Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **11th day of December, 2020** are as follows:

BY Genovese, J.:

2020-C-00462 *SHEROME HANKTON VS. THE STATE OF LOUISIANA, MEDICAL CENTER OF LOUISIANA AT NEW ORLEANS (UNIVERSITY HOSPITAL), THROUGH THE BOARD OF SUPERVISORS AT LOUISIANA STATE UNIVERSITY AND DR. JOHN DOE (Parish of Orleans Civil)*

AFFIRMED IN PART. AMENDED IN PART. AND AFFIRMED AS AMENDED. SEE OPINION.

Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

Retired Judge Freddie Pitcher, Jr., assigned as Justice ad hoc, sitting for Chief Justice Bernette Johnson, recused.

Weimer, J., concurs in part, dissents in part and assigns reasons.
Hughes, J., concurs in part, dissents in part and assigns reasons.
Crain, J., dissents and assigns reasons.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-C-00462

SHEROME HANKTON

VS.

THE STATE OF LOUISIANA, MEDICAL CENTER OF LOUISIANA AT NEW ORLEANS (UNIVERSITY HOSPITAL), THROUGH THE BOARD OF SUPERVISORS AT LOUISIANA STATE UNIVERSITY AND DR. JOHN DOE

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

GENOVESE, JUSTICE*

Plaintiff, Sherome Hankton, an officer with the New Orleans Police Department, filed this personal injury suit for damages resulting from an attack upon her by a prisoner, Conrad Jackson, while Officer Hankton was guarding Jackson during a hospital stay. Following a bench trial, the trial court apportioned 50% fault to Jackson, 40% fault to the hospital, and 10% fault to Officer Hankton; it then awarded damages totaling $1,134,287.44. The court of appeal affirmed in part, amended in part, and affirmed as amended. We granted certiorari to review the trial court's allocation of fault. For the reasons that follow, we affirm in part, amend in part, and affirm as amended.

FACTS AND PROCEDURAL HISTORY

Conrad Jackson ("Jackson"), an armed robbery suspect, was being treated at the Medical Center of Louisiana at New Orleans ("University Hospital") for injuries he sustained after jumping from a two-story building while attempting to elude

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police. During his hospitalization, Jackson was being guarded by New Orleans Police Department ("NOPD") police officers.

On November 24, 2009, approximately three weeks after Jackson's hospital admission, Plaintiff, NOPD Officer Sherome Hankton ("Officer Hankton"), reported to University Hospital to guard Jackson. Shortly after her guard duty began, Jackson attacked Officer Hankton and attempted to escape. Officer Hankton received multiple injuries, including approximately 25 stab wounds inflicted by Jackson with a pair of suture scissors while he attempted to gain access to her gun.

Officer Hankton filed a personal injury action against Defendant, the State of Louisiana, through the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, on behalf of the Interim LSU Public Hospital[1] (collectively "University Hospital"), for the injuries she sustained in the attack. University Hospital answered and raised several affirmative defenses, including the comparative fault of Officer Hankton and that of a nonparty. A Motion for Leave to Intervene and a Petition of Intervention was filed by the City of New Orleans (the "City"), requesting to intervene in the matter and to be reimbursed for expenses paid to Officer Hankton pursuant to the Louisiana Workers' Compensation Act.[2]

Following a bench trial, judgment was rendered in favor of Officer Hankton. The trial court assessed fault as follows: Jackson 50%, University Hospital 40%,

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[1] Officer Hankton's petition erroneously named the State of Louisiana, through its Political Subdivision, the Medical Center of Louisiana at New Orleans (University Hospital), through the Board of Supervisors at Louisiana State University and Mechanical College, Medical Center of Louisiana at New Orleans (University Hospital), through the Board of Supervisors at Louisiana State University and Mechanical College, and Dr. John Doe.

[2] The parties stipulated that the City had sufficient interest to be joined as an intervenor. Additionally, they stipulated to the City's workers' compensation lien of $201,094.05, which was subject to a reduction following any assessment of fault to Officer Hankton and/or the City, and a fee pursuant to La.R.S. 23:1103(C) (the "*Moody* fee").

and Officer Hankton 10%. Officer Hankton was awarded damages totaling $1,134,287.44.[3]

University Hospital appealed, raising several assignments of error, including in part, whether the trial court erred in assessing 40% fault to University Hospital and assessing 10% fault to Officer Hankton, while failing to assess any fault to the NOPD. The court of appeal affirmed in relevant part, including affirming the trial court's judgment on the allocation of fault. *Hankton v. State*, 19-557 (La.App. 4 Cir. 3/4/20), 294 So.3d 25.

This Court granted certiorari to review University Hospital's challenge to the trial court's 10% fault allocation to Officer Hankton and the lack of an assignment of any percentage of fault to NOPD, a nonparty. *Hankton v. State*, 20-462 (La. 7/2/20), 297 So.3d 765.

