NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0302

CHARLES GLYN BARDWELL II

VERSUS

MARY P. MOREAU AND HECTOR P. PEREZ

Judgment Rendered: September 14, 2011.

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On Appeal from the
21st Judicial District Court,
In and for the Parish of Tangipahoa,
State of Louisiana
Trial Court No. 2006-0000817

The Honorable Brenda Bedsole Ricks, Judge Presiding

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Hobart O. Pardue, Jr. DeVan Pardue Springfield, La.	Attorneys for Plaintiff/Appellee, Charles Glyn Bardwell, II
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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

Parro, J., dissents and will assign reasons.

CARTER, C.J.

In this action for damages arising out of a multi-motor vehicle collision, the defendant/appellant, Safeway Insurance Company of Louisiana, appeals the district court judgment granted in favor of appellees, Charles Glyn Bardwell, II and State Farm Mutual Automobile Insurance Company. Safeway assigns error to the district court's assessment of fault and general damages award.

After a thorough review of the record, we find that the district court's assessment of fault was not manifestly erroneous. *See Brewer v. J.B. Hunt Transport, Inc.*, 09-1408 (La. 3/16/10); 35 So. 3d 230, 239. And, we further conclude that the district court's determination of damages in the instant case was not an abuse of discretion. *See Guillory v. Lee,* 09-0075 (La. 6/26/09), 16 So. 3d 1104, 1117.

For the foregoing reasons, the judgment of the district court is affirmed by summary disposition in accordance with Uniform Rules-Louisiana Courts of Appeal, Rule 2-16.2(A)(2), (7), and (8). Costs of this appeal are assessed to the defendant/appellant, Safeway Insurance Company of Louisiana.

AFFIRMED.

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

PARRO, J., dissenting.

I respectfully disagree with the majority in this case, because I believe that the trial court committed errors of both law and fact in rendering its judgment.

This matter arose out of an accident involving vehicles driven by Mary Moreau, Francis Manale, Hector Perez, and the plaintiff, Charles Glyn Bardwell, II. A review of the record indicates that, on the date of the accident, Ms. Moreau was driving westbound on Interstate 12 in the left lane, when she decided to turn left into a crossover road between the westbound and eastbound lanes in order to proceed in the opposite direction. As Ms. Moreau slowed her vehicle to execute the allegedly illegal turn, Mr. Manale, who was driving the vehicle immediately behind her, was able to slow his vehicle in order to match her speed and avoid a collision. However, Mr. Manale suddenly switched into the right lane after noticing that a large vehicle was bearing down on him rather quickly from behind. Mr. Bardwell, who was immediately behind Mr. Manale, applied his brakes and veered to the left onto the median in an effort to avoid a collision. Despite these efforts, Mr. Bardwell's vehicle was struck from behind

by the vehicle immediately behind him, which was driven by Mr. Perez. Thereafter, the Perez vehicle continued ahead and also struck the Manale vehicle in the right lane.

Mr. Bardwell filed suit against all of the drivers involved, as well as their respective insurance companies; however, after various settlements, the only defendants remaining at the time of trial were Ms. Moreau's insurance company, Safeway Insurance Company of Louisiana (Safeway),[1] and Mr. Manale's insurance company, State Farm Automobile Insurance Company (State Farm).[2]

After a trial on the merits, the trial court assigned the following reasons in support of its judgment:

> Gentlemen, I could take this under advisement and go back through everything that is sitting there, and if I did in fact I would probably render a judgment in the nature of $45,000[,] plus interest and all. All that is available is the $10,000 that I believe should have been tendered based just upon the medical bills, just based upon the injury. Had there been additional money available, the court would have considered something more than that. As that is all that is available, the court gives that[,] plus interest and all costs.

Thereafter, the trial court signed a written judgment in favor of Mr. Bardwell and against Safeway in the amount of $10,000, the limits of Safeway's policy, plus legal interest and all costs of court.

The majority is correct that the trial court's findings of fact concerning allocation of fault are subject to the manifest error standard of review. See Brewer v. J.B. Hunt Transport, Inc., 09-1408 (La. 3/16/10), 35 So.3d 230, 239. Although great deference is generally afforded a trial court's findings of fact under this standard of review, this does not mean that factual determinations cannot ever, or hardly ever, be upset. Although deference to the fact finder should be accorded, because appellate courts have a constitutional duty to review both law and facts, they have the right, and the obligation, to determine whether a trial court's factual findings are clearly wrong based on the evidence, or clearly without evidentiary support. Id.

A review of the above oral reasons provided by the trial court indicates that the trial court actually did not make any specific findings of fact with regard to the fault of

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[1] Ms. Moreau was never served with the original petition or any of its amendments; therefore, she was dismissed on Safeway's motion at the trial.

[2] State Farm had also filed a cross claim against Safeway for damages to the Manale vehicle. The parties stipulated that State Farm had reimbursed damages of $4,700.94 to Mr. Manale for his claim.

any of the defendants in this matter. While it may be implied that the trial court intended to find Ms. Moreau to be 100 percent at fault in causing the accident, no such finding appears in the trial transcript.

Furthermore, it should be noted that the trial court erred as a matter of law in failing to comply with LSA-C.C. art. 2323, which provides, in pertinent part:

> A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.
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> B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

As noted previously, at no point in its oral reasons did the trial court assign a percentage of fault to any individual involved in the accident. Furthermore, even if an assignment of a percentage of fault to Ms. Moreau could be considered implicit, the trial court failed to consider the potential fault of any of the other individuals causing or contributing to the injury or loss.[3] Such a failure is an error of law.

Finally, the trial court failed to address the fact that, pursuant to LSA-R.S. 32:81, a following motorist has a duty not to follow another 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. As Louisiana courts have uniformly held, a following motorist in a rear-end collision is presumed to have breached this duty, and hence, is presumed negligent. Mart v. Hill, 505 So.2d 1120, 1123 (La. 1987); Ly v. State Through Dept. of Public Safety and Corrections, 633 So.2d 197, 201 (La. App. 1st Cir. 1993), writ denied, 93-3134 (La. 2/25/94), 634 So.2d 835. Therefore, in a rear-end collision, the following motorist is presumed negligent, unless he proves lack of fault. Taylor v. Voigtlander, 36,670 (La. App. 2nd Cir. 12/11/02), 833 So.2d 1204, 1206.

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[3] Moreover, if Ms. Moreau's percentage of fault is implied to be 100 percent, I submit that such a finding would constitute manifest error based on the record in this case.

When this presumption applies, in order to escape liability, the following motorist has the burden to prove that he had his vehicle under control, closely observed the lead vehicle and followed at a safe distance, or that the lead vehicle negligently created a hazard which the following vehicle could not reasonably avoid. Id.

In the matter before this court, there is clearly some evidence that Ms. Moreau was negligent. However, both Mr. Bardwell and Mr. Manale were able to maintain control over their vehicles and avoid a collision, while Mr. Perez failed to do so. Therefore, I believe that the trial court legally and manifestly erred in failing to assign some percentage of fault to Mr. Perez for his failure to maintain control over his vehicle and avoid colliding with the Bardwell and Manale vehicles. Accordingly, I respectfully dissent.