LIONEL E. TURNER, SR.

VERSUS

ST. JOHN PARISH SHERIFF

NO. 14-CA-245

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE FORTIETH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA
NO. 53705, DIVISION "A"
HONORABLE MADELINE JASMINE, JUDGE PRESIDING

COURT OF APPEAL
FIFTH CIRCUIT

FILED OCT 29 2014

CLERK
Cheryl Quirk Landrieu

OCTOBER 29, 2014

ROBERT A. CHAISSON
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Jude G. Gravois, and Robert A. Chaisson

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AMENDED, AND AS AMENDED, AFFIRMED

RAC
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Mike Tregre, the sheriff of St. John the Baptist Parish, appeals from a $35,000 judgment rendered in favor of Lionel Turner in Mr. Turner's lawsuit arising from use of allegedly excessive force by a sheriff's deputy while conducting an investigative stop. For the following reasons, we reduce the award to $10,000, and affirm the judgment as amended.

FACTS AND PROCEDURAL HISTORY

Late in the evening of May 7, 2006, Sergeant Keith Brooks of the St. John the Baptist Parish Sheriff's Office received a complaint of a domestic abuse situation. The victim gave Sergeant Brooks a name and description of the suspect, and a description of his vehicle. Sgt. Brooks put out a radio bulletin about the situation, and Deputy Kory Borcherding heard it while on patrol. Shortly after midnight, Deputy Borcherding saw a van which seemed to match the color of the vehicle mentioned in the bulletin, and he ran the license plate number to ascertain the address of the owner. When the van passed up the address of record and turned into a driveway at a different address, the officer put on his flashing police lights,

stopped his cruiser, got out, and approached the driver. Shortly thereafter, Sergeant Brooks also arrived at the scene, but remained on the sidewalk.

Mr. Turner was the driver of the vehicle that Deputy Borcherding stopped. He was returning home from a trip to the drug store and had turned into what was in fact his own driveway. It is not disputed that as Mr. Turner was getting out of his vehicle, Deputy Borcherding approached him and demanded to see his identification. It is also not disputed that after a brief interaction between the two, Deputy Borcherding used a "take down" maneuver to bring Mr. Turner to the ground. Mr. Turner alleges that his pre-existing back injury was aggravated during this incident.

There was conflicting testimony, however, about the details of the encounter. Deputy Borcherding's version was that Mr. Turner was belligerent and at first resisted requests to produce his driver's license. He testified that he tried to explain the situation to Mr. Turner, but that when Mr. Turner continued to resist his request, he decided that another level of force was required. At that point, he grabbed Mr. Turner by the wrist and arm and forced him onto the ground. He explained that the maneuver did not involve any abrupt throwing to the ground, but rather was a slow and steady process which resulted in Mr. Turner lying on his stomach with the deputy kneeling on the ground beside him. He said that Mr. Turner was never arrested, handcuffed or otherwise struck during the incident. Sergeant Brooks did not participate in the incident, but simply watched it from a distance. Sergeant Brooks did not testify at trial.

Mr. Turner testified to the contrary that Deputy Borcherding rushed up to him as he was getting out of his vehicle and demanded his identification. Although he tried to explain that he was in his own driveway, Deputy Borcherding continued to badger him. He further indicated that he tried to get out his identification, but

Deputy Borcherding nonetheless grabbed him and forced him to the ground before he could comply. He did confirm that once Deputy Borcherding satisfied himself that Mr. Turner was not the suspect, both officers left the scene without further incident. He estimated that the entire incident may have lasted five to six minutes. Mr. Turner further testified that at the time, he was recovering from a work-place back injury, and as a result of this incident, his back condition was aggravated. He also claimed mental anguish and suffering.

On the basis of the above evidence, the trial judge found that Deputy Borcherding had indeed used excessive force. She further found that as a result, Mr. Turner had suffered an aggravation of his back problem, as well as mental injuries, and she awarded him $35,000 in total damages. This appeal followed.

