

STATE OF MICHIGAN
COURT OF APPEALS

MARQUIS DYER, MCKINNEY LESLIE, JR.,
and GLORIA DYER LESLIE,

UNPUBLISHED
July 9, 2002

Plaintiffs-Appellants,

v

REYNARD REED, KERVIN BROWNER, JOHN
ELDRINGTON, KIMBERLY BENNETT,
ALFRED COLEMAN, CHARLES YOUNGKIN,
CITY OF DETROIT, OFFICER BYRD,
OFFICER FAIRLEY, SERGEANT RUCKER, and
OFFICER BRUNSON,

No. 220300
Wayne Circuit Court
LC No. 96-646845-NO

Defendants-Appellees.

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Following a jury trial, the trial court entered a directed verdict in favor of the defendant City of Detroit and four of its officers. With respect to the remaining six officers, the trial court entered a no cause of action judgment in accord with a special jury verdict. Plaintiffs appeal as of right. We affirm.

I.

The officers involved were responding to a reported shooting that occurred in the City of Detroit. The victim advised that she was at a house nearby and that several men in the house coerced her into having sexual relations. The victim vaguely described the location and also gave a description of the perpetrator. The officers searched the area and when they arrived in front of plaintiffs' home, they observed Marquis Dyer (Marquis), run from the porch into the house.

Noting that Marquis fit the description of the perpetrator provided by the victim, some of the officers went to the rear of the house to secure the perimeter and other officers went inside. After several police officers entered the home, they subdued Marquis by forcing him to the floor and handcuffing him. Shortly thereafter, the officers received a radio communication from another officer that he was preparing to make some arrests in conjunction with the incident at a

different location. Upon receiving this communication, the officers left plaintiffs' residence. Defendants concede that Marquis was not involved in either the shooting or the "gang rape."

Plaintiffs McKinney and Gloria Leslie along with Gloria's son, Marquis, brought an action against the individual police officers and the city seeking damages sustained when the Detroit police officers entered their home without a warrant and handcuffed Marquis. After a jury trial, the trial court directed a verdict in favor of the city and four of its police officers and the jury found in favor of the other six defendants. Pursuant to the jury's verdict, the trial court entered a judgment of no cause of action. Plaintiffs appeal as of right, raising numerous claims of alleged instructional error. However, as an initial matter, we note that plaintiffs do not provide support for their failure to protect claim. It is axiomatic that litigants may not appear before this Court and merely announce their position leaving it to us to discover and rationalize a basis for the claim presented. *In re Coe Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999). In addition, given plaintiffs' cursory treatment of their constitutional claims, we similarly decline to consider those claims as well. *Id.*¹ Thus, we limit our review to the jury instructions on Marquis' claims for assault, false arrest, and false imprisonment, which form the basis of plaintiffs' arguments on appeal.

II.

Plaintiffs first argue that the trial court committed instructional error requiring reversal by failing to distinguish between the requirements for a lawful arrest and the requirements for a warrantless entry into a private residence based on exigent circumstances thus inviting the jury to erroneously conclude that exigent circumstances constitutes an exception to probable cause necessary for an arrest without a warrant. We disagree.

While we consider de novo claims of instructional error, *Case v Consumes Power Company*, 463 Mich 1, 6; 615 NW2d 17 (2000), we must review the instructions rendered as a whole and otherwise decline to extract them piecemeal to establish error. *Id.* Although "somewhat imperfect," instructions do not necessarily require reversal "if on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury."
" *Id.*

The instruction defining exigent circumstances in this case was consistent with our Supreme Court's holding in *In re Forfeiture of \$176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993) with regard to the requirements necessary for probable cause and the existence of an actual emergency justifying a warrantless entry into a premises. We thus reject plaintiffs' claim that the trial court failed to give the jury guidance on its meaning.

