NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2349

ERNEST J. LAPEZE, JR.

VERSUS

LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES AND JAMES CANNON

On Appeal from the 18th Judicial District Court
Parish of West Baton Rouge, Louisiana
Docket No. 31,121, Division "D"
Honorable William C. Dupont, Judge Presiding

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BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Judgment rendered DEC 2 8 2007

Downing, J. concurs and assigns reasons.

PARRO, J.

The Louisiana Department of Wildlife and Fisheries (LDWF) and one of its former agents, James Cannon,[1] appeal a judgment ordering them to pay Ernest J. Lapeze, Jr. the sum of $49,000 in damages. For the following reasons, we amend the judgment and affirm it as amended.

FACTUAL AND PROCEDURAL BACKGROUND

Most of the facts underlying this litigation are not in dispute. On September 4, 1999, the opening day of dove hunting season, Mr. Lapeze was having an annual pig roast and dove hunt for family and friends at his rural property in West Baton Rouge Parish. James Cannon, then an LDWF agent, was assisting with a state-run dove hunt across the road from the Lapeze property when he became aware that someone hunting on the Lapeze property was shooting. He drove his vehicle onto the Lapeze property to check the hunter's license and bag limit. Mr. Lapeze saw the agent driving across his property in a four-wheel-drive vehicle and was concerned about the safety of his guests, some of whom were children. Because of heavy rains earlier in the day, he also feared the agent's vehicle would "tear up" a grass airstrip on his property, toward which the agent was heading. Mr. Lapeze jumped in his truck and followed Mr. Cannon to the edge of the airstrip, where the agent was questioning the hunter, who was one of Lapeze's guests. Mr. Lapeze waited until the agent had satisfied himself that the hunter was properly licensed and within his bag limit; he then asked Mr. Cannon about repairing the deep wheel-ruts his vehicle had left on the property. Mr. Cannon said he did not think there was any damage and did not intend to do anything about the ruts.[2]

Not content with this answer, Mr. Lapeze refused to move his truck, which he had parked behind Mr. Cannon's vehicle, until he had a more satisfactory response concerning the property damage. Mr. Lapeze told Mr. Cannon he intended to keep the agent there until sheriff's deputies could arrive and investigate the damage. The

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[1] At trial, Mr. Cannon stated he later became employed as a trooper with the Louisiana State Police.

[2] Testimony at trial was inconsistent on whether he also told Mr. Lapeze to call the LDWF office on Monday to see if repairs would be done, or whether Mr. Lapeze told him to call his supervisors immediately.

situation quickly escalated, with Mr. Cannon threatening to arrest Mr. Lapeze for obstructing justice and Mr. Lapeze refusing to move his truck.[3] Eventually, Mr. Cannon told Mr. Lapeze he was arresting him for resisting an officer and handcuffed his left wrist. The cuff was very tight, possibly because it was set that way at the outset and possibly as a result of its "ratcheting" tighter in the ensuing struggle, as Mr. Cannon tried to get a second handcuff on. Mr. Lapeze complained of the pain in his wrist and asked the agent to loosen the handcuff. Mr. Cannon refused to loosen the handcuff, which was causing Mr. Lapeze's hand to turn red and puffy. Instead, Mr. Cannon kept trying to cuff the right wrist and used the cuffed wrist as leverage in what he described as a "wrist lock level technique" that forced Mr. Lapeze to his knees. At that point, Mrs. Lapeze joined the scuffle, trying to help her husband. She was also arrested.

Mr. Cannon eventually removed the handcuff, and the situation was stabilized when several sheriff's deputies and a number of LDWF agents came to investigate.[4] Mrs. Lapeze was transported downtown for booking. However, before joining her there, Mr. Lapeze was taken by another LDWF agent to the hospital emergency room for treatment of the pain and numbness in his left wrist and hand. Mr. Lapeze was treated conservatively for several years by his family doctor and a neurologist, was diagnosed with possible carpal tunnel syndrome, and continues to have some numbness and weakness in his left hand and wrist.