DISCUSSION

Sheriff Tregre first argues that it was manifest error to find that the officer used excessive force. He also asserts that it was similar error not to find that Mr. Turner was comparatively at fault for resisting the officer. In regard to damages, he argues that Mr. Turner failed to present sufficient evidence to prove that his back injury was aggravated so as to support a damage award. Lastly, he asserts that the award of $35,000 was an abuse of discretion.

The standard of review of factual findings on appeal is the manifest error or clearly wrong standard. *Garrity v. St. Paul Fire & Marine Ins. Co.*, 07-965 (La. App. 5 Cir. 4/15/08), 984 So.2d 900, *writ denied,* 08-1051 (La. 8/29/08), 989 So.2d 106. Under that standard, it is not whether the reviewing court would have made different findings had it been sitting as the fact-finder, but rather whether on the record as a whole, there is a reasonable basis for the findings made, and if not, whether the findings are clearly wrong. *Id.* at 904.

In suits involving allegations of police use of excessive force in dealing with suspects, a number of factors are to be considered, if applicable to the totality of the circumstances, including 1) the character of the suspect, if known; 2) the risks faced by the officers; 3) the nature of the offense involved; 4) the possibility of escape; 5) the existence of alternatives to the force used; 6) the size of the suspect and whether or not he may be armed; and 7) the exigencies of the moment. *Mathieu v. Imperial Toy Corp.*, 94-952 (La. 11/30/94), 646 So.2d 318.

In the present case, the trial judge considered the above factors and made a number of factual findings in support of her ultimate finding that excessive force had been used. As to the risks faced, she found that the only evidence regarding actions which might be construed as creating a risk for the officer was that Mr. Turner had tried to re-enter his van. She noted, however, that the officer never gave a detailed explanation of how Mr. Turner was attempting to do so. Since Mr. Turner denied this assertion, explaining instead that he was reaching for his paperwork, there was an implicit finding that he was found to be more credible on this point. The trial judge also noted in this regard that Sergeant Brooks was observing the entire encounter from his position at the end of the driveway, and apparently did not perceive that Deputy Borcherding was in any danger, because he did not intervene.

As to the nature of the offense involved, Deputy Borcherding was investigating a complaint of domestic abuse. At the time of the encounter with Mr. Turner, the officers knew that the victim of the domestic incident was safe in the hospital, and thus there was no continuing threat to her safety. Regarding the chance of escape, the trial judge noted that there was no evidence to suggest that that was a possibility. She similarly found that although the height of the two men was similar, Deputy Borcherding was younger and heavier, and there was no

indication that Mr. Turner might be armed. She finally found that there were no exigent circumstances warranting the level of force used.

In considering the totality of the circumstances, the trial judge noted that the evidence established that the only information that Deputy Borcherding had when he confronted Mr. Turner was a generic description of a maroon vehicle, and that this was insufficient for him to have confronted Mr. Turner in the manner that he did. She also did not find that Mr. Turner's behavior contributed in any way to the incident, and thus did not assign any portion of fault to him.

The standard of review is, when considering the record as a whole, whether there is a reasonable basis for the facts found, and if not, whether the facts are clearly wrong. Here, the trial judge made specific credibility determinations and found facts which were reasonable, based as they were on these credibility determinations. In this circumstance, we do not find that the trial court's findings were manifestly erroneous or clearly wrong.

The next issue concerns the quantum of damages. Mr. Turner testified that prior to the incident he was disabled because of a back condition, and that Deputy Borcherding's action in forcing him to the ground aggravated that condition. He also testified that he had suffered mental distress from having been mistreated by Deputy Borcherding for what he considered no reason. He sought damages for medical bills, prescription medicines, pain and suffering, neurosis, and future medicals and future pain and suffering. The trial judge found that there was no evidence of either past or future medical or prescription drug expenses, or of future pain and suffering. She found only that there was an aggravation of Mr. Turner's pre-existing back condition and neurosis, and awarded $35,000 in damages for these items.

