NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1932

BRIAN TOWNSEND

VERSUS

OFFICER NATHAN DAVIS AND CITY OF BATON ROUGE/ PARISH OF EAST BATON ROUGE

Judgment Rendered: APR 15 2015

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 553,519

Honorable Todd W. Hernandez, Judge Presiding

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Henri M. Saunders
Scotty E. Chabert
Aidan C. Reynolds
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellee
Brian Townsend

Mary Roper
Gwendolyn K. Brown
Tedrick K. Knightshead
Baton Rouge, Louisiana

Counsel for Defendants/Appellants
City of Baton Rouge/Parish of
East Baton Rouge

Henry D.H. Olinde, Jr.
Scott E. Mercer
Baton Rouge, Louisiana

Counsel for Defendant/Appellee
Officer Nathan Davis

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McCLENDON, J.

This is an appeal by the defendant, the City of Baton Rouge/Parish of East Baton Rouge (City), from a trial court judgment following a jury verdict. The judgment awarded damages to the plaintiff, Brian Townsend, for injuries he sustained resulting from the actions of the defendant, Nathan Davis, a City police officer. The City appeals the amount of damages awarded, as well as the trial court's grant of a motion for a judgment notwithstanding the verdict (JNOV), which found that Davis was acting within the course and scope of his employment as a police officer. Davis answered the appeal, contending that the jury erred in finding that he used unreasonable force when he tackled Townsend and that the jury erred in its award of damages. Davis also maintains that the trial court erred in denying his motion for a JNOV as to liability and damages. Townsend answered the appeal, asserting that the jury and trial court erred in failing to find that Davis kicked Townsend, thereby violating his constitutional rights, and in failing to find that an award of punitive damages was appropriate. For the reasons that follow, we affirm.

FACTUAL HISTORY

During the early morning hours of March 4, 2007, Townsend and his ex-fiancé, Amanda Helfenbein, hosted an after-work party at their residence off Highland Road in Baton Rouge. At the time, Townsend worked as a manager at the Chili's Restaurant on College Drive and had gotten off work around midnight. At the height of the party, approximately twenty to twenty-five people were at the home. Sometime during the party, Officers Nicholas Batiste and Nathan Davis were dispatched to the scene due to a noise complaint. When the officers arrived at the residence around 3:00 a.m., they knocked on the front door, and Townsend answered. Townsend went outside to speak to the officers closing the door behind him. Townsend was told to shut the party down.

What happened after this is disputed. Townsend contends that after he and the officers engaged in a cordial conversation, he went back inside the house to tell everyone to go home, closing the door behind him. He then heard

a pounding on the door and again went outside. According to Townsend, Davis became hostile and began reading his Miranda rights to him for no reason, so he turned to the door to tell his fiancé that he was being arrested. However, according to the officers, when they first knocked on the door, they explained to Townsend that they had been out to his home earlier that morning in response to a previous noise complaint and that the party needed to end. According to Davis, Townsend, who appeared intoxicated, refused to shut down the party. The officers informed Townsend that if he did not voluntarily shut it down, they would issue him a summons and shut the party down themselves. Townsend again refused. Officer Batiste wrote the summons and began advising Townsend of his rights. According to the officers, Townsend then bolted and ran towards the front door.

It is undisputed that at this point Davis tackled Townsend to the ground. Davis landed on top of Townsend with his knees in his lower back with enough force to cause Townsend to involuntarily defecate on himself. While on the ground, Townsend refused to put his hands behind his back, and Davis told Townsend that if he did not comply, he would pepper spray him. Townsend continued to resist, and he was pepper sprayed by Davis. Townsend was then handcuffed.

Townsend was put on his feet and escorted to Davis' police unit. After being placed in the car, Townsend was taken to the Second District police station on Highland Road. Two other guests from the party, Richard Hawkins and John Cullen, were also arrested for their involvement in the altercation and were transported to the Second District in Batiste's police car. At the Second District, Hawkins and Cullen were placed in a holding room on a bench and cuffed to a nearby railing. Because of Townsend's unsanitary condition, he was told to sit on the floor in the holding room. He remained handcuffed. Officers Batiste and Davis then went into an office directly across the hallway from the holding room to do their paperwork.

Hawkins was released from the station fairly quickly. Sometime thereafter, Cullen requested to use the restroom, which request was granted. Townsend then began asking to use the restroom, but his requests were denied. According to Davis, Townsend's requests were denied because the Second District was not secure enough and Mr. Townsend would have access to a restroom when the officers got him processed at the First District police station. Additionally, Davis stated that Townsend was chanting obscenities in a sing-song manner and being uncooperative.