All charges against the couple were eventually dropped or refused by the district attorney. Mr. Lapeze then sued LDWF and Mr. Cannon, individually and in his capacity as an agent for LDWF, seeking damages for physical pain and suffering, mental anguish and suffering, bodily injury, medical bills and expenses, physical disability, and various constitutional violations. Before trial, the parties stipulated that Mr. Lapeze's damages did not exceed $50,000, exclusive of interest and costs.

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[3] Testimony was also inconsistent on whether Mr. Cannon could have left by driving around Lapeze's truck.

[4] It appeared from the testimony that Lapeze family members had called the sheriff's office and Mr. Cannon called for backup from the LDWF.

After a bench trial, the court concluded Mr. Lapeze had carried his burden of proving that Mr. Cannon was liable for false arrest and detention and for violation of his constitutional rights. The court found Mr. Lapeze's injuries consisted of median and ulnar nerve damage to his left hand, causing continued numbness in two of his fingers. The court noted that although medical records indicated Mr. Lapeze may have had some pre-existing carpal tunnel syndrome, it was obvious that the handcuffing injury greatly aggravated that condition. In reasons for judgment, the court stated it was awarding Mr. Lapeze general damages of $49,000 for false arrest and detention, violation of constitutional rights, injury, and medical bills.[5] The judgment was signed May 22, 2006. LDWF and Mr. Cannon appealed, asserting that the court erred: in finding there was no probable cause to arrest Mr. Lapeze; in finding Mr. Cannon was guilty of false arrest, detention, and a violation of Mr. Lapeze's constitutional rights; in finding no comparative fault on the part of Mr. Lapeze; and in awarding excessive damages.

APPLICABLE LAW AND ANALYSIS

Resisting an Officer, False Arrest, Probable Cause

The pertinent provisions of Louisiana Revised Statute 14:108 state the following:

> A. Resisting an officer is the intentional interference with, opposition or resistance to, or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest, lawful detention, or seizure of property or to serve any lawful process or court order when the offender knows or has reason to know that the person arresting, detaining, seizing property, or serving process is acting in his official capacity.
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> B. (1) The phrase "obstruction of" as used herein shall, in addition to its common meaning, signification, and connotation mean the following:
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> (b) Any violence toward or any resistance or opposition to the arresting officer after the arrested party is actually placed under arrest and before he is incarcerated in jail.
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> * * *
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> (2) The word "officer" as used herein means any peace officer, as defined in R.S. 40:2402, and includes ... wildlife enforcement agents.

[5] Medical bills are usually considered an item of special damages and are separately itemized. However, the court included them in the "general damage" award without itemizing them. Neither side has raised this as an issue in this appeal.

This statute prohibits conduct which obstructs officers acting in their official capacity while attempting to seize property, serve lawful process, or make a lawful arrest. State v. Nix, 406 So.2d 1355, 1356 (La. 1981); State v. Huguet, 369 So.2d 1331, 1333-34 (La. 1979). Interference with an officer's investigation is insufficient to establish the offense. Nix, 406 So.2d at 1356. Likewise, the refusal to move when ordered to do so by police is not a crime unless it obstructs police in their official duties in making a lawful arrest, seizure, or service of process. Huguet, 369 So.2d at 1333; Melancon v. Trahan, 94-26 (La. App. 3rd Cir. 10/5/94), 645 So.2d 722, 726, writ denied, 95-0087 (La. 3/10/95), 650 So.2d 1183.

