

STATE OF MICHIGAN
COURT OF APPEALS

KASEY G. HOPPER,

Plaintiff-Appellee,

v

TOTAL PETROLEUM, INC.,

Defendant-Appellant.

UNPUBLISHED

July 8, 1997

No. 190498

Oakland Circuit Court

LC No. 93-005879

ON REMAND

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Defendant appeals the circuit court order affirming the district court order entering judgment for plaintiff and awarding him \$40,000 in damages in this action for false arrest. After a panel of this Court denied defendant's application for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for plenary consideration. See *Hopper v Total Petroleum, Inc.*, 450 Mich 904; 543 NW2d 308 (1995). We affirm.

I

Defendant first argues that the district court erred in denying its motions for directed verdict and judgment notwithstanding the verdict (JNOV) because the evidence established that defendant did no more than provide information to the police, and the police acted on their own judgment in arresting plaintiff. We disagree.

In reviewing the district court's denial of defendant's motions for directed verdict and JNOV, this Court examines the testimony and all legitimate inferences that may be drawn in a light most favorable to plaintiff. *Zander v Ogihara Corp.*, 213 Mich App 438, 441; 540 NW2d 702 (1995). If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Id.*

To establish the tort of false arrest, plaintiff was required to show that he was subjected to an unlawful or unjustified arrest and that defendant intended to arrest him. *Hall v Pizza Hut of America, Inc.*, 153 Mich App 609, 613; 396 NW2d 809 (1986); see also SJI2d 116.20. A defendant is not subject to liability for false arrest if he has fully, fairly and in good faith disclosed all material facts to law enforcement officials and done nothing more to advance a prosecution based on such information. *Flores v Dalman*, 199 Mich App 396, 404-405; 502 NW2d 725 (1993); see also *Lewis v Farmer Jack*, 415 Mich 212, 218-219; 327 NW2d 893 (1982). However, liability may attach if the defendant instigated the arrest, or otherwise caused police to suspend their judgment in deciding to make the arrest. *Lewis, supra* at 218-219, 219 n 3; *Maliniemi v Gronlund*, 92 Mich 222, 227; 52 NW 627 (1892). It is not enough for instigation that the actor has given information to the police about the commission of a crime, or has accused the other of committing it, so long as he leaves to the police the decision as to what shall be done about any arrest, without persuading or influencing them. *Hall, supra* at 614, quoting 1 Restatement Torts, 2d, § 45A, Comment c, p 70.

Plaintiff testified at trial that the Total station at issue was near his work, that he was a frequent customer there, usually purchased gas there with his Total credit card, and had bought gas there four days before he was arrested using his Total credit card. Plaintiff stopped there because he was very low on gas, and also wanted to fill up a gas can for his lawnmower. Plaintiff testified that as he pulled up to the gas tank and stepped out of his car, a man approached him attempting to sell him a walkman for twenty dollars. Plaintiff then opened his gas cap, placed the hose in the car and pushed the yellow reset button on the gas pump. The pump did not reset, so plaintiff pushed it several times again. He looked at the station attendant, who was on the phone and not looking at him. In the approximately two minutes that plaintiff stood at the pump, the pump never reset and plaintiff pumped no gas. He got impatient and left. About a block away, plaintiff was stopped by police and asked to return to the Total station. At the station, several officers and several of defendant's employees were there. By this time, plaintiff's gas gauge was on empty. Plaintiff explained to them that his gas gauge was on empty, and showed them the empty gas can. Nevertheless, plaintiff was handcuffed and arrested and his car was impounded. After plaintiff's wife posted bail and plaintiff was released, he drove directly to an auto mechanic shop and had the gas tank drained. There were two gallons in plaintiff's tank. The mechanic then put thirteen dollars of gas in the tank, and it registered three-quarters full.

The cashier at the Total station testified that a man in a Chevette drove off without paying for gas, that she ran out and grabbed the keys from his ignition, and then called the police. The owner of the car came into the station and said he did not have enough money to pay for the gas and was trying to sell a radio to pay for his gas. The cashier testified that she also recalled plaintiff driving into the station, but that she did not see him pumping gas because she was keeping an eye on the Chevette owner. She could not recall if there was another car at the same bay as plaintiff, and testified that there were a lot of pumps at that bay. The cashier testified that she thought plaintiff had taken gas because she observed plaintiff leave the station without paying. She further testified that the console in the station, which reflects the amount of gas pumped, sometimes malfunctioned by registering gas from one pump as having come from a different pump. She testified that she had reported problems with the console before the incident in question. The cashier testified that she and the station manager told the

police that plaintiff had left the station without paying for gas, but did not tell them that there had been problems with the console malfunctioning.

The station manager testified that at the time of the incident in question, he was not running the pump console, he was doing managerial duties on his computer. He testified that he saw the pump in plaintiff's car and saw the console being turned on inside and gas being pumped registering on the console. He acknowledged that the console had had "computer problems" but testified that they had been fixed at the time the incident in question occurred. The manager testified that he did not look in plaintiff's car when the police brought plaintiff back to the gas station.

The arresting officers testified that they relied on the statements of defendant's employees in deciding to arrest plaintiff, because plaintiff had not committed the crime in their presence.

