

## MEMORANDUM

TO: Lawyering Skills I students  
FROM: Professor David E. Sorkin  
DATE: August 21, 2008  
RE: Ward v. Lytton (Polk University)

Our firm serves as outside legal counsel to Polk University in Raleigh, North Carolina. Monty Ward is a second-year law student at Polk. Ward has filed a lawsuit against Professor Henry Lytton and the university, alleging that Lytton falsely imprisoned him during a class, and that the university is vicariously liable for Lytton's actions. Marsha Field, the dean of Polk's law school, and Charles Stevens, the university's general counsel, have asked us to evaluate the likelihood that the university may be held liable for false imprisonment.

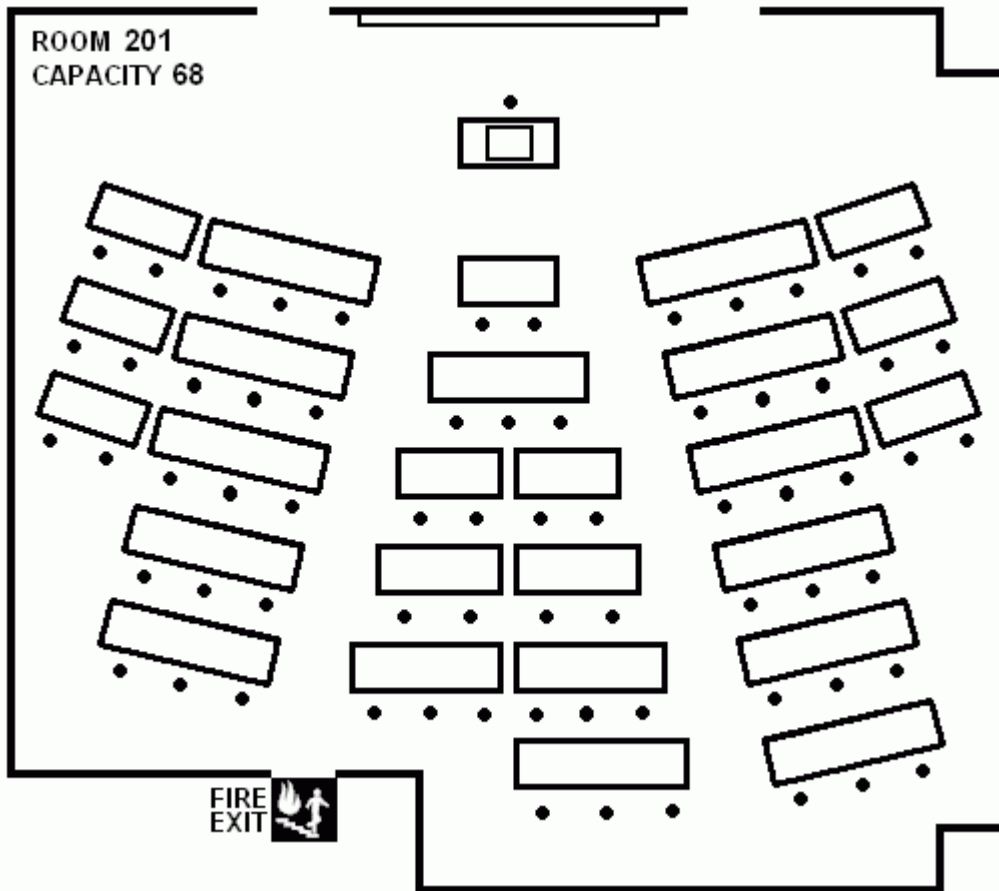
Ward was enrolled in Lytton's Torts class last spring. The class met on Tuesday and Friday mornings in room 201 of the law school building. A diagram of the classroom is attached. According to Lytton, on several occasions during January and February it was obvious to him that Ward had not prepared himself adequately for class. Twice during the first two weeks of class, Ward's cell phone rang in the middle of a class session, disrupting the class; thereafter, Lytton required Ward to deposit his cell phone on the lectern at the front of the room upon entering the classroom, and then retrieve it at the end of the class session. The topic of Lytton's class on March 4, 2008, was the intentional tort of false imprisonment. About thirty minutes into the ninety-minute class session, Lytton called upon Ward to recite a case. Ward demurred, explaining that he had neglected to read the case. "Mr. Ward, you are a slacker, an imbecile, or both," Lytton responded. "Perhaps it is time for you to reconsider your decision to become a lawyer." Embarrassed, Ward decided to leave the class. He gathered his books and began walking down the aisle toward the exit doors, which were located behind the professor's lectern at the front of the room. As he reached the lectern, he reached his arm out, apparently intending to retrieve his cell phone. Lytton stepped toward him and said, "Mr. Ward, you will return to your seat. I do not permit students to come and go from my classroom as they please." Ward stood still for a moment, as some of the other students in the room snickered quietly and whispered to one another. Then Lytton returned to the lectern, slammed down his notebook, and barked, "Sit down, Mr. Ward!" The room fell silent. Mortified, Ward returned to his seat. At the conclusion of the class session, Lytton turned to Ward and said, "Now, Mr. Ward, you are free to leave. I trust that you will remove the cellophane wrapper from your casebook, sharpen your crayons, and spend some time studying the law of torts before you rejoin us."

Ward's complaint alleges that he was so traumatized by the March 4 episode that he was unable to return to Lytton's class for the remainder of the semester, and the law school forced him to drop the course and retake it over the summer. He has begun to suffer from recurring nightmares, severe headaches, and stomach ulcers, and is currently under the care of a psychologist. He had to give up a lucrative summer associate position that he had been offered in Atlanta.

Ward reported the incident to Dean Field several days after it occurred. Field says that she occasionally receives complaints about faculty members, but this is the first complaint she recalls having received about Lytton. She promised Ward that she would investigate, but said that she generally prefers to give faculty members considerable leeway in their choice of teaching methods. On April 5, Field sent an e-mail message to Lytton, calling his attention to the following provision of the law school's academic policies: "All members of the law school community are expected to exhibit respect for one another."

Please write a memorandum addressing Polk University's potential liability to Ward for false imprisonment. Your research has unearthed the attached authorities, some or all of which may be relevant to this matter. Cite only to materials that are included here, and submit a complete draft of your memorandum no later than the due date stated on the course syllabus.

**POLK UNIVERSITY SCHOOL OF LAW  
FLOOR PLAN—ROOM 201**



## AUTHORITIES

<i>Hales v. McCrory-McLellan Corp.</i> , 133 S.E.2d 225 (N.C. 1963).....	5
<i>Medlin v. Bass</i> , 398 S.E.2d 460 (N.C. 1990).....	8
<i>Stanley v. Brooks</i> , 436 S.E.2d 272 (N.C. App. 1993).....	15
<i>Richardson v. Costco Wholesale Corp.</i> , 169 F. Supp. 2d 56 (D. Conn. 2001).....	18
<i>Lopez v. Winchell’s Donut House</i> , 466 N.E.2d 1309 (Ill. App. 1st Dist. 1984).....	25
<i>Banks v. Fritsch</i> , 39 S.W.3d 474 (Ky. App. 2001).....	29

260 N.C. 568  
Marie HALES

v.

McCRORY-McLELLAN CORPORATION,  
J. W. Meares and F. D. Morphis.

No. 250.

Supreme Court of North Carolina.

Nov. 27, 1963.

Action was brought for compensatory and punitive damages for false imprisonment and slander. The Superior Court, Wilson County, Albert W. Cowper, J., entered a judgment of compulsory nonsuit, and the plaintiff appealed. The Supreme Court, Higgins, J., held that question whether defendants either actually or by procurement caused the plaintiff to be falsely imprisoned and falsely accused of shoplifting was for jury.

Reversed.

**1. False Imprisonment** Ⓒ7(4)

Act of calling policeman to assist in unlawful restraint does not legalize unlawful restraint.

**2. False Imprisonment** Ⓒ2

"False imprisonment" is illegal restraint of person of anyone against his will.

See publication Words and Phrases for other judicial constructions and definitions.

**3. False Imprisonment** Ⓒ5

False imprisonment may be committed by words alone, or by acts alone, or by both, and it is not necessary that individual be actually confined or assaulted, or even that he should be touched.

**4. False Imprisonment** Ⓒ5

Any exercise of force, or express or implied threat of force, by which in fact person is deprived of his liberty, is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is "imprisonment".

See publication Words and Phrases for other judicial constructions and definitions.

**5. False Imprisonment** Ⓒ39

**Libel and Slander** Ⓒ123(1)

Question whether defendants either actually or by procurement caused plaintiff to be falsely imprisoned and falsely accused of shoplifting was for jury.

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The plaintiff instituted this civil action on August 24, 1961, to recover from the defendants compensatory and punitive damages for false imprisonment and slander. At the close of the evidence the court entered judgment of compulsory nonsuit, from which the plaintiff appealed.

Lucas, Rand, Rose & Morris, and Louis B. Meyer, Wilson, for plaintiff appellant.

Gardner, Connor & Lee, by Cyrus F. Lee and Raymond M. Taylor, Wilson, for defendants appellees.

HIGGINS, Justice.

The appeal presents this question of law: Was the evidence offered at the trial, when considered in the light most favorable to the plaintiff, sufficient to permit the jury to find the defendants either actually or by procurement caused the plaintiff to be falsely imprisoned and falsely accused of shoplifting as a result of which she sustained damages? In addition to the general denial, the defendants by amendment to the answer pleaded that more than six months elapsed after the action accrued and before it was instituted.

The evidence disclosed that the corporate defendant operated in the City of Wilson a self-service variety store. Merchandise was displayed on counters from which customers were permitted to make their selections to be paid for on their way out. The individual defendants were agents and servants of the corporate defendant and were in charge of its store.

The plaintiff testified that on September 3, 1960, she returned to the defendant's store certain articles previously purchased which she sought to exchange for more appropriate sizes. While so engaged, the individual defendants, acting for the corporation, charged her with shoplifting; that notwithstanding her complete innocence of the charge, the defendant Morphis ordered her to "come over here with me \* \* \* you know what for \* \* \* He told her (Mrs. Baker, another employee) to call the police. \* \* \* We stood at the end of the counter waiting until the policemen came. \* \* \* We met the policemen about midway the aisle and we went into this little room. \* \* \* one of the policemen asked Mr. Morphis if he wanted to sign papers and he said yes. Mr. Morphis told one of the policemen that he saw me when I came down with a bag and he knew what the bag was for. That \* \* \* was before Mr. Morphis said he wanted to sign papers. \* \* \* Mr. Meares (another employee) \* \* \* came in (a little room adjacent to

the display counters) and he said he knew what it was about and what I was in there for and to go ahead and sign the papers. \* \* \* I was taken over to the police station by Mr. Tant (police officer) \* \* \* When I got to the police station, I went to the desk and gave them my name and address. \* \* \* After I answered the questions, I was told that I could go back to a little room and wait there. I had called my daddy \* \* \* (He) signed my bond and I was released."

Immediately an affidavit sworn to by defendant Morphis was filed in the recorder's court. Based thereon a warrant for the plaintiff's arrest was issued charging her with the crime of shoplifting. If the plaintiff was under unlawful arrest, not only the individual defendants but their principal, the corporation itself, may be held civilly liable. *Kelly v. Newark Shoe Co.*, 190 N.C. 406, 130 S.E. 32.

However, defendants stressfully contend the plaintiff was not under arrest; that no force was exerted; that she was not at any time restrained; that she remained in the store until after the officers appeared, accompanied them to the small room adjacent to the counters, and later to the police station entirely of her own free will.

From the foregoing circumstances, may not the jury, however, infer that the defendants, backed up by the presence and participation of two police officers whom they had called, induced the plaintiff to consider herself under restraint and to believe that any move or attempt on her part to leave the scene would not be allowed? Two of the store's employees, in the presence of police officers, accused the plaintiff of larceny. Upon receiving assurances the accusers would sign the necessary papers, the officers and the accusers conducted the plaintiff to police headquarters where she was charged and released only after she gave bond. A jury may find that she was justified in assuming

she was under involuntary restraint. It may further find the restraint was unlawful.

[1-4] Under the decisions of this Court, restraint must be consented to or it must be lawful. Calling a policeman to assist does not legalize an unlawful restraint. *Long v. Eagle Stores*, 214 N.C. 146, 198 S.E. 573. "False imprisonment is the illegal restraint of the person of any one against his will." *Parrish v. Boysell Mfg. Co.*, 211 N.C. 7, 188 S.E. 817; *Martin v. Houck*, 141 N.C. 317, 54 S.E. 291, 7 L.R.A., N.S., 576. Justice Walker, in *Riley v. Stone*, 174 N.C. 588, 94 S.E. 434, stated the rule: "Force is essential only in the sense of imposing restraint. \* \* \* The essence of personal coercion is the effect of the alleged wrongful conduct on the will of plaintiff. There is no legal wrong unless the detention was involuntary. False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched. 19 Cyc., pp. 319 and 323. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. \* \* \* The essential thing is the restraint of the person. This may be caused by threats, as well as by actual force, and the threats may be by conduct or by words. If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. \* \* \*"

[5] The plaintiff testified, and offered supporting evidence tending to corroborate her, that she was innocent of any wrongdoing. The evidence, in the light most favorable to her, entitles her to have the jury resolve the issues raised by the pleadings. This disposition leaves the plea of the statute of limitations unadjudicated.

Reversed.

Medlin v. Bass  
N.C., 1990.

Supreme Court of North Carolina.  
Gail West MEDLIN, Guardian Ad Litem for  
Pamela Lynn Medlin

v.

Vann J. BASS, Individually and as agent for Franklin County Board of Education; Luther Baldwin, Individually and as agent for Franklin County Board of Education; Warren W. Smith, Franklin County Board of Education; Russell E. Allen, Individually and as Agent for Franklin County Board of Education; Franklin County Board of Education, Defendants.

**No. 7A90.**

Dec. 5, 1990.

Student who was allegedly assaulted by principal sued school's superintendent, assistant superintendent, truancy officer, and county board of education. The Superior Court, Franklin County, Jack B. Crawley, J., entered summary judgment for defendants, and student appealed. The Court of Appeals, 96 N.C.App. 410, 386 S.E.2d 80, affirmed. Student appealed. The Supreme Court, Whichard, J., held that: (1) neither superintendent nor board was negligent in hiring or retention of principal, and (2) board was not liable for principal's alleged assault upon student under respondeat superior theory.

Affirmed.

Martin, J., filed opinion dissenting in part in which Frye, J., joined.

West Headnotes

**[1] Schools 345 ⚡63(3)**

345 Schools

345II Public Schools

345II(C) Government, Officers, and District

Meetings

345k63 District and Other Local Officers

345k63(3) k. Powers, Duties, and Liabilities in General. Most Cited Cases

**Schools 345 ⚡89.2**

345 Schools

345II Public Schools

345II(F) District Liabilities

345k89.2 k. Negligence in General. Most Cited Cases

Neither superintendent of schools nor county board of education was liable to student for negligently hiring and retaining principal who allegedly assaulted student, even though principal had earlier resigned from another school after he was accused of sexually assaulting student; forecast of evidence did not include evidence that superintendent or board knew or reasonably could have known of principal's alleged pedophilic tendencies prior to alleged assault which was basis for suit, as recommendations which were received contained no information indicating that principal was pedophile and principal performed his official duties in satisfactory manner for approximately 16 years.

**[2] Schools 345 ⚡89.3**

345 Schools

345II Public Schools

345II(F) District Liabilities

345k89.3 k. Particular Torts in General. Most Cited Cases

County board of education was not liable for principal's alleged assault upon student under respondeat superior theory, although assault allegedly occurred when principal called student to his office ostensibly to discuss her attendance problems; principal's duties included counseling chronically truant student, but sexual assault of student was unrelated to counseling or any other function explicitly or implicitly authorized by board and could not conceivably further any board purpose, so principal would

have stepped out of course and scope of his employment in sexually assaulting student.

**\*\*461 \*588** Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 96 N.C.App. 410, 386 S.E.2d 80 (1989), affirming summary judgment for defendants Franklin County Board of Education, Luther Baldwin, Warren W. Smith and Russell E. Allen, entered by Crawley, J., on 26 **\*589** April 1988 in Superior Court, Franklin County. Heard in the Supreme Court 4 September 1990.

J. Wilson Parker, Winston-Salem, and Kirk, Gay, Kirk, Gwynn & Howell by Andy W. Gay, and Katherine M. McCraw, Wendell, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog by David H. Batten, Raleigh, Davis, Sturges & Tomlinson by Charles M. Davis, Louisburg, for defendant-appellee Franklin County Bd. of Educ.

Young, Moore, Henderson & Alvis by David P. Sousa, Theodore S. Danchi, and Knox Proctor, Raleigh, for defendant-appellee Warren W. Smith.

J. Wilson Parker, Winston-Salem, for the North Carolina Academy of Trial Lawyers, amicus curiae. William G. Simpson, Jr., Raleigh, Charles M. Putterman, Raleigh, for the North Carolina Civ. Liberties Union Legal Foundation, amicus curiae.

Katherine Holliday, Charlotte, for the Children's Law Center, amicus curiae.

WHICHARD, Justice.

Plaintiff, as guardian ad litem for her minor daughter, sought to recover from defendants compensatory and punitive damages allegedly sustained as the result of sexual assaults upon the minor plaintiff by defendant Vann J. Bass, principal of the school which the minor plaintiff attended. She alleged that on one occasion defendant Bass sexually assaulted the minor plaintiff by committing lewd and lascivious acts and taking immoral, improper and indecent liberties, and that on a second occasion defendant Bass sexually assaulted the minor plaintiff by the same acts and additionally by willfully carnally

knowing and abusing the minor plaintiff. Plaintiff asserted claims against defendant Bass for assault and battery, false imprisonment, and intentional infliction of mental distress.

In an amended complaint plaintiff joined, as additional defendants, the Franklin County Board of Education (FCB), Warren W. Smith, Superintendent of FCB, Russell E. Allen, Assistant Superintendent of FCB, and Luther Baldwin, Truancy Officer for FCB. She alleged that defendants Smith and Allen were negligent **\*590** in hiring and retaining defendant Bass, and that defendant Baldwin inflicted severe emotional distress upon the minor plaintiff by causing issuance of a juvenile petition against her without proper investigation of all relevant facts. She alleged that all individual defendants at all relevant times were acting within the course and scope of their employment with defendant FCB and that their acts or omissions thus should be imputed to defendant FCB.

After consideration of the pleadings, affidavits, and deposition transcripts, including attachments and exhibits, the trial court denied defendant Bass' motion for summary judgment, but allowed motions for summary judgment filed on behalf of defendants Smith, Allen, Baldwin, and FCB. Plaintiff appealed, and the Court of Appeals affirmed. *Medlin v. Bass*, 96 N.C.App. 410, 386 S.E.2d 80 (1989). Judge Phillips dissented as to the summary judgments in favor of defendants FCB and Smith. Plaintiff exercised her right to appeal to this Court. N.C.G.S. § 7A-30(2) (1989).

Because this appeal is before us pursuant to N.C.G.S. § 7A-30(2), review is limited to the issues raised in Judge Phillips' dissent: (1) whether defendant Smith, as FCB Superintendent, negligently investigated defendant Bass before hiring him, and (2) whether defendant Bass' offenses occurred in the course and scope of his employment, thus subjecting FCB to liability under a respondeat superior theory. *Medlin*, 96 N.C.App. at 416-17, 386 S.E.2d at 83-84. See N.C.R.App.P. 16(b). We hold that plaintiff did not forecast evidence that defendant

Smith was negligent in his **\*\*462** investigation of defendant Bass or that defendant Bass was acting within the course and scope of his employment at the time he allegedly attacked the minor plaintiff. We thus affirm the Court of Appeals.

Summary judgment is proper when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c) (1990). “[I]ts purpose is to eliminate formal trials where only questions of law are involved.” *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

[1] North Carolina recognizes a claim for negligent employment or retention when the plaintiff proves:

**\*591** (1) the specific negligent act on which the action is founded ... (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in ‘oversight and supervision,’...*; and (4) that the injury complained of resulted from the incompetency proved.

*Walters v. Lumber Co.*, 163 N.C. 536, 541, 80 S.E. 49, 51 (1913) (quoting *Shearman & Redfield on Negligence* § 190 (6th ed. 1913)) (emphasis added); *see also Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942) (plaintiff must show employer's hiring or retention after actual or constructive knowledge of employee's incompetence).

Evidence before the trial court upon defendants' motions for summary judgment showed that before working in the Franklin County Schools, defendant Bass had worked as a teacher and principal in Rocky Mount, North Carolina, for ten years. In June 1968, a Rocky Mount student and the student's father alleged that Bass had assaulted the student

sexually. Bass neither confirmed nor denied the incident when Rocky Mount Superintendent Fields asked him about it; instead, he resigned. The official explanation for the resignation was “health reasons”; Rocky Mount school personnel never investigated the incident beyond Fields' inquiry.

Bass moved to Franklin County in the summer of 1968 and did not work until FCB hired him in January 1969. Before FCB hired Bass, Margaret Holmes, FCB Associate Superintendent, telephoned one of his references, Millie Moore, Holmes' college friend and a respected educator. In early February, Holmes sent forms to two of the three references Bass listed on his application. FCB's policy at the time was to contact two of the three references. Holmes' inquiries to Millie Moore, a school supervisor in Rocky Mount, and Ella Moore, a principal there, two of Bass' three listed references, did not reveal the previous alleged sexual assault. Ella Moore commented that she knew of no “habit, [or] physical or mental peculiarities, likely to interfere” with Bass' success and described him as “one of the most promising men in education.” Millie Moore wrote that Bass did “an excellent job” and that Rocky Mount “lost a very valuable educator when [the school system] lost Mr. Bass.”

**\*592** Holmes visited and interviewed Rocky Mount Superintendent Fields, Bass' third reference, later that spring after a FCB principal mentioned hearing a rumor that Bass was a homosexual. Bass was still a teacher at this time. According to Holmes' deposition, in that interview she specifically asked Fields about Bass' sexual proclivities. Fields does not recall whether Holmes questioned Bass' sexual proclivities specifically. Fields said nothing about the previous alleged assault during the interview. Before Bass became a FCB principal in June 1969, FCB Superintendent defendant Smith called Fields to ask whether Bass would be a good principal.

Although Holmes, who worked under defendant Smith, the FCB Superintendent, did not receive the written recommendations until after Bass was hired, it is clear that the recommendations contained no

information indicating that Bass was a pedophile. It is equally clear that the only **\*\*463** rumor relating to Bass' sexual tendencies was investigated and remained unconfirmed. Further, Bass performed his official duties in a satisfactory manner for approximately sixteen years. His alleged sexual assaults on the minor plaintiff occurred during the first few days of the 1984-85 school year, when, according to her forecast of evidence, he called her to his office ostensibly to discuss her attendance problems and then assaulted her.

The foregoing forecast is devoid of evidence that defendants FCB or Smith knew or reasonably could have known of defendant Bass' alleged pedophilic tendencies prior to the incident that is the subject of this lawsuit. It thus fails to establish an essential element of a claim for negligent hiring or retention, *Walters v. Lumber Co.*, 163 N.C. 536, 80 S.E. 49, and summary judgment for defendants on this claim was proper.

