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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001676-MR

KYLE JASON GREER;
AMANDA GREER; AND
KYLE JASON GREER AND
AMANDA GREER AS NEXT
FRIEND OF JOSEPH KILE
GREER, A MINOR CHILD

APPELLANTS

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 14-CI-00108

KMART CORPORATION; AND
UNKNOWN EMPLOYEES OF
KMART CORPORATION

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kyle Jason Greer, Amanda Greer, and Kyle Jason Greer and Amanda Greer, as next friend of Joseph Kile Greer, a minor child, (collectively referred to as appellants) bring this appeal from an October 6, 2015, summary judgment of the Russell Circuit Court dismissing their claims against Kmart Corporation and Unknown Employees of Kmart Corporation (collectively referred to as appellees). We affirm in part, reverse in part, and remand.

On January 18, 2013, Jason, Amanda, and their children (Brandon and Joseph) went to the Kmart store in Russell County, Kentucky. At the time, Joseph was four years old. After shopping, Jason and Amanda waited in the checkout line while the children played near the front door of Kmart. In her deposition, Amanda recalled two patrons of Kmart leaving the store, and each time hearing the security alarm go off as they passed through the front door. Joseph started playing with the security alarm by approaching the door and when the alarm sounded, he would run away. He did this several times. Then, according to both Amanda and Jason, an unknown woman approached Joseph, picked him up, and carried him to a cash register. The woman then placed Joseph on the register, took his feet, and moved his feet over the scanner in an effort to scan the shoes he was wearing. Upon witnessing these events, Amanda left her place in line and made her way to the register. Amanda promptly picked up Joseph and exited the store with him.

On January 21, 2014, appellants filed a complaint in the Russell Circuit Court against appellees. Therein, appellants raised the claims of wrongful custodial interference and false imprisonment. They sought damages for mental

and emotional distress. Kmart answered and eventually filed a motion for summary judgment. By summary judgment entered October 6, 2015, the circuit court granted Kmart's summary judgment and reasoned:

1. Defendant Kmart is entitled to summary judgment as a matter of law because the actions of the unknown woman, assuming she was an agent or employee of Defendant Kmart, were privileged and protected by KRS 433.236, which permits a merchant or its employee "who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person may take the person into custody and detain him in a reasonable manner for a reasonable length of time..."

Plaintiffs contend that Joseph was wrongfully detained and falsely imprisoned when the unknown woman scooped him up, carried him 20 feet, and scanned his shoes on a cash register. The Kentucky Court of Appeals addressed a somewhat similar situation in *Messer v. Robinson*, 250 S.W.3d 344 (Ky. App. 2008). In that case, Mona Robinson was stopped, and asked to come back into the Rite Aid store when the security alarm sounded as she passed through the store's detective device. The Court of Appeals ruled as a matter of law that Rite Aid employee Messer had objective probable cause to stop Mona Robinson when the security alarm sounded as Robinson passed through the Rite Aid store's detective device. In so ruling, the Court cited KRS 433.236 and held that the facts indicated Messer had objective probable cause to stop Robinson due to the security alarm sounding. The Court found that it was reasonable as a matter of law for Messer to stop Robinson and check her bags for unpurchased items.

In this case, the unknown woman who scooped Joseph up and scanned his shoes no doubt did so believing that he was in possession of unpurchased Kmart goods, and that the unpurchased goods were

triggering the door alarm. That is the only reasonable conclusion to be drawn from the evidence of her actions. That is also the assumption that Amanda and Jason Greer drew from their observations of the event. Additionally, the woman's purpose for scanning Joseph's shoes could only be to "make reasonable inquiry as to whether [Joseph] ha[d] in his possession unpurchased merchandise" as allowed for in KRS 433.236(1)(e). Furthermore, the evidence establishes that Joseph's detention was in a reasonable manner and for a reasonable length of time. The Greer Plaintiffs agree that Joseph was scooped into the woman's arms and cradled as she walked to the cash register. According to the Greers, Joseph was not abused, manhandled, or physically injured in any way. Furthermore, the detention was very brief - from 30 seconds to two minutes.