The standard of review of damage awards is whether the trier of fact abused her much discretion in fixing the award. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La. 1993). In reviewing awards, the appellate court may disturb an award only when it determines for articulable reasons that the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of a particular injury to the particular plaintiff under the particular circumstances of the case. *Id.* at 1261. Moreover, it is only after the court has determined that the award constitutes an abuse of discretion that it may look to awards in similar cases to decide the highest or lowest point which would be reasonable on the particular facts before it. *Id.* at 1260.

A plaintiff bears the burden of showing that, more probably than not, the fault of the defendant caused the injury claimed. In *Maranto v. Goodyear Tire & Rubber Co.*, 94-2603 (La. 2/20/95), 650 So.2d 757, the court ruled that when a plaintiff claims aggravation of a pre-existing condition, medical testimony is required to meet this burden of proving the aggravation. In *Schindler v. Harrah's Las Vegas, Inc.*, 07-827 (La. App. 4 Cir. 1/23/08), 976 So.2d 774, the court ruled that while a tortfeasor takes his victim as he finds him, a plaintiff must still establish a link between the tortious conduct and an aggravation of his pre-existing condition, and the plaintiff must prove this connection through medical testimony. In *Kliebert v. Breaud,* 13-655 (La. App. 5 Cir. 1/31/14), 134 So.3d 23, this court indicated in dicta that while, in general, expert medical testimony is necessary to establish aggravation of a pre-existing condition, that rule does not apply when medical causation is within common knowledge.

In the present case, the evidence showed that Mr. Turner was disabled because of back problems since 2004. He testified that his back pains were worse since the incident with Deputy Borcherding. In support of this claim, he

introduced a letter from Meda Colvin, M.D., dated July 18, 2006, concerning a single visit to this doctor. The letter recites his medical history as given by him to Dr. Colvin. A part of that recital is that the incident worsened his back pain, and he claimed that the level of pain was nine out of ten. Another medical report, from Parish Pain Specialists dated January 1, 2006, five months before the incident, also recites a pain level of nine out of ten. After conducting a physical examination, Dr. Colvin stated that "the patient appears to have a right L5 radiculopathy that has worsened since he had an altercation with a policeman in May. . . . He has had increased pain secondary to being thrown on the ground by the policeman. I would like to get an MRI. I would like to get a close MRI and compare it to the open MRI that was done [on April 18, 2006]." Dr. Colvin recommended that he continue on the medication which had been prescribed prior to the incident at issue, and have a second MRI done for comparison to the earlier one. The April 18, 2006 MRI showed a large disc extrusion on the right encroaching on the right neural foramina at the L5-S1 level. A second MRI (presumably done as per Dr. Colvin's suggestion) performed on July 19, 2006, two months after the incident with Deputy Borcherding, is almost identical to the first with findings of a disc extrusion at L4-5 with compromise of the nerve root. Although no mention is made of L5-S1 level in the second test, or of L4-5 in the first, it is evident that the two reports refer to the same disc problem. Mr. Turner presented no expert opinion to differentiate the two tests, nor any expert opinion as to whether they differed or were essentially reporting the same problem. The question of whether the incident aggravated the pre-existing disc condition is clearly one requiring expert medical evidence. Mr. Turner also produced no evidence or testimony to show that, other than the one visit to Dr. Colvin, he had otherwise sought treatment

for his allegedly worsened back condition until four years later, when in 2010 he began physical therapy.

On the above evidence, the trial judge found that Mr. Turner had not shown that he had any past or future medical or prescription expenses related to the incident, nor had he presented any evidence to establish that he would have future pain and suffering. These findings are reasonable in light of the entire record. The remaining items of alleged damages are therefore Mr. Turner's claims that 1) although he never pursued treatment for post-incident pain, his back nonetheless hurt him more after the incident than before, and 2) he suffered mental anguish from being grabbed and dragged to the ground by Deputy Borcherding. The trial judge deemed these two claims to be established by the evidence and awarded Mr. Turner $35,000.