[2] Plaintiff also argues that there is a genuine issue of material fact regarding defendant FCB's liability under a respondeat superior theory. An employer will be liable under this theory when the employee's act is "expressly authorized; ... committed within the scope of [the employee's] employment and in furtherance of his master's business-when the act comes within his implied authority; ... [or] when ratified by the principal." *Snow v. DeButts*, 212 N.C. 120, 122, 193 S.E. 224, 226 (1937). In *Snow*, this Court found that an employer was not liable when its employee, a general manager, assaulted the plaintiff after the plaintiff expressed his views at a public hearing. It concluded that even though the manager **\*593** had broad implied authority, the assault was not within the scope of his authority. Thus, where the employee's action is not expressly authorized or subsequently ratified, an employer is liable only if the act is "committed within the scope of ...and in furtherance of [the employer's] business." *Id.* (emphasis added); see also *Brown v. Burlington Industries, Inc.*, 93 N.C.App. 431, 437, 378 S.E.2d 232, 235, *disc. rev. allowed*, 325 N.C.

270, 384 S.E.2d 513, *cert. granted*, 325 N.C. 704, 387 S.E.2d 55 (1989), *disc. rev. improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990); *Troxler v. Charter Mandala Center*, 89 N.C.App. 268, 271, 365 S.E.2d 665, 668, *disc. rev. denied*, 322 N.C. 838, 371 S.E.2d 284 (1988) ("To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment.").

Where the employee's actions conceivably are within the scope of employment and in furtherance of the employer's business, the question is one for the jury. Thus, when a person assaulted plaintiff while defendant's employees were loading plaintiff's possessions on a truck, whether the attacker was defendant's employee and was acting in the course and scope of the employment was a question for the jury. *Robinson v. McAlhaney*, 214 N.C. 180, 198 S.E. 647 (1938). This Court noted that "proof that [the assailant] was authorized to assist in the removal of the furniture [does not] necessarily require the conclusion that he was about his master's business in committing the assault. This is a question for the jury." *Id.* at 183, 198 S.E. at 650.

Our Court of Appeals has held that when a parking attendant drew a gun on plaintiff after plaintiff refused to pay the posted parking fee, the question of whether the attendant was "about his master's business or whether he stepped aside from his employment to commit a wrong prompted by a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own" was for the jury to determine. *Carawan v. Tate*, 53 N.C.App. 161, 164, 280 S.E.2d 528, 531, *modified*, 304 N.C. 696, 286 S.E.2d 99 (1981). In *Edwards v. Akion*, the plaintiff and a sanitation worker disagreed about the manner in which the worker collected plaintiff's refuse, and the worker knocked plaintiff to the ground, injuring her. There was some evidence that the dispute concerned whether the worker should pick up a certain type of garbage. The Court of Appeals stated that "[w]hen

there is a dispute as to what the employee was actually doing at the \*594 time the tort was committed, \*\*464 all doubt must be resolved in favor of liability and the facts must be determined by the jury.” *Edwards*, 52 N.C.App. 688, 698, 279 S.E.2d 894, 900, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981).

Some acts, however, are so clearly outside the scope of employment that summary judgment is proper. As the Court of Appeals has noted, “[i]ntentional tortious acts are rarely considered to be within the scope of an employee's employment.” *Brown*, 93 N.C.App. at 437, 378 S.E.2d at 235. This Court stated in *Robinson* that “[i]f an assault is committed by the servant, not as a means or for the purpose of performing the work he was employed to do, but in a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own, then the master is not liable.” *Robinson*, 214 N.C. at 183, 198 S.E. at 650. When a busboy offered to cut out plaintiff customer's eyes and subsequently attacked the customer, who had requested that the busboy clear his table, this Court held that the busboy “did not strike the plaintiff as a means or method of performing his duties as a busboy.” Rather, “the assault ... was not for the purpose of doing anything related to the duties of [the employee], but was for some undisclosed, personal motive. It cannot, therefore, be deemed an act of his employer.” *Wegner v. Delicatessen*, 270 N.C. 62, 68, 153 S.E.2d 804, 809 (1967).

Clearly, the matters alleged and shown by the forecast of evidence here fall in the category of intentional tortious acts designed to carry out an independent purpose of defendant Bass' own, and they thus were not within the course and scope of his employment with defendant FCB or in furtherance of any FCB purpose. While Bass was exercising authority conferred upon him by defendant FCB when he summoned the minor plaintiff to his office to discuss her truancy problem, in proceeding to assault her sexually he was advancing a completely personal objective. The assault could advance no

conceivable purpose of defendant FCB; defendant Bass acted for personal reasons only, and his acts thus were beyond the course and scope of his employment as a matter of law. There thus was no genuine issue of material fact regarding defendant FCB's derivative liability under a respondeat superior theory, and summary judgment for defendant FCB was proper.

\*595 Plaintiff's reliance on *Munick v. Durham*, 181 N.C. 188, 106 S.E. 665 (1921), is misplaced. In *Munick*, an employee of defendant city assaulted the plaintiff when plaintiff, a Jewish immigrant from Russia, paid a portion of his water bill in pennies. The Court noted that the employee “was acting in his capacity as agent” at the time of the assault. *Munick*, 181 N.C. at 193, 106 S.E. at 667. The same cannot be said of defendant Bass here. In *Munick*, the employee, charged with general supervision of the water system, was overseeing the collection of money for services rendered at the time he attacked the plaintiff. Bass' duties as principal included counseling a chronically truant student, but sexually assaulting the student was unrelated to counseling or any other function explicitly or implicitly authorized by defendant FCB and could not conceivably further any FCB purpose. Although *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E.2d 804, discussed above, cites *Munick*, it is significant that the holding in *Wegner* implicitly rejected the “while on duty” language of *Cook v. R.R.*, 128 N.C. 333, 38 S.E. 925 (1901), on which *Munick* relied. *See Munick*, 181 N.C. at 193, 106 S.E. at 667. In *Cook*, the Court had suggested that “in the scope of employment” was the same as “while on duty.”

*See id.* Yet, in *Wegner*, although the busboy was on duty at the time he assaulted the customer, the assault was held not to be in the scope of employment as a matter of law. The holding in *Wegner* represents a shift from a “while on duty” test to a less static “within the scope of employment and in furtherance of the employer's business” test stated in the later cases discussed above. Just as the busboy in *Wegner* stepped out of the course and scope of his employment when he assaulted the customer,

defendant Bass here stepped out of the course and scope of his employment when he sexually assaulted the minor plaintiff.

**\*\*465** For the foregoing reasons, the decision of the Court of Appeals is

AFFIRMED.

MARTIN, Justice, dissenting in part.

I respectfully dissent from the majority opinion on the issue of respondeat superior. The question of whether the defendant, Franklin County Board of Education, is liable for the actions of its employee, Vann Bass, is properly for the jury to decide. There is a material question of fact as to whether Bass was acting within **\*596** the scope of his employment. Therefore, summary judgment was improvidently allowed.

At the outset, it is to be noted that paragraph 38 of plaintiff's complaint alleges that Bass was acting within the course and scope of his employment with the defendant Board of Education. The defendant Board of Education merely denies the allegations of paragraph 38.

Bass in his affidavit simply denies that he assaulted Pamela. Nowhere in the record is there any evidence that Bass was not acting in the course and scope of his employment with the Board at the time in question.

To the contrary, viewing the evidence in the light most favorable to the non-movant, plaintiff has made a forecast showing:

(1) Pamela was a nine-year-old elementary school student.

(2) She had not been attending school regularly and had a truancy problem.

(3) Bass was the principal of the school attended by Pamela and was charged by the defendant Board of Education with the duty of counselling and disciplining students because of truancy.

(4) At the time in question, Bass ordered Pamela to come into his office. Upon arriving in Bass's office, Pamela sat in a chair on the opposite side from where Bass sat at his desk. Once inside the office, Pamela was completely within the power of Bass.

(5) During his counselling and disciplining of Pamela, Bass committed a sexual assault upon her.

In *Munick v. Durham*, 181 N.C. 188, 106 S.E. 665 (1921), this Court held that a city employee was acting within the scope of his employment when he committed an unprovoked assault upon a customer who was paying his water bill. Although the employee had no instructions to commit acts of violence, he was nevertheless acting as an agent for the city. "Acting within the scope of employment means while on duty." *Id.* at 193, 106 S.E. at 667 (quoting *Cook v. R.R.*, 128 N.C. 333, 38 S.E. 925 (1901)). Although the "while on duty" rule has since been abandoned, "the employer is not absolved from liability by reason of the fact that the employee was also motivated by malice or ill will toward the person injured, or even by the fact that the employer had expressly forbidden **\*597** him to commit such act." *Wegner v. Delicatessen*, 270 N.C. 62, 66, 153 S.E.2d 804, 808 (1967) (citations omitted). In *Wegner* the Court noted that the employee who assaulted a customer had no managerial responsibilities in his position as bus boy. His job of clearing tables had nothing to do with his striking the plaintiff, although the original quarrel apparently arose while the employee was performing his duties. Had he assaulted the plaintiff while clearing the table, he would have been within the scope of his employment. *Id.* at 68, 153 S.E.2d at 809. Here the assault occurred while Bass was counselling and disciplining the child.

I do not agree with the majority's conclusion that the alleged sexual assault was beyond the course and scope of Bass's employment as a matter of law. Additional evidence gleaned from the materials before the court showed that Bass knew about Pamela's truancy problem and in the fall of 1984 had met with her mother to discuss the matter.

Taken in the light most favorable to the plaintiff for summary judgment purposes, the evidence shows that Bass called the plaintiff to his office for disciplinary purposes. Discipline of students is clearly within the scope of a principal's employment. N.C.G.S. § 115C-288(c) (1987) ("The principal shall use reasonable force to discipline students"). There is a material question of fact as to whether Bass was acting within the course and scope of his employment. That the assault was sexual in nature should not preclude the case from going before a jury. Courts \*\*466 in other jurisdictions have not found sexual assaults to be necessarily outside the scope of employment. *See, e.g., Marston v. Minneapolis Clinic of Psychiatry*, 329 N.W.2d 306 (Minn.1983) (whether sexual assaults committed by psychologist on a patient were within the scope of employment by medical center was a question of fact).

When the principal of a school, acting in that capacity and exercising the authority of that position, orders a nine-year-old girl into the confines of his office, she is completely subject to his control. The school board cannot escape liability by arguing that the assault was beyond the scope of the employment. This Court has long recognized that where an employee has committed a wrongful act, the loss should be borne by the employer, not the innocent victim:

The principal may be perfectly innocent of any actual wrong or of any complicity therein, but this will not excuse him, for the party who was injured by the wrongful act is also \*598 innocent; and the doctrine is that where one of two or more innocent parties must suffer loss by the wrongful act of another, it is more reasonable and just that he should suffer it who has placed the real wrong-doer in a position which enabled him to commit the wrongful act, rather than the one who had nothing whatever to do with setting in motion the cause of such act.

*Ange v. Woodmen*, 173 N.C. 33, 35-36, 91 S.E. 586, 587 (1917) (quoting Reinhardt on Agency § 335). Sexual assaults are not only acts of personal grati-

fication, but also acts of violence.

Here, the defendant Board of Education placed its employee, Bass, in the physical and authoritarian position that enabled him to commit the assault on Pamela. Under such circumstances the Board is liable for the torts of its agent. *See* Restatement (Second) Agency § 219(2)(d) (1957).

Moreover, the public policy of North Carolina demands that plaintiff should have at least an opportunity to present her case against the Board of Education to the jury. Our state has a compelling interest in protecting its school children from sexual assaults. This requires that such children have a meaningful remedy.

At the very least it is unclear what happened in Bass's office; he denies any assault occurred. Plaintiff's forecast of the evidence shows that she was ordered into Bass's office for counselling and discipline because of her truancy, and that she was sexually assaulted arising out of this encounter. This Court adopted the reasoning of our Court of Appeals in *Edwards v. Akion*, 52 N.C.App. 688, 279 S.E.2d 894, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981), which held:

When there is a dispute as to what the employee was actually doing at the time the tort was committed, all doubt must be resolved in favor of liability and the facts must be determined by the jury. The doctrine should be applied liberally, especially where the business involves a duty to the public, and the courts should be slow to assume a deviation from the duties of employment.

*Id.* at 698, 279 S.E.2d at 900 (citations omitted). *Akion* involved an assault by a sanitation worker arising out of a dispute as to the collection of garbage.

\*599 With the increased prevalence of sexual assaults on children in our society, the courts should be the last to deny relief to the innocent.

FRYE, J., joins in this dissenting opinion.

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**REBA BALL STANLEY v. W. STEPHEN BROOKS and RLK, INC. d/b/a BOB KING MITSUBISHI**

No. 9221SC1223

**COURT OF APPEALS OF NORTH CAROLINA**

112 N.C. App. 609; 436 S.E.2d 272; 1993 N.C. App. LEXIS 1197

**October 25, 1993, Heard in the Court of Appeals  
November 16, 1993, Filed**

**PRIOR HISTORY:** [\*\*\*1] No. 91 CVS 5078. Appeal by plaintiff from judgment entered 16 September 1992 by Judge William Z. Wood, Jr. in Forsyth County Superior Court.

**DISPOSITION:** Affirmed.

**HEADNOTES**

**1. Labor and Employment § 235 (NCI4th) -- employee's prior criminal history -- no knowledge by employer -- insufficiency of evidence of negligent hiring**

The trial court properly entered summary judgment for defendant on plaintiff's claim of negligent hiring where the individual defendant was a salesman for defendant car dealership; when plaintiff, a potential customer, took a vehicle out on a test drive, the individual defendant allegedly sexually assaulted her; the individual defendant had been charged three years before the incident in question with first-degree sexual offense and first-degree burglary and had pled guilty to lesser charges; but the forecast of evidence failed to show that defendant knew or reasonably could have known of the individual defendant's criminal history prior to the incident with plaintiff.

**2. Labor and Employment § 227 (NCI4th) -- sexual assault on customer by car salesman during test drive -- respondeat superior inapplicable -- car dealer not liable to plaintiff**

The trial [\*\*\*2] court properly entered summary judgment for defendant on plaintiff's claim of respondeat

superior where the evidence tended to show that the individual defendant, a salesman for defendant car dealership, was exercising the authority vested in him when he took plaintiff for a test drive of an automobile, but when he proceeded to sexually assault her, his actions amounted to intentional tortious conduct designed to carry out his own independent purpose and not that of his employer for which the employer could be held liable.

**SYLLABUS**

Viewed in the light most favorable to plaintiff, the evidence tends to show the following: On or about 11 January 1989, the individual defendant, W. Stephen Brooks, applied for employment with defendant Mitsubishi and was hired as a car salesman. Brooks worked at Mitsubishi until November 1989, at which time he went to work for Cloverdale Ford, another automobile dealership located in Forsyth County. He worked at Cloverdale Ford until Mitsubishi reemployed him on 19 April 1990. He continued working at Mitsubishi from April 1990 until January 1991. At all times defendant Brooks alleges that he was one of the top three salesmen for defendant Mitsubishi.

[\*\*\*3] On 26 January 1991, plaintiff, then eighteen years of age, considered purchasing a car from Mitsubishi. She met with defendant Brooks to test drive a Mitsubishi pickup truck. Plaintiff alleged that during the test drive Brooks assaulted her by touching and grabbing her about her arms, hands, groin area, and breasts. He also allegedly exposed his genitals and placed her hand on his private parts. Upon returning from the test drive, Brooks allegedly took plaintiff to the Mitsubishi service department, and again exposed himself and tried to force her to touch him. Plaintiff

freed herself from Brooks and left the premises.

At the time of the assault in January 1991, defendant Brooks had been charged in 1988 with first degree sexual offense and first degree burglary, to which he pleaded guilty to lesser charges in February 1989. On 4 June 1991, Brooks was convicted on charges arising out of the incident with plaintiff.

Plaintiff filed a complaint against defendants alleging that as a result of the assault by defendant Brooks she suffered from severe emotional distress. A default judgment was entered against defendant Brooks. Defendant Mitsubishi moved for summary judgment, and [\*\*\*4] the trial court entered a final judgment as to RLK, Inc. d/b/a/ Bob King Mitsubishi on 16 September 1992. Plaintiff appeals from the latter judgment.

**COUNSEL:** *Morrow, Alexander, Tash, Long & Black, by C.R. "Skip" Long, Jr., for plaintiff-appellant.*

*Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall, for defendant-appellee RLK, Inc., d/b/a Bob King Mitsubishi.*

**JUDGES:** Arnold, Chief Judge. Judges Wells and Johnson concur.

**OPINION BY: ARNOLD**

## OPINION

[\*611] [\*\*273] Plaintiff's only assignment of error is that the trial court erred by granting summary judgment in favor of defendant Mitsubishi. She argues that two theories exist from which she has presented sufficient evidence to show a genuine issue of material fact: negligent hiring and respondeat superior. Plaintiff also argues that under a respondeat superior theory and/or a gross negligence theory, a jury could determine that defendant's negligence rises to a level of willful, wanton or reckless disregard of plaintiff's rights, thus supporting an award of punitive damages.

[1] Plaintiff claims that the evidence was sufficient to raise a genuine issue of material fact on her claim of negligent hiring. North [\*\*\*5] Carolina recognizes a claim for negligent hiring when the plaintiff proves:

- (1) the specific negligent act on which the action is founded . . . (2)

incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . .*; and (4) that the injury complained of resulted from the incompetency proved.

*Walters v. Lumber Co.*, 163 N.C. 431, 435, 80 S.E. 49, 51 (1913) (quoting Shearman & Redfield on Negligence § 190 (6th ed. 1913)) (emphasis added); *see also Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942). Thus, employers of certain establishments can be held liable to an invitee therein assaulted by an employee of the place of business whom the employer "knew, or in the exercise of reasonable care in the selection and supervision of his employees should have known, to be likely, by reason of past conduct, bad temper or otherwise, to commit an assault, even though the particular assault was not [\*\*\*6] committed within the scope of the employment." *Wegner v. Delicatessen*, 270 N.C. 62, 65, 153 S.E.2d 804, 807 (1967).

The Supreme Court has recently addressed the issue of an employer's notice in a case not unlike the case at bar. In *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990), summary judgment was upheld in favor of defendants Franklin County Board of Education (FCB) and others associated with FCB, who had a claim for [\*612] negligent hiring brought against them by the plaintiff, a minor, who allegedly was sexually assaulted by the school's principal, defendant Bass. The plaintiff contended, *inter* [\*\*274] *alia*, that FCB negligently investigated defendant Bass before hiring him. The evidence showed that before working in the Franklin County Schools, defendant had worked as a teacher and principal in Rocky Mount, North Carolina for ten years. In 1968, a Rocky Mount student alleged that Bass sexually assaulted the student. Although he never confirmed or denied the incident, Bass resigned. The following year FCB hired him after telephoning only one of his references. FCB also sent forms to two other references in accordance with FCB policy, but did [\*\*\*7] not receive them until after hiring Bass. None of these contacts revealed the previous alleged sexual assault. Although rumors surfaced that Bass was a homosexual,

these rumors remained unconfirmed and Bass became a FCB principal, having performed his duties in a satisfactory manner for approximately sixteen years at the time of the alleged assault in Franklin County. The Court held that the facts were "devoid of evidence that defendants FCB or [the school superintendent] knew or reasonably could have known of defendant Bass' alleged pedophilic tendencies prior to the incident that is the subject of this lawsuit." *Medlin*, 327 N.C. at 592, 398 S.E.2d at 463.

Plaintiff contends that unlike the defendants in *Medlin*, the defendant here failed to conduct a reasonable investigation of its employee. A presumption exists that an employer has used due care in hiring his employees. *See Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627. The burden rests with the plaintiff to show that he has been injured as a result of the employer's negligent hiring if the employer had actual or constructive knowledge of the employee's incompetency. *Id.* There is no argument that defendant [\*\*\*8] had actual knowledge of Brooks' criminal past. Furthermore, the record is devoid of any suggestion that defendant had any constructive knowledge of Brooks' past, or that defendant did not exercise due care in hiring Brooks. Although defendant admits that it did not do a criminal record check on Brooks, we believe that it did not have a duty to do so. *See, e.g., Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978) (stating that the majority of courts do not recognize a duty to inquire about an employee's criminal record). Instead, defendant had a sufficient basis to rely upon Brooks because he was re-hired in April 1990, at which time he had a known history of top salesmanship with Mitsubishi and [\*613] good work habits. Moreover, at the second hiring (the time frame in which the assault occurred), Brooks filled out an insurance application in which he responded in the negative to the question "Have you ever been convicted of a fraudulent or dishonest act?" Therefore, as in *Medlin*, the forecast of evidence failed to show that Mitsubishi knew or reasonably could have known of Brooks' criminal history prior to the incident with plaintiff. Since the facts fail to support [\*\*\*9] a material element of negligent hiring summary judgment was therefore proper.

[2] Plaintiff also contends that there is a genuine issue of

material fact regarding defendant Mitsubishi's liability under a respondeat superior theory. An employer may be liable under the theory of respondeat superior when the employee's act was either expressly authorized, committed within the scope and in furtherance of the employer's business, or subsequently ratified by the employer. *Medlin*, 327 N.C. 587, 398 S.E.2d 460. "To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *B.B. Walker Co. v. Burns International Security Services*, 108 N.C. App. 562, 566, 424 S.E.2d 172, 174, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 552 (1993) (quoting *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668, *disc. review denied*, 322 N.C. 838, 371 S.E.2d 284 (1988)). Furthermore, "[w]here the employee's actions conceivably are within the scope of employment and in furtherance of the employer's business, the [\*\*\*10] question is one for the jury." *Medlin*, 327 N.C. at 593, 398 S.E.2d at 463. Intentional torts are seldom considered to be within the scope of an employee's employment. *Id.* at 594, 398 S.E.2d at 464.

[\*\*275] The alleged sexual assault by defendant Brooks clearly was not within the scope and in furtherance of his employment. The duties of the salespersons at Mitsubishi were to "meet and greet individuals interested in automobiles, help with selection and place the tag on the vehicle after the transaction." While defendant Brooks was exercising the authority vested in him to take plaintiff for a test drive, in proceeding to sexually assault her his actions fell within "the category of intentional tortious acts designed to carry out an independent purpose of defendant [Brooks'] own . . ." *Id.* There was no genuine issue of material fact, therefore, regarding defendant Mitsubishi's derivative liability under a respondeat [\*614] superior theory, and summary judgment for defendant Mitsubishi was proper.

Based on our decision that summary judgment was proper as to defendant's negligence, we need not address plaintiff's final argument on the issue of punitive damages.

[\*\*\*11] Affirmed.

**Elaine RICHARDSON and Heather  
Antedomenico, Plaintiffs**

v.

**COSTCO WHOLESALE  
CORPORATION,  
Defendant.**

**No. 3:98CV492(WWE).**

United States District Court,  
D. Connecticut.

Oct. 2, 2001.

Employees sued employer, claiming that an employment practice of locking employees in a store during its closing collection procedure violated Connecticut wage and hour statutes and the federal Fair Labor Standards Act (FLSA), and constituted false imprisonment, and a former employee asserted a claim of constructive discharge. On the employer's motion for summary judgment, the District Court, Eginton, Senior District Judge, held that: (1) limitations barred claims prior to specified date; (2) "lock-up" time was not compensable "work," as defined by the FLSA and Connecticut wage and hour statutes; (3) employees failed to prove a false imprisonment claim; and (4) common law claim for wrongful discharge was not available where employee had a statutory remedy in the FLSA.

Motion granted in part, and denied in part.

#### **1. Labor Relations ⇌1283**

"Lock-up" time employees spent in a warehouse during a store closing collection procedure was not compensable "work," as

defined by the Fair Labor Standards Act (FLSA) and Connecticut wage and hour statutes; employees were not required to remain after their shift primarily for the benefit of the employer, but were free to leave after their shift unless they happened to remain on the premises after commencement of the collection procedure, and thus, their presence in the warehouse during the collection procedure was not an indispensable part of their principal activities. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; C.G.S.A. § 31-76b(2)(A).

See publication Words and Phrases for other judicial constructions and definitions.

