STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY SUDUL and TERESA SUDUL,

Plaintiffs-Appellees,

v

DAVID DONNELL,

Defendant-Appellant,

and

WILLIAM ROBINSON, CITY OF HAMTRAMCK, PETER C. GARON, MARK KAY, MARK JAWORSKI and DEREK SULAKOWSKI

Defendants.

UNPUBLISHED
May 25, 2001

No. 216471
Wayne Circuit Court
LC No. 92-204061-NO

ANTHONY SUDUL and TERESA SUDUL,

Plaintiffs-Appellees,

v

WILLIAM ROBINSON,

Defendant-Appellant,

and

DAVID DONNELL, CITY OF HAMTRAMCK, PETER C. GARON, MARK KAY, MARK JAWORSKI and DEREK SULAKOWSKI,

Defendants.

No. 216560
Wayne Circuit Court
LC No. 92-204061

Before: Hoekstra, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Defendants William Robinson and David Donnell appeal as of right the trial court's denial of their motions for judgment notwithstanding the verdict (JNOV), new trial, and remittitur in this consolidated action alleging police brutality. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This case arises out of the October 21, 1991, arrest of plaintiff, Anthony Sudul (Sudul), by Hamtramck police officers, including defendants, in the presence of Sudul's wife and children. Subsequently, plaintiffs (the Suduls) brought a cause of action against the City of Hamtramck, Hamtramck Police Department, and seven Hamtramck police officers alleging assault and battery, a violation of Sudul's civil rights pursuant to 42 USC 1983, intentional infliction of emotional distress, and loss of consortium. In 1993, the case proceeded to trial and culminated in a jury verdict in the Suduls' favor. Thereafter, an appeal to this Court resulted in a reversal and remand to the trial court for a second trial on the merits of the claims against defendants Robinson and Donnell only. See *Sudul v Hamtramck*, 221 Mich App 455; 562 NW2d 478 (1997). The second jury trial commenced in September 1997 and resulted in a unanimous verdict in plaintiffs' favor.

On appeal, defendants contend that the trial court erred in denying their motions for JNOV, arguing there was insufficient evidence to support a finding that excessive force was used during Sudul's arrest and, thus, that Sudul's civil rights were violated. Defendant Robinson also argues that he was entitled to qualified immunity with regard to Sudul's claim for damages pursuant to 42 USC 1983. We disagree.

When deciding a motion for JNOV, the trial court must view the evidence in a light most favorable to the nonmoving party, drawing all reasonable inferences in their favor, to determine whether the nonmoving party failed to establish a claim as a matter of law. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999). The trial court's decision on the motion is reviewed de novo. *Id*. "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998), quoting *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). The issue of qualified immunity is one of law and is reviewed de novo. *Thomas v McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000).

In actions brought under 42 USC 1983, governmental officials, including police officers, performing discretionary functions may be entitled to qualified immunity if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id*., quoting *Guider v Smith*, 431 Mich 559, 565; 431 NW2d 810 (1988). On appeal, defendant Robinson argues that he was entitled to governmental immunity because the force he used during Sudul's arrest was not excessive, therefore, Sudul's Fourth Amendment rights were not violated. The reasonableness of the conduct in which immunity depends is a factual question that the factfinder must first determine. *Alexander v Riccinto*, 192 Mich App 65,

72-73; 481 NW2d 6 (1991). Defendant Donnell similarly argues that the force he used in assisting in Sudul's arrest was reasonable and that he had minimal contact with Sudul during the arrest.

To determine whether the force used to effect an arrest was "reasonable" under the Fourth Amendment, this Court must consider the totality of the circumstances surrounding the seizure, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v MS Connor*, 490 US 386, 396; 109 S Ct 1865, 1872; 104 L Ed 2d 443 (1989). An objective standard must be implemented to determine the "reasonableness" of the particular force used in light of the facts and circumstances confronting a reasonable officer on the scene. *Id*. at 396-397; see also *People v Hanna*, 459 Mich 1005; 595 NW2d 827 (1999). A police officer effecting a lawful arrest may use reasonable force if the arrestee resists. *Tope v Howe*, 179 Mich App 91, 106; 445 NW2d 452 (1989).

