

IN THE COURT OF APPEALS OF IOWA

No. 9-287 / 08-1454
Filed July 22, 2009

**BRUCE BULDHAUPT and
PRESHIA BULDHAUPT,**
Plaintiffs-Appellees/Cross-Appellants,

vs.

**CITY OF DES MOINES, IOWA,
MATTHEW TOWERS, TIMOTHY
NADING, SCOTT NEWMAN, and
ELLIOTT NESS, both Individually
and in their Official Capacities,**
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,
Judge.

The defendants appeal from judgment entered against them on Bruce
Buldhaupt's claims of false arrest and unlawful entry. **AFFIRMED.**

Angela T. Althoff and Gary D. Goudebeck, Jr., Assistant City Attorneys, for
appellants/cross-appellees.

Elizabeth Flansburg of Lawyer, Dougherty, Palmer & Flansburg, P.L.C.,
West Des Moines, and Thomas J. Duff of Duff Law Firm, P.L.C., Des Moines for
appellees/cross-appellants.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

The defendants appeal from the judgment entered against them on several of the Bruce Buldhaupt's claims stemming from his September 2008 arrest. They contend the court erred in failing to direct a verdict in their favor and in overturning the jury's initial verdict based upon inconsistency. They also allege the court erred in instructing the jury. Buldhaupt's cross-appeal contends the court erred in failing to award him attorney fees. We affirm.

I. Background Facts and Proceedings. On September 1, 2003, Buldhaupt had an argument with his daughter and her boyfriend, who lived next door. The daughter called 911, and Officers Towers and Nading were dispatched to the scene shortly after midnight on September 2, 2003.

While Officer Nading interviewed the daughter, Officer Towers went to Buldhaupt's home where his wife, Preshia, was sitting on the front steps. The officer approached Preshia and said he understood there was a problem. When Preshia got up and went in the home to find her husband, Officer Towers followed her inside.

Upon seeing Officer Towers in his home, Buldhaupt ordered him to leave. Officer Towers told Buldhaupt he was conducting an investigation and asked him to step outside to talk with him. When Buldhaupt refused, Officer Towers stated he was going to arrest him. Buldhaupt sat down on the couch and Towers approached to arrest him. A physical altercation ensued as Towers attempted to place Buldhaupt in handcuffs.

Having heard yelling, Officer Nading entered the home. Both officers attempted to remove Buldhaupt from the couch. One of the officers radioed for backup. When Buldhaupt released his grip from the couch, he was handcuffed and removed from the residence. He was placed in a paddy wagon, transported to jail, and charged with interference with official acts and resisting arrest. The charges were later dropped. Buldhaupt received injuries from the altercation, including a cracked sternum.

Buldhaupt and his wife sued the City of Des Moines, Officers Towers and Nading, and two other police officers, alleging various torts were committed during the course of Buldhaupt's arrest. The case proceeded to a jury trial. At the close of their evidence, plaintiffs voluntarily dismissed their claim against one officer. A motion for directed verdict by the remaining defendants was denied. The motion was renewed at the close of the trial, and the court again denied it.

The jury returned a verdict in favor of Buldhaupt on claims of false arrest and unlawful entry against Officers Tower and Nading. It found in favor of the defendants on the remaining claims. The jury awarded Buldhaupt ten dollars in past medical expenses (the amount of his co-pay after insurance) and found the officers' conduct was willful and wanton.

A second phase of trial was then held to determine whether Buldhaupt was entitled to punitive damages. The court also instructed the jury that because it had awarded Buldhaupt damages for past medical expenses, it must also award damages for past pain and suffering in some amount. The jury returned a verdict awarding \$17,500 against both Officers Towers and Nading for past pain

and suffering, and \$4000 against Officer Towers and \$1000 against Officer Nading in punitive damages.

The defendants filed motions for new trial, remittitur, and judgment notwithstanding the verdict. Buldhaupt filed a motion for attorneys' fees. Following a hearing, the district court denied all the motions. Judgment was entered against the city and Officers Towers and Nading in the amounts determined by the jury. The defendants appeal. Buldhaupt cross-appeals from the court's order denying his request for attorney fees.

II. Directed Verdict. On appeal, the defendants first contend the court erred in failing to direct a verdict in their favor. The defendants allege they were entitled to directed verdict because the undisputed facts show Officers Towers and Nading had a good faith and reasonable belief in the legality of their actions.

Our review of a challenge to the denial of a motion for a directed verdict is for correction of errors at law. *Wolbers v. Finley Hosp.*, 673 N.W.2d 728, 734 (Iowa 2003). The evidence is considered in the light most favorable to the nonmoving party. *Id.* If there is substantial evidence in the record to support each element of a claim, the motion for directed verdict must be overruled. *Id.* Additionally, if reasonable minds could reach different conclusions based upon the evidence presented, the issue is properly submitted to the jury. *Id.*

We first address the issue of whether the officers had a good faith and reasonable belief there was probable cause to arrest Buldhaupt. A warrantless arrest may be made where an officer has a reasonable ground for believing an indictable public offense has been committed and has a reasonable ground for

believing the person to be arrested has committed it. Iowa Code § 804.7(3) (2005); *Children v. Burton*, 331 N.W.2d 673, 679 (Iowa 1983). The expression “reasonable ground” is equivalent to traditional “probable cause.” *Children*, 331 N.W.2d at 679.

