



IN THE COURT OF APPEALS OF IOWA

RONALD GORDON,)

Plaintiff-Appellee,)

Filed April 24, 1984

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vs.)

DAVID NOEL, DAVID BOWEN, and)
CITY OF DES MOINES, IOWA,)

4-08
83-158

Defendants-Appellants.

Appeal from the Iowa District Court for Polk County - George W. Bergeson,
Judge.

Defendants appeal from a jury verdict for the plaintiff in this action for
assault and battery, false arrest, malicious prosecution, and intentional
interference with a business relationship. AFFIRMED.

J. M. Sullivan, Assistant Des Moines City Attorney, for defendants-
appellants.

Nick Critelli, Des Moines, Iowa, for plaintiff-appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

Defendants appeal from a jury verdict for the plaintiff in this action for assault and battery, false arrest, malicious prosecution, and intentional interference with a business relationship.

On September 27, 1979, plaintiff, Ronald Gordon, became involved in an altercation with plainclothes police officers Noel and Bowen in plaintiff's tavern. The facts concerning how the altercation began are sharply disputed and are not essential to our resolution of the legal issues raised. Gordon, his daughter, and his son-in-law were arrested. The charges against the daughter and son-in-law were dismissed prior to trial. Gordon was acquitted of all charges by a jury.

Gordon, his daughter, and son-in-law brought the present action against the two arresting officers and the City of Des Moines seeking recovery for false arrest and malicious prosecution. In addition, Gordon sought recovery for assault and battery, based on his allegation that the officers had beaten him, and for intentional interference with a business relationship, based on his allegation that a police department report concerning his arrest resulted in the suspension of his tavern's liquor license.

This lawsuit was tried to a jury which awarded \$40,000 to Gordon but no damages to his daughter or son-in-law. In response to a special interrogatory submitted by plaintiff, the jury indicated that it was not awarding Gordon any damages for that part of his petition which alleged intentional interference with a business relationship.

Defendants have appealed asserting that: (1) the trial court's instructions on probable cause and actual malice regarding the claims for malicious prosecution are erroneous; and (2) the trial court's instructions concerning the amount of plaintiff's damages were incomplete and permitted the jury to speculate as to the amount.

Our review of this ordinary action at law is on assigned error. Iowa R. App.

P. 4.

I. The Jury Verdict. Plaintiff contends that the general jury verdict must be upheld unless we find error in each of the theories of recovery which were submitted. Although jurisdictions are split on this issue,¹ Iowa appears very early in its history to have adopted the rule that the appellate court should presume that the jury allowed recovery on the theory free from error and, therefore, uphold a general verdict whenever possible. In Hudson v. Matthews, 1 Morris 94, 95 (Iowa 1841), the supreme court held that where a declaration contains a count on a promissory note and also other counts, the court would not presume the verdict was rendered on the count based on the note when it appeared that the cause of action on the note had not accrued at the time the suit was brought. The court stated that "if the court ought to presume anything, it would be in favor of the legality of the proceedings." Id. This issue was addressed again in Bays v. Herring, 51 Iowa 286, 290, 1 N.W. 558, 561 (1879), where the court stated:

The verdict was general. It is impossible, therefore, to say with certainty on which cause of action stated in the petition it was based. What, then, is the presumption? Certainly, we think that it is based on the count which was sustained by the evidence. We cannot presume the verdict was found under the count that had not been proved or established.

Although these cases are old, they have not been overruled and we have found nothing in newer cases inconsistent with their results. Defendants have cited to us several cases standing for the proposition that where error exists prejudice is presumed unless the contrary is affirmatively established. Lewis v. Kennison,

¹ See, for example, the following cases which presume that the jury did not base its verdict on a theory in which error is found and, therefore, uphold the verdict: Mid-America Marketing Corp. v. Dakota Industries, Inc., 289 N.W.2d 797, 799 (S.D. 1980); Codekas v. Dyna-Lift Co., 48 Cal. App. 3d 20, 25, 121 Cal. Rptr. 121, 124 (1975); Larriva v. Widmer, 101 Ariz. 1, 415 P.2d 424, 430 (1966). For a contrary result see State v. Hall, 432 N.E.2d 679, 681 (Ind. 1982), and Rock v. Derrick, 51 Mich. App. 704, 216 N.W.2d 496, 499 (1974).