False arrest and imprisonment occur when one arrests and restrains another against his will without a warrant or other statutory authority. Simply stated, it is restraint without color of legal authority. Kyle v. City of New Orleans, 353 So.2d 969, 971 (La. 1977); Kennedy v. Sheriff of East Baton Rouge, 05-1418 (La. 7/10/06), 935 So.2d 669, 690. A peace officer may, without a warrant, arrest a person when the person to be arrested has committed an offense in his presence or when the officer has reasonable cause to believe that the person has committed an offense, even if not in the presence of the officer. LSA-C.Cr.P. art. 213(1) & (3). Reasonable or probable cause exists when the facts and circumstances within the arresting officer's knowledge, and of which he has reasonable and trustworthy information, are sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense. Gibson v. State, 99-1730 (La. 4/11/00), 758 So.2d 782, 788; Wolfe v. Wiener Enterprises, Inc., 94-2409 (La. 1/13/95), 648 So.2d 1293, 1295. Whether a law enforcement officer has complied with the reasonable cause standard in making a warrantless arrest is a substantive determination to be made by the trial court from the facts and circumstances of each case. Theriot v. State Dep't of Wildlife and Fisheries, 94-1536 (La. App. 1st Cir. 4/7/95), 661 So.2d 986, 991, writ denied, 95-1617 (La. 10/6/95), 662 So.2d 1041. The proper standard of review is whether the trial court committed an error of law or made a factual finding that is manifestly erroneous or clearly wrong. If the trial court's decision is reasonable in light of the record reviewed

in its entirety, this court may not reverse even if we would have weighed the evidence differently. Where there is no dispute of fact, the question of probable cause is a question of law. Gibson, 758 So.2d at 788.

Every person has a right to resist an unlawful arrest. In preventing such an illegal restraint of liberty, a person may use only such force as may be necessary under the circumstances. White v. Morris, 345 So.2d 461 (La. 1977); Melancon, 645 So.2d at 727.

As noted by the trial court in written reasons for judgment, Mr. Cannon's "liability rests on his authority to arrest [Mr. Lapeze] for resisting and obstruction." The key phrase in LSA-R.S. 14:108(A) is "... authorized by law to make a lawful arrest ... ." Only if the officer is making a lawful arrest can a person be charged with resisting or obstructing that officer. Mr. Cannon testified that he arrested Mr. Lapeze because he refused to remove his truck, thus keeping the agent from leaving so he could perform his other duties. Therefore, Mr. Cannon contended that Mr. Lapeze was obstructing his investigation.

However, this puts the cart before the horse. Louisiana Revised Statute 14:108 has been strictly interpreted, in that only if the arresting officer is engaged in one of the three stated activities, namely, attempting to seize property, serving process, or making a lawful arrest or detention, may a person opposing him be guilty of a violation of that statute. Unless the other elements of LSA-R.S. 14:108 are present, simple interference with an officer's investigation is not sufficient to establish the offense of obstruction or resisting arrest. Under the facts of this case, there was no attempt to seize property or serve process. Therefore, unless Mr. Cannon was in the process of lawfully arresting or detaining someone for some other infraction, he could not cite Mr. Lapeze for resisting that lawful arrest or obstructing him in his duties.

The arrest of Mr. Lapeze was made without a warrant and could only be lawful if Mr. Cannon had probable cause for the arrest. As previously noted, the only "offense" on which Mr. Cannon based the arrest was Mr. Lapeze's refusal to move his truck until sheriff's deputies could arrive and investigate. The trial court determined that Mr.

Cannon did not have probable cause to arrest, because despite his belief that Mr. Lapeze was interfering with his investigation, this was not an offense in and of itself. Moreover, after placing him under arrest, albeit unlawfully, Mr. Cannon charged him with resisting arrest. However, Mr. Lapeze had the right to resist the unlawful arrest. There was nothing in the record indicating that Mr. Lapeze used excessive force against the agent. Having reviewed the facts, we find support for the trial court's conclusion, and the record as a whole does not establish that it is clearly wrong.

Comparative Fault

Louisiana Civil Code article 2323(A) provides, in pertinent part, as follows:

> 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 ... . 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.

In assessing the nature of the conduct of the parties, various factors may influence the degree of fault, including: (1) whether 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. Clement v. Frey, 95-1119, 95-1163 (La.1/16/96), 666 So.2d 607, 611. The finding of percentages of fault pursuant to the comparative fault article is a factual determination. Id. at 610. If the court of appeal finds a "clearly wrong" apportionment of fault, it should adjust the allocation, but only to the extent of lowering or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. Id. at 611; see also Rideau v. State Farm Mut. Auto. Ins. Co., 06-0894 (La. App. 1st Cir. 8/29/07), ___ So.2d ___, ___.

