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| O. Lee Gregory | § | IN THE DISTRICT COURT OF |
| Plaintiff/Counter-Defendant | § | TRAVIS COUNTY, TEXAS |
| v. | § | 163rd JUDICIAL DISTRICT |
| J-Mart Corporation | § | |
| Defendant/Counter-Plaintiff | § | |

DEFENDANT/COUNTER-PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW J-Mart Corporation (J-Mart), Defendant/Counter-Plaintiff in this action, and files this Motion for Summary Judgment in accordance with Tex. R. Civ. P. 166(a), seeking relief stated as follows:

1. Summary Judgment denying and disposing, by virtue of material fact and law presented herein, Plaintiff/Counter-Defendant's claims asserted adversely and erroneously against Defendant/Counter-Plaintiff, thus releasing, completely and without doubt, Defendant/Counter-Plaintiff from this action's adverse claims and allegations contained and inferred within.
2. Judgment against Plaintiff/Counter-Defendant for actual damages in an amount in excess of the minimum jurisdictional limits of the Court;
3. Further damages by reason of Plaintiff/Counter-Defendant's knowing misconduct;

4. Prejudgment interest as provided by law;
5. Attorney's fees;
6. Post judgment interest as provided by law;
7. Costs of suit; and
8. Such other and further relief to which Defendant/Counter-Plaintiff may be justly entitled.

I.

Claims of Plaintiff/Counter-Defendant

Plaintiff/Counter-Defendant O. Lee Gregory has asserted claims against Defendant Counter/Plaintiff reiterated as follows from Plaintiff/Counter-Defendant's Original Pleading:

1. Of gross negligence by breaching the duty to care by exposing plaintiff to an unreasonable risk of harm in the reckless manner in which the allegations of the unfounded shop-lifting were conducted. The security guard's wanton and reckless conduct blatantly lead to plaintiff's injured reputation.

2. Of false imprisonment by detaining and restricting plaintiff until the legal authorities arrived against plaintiff's will without proper cause and with no other means of leaving establishment when there was no alleged merchandise found on the plaintiff.

3. Of defamation by security guard's slanderous allegations against the plaintiff, and of the charges brought against plaintiff of shop-lifting proximately caused by the security guard's slanderous remarks and of libel due to the event being published in

the newspaper, causing the loss or reputation of the plaintiff having been a respected Judge of the Texas County Court and a respected citizen in the community.

4. Of intentional infliction of emotional distress due to the extreme conduct of security guard in the store with the plaintiff and in the parking lot with the plaintiff's wife with obvious reckless intent to cause plaintiff and his wife severe mental anguish from the lack of delicacy with which the entire matter was handled.

Each of such acts, singularly or in combination with others constituted negligence which proximately caused the loss of reputation which plaintiff has suffered.

Plaintiff concludes claims against J-Mart as follows:

As a direct and proximate result of the gross negligence of J-Mart Corporation, defendant, Judge O. Lee Gregory, plaintiff, has suffered slander per se, mental anguish, and emotional distress due to the reckless actions and statements of J-Mart Corporation and its employees.

II.

Counter-Claims of Defendant/Counter-Plaintiff

1. Conversion: Plaintiff/Counter-Defendant did knowingly and with intent deprive Defendant and Counterclaimant of its lawful property.

2. Negligence Per Se: Plaintiff/ Counter-Defendant's conduct was clearly negligent without argument because it was in direct violation of statute and so palpably opposed to the dictates of

common prudence that it can be said without hesitation that no careful or reasonable person would have been guilty of it.

3. Intentional Infliction of Emotional Distress:

Plaintiff/Counter-Defendant's actions were intentional and knowing and were the proximate cause of emotional distress inflicted on store personnel. Without doubt, proximate cause of intentional acts, and the outrageous behavior inherent in them that gave rise to emotional distress, was commission of two torts named above.

III.