DISCUSSION

In an action for damages where personal injury is sustained, the percentage of fault of all persons causing or contributing to the injury shall be determined, regardless of whether the person is a party or a nonparty and regardless of immunity by statute, including immunity pursuant to La.R.S. 23:1032. La.Civ.Code art. 2323(A). The allocation of fault by the trier of fact is a factual determination that will not be set aside by a reviewing court unless it is manifestly erroneous or clearly wrong. *Thompson v. Winn-Dixie Montgomery, Inc.*, 15-477, p. 14 (La. 10/14/15), 181 So.3d 656, 666; *Foley v. Entergy Louisiana, Inc.*, 06-983, p. 9 (La. 11/29/06), 946 So.2d 144, 153; *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252, pp. 3-4 (La. 2/20/95), 650 So.2d 742, 745. Although great deference is to be afforded the factfinder's determination, the manifest error standard does not mandate that the factfinder's determination cannot ever, or hardly ever, be upset. *Brewer v. J.B.*

[3] The trial court's judgment further ordered that the City's workers' compensation lien be reduced by 10% and subject to a one-third *Moody* fee.

Transport, Inc., 09-1408, 19-1428, p. 13 (La. 3/16/10), 35 So.3d 230, 240 (citing *Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 93-3099, 93-3110, 93-3112, p. 8 (La. 7/5/94), 639 So.2d 216, 221).

This Court, in *Duncan v. Kansas City Southern Railway Co*., 00-66, pp. 10-11 (La. 10/30/00), 773 So.2d 670, 680-81, summarized the standard for reviewing allocation of fault determinations as follows:

> This Court has previously addressed the allocation of fault and the standard of review to be applied by appellate courts reviewing such determinations. Finding the same considerations applicable to the fault allocation process as are applied in quantum assessments, we concluded "the trier of fact is owed some deference in allocating fault" since the finding of percentages of fault is also a factual determination. *Clement v. Frey*, 95-1119 (La.1/16/96); 666 So.2d 607, 609, 610. As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. *Id.* Therefore, an appellate court should only disturb the trier of fact's allocation of fault when it is clearly wrong or manifestly erroneous. Only after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the award, and then only to the extent of lowering it or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. *Clement*, 666 So.2d at 611; *Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 (La.1977).
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> The appellate court[']s determination of whether the trial court was clearly wrong in its allocation of fault is guided by the factors set forth in *Watson v. State Farm Fire and Cas. Ins. Co.*, 469 So.2d 967, 974 (La.1985). In *Watson*, we said []various factors may influence the degree of fault assigned, including:
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> > (1) [W]hether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) 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. And, of course, as evidenced by concepts such as last clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties.
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> *Watson*, 469 So.2d at 974. These same factors guide the appellate court's determination as to the highest or lowest percentage of fault that could reasonably be assessed. *Clement*, 666 So.2d at 611.

With the foregoing principles in mind, we address University Hospital's argument relative to the trial court's allocation of fault. We have reviewed the relevant portions of the record in this matter, including the trial testimony of Officer Hankton; NOPD Officer Tracey Fulton, whom Officer Hankton relieved of guard duty; T.J. Freeman, the Deputy Chief of Police for University Police Department ("UPD") at the time of this incident;[4] and, George Armbruster, an expert in the field of police policies, procedures, and training. Further, we have reviewed Jackson's deposition that was introduced into evidence at trial.

University Hospital argues that the trial court's assessment of only 10% fault to Officer Hankton is manifestly erroneous. The trial court's Reasons for Judgment provide a discussion of the evidence supporting its assessment of fault to Officer Hankton. The trial court noted that she was a 12-year veteran of NOPD and had been placed on guard duty many times. Officer Hankton testified that when an officer takes over custody of a prisoner from another officer, a search for weapons should occur, as well as communication between the officers. She also testified that she was familiar with the concept of keeping a distance of about six feet away from a prisoner to allow for reaction time should a subject take hostile actions. Officer Hankton also explained she was taught in the academy that an officer should never turn his/her back to a prisoner.

In this instance, however, the trial court found that when she relieved Officer Fulton of his guard duty, Officer Hankton did not inquire whether Jackson was restrained, but testified that she assumed that he was. She also did not ask whether Jackson had been searched, and she did not search Jackson upon entering the hospital room. Additionally, while there were two chairs in the hospital room, for her guard duty, Officer Hankton chose to sit in the chair located between Jackson's bed and

[4] Because the parties and the lower courts refer to T.J. Freeman as "Mr. Freeman," that is how he is referred to by this Court.

the window, which placed her less than six feet away from Jackson and her firearm within four feet of Jackson. For these reasons, the trial court assigned Officer Hankton 10% fault.

The court of appeal affirmed the trial court's assessment of 10% fault to Officer Hankton, reasoning as follows:

> Applying the *Watson* factors, we find Officer Hankton's conduct amounted to inadvertence. In particular, Officer Hankton testified that she did not check to see if Mr. Jackson was restrained in the bed, but rather assumed he was restrained because Officer Fulton was guarding Mr. Jackson prior to her arrival. Further, she testified that she sat in the chair next to Mr. Jackson's bed, which was within Mr. Jackson's reach. As Officer Hankton confirmed, sitting in a chair so close to Mr. Jackson was an act contrary to her training. As such, her conduct inadvertently created the risk that she was accessible to Mr. Jackson. In this instance, we agree with the trial court's findings that Officer Hankton did not act as a reasonable police officer under the circumstances. However, we find that Officer Hankton's conduct was a mere inadvertence. She was not aware that Mr. Jackson was armed with surgical tools and would attack her. Thus, we find the trial court was not manifestly erroneous in allocating ten percent (10%) of fault to Officer Hankton.

Hankton, 294 So.3d at 32.

University Hospital argues that the trial court erred in assigning an inadequate amount of fault to Officer Hankton since she disregarded her training and her personal safety. Specifically, it posits that Officer Hankton should have checked to see if Jackson was restrained and should have searched both Jackson and the hospital room for weapons. Additionally, University Hospital asserts that Officer Hankton should have properly positioned herself in order to keep a safe distance between her and Jackson. According to University Hospital, Officer Hankton was negligent in failing to implement these simple preventative measures that would have significantly decreased the likelihood of an attack.

Although University Hospital argues strenuously that the actions of Officer Hankton warrant a greater assessment of fault, it relies on the same facts cited by the trial court and simply disagrees with the percentage of fault assigned. We find the

apportionment of fault made by the trial court to Officer Hankton was based upon the evidence placed before it and is fully supported by the record.

The record confirms that Officer Hankton admitted that upon her arrival at the hospital, she failed to confirm with Officer Fulton that Jackson was restrained. She testified that she believed Jackson was restrained, but he was covered with a blanket, and she did not independently confirm this fact. Officer Hankton also testified that she was aware of the concept of keeping about six feet away from a prisoner in order to allow for reaction time should a prisoner take hostile action and was also aware of the need to search for weapons while on guard duty. She admitted that upon assuming guard duty, she sat in a chair between the hospital bed and the window. According to her testimony, Jackson attacked her from behind when she stood and momentarily turned away from the bed toward the window. These actions of Officer Hankton constitute negligence; however, as concluded by the court of appeal, Officer Hankton's conduct amounted to "mere inadvertence[,]" as "[s]he was not aware that Mr. Jackson was armed with surgical tools and would attack her." *Id.* For the foregoing reasons, we conclude that the record contains a reasonable factual basis for the trial court's determination, and University Hospital has failed to prove the trial court's judgment allocating 10% fault to Officer Hankton rises to the level of being clearly wrong. We, therefore, affirm the trial court's allocation of 10% fault to Officer Hankton.

We next address University Hospital's argument that the trial court erred in failing to assess NOPD with any percentage of fault. In considering this argument, we are mindful that "[t]o the extent that a party defendant seeks to have the benefit of comparative fault of another as an affirmative defense, . . . it bears the burden of proof by a preponderance of the evidence that the other party's fault was a cause-in-fact of the damage being complained about." *Dupree v. City of New Orleans*, 99-3651, p. 18 (La. 8/31/00), 765 So.2d 1002, 1014 n.13 (citations omitted).

Initially, we note that the trial court's Reasons for Judgment do not address the potential fault of NOPD;[5] therefore, we are unable to ascertain the trial court's reasons for not assessing any fault to NOPD. The court of appeal did address University Hospital's burden of proving the fault of NOPD and concluded that it did not meet this burden, reasoning as follows:

> A review of the record shows that the NOPD's policies and procedures were not introduced into evidence at trial. Moreover, Appellants did not present any experts to testify regarding the NOPD's policies and procedures that were in place at the time of the attack. While Officer Fulton testified as to his police training, he was not qualified as an expert to testify as to the NOPD's policies and procedures. Additionally, Mr. Armbruster, Appellants' expert in police policies, procedures, and training, could not testify as to the NOPD's policies and procedures because he was not qualified as an expert on the NOPD's policies and procedures. Thus, we find the trial court did not commit manifest error in failing to assess fault to the NOPD.

Hankton, 294 So.3d at 33.

The court of appeal's finding of no manifest error by the trial court, therefore, was premised on the fact that University Hospital failed to introduce NOPD's policies and procedures in effect at the time of the attack and to present expert testimony on these policies and procedures. University Hospital argues before this Court that the absence of evidence of NOPD's policies and procedures and expert testimony relative to same does not preclude an assessment of fault on the part of NOPD.

Accordingly, before addressing the propriety of the trial court's allocation of fault, we first consider the necessity for and the adequacy of expert testimony. We find that the court of appeal too narrowly focused the inquiry relative to University Hospital's burden of proof on NOPD's policies and procedures. We acknowledge that specific NOPD policies and procedures were not introduced into evidence, and there was no expert testimony relative to its specific procedures; however, Mr.