Mr. Cannon and LDWF argue in their brief that the trial court erred in failing to find any comparative fault on the part of Mr. Lapeze, since "but for his refusal to submit to being handcuffed, the cuffs would never have been tightly applied." Therefore, they

contend he caused his own injuries with his resistance. However, as previously noted, a person who is being unlawfully arrested has a right to resist that arrest. According to all the witnesses, including Mr. Cannon, Mr. Lapeze did not use any force against the agent. He merely tried to prevent the handcuffing of his right wrist by holding it in front of his body, rather than acquiescing in the agent's orders to put his right hand behind him so the handcuff could be attached. Of the two of them, only Mr. Cannon had experience with the use of handcuffs. Although the agent obviously knew that the handcuff might ratchet tighter when pulled, Mr. Lapeze did not know that, so he did not know how to avoid additional injury to his wrist. Furthermore, Mr. Cannon deliberately increased the pain and potential damage to the wrist by using a leverage technique to force Mr. Lapeze into submission. The agent could have avoided the entire incident by offering to approach his LDWF supervisor about repairing the wheel-ruts or by waiting for the sheriff's deputies to arrive. By virtue of his position as a law enforcement officer, he should have used his training to avoid escalating a minor disagreement into a major incident, rather than using a show of authority to fuel the conflict.

The trial court did not assign any comparative fault to Mr. Lapeze. Based on our review of the record, and in the light of Mr. Cannon's superior power to create and avoid injury to Mr. Lapeze in this factual situation, we find no manifest error in this conclusion.

General Damages

Much discretion is left to the judge or jury in the assessment of damages. LSA-C.C. art. 2324.1. The role of an appellate court in reviewing awards of general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. Andrus v. State Farm Mutual Auto. Ins. Co., 95-0801 (La. 3/22/96), 670 So.2d 1206, 1210; Reck v. Stevens, 373 So.2d 498, 501 (La. 1979). Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the

appellate court should increase or reduce the award. Andrus, 670 So.2d at 1210. This rationale applies to appeals by defendants as well as to appeals by plaintiffs. Williams v. State Dep't of Wildlife & Fisheries, 95-2456 (La. App. 1st Cir. 11/20/96), 684 So.2d 1018, 1023, writ denied, 96-3069 (La. 3/7/97), 689 So.2d 1372.

In reviewing a general damage award, a court does not review a particular item in isolation; rather, the entire damage award is reviewed for an abuse of discretion. Smith v. Goetzman, 97-0968 (La. App. 1st Cir. 9/25/98), 720 So.2d 39, 48; Dennis v. The Finish Line, Inc., 99-1413 (La. App. 1st Cir. 11/22/00), 781 So.2d 12, 30, writ denied, 01-0214 (La. 3/16/01), 787 So.2d 319. If the appellate court determines that the trier of fact abused its discretion in making or withholding an award for general damages, only then may the appellate court refer to prior awards in similar cases and then only to determine the highest or lowest point of an award within that discretion. Andrus, 670 So.2d at 1210.

LDWF and Mr. Cannon claim the trial court abused its discretion in making this award. Mr. Lapeze had pre-existing carpal tunnel symptoms in both hands. The handcuffing incident caused him severe pain, and this pain was aggravated by the wrist lock maneuver, which was intended to increase the pain. However, the actual handcuffing was limited in duration. He saw his family doctor and a neurologist over a period of several years for numbness and pain in the left wrist and hand. Conservative treatment, including pain medication, anti-inflammatory medication, a wrist splint, and nerve blocking injections, eventually relieved most of Mr. Lapeze's symptoms. Dr. Joseph A. Acosta, his treating neurologist, suggested that his symptoms could be relieved by carpal tunnel release surgery. After consulting with a surgeon in the year following the injury, Mr. Lapeze decided not to have this procedure performed. At the time of trial, he still had numbness in two fingers. He related a recent incident when a piece of wire became imbedded in one of his fingers as he worked with a buffer; he did not know the wire was there until he washed his hands two hours later. However, the injury did not keep him from working or participating in other activities, possibly because the injury was not to his dominant hand.

After reviewing the testimony of the witnesses, the deposition of Dr. Acosta, and Mr. Lapeze's medical records, we agree that the trial court abused its discretion, and we find that this general damage award was excessive. The injury to Mr. Lapeze's left hand and wrist has mostly resolved, except for occasional lingering numbness in two fingers. His medical records show that in January 2003, he developed a tender area in the left long finger, which was diagnosed as a ganglion cyst and surgically removed. There is nothing in the medical evidence linking this condition to the handcuffing incident. The orthopedist's notes related to that procedure indicate that Mr. Lapeze had "a little tenderness at the ulnar nerve of the left elbow with no localized weakness in the left hand," and "minimal diminished fine touch sensation in the ring and little fingers." It appears from these records that by 2003, the continuing numbness of these fingers was little more than a nuisance.

For these reasons, we do not believe the record supports a general damage award of this magnitude for what amounts to a relatively minor injury. Such an award is an abuse of discretion. Therefore, we must adjust the award to the highest possible reasonable amount. After reviewing the jurisprudence and comparing awards for similar injuries, we find that an award of $30,000 is the highest reasonable amount for this injury. See, e.g., Wheelis v. CGU Ins., 35,230 (La. App. 2nd Cir. 12/7/01), 803 So.2d 365 (general damages of $25,000 for a fractured wrist, surgery for resulting carpal tunnel syndrome, and pain lasting 14 months); Trunk v. Medical Ctr. of La. at New Orleans, 04-0181 (La. 10/19/04), 885 So.2d 534 (court reinstated a jury verdict awarding $35,000 in general damages for injuries to physician's left wrist that included a badly torn ligament, required arthroscopic surgery, was still painful six years later, and interfered with the physician's medical practice on a daily basis); Elliot v. Robinson, 612 So.2d 996 (La. App. 2nd Cir. 1993) ($40,000 in medical malpractice action for carpal tunnel surgery that damaged the patient's median nerve, producing a 30% permanent disability to left thumb); Parker v. Robinson, 05-0160 (La. App. 4th Cir. 2/22/06), 925 So.2d 646, 654, writ denied, 06-0944 (La. 9/29/06), 937 So.2d 860 (court overturned jury verdict and awarded $60,000 as the lowest reasonable amount

that could be awarded for bilateral carpal tunnel syndrome and aggravation to a pre-existing herniated disc); Williams v. Finley, Inc., 04-1617 (La. App. 3rd Cir. 4/6/05), 900 So.2d 1040, writ denied, 05-1621 (La. 1/9/06), 918 So.2d 1050 (general damages of $45,000 for headache, back pain, carpal tunnel syndrome, and other problems suffered after a fall that resulted in decreased ability to perform daily activities). While some of these cases have higher general damage awards, the scope of the injuries, the medical treatment needed, and the degree of pain and disability were greater in each of these cases than in the case we are reviewing. Therefore, the general damage award will be amended and reduced to $30,000.

CONCLUSION

For the above reasons, we amend the judgment of the trial court and reduce the award of damages to $30,000. The judgment is affirmed in all other respects. Each party is to bear its own costs of this appeal, with the amount of $995.50 being assessed to the Louisiana Department of Wildlife and Fisheries and James Cannon.

JUDGMENT AFFIRMED AS AMENDED.

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VERSUS

LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES AND JAMES CANNON

DOWNING, J., concurring

We hold here that a person may lawfully prevent a law enforcement officer from leaving the site of an investigation and the officer can do nothing about it. I disagree. However, although I disagree with the jurisprudence, I am required to follow it.