FACTS OF THE CASE

1. Security Guard, Ms. Jordan Smith (answering for J-Mart Corporation in this action and hereafter referred to as Ms. Smith), observed Plaintiff/Counter-Defendant, O. Lee Gregory (hereafter referred to as Plaintiff), and his wife, Lynn Gregory (hereafter referred to as Plaintiff's wife), when the two entered the premises of J-Mart store located at 2525 Gulf to Bays Boulevard in Austin, Texas on the afternoon of November 15, 1996. Ms. Smith took special notice of Plaintiff and Plaintiff's wife because Plaintiff is listed on the Austin Merchants' Association 'Hot Sheet' database as a prolific thief.

2. This "hot sheet," is a group of documents, kept in a centralized local database maintained by the Austin Merchants' Association, and circulated to Austin merchants to warn them about "known thieves" who live, and may be active, in the area. "Hot Sheets" consist of photographs and descriptions of these known

criminals. The "Hot Sheet" also lists what the thief usually steals. The "Hot Sheet," page on Judge O. Lee Gregory states that he always steals model cars and airplane kits and warns merchants to watch out for his wife who is often on look-out for the judge while he is stealing. See, Attachment 99 (Exhibit Z), Copy of "Hot Sheet" Page on O. Lee Gregory.

3. Security Guard Smith took precaution in regards to the advice of the "Hot Sheet." She immediately went to the store aisle where the model car kit section is located. There, Ms. Smith witnessed the Plaintiff slip a car kit box into his trench coat. Ms. Smith then witnessed both the Plaintiff and his wife walk to the front of the store and pass the cashier lines without stopping. See, Attachment 5, (Police Report).

4. Ms. Smith then instructed a store cashier to call the police and inform them that she was going to be in need of assistance. Ms. Smith then asked the plaintiff and his wife to stop and go with her, explaining that she suspected the plaintiff of stealing a model car kit. Plaintiff and wife refused.

5. Company Procedure regarding investigation of retail theft at J-Mart is to escort suspected shoplifters to the back of the store. This helps security personnel control the situation and helps the suspected shoplifter avoid embarrassment. See, Attachment 2, Security Memorandum (EXHIBIT F), item 5.

5. Plaintiff opted to wait by the front doors for the police to arrive. This was done in reply to the request of Ms. Smith. See, Attachment 3, Defendant's Requests for Admissions Answered by Plaintiff, Nos. 2 and 28. Plaintiff voluntarily waited for police in

order to clear his name. In the words of plaintiff: "I waited for the police officer K.D. Turner and told her that I would submit to a full search at the jail to keep from being embarrassed." Attachment 4, Plaintiff's Answers to Defendant's Interrogatories, No. 12.

6. Officer K.D. Turner of Austin Police Department arrested Plaintiff at front of J-Mart Store and took him to the local Police Station to perform a search. The search revealed no stolen merchandise. Plaintiff was booked for attempted retail theft and released on his own recognizance. See, Attachment 5, (Police Report).

7. Before Plaintiff was taken from store, he gave his wife a long hug. See, Attachment 3, Defendant's Requests for Admissions Answered by Plaintiff at No. 18.

8. Ms. Smith believes that Plaintiff "slipped" the model in question to his wife during this hug.

9. Fearing for her job, Ms. Smith, knowing that Plaintiff's wife was a very important person in town, walked out to parking lot as Plaintiff's wife was getting into her car, intending to offer explanations for that afternoon's incident.

10. Ms. Smith saw Plaintiff's wife drive away in a haste with the suspected stolen model car-kit sitting in the front seat of her car. See, Attachment 5, (Police Report).

11. Ms. Smith immediately phoned Officer Turner at the Police Department to report what she had seen. Turner informed Smith that it was quite likely too late to do anything and that Mrs. Gregory had probably gotten rid of the kit by now if indeed she did have it. See, Attachment 5, (Police Report).

12. According to Officer Turner's police report, she had offered to search the Plaintiff immediately upon her arrival on J-Mart Property in order to expedite the process. Plaintiff refused, wanting to be searched at the jail instead. It was immediately after making this request, that the Plaintiff gave his wife the suspiciously enduring hug. See, Attachment 5, (Police Report).