## 2. Labor Relations ⇌1104

To interpret the Connecticut wage and hour statutes, Connecticut courts look to authorities relevant to the Fair Labor Standards Act (FLSA). Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; C.G.S.A. § 31-76b(2)(A).

## 3. Labor Relations ⇌1281.1

Work for which employees must be compensated under the Fair Labor Standards Act (FLSA) means mental or physical exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

## 4. Labor Relations ⇌1285

Activities performed by employees either before or after their regular work shifts are compensable under the Fair Labor Standards Act (FLSA), when those activities are an integral and indispensable part of the principal activities which the workers are employed to perform. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

## 5. Labor Relations ⇌1281.1

Fact that an activity gives some benefit to an employer does not automatically compel that the activity is compensable under the Fair Labor Standards Act (FLSA) Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

## 6. False Imprisonment ⇌5

Employees failed to prove a false imprisonment claim under Connecticut law against their employer regarding a requirement that employees stay in a store during its closing collection procedure; employees were not physically or actually restrained, as a safe avenue of escape existed through the employee exit, even though opening the employee exit door would result in an alarm sounding and possible employee discipline. Restatement (Second) of Torts § 36 comment.

## 7. False Imprisonment ⇌2

To establish liability for false imprisonment under Connecticut law, plaintiffs must prove each of the following elements: (1) their physical liberty was actually restrained; (2) the defendant intended to confine them; (3) they were conscious of the confinement; (4) they did not consent to the confinement; and (5) the confinement was not otherwise privileged.

## 8. False Imprisonment ⇌5

Under Connecticut law, false imprisonment can only be based upon circumstances that include actual restraint, threat of force or the assertion of legal authority.

## 9. False Imprisonment ⇌5

Under Connecticut law, for purposes of a false imprisonment claim, a reasonable means of escape does not exist if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity. Restatement (Second) of Torts § 36 comment.

### 10. Master and Servant ☞35

Under Connecticut law, a common law claim for wrongful discharge is available only where the employee is without any other remedy.

### 11. Master and Servant ☞35

Under Connecticut law, a common law claim for wrongful discharge was not available where the employee had a clear statutory remedy in the Fair Labor Standards Act (FLSA). Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

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William Thomas Blake, Jr., West Haven, CT, for plaintiffs.

Jonathan B. Orleans, Zeldes, Needle & Cooper, Bridgeport, CT, Edward Cerasia, II, Proskauer Rose, Newark, NJ, for defendant.

### ***RULING ON MOTION FOR SUMMARY JUDGMENT***

EGINTON, Senior District Judge.

This action concerns defendant Costco Wholesale Corporation's employment practice of locking employees in the store during its closing collection procedure. Plaintiffs Elaine Richardson and Heather Antedomenico allege that defendant's lock-in procedure violates the Connecticut General Statutes and the federal Fair Labor Standards Act ["FLSA"], and constitutes false imprisonment. Plaintiff Richardson alleges a claim of constructive discharge.

Defendant has filed a motion for summary judgment.

#### *Background*

The parties have submitted briefs, statements of facts pursuant to Local Rule 9(c), and supporting exhibits. These materials reveal the following undisputed facts.

Defendant Costco hired plaintiff Elaine Richardson in September, 1993, at its Waterbury, Connecticut store. She began her career with defendant as a part time cashier and was made a full time cashier in 1994. In 1996, she was transferred to the defendant's warehouse in Brookfield, Connecticut, where she worked as a cashier until her employment terminated in January, 1999.

Richardson received an hourly wage of \$12.14 as of May, 1995; \$12.67 as of August, 1995; \$13.60 as of December, 1995; \$14.67 as of March, 1996; and \$14.92 as of June 2, 1998.

In 1998, Richardson began having work-related problems. On January 22, 1998, Richardson was asked by a front-end supervisor to sign off on a front-end supervisor checklist. She refused to do so. Richardson was issued a counseling notice for this incident which she refused to sign. On April 29, 1998, Richardson left work without authorization, and received verbal counseling for this violation of Costco policy. On August 22, 1998, Richardson left work 1.2 hours prior to the end of her shift with a line of waiting members at her register. On August 25, 1998, Richardson received a counseling notice and was suspended for three days without pay for this violation of Costco policy.

Plaintiff Heather Antedomenico began her employment with defendant as a seasonal part time employee in September, 1991, working as a membership clerk on a part time basis. In January, 1992, she became a permanent part-time employee. At present, she is employed in this position.

Since February, 1997, Antedomenico has worked 30 hours per week; prior to that time, she worked 20 hours per week. She has not worked more than 40 hours per week since 1994. As of November, 1994,

Antedomenico received an hourly wage of \$13.00 per hour; and in March, 1998, Antedomenico's hourly wage increased to \$14.00, which remains her current wage.

At the conclusion of an employee's scheduled work shift, the employee leaves her work station, logs out on defendant's computerized time clock, collects any personal belongings in the employee locker area. An employee may then leave the warehouse unless the collection procedure has commenced. If an employee who has already clocked out does not leave the warehouse prior to the collection procedure, that employee remains in the warehouse until the conclusion of that procedure.

The collection procedure begins after the last customer member leaves Costco's Brookfield warehouse, the member's exit door is closed and locked, and the employee exit door is closed and alarmed. Generally, the collection procedure begins within five minutes after the employee exit door is alarmed.

No employee is allowed to leave the warehouse until the collection procedure is completed. Employees who have completed their shifts have been locked inside the warehouse during the collection procedure. At completion of the procedure, a manager disengages the alarm on the employee door so that any employee whose shift has ended can leave the warehouse. A manager then resets the security alarm on the employee door.

During the collection procedure one person takes tills from the cash registers and brings them to the vault. Another person takes the jewelry and brings it to a merchandise pickup room. A total of 36 cash till and money bags are collected during this process. Once in the vault, the manager signs a log showing the time that the cash was placed in the vault.

Plaintiffs assert that the collection procedure has taken up to 40 minutes on nights when they have been locked in the store. Plaintiffs also state that the collection procedure can take as little as ten minutes.

Neither plaintiff has records reflecting when or how often they remained in the warehouse during closing procedures. Antedomenico claims that she has remained in the warehouse during closing procedure once or twice since March, 1998.

Employees may leave the warehouse during closing procedures during an emergency situation. However, employees leaving for reasons other than an emergency could be subject to disciplinary action.

This action was commenced in Connecticut superior court on March 2, 1998, and removed to federal court on March 18, 1998.

#### DISCUSSION

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. *American International Group, Inc. v. London American International Corp.*, 664 F.2d 348, 351 (2d Cir.1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the

moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, then summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548. If the nonmoving party submits evidence which is “merely colorable,” legally sufficient opposition to the motion for summary judgment is not met. *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505.

#### *Counts One and Two*

Plaintiffs’ count one alleges that, under the Connecticut General Statutes Section 31-76b(2)(A), plaintiffs are entitled to wages for time spent “on the premises . . . after the warehouse has closed, until all of the cash and jewelry and drawers are collected and verified” and during their off-duty hours, and lunch hours when they have been asked to read administrative and training materials. In count two, plaintiffs allege that Costco employed them for workweeks in excess of 40 hours without overtime compensation, and that Costco failed to pay them a minimum wage, in violation of the FLSA and Connecticut law.

Defendant urges entry of summary judgment on these claims because (1) plaintiffs’ claims are barred by the relevant statute of limitations, (2) the time in question is not compensable as “work,” (3) plaintiffs cannot support their claims with proof, and (4) the amount of time in question is *de minimus*.

The court notes that defendant’s brief attacks the merits of plaintiffs’ claim that defendant failed to pay wages for time spent watching videos and reading employ-

ee material during lunch hours and breaks. However, plaintiffs’ opposition brief addresses only the claims relevant to defendant’s lock-in closing procedure. Accordingly, the court deems this portion of plaintiffs’ claims to be waived. This ruling addresses the arguments relevant to defendant’s lock-in closing procedures.

Defendant argues first that plaintiffs’ claims are barred by the applicable two year statute of limitations. 29 U.S.C. § 255; C.G.S. § 52-596; *Butler v. McIntosh*, 1997 WL 112010, at \* 5 (Conn.Super.1997). Plaintiffs make no attempt to assert that the FLSA’s three-year statute of limitations period for claims “arising out of a wilful violation” applies to this case. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988). Accordingly, the Court will dismiss plaintiff’s claims based on conduct that occurred prior to March 2, 1996. The court also reviews the merits of plaintiffs’ claims since the contested lock-in closing procedure may have resulted in detainment of the plaintiffs after March 2, 1996.

[1,2] Connecticut General Statutes Section 31-76b(2)(A) defines “hours worked” as “all time during which an employee by the employer is required to be on the employer’s premises or to be on duty, or to be at the prescribed work place, and all time during which an employee is employed or permitted to work, whether or not required to do so.” Thus, the determination of whether plaintiffs’ claim is meritorious depends upon whether their time spent during the “lock-up” constitutes work as defined by the Connecticut General Statutes and the FLSA<sup>1</sup>.

[3,4] Work for which employees must be compensated under the FLSA means

1. To interpret the Connecticut wage and hour statutes, Connecticut courts look to authorities relevant to the FLSA. See *Canzolino v.*

*United Technologies Corporation*, 1998 WL 851407 at \* 3.

“mental or physical exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.” *Tennessee Coal, Iron & R.R. v. Muscoda*, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944). Activities performed by employees either before or after their regular work shifts are compensable under the FLSA, when those activities are an integral and indispensable part of the principal activities which the workers are employed to perform. *Steiner v. Mitchell*, 350 U.S. 247, 253–56, 76 S.Ct. 330, 100 L.Ed. 267 (1956)(changing clothes and showering were compensable post-shift activities where employees at a battery production plant were exposed to dangerous toxic chemical and lead).

In this instance, plaintiffs were not required to remain after their shift primarily for the benefit of defendant. In fact, plaintiffs were free to leave after their shift unless they happened to remain on the premises after commencement of the collection procedure. Accordingly, plaintiffs’ presence in the warehouse during the collection procedure is not an indispensable part of the plaintiffs’ principal activities.

[5] Although the lock-in procedure may have benefitted defendant by ensuring the safety of defendant’s merchandise and cash, the time spent by the plaintiffs who remained in the warehouse after their shift was not primarily for defendant’s benefit. As defendant pointed out, the lock-in also safeguarded the employees from break-ins during the collection procedure. Furthermore, the fact that an activity gives some benefit to an employer does not automatically compel that the activity is compensable. *Reich v. IBP, Inc.*, 820 F.Supp. 1315, 1324 (D.Kan.1993), *affirmed on this ground*, 38 F.3d 1123 (10th Cir. 1994). The court finds that the time spent

in the warehouse during the collection procedure does not constitute compensable work. The court will enter summary judgment on count one and on count two, which count is contingent on a finding that time spent during the collection procedure constitutes compensable work.

#### *Count three*

[6] In count three, plaintiffs assert that the lock-in procedure constitutes false imprisonment. Defendant argues that plaintiffs cannot prove the prima facie case of false imprisonment.

[7, 8] To establish liability for false imprisonment, plaintiffs must prove each of the following elements: (1) their physical liberty was actually restrained; (2) the defendant intended to confine them; (3) they were conscious of the confinement; (4) they did not consent to the confinement; and (5) the confinement was not otherwise privileged. *Berry v. Loiseau*, 223 Conn. 786, 820, 614 A.2d 414 (1992). False imprisonment can only be based upon circumstances that include actual restraint, threat of force or the assertion of legal authority. *See Orgovan v. Eaton Fin. Corp.*, 1996 WL 155388\*3 (Conn.Super.1996).

In this instance, plaintiffs cannot prove that they were physically or actually restrained because a safe avenue of escape existed through the employee exit. *See* Restatement (Second) of Torts § 36 (1965). The evidence demonstrates that Richardson and Antedomenico understood that they could exit through the employee door during the closing procedures. The fact that opening the employee exit door would result in an alarm sounding and possible employee discipline does not give rise to an inference that actual confinement or threatening conduct took place. Moral pressure or threat of losing one’s job does not constitute a threat of force sufficient to

establish that plaintiffs' were involuntary restrained. See *Faniel v. Chesapeake and Potomac Telephone Company of Maryland*, 404 A.2d 147, 152 (D.C.Ct.App.1979). Testimony that two managers once ran after an employee who exited during closing procedures and informed her that she would be suspended for her conduct does not establish a threat of force.