[5] The trial court's Reasons for Judgment do state that "[a]lthough Mr. Jackson was considered an arrestee in hospital, it was established at trial that he was not properly restrained."

Freeman, Officer Fulton, Officer Hankton, and Mr. Armbruster all testified as to the relevant general police procedures for guarding a prisoner, and this evidence was unrefuted. It is axiomatic that law enforcement officers must abide by minimal practices and procedures that permeate the law enforcement community. There are certainly rudimentary practices on which officers are instructed in the course of their training and officers are required to adhere to these practices in the performance of their professional duties as law enforcement officers. Although different law enforcement agencies may have differing specific policies and procedures unique to their jurisdiction, it is not genuinely disputed that general police procedures still apply.

While University Hospital could have introduced NOPD policies and procedures and elicited expert testimony regarding the particular duties that were in effect and were breached by NOPD, as it attempted to do, we find that expert testimony relative to specific NOPD policies and procedures was not necessarily required for an assessment of fault as to NOPD. Any relevant NOPD policy and procedure would necessarily fall within the general policies and procedures of law enforcement officers as testified to by Mr. Freeman, Officer Fulton, Officer Hankton, and Mr. Armbruster. We conclude that University Hospital was not required to introduce the written policies and procedures of NOPD or to introduce expert testimony specifically opining on NOPD's duty or breach thereof in order to meet their burden of proving fault on the part of NOPD. Therefore, we must now consider whether University Hospital otherwise met its burden of proving fault on the part of NOPD.

Mr. Freeman, the Deputy Chief of UPD at the time of the incident and a law enforcement officer for 38 years, provided testimony regarding prisoners who were patients at University Hospital. It was his testimony that when an offender is taken to University Hospital for treatment, he/she remained in the care, custody and control

of the law enforcement agency that brought the individual to the hospital. He explained that protocol requires the prisoner to remain restrained and that restraining the prisoner is the responsibility of the arresting agency. Additionally, Mr. Freeman testified that UPD has neither the resources to place, nor the responsibility of placing, guards in the hospital rooms of patients receiving treatment.[6]

Officer Fulton also testified about police protocol applicable to guarding a prisoner and the responsibilities of the guard. According to Officer Fulton, when an officer is being relieved of guard duty, the officers should communicate about the prisoner's history and whether he was a flight risk. He also testified that protocol required guards to sit in a position that enables them to keep a visual observation of the prisoner. Officer Fulton also explained the necessity of keeping a distance between the guard and the prisoner so that the guard may respond to actions taken by the prisoner. According to Officer Fulton, a guard should also know what tools the medical staff are using and to be sure that the tools have been removed when they leave the room. Additionally, he testified that the prisoner should be restrained at all times, except when he is receiving certain medical treatment. Finally, it was his testimony that a guard is to inspect the hospital room to make sure that the area is clear of any type of weapon or anything that the prisoner can use to hurt someone.

Officer Hankton testified about her training in police procedures and its focus on the safety of herself and fellow officers. She explained that handcuffs are utilized to immobilize an individual and that it was the responsibility of the agency who made the arrest to have the individual restrained. As a matter of police procedure, the individual is searched. She was aware of the concept of keeping a distance of approximately six feet between the officer and the prisoner. Officer Hankton further

[6] Mr. Freeman also testified extensively about UPD policies and procedures with regard to prisoners who were patients at University Hospital. He stated that they applied to not only UPD, but to law enforcement officers who brought prisoners to University Hospital, and it was their responsibility to adhere to them. However, Officer Hankton and Officer Fulton testified that they were not given copies of UPD's policies and procedures.

testified that when changing custody of a subject from one officer to another, there should be a dialogue between the officers. Additionally, she was instructed to determine if the individual was restrained when taking over guard duty and, during guard duty, to maintain visual observation of the person being guarded.

Mr. Armbruster, accepted as an expert in police policies, procedures, and training, also provided testimony as to the responsibilities and protocols of law enforcement when guarding a prisoner. He explained the need for officers to keep a safe distance from the prisoner to maintain a position of advantage. With respect to handcuffing, Mr. Armbruster testified that handcuffing techniques are taught as restraining methods used to restrict the mobility of the prisoner. Like the officers, Mr. Armbruster testified that when guards are being relieved, they should exchange information, and the incoming guard should be informed if the person is restrained. Additionally, an incoming guard should search the prisoner and the area to ensure that nothing is within the reach of the prisoner. Mr. Armbruster's testimony echoed the need to have constant watch of the prisoner, and he stated that officers are taught the concept of keeping a distance of about six feet from the prisoner. Finally, according to Mr. Armbruster, each individual agency is responsible for the care, custody, and control of the prisoner during guard duty.

Based upon this evidence, we find that University Hospital met its burden of proving that NOPD had a duty to guard Jackson, a violent criminal, during his hospitalization. This duty to guard encompassed a duty of the guards to communicate, to maintain observation of Jackson, to search Jackson and the premises, and a duty to properly restrain the prisoner.

Thus, the next step in the inquiry is whether University Hospital proved that NOPD breached its duty to guard. We readily conclude that it did. The record establishes that Officer Fulton and Officer Hankton failed to have a conversation upon her arrival and did not discuss whether Jackson was restrained. Officer Fulton

admitted that he did not check for restraints, and he searched neither the prisoner nor the hospital room. Officer Hankton did not independently confirm that Jackson was restrained, and she did not search either the room or Jackson for weapons. She also failed to maintain a safe distance from Jackson and momentarily turned her back to him. The evidence also establishes that NOPD did not diligently observe Jackson, as he was able to obtain medical instruments, and to fashion a makeshift handle for the suture scissors.[7] Finally, although Jackson testified that he was never restrained during his hospital stay, Officer Fulton claimed that Jackson was restrained when he left the hospital room. Despite this conflicting testimony, Jackson was obviously not adequately restrained, given that he was able to get out of bed and attack Officer Hankton.

The final determination to be made is whether the actions of NOPD were a cause-in-fact of Officer Hankton's injuries. Because NOPD failed in its duty to guard, Jackson ultimately was able to obtain the suture scissors, fashion them into a weapon, and secrete them. Thereafter, he used the suture scissors in his attack upon Officer Hankton. Thus, we conclude that the conduct of NOPD in breaching its duty to guard was a cause-in-fact of the resulting harm.

Based on our examination of the evidence and testimony presented at trial, notwithstanding the deference due to the trial court, we find that the trial court's failure to assess any degree of fault to NOPD is not supported by the record. To the contrary, the record contains a reasonable factual basis to establish fault on the part of NOPD. Accordingly, the failure to assess any degree of fault to NOPD was manifestly erroneous.

Given our conclusion that NOPD bears some degree of fault, we must adjust the allocation of fault. Notably, the assessment of 50% fault to Jackson has not been

[7] Jackson's testimony as to when he obtained the suture scissors and the length of time they remained hidden was unclear; however, Jackson was able to obtain and hide the weapon, all of which went undetected by NOPD.

challenged by University Hospital. Additionally, as we determined above, the assessment of 10% fault to Officer Hankton is not manifestly erroneous. Thus, the remaining 40% of fault must be reallocated between University Hospital and NOPD pursuant to the principles set forth in *Clement*, 666 So.2d 607.

In allocating fault, courts must consider both the nature of the conduct and the extent of the causal relationship between the conduct and the damages claimed. *Id.* at 611*; Watson*, 469 So.2d at 974. These same factors guide the appellate court's determination as to the highest or lowest percentage of fault that could reasonably be assessed. *Clement*, 666 So.2d at 611. After an appellate court finds a clearly wrong apportionment of fault, it should adjust the award, but only to the extent of lowering or raising it to the highest or lowest point respectively, which is reasonably within the trier of fact's discretion. *Id.; Toston v. Pardon*, 03-1747, p. 17 (La. 4/23/04), 874 So.2d 791, 803; *Brewer*, 35 So.3d at 244. Therefore, in making a determination of the highest or lowest percentage of fault that could reasonably be assessed under the facts of this case, we apply the comparative fault factors announced in *Watson*, 469 So.2d at 974.

Because University Hospital argues that the trial court erred in failing to assign NOPD any degree of fault, the fault of NOPD is discussed in detail above. However, that discussion in no way minimizes the fault of University Hospital, and we find that the record amply supports an assessment of fault to University Hospital.

In its Reasons for Judgment, the trial court recounted that Jackson was able to obtain three medical instruments, and he was able to fashion the suture scissors into a weapon. Specifically, as to University Hospital, the trial court found that medical staff negligently left these medical instruments in Jackson's hospital room and, "but for University Hospital's failure to account for and safeguard its own medical devices and tools, [Officer] Hankton would not have been brutally and repeatedly stabbed."

The court of appeal considered the propriety of the trial court's allocation of fault to University Hospital. Applying the *Watson* factors, it held that the trial court's factual finding that University Hospital created an unreasonable risk of harm was not manifestly erroneous. The court noted Mr. Freeman's testimony that University Hospital's employees did not adhere to its policies, and his admission that if surgical tools were left in Jackson's room by an employee, that was a violation of their policies. Thus, the court of appeal agreed with the trial court's finding that Jackson's stabbing of Officer Hankton would not have occurred but for University Hospital's failure to safeguard its surgical tools.

In affirming the percentage of fault allocated to University Hospital, the court of appeal reasoned that "University Hospital, by admission of its own employee, Mr. Freeman, violated its policies in failing to secure surgical tools that were used as a weapon to attack Officer Hankton[,]" and this violation created an unreasonable risk of harm to Officer Hankton. *Hankton*, 294 So.3d at 32. Thus, although University Hospital challenged the percentage of fault it had been assessed, the court of appeal held that the trial court did not err, noting that the highest percentage of fault had been assessed to Jackson.