278 N.W.2d 12, 15 (Iowa 1979); State v. Davis, 228 N.W.2d 67, 73 (Iowa 1975); Remer v. Takin Brothers Freight Lines, Inc., 227 Iowa 903, 917, 289 N.W. 477, 484 (1940). None of those cases involve a general verdict for the plaintiff where multiple theories have been submitted and the defendants allege error on appeal relating to some but not all of the theories.

We believe that the rule of Hudson and Bays is consistent with modern ideas of judicial economy and properly places on those challenging the judgment the burden of seeking special interrogatories and affirmatively showing that reversible error occurred. In Codekas v. Dyna-Lift Company, 48 Cal. App. 3d 20, 25, 121 Cal. Rptr. 121, 124 (1975), the California court observed:

... when a general verdict is returned under circumstances where a special verdict might have been used, the appellate courts must guess which of several possible alternate routes the jury traveled to reach its destination; well-conceived special verdicts simplify and often eliminate issues on appeal; the responsibility for requesting special verdict forms rests with the party who loses the verdict (the appellant).

We believe that the defendant in the present case should have made a record in the proceedings below of the theory on which recovery was predicated. In the absence of such a record, we are unwilling to order a new trial based on errors in the malicious prosecution instructions when it is possible that the jury completely rejected that theory and allowed recovery for assault and battery. We are further persuaded by the fact that the assault and battery claim was unique to Gordon, the only one of the three plaintiffs to prevail in this action. Plaintiff Gordon and his daughter and son-in-law all sought recovery on the theories of false arrest and malicious prosecution. Gordon, in addition, alleged assault and battery and intentional interference with a business relationship. The jury gave no recovery to the daughter and son-in-law and in response to a special interrogatory indicated that no recovery was allowed Gordon for intentional interference with a business relationship. In this situation defendants urge us to order a new trial due to

alleged errors in the jury instructions regarding the malicious prosecution claim. We decline to do so; instead, we presume that the jury based its verdict on the assault and battery claim unique to plaintiff Gordon. There was ample evidence presented to support this claim. Therefore, the verdict is affirmed.

II. Damages. The trial court's instruction to the jury on the issue of damages included the following language:

Plaintiffs are entitled to recover only such damages as have been shown by a preponderance of the evidence to have been sustained as a proximate result of the incident in question. . . . The damages, if any you find, . . . cannot be measured by any exact or mathematical standard, but the amount must rest in the sound discretion of the jury. Such discretion must not be exercised arbitrarily, or out of passion or sympathy or prejudice for or against the parties, but must be based upon a fair, intelligent, dispassionate and impartial consideration of the evidence.

This language was taken from I Iowa Uniform Jury Instructions 3.9 (1982).

Defendant appeals the trial court's failure to give the following two requested instructions on the same issue:

No. 23. In order to be entitled to an award of damages, the Plaintiff has the burden of proving the value of the damages as to each item with some reasonable measure of certainty. To authorize recovery of more than nominal damages, facts must exist and be shown by the evidence which afford a reasonable basis for measuring the Plaintiff's loss, if any.

No. 24. The amount of damages may not be determined by mere speculation, conjecture, or surmise.

We hold that the instruction as given was a fair and accurate statement of the law. Defendants contend that the instruction does not make it clear that the burden is on plaintiff to show the damages sustained. However, the instruction as given clearly states that plaintiffs can recover "only such damages as have been shown by a preponderance of the evidence" Defendants further contend that plaintiff must show the value of his loss with greater specificity. The supreme court has held, however, that intangibles such as pain and suffering and disability "are incapable of pecuniary measurement by witnesses and must be left to the

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sound judgment of the factfinder, based on the evidence." Schnebly v. Baker, 217 N.W.2d 708, 725 (Iowa 1974). The instruction as given properly informed the jury that its determination must be based on the evidence and cannot be arbitrary. As long as the instruction correctly states the law, the trial court is free to choose its own language and reject the formulations of counsel. Moser v. Brown, 249 N.W.2d 612, 616 (Iowa 1977).

Since it is up to the jury to determine the amount of damages for intangible losses, we hold that it was not error for the trial court to deny defendants' request to compel plaintiff during discovery to affix a dollar amount to these losses.