Although being instructed to remain on the floor, Townsend kept trying to stand up, and when he did, Davis crossed the hall and pepper sprayed him again. Thereafter, Cullen was moved to the hallway because of the pepper-spray fumes. Despite being pepper sprayed, Townsend continued to request to use the restroom. It is here that the facts again diverge. Davis stated that he never went into the holding room and adamantly denied that he kicked Townsend. However, Townsend stated that Davis got up from his desk, crossed into the holding room, and kicked Townsend in the groin area with extreme force.

Thereafter, the officers began the process of transporting Cullen and Townsend to Prisoner Processing and Transport (PPT), located in the First District police station. Batiste put Cullen into his police unit and then returned to help Davis with Townsend. According to Davis and Batiste, Townsend refused to stand up, and the officers dragged him to Davis' police car by pulling him on his back by his sweatshirt. Townsend's hands remained cuffed behind his back as he was dragged across the concrete and gravel of the parking lot, resulting in scrapes and cuts to Townsend's hands and wrists.

At the First District, Townsend voluntarily walked into PPT. However, because of Townsend's unsanitary condition, the PPT sergeant refused to process Townsend. Davis took Townsend back outside and had him sit on the ground. Davis called his supervisor, Sergeant Hardin, to ask what to do next. Hardin told Davis to take Townsend to East Baton Rouge Parish Prison to be

cleaned up, put in a jumpsuit, and then returned to PPT for processing. En route to Parish Prison, Hardin called Davis and told him to take Townsend to Earl K. Long Hospital to receive medical attention for the cuts and scrapes on his hands.

Davis arrived at the hospital at approximately 6:00 a.m. Davis and Townsend walked through the parking lot to the emergency room. Townsend complained to the emergency room staff that he had abdominal pain. After being evaluated, blood was found in his urine, and Townsend was admitted for observation. Townsend remained in the hospital and was to be discharged on March 6, 2007; however, he continued to complain of pain. Tests were performed that revealed that Townsend's bladder was not intact. Exploratory surgery followed, and the bladder rupture was discovered and repaired. Townsend was discharged from the hospital on March 8, 2007, but was readmitted on the morning of March 9, 2007, for postoperative ileus (nonfunctioning bowel) and a urinary tract infection. Townsend also developed pneumonia and postoperative deep vein thrombosis, and he remained in the hospital until March 15, 2007. Townsend missed four to five months of work and incurred medical expenses of approximately $32,000.00.[1]

PROCEDURAL HISTORY

On March 22, 2007, Townsend filed a Petition for Damages against Davis and the City, asserting violations of his constitutional rights under the United States and Louisiana Constitutions. He alleged that he was entitled to recover damages under state law and the federal Civil Rights Act, 42 USC § 1983, *et seq.* Townsend asked for general and specific compensatory damages, including punitive damages.

A jury trial of this civil matter began on September 17, 2012, and ended on September 21, 2012. The jury returned the following verdict, which was

[1] After Townsend's arrest, an internal investigation was conducted by the Baton Rouge Police Department, resulting in Davis' termination from employment. The matter was also referred to the FBI, and Davis was subsequently indicted and entered a plea of guilty to one count of a violation of 18 U.S.C. § 242, Deprivation of Rights Under Color of Law, in the United States District Court for the Middle District of Louisiana, in the matter entitled **United States of America v. Nathan Davis**, Case Number 3:08CR00154-001.

incorporated into a judgment that was signed by the trial court on January 2, 2013:

1. Do you find that Nathan Davis violated Brian Townsend's constitutional right to be free of the use of excessive force by pepper spraying?

   __x__ Yes _____ No

2. Was the constitutional violation described in question #1 a legal cause of damage to Brian Townsend?

   __x__ Yes _____ No

3. Do you find that Nathan Davis kicked Brian Townsend in violation of his constitutional right to be free from the use of excessive force?

   _____ Yes __x__ No

4. Was the constitutional violation described in question #4 (it should have read #3) a legal cause of damage to Brian Townsend?

   _____ Yes _____ No

5. As to the plaintiff's state law claims of negligence and battery, do you find that Nathan Davis' use of force on Brian Townsend was unreasonable?

   __x__ Yes _____ No

6. Was the negligence or battery committed by Nathan Davis a legal cause of damage to Brian Townsend?

   __x__ Yes _____ No

7. Was Nathan Davis acting in the course and scope of his employment with the Baton Rouge City Police Department at the time he committed a battery on Brian Townsend?