Although plaintiffs claim that exigent circumstances does not constitute a defense to false arrest, plaintiffs do not provide any authority to support their position. Instead, plaintiffs only

¹ However, on this point, we note that our Supreme Court recently held that damages for a state constitutional violation against an individual governmental employee are not available. *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000). Accordingly, plaintiffs cannot demonstrate a basis for relief as regards their constitutional claims.

cite authority for the proposition that probable cause is required to justify a warrantless arrest. While we agree that exigent circumstances is not an affirmative defense of which defendant police officers had to definitively prove, we do not find any basis for relief. An affirmative defense “is a defense that does not controvert the plaintiff’s establishing a prima facie case, but that otherwise denies relief to plaintiff.” *Stanke v State Farm Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). Stated another way, an affirmative defense “is a matter that accepts the plaintiff’s allegations as true and even admits the establishment of the plaintiff’s prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff’s pleadings.” *Cole v Ladbroke Racing*, 241 Mich App 1, 9; 614 NW2d 169 (2000).

To prevail on a false arrest claim, plaintiff must establish that the arrest was not legal; i.e. that it was made without probable cause. *Blase v Appicelli*, 195 Mich App 174, 177; 489 NW2d 129 (1992). In the case sub judice, the existence of probable cause or the existence of exigent circumstances for a lawful arrest was submitted to the jury as a defense that defendant police officers had to prove. Simultaneously, an unlawful arrest was presented as an element of false arrest that plaintiffs had to prove. Since the trial court defined an unlawful arrest in its instructions to the jury as an arrest without probable cause, it necessarily follows that a probable cause “defense” would controvert plaintiffs’ prima facie case and thus, by definition, does not constitute an affirmative defense for which defendants carry the burden. Although an arrest occurring in a suspect’s home without a warrant is illegal unless the surrounding circumstances are exigent, *People v Snider*, 239 Mich App 393, 413-414; 608 NW2d 502 (2000), unless a plaintiff’s theory on a false arrest claim is that the very entry into the premises without a warrant rendered the subsequent arrest unlawful, the existence or absence of exigent circumstances justifying the warrantless entry is immaterial. Nonetheless, it would not be an affirmative defense, but rather, an element of the plaintiff’s unlawful arrest claim. We reach the same conclusion for the probable cause “defense” presented to the jury. Accordingly, we conclude that the instructional error committed by the trial court did not affect Marquis’ substantial rights requiring reversal of the jury’s verdict. See *Case, supra* at 6.

With regard to the false imprisonment claim and claims for assault, we reach the same conclusion. We note that “false arrest is one way to commit false imprisonment; since an arrest involves a restraint, it always involves imprisonment.” 32 Am Jur 2d, False Imprisonment, § 2, pp 59-60. In the instant case, the jury instructions defined false imprisonment as an “unlawful restraint.” Further, like the false arrest instruction rendered by the trial court, with regard to the burden of proof, the trial court’s instruction as regards false imprisonment required plaintiff to establish an unlawful imprisonment as part of his prima facie case, but also imposed a burden on defendant police officers to prove either probable cause or exigent circumstances. On the contrary, unlike both false arrest and false imprisonment, an assault and battery may exist regardless of the validity of the arrest. *Delude v Raasakka*, 391 Mich 296, 302; 215 NW2d 685 (1974). Limiting our review to plaintiffs’ claim concerning the addition of exigent circumstances to the probable cause “defense” included in the instructions presented to the jury for assault, false arrest and false imprisonment, considering the instructions as a whole, we cannot conclude that Marquis’ substantial rights were affected because of instructional error. MCR 2.613(A). We thus decline to find error requiring reversal in this regard.

III.

