

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
November 18, 2003 Session

**ELLA BARBEE, ET AL. v. WAL-MART STORES, INC., ET AL.**

**Direct Appeal from the Circuit Court for Lauderdale County  
No. 5470 Joseph H. Walker, III, Judge**

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**No. W2003-00017-COA-R3-CV - Filed February 9, 2004**

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Plaintiffs filed suit against Defendants seeking compensatory and punitive damages based on violations of 42 U.S.C. § 1983, the Tennessee Consumer Protection Act and under theories of gross negligence, deprivation of human rights, intentional infliction of emotional distress, negligent infliction of emotional distress, false light, false imprisonment and arrest, fraud, misrepresentation, and larceny by trick, scheme, or device. Plaintiffs appeal from the trial court's grant of Defendants' motion for summary judgment. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Michael W. Whitaker, Covington, Tennessee, for the Appellant, Ella Barbee.

Frank Deslauries, Covington, Tennessee, for the Appellant, Janice Lee.

Jill M. Steinberg and Emily Turner Landry, Memphis, Tennessee, for the appellees, Wal-Mart Stores, Inc. and Dob Johnson.

**OPINION**

In February of 2000, the Tennessee Bureau of Investigation (TBI) and the Bartlett, Tennessee Police Department began a sting operation in Henning, Tennessee, to catch people who were knowingly buying stolen merchandise. This sting was focused on catching the Chief of Police for Henning, Tennessee, James Treadway (Treadway), and the City Recorder, Plaintiff Sheila Dillard (Dillard), based upon information provided by an informant, Ronnie Winbush (Winbush). Special Agent Roger Turner (Turner) of the TBI arranged a meeting with Defendant Dob Johnson (Johnson), the Loss Prevention Supervisor of Defendant Wal-Mart, to discuss his

participation in this sting. At this meeting, Johnson and another Wal-Mart representative agreed to provide certain Wal-Mart merchandise to be used as props in the sting.

In an undisputed chronology of events,<sup>1</sup> the Tennessee Office of Attorney General recounted the following events in carrying out the sting:

February 18, 2000: At 10:54 a.m., a recorded call was made to Treadway, who directed Winbush to deliver the requested merchandise to his home . . . . Dob Johnson was in the Henning area with the Wal-Mart merchandise that he was supplying for the “sting.” Johnson transferred merchandise to Winbush et al at the D.A.’s office in Dyersburg. The people involved in the “sting” included the following: Jack Van Hoosier, John Connell, John Simmons, Brent Booth and Danny Wilson from the T.B.I.; Dob Johnson and his supervisor Hunter Eads from Wal-Mart; Fred Jones; Andy Luckett and Otis Anderson of the Memphis Auto Cargo Task Force, and Ronnie Winbush an informant.  
12:06 p.m.- All sting units were in place near [Treadway’s] home, but he was not there . . . .  
12:22 p.m.- . . . . Winbush returned to the Henning City Hall and sold Chief Treadway various items. He also spoke with Sheila Dillard.

February 22, 2000

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. . . .  
Winbush made a telephone call to Henning City Hall and contacted Sheila Dillard, which was recorded by T.B.I. Agent Danny Wilson. Winbush also talked with Treadway. Merchandise was transferred by Dob Johnson to Winbush and Jones. Winbush and Jones went to Henning City Hall. Ms. Dillard and Chief Treadway both made purchases from Winbush and undercover Memphis police office Fred Jones. Either Dillard or Treadway told Winbush and Jones that Sheila Dillard’s sister, [Plaintiff] Ella Barbee, wanted to buy some merchandise and directed him to go to her house and then return to the police headquarters.

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<sup>1</sup>This document was filed as an exhibit by the Attorney General and counsel for Defendants and subsequently adopted by the trial court in its order granting summary judgment.

Winbush and Jones stopped on the dead-end street in front of Dillard[’s] and Barbee’s residences. Both Dillard and Barbee made purchases from Winbush.

Winbush and the undercover agent went back to HenningCity Hall/Police Headquarters, where [Plaintiff] Janice Lee made a purchase. Just after that, several people were detained by people involved in the “sting” operation. Among those detained were Janice Lee and Chief Treadway.

The agents then went to the home of Sheila Dillard and Ella Barbee . . . . Dillard and Barbee were arrested. . . . Treadway was charged with Theft (Receiving Stolen Property) over \$1,000.00. Dillard and Lee were arrested and charged with felony of Theft (Receiving Stolen Property) under \$500.00. Barbee was arrested and charged with the felony of Theft (Receiving Stolen Property) over \$500.00.

April 20, 2000: Lee, Barbee and Dillard were present at their preliminary hearing pertaining to the theft charges. Judge Lyman Ingram of Dyersburg presided. Judge Ingram held that sufficient probable cause existed to hold each case for the Grand Jury.

June 6, 2000: The Lauderdale County Grand Jury met to consider the cases against James Treadway, Jr. [,] Sheila Dillard, Ella Barbee and Janice Lee. The Grand Jury returned True Bills against Barbee, Lee and Dillard.

