UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

HOPE MICHELLE HALL,	)	
	)	
Plaintiff,	)	Case No. 1:03CV00056
	)	
v.	)	**OPINION**
	)	
WAL-MART STORES EAST, INC.,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Donald G. Hammer, Burke, Graybeal and Hammer, Marion, Virginia, for Plaintiff; W. Bradford Stallard and Cameron S. Bell, Penn, Stuart & Eskridge, Abingdon, Virginia, for Defendant.

A customer who was detained by a store owner's employees and accused of shoplifting but later acquitted brings this tort action alleging false imprisonment, malicious prosecution, and intentional infliction of emotional harm.[1] The question before me is whether the plaintiff has produced sufficient evidence to create a genuine issue of material fact so as to withstand summary judgment. After consideration of the pertinent Virginia law, I find there are no genuine issues of

[1] Although the pleadings filed by the plaintiff allege a variety of claims against the defendant, many of which state no legal cause of action, the plaintiff clarified during oral argument on the defendant's Motion for Summary Judgment that these are the three causes of action she intended to assert.

material fact with regard to any of the claims advanced by the plaintiff, and I grant the defendant's request for summary judgment.

I

The plaintiff was prosecuted for shoplifting at the behest of the defendant Wal-Mart Stores East, Inc. ("Wal-Mart"), was acquitted, and thereafter filed this action in state court against Wal-Mart. The defendant, after removing the case to this court[2] and conducting discovery, has filed a Motion for Summary Judgment. The motion has been briefed and argued and is now ripe for decision.

The facts of the case, either undisputed or, where disputed, taken in the light most favorable to the plaintiff, are based on the summary judgment record[3] and are as follows. In April 2002, the plaintiff visited the Wal-Mart store in Bristol, Virginia, to purchase a birthday present for her son. She was accompanied by her three young sons, ages 11, 9, and 5, and a friend of the nine-year-old son. This particular Wal-Mart has at least two entrances by which shoppers can enter the store. One is considered the general store entrance, and the other is the grocery store entrance. The

[2] Jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2003).

[3] The summary judgment record contains transcripts of the plaintiff's deposition and of the plaintiff's criminal trial for shoplifting.

entrances are on the same side of the building and are separated by approximately fifty to seventy feet.

After parking their car, the plaintiff and the four children entered the Wal-Mart store from the grocery store entrance. On her way in, the plaintiff stopped by a promotional table set up outside by Wal-Mart and picked up three azalea plants that were for sale. Placing the plants in her shopping cart, the plaintiff proceeded to enter the store. She continued her shopping, allowing her eldest son to pick out a video game and buying some food items for the four children. Although the children consumed some of the food items right away, the plaintiff saved the containers so as to be able to properly pay for the items during check out. After completing her shopping, she approached a cash register, where the clerk handling her transaction scanned all the items in the cart, including the empty food containers, but inadvertently left the azalea plants in the cart, unscanned. While the clerk was scanning the items in the cart, the plaintiff's son had wandered off with his video game. In an effort to be honest, the plaintiff called him over to make sure that his game was properly paid for as well.

Once the clerk totaled the transaction, the plaintiff did not have enough money in cash and had one check. She also needed to keep five dollars in cash so as to buy a dog tag in the vestibule of the store. The plaintiff gave the clerk her available cash

and wrote a check for the remaining amount due. Once the transaction had concluded, the plaintiff and the clerk noticed that the azalea plants were still in the cart and had not been included in the purchase. The clerk asked the plaintiff whether she still wanted to purchase the plants, to which the plaintiff replied "no" because she did not have any more money or checks left, except for the five dollars she needed to purchase the dog tag. The plaintiff then asked the clerk whether she preferred that the plants be left with her at the register or replaced on the promotional table outside. The plaintiff claims the clerk answered "yes," and the plaintiff understood that response to mean that she should return the plants herself to the promotional table outside. The plaintiff thus left the plants in her cart and exited the store, with the four children and the cart, from the general store entrance. On her way out, she stopped at the vending machine in the vestibule to make a dog tag for her dog, a process that took approximately fifteen minutes.

As she exited the store, the plaintiff claims she walked along the sidewalk for a few feet and then angled towards her car, forgetting to replace the azalea plants. Once at the car, when loading all her purchases into the trunk, she realized she had forgotten to return the plants. Claiming that she planned to drive over to the promotional tables to return the azaleas, the plaintiff put all her purchases in the trunk and took the three plants into the front seat with her, giving one or two to her son who

was seated in the front passenger seat. Once she entered her car with the plants, she saw what appeared to her to be a Wal-Mart employee walking towards her. Figuring she would ask the employee to replace the plants for her, the plaintiff tried to solicit the employee's help. However, before she could do so, the employee approached her, asking her to step out of the car and accusing her of shoplifting. Other Wal-Mart security personnel also arrived at the scene moments thereafter. Although both the plaintiff and her eldest son tried to explain to the security guards their intention to return the plants, the guards asked the plaintiff to accompany them with her children to the security processing area, where a police officer was called and gave her a summons for shoplifting. It is uncontested that the Wal-Mart employees did not touch the plaintiff at any time. The plaintiff does claim, however, that, once in the security room, a Wal-Mart employee "grabbed" her son's arm and pulled him away from a machine and said, "Listen to your mother. You're not going to tear up my store." (Hall Dep. 32, 49.)

Unbeknownst to the plaintiff, at the time she left the cash register with the unpaid-for azalea plants, the clerk who had handled her transaction had notified a door attendant that she had these unpaid-for plants in her possession and was planning on replacing them at the azalea tables outside. The door attendant notified the manager, and the manager notified security personnel, who then kept their eyes

on the plaintiff to make sure she returned the plants. The defendant's employees claim that the plaintiff exited the Wal-Mart store from the general store doorway and walked towards the grocery store doorway for a significant distance. The employees claim that there were promotional azalea tables at both entrances and that the plaintiff passed one of the tables and walked toward the other table but failed to return the plants. The security personnel watching the plaintiff claim they gave her every opportunity to return the plants, waiting to approach her until she entered her car, presenting the risk that she would drive away and leave the parking lot with the plants.

After being detained in the security processing area, the plaintiff was released in less than an hour. She was later tried on the misdemeanor charge of shoplifting and acquitted by the judge.

II

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate only where the evidence as a whole shows that no genuine issues as to any material fact exist to be resolved by a jury and that the moving party is entitled to judgment as a matter of law. *See Clark v. Alexander*, 85 F.3d 146, 150 (4th Cir. 1996). Genuine issues of fact exist where the evidence is such that a reasonable jury

could decide in favor of the non-movant. *See Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996). Although the burden of proof initially rests with the moving party to establish the absence of any genuine issue of material fact, the non-moving party, in opposing the motion, must present specific facts showing there is a genuine issue for trial and may not rely on mere allegations. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). In ruling on a motion for summary judgment, the district court is not restrained by the scant existence of some disputed facts. Instead, the court must inquire into the genuineness and materiality of those facts so as to determine whether they are "material to an issue necessary for the proper resolution of the case" and whether "the quality and quantity of the evidence offered to create a question of fact [are] adequate to support a jury verdict." *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995). Finally, although any discrepancies in or any inferences drawn from the evidence must be resolved in favor of the non-moving party, such determinations must "fall within the range of reasonable probability and [may] not be so tenuous as to amount to speculation or conjecture." *Id.*

The parties agree that federal courts sitting pursuant to their diversity jurisdiction are to apply the law of the forum state. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). Under Virginia tort law, a merchant who has probable cause for

believing that an individual has engaged in shoplifting goods from the merchant may arrest, detain, or cause the arrest or detention of that individual in a reasonable manner and for a reasonable length of time without being civilly liable for false imprisonment or malicious prosecution. *See* Va. Code Ann. § 18.2-105 (Michie 1996).[4]

In order for the immunity of section 18.2-105 to apply to Wal-Mart in this case, its employees must have had probable cause to believe that Bishop had the intent to convert the plants to her own use. Wal-Mart bears the burden to show probable cause, which exists where the circumstances prompting the arrest or detention, judged

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[4] The relevant text of the statutory provision states:

> A merchant, agent, or employee of the merchant, who causes the arrest or detention of any person pursuant to the provisions of § 18.2-95 or § 18.2-96 or § 18.2-103, shall not be held civilly liable for unlawful detention, . . . slander, malicious prosecution, false imprisonment, false arrest, or assault and battery of the person so arrested or detained, whether such arrest or detention takes place on the premises of the merchant, or after close pursuit from such premises by such merchant, his agent or employee, provided that, in causing the arrest or detention of such person, the merchant, agent or employee of the merchant, had at the time of such arrest or detention probable cause to believe that the person had shoplifted or committed willful concealment of goods or merchandise.

Although the record does not reflect the exact charge against the plaintiff here, it was apparently either under sections 18.2-96 (petit larceny) or 18.2-103 (shoplifting). Section 18.2-95 punishes grand larceny (goods of a value of more than $200). *See* Va. Code Ann. § 18.2-95 (Michie Supp. 2003).

in light of the facts as they appeared at the time of the detainment, were such that an "ordinarily prudent person" would act as the defendants did in the given circumstances. *F.B.C. Stores, Inc. v. Duncan*, 198 S.E.2d 595, 599 (Va. 1973). Although the scope of the immunity has been interpreted to be broad, it is not absolute and will not apply to torts committed in a "willful, wanton or otherwise unreasonable or excessive manner." *Jury v. Giant of Md., Inc.*, 491 S.E.2d 718, 720 (Va. 1997).

Under the authority of this statute, Wal-Mart is immune in this case from any civil liability for false imprisonment or malicious prosecution arising from its employees' conduct. The defendant's security personnel observed the plaintiff soon after she left the checkout area until she reached her vehicle and watched as she bypassed opportunities to return the azalea plants. Even giving credence to the plaintiff's contention that she simply forgot to return the plants and did not intend to steal them, there is no question but that the Wal-Mart employees, given the facts they knew at the time, had probable cause to believe that the plaintiff intended to keep and therefore shoplift the plants. They acted properly and with probable cause in approaching and detaining her for further questioning. The consequent detainment was also of a reasonable nature and reasonable duration. The evidence is undisputed that the plaintiff was not physically abused in any way during her detainment and that

she was released in less than one hour, at which time she was free to return to her vehicle and go about her business. Similarly, in light of the number of attempted thefts and accompanying explanations Wal-Mart personnel likely encounter on a daily basis, no reasonable jury could find that they did not act with sufficient probable cause.[5]

The plaintiff compares her case to *Stamathis v. Flying J, Inc.*, No. 7:01CV00838, 2002 WL 1477586 (W.D. Va. July 9, 2002), in which the court, applying section 18.2-105, held that the existence of probable cause was an issue for the jury and could not be resolved at summary judgment. In that case, Stamathis had been detained and charged with petit larceny after an incident in which he fueled his truck at the defendant's truck stop, unsuccessfully attempted several times to pay for the fuel, and then moved his truck at the request of a truck stop employee to an adjacent lot so as to make room at the fueling station for trucks waiting behind him, planning to attempt again to pay for the fuel. The plaintiff argues that her case is similar because had Wal-Mart's checkout clerk not forgotten to include the plants in the plaintiff's transaction, the subsequent course of events would not have transpired, and the plaintiff would not have been in a situation that aroused suspicion. The

[5] The Virginia Supreme Court has characterized the legislature's intent in enacting the immunity statute as "seeking [a] remed[y] for the multi-billion dollar epidemic of shoplifting." *F.B.C. Stores, Inc.*, 198 S.E.2d at 599.

analogy is unpersuasive because the merchant's reasonable perception of the conduct is the key inquiry. *Stamathis* is distinguishable because in that case, the plaintiff, upon pulling out of the defendant's truck stop to make room for other trucks, pulled into an adjoining parking area. A reasonable employee would perceive this conduct to be consistent with the plaintiff's intent to return to the truck stop to pay for the fuel, and the existence of probable cause for any subsequent detention was therefore properly a jury question. In the present case, the plaintiff, once she exited the Wal-Mart store, did not exhibit conduct that would be perceived by a reasonable employee to be consistent with an intent to return the plants or to pay for them. Not only did she bypass opportunities to return the plants, she proceeded to enter her car with them. Wal-Mart's employees therefore had probable cause to believe that Bishop intended to take the plants with her without paying for them.

In addition, the plaintiff asserts that, because she did not leave the parking lot with the plants, a genuine issue of fact exists as to whether the defendant's employees acted with probable cause. As a preliminary matter, the plaintiff's citation of Virginia Code section 18.2-102.1(2) is irrelevant because that provision specifically addresses the theft of shopping carts, items for which a broader understanding of "premises" is functionally required. *See* Va. Code Ann. § 18.2-102.1(2) (Michie 1996). In contrast, "[r]emoval of the targeted property from the owner's premises is

not required" in order to find sufficient possession for purposes of larceny. *Welch v. Commonwealth*, 425 S.E.2d 101, 105 (Va. Ct. App. 1992). Thus, even though the plaintiff was still in the parking lot, her conduct provided the defendant's employees with sufficient probable cause to detain and charge her.

Because all the evidence presented by the plaintiff fails to create a question of fact as to whether the defendant's employees acted without probable cause, the statutory immunity from civil liability provided by section 18.2-105 is applicable as a matter of law. The defendant is therefore protected from liability for false imprisonment or malicious prosecution, and summary judgment on these two claims will be granted in favor of the defendant.

As to the defendant's claim for intentional infliction of emotional harm, the Supreme Court of Virginia has determined that a successful claim is to be premised on a showing by the plaintiff (1) that the defendant's conduct was "intentional or reckless"; (2) that the conduct was "outrageous and intolerable"; (3) that the "alleged wrongful conduct and emotional distress are causally connected"; and (4) that the "distress is severe." *Russo v. White*, 400 S.E.2d 160, 162 (Va.1991). Tort actions based on emotional harm have traditionally been disfavored and are available only in those cases where the facts allege inordinately shocking or unconscionable conduct. "Liability has been found only where the conduct has been so outrageous

in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Ruth v. Fletcher*, 377 S.E.2d 412, 415 (Va. 989); *see also Delk v. Columbia/HCA Healthcare Corp.*, 523 S.E.2d 826 (Va. 2000) (permitting a claim for intentional infliction of emotional distress where hospital staff failed in their duty of care to the patient when a bipolar mental health patient who had endured sexual molestation and gang rape as a child was sexually assaulted by a fellow patient who was HIV-positive); *Russo*, 400 S.E.2d at 163 (dismissing a claim for intentional infliction of emotional distress where the plaintiff alleged that the defendant's daily hang-up phone calls to her made her feel threatened and suffer emotional difficulties). In addition, it is well-recognized that emotional ailments can be of a wide variety. In keeping with the disfavored status of such claims, liability flows only where the emotional affliction sustained by the plaintiff is "so severe that no reasonable person could be expected to endure it." *Id*. (holding that nervousness, sleeplessness, stress, withdrawal from activities, and inability to concentrate at work did not constitute emotional distress of sufficient severity to provide a cause of action for intentional infliction of emotional distress).

The plaintiff in the present action seeks recovery for intentional infliction of emotional harm, saying she was emotionally wounded when she was wrongly and

repeatedly accused of shoplifting by the defendant's employees and when one officer of the security personnel allegedly mistreated her son by grabbing him in order to force him to stop being disruptive. She claims she suffers from anxiety attacks, an irregular appetite, and stress, as a result of the conduct engaged in by the defendant's employees. In addition, the plaintiff says she sustained an injury to her reputation and credit in the community because she was the subject of public scorn and ridicule. Finally, she maintains that the incident has made her unable to engage in certain activities, including shopping, for fear of being wrongly accused again.

Although I do not doubt the emotional discomforts borne by the plaintiff, the specific difficulties she alleges do not rise to the severity that would be actionable and recoverable in tort. In addition, the conduct of the defendant's employees, although perhaps hasty, brash, and mistaken from the plaintiff's perspective, was not nearly so egregious or atrocious as to warrant an action for intentional infliction of emotional harm under Virginia law. Given the established standards for a successful recovery for intentional infliction of emotional harm, no reasonable jury could find that the plaintiff's emotional suffering was sufficiently severe or that the defendant's conduct was sufficiently outrageous to permit a recovery in tort. Thus, there exists no genuine issue of material fact as to the plaintiff's claim for intentional infliction of emotional

harm, and summary judgment on this claim will also be granted in favor of the defendant.

III

For the foregoing reasons, the defendant's Motion for Summary Judgment will be granted and final judgment entered in its favor.

DATED: November 21, 2003

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United States District Judge