

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

DEBORAH BARKLEY

Appellant

v.

MCKEEVER ENTERPRISES, INC. D/B/A PRICE CHOPPER

Respondent

DOCKET NUMBER WD75944

DATE: April 15, 2014

Appeal From:

Circuit Court of Jackson County, MO
The Honorable James F. Kanatzar, Judge

Appellate Judges:

Division One
Alok Ahuja, P.J., Thomas H. Newton, and Anthony R. Gabbert, JJ.

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MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

DEBORAH BARKLEY, Appellant, v. MCKEEVER
ENTERPRISES, INC. D/B/A PRICE CHOPPER, Respondent

WD75944

Jackson County

Before Division One Judges: Ahuja, P.J., Newton, and Gabbert, JJ.

Barkley filed a lawsuit against Price Chopper for torts (civil wrongs) committed against her while she was being detained in its loss prevention office for suspected shoplifting. In the loss prevention office, Barkley was told to have a seat. She got up from the seat. Herrington, a loss prevention officer, immediately attempted to place a handcuff on Barkley, but she resisted. After overcoming the resistance, he handcuffed her to the front because she complained of pain when they were in the back. Barkley shook her head “no” when he ordered her to return to her seat. Barkley slightly opened the door and held onto the doorknob. Barkley let it go after Herrington employed a technique that brought her to the floor. The handcuffs were moved to the back. Herrington yanked Barkley off the floor, moved her, and then released her in an awkward sitting position on the floor. Herrington and his colleague continued to record the items and fill out paperwork. After Herrington had finished recording and storing the items, he and his colleague lifted Barkley off the floor and helped her to the seat. Later, a police officer arrived, removed the handcuffs, questioned her, and then escorted Barkley out of the office.

At the jury trial, the trial court admitted certain testimony from Barkley’s former doctor over Barkley’s timely objection. The trial court excluded evidence about Herrington’s prior behavior and a case file showing a similar occurrence with other Price Chopper loss prevention officers. At a jury instruction conference, Price Chopper offered a verdict director for battery (Instruction 9) that defeated Barkley’s claim if the jury found in favor of the affirmative defense, which was provided in a different instruction (Instruction 10). Barkley objected to the submission of the instructions (battery verdict director and the affirmative defense). The trial court overruled the objections and submitted the instructions. The jury returned favorable verdicts for Price Chopper. Barkley appeals, raising four points.

AFFIRMED.

Division One Holds:

In the first point, Barkley argues that the trial court erred in rejecting her proposed verdict director for the battery claim, which did not reference an affirmative defense, and instead submitting Price Chopper’s Instruction 9, a verdict director, which did reference an affirmative defense, and submitting Instruction 10, the affirmative defense, itself. Ms. Barkley claims that the instructions were erroneous because there is no defense to batteries committed against a suspected shoplifter after the property is recovered and after a merchant’s investigation has concluded. We disagree because the common law and subsection 4 of 537.125 provide for the continued detention of a suspect to release him or her to the authorities within limitations. Additionally, reasonable force is allowed to be used to continue detention. Thus, Price Chopper had an available affirmative defense against a battery claim. The first point is denied.

In the second point, Barkley argues that the trial court erred in submitting Instruction 10 because the evidence did not support the submission. Ms. Barkley claims that competent and substantial evidence did not support its submission because it “hypothesized that all of the

batteries inflicted upon [her] were [done so] after and as a result of her alleged attempt to flee the loss prevention office when in fact the evidence showed that numerous batteries were inflicted upon her before the alleged attempt to flee.” Because this argument was not addressed in the trial court, it was not preserved. We decline plain error review. The second point is denied.

In the third point, Barkley argues that the trial court erred in admitting, over her timely objection, evidence that her former doctor wrote release letters to excuse her from jury duty at Barkley’s request because it was legally irrelevant (its prejudice outweighs its evidentiary support). She also argued that it was improper character evidence. We disagree because Price Chopper had the right to present evidence on the damages issue and relevancy is within the trial court’s discretion. We cannot conclude that the trial court abused its discretion. The third point is denied.

In the fourth and final point, Barkley argues that the trial court erred in excluding evidence about Herrington’s prior behavior and a case file showing a similar occurrence with other Price Chopper loss prevention officers because the evidence was competent, material, and relevant as to the issue of punitive damages. We do not need to address this issue because punitive damages are available when the jury awards other damages, which the jury did not do here. We have already affirmed the jury verdicts. The fourth point is denied as moot.

Therefore, we affirm.

Dissenting Opinion by Judge Gabbert:

The dissent would find that the circuit court erred in submitting Instructions 9 and 10 to the jury. Price Chopper pled in its Answer to Plaintiff’s Amended Petition under “Affirmative Defenses” that Price Chopper was entitled to the “mercantile privilege defense” pursuant to Section 537.125.2, RSMo 2000. However, Instruction 10, which set forth this defense to the jury, does not follow Section 537.125.2 and, as written, would have misdirected, misled and confused any reasonable juror.

As Instruction 10 is written, an average juror would not properly understand that Price Chopper’s reasonableness must be based on its actions in detaining Barkley for a wrongful taking, not in detaining Barkley for refusals or attempted flight. Logically, more force may be necessary to detain someone from the crime of fleeing, if it were a crime, than to detain someone for investigation of a theft. Consequently, a jury could conceivably conclude that the force used to keep an individual from fleeing was reasonable, but that same force was unreasonable in the context of investigating a theft. By improperly designating Barkley’s crime as refusing to follow instructions and attempting to flee, instead of theft, Instruction 10 does not follow the substantive law of Section 537.125.2 and prejudicially alters the jury’s focus.

For the foregoing reasons, the dissent would reverse the circuit court’s judgment.

Opinion by Judge Thomas H. Newton. Presiding Judge Alok Ahuja concurs. April 15, 2014
Dissenting opinion by Judge Anthony R. Gabbert April 15, 2014

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