Viewing the evidence in a light most favorable to plaintiff, reasonable jurors could conclude that defendant instigated plaintiff's arrest and that the police did not use their independent judgment in making the decision to arrest. Reasonable jurors could conclude that defendant's employees had not fully, fairly and in good faith disclosed all the facts to the police. There was evidence that although defendant's employees were aware that the computerized register console had malfunctioned in the past, sometimes reflecting that gas had been taken from a pump when it actually had been taken from another pump, they did not share this information with the police when defendant insisted that he had pumped no gas. Officer Sage testified that when plaintiff pointed out that his car's gas gauge was on empty and the gas can was empty, Sage thought the car's gauge could be defective. Sage testified that he would not have arrested plaintiff had he not been given the information he was given by defendant. He also testified that had he been given information about mechanical problems with the console, "[w]e would have had to find out what type of mechanical problems they were having. 'Cause if they're having problems with that and they're not positive of it, we cannot arrest. We can take a report without arresting them. And then if it turned out they were missing the gas, they would issue a warrant for his arrest later on." A jury could reasonably have concluded that the officers were acting upon the observations of defendant's employees and their representations regarding what their gas pump consoles reflected, that defendant's employees withheld material information regarding the pumps, and that had the officers been informed that the consoles had malfunctioned in the past, they would have further explored plaintiff's claims of innocence and would not have proceeded with the arrest. Because a reasonable juror could conclude that defendant's employees did not fully and fairly state all the material facts within their knowledge to the police, defendant's argument fails. We conclude the district court properly denied defendant's motions for directed verdict and JNOV.

Defendant further argues that plaintiff cannot succeed in establishing its liability for false arrest because the district court conclusively determined that the police had probable cause to arrest defendant when it dismissed the police from this action on governmental immunity grounds. Defendant correctly argues that a person generally may not maintain an action for false arrest when the arrest was legal, even if the plaintiff is in fact innocent. *Lewis, supra* at 218 n 2; *Hall, supra* at 614. However, notwithstanding the police officers' determination of probable cause based on the information in their possession, plaintiff raised a material issue as to the legality or justification of his arrest by introducing

evidence that defendant's employees caused the police to arrest plaintiff, and withheld material information from the police regarding the alleged crime. *Hall, supra* at 614-615. Defendant's statutory argument fails for the same reasons.

Defendant also argues that public policy considerations militate against holding it liable for false arrest. We acknowledge that defendant's employees had a right to participate in the execution of the law by reporting their suspicions of crime to the police. *Id.* at 615. However, this case concerns defendant's employees' failure to fully and fairly disclose all of the facts and circumstances surrounding their suspicion of criminal wrongdoing and failure to investigate potentially exculpatory information. This Court's decision to affirm the district court's judgment will encourage full, fair, and accurate disclosure of information to the police. Accordingly, we affirm the district court's denial of defendant's motions for directed verdict and JNOV.

II

Next, defendant argues that the trial court abused its discretion in denying its motion for a new trial, because the jury's verdict was against the great weight of the evidence and contrary to law. We disagree.

We review the denial of a party's motion for a new trial for an abuse of discretion. *Hamman v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995). Where a party's substantial rights are at stake, a trial court may grant a new trial for several reasons, including an excessive award of damages, jury misconduct, an irregularity or error of law in the proceedings, and a verdict against the great weight of the evidence. MCR 2.611(A)(1); *Phillips v Mazda Motor Manufacturing (USA) Corp*, 204 Mich App 401, 410-411; 516 NW2d 502 (1994).

Based on the evidence adduced at trial concerning defendant's employees' failure to fully and fairly apprise the police of all of the facts surrounding plaintiff's alleged larceny, we conclude that the jury's verdict was not against the great weight of the evidence, and was not contrary to law. Accordingly, we affirm the district court's denial of defendant's motion for a new trial.

III

Next, defendant argues that the district court erred in admitting evidence of plaintiff's innocence, because his innocence was not an element of the tort of false arrest. See *Lewis, supra* at 218 n 1; see also *McCullough v Greenfield*, 133 Mich 463, 468; 95 NW 532 (1903). Defendant failed to preserve this issue for review by neglecting to advance timely objections to the challenged evidence. MRE 103(a)(1); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 368; 533 NW2d 373 (1995). Moreover, like plaintiff, defendant advanced at trial that plaintiff's innocence was an appropriate issue for the jury's consideration. Defendant may not take a contrary position on appeal. *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Accordingly, we decline to address this issue.

IV

Next, defendant argues that it was denied a fair trial because the district court improperly instructed the jury on negligence. Defendant failed to object to the allegedly defective jury instructions, thus foreclosing appellate review absent manifest injustice. *Phillips v Deihm*, 213 Mich App 389, 403; 541 NW2d 566 (1995). Having reviewed the district court's instructions, we conclude that no manifest injustice is present.

V

Defendant's next argument, that the trial court abused its discretion when it prevented defendant from confronting plaintiff with an allegedly inconsistent prior statement concerning his criminal history, is unsupported by the record. The record reflects that the statement was not inconsistent with plaintiff's testimony on direct examination. Defendant's argument thus fails.

VI

Lastly, defendant argues that the district court abused its discretion in denying its motion for remittitur. We disagree.

A trial court's decision with respect to a request for remittitur is reviewed for an abuse of discretion. *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 45; 550 NW2d 809 (1996). The question on appeal is whether, viewing the evidence in a light most favorable to the prevailing party, the jury award was supported by the evidence. *Phillips, supra* at 404-405. We defer to the trial court's decision because of its superior ability to view the evidence and evaluate the credibility of the witnesses. *Id.* at 404.

Upon reviewing the evidence in a light most favorable to plaintiff, we conclude that the jury's \$40,000 award of damages was supported by the evidence. Plaintiff was jailed, an experience that he found frightening and humiliating. Plaintiff was subjected to ridicule and humiliation at his place of employment as a result of being arrested, suffered from nightmares and was left with a lingering sense of insecurity and distrust of the police. We are unable to say that the trial court abused its discretion by denying the request for remittitur.

Defendant further advances that plaintiff's monetary award was the product of bias and prejudice. However, the record provides little support for this proposition. Further, the district court was in the best position to evaluate the jury's disposition and the tenor of the trial, and

found that the jury's award of damages was not motivated by bias or prejudice. We defer to this determination.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White