







Stop & Risk


**Addressing the Realities Inherent
in Loss Prevention Liability**



Presented by:
H. William Reising
Macy R. Abdallah
Margaret A. Czuchaj

Today's Presenters


H. William Reising
 (810) 342-7001
wreising@plunkettcooney.com



Macy R. Abdallah
 (248) 594-5768
mabdallah@plunkettcooney.com

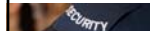


Margaret A. Czuchaj
 (248) 594-8674
mczuchaj@plunkettcooney.com


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Shoplifting

- When a customer is stopped, or even just suspected of shoplifting/theft, it can open the door to a large category of lawsuits, even when asset protection has acted appropriately and even when the person really did steal!




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Assault

- An intentional, unlawful threat or offer to do bodily injury by another by force ... M Civ JI 115.01
- Subjective feelings about defendant's actions are irrelevant. Requires a "well-founded fear of imminent peril."
 - Must be "well-founded" and exist under circumstances sufficient to create such a "well-founded" fear



Battery

- An intentional, unwanted, and unlawful touching against the victim's will. M Civ JI 115.02



False Imprisonment

- Unlawful restraint of an individual's personal liberty or freedom of movement.
 - Must be intentional or unlawful restraint/detention/confinement ... MCJI 116.02
 - Can be committed by actual physical force or express or implied threat of force



False Arrest

- Unlawful taking, seizing or detaining person, by touching or putting hands on him or by any other act that indicates an intention to take him into custody
- Must be performed with intent to make an arrest and must be so understood by person arrested.
MCJI 116.01



False Imprisonment / Arrest

- Torts often used interchangeably.
- False arrest is a MEANS of committing false imprisonment.
- False Imprisonment is committed without any thought of attempting arrest.



Elements

- Plaintiff was imprisoned by the defendant and, thereby, deprived of his personal liberty or freedom of movement.
- Such imprisonment was against his will.
- Defendant accomplished imprisonment by actual physical force or by express or implied threat of force.
- Defendant intended to deprive plaintiff of his personal liberty or freedom of movement.
- Such imprisonment was unlawful.



Defense

- Primarily consists of
 - Arguing no imprisonment took place
 - Arguing imprisonment was justified/lawful



Intentional Infliction of Emotional Distress

- Routinely filed and litigated but the Michigan Supreme Court has not yet said this is a valid cause of action
- Plaintiff has the burden of proving four elements
 - Extreme and outrageous conduct
 - Intent or recklessness
 - Causation
 - Severe emotional distress

Continued



Intentional Infliction of Emotional Distress

- Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities.
- Whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to "permit recovery" is a question for the trial court.

Continued



Intentional Infliction of Emotional Distress

- It is not enough that defendant may have acted with an intent which is tortious or even criminal, or that he acted to inflict emotional distress, or even that his conduct was characterized by 'malice', or a degree of aggravation which would entitle plaintiff to punitive damages for another tort.
- It is only found where the conduct complained of has been SO outrageous in character, and SO extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

Continued



Intentional Infliction of Emotional Distress

- It has been said that the case is generally one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"



Not 'Outrageous Conduct'

- Warren v June's Mobile Home Village & Sales, Inc*, 66 Mich App 386, 393; 239 NW2d 380 (1976)
- Watkins v City of Southfield*, 221 F.3d 883; 2000 Fed. App. 0244P (6th Cir. 2000)
- Cebulski v City of Belleville*, 156 Mich App 190; 410 NW2d 616 (1987)



Intent or Recklessness

- “... a plaintiff can show that a defendant specifically intended to cause a plaintiff emotional distress or that a defendant’s conduct was so reckless that ‘any reasonable person would know emotional distress would result.’”



Damages

- “... a plaintiff is not entitled to recover damages for intentional infliction of emotional distress where she supplies no evidence of grief, depression, disruption of lifestyle, or of treatment for anxiety or depression.”
- Plaintiff may not recover under a theory of intentional infliction of emotional distress unless there is a showing that the emotional distress experienced by the plaintiff is “severe.”

Continued



Damages

- “... the plaintiff carries a heavier burden to show emotional injury in the absence of physical injury.”
- “Complete emotional tranquility is seldom obtainable in this world, ... plaintiff is not entitled to recover damages for intentional infliction of emotional distress absent evidence of grief, depression, disruption of lifestyle, or treatment for anxiety or depression.”



Exercise of Legal Rights

- In Michigan, even though party may be aware that emotional distress will result, there is no cause of action for intentional infliction of emotional distress.
- An exercise of defendant's legal rights is arguably not actionable under a theory of intentional infliction of emotional distress.
— *Rosenberg*, 134 Mich App at 354-355



Shopkeepers Privilege

- Bars a plaintiff from recovery if a shopkeeper had "probable cause" to believe that a crime had been committed (MCL § 600.2917)

Continued



Shopkeepers Privilege

- "... if the claim arises out of the conduct involving a person suspected of removing or attempting to remove, without right or permission, goods held for sale in a store from the store, ... and if the merchant, library, agent, or independent contractor **had probable cause for believing and did believe that the plaintiff had committed or aided or abetted in the larceny of goods held for sale** in the store,... damages shall not be allowed ..."



MCL § 600.2917

- "... provides a "statutory privilege" under Michigan law, to detain individuals under suspicion of unlawfully removing property from a store and "attaches if the merchant has reasonable cause to suspect the person of stealing."
- "... allows storeowners who suspect individuals of shoplifting to detain them without fear of recovery of exemplary damages or damages beyond the purely compensatory[.]"



Logic Behind Privilege

- Shopkeeper should not be compelled either to permit a suspected shoplifter to walk out and disappear, or accost him at imminent risk of punitive mulct for any cause specified in this section should the shopkeeper's suspicions be unfounded.
- Note, this is not a total bar against all claims, but only against those for or resulting from mental anguish, punitive, exemplary or aggravated damages.



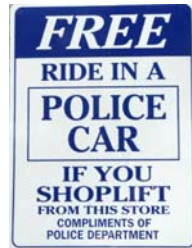
Michigan Model Jury Instructions

- Instruct jury that privilege applies UNLESS they find the defendant
 - Used unreasonable force
 - Detained plaintiff unreasonable length of time
 - Acted with unreasonable disregard for plaintiff's rights or sensibilities
 - Acted with intent to injure plaintiff



Probable Cause

- Guilt or innocence is irrelevant
- Does not require proof beyond a reasonable doubt
- Simply a "reasonable belief" that a crime was committed and not an absolute certainty of such



Civil Rights Claims

- If the customer stopped or accused of shoplifting is someone with a protected status, he may also assert a federal or state civil rights claim.
- If you see this type of claim, be aware that plaintiff may be statutorily entitled to attorney fees, thereby, substantially increasing the value of the claim.



Liability for Others

- Advised behavior was not by the premises owner but by the police responding to the call
- Liability depends on the degree to which police were directing their own actions versus carrying out instructions by the premises owner.



Reminders

Regarding Documentation

- Asset Prevention employees often the best and most detailed about documenting incidents/stops
- Preserving video is key
 - Of the stop and all interactions
 - Of ALL plaintiffs' actions prior to the stop
- Detailed statements by asset prevention ideal



Questions?



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