III. Proof of Lack of Probable Cause for a Malicious Prosecution Claim.

Even though our holding in part I of this opinion makes it unnecessary for us to reach this issue, we address it to clarify for future cases the proper weight to be given an acquittal when considering that element of a malicious prosecution claim requiring a plaintiff to prove lack of probable cause for the prosecution.

The trial court in this case instructed the jury that Gordon's acquittal by jury verdict in the criminal prosecution constituted evidence that would support a finding that the prosecution was without probable cause unless the presumption was overcome by other evidence. The instruction given by the court is similar to I Iowa Uniform Jury Instruction No. 18.6 as set forth below:

The (refusal of the grand jury to indict the plaintiff on the prior criminal charge) (the dismissal of the charge by the county attorney) (the acquittal of the plaintiff by the trial jury in the prior criminal charge) constituted a favorable termination of the criminal prosecution as that term is used in these instructions.

This favorable termination of the prosecution constitutes evidence that would support a finding by you that the criminal prosecution was without probable cause unless overcome by other evidence.

The authority cited for this instruction is Schnathorst v. Williams, 240 Iowa 561, 36 N.W.2d 739 (1949). However, the supreme court in Schnathorst did not consider a situation where there had been an acquittal after a criminal trial. The court

stated merely that the dismissal of criminal charges by the county attorney after the grand jury refused to indict constituted prima facie evidence that the charge was filed without probable cause. Schnathorst v. Williams, 240 Iowa at 572-74, 36 N.W.2d at 745-46. In reaching this result the Schnathorst court relied upon the older case of Hidy v. Murray, 101 Iowa 65, 69 N.W. 1138 (1897).

The supreme court held in Philpot v. Lucas, 101 Iowa 478, 481, 70 N.W. 625, 626 (1897), that an acquittal after a criminal trial affords no evidence that the charge was filed without probable cause. The court distinguished Hidy v. Murray which had dealt with dismissal of charges by a magistrate. The court in Philpot stated that the distinction was due to the difference between the functions of a grand jury or a committing magistrate and a petit jury. The former determines whether there is sufficient evidence to hold the criminal defendant for trial. A negative answer is clear evidence that there was no probable cause for the charge. However, an acquittal after a trial has no bearing on whether there was probable cause for the charge but implies only that the evidence did not meet the heavy standard necessary for conviction. Philpot v. Lucas, 101 Iowa at 481, 70 N.W. at 626. This distinction is accepted by a majority of jurisdictions. See 52 Am. Jur. 2d Malicious Prosecution §§ 164 and 165 (1970).

We disapprove of I Iowa Uniform Jury Instruction No. 18.6 to the extent that it includes "acquittal of the plaintiff by the trial jury" as a favorable termination of the criminal charge creating a presumption of lack of probable cause. However, since no evidence was presented here showing that the jury verdict was based on the theory of malicious prosecution, our views on this issue do not affect the outcome of this case.

AFFIRMED.

Schlegel, P.J., concurs; Sackett, J., dissents.

SACKETT, J., (dissenting).

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I agree with the majority that Uniform Instruction 18.6, to the extent that it includes "acquittal of the plaintiff by the trial jury" as a favorable termination of the criminal charge creating a presumption of probable cause, is an erroneous statement of the law. I cannot agree, however, that the verdict should be affirmed on the grounds that a general verdict must be upheld unless error is found in each of the theories of recovery which were submitted.

The majority cites Bays v. Herring, 51 Iowa 286, 290, 1 N.W. 558, 561 (1879), in support of that proposition. The Bays case, however, is distinguishable from this case. The issue presented in Bays involved the introduction of evidence sufficient to support submission of a count of plaintiff's petition. That count was submitted to the jury as part of a general verdict. In Bays one count may not have been supported by the evidence. The jury is the finder of fact, and it may be possible to presume, as did the court in Bays, that the jury returned a verdict on the count supported by the facts or evidence. It is the jury's job to find facts.

In the case at bar a general verdict was returned based on an erroneous instruction of law. The jury was instructed that a favorable termination of the criminal case constitutes evidence that would support a finding of probable cause unless overcome by other evidence.

We cannot presume that the jury knew that the legal instructions given by the court were in error and consequently returned a verdict only on the assault and battery issue.

This is not a case of insufficient evidence to create a jury issue. This is a case of an erroneous instruction on the law by the court. The instruction was prejudicial and I believe that the case should be reversed.