Probable cause exists where “the facts and circumstances within their [the officers’] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution to the belief that” an offense has been or is being committed.

Id. (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11, 93 L. Ed. 1879, 1890 (1948)).

Probable cause must be determined on the particular facts in each case. *Id.* at 680. The significant point is that courts look to the facts within the officers' knowledge at the time the arrest is made. *Id.* In dealing with civil damage actions for false arrest, courts apply a probable cause standard less demanding than the constitutional probable cause standard in criminal cases. *Id.* If the officer acts in good faith and with reasonable belief that a crime has been committed and the person arrested committed it, his actions are justified and liability does not attach. *Id.*

We must decide whether the pertinent facts on the issue of probable cause were in dispute. See *id.* at 681. If so, the motions for directed verdict and judgment notwithstanding the verdict were properly denied. *Id.* If not, the determination was for the court. *Id.*

We conclude the facts on the issue of probable cause were in dispute. The dispatcher relayed the following information to the officers: “10-17 Kenna.

Her step-father Bruce Buldhaupt, WHI male, 40 YOA, is drunk and causing problems.” When they arrived at the scene, there was no crime in progress. Officer Towers admitted in his testimony that at the time he entered Buldhaupt’s home, he did not know whether any crime had been committed, but was simply trying to gain information.

The defendants argue Buldhaupt’s conduct once Officer Towers was inside his home provided probable cause to arrest him for interference and resisting arrest. A person commits the crime of interference with official acts when he or she knowingly resists or obstructs anyone known by the person to be a peace officer in the performance of any act which is within the scope of the lawful duty or authority of that officer. Iowa Code § 719.1(3) (2003); *State v. Turk*, 595 N.W.2d 819, 822 (Iowa Ct. App. 1999) *overruled on other grounds by State v. Maring*, 619 N.W.2d 693 (Iowa 2000). The terms “resist” and “obstruct” imply active interference. *State v. Smithson*, 594 N.W.2d 1, 2 (Iowa 1999). They therefore do not “include verbal harassment unless the verbal harassment is accompanied by a present ability and apparent intention to execute a verbal threat physically.” Iowa Code § 719.1(3).

The defendants cite to the case of *Davis v. City of Albia*, 434 F. Supp. 2d 692 (S.D. Iowa 2006), in support of their claim Officer Towers had probable cause for arresting Buldhaupt for interference with official acts. That case is distinguishable. There, the officer was in the process of writing a citation for Davis for having parked in a handicapped spot without the required placard being displayed. *Davis*, 434 F. Supp. 2d at 704. Davis attempted to get in his vehicle

and leave. *Id.* When the officer tried to stop him, Davis pulled away from his grasp, got in the vehicle, and refused to exit the vehicle when told to do so. *Id.* The court found Davis “actively resisted and hindered [the officer] in the issuance of the citation” and therefore the officer had probable cause to arrest Davis for interfering with official acts. *Id.*

As indicated, Officer Towers admitted he did not have grounds for arresting Buldhaupt prior to entering the home. There was evidence for a jury to find Buldhaupt did not actively interfere with Towers’s duties as a police officer. See *McCabe v. Macaulay*, 515 F. Supp. 2d 944, 971 (N.D. Iowa 2007) (“Simply ‘object[ing]’ or even passively ‘failing to cooperate’ with law enforcement officers does not provide arguable probable cause . . .”). Because the pertinent facts on the issue of probable cause were in dispute, the court did not err in denying the defendants’ motion for directed verdict.

The preliminary determination of probable cause made at Buldhaupt’s initial appearance does not establish the officers had probable cause to arrest him. As stated, the proper consideration in determining whether the officers had probable cause is the facts within the officers’ knowledge at the time the arrest is made. *Children*, 331 N.W.2d at 680.

Finally, the defendants argue the court should have granted their motion for directed verdict on the grounds Officer Towers had a good faith and reasonable belief he had consent to enter the Buldhaupt residence. Regardless of whether Officer Towers had a good faith belief Preshia Buldhaupt had consented to his entry in the home, Officer Towers admitted he knew consent

could be revoked by a co-occupant of the residence. See *State v. Sanford*, 474 N.W.2d 573, 575 (Iowa 1991) (“[A]n initial voluntary grant of consent may be limited, withdrawn or revoked at any time . . .”). Buldhaupt told Officer Towers to leave the home and he refused. There is a factual dispute as to whether Officer Towers had a good faith and reasonable belief he had consent to be in the residence. The motion for directed verdict was properly denied.¹

III. Pain and Suffering Damages. The defendants next contend the court erred in overturning the jury’s initial verdict and instructing the jury it must award some amount for pain and suffering, and in failing to award the defendants a remittitur or new trial.

The district court may grant an aggrieved party a new trial when the jury awards excessive or inadequate damages, or when the verdict is not sustained by sufficient evidence, or is contrary to law. *Fisher v. Davis*, 601 N.W.2d 54, 57 (Iowa 1999). The district court has considerable discretion in ruling upon a motion for new trial based upon the ground that the verdict was inadequate. *Id.* Whether damages are so inadequate to warrant a new trial is for the district court to decide. *Id.* We will not ordinarily disturb its discretion to grant or deny the motion unless an abuse of discretion is shown. *Id.*

¹ On appeal, Officer Nading argues that a verdict should have been directed in his favor for the additional reason that he was unaware of what had happened before he entered Buldhaupt’s home. Thus, according to Officer Nading, he had a right to assume that the prior circumstances justified the decision to arrest Buldhaupt. However, Buldhaupt correctly points out that this argument was not made below. Rather, in the motions for directed verdict, no effort was made to distinguish between the two officers. Accordingly, we believe this argument is not properly before us.

Whether damages in a given case are adequate depends on the particular facts of the case. *Id.* The test is whether the verdict fairly and reasonably compensates the party for the injury sustained. *Id.* Here, the court determined the jury's initial verdict awarding Buldhaupt ten dollars in past medical bills, but failing to award some amount of pain and suffering, was inconsistent with the evidence. Buldhaupt testified regarding pain he suffered from the fractured sternum he received. Our supreme court has found that allowing damages for past medical damages but declining to award damages for past pain and suffering from the treated injury is illogical. *Id.* at 58-59; *Shewry v. Heuer*, 255 Iowa 147, 152, 121 N.W.2d 529, 532 (1963). As such, the court did not abuse its discretion in resubmitting the issue to the jury during the second phase of the trial. Although there was evidence Buldhaupt had pre-existing injuries to his back, neck, and shoulder, he testified the pain he suffered as a result of those injuries was separate and distinct from the pain resulting from the injury to his chest.

The defendants also contend the court erred in denying their motion for remittitur because the jury's second verdict was the result of passion, prejudice, or other improper considerations.

Because fixing the amount of damages is a function for the jury, we are "loath to interfere with a jury verdict." In considering a contention that the jury verdict is excessive, the evidence must be viewed in the light most favorable to the plaintiff. The verdict must not be set aside merely because the reviewing court would have reached a different conclusion. When considering a remittitur, we will reduce or set aside a jury award only if it is: (1) flagrantly excessive or inadequate; (2) so out of reason as to shock the conscience; (3) a result of passion, prejudice, or other ulterior motive; or (4) lacking in evidentiary support. If a verdict meets this

standard or fails to do substantial justice between the parties, the district court must grant a new trial or enter a remittitur.

Triplett v. McCourt Mfg. Corp., 742 N.W.2d 600, 602-03 (Iowa Ct. App. 2007) (citations omitted). Viewing the jury's verdict in the light most favorable to Buldhaupt, we conclude the verdict was not excessive.

The defendants further contend because Buldhaupt failed to request pain and suffering damages for false arrest, arrest without probable cause, and illegal entry in his second amended petition, it was improper to award him such damages. This issue was not presented to and passed on by the district court, and therefore is not preserved for our review on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

IV. Jury Instructions. Finally, the defendants contend the court erred in instructing the jury on both a claim for false arrest and a claim for arrest without probable cause. They argue the claims are identical and rely on the same facts; therefore, the instructions unduly emphasized Buldhaupt's theory of the case.

Courts must give requested jury instructions when they correctly state the law applicable to the facts of the case and if the legal concept is not embodied in other instructions. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994). However, even instructions correctly stating the law should not give undue emphasis to any particular theory, defense, stipulation, burden of proof, or piece of evidence. *Id.* Error in giving or refusing to give instructions is reversible, only if prejudicial. *Id.*

Buldhaupt's claims for false arrest and arrest without probable cause vindicate separate rights and are separate theories for recovery. However, the

defendants argue, “Allowing the jury to consider and award damages for both claims unduly emphasized Mr. Buldhaupt’s theory of the case” Because the jury was instructed not to award duplicative damages, the district court denied the defendants’ motion for new trial on this ground. We find no error.

V. Attorney Fees. On cross-appeal, Buldhaupt contends the court erred in failing to award attorney fees. The court denied his motion for attorney fees, finding Buldhaupt failed to plead them. The court further found it would reject the fee claim on the merits, noting Iowa has not recognized the “private attorney general doctrine” urged by Buldhaupt.

Without addressing the merits of Buldhaupt’s claim for attorney fees, we find he is not entitled to them because he failed to plead them. As this court has previously held, “[A]ttorney fees must be specifically pleaded before they may be awarded. We can find no reason to separate attorney fees from other kinds of special damages or to establish separate rules allowing them to be raised after the trial.” *Nelson Cabinets, Inc. v. Pfeiffer*, 542 N.W2d 570, 573 (Iowa Ct. App. 1995). Because Buldhaupt deleted his request for attorney fees from his amended petition, we affirm the district court’s denial of his motion for attorney fees.

AFFIRMED.