# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 21-20277

THALIA HUYNH; DALENA BUSTOS,

*Plaintiffs—Appellants*,

*versus*

WALMART INC.; WAL-MART STORES TEXAS, L.L.C.,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-4257

Before DENNIS, SOUTHWICK, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

In certain circumstances under Texas law, shopkeepers can detain suspected shoplifters. In 2017, Walmart employees stopped Thalia Huynh and her daughter, Dalena Bustos, on just such a suspicion. After the situation escalated (to put it gently), the two sued Walmart in state court, alleging false imprisonment among other claims. Walmart removed the case to federal court, and the district court eventually dismissed some of Huynh and Bustos's claims and entered summary judgment in favor of Walmart on the remaining ones. The court determined that Walmart's employees acted appropriately and that plaintiffs could not prove their claims. We affirm.

## I.

In June 2017, Antonio De La Cruz and Tyrone Rock were working as asset protection associates at a Walmart in the greater-Houston area. De La Cruz was monitoring the store's security cameras while Rock circulated throughout the store. De La Cruz saw Thalia Huynh move through several clothing sections in the store, pick up merchandise, and place the merchandise in her purse. De La Cruz called Rock, gave him a description of Huynh, and asked him to stop her before she left the store.

Two security cameras recorded what happened next. Rock saw Huynh leaving and jogged in front of her shopping cart in the store's vestibule. De La Cruz arrived shortly after Rock. Rock asked Huynh to return the merchandise, but Huynh instead took her purse out of the otherwise empty cart and moved to walk around Rock and out of the store. Rock responded by grabbing Huynh's purse. Huynh did not let go of the purse and instead tried to yank it away from Rock while Rock slowly walked back into the store, purse and Huynh in tow. Dalena Bustos followed her mother and Rock as they reentered the store. De La Cruz trailed behind the three.

As other shoppers passed by (shortly, many would congregate to watch the unfolding spectacle), Bustos intervened and began tugging on the purse as well. After saying something to Rock, Bustos attacked him—the store video shows her punching, kicking, and biting him.

At this point Marcus McNeil intervened, and Rock and De La Cruz had no further direct involvement in the altercation. McNeil was an off-duty Houston police officer working as a store security guard. He had been escorting two assistant managers while they collected money from registers throughout the store.

McNeil quickly handcuffed Bustos and then began trying to subdue and handcuff Huynh. Huynh resisted, though McNeil was eventually able to cuff her. To little avail: the store video shows that Bustos and Huynh were literally kicking and screaming, attempting to attack McNeil despite their restraints. Almost immediately after McNeil handcuffed Huynh, Bustos aimed a kick at him. In response, McNeil dropped Bustos to the floor; when he did, Huynh began kicking him. McNeil then attempted to subdue Huynh, finally forcefully throwing her to the floor as well. Even then, Huynh and Bustos both continued to kick at McNeil for the next minute or so. McNeil held them there until Houston police officers arrived approximately four minutes later. The officers removed Huynh and Bustos from the store.

Following the incident, Huynh and Bustos sued Walmart, Inc. in Texas state court. They alleged claims for false imprisonment, malicious prosecution, assault and battery, offensive physical contact, intentional infliction of emotional distress, negligence, negligence per se, gross negligence, and violations of the Texas Deceptive Trade Practice & Consumer Protection Act. Wal-Mart Stores Texas, LLC, filed an answer, noting that it, not Walmart, Inc., was the proper defendant.[1] Walmart then filed a notice of removal to federal district court, alleging complete diversity as the ground for subject-matter jurisdiction.[2]

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[1] For ease of reference in this opinion, we refer to both entities collectively as Walmart.

[2] Because of conflicting representations by Walmart in the district court and on appeal regarding its corporate structure, the entities involved, and their states of incorporation and residence, complete diversity of the parties was not immediately apparent. Since oral argument, Walmart has filed an amended notice of removal that properly asserts citizenship, and the parties have filed supplemental information clarifying that the requirements for complete diversity jurisdiction are in fact met in this case. *See* 28 U.S.C. § 1653.

Shortly after removal, Walmart filed a motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss the Texas Deceptive Trade Practice & Consumer Protection Act claim as well as the malicious prosecution, intentional infliction of emotional distress, and negligence per se claims. The district court granted the motion and dismissed those claims. After discovery, Walmart moved for summary judgment on plaintiffs' remaining claims. The district court granted summary judgment, noting that the video recording of the altercation between Huynh, Bustos, Rock, De La Cruz, and McNeil materially refuted the version of events advanced by Huynh and Bustos. Plaintiffs now appeal.

## II.

### A.

Huyhn and Bustos begin by challenging the district court's Rule 12(b)(6) dismissal of their Texas Deceptive Trade Practices & Consumer Protection Act claim. This court reviews a grant of a motion to dismiss de novo. *Budhathoki v. Nielsen*, 898 F.3d 504, 507 (5th Cir. 2018) (citing *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010)). In order to survive a motion to dismiss, a plaintiff must "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Wampler*, 597 F.3d at 744 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). As this is a diversity case involving claims alleged under Texas law, this court applies Texas's substantive law. *Klocke v. Watson*, 936 F.3d 240, 244 (5th Cir. 2019) (citing *Hanna v. Plumer*, 380 U.S. 460, 465 (1965)).

The Texas Deceptive Trade Practices & Consumer Protection Act "protects a consumer from 'false, misleading, or deceptive acts or practices,' from an 'unconscionable action or course of action by any person,' and from the breach of an implied or express warranty in the conduct of any trade or commerce that is the producing cause of actual damage." *Miller v. Kim*

*Tindall & Assocs., LLC*, 633 S.W.3d 102, 104-05 (Tex. App. 2021) (internal quotation marks omitted) (quoting *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 400 (Tex. App. 2000)). To sustain a claim under the Act, a plaintiff must show that "(1) the plaintiff was a consumer; (2) the defendant either engaged in false, misleading, or deceptive acts . . . or engaged in an unconscionable action or course of action; and (3) the [Act's] laundry-list violation or unconscionable action was a producing cause of the plaintiff's injury." *Bus. Staffing, Inc. v. Jackson Hot Oil Serv.*, 401 S.W.3d 224, 236 (Tex. App. 2012) (citing *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996); *Doe v. Boys Clubs of Greater Dall., Inc.*, 907 S.W.2d 472, 478 (Tex. 1995)).

Huynh and Bustos allege that they "were consumers because they sought or acquired goods from Walmart," and that "Walmart committed an unconscionable act[.]" A consumer is defined by the Act as "an individual . . . who seeks or acquires by purchase or lease, any goods or services[.]" TEX. BUS. & COM. CODE § 17.45(4). An unconscionable act in this context is defined as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Id.* § 17.45(5). The Texas Supreme Court has held that "[t]o prove an unconscionable action or course of action, a plaintiff must show that the defendant's act took advantage of her lack of knowledge and 'that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.'" *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 677 (Tex. 1998) (quoting *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985)).

Nowhere in their pleadings or briefs do Huynh and Bustos identify any facts that would establish an unconscionable action by Walmart under the Texas Deceptive Trade Practices & Consumer Protection Act. They do not assert that Walmart took advantage of their lack of knowledge; rather, they

allege that Walmart restrained, assaulted, and battered them. This conduct does not fall within the ambit of unconscionability under the Act. Further, unconscionability must relate to the alleged transaction itself, not "post-transaction conduct[.]" *Charlie Thomas Chevrolet, Ltd. v. Martinez*, 590 S.W.3d 9, 19 (Tex. App. 2019). As a result, Huyhn and Bustos fail to state a claim under the Act, and the district court properly granted Walmart's motion to dismiss.