The evidence presented at trial, viewed in a light most favorable to Sudul, was legally sufficient to support a finding by the jury that the force used by both defendants during Sudul's arrest was unreasonable. It was undisputed at trial that Sudul was being pursued on a misdemeanor charge of fleeing and eluding by at least four police officers, did not pose an immediate threat to the officers, himself, or others, was grabbed by at least two officers, and was taken to the ground by both defendants and a third officer where he was handcuffed by both defendants. There were disputed factual issues regarding whether: (a) Sudul was "struggling" during the arrest, (b) Sudul's legs were pulled out from under him causing him to fall head first to the ground and strike his head or whether he was gently placed on the ground, (c) Sudul's face was "smashed" against the trunk of his car and sidewalk by defendant Robinson, (d) Sudul was beaten, punched, and kicked while on the ground by the officers, (e) Sudul was kneeled on during handcuffing, (f) Sudul was lifted off of the ground by the handcuffs, and (g) defendant Robinson pulled Sudul from the police car and escorted him into the police station by pulling Sudul's handcuffed arms high up in the air, forcing him to walk on his toes.

In sum, there were disputed issues of fact regarding the circumstances surrounding the seizure, the necessity for the use of force, the type and amount of force used, and the manner in which the arrest was conducted. The evidence established that both defendants were actively involved in Sudul's arrest. If the jury accepted plaintiffs' evidence in support of their version of the events, the jury could reasonably find that defendants Robinson and Donnell used an unreasonable amount of force during Sudul's arrest. If the jury accepted defendants' evidence in support of their version of the events, the jury would find that almost no force was used to effect Sudul's arrest. JNOV is improper where reasonable minds could differ with regard to issues of fact. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 672; 591 NW2d 438 (1998). Consequently, defendant Robinson was not entitled to qualified immunity and the trial court properly denied defendants' motions for JNOV regarding Sudul's § 1983 claim because the evidence was legally sufficient to support a finding that the force used

by both defendants during Sudul's arrest was unreasonable and violated Sudul's Fourth Amendment rights.[1]

Next, defendants argue that the trial court erred in denying their motions for JNOV regarding plaintiff Bernard Sudul's claim of infliction of emotional distress because such action was barred by governmental immunity pursuant to MCL 691.1407(2); MSA 3.996(107)(2). We agree.

In the second trial, plaintiff Bernard Sudul pursued a bystander claim of "infliction of emotional distress" that was not premised on either a negligent or intentional act after this Court reversed the trial court's decision to allow a "grossly negligent infliction of emotional distress" to proceed to trial. *Sudul*, *supra* at 462. However, the jury instruction set forth elements that have been recognized as elements for bystander recovery in a "negligent infliction of emotional distress" cause of action. See *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 80-81; 385 NW2d 732 (1986).

In Michigan, police officers are immune from tort liability while engaged in governmental functions if the officer was acting, or reasonably believed he was acting, within the scope of his authority, unless his conduct amounted to gross negligence that proximately caused a plaintiff's injury or damage. MCL 691.1407(2); MSA 3.996(107)(2); see also *Otero v Warnick*, 241 Mich App 143, 145-146 n 1; 614 NW2d 177 (2000). Plaintiff argues in his rebuttal brief that an "infliction of emotional distress" cause of action need not be based on a negligent or intentional act. Plaintiff's position is inconsistent with prevailing case law. See *Nugent v Bauermeister*, 195 Mich App 158; 489 NW2d 148 (1992); *Pate v Children's Hosp of Michigan*, 158 Mich App 120; 404 NW2d 632 (1986); *Wargelin*, *supra*; *Gustafson v Faris*, 67 Mich App 363; 241 NW2d 208 (1976). As a negligence action, plaintiff Bernard Sudul's claim of infliction of emotional distress was barred by governmental immunity and, thus, fails as a matter of law. MCL 691.1407(2); MSA 3.996(107)(2). Consequently, the trial court erred in denying defendants' motions for JNOV with regard to plaintiff Bernard Sudul's bystander claim of "infliction of emotional distress" and the jury award in his favor must be vacated.

Next, defendants argue that they are entitled to a new trial because the jury's decision on Sudul's § 1983 and assault and battery claims was against the great weight of the evidence. We disagree.

In deciding a motion for a new trial based on a claim that the verdict is against the great weight of the evidence, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 525;

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[1] Although in his statement of question presented defendant Robinson referred to an argument regarding insufficient evidence presented on the assault and battery claim, defendant did not discuss or argue the issue in his brief. Defendant may not merely announce his position and leave it to this Court to determine and rationalize the basis for his claim. Therefore, the issue is not properly presented on appeal and is deemed waived. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000).

564 NW2d 532 (1997). This Court accords substantial deference to the trial court's conclusion but reviews the record on appeal to determine whether the trial court abused its discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999); *Phinney*, *supra* at 525.