   _____ Yes __x__ No

8. What sum of money, if any, do you find adequately compensate Brian Townsend for his damages?

General Damages (Pain and Suffering, Mental Anguish, Past, Present and Future)	$160,000.00
Loss of Enjoyment of Life	$30,000.00
Permanent Scarring and Disfigurement	$0.00
Medical Expenses, Past and Future	$32,000.00
Lost Wages	$17,000.00

9. Do you find that Nathan Davis' violation of Brian Townsend's constitutional rights was motivated by an evil motive or intent or was

reckless or so callous as to make an award of punitive damages appropriate?

_____ Yes __x__ No

10. What amount of punitive damages, if any, do you find that is owed to Brian Townsend from Nathan Davis?

$0.00

The judgment ordered that the verdict of the jury be incorporated therein and made a judgment of the court in favor of Townsend against Davis for the total sum of $239,000.00. Additionally, in accordance with the jury verdict, Townsend's claims against the City were dismissed.

Thereafter, on January 14, 2013, Townsend filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial, arguing that the jury erred, 1) in finding that Davis was not in the course and scope of his employment as a Baton Rouge police officer, 2) in finding that Davis did not kick Townsend in violation of his constitutional rights, and 3) in failing to award punitive damages. On January 15, 2013, Davis filed his own motion for JNOV, asserting that Townsend was only entitled to damages for being pepper sprayed in violation of his civil rights. The motions were heard on April 8, 2013, after which the trial court took the matter under advisement. On June 21, 2013, the trial court rendered its written ruling. The court determined that the jury's verdict as to whether Davis kicked Townsend and whether Townsend was entitled to punitive damages was reasonably supported by the evidence. The trial court denied both the motion for JNOV and for a new trial on these issues. However, the trial court found legally erroneous the jury's verdict that Davis was not acting in the course and scope of his employment with the Baton Rouge Police Department at the time he committed a battery on Townsend. A final judgment was signed on July 29, 2013, granting Townsend's motion for JNOV with respect to the jury's finding that Davis was not in the course and scope of his employment. It denied Townsend's motion for JNOV in all other respects and denied his motion for new trial. The trial court also denied the motion for JNOV filed by Davis.

ASSIGNMENTS OF ERROR

The City filed a suspensive appeal, and assigns the following as error:

1. The trial court erred in granting the JNOV upon its finding that Davis' criminal actions in pepper spraying Townsend was conduct within the course and scope of his employment.
2. The jury erred by awarding excessive damages for the pepper-spraying incident.

Davis answered the appeal, asserting the following assignments of error:

1. The jury committed manifest error when it found that Davis used unreasonable force when he tackled Townsend during the arrest of Townsend.
2. The jury committed manifest error when it awarded Townsend damages for his ruptured bladder.
3. The trial court committed error when it denied Davis' motion for JNOV on the issue of liability and damages relating to Townsend's ruptured bladder.

Townsend also answered the appeal. He assigns as error:

1. The jury erred when it found that Davis did not kick Townsend in violation of his constitutional rights.
2. The jury erred when it did not award punitive damages for the conduct of Davis and resulting injuries and damages to Townsend.
3. The jury erred in not awarding any damages for scarring and disfigurement.
4. The trial court erred in failing to grant Townsend's motion for JNOV on the issue of punitive damages.

DISCUSSION

Standard of Review

A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The appellate court must find from the

record that a reasonable factual basis does not exist for the finding of the trial court, and the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882 (La. 1993).

The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. **Id.** Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. The reviewing court must always keep in mind that if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Thus, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. **Stobart**, 617 So.2d at 882-83.

Did the Jury Err in Finding that Davis did not Kick Townsend?

In his answer to the appeal, Townsend alleges that the jury erred in not finding that Davis kicked him in violation of his constitutional rights. Townsend asserts that no reasonable jury could reach a conclusion that Townsend was not kicked.

Townsend's testimony at trial was that while at the Second District police station, he asked to use the bathroom. After being pepper sprayed, he again requested to go to the restroom. That was when Davis threw his pen on his desk, ran across the hall, and kicked Townsend in the lower abdomen as hard as he could.