In this court's opinion, this award is abusively high. The evidence shows that at most Mr. Turner may have felt some additional pain in his back due to the incident as he testified, but the claimed severity of that pain is belied by the fact that no medical testimony established that it was due to an aggravation of his pre-existing condition, and, except for the one consultation with Dr. Colvin, he did not seek any treatment for it. Moreover, he reported to Dr. Colvin a pain level of nine out of ten, which was the same level that he had reported at the pain clinic a few months before the incident with Deputy Borcherding. The evidence of the remaining item of damages sought, i.e., for mental distress, was also not supported by anything other than Mr. Turner's brief testimony. That total testimony was that "He touched me. He hurt my body. And he touched me and he hurt my pride. And I'm still mentally concerned about it. It bothers me every day." There was no

evidence that he ever sought psychological treatment or counseling for these concerns. Considering all of these factors, an award of $35,000 is beyond an amount within the discretion of the trier of fact.

Having found an abuse of discretion in the award, we turn to similar cases for guidance as to what a proper award would be, keeping in mind the particular injuries to Mr. Turner in the total circumstances of the case. *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La. 1976). Also, where an appellate court deems the award too high, it may reduce it only to the highest amount which would reasonably be within the "much discretion" of the trier of fact. *Youn v. Maritime Overseas Corp., supra.*

In *Patton v. Self,* 06-1029 (La. App. 3 Cir. 3/7/07), 952 So.2d 874, the plaintiff was approached by the police for walking in the street rather than on the sidewalk late one night. After stopping briefly next to the police car, plaintiff fled the scene. Two officers gave chase and apprehended plaintiff when he became entangled in a fence. He was handcuffed and testified that one of the officers beat him on the head with an object he could not identify. He was treated by the EMS, and later at a medical facility, for a laceration on his eye and shoulder pains lasting three months. A finding of excessive force was made and based on the plaintiff's injuries, an award for general damages of $10,000, reduced by 49% for comparative fault, was affirmed on appeal. In *Smith v. City of Shreveport,* 46,596 (La. App. 2 Cir. 9/21/11), 73 So.3d 496, the plaintiff was stopped for an alleged traffic violation. When she refused to exit her vehicle, the officers pepper sprayed her through a crack in the driver's side window. When she opened the door to get out of the vehicle, she was grabbed and thrown to the ground. She testified to physical injuries to her neck, back, hip, thigh, knee and eye during the encounter, and although some of these problems pre-dated the incident, she was not being

treated for any of them prior to the incident. An award of $20,000 was deemed to be within the discretion of the trier of fact. In *Elrod v. Wal-Mart Stores, Inc.,* 31,852 (La. App. 2 Cir. 5/7/99), 737 So.2d 208, the plaintiff was held in a storeroom for thirty minutes, handcuffed and led out of the store. Although he was not otherwise physically abused, the court adjudged an award of $3,500 to be within the discretion of the trier of fact. Mr. Turner brings to our attention *Smith v. Guidroz,* 12-1232 (La. App. 3 Cir. 10/30/13), 125 So.3d 1268, where awards of $50,000 for physical injury and $50,000 for emotional damages were affirmed. The facts there were that the plaintiff was tasered several times, pepper sprayed, handcuffed, falsely arrested, and neglected in a police cruiser while he was suffering convulsions. The plaintiff suffered injuries to his back, hip, shoulder and knees. He was fired from his job because of the incident, and was treated for emotional damages by a physician.

Considering the above cases, and mindful of the totality of the circumstances involved, and the particular circumstances of Mr. Turner, this court is of the opinion that an award of $10,000 is the upper limit of the discretion allowed to the fact finder on the facts before us. Although Mr. Turner testified to an aggravation of a pre-existing condition, there was no medical testimony to substantiate this claim. Further, aside from the one visit to Dr. Colvin, there was no evidence that he sought treatment for this problem. Nor did he seek treatment or counseling for his claimed mental distress.

CONCLUSION

For the foregoing reasons, the $35,000 award of damages is amended to $10,000. In all other respects, the judgment is affirmed.

AMENDED, AND AS AMENDED, AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **OCTOBER 29, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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14-CA-245

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