IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

JUNET FARRELL and CRAIG CHRISTIAN,	)	CIVIL NO. 813/1994
Plaintiffs,	)	ACTION FOR DAMAGES
vs.	)	
K-MART INC., PETRIE JOSEPH and CLARENCE GREEN,	)	
Defendants.	)	NOT FOR PUBLICATION

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CABRET, J.

MEMORANDUM OPINION
(January 28, 1999)

Junet Farrell and her son Craig Christian sued K-Mart, Inc. ("K-Mart") for, *inter alia,* false imprisonment and slander per se. Farrell and Christian alleged that these causes of action arose out of circumstances in which K-Mart employees wrongfully accused them of shoplifting and subsequently detained them to investigate the incident. Following trial, a jury found K-Mart not liable to either plaintiff on their false imprisonment claims, but liable to Farrell for slander per se in the amount of $80,000. K-Mart moved the Court for judgment as a matter of law, new trial or alternatively, remittitur of the judgment amount. As grounds for its motion for new trial, K-Mart contends that the trial court erred in its charge to the jury. For reasons which follow, the Court concludes that K-Mart is entitled to a new trial.

I. STANDARD FOR NEW TRIAL

There is no fixed standard for granting a motion for new trial under Rule 59 of the Federal Rules of Civil Procedure. Henry v. Hess Oil Virgin Islands Corp., 33 V.I. 163, 168 (D.V.I. 1995). "Instead, the applicable standard varies with the grounds on which a new trial is sought." Id. "In cases involving an injustice resulting from an action of the trial judge, the trial judge has broad discretion to order a new trial." Williams v. Rene, 32 V. I. 216, 226 (D.V.I. 1995) (citations omitted). Such instances include a court's improper charge to the jury which renders the "giving of a just verdict . . . difficult or impossible." Id. at 226, n. 8.

II. THE FACTS

In this case, much of the evidence presented at trial was undisputed. The evidence showed that Farrell and Christian went to K-Mart to pay for some items that Farrell had purchased on a layaway plan. When they reached the layaway counter, Farrell gave her name to a K-Mart employee. The employee left the counter to retrieve the merchandise and returned with a sports bag containing several items that Farrell had on layaway. After Farrell payed for the merchandise, which included the sports bag, the employee gave her the bag and its contents, none of which was in a K-Mart bag. Farrell in turn gave the sports bag to Christian and told him to make sure she got everything she paid for by matching the items on the receipt with the bag and its contents. Christian went to a bench in the layaway department, took the merchandise out of the sports bag, and after checking the items against the receipt, put them back into the sports bag and put the bag in a shopping cart.

Arleen Coggins, a K-Mart employee who was on a work break at the time, testified that she observed Christian sitting on a bench in the lay away department "stuffing clothes in a travelling bag. . . ."[1] Coggins stated that the situation appeared suspicious because Christian had his back "turned to the lay away counter and he was stuffing clothes in a travelling bag whereby when you do a lay away your stuff have (sic) to be in a K-Mart plastic bag."[2] Coggins elaborated that when a customer picks up merchandise that they purchased on layaway, a department employee is required to put the merchandise in a K-Mart plastic bag and staple the receipt to the plastic bag. Coggins' co-worker, who also observed the situation, reported it to Petrie Joseph, a K-Mart loss control officer.

Joseph testified that after being notified of Christian's actions, he observed "Farrell and Mr. Christian [with] their backs turn[ed] to lay away. . . ."[3] Joseph stated that he found it "strange the way these items were placed on the bench and being placed inside of this gray sports

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[1] Tr.1 at 27.

[2] Tr.1 at 27-28.

[3] Tr.1 at 33-34.

bag; an NBA bag."[4] Like Coggins, Joseph also explained that "[i]t's strange because it's a lay away. Any items in lay away that could fit in a bag has to go in a K-Mart plastic bag. That particular bag has to be stapled with the contract on top of that plastic bag. . . . That way we can verify, yes, it is a lay away."[5] Although Joseph found Farrell's and Christian's conduct suspicious, he testified that he did not immediately stop them as suspected shoplifters because they were still considered customers shopping in the store. Joseph further testified that he did not question the layaway department employee about the situation because it was a busy day and the employee was helping other customers and because K-Mart loss control employees "have to go through the entire investigation before [they] can approach an employee."[6] Joseph reiterated several times that he could not question an employee about a customer's suspicious conduct until he first talks to the customer about the conduct. In fact, although Joseph acknowledged that he had the opportunity to talk to the lay away department employee, he was emphatic that he "won't approach an employee."[7] Accordingly, Joseph and another K-Mart loss control officer who was working in the store's surveillance camera monitoring room continued observing Farrell and Christian.