Batiste testified by video deposition. He stated that he remembered Townsend telling him that Davis kicked him. Batiste also testified that when they were in the holding room, Davis passed behind him, he heard a loud "thump," and Townsend yelled "he kicked me." Batiste stated that Townsend screamed

after the "thump," and Townsend sounded like he was in pain. According to Batiste, Davis looked "short-fused" and "had a head full of steam." Batiste testified on cross-examination that Davis "definitely made contact" with Townsend in the holding room.

Davis also testified by video deposition. He stated that although Townsend continued to be uncooperative, he did not go into the holding room nor did he kick Townsend. Davis further testified that Townsend walked into the First District precinct station without assistance and that Townsend never complained of pain to anyone at the First District or PPT.

Cullen testified that while at the Second District, he was moved out of the holding room after Townsend was pepper sprayed because of the fumes. Cullen stated that Townsend continued to plead to use the bathroom, and he saw Davis run across the hall. Cullen heard a "loud thud" and heard Townsend "screaming at the top of his lungs." To Cullen, it sounded like "something hitting something," and he "could tell that it was hitting a person." Cullen then heard Townsend say, "He kicked me. He kicked me." Soon thereafter, Cullen was escorted out of the precinct. Cullen admitted on cross-examination that he did not tell the Internal Affairs investigator about a kick.

However, the medical records did not show that Townsend suffered any external injury, such as bruising or swelling, at the site of the alleged kick. Further, there was testimony from some of the medical experts that had Townsend suffered a forceful kick there would have been external signs of trauma.

Although we may have found differently, after carefully reviewing all of the evidence, the jury could have reasonably found that no kick occurred. Only Davis and Townsend were in the room when the alleged kick occurred. While the other evidence would seem to support Townsend's account, there were no other eyewitnesses to the actual event. Two permissible views of the evidence were presented, and the jury's choice between them cannot be clearly wrong. Accordingly, we can find no merit in Townsend's assignment of error that the

jury erred in finding that Davis did not kick Townsend in violation of his constitutional rights.

Did the Jury Err in Finding that Davis used Unreasonable Force in Tackling Townsend?

In his answer to the appeal, Davis contends that there is no evidence in the record supporting the jury's finding that his tackle of Townsend was an unreasonable use of force. Davis argues that because the jury was manifestly erroneous in finding that he used unreasonable force when he tackled Townsend, the trial court manifestly erred in denying his motion for JNOV.

Louisiana Code of Criminal Procedure article 220 provides:

> A person shall submit peaceably to a lawful arrest. The person making a lawful arrest may use reasonable force to effect the arrest and detention, and also to overcome any resistance or threatened resistance of the person being arrested or detained.

Thus, under state law, the use of force by law enforcement officers is scrutinized by considering the "reasonable force" standard established in LSA-C.Cr.P. art. 220. The test precludes "clearly inappropriate force." LSA-C.Cr.P. art. 220, Official Revision Comment (b); **Kyle v. City of New Orleans**, 353 So.2d 969, 972 (La. 1977). The use of force when necessary to make an arrest is a legitimate police function. **Kyle**, 353 So.2d at 972. But excessive force transforms ordinarily protected use of force into an actionable battery, rendering the defendant officer and his employer liable for damages. **Penn v. St. Tammany Parish Sheriff's Office**, 02-0893 (La.App. 1 Cir. 4/2/03), 843 So.2d 1157, 1161.

Whether the force used is reasonable depends on the totality of the facts and circumstances in each case. Further, the degree of force employed is a factual issue, and, as such, is entitled to great weight. **Kyle**, 353 So.2d at 973. Factors in determining whether the force exerted was reasonable under the circumstances entail: the known character of the arrestee; the risks and dangers faced by the officer; the nature of the offense or behavior involved; the chance of escape if the particular means are not employed; the existence of alternative methods of arrest or subduing the arrestee; the physical strength, size and

weaponry of the officers as compared to that of the arrestee; and the exigencies of the moment. **Kyle**, 353 So.2d at 973; **Penn**, 843 So.2d 1161.

In this matter, Batiste stated that on the morning of the incident, he received an anonymous loud music call regarding Townsend's home. Batiste stated he drove by the party and told a few people in the front yard to keep it down and go inside. On the second call, Batiste was accompanied by Davis, who went to the house as Batiste's backup. Batiste testified that his intent was to write a summons to Townsend and then release him. However, when Batiste read Townsend his rights, Townsend "bolted" and ran to the front door.[2] At that point Davis tackled Townsend, and they fell to the ground a few feet from the door. According to Davis, when Townsend began running to the door, he followed Townsend and grabbed him by the shirt for safety purposes. Davis stated that Townsend lost his balance and fell down. Because he was holding onto Townsend's shirt, Davis stated that he fell on top of Townsend. In contrast, at trial, Townsend described the tackle as a "football-style tackle" from behind that caused him to defecate on himself.

Having reviewed the record and the facts and circumstances of this case, we find no manifest error in the jury's finding that Davis used excessive force in effectuating Townsend's arrest when he tackled Townsend. The record shows that the nature of the offense was nothing more serious than a noise complaint, a citation-only offense, with no requirement that Townsend be taken into custody. While Townsend may have had an "attitude" and failed to comply with the officers' requests, there was no evidence to indicate that any exigent circumstances existed during the exchange between the officers and Townsend to suggest a heightened sense of caution in the reason, manner, and execution of the arrest. There is no indication that Townsend had a weapon of any kind or that he was an escape risk. Although Townsend was trying to go inside, Davis' choice to tackle Townsend with enough force to cause him to involuntarily defecate on himself was unreasonable. A reasonable factual basis exists for the

[2] The photographs introduced into evidence show the front porch to be a fairly small area.

jury's determination that Davis did not act reasonably under the circumstances, and we find no manifest error. Accordingly, the trial court was not manifestly erroneous or clearly wrong in denying Davis' motion for a JNOV.

Was Davis Acting within the Course and Scope of his Employment?

In its first assignment of error, the City contends that the trial court erred in granting Townsend's motion for JNOV. The jury found that Davis was not acting within the course and scope of his employment with the Baton Rouge Police Department at the time he committed a battery on Townsend, but the trial court granted Townsend's motion for JNOV finding that he was within course and scope. The City asserts that Davis acted contrary to his training as a police officer when he pepper sprayed Townsend and that Davis' motivation was purely personal in response to Townsend's threatening, hostile, and disrespectful behavior.

A JNOV is a procedural device authorized by LSA-C.C.P. art. 1811, by which the trial court may correct an erroneous jury verdict by modifying the jury's finding of liability or damages, or both. **Granger v. United Home Health Care**, 13-0910 (La.App. 1 Cir. 6/19/14), 145 So.3d 1071, 1077, writ denied, 14-1665 (La. 10/31/14), 152 So.3d 158. Article 1811 does not set out the criteria to be used when deciding a motion for JNOV. **Id.** However, the Louisiana Supreme Court has set forth the standard to be used in determining whether a JNOV is legally called for, stating:

> A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. If there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. In making this determination, the court should not evaluate the credibility of the witnesses and all reasonable inferences or factual questions should be resolved in favor of the non-moving party. [Citations omitted.]

Davis v. Wal-Mart Stores, Inc., 00–0445 (La. 11/28/00), 774 So.2d 84, 89. See also **Cobb v. Mitchell**, 12-1032 (La.App. 1 Cir. 6/27/13), 121 So.3d 692, 695-96, writs denied, 13-2049 (La. 11/15/13), 126 So.3d 471, and 13-2315 (La. 12/2/13), 126 So.3d 1288.

An appellate court reviewing a trial court's grant of a JNOV employs the same criteria used by the trial court in deciding whether to grant the motion. **Wood v. Humphries**, 11-2161 (La.App. 1 Cir. 10/9/12), 103 So.3d 1105, 1110, writ denied, 12-2712 (La. 2/22/13), 108 So.3d 769. In other words, the appellate court must determine whether the facts and inferences adduced at trial point so overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary finding of fact. If the answer is in the affirmative, then the appellate court must affirm the grant of the JNOV. **Id.** However, if the appellate court determines that reasonable minds could differ on that finding, then the trial court erred in granting the JNOV, and the jury's verdict should be reinstated. **Id.**

Considering the above, our inquiry is whether the evidence so overwhelmingly supported a finding that Davis acted within the course and scope of his employment that reasonable jurors could not have concluded otherwise. If so, then the trial court was correct in granting the JNOV. However, if reasonable jurors might conclude from the evidence that Davis' conduct was outside the scope and course of his employment as a police officer, then the trial court erred in granting the motion, and the jury's verdict should be reinstated.

Under Louisiana law, an employer is answerable for the damage occasioned by its servant in the exercise of the functions in which the servant is employed. LSA-C.C. art. 2320[3]; **Timmons v. Silman**, 99-3264 (La. 5/16/00), 761 So.2d 507, 510. Specifically, an employer is liable for its employee's torts committed if, at the time, the employee was acting within the course and scope of his employment. **Timmons**, 761 So.2d at 510; **Baumeister v. Plunkett**, 95-

[3] The principle of vicarious liability in this case is derived from LSA-C.C. art. 2320, which provides, in part, "[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

2270 (La. 5/21/96), 673 So.2d 994, 996. An employee is acting within the course and scope of his employment when the employee's action is "of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer." **Timmons,** 761 So.2d at 510 (quoting **Orgeron v. McDonald**, 93-1353 (La. 7/5/94), 639 So.2d 224, 226-27).

Generally, courts consider four factors when assessing vicarious liability, including whether the tortious act: (1) was primarily employment rooted; (2) was reasonably incidental to performance of employment duties; (3) occurred during working hours; and (4) occurred on the employer's premises. **Holt v. Torino**, 12-1579 (La.App. 1 Cir. 4/26/13), 117 So.3d 182, 185, writ denied, 13-1161 (La. 8/30/13), 120 So.3d 267. See **LeBrane v. Lewis**, 292 So.2d 216, 217-18 (La. 1974). It is not necessary that each factor be present in each case, and each case must be decided on its own merits. The determinative question is whether the employee's tortious conduct was so closely connected in time, place, and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interest. **Holt**, 117 So.3d at 185.

If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act is otherwise within the service. The scope of risk attributable to an employer increases with the amount of authority and freedom of action granted to the servant in performing his assigned tasks. **Richard v. Hall**, 03-1488 (La. 4/23/04), 874 So.2d 131, 138-39; **Ellender v. Neff Rental, Inc.**, 06-2005 (La.App. 1 Cir. 6/15/07), 965 So.2d 898, 901-02.

Considering the foregoing principles and the particular facts of this case, we conclude that Davis' conduct that resulted in a battery on Townsend was a reasonable incident of Davis' duties as a police officer. Reasonable and fair-minded jurors could not have reached a contrary verdict. Davis was aiding

Batiste in responding to a complaint and effectuating the arrest and processing of Townsend. He was acting in his official capacity as a police officer, and the events occurred during working hours. Further, the later events occurred on the employer's premises. Thus, we find no error in the trial court's determination that Davis was acting within the course and scope of his employment at the time he committed a battery on Townsend.

Punitive Damages

Mr. Townsend also assigns as error the jury's failure to award punitive damages. In connection therewith, Mr. Townsend also maintains that the trial court erred in failing to grant his motion for JNOV regarding punitive damages.

The general public policy in Louisiana is against punitive damages. **Ross v. Conoco**, Inc., 02–0299 (La. 10/15/02), 828 So.2d 546, 555. Thus, punitive or other penalty damages are not allowed unless expressly authorized by statute. And even when a statute does authorize the imposition of punitive damages, it is strictly construed. **Id.**

Punitive damages are sums awarded separate and apart from any compensatory or nominal damages, as punishment or deterrence levied because of particularly aggravated misconduct on the part of the defendant. **Chauvin v. Exxon Mobil Corp.**, 14-0808 (La. 12/9/14), ___ So.3d ___, ___. The basis for the award is the defendant's motives and conduct in committing the particular tort, rather than the tort or injury itself. Thus, the purpose of punitive damages, given to the plaintiff over and above the full compensation for his injuries, is to punish the defendant, to teach the defendant not to do it again, and to deter others from following the defendant's example. **Id.**

In this matter, Mr. Townsend sought punitive damages under 42 U.S.C. § 1983. Punitive damages are allowed in appropriate cases under 42 U.S.C. § 1983. **Varnado v. Department of Employment and Training**, 95-0787 (La.App. 1 Cir. 6/28/96), 687 So.2d 1013, 1036, writ denied, 97-0312 (La. 3/27/97), 692 So.2d 394. Punitive damages are recoverable under § 1983 when the defendant's "conduct is shown to be motivated by evil motive or intent, or

when it involves reckless or callous indifference to the federally protected rights of others." **Id.** The object of the remedy is to punish as well as to deter the commission of similar offenses in the future. Stated another way, the purpose of granting punitive damages under § 1983 is to deter future egregious conduct that violates constitutional rights. **Id.** Even when a showing is made, the trier of fact must exercise discretion, weighing the nature of the defendant's conduct, the wisdom of pecuniary punishment, and the advisability of a deterrent. **Id.**

In refusing to award punitive damages, the jury must have determined that the circumstances presented herein did not warrant the award of punitive damages. Upon our own thorough review of the record, we cannot say that the evidence established that Davis' conduct was motivated by evil motive or intent or constituted reckless or callous indifference. Therefore, we cannot say that jury manifestly erred or was clearly wrong in failing to award such damages.

Compensatory Damages

In its second assignment of error, the City asserts that the jury awarded excessive damages for the pepper-spraying incident since no unreasonable force was used when Davis tackled Townsend and since the jury found that there was no kick. Davis also contends that the jury erred in awarding Mr. Townsend damages for his ruptured bladder arguing that there is no evidence that the tackle at the arrest scene was improper. Therefore, according to both the City and Mr. Davis, damages are appropriate only for the pepper spraying at the Second District.

The jury awarded Townsend $160,000.00 in general damages for pain and suffering and mental anguish. The jury also awarded $30,000.00 for loss of enjoyment of life. Additionally, the jury awarded $32,000.00 in medical expenses and $17,000.00 in lost wages. Thus, in order to have awarded $190,000.00 in general damages, medical expenses for Townsend's ruptured bladder, and lost wages, and having found that there was no kick, the jury had to have found that Townsend's bladder ruptured when he was tackled and that the force used was unreasonable. Having already found that the jury did not err

in finding the force used in the tackle was unreasonable, the next issue to be decided is whether the jury could have reasonably found that the tackle caused Townsend's bladder to rupture.

Dr. John Uffman testified by deposition. He was a general surgery resident at Earl K. Long Hospital at the time of the incident herein and performed the exploratory laparotomy and bladder repair on Townsend. He testified that Townsend suffered an eight-centimeter rupture at the dome of his bladder. He stated that the pubic bone protects the bladder, unless it is distended. In that case, the bladder will stick up considerably above the pubic bone. Thus, it is more likely that a bladder will rupture if it is full than if it is empty. Dr. Uffman stated that any blunt abdominal trauma could rupture the bladder. He believed in this matter that if the force of the tackle was strong enough to cause involuntary defecation, it was strong enough to rupture the bladder. He also stated, however, that a kick in the genital area could be a force strong enough to rupture the bladder. A kick might cause external trauma as well, although there was no evidence of external injury to Townsend. Dr. Uffman stated that he could not say what caused the rupture, although it would be a fair assumption that if Townsend suffered pain immediately after the alleged kick, then the kick caused the rupture. However, he also stated that a bladder rupture can go unnoticed for a short period of time.

Dr. James Morris, an expert in urology testified that he saw Townsend approximately five to six weeks after his bladder repair. It was his opinion that a kick to the testicles or lower abdomen with a fully distended bladder could cause a bladder to rupture. He stated that he would expect extreme pain if there was a rupture at the time of the tackle as it is significant blunt trauma. Further, an eight-centimeter rupture would not usually go unnoticed. He stated that an individual would have to be passed out not to feel that pain. It was Dr. Morris' opinion that a patient who is ambulatory, alert, and oriented is "certainly going to be aware of a bladder rupture," "even if he'd been drinking." On cross-examination, Dr. Morris stated that the pain could possibly be delayed, but that

he hasn't seen that in his practice in twenty years. He admitted, however, that a tackle hard enough to cause Townsend to defecate on himself could possibly cause the rupture.

Dr. John Staub, a urologist in Texas where Townsend currently resides, testified that Townsend related to him that he was kicked in the testicles. He stated that bladder ruptures are not common and that he has never seen a kick in the testicles cause a ruptured bladder. If a kick occurred as described by Townsend, he would expect the entire pelvis to hurt. Theoretically, a tackle could cause a rupture and he would also expect severe abdominal pain. Dr. Staub testified that it was possible to have a ruptured bladder and not know about the rupture right away; however, that usually occurred with multiple injuries. He also stated that the extravasation of urine into the abdominal cavity from the bladder rupture would cause more pain than the rupture itself.

Dr. Adrian Landry, an expert in the field of internal medicine, reviewed Townsend's records from Earl K. Long Hospital. He testified at trial and stated that Townsend told the emergency room and treating doctors that he was kicked in the groin by a police officer. At the emergency room, Townsend complained of pelvic pain, and there was blood in his urine. However, a CAT scan was initially unremarkable, but the attending doctors decided to keep Townsend in the hospital. Two days later, when Townsend's catheter was removed, he continued to complain of pain and difficulty. As a result, a cystourethrogram, where the bladder is filled with dye, was performed, and the bladder was not intact. Exploratory surgery followed, and the eight-centimeter rupture was discovered. Dr. Landry testified that it was a fair statement to say that an eight-centimeter rupture would cause extreme pain, even if someone is fairly inebriated.

On cross-examination, Dr. Landry stated that the hospital records did not show any signs of external trauma, such as bruising or swelling. He also stated that with a ruptured bladder, a person could still have the urge to urinate, but he would defer his opinion to a urologist. Dr. Landry testified that a violent tackle

could be significant enough trauma to rupture a distended bladder and that pain can be delayed. It was his opinion, however, that it was more likely that a kick, rather than the tackle, caused the rupture.

Dr. Kenneth Blue, an expert in the field of urology, testified at trial on behalf of Davis. He stated that he is retired from private practice after thirty-two years. Currently he is the full-time chief of urology and an assistant clinical professor at the LSU School of Medicine. Dr. Blue stated that he has been involved with hundreds of ruptured bladders and that, in all his years, he has never seen a bladder rupture caused by a kick to the pelvic bone. He stated he has seen a bladder rupture due to a tackle or fall. Dr. Blue testified that 80% of bladder ruptures are caused by blunt abdominal trauma and the rest by penetrating injuries, such as knives, guns, and the bony fragments of a fractured pelvis. The most common cause of a ruptured bladder is blunt abdominal trauma from automobile accidents, and a seat belt injury is the most common kind. The literature states that from three to ten percent of bladder ruptures occur with falling. Dr. Blue additionally testified that with severe trauma to the groin, generally, you will always see some external sign of trauma. In this case, the hospital records show no external trauma at all. It was his opinion that the evidence was not consistent with someone who says he was kicked in the groin as hard as possible. He stated that this is backed up over and over in the medical literature. Dr. Blue stated that when Townsend was tackled, he hit the ground with enough force to defecate, and from evidence-based medicine, the blunt abdominal trauma probably caused the bladder to rupture. He also stated that a bladder injury causes symptoms, as it will give someone an urge to urinate. Therefore, according to Dr. Blue, "the fact that he needed to urinate at the police station tells me nothing."

Dr. Blue testified that two out of three people with a bladder rupture will experience immediate pain. Therefore, in a reasonable number of cases, there is a delay in diagnosis because of the absence of pain. Dr. Blue also considered

Townsend's intoxication in his opinion. Alcohol is an anesthetic agent that depresses the central nervous system.[4]

Dr. Blue stated that eight centimeters is approximately three inches. That is a large tear, but a one-centimeter tear is as bad as an eight-centimeter tear. According to Dr. Blue, the size of the tear has nothing to do with the severity of the injury or complications. Additionally, sensory nerves in the bladder are primarily concentrated at the bottom of the bladder. Probably close to 100% of tears in the dome are caused by blunt abdominal trauma.

On cross-examination, Dr. Blue conceded that a kick could probably cause a rupture to the bladder, but without any evidence of a kick, he disagreed that a kick occurred in this matter. A completely negative exam of Townsend's genitalia indicates to him that either there was no kick or a kick with little force. On redirect examination, Dr. Blue stated that if there was enough force to cause Townsend to involuntarily defecate, that force indicates a lot of pressure inside of his abdomen. Townsend's bowels had an escape route and the escape for the bladder was the rupture.

Townsend testified that he had no abdominal pain after the tackle. However, he admitted to drinking more than one six-pack of beer, but less than two, on the night of the incident, plus at least one glass of wine.

After thoroughly reviewing the record, we find that a reasonable factual basis exists for the jury's conclusion that Townsend's bladder ruptured when he was tackled by Davis. We cannot say that this factual finding was manifestly erroneous. Accordingly, the City's second assignment of error is without merit, as is Davis' answer to the appeal.

The remaining issue is Townsend's argument that the jury erred in not awarding him any damages for his scarring and disfigurement.

Helfenbein, Townsend's ex-fiancé, testified at trial that she took the photographs introduced into evidence showing Townsend's injuries. However, all

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[4] Dr. Blue testified and the emergency room records show that Townsend's blood alcohol level was .173, several hours after the incident.

of the photographs were taken while Townsend was in the hospital shortly after the bladder-repair surgery. There is nothing in the record to indicate that the jury observed any scarring at the time of trial, nor were any photos introduced of the surgery site after it had healed. Accordingly, we cannot say the jury manifestly erred in failing to award any damages for Townsend's scarring and disfigurement.

CONCLUSION

For the above and foregoing reasons, we affirm the trial court's judgment. Costs of this appeal shall be divided equally, between the City of Baton Rouge/Parish of East Baton Rouge; Brian Davis; and Brian Townsend.

AFFIRMED.