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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000329-MR

MICHAEL BOGGS

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 04-CI-90102

WAL-MART STORES, INC.;  
WAL-MART STORES EAST, INC.; and  
WAL-MART STORES EAST, L.P.

APPELLEES

OPINION  
AFFIRMING IN PART  
AND  
REVERSING AND REMANDING IN PART

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BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Michael Boggs appeals from the Rowan Circuit Court's order granting summary judgment in favor of appellee Wal-Mart Stores, Inc. Boggs argues on appeal that the circuit court erred in granting summary judgment on his claims of false imprisonment, defamation, and punitive damages. For the following reasons we affirm in part, and reverse and remand in part.

According to Boggs's deposition, he and his girlfriend, Shawnia Long, went shopping at Wal-Mart in Morehead, Kentucky on March 19, 2003. After browsing in the men's clothing section, Boggs joined Long in the women's clothing section and noticed a Wal-Mart manager staring at him. The manager followed the two as they continued browsing in the baby, electronics, automotive, sporting goods, and toy departments. While in the home and garden department, Boggs noticed a plain-clothes security officer watching them.<sup>1</sup> The security guard, Lisa Brown, followed them to the health and beauty and the clearance departments.

Frustrated that they had been followed throughout the store, Boggs and Long left the building. When the two were nearly at Boggs's truck, Brown shouted for him to stop and told Boggs that her husband liked the NASCAR<sup>2</sup> jacket Boggs was wearing. The two continued to talk about NASCAR despite the hard rain, and Brown eventually told Boggs that the manager thought he had seen tags hanging from the jacket. Boggs explained that he bought the jacket about a year earlier at Hometown Racing and that it had been washed four or five times since then. Boggs also obtained a similar jacket from his truck

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<sup>1</sup> Boggs knew she was a security guard because he shopped at the store regularly and had seen her stop shoplifters before.

<sup>2</sup> The National Association for Stock Car Auto Racing.

and showed it to Brown. Brown, who had been inching closer and closer to him during their conversation, then unbuttoned Boggs's jacket and searched it both inside and out, and she patted down Boggs's pant pockets. Finding nothing inappropriate, Brown told Boggs to have a nice day and walked back inside the building.

According to Brown's contrasting deposition testimony, she was smoking a cigarette outside of the store in the drizzling rain when Boggs exited the building and told Brown that he did not steal the jacket he was wearing. Confused, Brown told him that she liked the jacket. Boggs, who told Brown that he sold the jackets at a flea market, then showed Brown another jacket from his truck. Brown asked Boggs if he had a jacket for a particular NASCAR driver, and he informed Brown that they did. Brown and Boggs chatted for a few minutes, and Brown went back into the store.

Boggs filed a complaint on March 18, 2004, seeking punitive damages based on claims of false imprisonment, defamation, and emotional distress. After discovery was completed, the circuit court granted summary judgment in Wal-Mart's favor as to each of Boggs's claims. This appeal followed.

When ruling upon a summary judgment motion, "the trial court must view the evidence in a light most favorable to the party opposing the summary judgment motion, and summary judgment

should be granted only if it 'appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor.'"<sup>3</sup> On appeal, we must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."<sup>4</sup>

Boggs's first argument on appeal is that the circuit court erred by granting summary judgment in Wal-Mart's favor on his claim of false imprisonment. We disagree.

In order to recover under a theory of false imprisonment, a plaintiff "must establish that he was detained and that the detention was unlawful."<sup>5</sup> Further, "it is essential that there be some direct restraint present. Restraint constituting a false imprisonment may arise out of words, acts, gestures, or the like, which induce a reasonable apprehension that force will be used if the plaintiff does not submit."<sup>6</sup>

Here, Boggs testified that Brown shouted, "Hey boy, stop." When Boggs then stopped, turned to Brown, and pointed at himself, Brown responded, "Yes." Boggs has offered no evidence

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<sup>3</sup> *Leslie v. Cincinnati Sub-Zero Products*, 961 S.W.2d 799, 804 (Ky.App. 1998) (quoting *Steelvest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476, 480-82 (Ky. 1991)).

