

NOT DESIGNATED FOR PUBLICATION

MUHAMMED A. HUSSEIN * **NO. 2000-CA-0957**
VERSUS * **COURT OF APPEAL**
CHARLES FOTI, CRIMINAL * **FOURTH CIRCUIT**
SHERIFF FOR THE PARISH * **STATE OF LOUISIANA**
OF ORLEANS, AN UNKNOWN *
SHERIFF'S DEPUTY AND XYZ *
INSURANCE COMPANY *

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-14813, DIVISION "M-16"
Honorable Piper Griffin, Judge Pro Tempore

Judge Patricia Rivet Murray

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray,
Judge Terri F. Love)

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AFFIRMED

Defendants, Orleans Parish Criminal Sheriff Charles Foti, his deputy and insurer, appeal the trial court's judgment holding them liable for plaintiff's injury and awarding plaintiff damages. For the reasons that follow, we affirm.

On October 24, 1996, plaintiff Muhammed Hussein was a federal immigration detainee being housed in a private cell at one of Sheriff Foti's prison facilities, the Community Correctional Center. Hussein was on a hunger strike and had been rejecting his meals. When Deputy McRay Mottley entered Hussein's cell to give him his breakfast tray, the two men were involved in a disagreement, the facts of which are in dispute, that resulted in Hussein's hand being slammed in the cell door as Mottley tried to close it. According to Mottley, Hussein kicked the tray, causing the food to spill on Mottley, then followed Mottley toward the door and pushed against it while Mottley attempted to close it. Mottley testified that he did not know

Hussein's fingers were caught inside the hinged side of the door, between the door and the frame, when he attempted to close it. According to Hussein, the only other eyewitness, he merely placed the tray on the floor after Mottley handed it to him; Mottley then kicked the tray, and Hussein tried to push it back toward the door with his left hand as he steadied himself with his right hand placed between the door and the frame. Hussein testified that he screamed as Mottley leaned on the door with all his weight to shut it. Eventually, Mottley let go of the door, and Hussein was able to remove his hand. Mottley then closed the door and continued down the hall distributing trays to other inmates, although Hussein testified that Mottley could see through the door window that Hussein was on the floor clutching his bleeding hand. Approximately two hours later, when another deputy came on duty to relieve Mottley, the new deputy sent Hussein to the jail nurse for medical treatment.

The nurse found that Hussein had a laceration of his right ring finger, as well as an abrasion of his right palm, and an x-ray revealed that his right little finger was possibly broken. Based on this evaluation, Hussein was sent to the Medical Center of Louisiana in New Orleans, where doctors placed

five stitches in his forefinger, treated his palm, and put his fractured little finger in a soft cast. Hussein was transferred to a correctional facility in St. Martin Parish, and approximately one month after the incident, personnel at Lafayette University Medical Center removed the stitches and the cast.

The case was tried in the district court on September 30, 1999. The sole plaintiff's witness was Hussein himself. Four witnesses testified for the defense: Deputy Mottley, Melvin Joseph, Stanley Deterville, and Dana Anderson. Mottley testified that he did not know Hussein's fingers were caught in the door as he leaned on it in an attempt to close it; rather, he believed Hussein was pushing on the door from the other side. Mottley also stated that he did not know Hussein's hand had been injured until he was called in the next day to make a report. In fact, before he went off duty, Mottley reported to his shift supervisor, Officer Melvin Joseph, that Hussein had been kicking his cell door all night and had kicked his breakfast tray on him that morning. Mottley indicated that he heard Hussein screaming after he closed the door, but essentially ignored it because Hussein had been "hollering" all night, complaining that he had missed getting a shower that day.

Melvin Joseph, the watch commander who acted as shift supervisor that night, confirmed that Mottley had reported having problems with Hussein, specifically that Hussein had kicked a plate of grits on him. Joseph noticed food stains on Mottley's pants consistent with his story. Joseph stated that Mottley was following proper procedure when he closed the door, because the cell doors on that tier had to remain locked.

Sergeant Stanley Deterville relieved Joseph at 6:30 a.m. After roll call, he was called upstairs because an inmate had allegedly slammed his hand in a door. Hussein was escorted to the nurse by Deputy Lee at approximately 7:20 a.m. Because Hussein was alleging that the guard had closed his hand in the door on purpose, Deterville took a statement from Hussein and one from Mottley, and filed an incident report.

Nurse Dana Anderson, a nurse at the prison facility (but not the nurse who treated Hussein) explained the procedure that is followed when an inmate is injured and interpreted the written notes from the prison clinic concerning this incident. According to the notes, the physician on call was paged on the basis that an x-ray showed a fracture of Hussein's pinkie finger, and the doctor gave the order by telephone to transport Hussein

immediately to the hospital.

After hearing the evidence, the trial judge ruled from the bench and assigned oral reasons for her ruling. She found Mottley to be negligent in the performance of his duties, and assigned defendants 50% of the fault in causing plaintiff's injury, with the remaining 50% attributed to the plaintiff. The trial judge then awarded plaintiff damages in the amount of \$30,000, to be reduced by 50% to reflect Hussein's fault, plus interest, costs and \$651.00 in medical expenses for which the Medical Center of Louisiana had filed a lien.

The judge noted on the record that she found Hussein's testimony to be credible and consistent with the statement he gave immediately following the accident. She also noted several inconsistencies in the testimony of the defense witnesses, particularly with regard to whether or not Hussein had "yelled" sufficiently to let the guard know he was in pain; the judge believed that despite Mottley's denial, Hussein had indeed done enough to indicate he was hurt, but Mottley had evidently ignored Hussein's cries for help. The trial judge also indicated that she did not believe the prison guards were unaware that Hussein had been refusing food and was on a hunger strike,

and she did not believe Hussein would have kicked the tray for no reason.

Finally, she reasoned that Hussein must be held contributorily at fault because he placed his own hand in a position where it could be hurt.

Defendants assign three errors on appeal: (1) The trial court's conclusion that Deputy Mottley was at fault, or alternatively, the percentage of fault allocated to him, is clearly erroneous; (2) The amount of damages awarded is abusively high; and (3) The trial court committed manifest error by allowing Hussein to offer hearsay testimony regarding his prognosis and treatment by unidentified physicians in Lafayette after he was transferred to a correctional facility there.

Factual finding by a trial court should not be disturbed on appeal in the absence of manifest error. An appellate court may reverse a finding of fact if it determines that no reasonable basis exists for the finding, and the record as a whole demonstrates that the finding is clearly wrong. *Lewis v. State, through Department of Transportation and Development*, 94-2370, p.4-5 (La. 4/21/95), 654 So.2d 311, 314. When factual findings are based on credibility determinations, the manifest error/ clearly wrong standard demands great deference to the trier of fact, who has the capacity to evaluate

live witnesses, as opposed to the appellate court's access only to a cold record. *Canter v. Koehring*, 283 So. 2d 716, 724 (La. 1983).

In the instant case, the trial court's apportionment of fault is a factual finding to be reviewed under the manifest error standard. In view of the evidence, we cannot say that the assessment of 50% fault to the defendants is clearly wrong. The trial judge expressly stated that she found Hussein's story to be credible, and because Hussein and Mottley disagreed as to how the incident occurred, we must infer that the judge found Mottley to be less credible. If the trial judge believed Mottley provoked the incident, first by kicking the tray inside the cell and then by being overly aggressive in slamming the door, which belief would be reasonable considering the evidence, we cannot say that the assigning of 50% liability to defendants is unreasonable. The defendants argue that the inconsistencies in their witnesses' testimony noted by the trial judge relate only to whether Mottley was aware that Hussein had been injured, which they assert is irrelevant. However, if the trial judge questioned Mottley's assertion that he was completely unaware of Hussein's injury, it would make her more likely to also question Mottley's account of the initial confrontation with Hussein.

Under the circumstances, we do not find her assessment of fault to be manifestly erroneous.

Defendants next contend that the trial court committed manifest error in determining the amount of damages. In support of this argument, defendants cite several prior cases involving broken or injured fingers in which the general damage awards were less than \$10,000. Defendants also assert that the quantum is too high because the trial judge incorrectly assumed that the plaintiff had a skin graft, rather than merely skin removed from the palm of his hand.

A trial court's award of damages may not be disturbed on appeal absent a clear abuse of discretion. It is only after an articulated analysis of the facts discloses such an abuse of discretion that the appellate court may resort to considering prior awards in similar cases. *Reichert v. State, Department of Transportation and Development*, 96-1419, 96-1460, p.10 (La. 5/20/97), 694 So. 2d 193, 201 (Citations omitted). We find no abuse of discretion in the instant case.

The trial judge's award for pain and suffering could have reasonably been based, at least in part, on the fact that due to defendants' negligence,

plaintiff remained in his cell in severe pain for nearly two hours before his cries for help were recognized. In addition, plaintiff testified that he has residual pain and numbness, as well as trouble lifting, gripping, and doing other normal things with his hand. These two factors are sufficient to justify the award made by the trial court, regardless of whether she was in error as to the severity of the abrasion to the palm of plaintiff's hand. We therefore decline to disturb the award.

Finally, defendants argue that the trial court improperly allowed hearsay evidence when Hussein was permitted to testify that his doctor in Lafayette had told him that he needed surgery on his hand, but the operation was risky because Hussein's condition might be worse after the surgery. Although the testimony was inadmissible hearsay, we find it was not prejudicial under the circumstances. As stated above, plaintiff's own testimony concerning his pain and the residual problems with his hand is sufficient to support our conclusion that the amount of damages awarded was not an abuse of discretion.

Accordingly, for the reasons stated, we affirm the judgment of the trial court.

AFFIRMED