Having considered the evidence, we find the record supports the conclusion that as between University Hospital and NOPD, University Hospital bears the majority of fault with respect to the nature of the conduct and the relationship to the damage. University Hospital's conduct in failing to follow its own policies and procedures lead to the attack on Officer Hankton. It was University Hospital employees who needed the instruments, who used the instruments, and who failed safeguard their instruments. The risk created by this negligent conduct of University Hospital was significant. Clearly, University Hospital was in the superior position and could have and should have adhered to its own policies and procedures, and thus avoided leaving suture scissors in a hospital room within the reach of Jackson. Had

it done so, Jackson would not have been armed with the weapon he used to carry out his attack on Officer Hankton in the first instance.

Secondly, and no less significant, given its obligation to protect life and property, as testified to by Mr. Freeman, we find fault in UPD's failure to intervene and assist Officer Hankton once Jackson's attack began. Officer Hankton testified that there was a UPD officer outside of Jackson's room during the time of her attack. Officer Hankton was yelling and struggling, and Jackson was demanding that she give him her gun as he brutally attacked her. Despite this obvious danger, the UPD officer did not intervene to assist Officer Hankton, which Mr. Freeman testified would also be a policy violation. This failure to act allowed an extremely dangerous and life threatening situation to continue, and it put Officer Hankton and all other persons and property on the premises in grave danger.

For the reasons detailed above, NOPD was likewise negligent and at fault. However, NOPD was clearly no more at fault than University Hospital. Cognizant of the negligent conduct of NOPD in reallocating fault, we emphasize as the trial court correctly determined, "but for University Hospital's failure to account for and safeguard its own medical devices and tools, [Officer] Hankton would not have been brutally and repeatedly stabbed." While the negligent actions of NOPD were a contributing factor, the stabbing of Officer Hankton would not have occurred absent the medical instruments being left in the hospital room where they were accessible to Jackson.

Based on our analysis of the *Watson* factors, we find that University Hospital bears a greater degree of fault than NOPD. Charged with establishing the high/low range of fault attributable to NOPD that would constitute a reasonable conclusion by the trier of fact, and having reviewed the record, we find the fault of NOPD was not less than 15%, but no more than 25%. Accordingly, in reapportioning the remaining percentage of fault, we assign NOPD with 15% fault, which is the lowest

amount the trial court could have reasonably allocated to NOPD. In turn, we reduce University Hospital's fault from 40% to 25%. Based upon our reallocation, the percentages of fault assessed are Jackson 50%, Officer Hankton 10%, University Hospital 25%, and NOPD 15%.

CONCLUSION/DECREE

For the reasons set forth herein, we affirm the judgment of the trial court allocating 10% fault to Officer Hankton. The judgment of the trial court is amended to reflect our reallocation of fault, reducing the fault of University Hospital from 40% to 25% and assigning 15% fault to NOPD. As amended, the trial court's judgment is affirmed.

AFFIRMED IN PART, AMENDED IN PART, AND AFFIRMED AS AMENDED.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-C-00462

SHEROME HANKTON

VS.

THE STATE OF LOUISIANA, MEDICAL CENTER OF LOUISIANA AT NEW ORLEANS (UNIVERSITY HOSPITAL), THROUGH THE BOARD OF SUPERVISORS AT LOUISIANA STATE UNIVERSITY AND DR. JOHN DOE

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

WEIMER, J., concurring in part, dissenting in part.

I agree with the majority that the trial court's apportionment of fault was manifestly erroneous and, in the absence of a challenge to the apportionment of 50% fault to Defendant Jackson, that percentage must stand. In the absence of such a challenge, Jackson's fault has analytically been taken as a given.

However, Jackson's conduct was intentional, so I believe it necessary to state that apportioning his fault equally with all other actors is not necessarily mandated by law. As this court has recognized, the Civil Code's apportionment of fault provision "reflects a legislative determination that on the continuum of moral culpability, the act of an intentional actor should not benefit from a reduction in the damages inflicted on a less culpable negligent actor." **Landry v. Bellanger**, 02-1443, p. 14 (La. 5/20/03), 851 So.2d 943, 954 (discussing La. C.C. art. 2323). A factfinder's recognition of a continuum of moral culpability based on varying degrees of intent might well require apportioning greater fault to an intentional tortfeasor in comparison to negligent tortfeasors. While I am bound by the same procedural

constraints as the majority to not disturb the 50% allocation to Jackson, a review of the record inescapably establishes his brutal attack was the product of forethought and planning. Under a different procedural posture, I might well have found a greater allocation of fault to that intentional tortfeasor was required.