<sup>4</sup> *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

<sup>5</sup> *Wal-Mart Stores v. Mitchell*, 877 S.W.2d 616, 617 (Ky.App. 1994).

<sup>6</sup> *Ford Motor Credit Co. v. Gibson*, 566 S.W.2d 154, 155 (Ky.App. 1977).

that Brown intended to confine him.<sup>7</sup> Moreover, As Kentucky's highest court explained in *Grayson Variety Store v. Shaffer*,<sup>8</sup>

[s]ubmission to the mere verbal direction of another, unaccompanied by force or threats of any character, does not constitute false imprisonment. Bare words are insufficient to effect an imprisonment if the person to whom they are spoken is not deprived of freedom of action.

Further, Boggs was not deprived of freedom of action. Viewed in the light most favorable to Boggs, this scenario simply does not support a false imprisonment claim.

We are not persuaded by Boggs's claim that a different result is compelled by either *Birdsong v. Wal-mart Stores*<sup>9</sup> or *Wal-Mart Stores v. Mitchell*<sup>10</sup>. In *Birdsong*, this court reversed an order granting summary judgment in Wal-Mart's favor, because there was a genuine issue of material fact as to whether the shopkeeper's privilege<sup>11</sup> applied when a Wal-Mart employee led Birdsong to the front of the store, instructed her to sit, pushed a shopping cart in front of her, and told her that she must stay.<sup>12</sup> Further, in *Mitchell*, Blackburn, a

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<sup>7</sup> See *Restatement (Second) of Torts* § 35 (1965); *Banks v. Fritsch*, 39 S.W.3d 474, 482 (Ky.App. 2001) (false imprisonment is an intentional tort).

<sup>8</sup> 402 S.W.2d 424, 425 (Ky. 1966) (internal citation omitted).

<sup>9</sup> 74 S.W.3d 754 (Ky.App. 2001).

<sup>10</sup> 877 S.W.2d 616 (Ky.App. 1994).

<sup>11</sup> KRS 433.236.

<sup>12</sup> *Birdsong*, 74 S.W.3d at 756, 758.

fourteen-year-old boy, was asked by two Wal-Mart employees to return to the store after he made a purchase.<sup>13</sup> Blackburn testified that

while they were in the parking lot Jackson grabbed him by the arm and tried to put his hand in Blackburn's pants, apparently to extricate the object he thought the boy had stolen. Blackburn also testified that both Jackson and Landers "manhandled" him by grabbing his arms and taking him, against his will, to a training room in the rear of the store. Once there, Jackson closed and locked the door, and interrogated and intimidated him for approximately thirty minutes. During this time, Blackburn continued, Jackson several times ordered him to pull down his pants. Jackson also purportedly tried to persuade Blackburn to sign a statement admitting his guilt to the alleged theft, although Jackson never called the police or recovered any stolen merchandise. According to Blackburn, Jackson released him only after the boy began to cry and complain of feeling sick.<sup>14</sup>

The facts in the matter now before us simply do not portray a similar level of deprivation of freedom.

Next, Boggs argues that the circuit court erred by granting summary judgment in Wal-Mart's favor on his claim of defamation. We agree.

This court set forth the elements of a defamation action in *Columbia Sussex Corp. v. Hay*<sup>15</sup> as follows: (1)

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<sup>13</sup> *Mitchell*, 877 S.W.2d at 616-17.

<sup>14</sup> *Id.* at 617.

<sup>15</sup> 627 S.W.2d 270, 273 (Ky.App. 1981).

defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation. Here, Wal-Mart argues that there was no defamatory language used, since Brown merely stated that the manager thought he had seen tags hanging from Boggs's jacket. However, when viewed in the light most favorable to Boggs, these words clearly could be construed as constituting defamatory language about him in that they accuse him of stealing the jacket.