As previously discussed, there were disputed issues of fact regarding the circumstances surrounding Sudul's seizure, the necessity for the use of force, the amount and type of force used, and the manner in which the arrest was conducted. Defendants' primary defense against Sudul's claims was that the force they used to assist in Sudul's arrest was justified and reasonable. Similarly, defendants denied that Sudul was kicked, punched, or beaten during the arrest. Disputed issues of fact and assessment of the credibility of witnesses are properly within the province of the jury to determine. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998); *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999). The evidence presented by Sudul and defendants supported diametrically opposed assertions of fact. The jury was apparently persuaded by the evidence to accept Sudul's account of the arrest, finding that excessive force was used during Sudul's arrest and that an assault and battery was committed against Sudul during his arrest. The overwhelming weight of the evidence presented at trial did not favor defendants. Therefore, the trial court did not abuse its discretion in determining that the verdict was not against the great weight of the evidence and properly denied defendants' motions for a new trial.

Defendants next argue that they are entitled to a new trial because the verdict was influenced by passion and prejudice as a consequence of inflammatory remarks made by opposing counsel during closing arguments. We disagree.

Asserted claims of counsel misconduct are reviewed by first determining whether the attorney's action was error and, if it was, whether reversal is required. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). The comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id*. "Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Id*.

This issue was not properly preserved for review because defendants did not object to the disputed remarks during plaintiffs' counsel's closing argument. However, this Court will review the issue to determine whether the comments "may have caused the result or played too large a part and may have denied the party a fair trial." *Ellsworth*, *supra* at 192, quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982).

After review of the contested remarks, including plaintiffs' counsel's references to: (a) defendants' medical expert's and Officer Garon's failure to testify live at trial, (b) Malice Green and Rodney King, (c) a "blue curtain" of silence, and (d) "big, strong police officers," we find no error requiring reversal. Prior to the deposition testimony being read to the jury and after closing arguments, the trial court gave proper instructions regarding the consideration to be accorded the deposition testimony presented at trial. The reference to Malice Green and Rodney King was an attempt to attack defendants' defense, was brief, and did not reflect a studied purpose to inflame the jury or deflect the jury's attention from the issues involved. The case did, in fact, turn on

credibility because the police officers' version and the Suduls' version of the events that transpired on the day of Sudul's arrest both could not be true; therefore, plaintiffs' counsel had the right to argue that his clients were speaking the truth and the police officers' version of the events was fabrication. See *Reetz, supra* at 109. Lastly, the evidence supported plaintiffs' counsel's characterization of the police officers involved in Sudul's arrest. Officer Garon testified that the five officers involved in Sudul's arrest were between 5'8" and 6'4" tall and weighed between 180 and 230 pounds. In sum, plaintiffs' counsel's comments were not improper and did not deny defendants a fair trial. Further, even if plaintiffs' counsel's comments were in error, reversal is not required because instructions from the bench during the closing argument would have effectively cured the errors. *Id*.; *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996).

Next, defendant Robinson argues that he is entitled to a new trial because of the improper admission of prejudicial hearsay statements attributed to Officer Garon in three instances during the trial. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). This Court may take notice of plain errors that affected substantial rights even if not raised before the trial court. MRE 103(d); *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). Further, an error in admission of evidence is not a ground for vacating, modifying, or otherwise disturbing a judgment unless refusal to do so would be inconsistent with substantial justice. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997).

First, defendant Robinson argues that plaintiffs' counsel improperly questioned him regarding the statement "you didn't have to beat him up" allegedly made to him by Officer Garon. This issue was not properly preserved or presented for review because defendant failed to object at trial, gave cursory treatment to the issue on appeal, and substantial justice does not mandate review. See MRE 103(a)(1); *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Community Nat'l Bank v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987).

Second, defendant Robinson argues that plaintiffs' expert, Dr. Shiener, improperly interjected the statement "Mr. Sudul said he overheard one officer say to another, 'you shouldn't have beat him up'" when he testified from his medical records. We agree that this statement was inadmissible hearsay without exception because the statement was not reasonably necessary for diagnosis and treatment of Sudul's psychiatric condition. See MRE 803(4). However, the admission of the statement constitutes harmless error. A prejudicial evidentiary error is found if the admission of evidence affects a substantial right of a party. *Merrow, supra*. In this case, defendant Robinson's primary defense was that no beating occurred. He also testified that he did not go to the police station after Sudul's arrest and that no such conversation took place between he and Officer Garon. The improperly admitted evidence did not prejudice defendant in such a manner as to entitle him to a new trial.

Third, defendant Robinson argues that the admission of the contested statement during Sudul's direct examination testimony was error. Plaintiffs argue that the statement was

admissible hearsay as an adoptive admission pursuant to MRE 801(d)(2)(B). We disagree that the statement constituted a party admission because no evidence was presented supporting a finding that, if Officer Garon made the statement, defendant Robinson expressly adopted the statement as true solely by virtue of his alleged silence. See *Durbin v K-K-M Corp*, 54 Mich App 38, 50; 220 NW2d 110 (1974). Although the statement should not have been admitted through Sudul's testimony, the error was harmless for the reasons already discussed.