October 19, 2000: The Barbee, Dillard and Lee trial began in Lauderdale County Circuit Court. Prior to the commencement of the trial, the prosecuting attorney . . . lowered all charges from theft to attempted theft. After three days of trial[,], the jury found all defendants not guilty.

Subsequent to trial, Barbee and Lee filed suit against Wal-Mart, Dob Johnson, Fred Jones of the Memphis Auto Cargo Task Force, the City of Memphis, Special Agent Roger Turner of the TBI, and the State of Tennessee in the Circuit Court of Lauderdale County. Barbee and Lee sought compensatory and punitive damages based on violations of 42 U.S.C. § 1983, the Tennessee Consumer Protection Act, and under theories of gross negligence, deprivation of human rights, intentional infliction of emotional distress, negligent infliction of emotional

distress, false light, false imprisonment and arrest, fraud, misrepresentation, and larceny by trick, scheme, or device. Dillard filed a separate lawsuit against the same Defendants and under the same theories in the Circuit Court of Lauderdale County. Both cases were transferred to the United States District Court for the Western District of Tennessee where the cases were consolidated pursuant to an order of the court. Dillard, Barbee, and Lee subsequently agreed to dismiss all Defendants except Wal-Mart and Dob Johnson. The remaining Defendants, Johnson and Wal-Mart, moved for summary judgment which the District Court ordered for the § 1983 claim but remanded the state law claims to the Circuit Court of Lauderdale County. After remand, Wal-Mart and Johnson moved for summary judgment which the trial court granted on the remaining state law claims. In its order granting summary judgment, the trial court found as follows:

Defendant Johnson was present to maintain an inventory of all items supplied by Wal-Mart to the TBI in support of its operation. Johnson had no contact with plaintiffs. [Neither Johnson nor Wal-Mart] was given authority to direct or manage any aspect of the operation, and did not arrest or charge any plaintiff. The decision to arrest plaintiffs was made by law enforcement.

Barbee and Lee timely filed their notice of appeal. The record indicates that Dillard did not file a notice of appeal. Accordingly, Dillard is dismissed as an appellant in this case. Tenn. R. App. P. 3(f), 4(a); *see also Mairose v. Fed. Express Corp.*, 86 S.W.3d 502, 509 (Tenn. Ct. App. 2001).

### **Issues Presented**

In considering the issues as presented by both parties, this Court perceives the issue, as presented by the Appellees, to be whether the trial court erred in granting summary judgment for Johnson and Wal-Mart on Barbee's and Lee's claims of (1) intentional infliction of emotional distress, (2) negligent infliction of emotional distress, (3) gross negligence, (4) false light, and (5) false arrest and imprisonment.<sup>2</sup>

### **Standard of Review**

This Court must decide whether it was error for the trial court to award summary judgment in favor of Johnson and Wal-Mart. Summary judgment should be awarded when the moving party can demonstrate that there are no genuine issues regarding material facts and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). Mere assertions that the non-moving party has no evidence does not suffice to entitle the moving party to summary judgment. *McCarley*, 960 S.W.2d at 588. The moving party must either

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<sup>2</sup>In their brief, Barbee and Lee indicate that they will no longer pursue their causes of action based on theories of fraud, misrepresentation, larceny by trick, scheme, or device, or their claims under the Tennessee Human Rights Act, or the Tennessee Consumer Protection Act.

conclusively demonstrate an affirmative defense or affirmatively negate an element which is essential to the non-moving party's claim. *Id.* If the moving party can demonstrate that the non-moving party will not be able to carry its burden of proof at trial on an essential element, summary judgment is appropriate. *Id.*

This Court reviews an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002). In determining whether to award summary judgment, we must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). Summary judgment should be awarded only when a reasonable person could reach only one conclusion based on the facts and inferences drawn from those facts. *Id.* If there is any doubt about whether a genuine issue of material fact exists, summary judgment should not be awarded. *McCarley*, 960 S.W.2d at 588.

### **Intentional Infliction of Emotional Distress**

In *Miller v. Willbanks*, 8 S.W.3d 607 (Tenn. 1999), the Tennessee Supreme Court enumerated the requirements for making a prima facie claim of intentional infliction of emotional distress by stating that “(1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct must result in serious mental injury to the plaintiff.” *Miller*, 8 S.W.3d at 612 (citing *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997)). In viewing the evidence in the light most favorable to Barbee and Lee, this Court cannot find that the Defendants' involvement in the sting was intentional or reckless, and that it was so “outrageous that it is not tolerated by civilized society.” *Id.* Further, while Barbee and Lee complain of embarrassment and humiliation, they present no further proof as to any additional mental injury they suffered. This Court is not willing to identify such emotional injury, without further proof, as a serious mental injury. Accordingly, the trial court's grant of summary judgment against Barbee's and Lee's claim of intentional infliction of emotional distress is affirmed.

### **Negligent Infliction of Emotional Distress**

In *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996), the Tennessee Supreme Court outlined the negligence elements as those required for a prima facie case of negligent infliction of emotional distress.

