

STATE OF MICHIGAN
COURT OF APPEALS

TOMMIE LEE REED,

Plaintiff-Appellee,

v

OFFICER DANIEL SITARSKI,

Defendant-Appellant,

and

OFFICER MICHAEL SMITH,

Defendant.

UNPUBLISHED

March 19, 2009

No. 281041

Wayne Circuit Court

LC No. 05-519875-NZ

TOMMIE LEE REED,

Plaintiff-Appellee,

v

OFFICER MICHAEL SMITH,

Defendant-Appellant,

and

OFFICER DANIEL SITARSKI,

Defendant.

No. 281403

Wayne Circuit Court

LC No. 05-519875-NZ

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

CAVANAGH, J. (*dissenting*).

Because I conclude that defendants waived any claim of instructional error, I respectfully dissent.

On appeal, defendants raise three arguments. First, defendants argue that their motion for JNOV premised on the grounds that (a) plaintiff failed to prove his malicious prosecution claim, and (b) punitive damages could not be awarded in Michigan, should have been granted. But, defendants' motion for JNOV did not raise an issue related to plaintiff's alleged failure to prove his malicious prosecution claim; rather, defendants argued that punitive damages were not legally available on such a claim. The trial court rejected defendants' argument regarding punitive damages because defendants admittedly drafted, and approved, the jury verdict form which included this question pertaining to damages: "What is the total amount of any punitive damages, if any, you award to plaintiff for the defendants['] malicious prosecution of the plaintiff[?]"

Second, defendants argue on appeal that they are entitled to a new trial because the trial court did not instruct the jury regarding (a) the elements of malicious prosecution, and (b) the availability of punitive damages. However, defendants never objected to the jury instructions and, even in their post-verdict motion, defendants only argued that punitive damages were not available on the malicious prosecution claim. Defendants did not raise any issue related to purportedly erroneous jury instructions. Accordingly, the trial court never had the opportunity to exercise its discretion with regard to this claimed error so our review cannot be "for an abuse of discretion." Third, defendants argue on appeal that the award of punitive damages was excessive and violated their due process rights.

It appears that the majority's reversal of the judgment rendered in plaintiff's favor after a three-day jury trial is based on defendants' second argument, the unpreserved issue of deficient jury instructions with regard to plaintiff's malicious prosecution claim. Throughout the trial, including during opening statements and closing arguments, plaintiff's claim of malicious prosecution was before the jury. After the trial court instructed the jury, both plaintiff's counsel and defendants' counsel were asked if there were "any further requests for instructions" and both sides responded in the negative.

Pursuant to MCR 2.516(C), "[a] party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict . . . stating specifically the matter to which the party objects and the grounds for the objection." The failure to object to the jury instructions is considered a forfeiture of the right; but, a claim of instructional error may still be reviewed on appeal for plain error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). However, a party is deemed to have waived a challenge to the jury instructions when a party has expressed satisfaction with, or denied having any objection to, the instructions as given. *People v Lueth*, 253 Mich App 670; 660 NW2d 322 (2002); *People v Tate*, 244 Mich App 553, 558; 624 NW2d 524 (2001). A waiver extinguishes any instructional error and appellate review is precluded. *Carter*, *supra* at 215; *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007).

In this case, defendants did not merely fail to object to the jury instructions; therefore, a plain error analysis is not applicable here. Rather, defendants waived any objection to the jury instructions because their counsel affirmatively approved the instructions. After the jury instructions were given, the trial court asked each party's counsel whether there were any further requests for instructions on their behalf, and both counsels replied in the negative. As in *Tate*, *supra* at 559, I conclude that the negative response to the inquiry whether defendants' counsel had any further requests for instructions constituted express approval of the instructions and,

thus, waiver of any challenge. This waiver extinguished any instructional error. Therefore, I disagree with my colleagues' decision to reverse and remand this matter for a new trial on the malicious prosecution claim. Any challenge related to the jury instructions was not only unpreserved, but waived; thus, any such error was extinguished and appellate review is precluded.

/s/ Mark J. Cavanagh