[4] Tr.1 at 34.

[5] Tr.1 at 34.

[6] Tr.1 at 37.

[7] Tr.2 at 181.

When Farrell and Christian left the layaway department with the sports bag in the cart, they walked to the cosmetics department where they shopped for some toiletries. After selecting several items and placing them in the cart, Farrell and Christian proceeded to the cashier to pay for the toiletries. Joseph and the surveillance camera monitor watched Farrell pay for the toiletries which she placed on the checkout counter, but noticed that she left the sports bag and its contents in the shopping cart.

After paying for the items, Farrell and Christian left the checkout aisle, and as they were exiting the store Joseph stopped them. Joseph told them he was a K-Mart security guard, showed them his identification badge, and informed Farrell that she needed to accompany him "back inside because [he had] some major concerns about that particular gray bag that is not in a K-Mart plastic bag. . . ."[8] Farrell told Joseph that she had purchased the items on layaway and attempted to show him the receipt. When Joseph insisted that Farrell come inside to discuss the matter, she at first resisted but eventually accompanied Christian, Joseph and two other store employees to the store's loss control office. Once inside the office, Joseph explained that he stopped them because of the items in the sports bag and asked Farrell if she had a purchase receipt for the items. Farrell produced the receipt, and after matching the items on the receipt with the bag and the items in the bag, Joseph apologized and called the store manager who also apologized. Joseph then walked with Farrell and Christian as they left the store.

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[8] Tr.1 at 41.

After Farrell and Christian left the store, Joseph went to the layaway counter and asked why Farrell's layaway merchandise was not placed in a K-Mart bag with the receipt affixed. Joseph discovered that it was the fault of layaway department employees and not that of either Farrell or Christian.

III. DISCUSSION

A. The Court's Jury Instruction on Negligence Per Se.

K-Mart asserts that it is entitled to a new trial because the Court failed to instruct the jury that it must find K-Mart was at least negligent before it could impose liability for slander per se. The Court agrees.

In the Virgin Islands, the standard for imposing liability for defamation of private figures is established by the Restatement (Second) Torts § 580B which provides: "One who publishes a false and defamatory communication concerning a private person . . . is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them." This standard reflects the Supreme Court's decision in Gertz v. Robert Welch, Inc. 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) where the Court held that "when a private figure is the plaintiff, the First Amendment requires a finding of at least negligence." Ross v. Bricker, 26 V.I. 314, 320 (D.V.I. 1991). Although the Supreme Court subsequently left open the question of whether a lesser standard of fault or even strict liability might be appropriate in a case of a private figure involving an issue of private concern, *see* Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), courts in this jurisdiction "continue to follow the rule allowing the application of a negligence standard to all private figure defamation cases." Ross, 26 V.I. at 322.

As for K-Mart's assertion that the Court erred in not instructing the jury regarding this standard of fault, the record shows that K-Mart never requested such an instruction and failed to object following the Court's charge to the jury. Although such inaction would normally result in a waiver of the asserted error, *see* Poole v. Ford Motor Co., 17 V.I. 354, 359 (D.V.I. 1980), under the circumstances here, no such waiver results.

The general rule requiring a party to request an instruction and object to the charge is provided by Rule 51 of the Federal Rules of Civil Procedure. This rule provides in relevant part: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. "The purpose of Rule 51 is to 'prevent unnecessary new trials because of errors the judge might have corrected if they had been brought to [her] attention at the proper time.'" Pate v. Seaboard R.R., Inc., 819 F.2d 1074, 1082 (11th Cir. 1987) (citation omitted). Despite the clear language of Rule 51, courts have recognized an exception where a party failed to object but "'the error in the charge was fundamental and highly prejudicial, and [the] failure to consider the error would result in a gross miscarriage of justice.'" McNello v. John B. Kelly, Inc., 283 F.2d 96, 102 (3rd Cir. 1960). For instance, "[w]here a jury is given an erroneous charge which will 'mislead the jury or leave the jury to speculate as to an essential point of law,' the error is sufficiently fundamental to warrant a new trial despite a party's failure to state a proper objection." Pate, 819 F.2d at 1083 (citation omitted).

In McNello, supra, the trial court failed to adequately charge the jury on the principles of negligence. On appeal, the Third Circuit characterized the trial court's charge on negligence as "totally inadequate to provide even the barest legal guideposts to aid the jury in rationally reaching a decision." McNello, 283, F.2d at 102. As result, the Third Circuit concluded, "[t]he question of liability . . . was submitted to the jury with what was tantamount to no instructions at all. Few more fundamental errors with respect to a charge can be conceived." Id. Similarly, in Wilson v. Am. Chain & Cable Co., 364 F.2d 558, 562 (3rd Cir. 1966), the Third Circuit found that the errors in the trial court's charge on causation were so critical that the jury "was without adequate guidance on the fundamental question whether defendant should be absolved from liability for negligence by the intervening act of [one of the plaintiffs]." The court concluded that "[a] verdict so arrived at is one ungoverned by the legal principles which determine the dispute between the parties and therefore may not be sustained as the ultimate product of the judicial process." Id. Even more on point is the case of Hunt v. Liberty Lobby, Corp. 720 F.2d 631 (11th Cir. 1983). In Hunt, a libel suit by a public figure against a publisher, the trial court gave an erroneous instruction on the standard of fault the plaintiff was required to prove. Although the defendant failed to object to the charge, the appellate court found the error so fundamental that it required a new trial. Id. at 647.

As in the foregoing cases, the record in this case reveals that, despite K-Mart's failure to raise a timely objection, the Court's charge to the jury was fundamentally flawed and warrants a new trial. In its charge to the jury on Farrell's claim of slander per se, the Court failed to include any instructions explaining that to hold K-Mart liable, the jurors must find that the defendant acted negligently in failing to ascertain the truth of the matter. *See* Ross, 26 V.I. at 322; Restatement (Second) Torts § 580B. The result of this error, as in McNello, was that the "[t]he question of liability . . . was submitted to the jury with what was tantamount to no instructions at all." McNello, 283, F.2d at 102. Indeed, without such guidance, the jury was left to speculate about what standard of fault to apply and may have awarded damages to Farrell upon a finding of strict liability. *See* Pate, 819 F.2d at 1083. Accordingly, the Court concludes that K-Mart is entitled to a new trial on Farrell's claim of slander per se.

B. Applicability of the Shopkeeper's Privilege.

Because the issue may arise on retrial, the Court will also address K-Mart's contention that the Court erred in refusing to instruct the jury on the applicability of the shopkeeper's privilege under Restatement (Second) Torts § 120A. This section provides in pertinent part: "One who reasonably believes that another . . . has failed to make due cash payment for a chattel purchased or services rendered there, is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts." Restatement (Second) Torts § 120A. The purpose of the shopkeeper's privilege it to protect the shopkeeper

> against the dilemma in which he would otherwise find himself when he reasonably believes that a shoplifter has taken goods from his counter. If there were no such privilege, he must either permit the suspected person to walk out of the premises and disappear, or must arrest him, at the risk of liability for false arrest if the theft could not be proved.

Restatement (Second) Torts § 120A cmt. a. The comments to Section 120A further explain that the privilege afforded by the section is limited to "one of detention on the premises." Id. at cmt. f. (Emphasis supplied). *See* Id. at cmt. g.

As a threshold matter, the Court notes that depending on the facts, the shopkeepers' privilege could apply to a claim of slander per se.[9] Under the Restatement, slander includes the publication of defamatory matter by "transitory gestures or by any other form of communication other than those [that constitute libel]." Restatement (Second) Torts, § 568 (2). Courts have held that such transitory gestures can include investigatory detentions of suspected shoplifters. *See* Bennett v. Norban, 151 A.2d 478, 479 (Pa. 1959); *see also* Krochalis v. Ins. Co. of N. Am., 629 F.Supp. 1360, 1368 (E.D.Pa. 1985); G.H. Genzel, *Actionability of Accusation or Imputation of Shoplifting,* 29 A.L.R.3d 961 (1970). Thus, if the slander per se claim is grounded upon the investigatory detention of the individual, and the evidence showed that the shopkeeper complied with the requirements for the privilege, then it would protect against liability for the claim.

Although for the foregoing reasons the Court believes that the privilege could apply to a slander per se claim, the evidence presented during the trial of this case showed that K-Mart's

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[9] Because the issue has not been raised, the Court will not address the applicability of other privileges to this cause of action.

detention of Farrell was not privileged.[10] The pivotal question concerning K-Mart's right to assert the privilege was whether Joseph had a reasonable belief that Farrell and Christian were shoplifting. In determining whether a shopkeeper has reasonable grounds for detaining a suspected shoplifter, courts generally employ an objective standard. *See*, Swift v. R.H. Macy's & Co., 780 F.2d 1358, 1361 (8th Cir. 1985); Coblyn v. Kennedy's, Inc., 268 N.E.2d 860, 863-65 (Mass. 1971); *see also* Robert A. Brazener, *Construction and Effect, in False Imprisonment Action, of Statute Providing for Detention of Suspected Shoplifters*, 47 A.L.R.3d 998, 1006 at § 4 (1973). Thus, the question is "whether the facts available to the detaining party at the moment would warrant a reasonably prudent person to believe that the person in question had been shoplifting." Id. *See* Coblyn, 268 N.E.2d at 863-64. This issue presents a mixed question of law and fact. Southwest Drug Stores of Miss., Inc. v. Garner, 195 So.2d 837, 841 (Miss.1967); 47 A.L.R.3d at 1003 (1973). When the evidence concerning the actions of the suspected shoplifter are in dispute, a question of fact exists that must be resolved by the jury under proper instruction from the court. Garner, 195 So.2d at 841. When such evidence is undisputed, however, it is for the court to decide as a matter of law whether the shopkeeper has reasonable grounds for his or her belief. Id.

