

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TOMMIE LEE REED,  
Plaintiff-Appellee,

UNPUBLISHED  
March 19, 2009

v

No. 281041  
Wayne Circuit Court  
LC No. 05-519875-NZ

OFFICER DANIEL SITARSKI,  
Defendant-Appellant,

and

OFFICER MICHAEL SMITH,  
Defendant.

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TOMMIE LEE REED,  
Plaintiff-Appellee,

v

No. 281403  
Wayne Circuit Court  
LC No. 05-519875-NZ

OFFICER MICHAEL SMITH,  
Defendant-Appellant,

and

OFFICER DANIEL SITARSKI,  
Defendant.

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

PER CURIAM.

In this consolidated appeal, defendants, Officer Daniel Sitarsky and Officer Michael Smith, appeal as of right the judgment entered on the jury's verdict awarding plaintiff punitive

damages for malicious prosecution. We reverse and remand for a new trial on the malicious prosecution claim.

This case finds its genesis in a traffic stop initiated by defendants, who are Detroit police officers. On the night in question, plaintiff was parked at a party store when defendants approached his vehicle. Defendants had previously observed plaintiff's car cross a yellow line before parking and suspected plaintiff to be under the influence of drugs. The tail light of plaintiff's car was also broken. According to defendants, plaintiff became unruly during the stop and began fleeing from defendants on foot after defendants attempted to subdue him with pepper spray. Plaintiff, however, testified that he initially cooperated with defendants and only attempted to flee after he was searched in a rough manner, choked, and sprayed with pepper spray. While running, plaintiff fell at which point defendants handcuffed and arrested him. Although contradictory evidence was presented regarding whether plaintiff possessed drugs, plaintiff tested positive for cocaine. Plaintiff testified that he was not convicted on subsequent drug possession and resisting arrest charges. Following his criminal proceedings, plaintiff initiated the instant suit against defendants alleging assault and battery, intentional infliction of emotional distress, false arrest and imprisonment, gross negligence, abuse of process, and malicious prosecution. The case proceeded to trial and the jury awarded plaintiff \$250,000 in punitive damages for the malicious prosecution claim only. The trial court denied defendants' subsequent motions for judgment notwithstanding the verdict and entered judgment on the verdict.

On appeal, defendants argue that a new trial is in order because the trial court failed to instruct the jury on the elements of malicious prosecution. We review a trial court's decision on a motion for new trial for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006). An abuse of discretion occurs when the result is outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

There is no dispute that on the only claim on which the jury found in favor of plaintiff, the malicious prosecution claim, there was absolutely no jury instruction on the elements plaintiff is required to prove, and the jury must find, in order to create liability on a claim for malicious prosecution. Quite simply, and as our Court recognized in *Howard v Feld*, 100 Mich App 271, 275; 298 NW2d 722 (1980), without being instructed on the law for the claim at issue, the jury is unable to follow its oath to apply the law as instructed:

We note that the gravamen of plaintiff's action is assault and battery and yet the record below is completely devoid of any jury instructions defining or explaining the elements of assault and battery. Without such an instruction the jury could not have possibly, if it followed its oath and applied the evidence only to the law instructed upon, rendered a verdict in favor of the plaintiff. In effect, it was left to theorize as to what acts may legally constitute an assault and battery. In short, we believe this is one of those rare cases where the failure to instruct on a controlling legal issue, even though such an instruction was not requested, is so manifestly unjust as to require reversal. [Footnote omitted.]

As in *Howard*, the record is completely devoid in this case of *any* instructions on malicious prosecution, and that is the only basis upon which the jury awarded the \$250,000 punitive damage award against both defendants. Because the jury could not follow its oath and apply the

evidence to the law instructed, we reverse and remand for a new trial on the malicious prosecution claim. While we acknowledge that parties may not, by their own actions, create an error in the trial court which then results in a reversal on appeal,<sup>1</sup> see *Bloesma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991), in this case upholding the judgment would be inconsistent with substantial justice. MCR 2.613(A).

In light of this conclusion, it is unnecessary to address defendants' remaining arguments on appeal. Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Christopher M. Murray

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<sup>1</sup> Defendants expressed satisfaction with the instructions even though they contained no malicious prosecution instruction.