

STATE OF MICHIGAN
COURT OF APPEALS

KEITH DOETSCH,

Plaintiff-Appellee,

v

ALLEN GOLDEN,

Defendant-Appellant.

UNPUBLISHED

March 9, 2004

No. 227711

Macomb Circuit Court

LC No. 93-002932-NO

ON REMAND

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for consideration of the issues not reached in our earlier decision, *Doetsch v Golden*, unpublished per curiam opinion of the Court of Appeals, issued January 31, 2003 (Docket No. 22771) (Cooper, J, dissenting). We now address the remaining issues and reverse.

A jury found in favor of plaintiff against defendant Golden, a police officer, on a false arrest and false imprisonment claim, and a judgment was entered against defendant in the amount of \$123,965. This Court, in a divided decision, held that the trial court erred by denying defendant's motion for a directed verdict. The majority found that defendant had probable cause to arrest plaintiff, whose actions amounted to battery, and that the disposition of the case turned on whether defendant was justified in conducting a pat down search of plaintiff. The majority concluded that because under the totality of the circumstances the undisputed facts gave rise to a reasonable suspicion that plaintiff might have been carrying a weapon, the trial court erred in refusing to decide the issue of the legality of the pat down search as a matter of law and submitting the issue to the jury. The majority reversed the judgment in favor of plaintiff and remanded for entry of a judgment in favor of defendant.

Plaintiff sought leave to appeal in the Supreme Court. The Supreme Court, in lieu of granting leave to appeal, reversed this Court's decision and reinstated the judgment. The Supreme Court found that the jury could reasonably have concluded that defendant was not credible and did not reasonably suspect that plaintiff was armed, and that plaintiff was justified in refusing to submit to a pat down search. On defendant's motion for reconsideration, the Supreme Court granted the motion and vacated its previous order. The Supreme Court reversed this Court's decision for the same reason as stated in its previous order, and remanded the case to this Court for consideration of the remaining issues in defendant's appeal as of right.

Defendant argues that the trial court abused its discretion by admitting evidence of the district court's disposition of the underlying assault and battery charge against plaintiff because the evidence was not relevant to whether plaintiff was arrested without probable cause.

Generally, all relevant evidence is admissible. Relevant evidence is evidence having any tendency to make the existence of the fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 175 (2003). An evidentiary error does not provide a basis for appellate relief unless the refusal to grant the relief would be inconsistent with substantial justice. MCR 2.613(A).

False imprisonment is an unlawful restraint on a person's liberty or freedom of movement. A false arrest is an illegal or unjustified arrest. To prevail on a claim of false imprisonment or false arrest, a plaintiff must show that the arrest was not legal, i.e., that it was not supported by probable cause. The guilt or innocence of the person arrested is irrelevant. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 17-18; 672 NW2d 351 (2003). A plaintiff need not show that he was acquitted of any charge stemming from an arrest in order to establish the elements of false arrest or false imprisonment. SJI2d 116.20; SJI2d 116.21. In other words, termination of criminal proceedings in a plaintiff's favor is not an element of either false imprisonment or false arrest. *Peterson Novelties, supra* at 18.

We conclude that the trial court abused its discretion by admitting evidence of the district court's disposition of the assault and battery charge and that defendant is entitled to a new trial on this ground. The fact that a person was acquitted of charges in a criminal proceeding does not mandate a conclusion that no probable cause existed to arrest the person. However, lay jurors who are informed that a person was acquitted of underlying criminal charges could easily conclude that probable cause was lacking for a valid arrest. By allowing plaintiff to introduce evidence of his acquittal, the trial court created a substantial danger of unfair prejudice, confusion of the issues, and misleading the jury. These dangers substantially outweighed the nonexistent probative value of the evidence.