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[10] The Court acknowledges that it prematurely ruled on this issue prior to trial in response to K-Mart's motion that it was entitled to summary judgment because the detention was privileged. Upon finding insufficient evidence to grant the motion, the Court should have merely denied it, but instead concluded as a matter of law that K-Mart's actions were not privileged. Despite the Court's error, however, at trial both parties presented evidence concerning whether K-Mart had reasonable grounds to believe that Farrell and Christian were shoplifting. And, as was the case when K-Mart moved for summary judgment, the undisputed evidence at trial showed that K-Mart employee Joseph did not have reasonable grounds to believe that the plaintiffs were shoplifting.

Because the above-described objective standard charges the shopkeeper with constructive knowledge of the "facts available" to him or her, many courts have examined whether the shopkeeper conducted a reasonable investigation of the surrounding circumstances prior to detaining the customer. For example, in Garner, the court held that the defendant was not entitled to a jury charge on the shopkeeper's privilege because the store's manager failed to make a reasonable inquiry concerning whether a customer had paid for a bar of soap. The court found that if the manager "asked the cashier if [the customer] had paid for a bar of soap, he would have ascertained that she had." Id. at 840 Similarly, in Weissman v. K-Mart Corp., 396 So.2d 1164, 1167 (Fla.App. 1981), the court found that while the governing statute did not explicitly require a merchant to investigate the situation prior to detaining a suspected shoplifter, the store security officer's "failure to speak with the cashier must be taken into account in determining the existence of probable cause [to temporarily detain a suspected shoplifter]." Likewise, in J.S. Dillon & Sons Stores, Co. v. Carrington, 455 P.2d 201 (Colo. 1969), the court held, as a matter of law, that the store acted upon reasonable grounds in stopping a customer whom store security officers mistakenly believed had shoplifted a prescription drug purchase. There, the evidence showed that the store security officer questioned both the store druggist and a cashier concerning the incident prior to detaining the customer to inquire about the merchandise.

At the trial of this case, the undisputed evidence showed that Joseph had ample opportunities to discover that Farrell had paid for the merchandise, yet he failed to avail himself of that information. When Joseph's suspicions were first aroused, Farrell was standing in the layaway department. Rather than asking the department employee whether Farrell had paid for the merchandise, Joseph continued to observe her actions. Similarly, when Farrell left the layaway department and walked to the cosmetics department where she shopped for toiletries, Joseph had another opportunity to ask the layaway department employee about the merchandise without risking Farrell's departure. After all, the undisputed evidence showed that another K-Mart employee was watching Farrell's every movement on the numerous surveillance cameras placed throughout the store. And, while Farrell was walking to the cashier and proceeding through the checkout aisle, Joseph had another chance to confirm or dispel his suspicions by inquiring at the layaway department about the situation. Yet, Joseph failed to seize these opportunities. Whether Joseph's failure to question the layaway department employee was due to improper training, store policy or his own volition, it is nevertheless clear that had he taken this action, he would have learned that Farrell had paid for the merchandise. Under these circumstances, the Court concludes the evidence presented in the first trial showed that the facts available to Joseph would not "warrant a reasonably prudent person to believe that [Farrell] had been shoplifting." 47 A.L.R.3d at 1006; Garner, 195 So.2d at 840. Accordingly, as in Garner, in this case K-Mart was not entitled to have the jury instructed concerning the shopkeeper's privilege. Whether K-Mart will be entitled to such an instruction on retrial will depend on the evidence presented there.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that K-Mart is entitled to a new trial on Farrell's claim of slander per se. Despite K-Mart's failure to request a jury charge on fault and to object to the charge as given, the absence of such instruction left the jury to speculate as to the applicable standard of care. Thus, a new trial is warranted.

MARIA M. CABRET
Territorial Court Judge

A T T E S T:
YVONNE V. WESSELHOFT
Clerk of the Court

By: Karlene Turnbull
Deputy Clerk
Dated: 7/29/99