For allocating the remaining 50% of fault among the negligent parties in the present posture, this case does require the factfinder to account for, among other factors, the relative "capacities of the actor, whether superior or inferior" to that of other actors with a role in the tort. See **Watson v. State Farm and Cas. Ins. Co.**, 469 So.2d 967, 974 (La. 1985). The majority of this court wisely–in my estimation–recognizes that the New Orleans Police Department (NOPD) was erroneously omitted from an assignment of fault by the lower courts. However, I respectfully disagree that the NOPD's share of fault was less than that of University Hospital. As the majority has properly framed this case, the relevant duty to prevent the patient-prisoner from attacking Officer Hankton concerns procedures for guard duty. Accordingly, apportionment of fault requires "a comparison of the respective degrees of duty." **Socorro v. City of New Orleans**, 579 So.2d 931, 943 (La. 1991).

The record reflects that while both NOPD and University Hospital, which had its own security personnel, shared a duty to guard Jackson, the duty to guard was not shared equally. Stated simply, the primary duty of University Hospital was to medically treat Jackson, whereas NOPD's sole duty at the hospital was to guard Jackson.[1] From these facts alone, under the comparison of the capacities of these

[1] While tacitly acknowledging in her brief that she could not see what was "outside the door" of Jackson's hospital room, the Plaintiff has nevertheless posited that she believed a University Hospital security guard was nearby Jackson's room yet did not respond to her cries for help when Jackson attacked her. Inasmuch as the lower courts erred by failing to evaluate the relative fault between NOPD and University Hospital, in my *de novo* review of the record on this point, I find Plaintiff's testimony insufficient to impact the apportionment of fault. See **Evans v. Lungrin**, 97-0541, 97-0577, pp. 6-7 (La. 2/6/98), 708 So.2d 731, 735 ("where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if

actors and their duties required by **Watson and Soccoro**, *supra*, I would ascribe a greater degree of fault to NOPD than to University Hospital.

However, facts establishing breaches of the duty to guard are not the lone facts to be considered. Indisputably, but for the University Hospital's failure to prevent Jackson's access to the surgical scissors he used in the attack, his attack would not have been so destructive. Therefore, accounting for the injurious effects of University Hospital's twofold breaches of its duty to: 1) guard Jackson's person; and 2) prevent Jackson as a patient-prisoner from having access to surgical instruments, raises University Hospital's culpability to a place equal with the NOPD's singular breach of its duty to guard. See **Socorro**, 579 So.2d at 943 (indicating that alongside a "comparison of the respective degrees of duty" that a comparison of the "respective degrees of causation" is an appropriate consideration for assigning degrees of fault). Thus, after accepting the majority's conclusion that Plaintiff is 10% at fault,[2] for the remainder, I find that ascribing NOPD with 20% fault and University Hospital 20% fault would comport with requirement to ascribe fault consistent with the highest and lowest points reasonably within the factfinder's discretion. See **Clement v. Frey**, 95-1119, 95-1163, p. 8 (La. 1/16/96), 666 So.2d 607, 611.

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the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine a preponderance of the evidence.").

[2] As noted earlier, because the fault of the intentional tortfeasor Jackson is beyond review and, therefore, set at 50%, this court's analysis is essentially constrained to apportioning the remaining 50%. If the entire 100% fault had been submitted for this court's review, I might have apportioned plaintiff's fault differently.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-C-00462

SHEROME HANKTON

VS.

THE STATE OF LOUISIANA, MEDICAL CENTER OF LOUISIANA AT NEW ORLEANS (UNIVERSITY HOSPITAL), THROUGH THE BOARD OF SUPERVISORS AT LOUISIANA STATE UNIVERSITY AND DR. JOHN DOE

On Writ of Certiorari to the Court of Appeal, Fourth Circuit,
Parish of Orleans Civil

Hughes, J., concurs in part and dissents in part.

I agree with the analysis of the well-written opinion but am mindful of the other opinions of my colleagues. Within the legal parameters available, I would assign fault at 50% to defendant Jackson, 10% to University Hospital, 20% to NOPD, and 20% to plaintiff.

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CRAIN, J., dissents with reasons.

Allocations of fault are reviewed under a manifest error standard of review. *Thompson v. Winn-Dixie Montgomery, Inc.*, 15-477, p. 14 (La. 10/14/15), 181 So.3d 656, 666. The majority correctly found the trial court erred in its allocation of fault; however, the duty-risk analysis of the alleged negligence of Officer Hankton, the NOPD, and University Hospital mandates a different allocation.

Under a duty-risk analysis, a plaintiff must prove: (1) the conduct in question was the cause-in-fact of the resulting harm; (2) defendant owed a duty of care to plaintiff; (3) the requisite duty was breached by the defendant; and (4) the risk of harm was within the scope of protection afforded by the duty breached. *Faucheaux v. Terrebonne Consolidated Government,* 615 So.2d 289 (La.1993).