Defendant Robinson also argues that he is entitled to a new trial because he was prejudiced by the fact that he and defendant Donnell were represented by the same attorney. This issue was not properly presented for review because defendant failed to raise the issue in his statement of questions presented and failed to argue the merits of his position. See *Wilson, supra*; *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

Next, defendants argue that they are entitled to a new trial because they were not individually designated on the special jury verdict form to allow apportionment of damages. However, apportionment of damages is appropriate only when a factual inquiry into the injuries suffered by a plaintiff are separable and can be allocated between multiple tortfeasors with reasonable certainty. See *Setterington v Pontiac General Hosp*, 223 Mich App 594, 601; 568 NW2d 93 (1997); *Kaminski v Newton*, 176 Mich App 326, 332; 438 NW2d 915 (1989). Because of the nature of the injuries, i.e. primarily mental and/or emotional, and the simultaneous manner in which they were inflicted, the injuries allegedly suffered by Sudul were not separable as between defendants with reasonable certainty. Therefore, the trial court properly denied defendants' motions for a new trial on this basis.

Defendants next argue that there was insufficient evidence to support an award of punitive damages with regard to Sudul's § 1983 claim. We disagree.

Federal standards govern damage awards for deprivation of a federal right. *Janda v Detroit*, 175 Mich App 120, 129; 437 NW2d 326 (1989). Punitive damages are available in § 1983 actions 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." *Smith v Wade*, 461 US 30, 56; 103 S Ct 1625; 75 L Ed 2d 632 (1983). Punitive damages are not awarded as a matter of right but, instead, are awarded after a finding by the jury that the misconduct is such that it calls for deterrence and punishment in an amount over and above that provided by a compensatory award. *Id*. at 52-54.

In this case, there was sufficient evidence to support a jury verdict against defendants with regard to Sudul's § 1983 action. Consequently, it was for the jury to determine whether, based on the evidence presented, defendants' conduct merited an award of punitive damages. We will not disturb the jury's decision.

Next, defendants argue that they are entitled to a new trial or remittitur because the verdict was clearly excessive. We remand to the trial court for further consideration of this issue.

A new trial may be granted when a verdict is clearly or grossly excessive. MCL 600.6098(2)(b)(v); MSA 27A.6098(2)(b)(v); MCR 2.611(A)(1)(d). A trial court's decision to

deny a motion for a new trial or remittitur is reviewed on appeal for an abuse of discretion. *Anton, supra* at 683. In denying defendants' motions for remittitur, the trial court held:

> As far as remittitur, I've never granted an additur or remittitur. And I know that's certainly not the standard I'm supposed to look at, but I do when I'm asked to do a remittitur. This is when I feel I've become the 13th juror, because I instruct the jurors that the law says that these damages cannot be proved in a precise dollar amount and it is up to your sound judgment to determine the amount of money that fairly, adequately compensate[s] the plaintiffs. And I'm not[,] after they've determined what that fair compensation is[,] going to substitute my judgment for what that [sic] believed to be fair and proper compensation to these plaintiff[s].

We cannot discern from this limited record whether the trial court abused its discretion in denying defendants' motions for a new trial or remittitur on the basis that the jury's damage award was excessive. In reviewing jury verdicts, the trial court should examine a number of factors but its inquiry is limited to objective considerations regarding the evidence adduced and the conduct of the trial. See *Palenkas v William Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989); *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997). The trial court must determine whether the jury verdict was for an amount greater than the evidence supported. See MCR 2.611(E)(1); *Anton, supra*. Consequently, we express no opinion on the merits of defendants' arguments in this regard and remand to the trial court for further consideration of defendants' motions for remittitur or new trial on the basis that the verdict was clearly excessive because it was not supported by the evidence presented at trial. MCR 2.611(F); *Ritchie v Michigan Consol Gas Co*, 163 Mich App 358, 375; 413 NW2d 796 (1987).

In conclusion, the trial court erred in denying defendants' motions for JNOV with regard to plaintiff Bernard Sudul's infliction of emotional distress claim and the jury award in his favor must be vacated. In addition, we remand to the trial court for further consideration of defendants' motions for remittitur or new trial on the basis that the verdict was clearly excessive, only. With regard to all other issues raised by defendants, we affirm.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We retain jurisdiction and instruct the trial court to conduct a hearing on this matter within 28 days of the release of this opinion, render its opinion on the issue within 28 days of the hearing, and forward its findings and a transcript of the hearing to this Court within 84 days of the release of this opinion. Defendants may file supplemental briefs with this Court within 14 days after the trial court renders its opinion and plaintiffs may file a supplemental brief within 14 days after receipt of defendants' supplemental briefs.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage