



### *Undisputed Facts*

It is undisputed that on December 11, 1996, Plaintiff went into Defendant's Bangor store with her two children in order to return two items and to shop. While they waited at the service desk, Defendant's employee Karla Hughes thought she recognized Jonathan McCann as a boy who had been barred from the store after a recent shoplifting incident. Ms. Hughes had already paged Jean Taylor, the store's support manager and the senior person on duty that evening, to come to the service desk to approve the return. When Ms. Taylor arrived, Ms. Hughes reported her suspicion. Ms. Hughes then telephoned the loss-prevention officer who had handled the original shoplifting, and described Plaintiff and her son. As a result of the conversation, Ms. Hughes believed Jonathan to be the shoplifter in question.

When Ms. Hughes noticed later that the Plaintiff and her children were still in the store, she again paged Ms. Taylor. At this point, the parties' version of events differs considerably, but it is not in dispute that Plaintiff was intercepted as she was leaving the checkout area, and that she and the children remained standing in the front of the store with at least one Wal-Mart employee present until the loss-prevention officer arrived from her home in Glenburn.<sup>1</sup> The loss-prevention officer informed the Wal-Mart employees that Jonathan McCann was not the boy in question, and Plaintiff left the store.

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<sup>1</sup> Defendant notes that the drive from Glenburn to the Bangor Wal-Mart takes approximately 12 to 15 minutes, but makes no specific assertion as to the time Plaintiff remained in the store after she was approached. Plaintiff points out that her register receipt indicated the time as 10:10 p.m., and that they left the store at 11:16 p.m.

## *Legal Analysis*

### *A. False Imprisonment.*

The parties are in agreement that Plaintiff may establish claims for false imprisonment by showing that she and the children were unlawfully detained. Defendant argues that the McCanns were not detained in this case because they were taken to an area near the exit, rather than a closed room, they were not physically restrained in any way, and they were not told they could not leave. In addition, Defendant notes that Plaintiff indicated she wanted her children's names cleared. It argues that she remained in the store voluntarily to see that accomplished.

A genuine issue of material fact exists on this question sufficient to rebuff Defendant's attempt to achieve judgment as a matter of law. By way of example, Plaintiff asserts Ms. Taylor physically held her shopping cart while explaining to Plaintiff that she "had to go with her" while the authorities were contacted. Ms. Hughes acknowledges that Wal-Mart employees took turns standing with the McCanns at their position near the exit. Jillian McCann claims to have been denied her request to go home to bed because she had school the next day and wasn't feeling well. Jonathan McCann claims to have been denied the right to use the bathroom. These facts, viewed in the light most favorable to the Plaintiff, would permit a jury to conclude that Plaintiff reasonably believed she and her children were not permitted to leave. *Cf. Knowlton v. Ross*, 95 A. 281, 282 (Me. 1915) (defendants' conduct held not to justify a similar belief where the conduct could just as easily have been motivated by a desire to protect plaintiff's privacy, as to insure her continued presence in the room). Further, Plaintiff's desire to see her children's names cleared does not necessarily indicate she remained in the store voluntarily. In the case cited by Defendant in support of its argument to the contrary, the plaintiff specifically stated that she *chose to stay* in the store in

an effort to prove her innocence. *Anderson v. Wal-Mart Stores*, 675 So. 2d 1184, 1186 (La. App. 1996). If Plaintiff in this case remained in the store against her will, as she alleges, it is nevertheless logical that Plaintiff would want her childrens' names cleared.

***B. Defamation.***

Defendant asserts two bases upon which it claims it is entitled to judgment on Plaintiff's claims for defamation. First, Defendant asserts that Plaintiff has insufficient evidence that any defamatory statements were published to a third party. *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). Second, it claims a conditional privilege arising from its interest in guarding against shoplifting and prohibiting those who have shoplifted from coming to the store.

As a preliminary matter, the Court disagrees with Defendant that Jillian McCann's testimony regarding other people looking at them is "uncorroborated." Defendant's own corporate representative implicitly agreed that the way the incident had been handled in this instance caused a "big scene." Inasmuch as the allegedly defamatory "statement" need not be verbally communicated, the Court accepts this evidence as sufficient for purposes of this Motion to establish that Defendant's employees' actions "'brought an idea to the perception of'" other customers and employees. *Jimenez-Nieves v. United States*, 682 F.2d 1, 6 (1<sup>st</sup> Cir. 1982) (quoting Rest. (2d) Torts, § 558, comment (a)).

The Court does agree, however, that to the extent the communications in question travelled between Ms. Hughes, Ms. Taylor, the loss-prevention officer, and Mr. Cabell, they were conditionally privileged in the sense they were intended to further an important interest of the recipients in safeguarding the Wal-Mart from shoplifters and trespassers. *See, Rippett v. Bemis*, 672 A.2d 82, 87 (Me. 1996). The Court is further satisfied that the privilege enjoyed by the four persons

mentioned was not abused in this case; indeed, Plaintiff argues in her Memorandum that Ms. Taylor was negligent for her failure to ask *another* manager what to do about the situation. Pltf. Memo. at 15. Defendant's employees could hardly be required to conduct the "reasonable inquiry" Plaintiff asserts was necessary only to suffer liability for defamation as a result.

***C. Punitive Damages.***

Defendant argues that Plaintiff has failed to generate evidence upon which a jury could conclude that Defendant's employees' conduct was outrageous, *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985), which it notes is defined in the American Heritage Dictionary as "'grossly offensive to decency or morality.'"<sup>2</sup> The Court is satisfied, however, that the facts presented by Plaintiff in the light most favorable to her, and reiterated in Defendant's Reply Memorandum at page 6, could indeed be found by a rational jury to amount to more than mere "reckless indifference" to Plaintiff's rights. *Id.* at 1362 (citation omitted). Defendant is not entitled to judgment as a matter of law on Plaintiff's claims for punitive damages.

***Conclusion***

For the foregoing reasons, I hereby recommend Defendant's Motion for Summary Judgment be GRANTED to the extent Plaintiff's claims for defamation rely upon statements communicated by and between Ms. Hughes, Ms. Taylor, Mr. Cabell, and the loss prevention officer. I recommend the Motion for Summary Judgment be DENIED in all other respects.

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<sup>2</sup> The Court agrees that Plaintiff reasonably makes no attempt to argue that Defendant's employees behaved with actual malice, or ill will toward the Plaintiff and her children. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on June 1, 1998.