Next, plaintiffs contend that the evidence did not justify an instruction on exigent circumstances. Incumbent upon this Court when reviewing the sufficiency of evidence in a civil matter is to view the evidence and all legitimate inferences flowing therefrom in a light most favorable to the nonmoving party. See *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999). At trial, plaintiffs objected to the lack of a factual premise to support an exigent circumstances instruction. However, to the extent that the trial court instructed that exigent circumstances was an affirmative defense, we already determined that instructional error obtained. Notwithstanding, we concluded that the error did not affect Marquis' substantial rights. In conjunction with Marquis' claims, the jury also had to consider plaintiff's unlawful entry claim². Further, the record here before us reveals disputed factual issues not only concerning the circumstances surrounding the entry of the home, but also the identity of the police officers who actually participated in the entry. A jury is certainly free to credit or discredit any testimony. *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001). When considered in a light most favorable to plaintiffs, we conclude that plaintiffs have not established error requiring reversal for lack of exigent circumstances justifying defendant police officers entry into plaintiffs' home, or that instructional error warranting relief occurred.

IV.

Plaintiffs argue that the trial court erred when it instructed the jury on gross negligence. We note that with regard to this claim, plaintiffs do not support their position with adequate citations to the record or otherwise identify the allegedly offending instruction. Consequently, plaintiffs failed to establish that this instructional issue was properly preserved for our review with an appropriate objection at trial. MCR 2.516(C). Indeed, contrary to plaintiffs' position, the record suggests that plaintiffs requested the gross negligence instruction. When responding to defendant police officers' claim that plaintiffs also submitted the special verdict form used at trial, with some modification, plaintiffs asserted, "[h]owever true that may be, this simply begs the question," and "plaintiffs attempted to follow the law, but it produced a miscarriage of justice."

Error requiring reversal must be that of the trial court and not error to which an aggrieved party contributed by devise or neglectful omission. *Harrigan v Ford Motor Co*, 159 Mich App 776, 786; 406 NW2d 917 (1987). "[A] party cannot ask a trial court to take a certain action, and then argue on appeal that the action constitutes error." *Giannetti v Cornillie*, 209 Mich App 96, 102; 530 NW2d 121 (1995).

Bearing these principles in mind and defining plaintiffs' argument on appeal as encompassing a challenge to the trial court's failure to grant a new trial predicated upon

² We note that similar to Marquis' claim, the jury instructions required plaintiffs to establish that defendants entered onto their property without lawful authority, while defendant police officers had to prove a lawful entry "defense."

instructional error, we are not persuaded that plaintiffs demonstrated any basis for disturbing the trial courts' decision denying their motion. MCR 2.611(A)(1)(g); see also *Knight, v Gulf & Western Properties Inc*, 196 Mich App 119, 132; 492 NW2d 761 (1992). Quite to the contrary, when considering the instructions rendered as a whole, the trial court reduced plaintiff's burden by shifting the burden of establishing the propriety of the warrantless entry into the home and the lawfulness of the arrest onto defendants in connection with several of plaintiffs' claims. In addition, the special verdict form does not distinguish between the six different police officers further requiring the jury to return verdicts based on questions like "[d]id defendant police officers assault plaintiff Marquis Dyer, and act with gross negligence in doing so?" Furthermore, while we recognize that plaintiffs' assault and battery claim, as an intentional tort, would fall within the purview of *Sudul v Cit of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997) (holding that the governmental immunity statute, MCL 691.1407, does not shield intentional torts), plaintiff otherwise failed to establish that all of the police officers' alleged conduct would similarly fall within the holding in *Sudul*.

Although plaintiffs do establish some instructional error pursuant to the holding in *Sudul*, *supra*, on the record presented for our review, we nevertheless conclude that a failure to reverse on this basis would not be inconsistent with substantial justice. Thus, the error was harmless. *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001); MCR 2.613(A).

V.

Finally, plaintiffs argue that the jury's finding of a lawful entry and probable cause for the arrest contravened the great weight of the evidence. We do not agree. Upon review of the special verdict form, we do not find any support for plaintiffs' position that the jury made any specific findings on these very narrow factual issues. Regardless, upon review of the record, we are not persuaded that plaintiffs demonstrated any grounds for disturbing the trial court's decision denying plaintiffs' motion for a new trial with respect to any of the defendant police officers on this basis. MCR 2.611(1)(e); *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray