COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2423 **Cir. Ct. No. 00 CV 152**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

GREGORY THORNTON,

PLAINTIFF-RESPONDENT,

DEPARTMENT OF JUSTICE AND MILWAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PLAINTIFFS,

V.

CITY OF MILWAUKEE,

DEFENDANT-APPELLANT,

LAMONT HODNETT,

DEFENDANT-CO-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. The City of Milwaukee and Lamont Hodnett appeal from a judgment entered after the trial court found Hodnett liable for violating Gregory Thornton's constitutional rights contrary to 42 U.S.C. § 1983, and found the City liable for indemnification pursuant to WIS. STAT. § 895.46 (2001-02)[1] because Hodnett was acting within the scope of employment. The City and Hodnett claim that the trial court erred in concluding that Hodnett violated Thornton's civil rights because Hodnett acted as a reasonable police officer would, when perceiving a threat to his safety. The City and Hodnett also claim that the trial court erred in concluding Hodnett was not entitled to qualified immunity because of the perceived threat to his safety. Lastly, the City claims the trial court awarded excessive damages for past and future pain and suffering. Because the trial court did not err in finding a civil rights violation, the trial court did not err in finding that Hodnett was not entitled to qualified immunity, and the trial court did not award excessive damages, we affirm.

I. BACKGROUND

¶2 In the early morning hours of May 16, 1998, off-duty Milwaukee police officer Lamont Hodnett was driving in the City of Milwaukee when he noticed a vehicle approaching him from behind at a high rate of speed. The vehicle, driven by Gary Brumfield, passed Hodnett's vehicle, and Hodnett observed what he considered erratic driving. Instead of calling 911 from his cell phone, Hodnett decided to take police action and attempted to catch up to

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Brumfield and display his badge in the hope that Brumfield would begin driving more carefully.

¶3 Hodnett followed Brumfield to North 7th Street and West Capitol Drive where Brumfield parked in front of his cousin's house. As a precaution, Hodnett placed his service weapon between his legs with the barrel pointing down. A discussion ensued between Hodnett and Brumfield about Brumfield's driving. Brumfield got out of his vehicle and began talking to his cousin, Thornton, who was outside with his dog. Hodnett remained in his vehicle during the discussion. At one point, Thornton saw the gun between Hodnett's legs and warned Brumfield about the gun. Hodnett claims that during the discussion, Thornton pulled a gun out of his waistband and put it behind his right leg. When Hodnett saw Thornton turn his body and raise his elbow, Hodnett believed Thornton was going to fire his gun, so Hodnett fired two shots, hitting Thornton in the hip and the shoulder. After circling the block in his vehicle, Hodnett called 911 three times, but did not explain why he discharged his weapon, identify his location, or provide a description of Thornton.

¶4 As a result of the shooting, Thornton suffered injuries to his hip and shoulder. He was in the hospital for five days, underwent several surgeries, and has had follow-up care and rehabilitation to seek recovery from his injuries.

¶5 Thornton filed a lawsuit against Hodnett for violating his constitutional rights and against the City for indemnification. After a trial to the court, the court found Hodnett liable for $53,655.41[2] in past medical expenses,

[2] The medical expenses were later amended by stipulation to $41,885.54

$250,000 in past pain and suffering, and $250,000 in future pain and suffering. Before judgment was entered, the City filed a motion for reconsideration. The trial court denied the motion. Judgment was entered. The City of Milwaukee and Hodnett now appeal.

II. DISCUSSION

A. Findings of Fact

¶6 Hodnett and the City claim the trial court erred in concluding that Hodnett violated Thornton's civil rights. They claim that Hodnett's actions were reasonable under the circumstances; therefore, the conclusion of law was in error. The ultimate conclusion of law that Hodnett violated Thornton's civil rights was decided based on the trial court's findings of fact. The trial court's findings of fact will only be reversed if clearly erroneous. ***Estate of Pindel v. Czerniejewski***, 185 Wis. 2d 892, 898, 519 N.W.2d 702 (Ct. App. 1994). Because the trial court's findings were not clearly erroneous, we reject this claim.

¶7 As finder of fact, the trial court determines the credibility of witnesses and how much weight to give their testimony. ***Id.*** The trial court is in a better position to determine credibility because it can observe the witnesses as they testify, and take into account the witnesses' demeanor and attitude. ***Id.*** at 898-99.

¶8 In this case, the trial court heard the testimony of Thornton, Brumfield, and Hodnett. The court decided that Hodnett's version of the events was not credible and that his actions in shooting Thornton were unreasonable and unjustified. This finding is supported by the evidence and is not clearly erroneous. Several factors contributed to Hodnett's lack of credibility according to the trial court. Hodnett had been drinking that evening, Thornton did not threaten Hodnett,

and Hodnett would not answer any questions after the shooting as to why he fired his weapon. In addition, Dr. George Kirkham, a criminologist with police background, testified that Hodnett did several things contrary to police policy, including allowing a man he believed was armed to approach his vehicle. By concluding that Hodnett's version of the events was not credible, the court determined that his actions were unreasonable. Because there is substantial evidence in the record to support the trial court's findings of fact, we hold that the trial court did not err in concluding from those facts that Hodnett violated Thornton's civil rights.

B. Qualified Immunity

¶9 Hodnett and the City claim that the trial court erred in concluding that Hodnett was not entitled to qualified immunity. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985). The privilege is "an *immunity from suit* rather than a mere defense to liability." ***Id.*** (emphasis in original). Whether Hodnett is protected by qualified privilege is a question of law that we review *de novo*. ***Forman v. Richmond Police Dept.***, 104 F.3d 950, 957 (7th Cir. 1997).

¶10 The two-step process used to determine claims of qualified privilege is described in ***Saucier v. Katz***, 533 U.S. 194, 201 (2001). The first step is to determine whether the facts, in the light most favorable to the plaintiff, show a constitutional violation. If the plaintiff fails to establish a constitutional violation, the officer is entitled to qualified privilege. If the plaintiff does establish a constitutional violation, the court must determine whether the constitutional right was clearly established. ***Id.*** A constitutional right is "clearly established" when it

would be clear to a reasonable official that his conduct was unlawful in the situation he confronted. ***Id.*** at 202. As the Supreme Court in ***Saucier*** explains:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine … will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Id. at 205.

¶11 The use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. ***Graham v. Connor***, 490 U.S 386, 397 (1989). Hodnett and the City claim that Hodnett's actions were reasonable because of a perceived threat to Hodnett's safety. They support their position with several cases where an officer's actions were protected by qualified immunity, even though the officer misperceived the existence of a gun. *See* ***Sherrod v. Berry***, 856 F.2d 802 (7th Cir. 1988), ***Davis v. Freels***, 583 F.2d 337 (7th Cir. 1978). Those cases can be distinguished from the present case because the officers defended their actions based on mistake or misperception. Hodnett, however, did not defend his actions based on mistake or misperception; rather, his defense was that Thornton had a gun and he (Hodnett) shot his weapon to defend himself. The trial court did not believe Hodnett's version of events. Because the trial court found that Hodnett's actions were unreasonable and unjustified, a constitutional violation of Thornton's civil rights existed.

¶12 We must now consider whether the constitutional violation was "clearly established," or that a reasonable officer would know his conduct is

unlawful under the circumstances. ***Saucier***, 533 U.S. at 202. We conclude that it would be clear to a reasonable officer that actions such as Hodnett's were unlawful under the circumstances. Hodnett violated several policy rules that morning, including: using his firearm while under the influence of alcohol, driving at excessive speeds to catch up to Brumfield's vehicle while in his personal vehicle and not a police vehicle, and shooting Thornton without first drawing his weapon, identifying himself as a police officer, and commanding Thornton to freeze. The reasonable police officer would not have reacted as Hodnett did. As Dr. Kirkham testified, some of Hodnett's actions were directly in conflict with how officers are trained to handle tense and dangerous situations. In particular, Dr. Kirkham questioned why Hodnett would allow Brumfield to walk up to his car while he was still in it, and why Hodnett would allow Thornton to approach his vehicle if he indeed saw Thornton take a gun out of his waistband. The doctrine of qualified immunity seeks to protect officials from the consequences of their reasonable mistakes; however, Hodnett's actions went beyond reasonable mistakes. Because a constitutional violation has been clearly established, Hodnett is not entitled to qualified immunity, and the trial court did not err in so ruling.

C. Excessive Damages

¶13 The City claims that the trial court awarded excessive damages for past and future pain and suffering. Within its conclusions of law, the trial court awarded $250,000 for past pain and suffering and $250,000 for future pain and suffering. While the trial court labeled the damages as conclusions of law, the parties agree that they are findings of fact that this court will not overturn unless clearly erroneous. ***Pindel***, 185 Wis. 2d at 898.

¶14 The City claims that the award of damages is excessive because the evidence was insufficient to support the award. The City acknowledges that Thornton suffered substantial pain for several days after the shooting, but asserts that the evidence does not establish any permanent disfigurement or substantial daily discomfort to justify the award. We disagree.

¶15 The record contains lay and expert testimony regarding Thornton's injuries and the effect they have had on his life. Specifically, Dr. Sridhar Vasudevan, Medical Director of the Center for Pain Rehabilitation at Community Memorial Hospital in Menomonee Falls and St. Nicholas Hospital in Sheboygan, testified as to Thornton's permanent physical conditions. These conditions include reduced range of motion in his left shoulder and left hip, somewhat altered biomechanics, and some tightness and triggerpoints in his scapular muscles.

¶16 There is also evidence in the record about Thornton's emotional problems as a result of the shooting. Dr. Vasudevan recognized Thornton's anger, depression, and frustration with the pain he suffered from the shooting. Thornton testified as to the changes in his life, including not being able to walk his dog, suffering from forgetfulness and nightmares, and feeling overall frustration with his life. The record contains Thornton's proof of damages; however, the City did not offer any rebuttal expert testimony to support its position. Because there is sufficient evidence in the record concerning the damages Thornton incurred as a result of the shooting, we conclude that the trial court's award was not clearly erroneous.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.