[T]he plaintiff must present material evidence as to each of the five elements of general negligence—duty, breach of duty, injury or loss, causation in fact, and proximate, or legal cause (citations omitted) in order to avoid summary judgment. Furthermore, we agree that in order to guard against trivial or fraudulent actions, the law ought to provide a recovery only for “serious” or “severe” emotional injury. (Citations omitted.) A “serious” or “severe” emotional injury occurs

“where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970) (additional citations omitted). Finally, we conclude that the claimed injury or impairment must be supported by expert medical or scientific proof. (Citations omitted.)

*Id.* at 446. In this case, the trial court found that Johnson and Wal-Mart had no contact with Barbee and Lee, that it was law enforcement who decided to run the sting operation and charge and arrest the plaintiffs. After taking all reasonable inferences in favor of Barbee and Lee in review of the record, this Court can only agree with the trial court and hold that Barbee and Lee failed to produce proof in establishing a negligence claim, namely a duty that Johnson and Wal-Mart owed to Barbee and Lee. *See id.* Further, Barbee and Lee adduce no additional proof of emotional injury other than the humiliation and embarrassment alleged in their complaint. This allegation, without expert medical or scientific proof, prevent Barbee and Lee from making out a prima facie case of negligent infliction of emotional injury. Accordingly, the trial court’s grant of summary judgment against Barbee’s and Lee’s claim of negligent infliction of emotional distress is affirmed.

### **Gross Negligence**

To successfully prosecute a claim for gross negligence, the plaintiff must prove that the defendant has committed a negligent act and further that the act was “done with utter unconcern for the safety of others, or one done with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law.” *Ruff v. Memphis Light, Gas, and Water Div.*, 619 S.W.2d 526, 528 (Tenn. Ct. App. 1981) (quoting *Odum v. Haynes*, 494 S.W.2d 795, 807 (Tenn. Ct. App. 1972)). As previously mentioned, Barbee and Lee failed to carry their burden of proof for an essential element of a negligence claim, the duty that Wal-Mart and Johnson owed to the plaintiffs. Accordingly, the trial court’s grant of summary judgment against Barbee’s and Lee’s claim of gross negligence is affirmed.

### **False Light**

Barbee and Lee allege that it was in Wal-Mart’s commercial interest to publicize the false arrest and prosecution of Barbee and Lee. This publication and the creation of false information and circumstances is the basis of Barbee’s and Lee’s tort of false light claim against Wal-Mart and Johnson. The trial court granted summary judgment in favor of the Defendants on this claim by stating “[f]alse light claims are subject to the statutes of limitations that apply to libel and slander, which is six months. [The c]omplaint herein was filed after the six months had run after publication of all known news accounts.” The record contains four separate newspaper articles concerning the arrests which ran from the twenty-third of February to the fifth of March 2000. Barbee and Lee’s complaint was filed on the twenty-first of February 2001. Further, we agree with the trial court’s holding as a matter of law that claims for the tort of false light are subject to the same statute of limitations that apply for libel and slander. *See West v. Media Gen.*

*Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001). The alleged publicity of Barbee and Lee for the tort of false light by the Defendants to the newspaper would have been spoken and is subsequently barred by the six month statute of limitation, which applies for slander cases. *See* Tenn. Code Ann. § 28-3-104 (a)(1) (2000).

In their brief, Barbee and Lee contend that the trial court erred in its grant of summary judgment on their false light claim because that alleged tort committed by the Defendants was not limited to newspaper articles but also extended “[f]rom the day they were arrested until the State dismissed the felony charge and the Plaintiffs were exonerated of the misdemeanor[, and the] lesser-included misdemeanor . . . .” However, in reviewing the record in the light most favorable to the plaintiff, this Court cannot find, and Barbee and Lee fail to adduce any proof of, any instance where the Defendants publicized the arrest or prosecution of Barbee and Lee. As a result, the trial court’s grant of summary judgement against Barbee’s and Lee’s tort of false light claim is affirmed.

### **False Arrest and Imprisonment**

To successfully prosecute a claim of false arrest and imprisonment, the plaintiff must prove “(1) the detention or restraint of one against his will and (2) the unlawfulness of such detention or restraint.” *Coffee v. Peterbilt of Nashville, Inc.*, 795 S.W.2d 656, 659 (Tenn. 1990). On this issue, the trial court found that Wal-Mart and Johnson had no contact with Barbee and Lee and no authority to manage or operate the sting, arrest, or prosecution. Further, relying upon the undisputed chronology of events, this Court agrees with the trial court that the arrests were supported by probable cause and the same was found by the grand jury to issue indictments against Barbee and Lee, even though a jury ultimately found them not guilty. Accordingly, the trial court’s grant of summary judgment against Barbee’s and Lee’s claim of false arrest and imprisonment is affirmed.

### **Conclusion**

In light of the foregoing, we affirm the trial court’s grant of Johnson’s and Wal-Mart’s motion for summary judgment. Costs of this appeal are taxed to the Appellants, Ella Barbee and Janice Lee, and their sureties, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE