 9/12/08), 994 So. 2d 635, 645. If, however, reasonable men in the exercise of impartial judgment might reach a different conclusion, then it was error to grant the motion, and the jury's apportionment of fault should be reinstated. Considering the

particular facts and circumstances presented herein, as discussed below, we agree with the trial court that the evidence overwhelmingly supports the conclusion that reasonable jurors could not have apportioned fault in the percentages the jury assessed herein.

With regard to Register's duties as a motorist attempting to turn right in the face of a red light, LSA-R.S. 32:232(3) governs, providing, in pertinent part, as follows:

> (a) Vehicular traffic facing a steady circular red signal alone shall stop at a clearly marked stop line, or if none, then before entering the crosswalk on the near side of the intersection, ... and shall remain standing until an indication to proceed is shown except as provided in Subparagraph (c) of this Paragraph.
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> * * *
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> (c) Except when a sign prohibits a turn, vehicular traffic facing any steady red signal may **cautiously** enter the intersection to turn right, ... after stopping as required by Subparagraph (a) ... of this Paragraph. **Such vehicular traffic shall yield the right-of-way to pedestrians lawfully within an adjacent crosswalk and to other traffic lawfully using the intersection.**

(Emphasis added). Although the requirement to yield before turning right on a red light is primarily designed to require the driver to strongly direct her attention to the left for traffic which may be coming legally in the lane which she intends to enter, there is also a duty upon the driver to ascertain that there are clear pedestrian walkways. Moreover, even if oncoming traffic would not be expected in the lane which a turning motorist intends to enter, such a driver cannot be oblivious to the traffic situation on the street she enters against the red light. Weber v. Phoenix Assurance Company of New York, 273 So. 2d 30, 33 (La. 1973). A primary rule of safety in the operation of a motor vehicle is to observe in the direction in which one is proceeding. Moreover, the law has never allowed one to assume his pathway is clear. Weber, 273 So. 2d at 33.

Conversely, with regard to Borck's duties, a bicyclist is subject to the same duties applicable to drivers of motor vehicles. LSA-R.S. 32:194. One of those duties is to keep a proper lookout at all times. Clement v. State Department of Transportation and Development, 528 So. 2d 176, 180 (La. App. 1st Cir.), writ denied, 532 So. 2d 157 (La. 1988). Additionally, every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable. LSA-R.S. 32:197. Moreover, a "vehicle" as defined in Title 32, governing motor vehicles and traffic regulation, includes a "bicycle," LSA-R.S. 32:1(92), and generally, all vehicles must be driven on the right half of the roadway. LSA-R.S. 32:71(A); LeBlanc v. Fidelity Fire & Casualty Insurance Company, 93-0146 (La. App. 1st Cir. 3/11/94), 633 So. 2d 891, 893.

In determining the degree of fault to be assigned to negligent actors, the factors to be considered are: (1) whether the conduct resulted from inadvertence or involved awareness of the danger; (2) how great a risk was created by the conduct; (3) 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. Watson v. State Farm Fire and Casualty Insurance Company, 469 So. 2d 967, 974 (La. 1985).

In the instant case, as Register approached the intersection of Valley Street and Perkins Road, she undisputedly was faced with a red light. Although she stopped at the intersection behind the white line demarcating the crosswalk and then looked to the left, Register acknowledged that she never looked to her right to ascertain whether anyone was in the crosswalk or whether her path was clear. Rather, without ever having looked to the right, she proceeded to attempt the right turn onto Perkins Road while traffic on Valley Street was governed by a red light. Indeed, Register

acknowledged that she did not see Borck before the collision occurred, but only felt and heard the impact, undoubtedly because she was looking off to the left and admittedly never looked to the right to ascertain whether her path was clear before attempting the right turn on red.

On the other hand, as Borck approached the intersection, she observed that the traffic on Perkins Road, along which she was traveling, was governed by a green light. She further observed that Register's vehicle was stopped at the red light on Valley Street behind the crosswalk line. Accordingly, Borck determined that it was safe for her to traverse the intersection. Only after Borck had entered the intersection did Register accelerate in an attempt to make the right turn, leaving Borck with insufficient time to avoid being hit by Register's vehicle and resulting in the **center** portion of Register's front bumper colliding with Borck's left knee.

Although Borck was traveling against the flow of traffic at the time she entered the intersection, Borck explained that she did so because she believed it was the safest bicycle route for her to take. Borck explained that she was riding her bicycle to work and that the vehicular traffic on Perkins Road was heavy during this rush-hour time. In order for Borck to cycle on the other side of Perkins Road, with the flow of traffic, she would have been required to cross five lanes of traffic on Perkins Road, and then later cross back over Perkins Road to reach her place of work. Given the heavy traffic along Perkins Road, Borck determined that the risk of crossing Perkins Road

twice in order to cycle with the flow of traffic was simply too dangerous.[2]

Register, on the other hand, was aware that her travel was governed by a red light and was further aware of the crosswalk at the intersection. Thus, Register should also have been aware that someone could have been utilizing the crosswalk at that intersection. Nonetheless, Register simply failed to look to the right to ascertain whether the crosswalk was occupied or whether her path was clear for her intended right-hand turn on red.

Considering the foregoing and the evidence as a whole in the light most favorable to Register and State Farm, we must agree with the trial court that reasonable jurors could not have apportioned only 40% fault to Register. Accordingly, we conclude that the trial court was correct in granting Borck's motion for JNOV as to the issue of apportionment of fault. See Pino v. Gauthier, 633 So. 2d 638, 653-655 (La. App. 1st Cir. 1993), writs denied, 94-0243, 94-0260 (La. 3/18/94), 634 So. 2d 858, 859.

Nonetheless, upon reviewing the trial court's independent assessment of fault, we must further conclude that the trial court was manifestly erroneous in finding Borck totally free from fault in causing the accident and, thus, in apportioning 100% fault to Register. See Pino, 633 So. 2d at 654-655 (wherein this court determined that the trial court had properly granted JNOV as to the trier of fact's apportionment of fault, but then further concluded that the trial court erred in its independent assessment of fault). As discussed above, Borck was traveling against the flow of traffic when she

[2]The record further establishes that the area between Perkins Road and the adjacent sidewalk along the area where the accident occurred consisted of a four-inch gutter, thus also making cycling along the shoulder of Perkins Road precarious.

crossed the intersection, despite her duty to ride as near to the right side of the roadway as practicable. Although there were legitimate safety concerns supporting her decision to travel against the flow of traffic, if Borck had been traveling on the right side of the roadway, she obviously would have been more visible to vehicles at an intersection attempting to make a right-hand turn on the roadway. Thus, the trial court manifestly erred in finding Borck free from fault herein. Having found that the trial court was clearly wrong in its apportionment of fault, this court must adjust the fault determination, but only to the extent of lowering it to the highest point, or, conversely, raising it to the lowest point, that was reasonably within the trial court's discretion. Clement v. Frey, 95-1119 (La. 1/16/96), 666 So. 2d 607, 610-611. Accordingly, we must raise the percentage of fault attributable to Borck to the lowest amount the trial court could have assessed and lower Register's percentage of fault to highest amount the trial court could have reasonably assessed within its discretion. Considering the respective actions of the parties herein, we reapportion fault 75% to Register and 25% to Borck.[3]

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[3]In doing so, we recognize that there is jurisprudence wherein recovery has been denied to bicyclists injured while traveling down the wrong side of the road. See e.g. LeBlanc, 633 So. 2d at 892-893, and Crump v. Ritter, 583 So. 2d 47 (La. App. 2nd Cir. 1991). However, we find that the facts of the instant case warrant a different result. Specifically, we note that both LeBlanc and Crump are distinguishable from the instant case in that there was no suggestion in either case of any negligence or fault on the part of the motorists therein. Rather, in both cases, the negligent acts of the bicyclists were found to be the cause of the accidents in question. In LeBlanc, which also involved an intersectional collision between an automobile and a bicycle, the "T" intersection was controlled by a stop sign rather than a traffic light, there was no mention of a crosswalk at the intersection, and, importantly, the automobile driver had looked both ways and forward again before executing the turn, while the bicyclist made no effort to avoid the collision. LeBlanc, 633 So. 2d at 892-893. Similarly, in Crump, which involved an intersectional collision where the bicyclist was riding his bicycle against the flow of traffic down a one-way street, the intersection was controlled by a stop sign, there was no mention of a crosswalk at the intersection, and the court found no liability on the part of the automobile driver who had observed that her way was clear "ahead and to her right." Crump, 583 So. 2d at 50-51.

Moreover, barring a plaintiff who may be guilty of a traffic violation from recovering for her injuries would make the provisions of LSA-C.C. art. 2323 meaningless. Instead, with the adoption of comparative negligence principles, courts are

JNOV on Damages
(Assignment of Error No. 3)

In this assignment of error, Register and State Farm contend that the trial court erred in granting Borck's motion for JNOV on the issue of damages and that the total amount awarded by the jury was reasonable and appropriate and, as such, was not an abuse of discretion.

If the trial court determines that a JNOV is warranted because reasonable persons could not differ in deciding that an award is abusively high or low, then the trial court must determine the proper amount of damages. Cavalier, 994 So. 2d at 644. Where the appellate court concludes that the trial court properly granted JNOV as to damages, the appellate court then reviews the trial court's award of general damages under the abuse of discretion standard and its award of special damages under the manifestly erroneous standard of review. Graffia v. Louisiana Farm Bureau Casualty Insurance Company, 2008-1480 (La. App. 1st Cir. 2/13/09), 6 So. 3d 270, 273-274.

As stated above, the jury returned a verdict which assessed Borck's damages for future pain and suffering at $65,000.00, but failed to award any amount of damages for past physical pain and suffering, mental anguish and distress, loss of enjoyment of life, past lost wages, past medical expenses or future medical expenses. Although the jury verdict form clearly awarded $65,000.00 for future physical pain and suffering, and no amount for any other item of damages, defendants urge on appeal that "roughly half" the amount awarded represented Borck's past medical bills and past lost wages and "[t]he jury then awarded a like amount for pain and suffering." We are

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obligated to look at the actions of both parties to ascertain what part, if any, each party's actions played in the accident that occurred. See Schmidt v. Chevez, 2000-2456 (La. App. 4th Cir. 1/10/01), 778 So. 2d 668, 671-672.

unpersuaded by defendants' speculative attempt to recharacterize the damages awarded by the jury.

Rather, with regard to the jury's failure to award any sum of damages other than for future pain and suffering, we note that a trier of fact errs when it fails to award the full amount of medical expenses proven by a victim. Carpenter v. Johnson, 95-0431 (La. App. 1st Cir. 12/15/95), 664 So 2d 1354, 1358; Taylor v. Tulane Medical Center, 98-1968, 98-1969 (La. App. 4th Cir. 11/24/99), 751 So. 2d 949, 962. Similarly, a plaintiff who is forced to use annual, compensatory, or sick leave while recovering from injury is entitled to recover the value of that leave measured at the plaintiff's regular rate of pay. Fruge v. Thornhill, 560 So. 2d 909, 911 (La. App. 1st Cir.), writ denied, 567 So. 2d 618 (La. 1990). In the instant case, Borck presented evidence of past medical expenses and time missed from work for which she was required to use leave, both of which were clearly related to the accident in question. Nonetheless, the jury declined to make any award for these elements of damages, and in so refusing, it erred. Moreover, we must conclude that the jury's award of future general damages, but its refusal to award any past general damages is inconsistent in light of the record. See generally Harris v. Delta Development Partnership, 2007-2418 (La. App. 1st Cir. 8/21/08), 994 So. 2d 69, 82. Accordingly, we find no error in the trial court's grant of JNOV as to damages. Having found that JNOV was properly granted as to the damages awarded, we must now review the trial court's assessment of damages awarded as the lump sum of $140,208.20.

As a result of the accident in question, Borck injured her left knee and sustained lacerations on her left foot and bruises on her left arm. She was taken by ambulance to Our Lady of the Lake Hospital, where she was initially treated in the emergency room. She underwent a CT scan and x-

rays, which revealed a fracture to the tibial plateau of her left knee. A deep laceration on her foot was sutured with ten stitches, her knee was placed in an immobilizer, and she was administered Lortab for pain. Borck was instructed to follow up with an orthopedist for the fractured tibial plateau and was given a prescription for Percocet for pain. Borck also began experiencing headaches by the afternoon of the accident, which eventually subsided a few days later.

Thereafter, Borck was treated by Dr. Richard Robichaux, an orthopedic surgeon. In an effort to repair the fracture, Dr. Robichaux was required to perform an open reduction and internal fixation. This surgery required general anesthesia and involved making an incision, "reducing" the fracture (by "put[ting] the broken pieces in place"), and securing the bone with metal plates and screws. The hardware remains in her knee.

Because of the nature of this type of injury, the bone is very slow to heal, taking about three months to completely heal. Thus, Dr. Robichaux explained that her recovery required that the knee be non-weight bearing and that Borck use crutches for almost three months. Borck's recovery also included physical therapy to work on muscle strength and rehabilitation of the leg and knee. During those months of her recovery, Borck experienced problems sleeping due to pain in her leg and the discomfort caused by the immobilizer she was forced to wear. She also had problems with performing daily activities due to pain and immobility. During this period, Borck was forced to miss work and, thus, used approximately 250 hours of sick leave, representing wages of $7,871.31. Also, Borck's medical expenses as of the time of trial totaled approximately $24,000.00.

Moreover, while Borck's surgery was considered successful, she has continued to suffer pain and swelling in her left leg. She also has a

permanent scar on her left knee. Borck, who was very athletic and active prior to the accident, can no longer walk for long distances, nor can she stand for long periods of time. For instance, on Thanksgiving in 2008, Borck prepared dinner at her house, which involved some standing the evening before and on Thanksgiving Day. As a result, Borck had to return to the orthopedist for treatment due to redness and increased swelling in her knee. Borck also has trouble fully bending her left knee and kneeling on that knee, and cold weather periodically causes her problems with her knee. Also, in December 2009, Borck again returned to Dr. Robichaux for treatment because she had begun to experience problems with her right knee due to overcompensating to protect the left knee.

Although Borck had not begun to exhibit evidence of arthritic changes in her knee when x-rays were taken in December 2008, Dr. Robichaux explained that post traumatic arthritis in an injured joint is "quite common." He further opined that there is a distinct possibility that Borck will have to undergo arthroscopy to clean out "debris" in the injured knee, surgery to remove the hardware, or even knee joint replacement in the future. Borck's physical limitations also affected her emotionally, and she experienced anxiety about her condition and possible future surgeries.

Considering the foregoing and the record as a whole, we cannot conclude that the trial court abused its discretion in awarding Borck $140,208.20 in total damages, representing both special and general damages suffered by her as a result of the accident. Accordingly, we find no merit to this assignment of error.

CONCLUSION

For the above and foregoing reasons, the April 5, 2011 judgment of the trial court, granting Borck's motion for JNOV and awarding damages, is

amended to reflect that Borck was 25% at fault in causing the accident, and Register was 75% at fault. Reducing the damages fixed by the trial court by the plaintiff's percentage of fault as amended herein, judgment is hereby rendered to provide for judgment in favor of Borck and against Register and State Farm in the total amount of $105,156.15, representing a 25% reduction for Borck's percentage of fault herein, subject to a credit for any sums previously paid. Additionally, the judgment is amended to provide that the liability of State Farm in its capacity as the liability insurer of Amanda Register is limited to its policy limits of $100,000.00, together with legal interest from date of judicial demand until paid, and further that the liability of State Farm in its capacity as Mary Helen Borck's uninsured motorist carrier for the excess judgment is limited to its policy limits of $22,500.00, together with legal interest from date of judicial demand until paid. In all other respects, the judgment is affirmed. Costs of this appeal are assessed equally against all appellants and appellee.

AMENDED IN PART, AND AS AMENDED, AFFIRMED.

MARY HELEN BORCK

VERSUS

AMANDA REGISTER AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2011 CA 1172

FEB 14 2012

KUHN, J., dissenting in part.

I agree with that portion of the opinion which concludes that the trial court erred in finding Borck 100% free from fault and reapportions fault 75% to Register and 25% to Borck. But I believe that the trial court abused its discretion in awarding the lump sum amount of $140,208.20. The lump sum amount of $65,000.00 fully compensates Borck for her damages. The record shows that while she had an expensive surgical procedure, according to Dr. Richard Robichaux, her treating physician, he only had to treat Borck five times after the surgery. Dr. Robichaux testified that Borck would not need surgery to remove the hardware any time in the near future, pointing out that she was doing 99.9% of the activities she wanted to do. He explained that the only reason she would need the hardware removed was if she were to need a knee replacement, which was an event he could not say with any medical certainty would be required in the future. Dr. Robichaux saw no arthritis developing and could not say with any medical certainty that it would develop. In light of the testimony of Borck's treating physician, it is evident that Borck was able to fully heal within about five months. Therefore, $65,000.00 is the maximum amount that the trial court could have awarded for all items of damages to which Borck was entitled. Accordingly, I dissent from that portion of the opinion which affirms the trial court's determination that Borck sustained damages in the amount of $140,208.20.