[9] Plaintiffs argue that the employee exit was not a reasonable means of egress because it would entail triggering an alarm. A reasonable means of escape does not exist if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity. Restatement (Second) of Torts, § 36(2), Comment a. However, the Restatement elaborates that it is unreasonable to refuse to utilize a means of escape because it entails "a slight inconvenience or requires him to commit a technical invasion of another's possessory interest. . . ." For example, as illustrated by the Restatement, it is unreasonable to require an unclothed individual to exit into a room of people, or to require an individual to use an exit that would cause material damage to her clothing. Exiting through an alarmed door in this instance does not rise to the level of offensiveness contemplated by the Restatement. The court will enter summary judgment on count three.

#### *Count Four*

In count four, plaintiff Richardson claims that she was "constructively discharged" as a result of Costco's alleged retaliation towards her for having complained about her belief that Costco was violating the wage and hour laws. Richardson asserts her constructive discharge claims pursuant to the FLSA, the Connecticut Act and Connecticut common law.

Upon review, the Court find that disputed issues of fact preclude entry of summary judgment on Richardson's claim of constructive discharge pursuant to the

FLSA and the Connecticut General Statutes.

[10, 11] However, summary judgment will enter on Richardson's wrongful discharge claim brought pursuant to Connecticut common law. Under Connecticut law, a common law claim for wrongful discharge is available only where the employee is without any other remedy. *Atkins v. Bridgeport Hydraulic Co.*, 5 Conn.App. 643, 648, 501 A.2d 1223 (1985). Because plaintiff has a clear statutory remedy in the FLSA, her common law claim of wrongful discharge cannot be sustained.

#### CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment [doc. # 46] is GRANTED in part, and DENIED in part. Summary judgment is granted as to all claims except the claim of constructive discharge brought pursuant to the FLSA and the Connecticut General Statutes. Plaintiff is instructed to amend the complaint in accordance with this ruling within 30 days of this ruling's filing date.

SO ORDERED.



LEXSEE 466 NE2D 1309

**JOVITA (ESTHER) LOPEZ, Plaintiff-Appellant, v. WINCHELL'S DONUT HOUSE, Defendant-Appellee****No. 83-1656****Appellate Court of Illinois, First District, Fifth Division****126 Ill. App. 3d 46; 466 N.E.2d 1309; 1984 Ill. App. LEXIS 2096; 81 Ill. Dec. 507****July 20, 1984, Filed**

**PRIOR HISTORY:** [\*\*\*1] Appeal from the Circuit Court of Cook County; the Hon. Thomas J. O'Brien, Judge, presiding.

**DISPOSITION:** Order affirmed.

**COUNSEL:** John Panici, of Chicago, for appellant.

Hubbard, Hubbard, O'Brien & Hall, of Chicago (Frederick W. Temple and John Skapars, of counsel), for appellee.

**JUDGES:** JUSTICE LORENZ delivered the opinion of the court. MEJDA, P.J., and SULLIVAN, J., concur.

**OPINION BY:** LORENZ

**OPINION**

[\*47] [\*\*1309] Plaintiff appeals from an order of the circuit court granting defendant corporation's motion for summary judgment. Plaintiff contends that the trial court erred in entering summary judgment against her because a genuine issue of material fact existed concerning her charge that she was [\*\*1310] falsely detained and imprisoned. For the reasons which follow, we affirm the trial court's decision.

Count I of plaintiff's unverified two-count complaint alleged that plaintiff was employed as a clerk in defendant's donut shop in Woodridge, for approximately three years; that on or about April 8, 1981, defendant, through its agents and employees, Ralph Bell and James Cesario, accused her of selling donuts without registering sales and thereby pocketing defendant's [\*\*\*2] monies;

and that she was falsely detained and imprisoned against her will in a room located on defendant's premises, with force, and without probable and reasonable cause, by defendant's employees. Count I of her complaint also alleged that as a result of defendant's employees' wilful and wanton false imprisonment, she was exposed to public disgrace; greatly injured in her good name and reputation; suffered, and still suffers, great mental anguish, humiliation and shock; wrongfully terminated from her employment; required to seek medical attention; all of which prevented her from attending to her usual affairs.

Defendant filed its answer on August 19, 1981, denying the material allegations of count I of plaintiff's complaint. Further, on February 9, 1983, defendant amended its answer by filing an affirmative defense that alleged, *inter alia*, it was a merchant; that any questioning of plaintiff by its employees was performed only after said employees had reasonable grounds to believe that plaintiff had committed [\*48] retail theft while working for defendant; that any alleged detention for questioning was limited solely to an inquiry as to whether plaintiff had failed to [\*\*\*3] ring certain retail sales; and that such inquiry took place in a reasonable manner and for a reasonable length of time.

Defendant's motion for summary judgment on count I of the complaint set forth the argument that plaintiff's complaint, sounding in false imprisonment and alleging that she was held against her will by her employers in a certain room of a Winchell's Donut House, was contradicted by her testimony in a discovery deposition. Defendant argued that plaintiff testified in this deposition that she had voluntarily complied with Messrs. Bell and Cesario's request to speak privately with her regarding

the matter of shortages in her register on April 9, 1981. Defendant further argued that plaintiff testified that when she no longer wished to continue her conversation with her employers, she got up and went home, electing never to return to her job.

The motion included portions of plaintiff's deposition which disclosed the following. James Cesario telephoned plaintiff at her home at 4:30 p.m. on April 9, 1981, and asked her to come down to the donut shop; he did not explain his reasons for wanting her to do so. As a result of this call, plaintiff walked to the store from [\*\*\*4] her home, arriving 10 minutes later. Upon her arrival at the store, Cesario asked her to accompany him into the baking room, which was located at the rear of the store; Ralph Bell was also present in the room. After Cesario asked plaintiff to sit down, she indicated that they (Cesario and Bell) closed the door and locked it by putting a "little latch on." She stated that the two men told her that they had proof that spotters going from store to store had purchased two dozen donuts from her, but that her register had not shown the sale. After refusing her request to view the "proof," plaintiff stated that she was "too upset" to respond to their questioning regarding the length of time that her alleged "shorting" of the cash drawer had been going on.

She further stated that defendant's employees never told her that she had to answer their questions or face the loss of her job; never directly threatened to fire her; and made no threats of any kind to her during the interrogation. She further testified that she at no time during the interrogation feared for her safety; that she at no time refused to answer any question put to her; that there was never a point in the interrogation [\*\*\*5] that she said, "I want to leave" and was prevented from doing so; and that she got up, left the [\*\*1311] room and went home when she first decided to do so.

Plaintiff's written response to defendant's motion for summary [\*49] judgment did not contradict the statements that she had made in her discovery deposition. In her affidavit filed in support of her response to defendant's motion for summary judgment, plaintiff averred that (1) she left the baking room after she began to shake, and when she felt that she was becoming ill; and (2) she was terminated from her employment by defendant.

The trial court entered summary judgment for defendant. Plaintiff appeals from that order. Count II of

her complaint alleging defamation of character remains pending in the trial court.

### Opinion

It is well established that summary judgment determines whether any genuine issue of material fact exists and summarily disposes of cases where no such fact exists in order to avoid congestion of trial calendars and the expense of unnecessary trials. (*Loveland v. City of Lewistown* (1980), 84 Ill. App. 3d 190, 192, 405 N.E.2d 453.) The motion should be granted where the pleadings, [\*\*\*6] exhibits, depositions and affidavits of record show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. (Ill. Rev. Stat. 1981, ch. 110, par. 2 -- 1005(c).) In addition, discovery depositions may be used in the context of summary judgment proceedings "for any purpose for which an affidavit may be used." See 87 Ill. 2d R. 212(a)(4); see also *Sierens v. Clausen* (1975), 60 Ill. 2d 585, 588, 328 N.E.2d 559.

In ruling on a motion for summary judgment, the trial court must construe pleadings, depositions and affidavits included therein most strictly against the movant and most liberally in favor of the nonmovant. (*Blaylock v. Toledo, Peoria & Western R.R. Co.* (1976), 43 Ill. App. 3d 35, 37, 356 N.E.2d 639.) The defendant may at any time move for summary judgment in his favor for all or any part of relief sought against him. (*Kusiciel v. LaSalle National Bank* (1982), 106 Ill. App. 3d 333, 338.) However, because summary judgment is a drastic method of disposing of litigation, it should be granted only when the right of the movant is clear and free from doubt. *Hillblom v. Ivancsits* (1979), 76 Ill. App. 3d 306, 310, [\*\*\*7] 395 N.E.2d 119.

Plaintiff asserts that the trial court erred in granting defendant's motion for summary judgment as there exists a genuine issue of material fact. She posits that she felt compelled to remain in the baking room so that she could protect her reputation by protesting her innocence to the two men, and that she left the room once she began to shake and feel ill. Additionally, she attributes her "serious emotional upset" to her feelings of intimidation that she contends were caused [\*50] by: James Cesario's sitting directly next to her during questioning, yellow pad and pencil in hand; Ralph Bell's repeated statement that his briefcase contained proof of her guilt; and his raised voice.

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1984 Ill. App. LEXIS 2096, \*\*\*7; 81 Ill. Dec. 507

The common law tort of false imprisonment is defined as an unlawful restraint of an individual's personal liberty or freedom of locomotion. (*Johnson v. Jackson* (1963), 43 Ill. App. 2d 251, 258, 193 N.E.2d 485; *Shelton v. Barry* (1946), 328 Ill. App. 497, 506, 66 N.E.2d 697.) Imprisonment has been defined as "any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or to go where he does not wish to go." (*McKendree* [\*\*\*8] v. *Christy* (1961), 29 Ill. App. 2d 195, 199, 172 N.E. 2d 380.) In order for a false imprisonment to be present, there must be actual or legal intent to restrain. *Campbell v. Kaczmarek* (1976), 39 Ill. App. 3d 465, 469, 350 N.E.2d 97.

Unlawful restraint may be effected by words alone, by acts alone or both (*Hassenauer v. F. W. Woolworth Co.* (1942), 314 Ill. App. 569, 41 N.E.2d 979 (abstract of opinion)); actual force is unnecessary to an action in false imprisonment. (*Winans v. Congress Hotel Co.* (1922), 227 Ill. App. 276, 282.) [\*\*1312] The Restatement of Torts specifies ways in which an actor may bring about the confinement required as an element of false imprisonment, including (1) actual or apparent physical barriers; (2) overpowering physical force, or by submission to physical force; (3) threats of physical force; (4) other duress; and (5) asserted legal authority. Restatement (Second) of Torts secs. 38 through 41 (1965).

It is essential, however, that the confinement be against the plaintiff's will, and if a person voluntarily consents to the confinement there can be no false imprisonment. (*Fort v. Smith* (1980), 85 Ill. App. 3d 479, 481, [\*\*\*9] 407 N.E.2d 117.) "Moral pressure, as where the plaintiff remains with the defendant to clear himself of suspicion of theft \* \* \* is not enough; nor, as in the case of assault, are threats for the future \* \* \*. Any remedy for such wrongs must lie with the more modern tort of the intentional infliction of mental distress." Prosser, Torts sec. 11, at 45 (4th ed. 1971).

Plaintiff principally relies on the court's decision in *Marcus v. Liebman* (1978), 59 Ill. App. 3d 337, 375 N.E.2d 486, for support of her position that summary judgment should not have been granted in the instant case. In *Marcus v. Liebman*, the court extensively examined the concept that threats of a future action are not enough to constitute confinement. (59 Ill. App. 3d 337, 341.) There, the defendant psychiatrist threatened to

have plaintiff committed to the Elgin State Hospital, and the *Marcus* court found that this was a *present* threat, [\*51] constituting false imprisonment, as opposed to a threat of future action. The court in *Marcus* concluded that the lower court had incorrectly directed a verdict for the defendant, and reversed and remanded the case for trial on the question of imprisonment. [\*\*\*10] The court noted that plaintiff was already voluntarily committed to the psychiatric wing of a private hospital when the defendant made the threat to commit her to a state mental hospital and reasoned, "[A]t the time the alleged threat was made plaintiff was already confined. It was certainly reasonable for the plaintiff to believe that before her release [from the private hospital] commitment procedures could have been concluded." 59 Ill. App. 3d 337, 341.

Our analysis of the *Marcus* decision, as well as the other cases cited by plaintiff, does not support plaintiff's position. All of these cases are easily distinguishable from the present case, as in each, either physical restraint or present threats of such were present.

In the case at bar, we are confronted with plaintiff's testimony, given under oath, that she voluntarily accompanied James Cesario to the baking room; that she stayed in the room in order to protect her reputation; that she was never threatened with the loss of her job; that she was never in fear of her safety; and that at no time was she prevented from exiting the baking room. Her affidavit, in which she averred that she left the baking room after [\*\*\*11] she began to shake and when she felt that she was becoming ill, does not place into issue material facts which she had previously removed from contention. (*Fontaine v. Hadlock* (1971), 132 Ill. App. 2d 343, 347, 270 N.E.2d 222.) In her discovery deposition, given under oath, she stated that she "got up and left" when Ralph Bell asked her how long the cash register "shorting" had been going on.

In the tort of false imprisonment, it is not enough for the plaintiff to have felt "compelled" to remain in the baking room in order to protect her reputation (see Prosser, Torts sec. 11 (4th ed. 1971)), for the evidence must establish a restraint against the plaintiff's will, as where she yields to force, to the threat of force or the assertion of authority. (See Restatement (Second) of Torts secs. 38 through 41 (1965).) In the present case, our search of the record reveals no evidence that plaintiff yielded to constraint of a threat, express or implied, or to

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physical force of any kind. Also, absent evidence that plaintiff accompanied Cesario against her will, we cannot say that she was imprisoned or unlawfully detained by defendant's [\*\*1313] employees. Finally, we [\*\*\*12] find no merit to plaintiff's argument that defendant's affirmative defense constituted an admission of an unlawful restraint.

[\*52] For the reasons stated above, we conclude that the trial court properly granted defendant's motion for summary judgment, as there exists no question of material fact in the present case.

Affirmed.

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**39 S.W.3d 474**  
**Wade BANKS, Appellant,**  
**v.**  
**John FRITSCH, Appellee.**  
**No. 1999-CA-002254-MR.**  
**Court of Appeals of Kentucky.**  
**March 2, 2001.**  
**Page 475**

David A. Weinberg, Weinberg & Capella  
Lexington, KY, Brief and Oral Argument for  
Appellant.

Arthur L. Brooks, Brooks, Fitzpatrick &  
McComb, Lexington, KY, Brief and Oral  
Argument for Appellee.

Before GUDGEL, Chief Judge; and  
BARBER and KNOPF, Judges.

OPINION

KNOPF, Judge.

The appellant, Wade Banks, brought this  
complaint against the appellee, John Fritsch,  
alleging false imprisonment., assault and battery,  
and outrageous

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conduct. A jury trial was conducted on July 21,  
1999. At the close of Banks's case, the trial court  
directed a verdict in favor of Fritsch, finding that  
Banks had failed to present evidence that he had  
been damaged by Fritsch's conduct. We find that  
the trial court erred in dismissing the claims for  
false imprisonment and assault and battery as  
there was sufficient evidence of emotional  
damages to warrant submitting the issue to the  
jury. However, we also conclude that the tort of  
outrageous conduct is not available under the  
facts presented in this case. Hence, we reverse  
the trial court in part, affirm in part, and remand  
this action for a new trial.

Since the trial court dismissed this action  
on a motion for a directed verdict, we shall view  
the evidence in the light most favorable to the

appellant. In June 1996, Banks was 17 years old  
and was a Junior at Bourbon County High  
School. His last class of the school day was  
Agriculture Wood Construction, taught by  
Fritsch. By his own admission, Banks had either  
skipped the class or left the class early on a  
number of occasions during that semester.1  
Banks testified that, while he was walking to the  
class on June 4, another student told him that  
Fritsch had a chain, and was planning to chain  
Banks up to keep him from skipping class.  
Nevertheless, Banks proceeded to the class.

Banks testified that when Fritsch walked  
into the classroom, he had a large log chain over  
his shoulder and had several key locks on his  
belt loop. Fritsch then told Banks that he was  
going to keep him from leaving the class early.  
After taking roll, Fritsch directed Banks to put  
his leg up on a chair so he could put the chain  
around Banks's ankle. Banks states that he  
initially protested, and then went along after  
Fritsch repeated the instruction. Fritsch secured  
the chain around Banks's ankle, and led him  
outside to an area where the class was painting  
feed troughs. Fritsch then put the chain around a  
tree, locked it, and told Banks not to go  
anywhere.

The entire class followed Fritsch and Banks  
from the classroom to the tree. After Banks was  
secured to the tree, Fritsch returned to the  
classroom and the other students went on with  
their projects. Banks sat down under the tree,  
removed his shoe and began trying to work the  
chain loose. After several minutes, Banks was  
able to remove the chain from his ankle, and he  
then attempted to leave the school premises.  
Several of his classmates chased Banks down,

tackled him, and then carried Banks back to the tree. Fritsch returned, placed another chain around Banks's neck, and then secured it to the chain around the tree.

Banks testified that he initially stood up and held the chain to keep its weight off of his neck. After about fifteen minutes, he got tired of holding the chain, so he sat down and began crying. Banks told another student that the chain was bothering him, and the student went to tell Fritsch. Several minutes later, Fritsch came and removed the chain from Banks's neck. However, Fritsch then secured the other chain tightly around Banks's ankle.

Thereafter, Fritsch and Banks began discussing his grades in the class and what it would take from him to pass. Fritsch returned to the classroom to check his records to see if Banks was in a position to pass the class. Upon returning five minutes later, Fritsch told Banks that he could pass the class if he painted the three remaining

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feeder and mineral troughs. Banks agreed and Fritsch removed the chain. Banks subsequently finished the painting assignments, and he received a passing grade in Fritsch's class. Banks testified that the chaining incident took place over a period of about an hour and a half.

Fritsch's account of the incident differs only slightly in the details, but markedly in tone. Fritsch testified that the idea of chaining Banks started as a joke between him and the other students in the class. Several days prior to the incident, Fritsch made an off-hand comment in front of the class to the effect that perhaps he should chain the truant boys to keep them from skipping class. On June 4, as Banks was arriving for class, the other students reminded Fritsch of this statement. After some prodding from the class, Fritsch decided to go forward with the plan.

Fritsch further testified that Banks never objected to the chaining, and in fact, he went along with the joke and appeared to enjoy the

attention. Fritsch did not recall placing the chain on Banks's leg in the classroom and leading him outside. This testimony was contradicted somewhat by another teacher, Ralph Speakes, who saw Banks leaving Fritsch's classroom with the chain around his ankle. However, Speakes also testified that everyone (including Banks) seemed to be laughing about it. In addition, Fritsch states that after Banks managed to remove the chain the first time, he called it to the attention of the other students and dared them to catch him. Several students informed Fritsch about Banks's escape, and they asked Fritsch what they should do about it. Fritsch told them that Banks should come back and finish the project, but he stated that he did not tell any of the students to bring Banks back. Speakes testified that Banks appeared to be leading the chase, and after the students caught up with Banks, they merely led him back to the class area. Fritsch denied that Banks ever showed that he was upset about the chaining or that he ever asked for the joke to stop, except for when Banks complained about the chain around his neck. Fritsch steadfastly denies that the chaining was intended as a punishment, or that he ever intended to hurt or humiliate Banks. Rather, Fritsch merely intended it as a light-hearted prank to impress on Banks the importance of staying in class and finishing his assignments. Fritsch further stated that the entire incident took place over 25 to 30 minutes.<sup>2</sup>

Banks testified that he was deeply upset by the chaining and thought about it often. After the incident was publicized, he states that other students gave him a hard time about it on several occasions. He also received a lot of unwelcome and negative media attention over the incident. In response, he decided that he could not return to Bourbon County High School in the fall. Instead, he went to live with his father and attended his senior year of high school in Columbia, Missouri. Banks testified that the move was traumatic for him, and it was difficult for him to fit in at his new school.

Banks saw a psychologist to discuss his feelings once prior to the move to Missouri. Banks further testified that sometimes he has

flashbacks and sometimes starts to cry over memories of the chaining. His family members stated that Banks had a hard time dealing with the incident and often seemed withdrawn. However, there was no expert testimony describing Banks's emotional state following the chaining.

At the close of Banks's case, the trial court granted Fritsch's motion for a directed verdict. The court determined that

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there was enough evidence to establish that a false imprisonment and an assault and battery occurred. However, the court concluded that there was no evidence that Banks had been damaged by Fritsch's conduct. The trial court stated on the record:

I mean, this strikes me as being exactly what it's characterized as, a prank, and perhaps one that was not appreciated by Mr. Banks and I can understand that, but I don't see that there's been any harm done here. Clearly, Mr. Fritsch should not have done this. He's been told that by a number of people, I think he realizes that. The fact is it happened, and basically there seems to be no harm, no foul here. And I haven't been proved-it hasn't been proven to me, and therefore I don't think the jury can find that there are damages here that Mr. Banks has suffered. There's evidence of that, I don't think that that is significant at this point. I think on the basis of the damages issue, that I am going to direct a verdict here in favor of Mr. Fritsch on all of these counts. I just don't think the jury has enough evidence to decide that Mr. Banks has been damaged by the incidence [sic], that it has been proven to then happen.

The trial court's written order granted the directed verdict for Fritsch based upon the oral findings in the record. Banks now appeals, arguing that there was sufficient evidence of damages to warrant submitting the issue to the jury. He further argues that he was also entitled to an instruction on punitive damages.

Fritsch responds that the trial court properly granted his motion for a directed verdict because Banks failed to establish the elements of false imprisonment, assault and battery, and outrageous conduct. However, the trial court specifically granted the directed verdict based upon lack of evidence to establish that Banks was damaged by Fritsch's actions. Moreover, the trial court found that Banks had presented sufficient evidence to create a jury issue on his claims alleging false imprisonment and assault and battery. Since Fritsch did not file a cross-appeal contesting this finding, this appeal is limited to the question of whether Banks presented sufficient evidence of damages to overcome Fritsch's motion for a directed verdict.

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party.<sup>3</sup> Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.<sup>4</sup> However, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses<sup>5</sup>

In order to consider the propriety of the trial court's decision to grant the motion for a directed verdict, we must first consider the nature of the claims asserted by Banks. The action for the tort of false imprisonment, sometimes called false arrest, is a lineal descendant of the old action of trespass to person. It protects the personal interest in freedom from physical

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restraint.<sup>6</sup> The interest involved is "in a sense a mental one," and false imprisonment may be maintained without proof of actual damages.<sup>7</sup> The tort is complete after "even a brief restraint on the plaintiff's freedom," and the plaintiff may recover nominal damages.<sup>8</sup> The plaintiff is entitled to compensation for loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to health. Since the injury is in large part a mental one, the plaintiff is also entitled to damages for mental suffering, humiliation and the like.<sup>9</sup>

Kentucky cases define false imprisonment as being any deprivation of the liberty of one person by another or detention for however short a time without such person's consent and against his will, whether done by actual violence, threats or otherwise.<sup>10</sup> Furthermore, false imprisonment requires that the restraint be wrongful, improper, or without a claim of reasonable justification, authority or privilege.<sup>11</sup> Fritsch's potential liability does not arise out of his efforts to keep Banks from leaving the class, and there is no contention that Fritsch was acting within the scope of his authority as a teacher. Rather, Fritsch's primary defense is that there was no imprisonment because Banks consented to being chained.

There are no Kentucky cases which directly discuss what evidence is necessary to prove damages from false imprisonment. However, a number of cases are instructive insofar as they address evidentiary issues relating to submission of the issue of damages to the jury. In *Butcher v. Adams*,<sup>12</sup> the plaintiff's testimony that he was humiliated by his false arrest on charges relating to the operation of his tavern was mitigated by evidence that he had previously been arrested on similar charges. The court noted that this evidence was sufficient for the jury to consider whether the plaintiff had actually been embarrassed by the false imprisonment.

In *Bradshaw v. Steiden Stores, Inc.*,<sup>13</sup> a store patron was detained for an hour while the store owner checked on the validity of her check. The store owner then told her to go to a back room, where briefly the patron was

questioned by two policemen. Once the validity of the check was established, the patron was allowed to go. The former Court of Appeals acknowledged that the patron had established a "borderline" case of false imprisonment. However, the Court noted that there was no evidence that the patron had been unnecessarily humiliated or embarrassed by the incident. Since at most the evidence would have justified an award of nominal damages, the Court concluded that the directed verdict in favor of the store owner was not reversible error. Similarly, in *SuperX Drugs of Kentucky, Inc. v. Rice*,<sup>14</sup> this Court held that, in an action for false imprisonment where the person is subsequently and properly charged with the commission of a felony, she can recover damages only for that mental suffering and embarrassment

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which she endured during the period prior to her arrest. Under these circumstances, this Court concluded that the plaintiff was entitled to no more than nominal damages, and the jury's award of \$75,000.00 in compensatory damages was clearly excessive.

The common thread among all these cases is that a plaintiff may be entitled to at least nominal damages arising from the humiliation, emotional distress or damage to reputation caused by the false imprisonment. "Humiliation and embarrassment are, by their nature, not easily quantified ..."<sup>15</sup> Nevertheless, the degree of humiliation or embarrassment actually suffered by the plaintiff is a factual matter for the jury to decide.

There was clearly a factual issue concerning whether Fritsch's conduct constituted an unlawful imprisonment of Banks. Furthermore, Banks testified that he suffered humiliation, embarrassment, emotional distress and he was held up to the ridicule of his peers by being publicly chained. There was contrary evidence that Banks did not express any distress during the chaining. Nevertheless, we are satisfied from the record that the jury could have returned a verdict for Banks for an amount

greater than nominal damages. Consequently, we find that the trial court's decision to dismiss this claim was erroneous.

Banks's second claim is that Fritsch's conduct amounted to an assault and battery. Assault is a tort which merely requires the threat of unwanted touching of the victim, while battery requires an actual unwanted touching.<sup>16</sup> Since intent is an essential element of assault and battery, the trial court properly left to the jury the issue of Banks's consent to the chaining.<sup>17</sup> However, a plaintiff need not prove actual damages in a claim for battery because a showing of actual damages is not an element of assault or battery and, when no actual damages are shown for a battery, nominal damages may be awarded.<sup>18</sup> Furthermore, a recovery for emotional distress caused by the assault or battery is allowable as an element of damages in an action based upon those torts.<sup>19</sup> Consequently, we find that the trial court's dismissal of Banks's claims for assault and battery also was erroneous.

Banks's third claim was that Fritsch's conduct amounted to the tort of outrageous conduct. The trial court did not address this claim, but presumably the court's finding that Banks failed to prove damages applies to this claim also. The tort of intentional infliction of emotional distress, or outrage, was first recognized in Kentucky in *Craft v. Rice*.<sup>20</sup> In that case, the Kentucky Supreme Court adopted the following portion of Section 46 of the Restatement ("Second) of Torts:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.<sup>21</sup>

In order to recover, the plaintiff must show that defendant's conduct was intentional or reckless, that the conduct was so outrageous and intolerable as to offend generally accepted standards of morality and decency, that a causal connection

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exists between the conduct complained of and the distress suffered, and that the resulting emotional stress was severe.<sup>22</sup> An action for outrage will not lie for "petty insults, unkind words and minor indignities"; the action only lies for conduct which is truly "outrageous and intolerable."<sup>23</sup>

In addition, the tort of outrage is intended as a "gap-filler", providing redress for extreme emotional distress where traditional common law actions do not. Where an actor's conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action.<sup>24</sup>

We have previously held that Banks may be able to recover emotional damages arising from false imprisonment, assault or battery. Hence, Banks must show that Fritsch's actions were intended only to cause him extreme emotional distress, rather than to merely touch or to deprive him of his liberty. We find no evidence in the record which would support such a finding by the jury. As a result, Banks's claim of outrageous conduct would not be appropriate in this case, and the trial court properly granted a directed verdict on this cause of action.

Lastly, Banks argues that he was entitled to an instruction on punitive damages. The trial court did not address this issue because it dismissed the action based upon lack of evidence of compensatory damages. Since we are remanding this action for a new trial, the trial court must consider the propriety of an instruction on punitive damages based upon the evidence presented at that time. However, we shall briefly address the standards for an award of punitive damages on these claims.

In false imprisonment cases, punitive damages are not justified absent "a showing that

the acts were either willful or malicious or that they were performed in such a way as would indicate a gross neglect or disregard for the rights of the person wronged."25 regard to Banks's claim for punitive damages arising from the alleged assault and battery, we find the following discussion from Fowler c. Mantooth,26 to be relevant in this case:

It is a rule of longstanding in this Commonwealth that exemplary or punitive damages may be recovered in an assault and battery case ... where the assault is willful, malicious and without justification. Shields Adm'rs v. Rowland, 151 Ky. 136, 151 S.W. 408 (1912). This is true even when no serious bodily harm results. Watts v. Lingentelton, 10 Ky.Op. 535 (1880).

The threshold for the award of punitive damages is misconduct involving something more than merely commission of the tort. The "something more" necessary in the present case was defined in the instructions as a finding "that the assault was willful, malicious, and without justification." Malice may be implied from outrageous conduct, arid need not be express so long as the

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conduct is sufficient to evidence conscious wrongdoing. Hensley v. Paul Miller Ford, Inc., Ky., 508 S.W.2d 759 (1974). Hensley cites Prosser, Law of Torts § 2 (4th Ed.1971), stating that punitive damages are "permitted" "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage." Id. at 762.

The mere fact that the act is intentional and a tort does not justify punitive damages absent this additional element of implied malice, meaning conscious wrongdoing. Harrod v. Fraley, Ky., 289 S.W.2d 203 (1956); Ashland Dry Goods Co. v. Wages, 302 Ky. 577, 195 S.W.2d 312 (1946). Fowler's evidence in the present case, if accepted by the jury (as it was), substantiated the element of conscious wrongdoing. The distinction is best illustrated by Harrod v. Fraley, supra at 205, where

instructions permitting an award of punitive damages if the jury "found that the alleged assault was committed `wrongfully' tortiously," were held erroneous because they did not further "require the jury to find that the assault was maliciously, wantonly or wilfully committed" before awarding punitive damages. The instructions in the present case required such a finding.27

In conclusion, we find that the trial court erred in granting a directed verdict in favor of Fritsch on the issue of proof of damages regarding Banks's claims for false imprisonment and assault and battery. Neither of these intentional torts requires proof of damages for at least a nominal award, and there was sufficient proof of emotional damages which would justify submitting the issue to the jury. However, Banks's ability to obtain emotional damages for these claims precludes any recovery based upon the tort of outrageous conduct. Furthermore, an instruction on the outrage claim is not justified based upon the lack of evidence that Fritsch's conduct in chaining Banks only was intended to cause severe emotional distress. Lastly, the trial court should consider the propriety of an instruction on punitive damages based upon the evidence presented at trial.

Accordingly, the judgment of the Bourbon Circuit Court is reversed in part, affirmed in part, and remanded for a new trial in accord with this opinion.

ALL CONCUR.

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Notes:

1. Fritsch's records show that Banks had missed class seven or eight times from January through April, and an additional ten days during May. However, the school's attendance records only show Banks absent from the class on three days. In his testimony, Banks admitted that he had skipped the class at least eight times. Fritsch's records also show that several other students skipped the class more often than Banks. According to Banks, the other students were in

his work group, and he was often left to complete projects alone. Fritsch testified that he was aware of this problem, and gave Banks the painting assignments so that Banks might be able to complete his class work.

2. Following a complaint by Banks's mother, the school superintendent investigated the incident and suspended Fritsch for 45 days. Fritsch challenged the suspension and sought a hearing. The Kentucky Department of Education appointed a three-member tribunal to hear the matter pursuant to KRS 161.790. The Tribunal conducted a hearing and set aside the suspension.

3. *Meyers v. Chapman Printing Co., Inc., Ky.*, 840 S.W.2d 814,821 (1992).

4. *Bierman v. Klapheke, Ky.*, 967 S.W.2d 16, 18-19 (1998).

5. *Id.* at 19.

6. *Prosser & Keeton on Torts § 11, at 47* (5th ed.1984) (hereafter *Prosser & Keeton*).

7. *Id.* at 47.

8. *Id.* at 48.

9. *Id.*

10. *Grayson Variety Store, Inc. v. Shaffer, Ky.*, 402 S.W.2d 424 (1966); *Great Atlantic & Pacific Tea Co. v. Billups*, 253 Ky. 126, 69 S.W.2d 5 (1934); *Ford Motor Credit Co. v. Gibson, Ky.App.*, 566 S.W.2d 154 (1977). See also *Columbia Sussex Corp., Inc. v. Hay, Ky. App.* 627 S.W.2d 270 (1981).

11. See *Great Atlantic & Pacific Tea Co. v. Smith*, 281 Ky. 583, 136 S.W.2d 759 (1939); *J.J. Newberry Co. v. Judd*, 259 Ky. 309, 82 S.W.2d 359 (1935); and *Louisville & Nashville Railroad Co. Mason*, 199 Ky. 337, 251 S.W. 184 (1923).

12. 310 Ky. 205, 220 S.W.2d 398 (1949).

13. *Ky.*, 265 S.W.2d 64 (1954).

14. *Ky.App.*, 554 S.W.2d 903 (1977).

15. *Daugherty v. Kuhn's Big K Store, Ky.App.*, 663 S.W.2d 748, 752 (1983) (quoting *Kentucky Commission on Human Rights v. Fraser, Ky.*, 625 S.W.2d 852, 855 (1981)).

16. *Brewer v. Hillard, Ky.App.*, 15 S.W.3d 1, 8 (1999).

17. *Graves v. Danyland Insurance Group, Ky.*, 538 S.W.2d 42, 45 (1976).

18. *Vitale v. Henchey, Ky.* 24 S.W.3d 651, 659 (2000) (citing 6 *Am.Jur.2d.*, *Assault and Battery* §§ 144 and 146),

19. *Rigazio v. Archdiocese of Louisville, Ky. App.*, 853 S.W.2d 295, 299 (1993).

20. *Ky.*, 671 S.W.2d 247 (1984).

21. *Restatement (Second) of Torts, § 46(I)* (1965).

22. *Humana of Kentucky, Inc. v. Seitz, Ky.*, 796 S.W.2d 1, 2-3 (1990).

23. *Kroger Co. v. Willgruber, Ky.*, 920 S.W.2d 61, 65 (1996).

24. *Rigazio*, 853 S.W.2d at 299; *Brewer v. Hillard*, 15 S.W.3d at 7-8.

25. *Horton v. Union Light, Heat & Power Co., Ky.* 690 S.W.2d 382, 389 (1985) (quoting *Ashland Dry Goods Co. v. Wages*, 302 Ky. 577, 195 S.W.2d 312, 315 (1946)).

26. *Ky.*, 683 S.W.2d 250 (1984). Banks also argues that KRS 411.010 requires the trial court to instruct the jury on punitive damages in any civil action seeking recovery for assault and battery. However, that statute merely permits a defendant to introduce evidence of provocation in mitigation of a claim for punitive damages.

27. *Id.* at 252.

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