Defendant also argues that the trial court erred by instructing the jury that defendant was required to have a "reasonable belief" that plaintiff was "armed and dangerous." A claim of instructional error is reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Jury instructions should be reviewed in their entirety rather than extracted piecemeal to establish error in isolated sections. *Lansing v Hartsuff*, 213 Mich App 338, 348; 539 NW2d 781 (1995). Reversal is not required unless the failure to reverse would be inconsistent with substantial justice. *Case, supra*. Reversible error does not exist if, on balance, the instructions adequately and fairly presented the theories of the parties and the applicable law to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

A brief investigatory stop short of arrest is permitted if a peace officer has a reasonable suspicion that criminal activity is afoot. *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 289 (1968). An investigatory stop must be justified by a particularized suspicion, based on some objective manifestation, that a person is, has been, or is about to be engaged in some type of criminal activity. The suspicion must be based on the totality of the circumstances presented to

the officer. *People v Shields*, 200 Mich App 554, 557; 504 NW2d 711 (1993). A reasonable suspicion is more than a hunch, but does not rise to the level of suspicion required for probable cause. *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001).¹ In determining the existence of a reasonable suspicion, the trial court should consider the objective facts, and should defer to the experience of law enforcement officers and their assessments of criminal modes and patterns of behavior. *People v Oliver*, 464 Mich 184, 196, 200; 627 NW2d 297 (2001).

In reversing this Court's decision and remanding for further proceedings, our Supreme Court held that a jury could have concluded that defendant was not credible and did not reasonably suspect that plaintiff was armed, and that therefore plaintiff was justified in resisting the pat down search. Thus, the Court concluded that the trial court did not err in refusing to decide the issue of the legality of the pat down search as a matter of law. However, we conclude that the trial court erred in instructing the jury that defendant was required to have a "reasonable belief" that plaintiff was "armed and dangerous." The instruction did not fairly and adequately apprise the jury of the applicable law in that it erroneously held defendant to a standard of belief constituting probable cause, *Yost, supra* n 1, rather than a reasonable suspicion. *Custer, supra*. Defendant is entitled to a new trial on this ground. *Murdock, supra*.

Last, defendant argues that he is immune from tort liability under the governmental immunity act. Governmental immunity is a question of law to be reviewed de novo. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002).

Governmental employees are immune from liability for injuries they cause during the course of their employment if they are acting within the scope of their authority, if they are engaged in the discharge of a governmental function, and if their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). MCL 691.1407(2) does not alter the law of intentional torts as that law existed prior to July 7, 1986. MCL 691.1407(3). Prior to July 7, 1986, governmental employees were not immune from liability for intentional torts committed during the course of their employment. *Subdul v Hamtramck*, 221 Mich App 455, 458, 481; 562 NW2d 478 (1997).

Defendant's argument that the trial court abused its discretion by denying his motion for JNOV because he was entitled to immunity from liability for false arrest and false imprisonment is without merit. False arrest and false imprisonment are intentional torts. See *Smith v Dep't of Public Health*, 428 Mich 540, 590, n 10; 410 NW2d 749 (1987). Defendant is not entitled to immunity from liability for intentional torts committed during the course of his employment.

¹ Probable cause is defined as evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

In light of our conclusion that defendant is entitled to a new trial, we need not reach defendant's argument that he was entitled to remittitur.²

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder

I concur in result only.

/s/ Jessica R. Cooper

² Defendant argued that he was entitled to remittitur because plaintiff was not entitled to damages for any days he was incarcerated after an impartial magistrate found that his arrest was supported by probable cause and because plaintiff failed to mitigate his damages. Were we to address this issue, we would conclude that defendant is entitled to a new trial on the issue of damages. The evidence showed that when plaintiff was arrested he had sufficient funds on his person to post bond immediately. Plaintiff testified that he was not employed on a steady basis, and presented no evidence regarding lost wages. He testified that he decided to remain in jail because he assumed that the fact that he had been arrested constituted an automatic violation of his probation. Further, plaintiff presented no evidence to support his assertion that he was damaged in the amount of \$3,000 per day for forty-one days.