Further, there is no dispute that Brown's words were about the plaintiff; moreover, the language was published when it was uttered in front of Long.<sup>16</sup> Finally, because Brown's words imputed the criminal act of shoplifting, Boggs has made out a case of slander per se,<sup>17</sup> which carries with it a presumption of malice and damage<sup>18</sup> and does not require Boggs to prove injury to his reputation.<sup>19</sup>

Nevertheless, Wal-Mart argues that the court properly granted summary judgment in its favor, because Brown had a qualified privilege to ask Boggs whether he had stolen the

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<sup>16</sup> See *Vanover v. Wells*, 264 Ky. 461, 466, 94 S.W.2d 999, 1001 (1936) ("addressing a defamatory remark to a party in the presence and hearing of others is a publication of it"). In arguing that there was no publication, Wal-Mart erroneously asserts that the alleged defamatory remarks were made by the store manager to Brown, rather than by Brown to Boggs.

<sup>17</sup> *Stringer v. Wal-Mart Stores*, 151 S.W.3d 781, 795 (Ky. 2004) (quoting *Courier Journal Co. v. Noble*, 251 Ky. 527, 65 S.W.2d 703, 703 (1933); *Shields v. Booles*, 238 Ky. 673, 38 S.W.2d 677, 681 (1931)).

<sup>18</sup> *Conner v. Taylor*, 233 Ky. 706, 708, 26 S.W.2d 561, 562 (1930).

<sup>19</sup> *Stringer*, 151 S.W.3d at 795.

jacket he was wearing. Such a privilege exists where the publisher has a duty to communicate the information in question.<sup>20</sup> For example, many courts have found that store proprietors have qualified privileges to question suspected shoplifters.<sup>21</sup> Support for this outcome is supported by the Second Restatement of Torts,<sup>22</sup> which establishes that a qualified privilege arises

if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important interest of the publisher, and

(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The Restatement further states, for purposes of § 594(a), that "[a]ny lawful pecuniary interest" is a sufficiently important interest of the publisher.<sup>23</sup>

Here, any finding that the communication was privileged is dependent upon a factual determination that Brown had a reasonable belief that Boggs stole the jacket he was wearing. Such a disputed issue of fact cannot properly serve as

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<sup>20</sup> *Stewart v. Pantry, Inc.*, 715 F.Supp. 1361, 1366 (W.D. Ky. 1988) (citing *Tucker v. Kilgore*, 388 S.W.2d 112, 114 (Ky. 1965)).

<sup>21</sup> See G. H. Genzel, Annotation, *Defamation: actionability of accusation or imputation of shoplifting*, 29 A.L.R.3d 961 (1970).

<sup>22</sup> *Restatement (Second) of Torts* § 594 (1977).

<sup>23</sup> *Id.* at § 594 cmt. f.

the basis for summary judgment in either party's favor. Further, although Boggs argues that Wal-Mart cannot rely on a qualified privilege since Brown denied his version of their encounter, such argument lacks merit since Wal-Mart may maintain that the events never occurred and argue, in the alternative, that if the events did occur, Brown was privileged to ask Boggs whether he stole the jacket. We note that if, upon remand, it is determined that Brown's words were qualifiedly privileged, the burden then rests on Boggs to prove that the defamatory statement was published with actual malice,<sup>24</sup> which "requires a showing of knowledge of falsity of the defamatory statement or reckless disregard of its truth or falsity[.]"<sup>25</sup>

Finally, as this matter is being remanded on Boggs's claim of defamation, the circuit court's summary judgment in Wal-Mart's favor as to Boggs's claim for punitive damages must be set aside. As Kentucky's highest court explained in *Louisville Times Co. v. Lyttle*,<sup>26</sup> in defamation cases "three classes of damages may be recovered if the facts are such as to fasten liability on defendant. They are: (a) General damages; (b) special damages; and, where express malice is proven, (c) exemplary or punitive damages."

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<sup>24</sup> *Weinstein v. Rhorer*, 240 Ky. 679, 685, 42 S.W.2d 892, 895 (1931).

<sup>25</sup> *Stringer*, 151 S.W.3d at 799 (quoting *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 885 (Ky. 1981)).

<sup>26</sup> 257 Ky. 132, 143, 77 S.W.2d 432, 437 (1935).

The judgment is affirmed in part, reversed in part,  
and remanded to the Rowan Circuit Court for further proceedings  
consistent with this opinion.

ALL CONCUR.

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