First, it is uncontested Officer Hankton had a duty to ensure Jackson's security. Testimony established law enforcement officers are responsible for the security of prisoners in their custody, not University Hospital. The arresting agency, here the NOPD, maintained responsibility of the care, custody, and control of the prisoner at all times. Yet, Jackson was left unsecured and with access to a dangerous instrument. Officer Hankton admitted she failed to follow protocol, which she

learned in training and pursuant to general police practices used over her twelve-year career with the NOPD. She conceded she did not communicate with the prior guard, Officer Fulton, regarding Jackson's violent nature. She also did not personally ensure Jackson was handcuffed or that the room was free of weapons or dangerous instruments. Nor did she keep a distance of six feet between herself and the prisoner. These acts amounted to a breach of a legal duty to secure the prisoner. The possibility that an unrestrained prisoner would attack is within the risk encompassed by that duty and was a substantial contributing factor to Officer Hankton's injuries. Thus, it was manifest error to assess Officer Hankton's fault at just ten percent. Applying the *Watson*[1] factors and the principle enunciated in *Clement*,[2] I find the lowest percentage of fault that can reasonably be assessed to Officer Hankton is twenty-five percent.

Next, the NOPD was solely responsible for guarding the prisoner. The majority recognizes the NOPD "had a duty to guard Jackson," which encompassed "a duty of the guards to communicate, to maintain observation of Jackson, to search Jackson and the premises, and a duty to properly restrain the prisoner," but found the "NOPD was clearly no more at fault than University Hospital." It further held "the stabbing of Officer Hankton would not have occurred absent the medical instruments being left in the hospital room where they were accessible to Jackson." I respectfully suggest these findings fail to properly consider the law on duty and risk.

In general, the owner or operator of a facility has the duty of exercising reasonable care for the safety of persons on his premises and the duty of not exposing such persons to unreasonable risks of injury or harm. *St. Hill v. Tabor*, 542 So.2d 499, 502 (La.1989). This duty does not extend to unforeseeable or

[1] *Watson v. State Farm Fire and Cas. Ins. Co.*, 469 So.2d 967, 974 (La. 1985).

[2] *Clement v. Frey*, 95-1119 (La. 1/16/96), 666 So.2d 607.

unanticipated criminal acts by third persons. *Harris v. Pizza Hut of La., Inc.*, 455 So.2d 1364, 1371 (La.1984). However, when a duty to protect others against such criminal misconduct has been assumed, liability may be created by a negligent breach of that duty. *Mundy v. Dep't of Health & Human Res.*, 620 So. 2d 811, 813–14 (La. 1993). As stated in the Restatement (Second) of Torts § 344 comment (f) (1965):

> If the place or character of his business, or his past experience, is such that he [the proprietor] should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Thus, the question presented is not whether University Hospital had a duty to provide a safe premises and reasonable medical care (including safeguarding surgical instruments), which it undeniably did, but whether a criminal act by an unrestrained prisoner is within the scope of that duty. Here, the risk sought to be covered by the hospital's duty is a criminal attack by an unrestrained violent prisoner. Assuming, for the sake of argument, such an attack was foreseeable, the next question, then, is whether University Hospital took reasonable precautions to address that risk.[3] It did. University Hospital, by written policy, required NOPD guards to constantly monitor the prisoner and ensure his security. This satisfied University Hospital's duty. To require more is to impose a duty upon a hospital to assess the risk of violence of every patient-prisoner. That is simply not what a hospital is charged with doing.

In contrast, the NOPD and its employed officers assumed the duty to secure its prisoners and protect the hospital against any related threats of danger. Officer Hankton failed to meet the established safety protocol, thereby breaching her duty. Officer Fulton, the guard who worked the shift immediately preceding Officer

[3] Notably, no evidence was presented that the hospital was aware of the nature of the prisoner or of the crimes for which he was held.

Hankton, failed to communicate the criminal background of Jackson, failed to ensure Jackson was handcuffed, and failed to sweep the room to guarantee it was free from dangerous instruments. Indeed, the attack occurred just ten minutes after Officer Fulton left and Officer Hankton began her shift, prompting defense expert Armbruster to opine that Jackson's ability to conceal two weapons indicated a prior failure by the NOPD to keep an eye on the prisoner.

The risk of an attack was the very reason both officers were required by both the NOPD and the hospital to guard the prisoner; thus, their duty absolutely encompassed the risk of an attack, whether from a hospital instrument or from the prisoner's own hands. The breach of that duty was a significant cause of the damages. Accordingly, I would assign NOPD (for the imputed fault of Officer Fulton) twenty-five percent fault, which is the lowest reasonable assessment, and assign no fault to University Hospital.[4]

[4] The prisoner's attack cannot be both the foreseen risk which imposes the duty on the officers and at the same time the basis for a claim by one of the officers for the breach of that very duty. See relatedly, *Argus v. Scheppegrell*, 472 So.2d 573 (La. 1985).