13. Plaintiff was wearing heavy clothes that day: a sweater, trench coat, scarf and gloves.

14. The total time from when Ms. Smith stopped the Plaintiff and his wife, until Plaintiff was taken away by Officer Turner was approximately 25 minutes.

15. Plaintiff had drawn previous to this incident, and did render for discovery, a map of the J-Mart store involved in the instant, marking the precise location of the model car kit aisle and the precise location of the item Ms. Smith claims she saw him steal. See, Attachment 6, (Map of J-Mart Drawn by Plaintiff), EXHIBIT I; Attachment 7, (Map of J-Mart Drawn by Jordan Smith- Illustrating Where She Saw Plaintiff and His Wife Stealing Model Kit and Where She Stopped Him), EXHIBIT E.

16. Plaintiff received a "Nolle Prosequi" recommendation in the criminal prosecution in this matter from his friend, State Attorney Dana Arthurs. See, Attachment 8, (Letter From Dana Arthurs to County Clerk), EXHIBIT H; Attachment 9, (Letter From Dana Arthurs to Plaintiff), EXHIBIT D.

17. Plaintiff is an elected Circuit Judge in our County. See, Attachment 10, (Letter from Plaintiff to Dana Arthurs Requesting Help in this Matter), EXHIBIT C.

18. Plaintiff was given a Public Reprimand in 1992 by the Supreme Court of our State for "failure to uphold the integrity of the judiciary" and "failure to avoid impropriety and the appearance of impropriety," stemming from his pleading "No Contest" to a charge of Retail Theft in July of that year in Seminole County. The Judicial Qualifications Commission Recommended impeachment. The Supreme Court chose to merely reprimand the Judge with stern warning that "Any further incident of this nature...shall result in more serious sanctions...not excluding removal...from the bench." Attachment 11, (Supreme Court Document, Inquiry Concerning a Judge), EXHIBIT A at Page 34, 35.

19. In the same Supreme Court Document mentioned above, the Justices stated, "We conclude that there is substantial and competent evidence to support that Gregory committed the crime with which he was charged." Id. at 34.

20. Ms. Smith has averaged five shoplifting detentions a week for more than ten years as a Security Officer for J-Mart. Ninety-Eight percent of those detentions have resulted in guilty pleas. The two percent that did not plead guilty were prosecuted under Plaintiff's friend, State Attorney Dana Arthurs.

21. Smith has been accused of planting evidence twice. Both times were by Plaintiff in July of 1992 just after he was arrested in Seminole County.

22. According to Officer Turner, Dana Arthurs called the Officer by telephone and spoke with her about the Plaintiff's arrest a few days after the incident.

23. Current State Attorney Shannon Crown reviewed this case and met with J-Mart officials from the store involved, telling them that she believed Jordan Smith's account of the incident that Judge Gregory committed retail theft.

IV.

Points and Authorities

In regards to the charge of False Imprisonment, J-Mart invokes the doctrine commonly known as "Shop Keeper's Privilege," which it is utilizing as an affirmative defense. This doctrine allows a privilege to investigate theft or to stop theft suspects on one's own property or property to which one has been charged as protector.

A person who reasonably believes that another has stolen or is attempting to steal property is privileged to detain that person in a reasonable manner and for a reasonable time in order to investigate ownership of the property. Tex. Civ. Prac. & Rem. Code Ann. § 124.001 (Vernon 1996).

There is further statutory evidence that allows and seemingly encourages even more aggressive protection of property in Texas than that in the Civil Practice and Remedies Code.

A person is justified in using force or deadly force against another to protect land or tangible, movable property of a third person if, under the circumstances as he reasonably believes them to be, the actor would be justified...in using deadly force to protect his own land or property and (1) the actor reasonably believes the unlawful interference constitutes attempted or consummated theft of or criminal mischief to the tangible, movable property; or (2) the actor reasonably believes that: (A) the third person has requested

his protection of the land or property; (B) he has a legal duty to protect the third person's land or property... Tex. Penal Code Ann. § 9.43 (Vernon 1989).

A considerable number of Texas cases have considered allegations of False Imprisonment, and the courts have developed a consistent rule regarding the issue.

"The essential elements of false imprisonment are (1) willful detention; (2) without consent; and (3) without authority of law." Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995).

It is now imperative to examine and apply each of these criteria to the case at hand.

Did Ms. Smith willfully detain the plaintiff?

"Willful Detention means detention resulting from an intent to confine." Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 519 (Tex. App.- San Antonio 1996, n.w.h.).

Smith had no intention to confine the plaintiff. If she did, she was certainly not successful. This issue would be much more precarious if she had succeeded in convincing the plaintiff to accompany her to the back of the store for further investigation of the question of theft. But as it stands, there is no question of willful intent which, in due course, walks in tandem with, and is incumbent upon, the "without consent" prong of the rule. If there is consent, there can be no willful detention.

As established under paragraph 5 of the facts section of this motion, it is evident that plaintiff consented to remaining on the J-Mart premises in order to await police and an ensuing search of

his person by the arresting officer at the police station. This raises the affirmative defense of *volenti non fit injuria* where an issue of "no duty" for which the defendant is liable arises. See, Harding v. Sinclair Pipeline Co., 480 S.W.2d 786, 791 (Tex. Civ. App.- Houston [14th Dist.] 1972, writ ref'd n.r.e.). "One who consents cannot receive an injury." Clarence Morris & C. Robert Morris, Jr., Morris on Torts 24 (1980).

"If a plaintiff voluntarily complies with a request to remain and establish his innocence, this has been determined not to give rise to a cause of action for false imprisonment." Martinez v. Goodyear Tire & Rubber Co., 651 S.W.2d 18, 21 (Tex. App.- San Antonio 1983, no writ). There is no question of fact that the plaintiff consented to remain in store to await police and was in no way willfully detained.

There is no question that Jordan Smith did have authority of law. The two statutes cited above, § 124.001 of the Civil Practice and Remedies Code and § 9.43 of the Penal Code, grant this. Smith's ten year-plus tenure with J-Mart as security person and her detailed memorandum regarding shoplifting investigation (attachment 2) further bolsters such assertion. Furthermore, burden is on plaintiff to disprove such authority as bestowed upon defendant. "...Plaintiff must prove the absence of authority in order to establish the third element of a false imprisonment action." Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985). Plaintiff has failed to preclude such authority by either fact or law.

Beyond doubt as presented by material fact and law, plaintiff has no cause of action for false imprisonment against J-Mart.

In regards to libel and slander charges levelled against J-Mart by plaintiff, a number of affirmative defenses based upon varied privileges are invoked.

Two such privileges are truth and fair comment concerning a public official. See, Civ. Prac. & Rem. Code Ann. § 73.002 (Vernon 1996). "Those who, by reason of notoriety... and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that defamatory falsehood was made...with reckless disregard for the truth." Casso v. Brand, 776 S.W.2d 551, 554 (Tex. 1989). Burden of proof to prove malice and reckless disregard for the truth lies with plaintiff. See, Id. at 555. "Reckless disregard is defined as a high degree of awareness of probable falsity..." Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989).

Another privilege invoked as affirmative defense by J-Mart is qualified privilege to communicate, in good faith, alleged wrongful acts to proper authorities charged to protect public from such acts. See, Darrah v. Hinds, 720 S.W.2d 689, 691 (Tex. App.- Fort Worth 1986, writ ref'd n.r.e.); Zarate v. Cortinas, 553 S.W.2d 652, 655 (Tex. Civ. App.- Corpus Christi 1977, no writ).

J-Mart asserts that there is no material proof that Ms. Smith's report to police of shoplifting by plaintiff was not done in good faith or exceeded her rights as a citizen or employee vested with authority for protection of J-Mart property and customers. Let it also be asserted that Ms. Smith nor any representative of J-Mart

made any defamatory statement about plaintiff in any context at any time. Plaintiff has failed to state proper cause of action here more blatantly than in its other shortcomings herein.

J-Mart also asserts the libel-proof doctrine against plaintiff to reinforce its defense. This doctrine is "...suitable when plaintiffs...notorious for past criminal behavior assert that they have been libeled by...charges of identical or similar behavior." McBride v. New Braunfels Herald-Zeitung, 894 S.W.2d 6, 9 (Tex. App.-Austin 1994, writ denied). Plaintiff has been given public reprimand by this State's Supreme Court for behavior exactly like that at subject in the instant. Such behavior became known by general interested populace and further damage of reputation on such point is moot since it is already irreparably damaged.

Furthermore, J-Mart is not in the broadcast or publication business. Any publicly disseminated information casting the plaintiff in an allegedly "bad light" was not done by J-Mart even if quotes or comments of representatives are contained therein. If any such comment by J-Mart or representative of J-Mart can remotely be construed as being defamatory in any way, defendant reliably stands upon privileges and affirmative defenses cast above.

By complete lack of factual and legal basis, plaintiff has no cause of action for Libel, Slander, or Defamation against J-Mart.

In regards to plaintiff's charges of gross negligence, J-Mart again holds that there is a want of material fact and that all points of law are in its favor.

Gross negligence, to be the ground for
exemplary damages, should be that entire

want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it. Universal Services Co., Inc. v. Ung, 904 S.W.2d 638, 640 (Tex. 1995).

The test for negligence is two-pronged. The objective test says "the defendant's conduct must create 'an extreme degree of risk.'" The subjective test asserts that "defendant must have actual, subjective awareness of risk involved, but...proceed in conscious indifference to the rights, safety, or welfare of others." Id. at 641.

J-Mart is guilty of neither above criteria. As is evident most obviously and irrefutably in Ms. Smith's security memorandum and from her actions on that day, J-Mart took special care to avoid allegations of false imprisonment and libel. J-Mart was, and still is, well aware that situations like that in the instant can and do arise. In this instant, as always, J-Mart proceeded with extreme caution as to completely diminish all possibilities that it could possibly be accused of creating an extreme degree of risk and having conscious indifference in relation to such.

By want of material fact and legal basis, plaintiff has no cause of action against J-Mart for any type of negligence.

In consideration of intentional infliction of emotional distress charges rendered by plaintiff, J-Mart asserts, in light of the legal and factual weaknesses of allegations of tortious behavior on which plaintiff relies, that no such tort exists here either in fact or in law.

...There is no general duty in Texas not to negligently inflict emotional distress. A claimant may recover mental anguish damages only in connection with defendant's breach of some other legal duty...Mental anguish damages should be compensated only in connection with defendant's breach of... duty imposed by law. Boyles v. Kerr, 855 S.W.2d 593, 594-596 (Tex. 1993).

Due to lack of independent cause for intentional infliction of emotional distress in Texas and the sheer factual and legal transparency of tort allegations made by the plaintiff, J-Mart holds that plaintiff is attempting to assert such as an independent cause for intentional infliction of emotional distress by default and thus has no course for remedy against J-Mart in any form whatsoever.

On factual and legal grounds, plaintiff has no cause of action for intentional infliction of emotional distress against J-Mart.

In regards to J-Mart's Counter-Claims, following are assertions for consideration in rendering of Summary Judgment.

Plaintiff committed Conversion by stealing a model car kit from J-Mart.

Conversion is an act which is indeed contrary to natural justice. It cannot be said that recognition of the event giving rise to title is prejudicial to general interests of our own citizens...Texas has a strong public policy against conversion of property...Exemplary damages may be recovered when conversion is accompanied by elements of fraud. Castilleja v. Camero, 414 S.W.2d 424, 427-428 (Tex. 1967).

"Conversion is classically defined as the unauthorized and wrongful assumption and exercise of dominion and control over the

property of another, to the exclusion...of or inconsistent with the owner's rights." Rogers v. Ricane Enterprises, Inc., 930 S.W.2d 157, 165 (Tex. App.- Amarillo 1996, n.w.h.).

In light of evidence asserted in facts section of this Motion for Summary Judgment, plaintiff and his wife did commit conversion by removing a model car kit from without of the control of its owner, J-Mart.

In examination of Negligence Per Se allegations levelled by J-Mart against plaintiff, it is asserted that the tort of conversion, and inherent statutory usurpation therein, as committed by plaintiff, supports said allegations.

"The unexcused violation of a penal statute constitutes negligence as a matter of law if such statute was designed to prevent injuries to a class of persons to which injured party belongs." Murray v. O & A Express, Inc., 630 S.W.2d 633, 636 (Tex. 1982).

In the instant, plaintiff did knowingly violate statute meant to protect J-Mart and like class.

"A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." Tex. Penal Code Ann. § 31.03 (Vernon 1989).

By stealing model car kit from J-Mart with the assistance of his wife, plaintiff violated above said statute meant to protect owners of movable property like J-Mart and thus committed Negligence Per Se.

On the matter of plaintiff's Intentional Infliction of Emotional Distress, such issue, as previously discussed, in order to

be valid, must rely on the commission of a valid tort claim. See, Boyles at 594. Here J-Mart is "required to establish the existence of an affirmative duty owed to them..." Kanetsky v. Murphy, 862 S.W. 2d 653, 657 (Tex. App.- Austin 1993, no writ).

Plaintiff did owe J-Mart a duty not to violate statute against it while acting as invitee upon its property. By violating said section of Texas Penal Code, plaintiff committed Negligence Per Se and thus this outrageous breach of duty is proximate cause of his intentional infliction of emotional distress upon certain employees of the store and the corporation in general.

V.

Conclusion

J-Mart hereby asserts that Summary Judgment Proof contained herein "establishes as matter of law that there is no genuine issue of material fact as to...elements of this cause of action." Id. at 656; See also, Nixon v. Mr. Property Management, 690 S.W.2d 546, 548-549 (Tex. 1985). J-Mart seeks summary judgment in its favor on all Plaintiff claims and on its counter-claims. J-Mart asserts that all factual and legal issues are heavily and without doubt in its favor.

VI.

Prayer

For all reasons stated and expounded upon above, Defendant/Counter-Plaintiff respectfully asks this court to grant

Summary Judgment in this action in its favor and render relief as follows:

1. Denial and dispositive, by virtue of material fact and law presented herein, Plaintiff/Counter-Defendant's claims asserted adversely and erroneously against Defendant/Counter-Plaintiff, thus releasing, completely and without doubt, Defendant/Counter-Plaintiff from this action's adverse claims and allegations contained and inferred within.
2. Judgment against Plaintiff/Counter-Defendant for actual damages in an amount in excess of the minimum jurisdictional limits of the Court;
3. Further damages by reason of Plaintiff/Counter-Defendant's knowing misconduct;
4. Prejudgment interest as provided by law;
5. Attorney's fees;
6. Post judgment interest as provided by law;
7. Costs of suit; and
8. Such other and further relief to which Defendant/Counter-Plaintiff may be justly entitled.

Respectfully Submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

(as prescribed by Rule 21(a), Tex. R. Civ. P.)

I hereby certify that a true and correct copy of the foregoing Request for Admissions was served by hand on this the 22nd day of May, 1997, to the foregoing attorney of record for Plaintiff/Counter-Defendant, O. Lee Gregory.

Attorney for

Defendant/Counter-Plaintiff

Certificate of Conference

I have discussed and attempted numerous discussions with opposing counsel on the subject matter of this suit. We are unable to resolve this matter outside jurisdiction of court.

Joe Mitchell

Attorney for J-Mart

Defendant/Counter-Plaintiff