Although there is no evidence in the record to establish that the unknown woman was, in fact, an employee or agent of Kmart, construing the evidence most favorably to the Plaintiffs that the woman who scooped up Joseph and scanned his shoes was an agent or employee of Kmart, her actions are consistent with, and protected by, the provisions of KRS 433.236. The triggering of the door alarm gave the unknown woman objective probable cause to scan Joseph Greer's shoes pursuant to KRS 433.236 and *Messer v. Robinson, supra*. Joseph's detention was in a reasonable manner and for a reasonable length of time. As a matter of law, Plaintiffs have no viable claims under the facts herein and Kmart cannot be held liable. Defendant Kmart is entitled to summary judgment as a matter of law.

2. Defendant is also entitled to summary judgment as a matter of law on Plaintiffs claims for mental and emotional distress. Plaintiffs claim for past and future mental suffering and emotional distress as a result of the January 18, 2013[,] incident is not supported by the evidence, and fails as a matter of law to satisfy the requirements of Kentucky law.

The Supreme Court of Kentucky in *Osborne v. Kenney*, 399 S.W.3d 1 (Ky. 2012), squarely addressed the quality of evidence required for a party to recover for emotional harm in Kentucky. In that case, Kentucky's highest Court stated, in pertinent part:

Furthermore, we recognize that emotional tranquility is rarely attained and that some degree of emotional harm is an unfortunate reality of living in a modern society. In that vein, to ensure claims are genuine, we agree with our sister jurisdiction, Tennessee, that recovery should be provided only for "severe" or "serious" emotional injury. A "serious" or "severe" emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiff's everyday life or require significant treatment will not suffice. And a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment.

(*Osborne v. Kenney* at 17-18). (Footnotes omitted. Emphasis added). *See also, Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538 (Ky. App. 2014), following *Osborne v. Kenney, supra*, holding that the plaintiffs there had failed to present sufficient evidence of severe emotional distress to meet their burden of proof under the standard established in the *Osborne v. Kenney* case.

In a footnote addressing the severity or seriousness of the alleged harm required for recovery, the *Osborne* Court stated:

We note that individuals are well equipped to deal with the emotional stress generally experienced throughout day-to-day living.

However, recovery is only permitted when the harm experienced reaches a level where a reasonable person would no longer be expected to adequately manage it. Many factors may be considered, including, but not limited to, the intensity of the harm, the duration of the harm, and the character or nature of the defendant's conduct. These considerations serve as indicia of the genuineness of the claim. (Footnote 59. *Id.* at 18. Emphasis added.)

The undisputed evidence in this case is that none of the Plaintiffs suffer from, or suffered from, an emotional harm "serious" or "severe" enough to entitle them to recovery under the standard established in the *Osborne v. Kenney* case. The undisputed evidence from Plaintiffs Amanda and Jason Greer is that for a period of 2 to 3 weeks after the incident, Joseph did not want to go to bed by himself, and wet the bed a few times. He was also "clingy" around strangers for a time. That is the extent of the evidence concerning Joseph's emotional harm. He never cried about the incident, either at the time or thereafter: and has never mentioned the incident to his mother or father. Joseph has never seen a physician for the alleged symptoms of the incident, and his medical records suggest that his parents never raised the matter with Joseph's pediatrician. There is no evidence that Joseph missed any school, or was unable to participate in any activity by reason of the alleged emotional harm. Joseph has never seen a counselor, psychologist, or other mental health provider for treatment. Joseph has never been prescribed any medication for his symptoms. The same can be said for Plaintiffs Amanda and Jason Greer's individual claims for emotional harm. No one in the family has consulted with any medical or mental health provider for any treatment for their alleged mental and emotional distress.

The only quasi-medical evidence in the record with respect to the nature and severity of Joseph's alleged

emotional distress is the testimony of Plaintiffs expert, Paul Ebben, Ph.D. who evaluated Joseph at the request of the Plaintiff parents and their attorney. Dr. Ebben's deposition testimony is that the January 18, 2013 event at Kmart exacerbated Joseph's pre-existing anxiety, led to some depression, and resulted in some PTSD arousal elements. Dr. Ebben described these symptoms as "mild to moderate" and "quite treatable," testifying that they should resolve within 6 to 9 months of the time he evaluated Joe in April, 2013.

Evaluating the undisputed evidence in this case concerning the Plaintiffs mental and emotional distress against the standard set forth in the *Osborne v. Kenney, supra*, case, it is clear that Plaintiffs cannot meet their burden of establishing that any of them suffered or suffers from "serious" or "severe" emotional harm. Because Plaintiffs evidence fails, as a matter of law, to satisfy the requirements of Kentucky law for recovery of damages for mental and emotional harm, Defendant Kmart Corporation is entitled to summary judgment.

October 6, 2015, Order at 4-8. This appeal follows.

Appellants contend that the circuit court erred by rendering summary judgment dismissing their claim of false imprisonment. Specifically, appellants argue that the circuit court erroneously concluded that appellees were entitled to the shopkeepers defense set forth in Kentucky Revised Statutes (KRS) 433.234(1). Appellants maintain appellees lacked probable cause to believe that Joseph had taken goods from Kmart and that appellees failed to detain Joseph in a reasonable manner per KRS 433.234(1).

Summary judgment is proper where there exists no material issues of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v.*

Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. Our review shall proceed accordingly.

The intentional tort of false imprisonment arises from the unlawful detention of an individual. *Great Atlantic & Pacific Tea Co. v. Smith*, 281 Ky. 583, 136 S.W.2d 759 (1939); *Wal-Mart Stores, Inc. v. Mitchell*, 877 S.W.2d 616 (Ky. App. 1994). Our Court has held that the wrongful “deprivation of the liberty of one person by another . . . for however short a time . . . whether done by actual violence, threats or otherwise” constitutes false imprisonment. *Banks v. Fritsch*, 39 S.W.3d 474, 479 (Ky. App. 2001). And, a claim of false imprisonment “may be maintained without proof of actual damages. The tort is complete after ‘even a brief restraint of the plaintiff’s freedom,’ and the plaintiff may recover nominal damages.” *Id.* at 479 (quoting *Prosser & Keeton on Torts* § 11 (5th ed. 1984)).

Under KRS 433.236(1), a shopkeeper is granted a defense to a claim of false imprisonment if the legal requirements thereunder are satisfied. KRS 433.236(1) reads:

- (1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person may take the person into custody and detain him in a reasonable manner for a reasonable length of time, on the premises of the mercantile establishment or off the premises of the mercantile establishment, if the persons enumerated in this section are in fresh pursuit, for any or all of the following purposes:

- (a) To request identification;
- (b) To verify such identification;
- (c) To make reasonable inquiry as to whether such person has in his possession unpurchased merchandise, and to make reasonable investigation of the ownership of such merchandise;
- (d) To recover or attempt to recover goods taken from the mercantile establishment by such person, or by others accompanying him;
- (e) To inform a peace officer or law enforcement agency of the detention of the person and to surrender the person to the custody of a peace officer, and in the case of a minor, to inform the parents, guardian, or other person having custody of that minor of his detention, in addition to surrendering the minor to the custody of a peace officer.

Thus, under KRS 433.236(1), if a shopkeeper or merchant possesses probable cause to believe that goods have been unlawfully taken, the merchant may detain the individual “in a reasonable manner for a reasonable length of time.” KRS 433.236(1). In this case, Kmart may successfully utilize the shopkeeper defense only if it (1) possessed probable cause to believe that Joseph had unlawfully taken goods, (2) detained Joseph in a reasonable manner, and (3) detained Joseph for a reasonable length of time. We shall address each legal requirement seriatim.

As to probable cause, the circuit court concluded that Kmart possessed probable cause to detain Joseph because the security alarm sounded as Joseph approached it. In support thereof, the circuit court relied upon *Messer v. Robinson*, 250 S.W.3d 344 (Ky. App. 2008). In *Messer*, a store patron had

purchased several items and was leaving the store when the security alarm sounded. *Id.* The Court of Appeals concluded that probable cause existed to detain the patron based solely upon the security alarm sounding when the patron attempted to exit the store.

In this case, the facts must be viewed in a light most favorable to appellants. According to Amanda, she was waiting in line at the cash register and witnessed the security alarm sounding on two different occasions when two separate customers exited Kmart's premises. A reasonable person could believe that the security alarm may have been malfunctioning at the time of Joseph's detention, and if true, this fact would certainly distinguish this case from *Messer*. *See id.* Therefore, a material issue of fact exists as to whether the security alarm was malfunctioning at the time Joseph was detained. If it were malfunctioning, we do not believe appellees possessed probable cause to detain Joseph under KRS 433.236(1). Therefore, we conclude that a material issue of fact exists as to whether Kmart possessed probable cause, thus precluding summary judgment.

As to whether Joseph was detained in a reasonable manner, the circuit court noted that Joseph "was not abused, manhandled, or physically injured in any way"; rather, the circuit court stated that "Joseph was scooped into the woman's arms and cradled as she walked to the cash register." Order at 3-4. At the time of the detention, Joseph was four years old.

Our Court has held that the shopkeeper defense statute (KRS 433.236(1)) "does not provide the merchant or employees with a license to

manhandle or browbeat a child in an attempt to discover if he has unlawfully taken merchandise.” *Mitchell*, 877 S.W.2d at 618. Joseph was actually picked up by the woman and carried away by her rather than simply being directed or led to the cash register. Also, no parent or guardian was notified or located before detaining the four year old child. Under these facts, we believe that reasonable minds could differ as to whether the detention was conducted in a reasonable manner, thus precluding summary judgment. *See Birdsong v. Wal-Mart Stores, Inc.*, 74 S.W.3d 754 (Ky. App. 2001).

As to whether the length of the detention was reasonable, it appears that the total length of time was between thirty seconds to two minutes. We, thus, agree with the circuit court that the detention was brief and for a reasonable length of time. Upon the whole, we conclude that the circuit court erred by rendering summary judgment concluding that appellees were entitled to the shopkeeper defense outlined in KRS 433.236(1); rather, we think material issues of fact exist that precluded summary judgment.

Appellants also assert that the circuit court erroneously rendered summary judgment determining that Joseph’s mental and emotional distress injury due to the false imprisonment was insufficient to support an award of damages. For the following reasons, we disagree.

In its summary judgment, the circuit court relied upon *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012) for its decision that Joseph’s mental distress was inadequate to support an award of damages. In *Osborne*, the Kentucky Supreme

Court held that recovery for emotional distress is proper only where expert testimony establishes that the emotional injury is severe or serious. The *Osborne* Court defined a severe or serious emotional injury as occurring “where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiffs everyday life or require significant treatment will not suffice.” *Id.* at 17.

In our case, appellants’ expert opined that Joseph’s mental distress was only mild to moderate and treatable. Viewing the facts most favorable to appellants, we agree with the circuit court that Joseph’s mental distress was not severe or serious as required by *Osborne*, 399 S.W.3d 1, to support an award of damages. Hence, the circuit court properly rendered summary judgment upon this issue. However, we observe that Joseph’s false imprisonment claim is still viable as the claim may be maintained without proof of actual damages. *See Banks*, 39 S.W.3d 474. If successful before the jury, appellants would be entitled to nominal damages. *See id.*

For the foregoing reasons, the summary judgment of the Russell Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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