**B.**

Huyhn and Bustos next assert that the district court improperly granted summary judgment to Walmart on their claims for false imprisonment, offensive contact, assault and battery, negligence, and gross negligence. A grant of summary judgment is reviewed de novo. *RealPage, Inc. v. Nat'l Union Fire Ins. Co.*, 21 F.4th 294, 297 (5th Cir. 2021) (quoting *Luminant Mining Co. v. PakeyBey*, 14 F.4th 375, 379 (5th Cir. 2021)). "Summary judgment is merited when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (internal quotation marks omitted) (quoting *PakeyBey*, 14 F.4th at 379). When the record includes video recordings, "as is the case here, the video depictions of events, viewed in the light most favorable to the [non-movant], should be adopted over the factual allegations . . . if the video 'blatantly contradict[s]' those allegations." *Harmon v. City of Arlington*, 16 F.4th 1159, 1163 (5th Cir. 2021) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

Huyhn and Bustos assert that McNeil, Rock, and De La Cruz each committed acts underlying plaintiffs' claims for false imprisonment, offensive contact, and assault and battery. They further contend that Walmart is vicariously liable for the actions. In response, Walmart asserts that under Texas law McNeil should be treated as an on-duty officer once he

intervened, so Walmart is not liable for his actions. As for Rock's and De La Cruz's actions, Walmart contends that the shopkeeper's privilege exception defeats any claim of false imprisonment. Finally, Walmart asserts that Huynh and Bustos have not proven the elements of their remaining claims.

### *i. Officer McNeil*

In Texas, an off-duty police officer is treated as an on-duty police officer for vicarious liability purposes when the officer observes a crime, reasonably suspects that an individual committed a crime, or detains an arrested person until the individual can be transported to a police station. *Ogg v. Dillard's, Inc.*, 239 S.W.3d 409, 418 (Tex. App. 2007) (quoting *Morgan v. City of Alvin*, 175 S.W.3d 408, 417 (Tex. App. 2004); citing *Mansfield v. C.F. Bent Tree Apartment Ltd. P'ship*, 37 S.W.3d 145, 150 (Tex. App. 2001)). To determine if an off-duty police officer was acting in an official capacity or as an employee of a private employer, courts "analyze the capacity in which the officer acted at the time he committed the acts for which the complaint is made." *Id.* at 418 (internal quotation marks omitted) (quoting *Morgan*, 175 S.W.3d at 416). This analysis generally splits into determining if the officer was (1) enforcing the general laws or (2) "protecting the employer's property, ejecting trespassers, or enforcing rules and regulations promulgated by the employer[.]" *Id.* (internal quotation marks omitted) (quoting *Mansfield*, 37 S.W.3d at 150).

Huynh and Bustos argue, without pointing to record support, that "Wal-Mart's employees direct[ed] [McNeil's] work, namely by asking him to assist with the investigation of [plaintiffs'] alleged shoplifting, which implicates Wal-Mart's financial interest." They assert that McNeil's actions clearly protected Walmart's property, such that he could not be enforcing general law. They further contend that "Officer McNeil did not have time nor was he given an explanation that could give rise to a 'reasonable

suspicion' of criminal activity," i.e., to suspect Huynh or Bustos of shoplifting.

While Huynh and Bustos focus their argument on the notion that McNeil acted to apprehend shoplifters, their reasoning misses the point. They may be correct that McNeil could not have had a reasonable suspicion that plaintiffs were attempting to steal Walmart merchandise. But the summary judgment evidence plainly establishes that McNeil intervened not to thwart shoplifting, but rather to protect Rock, whom McNeil *observed* being hit, kicked, spat upon—and bitten—by Huynh and Bustos. The store videos, as well as every affidavit that touches on McNeil's actions, establish that McNeil had been escorting Walmart managers who were collecting money from outlying cash registers in the store. McNeil and the managers arrived at the front of the store as the altercation between Rock, De La Cruz, Huynh, and Bustos escalated, and McNeil then intervened to protect Rock from Huynh and Bustos and to detain plaintiffs.

Put simply, McNeil witnessed what appeared to be an assault of Rock by Bustos and Huynh, and he acted to detain the assailants. *See Ogg*, 239 S.W.3d at 418 (quoting *Morgan*, 175 S.W.3d at 417). In doing so, McNeil is treated under Texas law as an on-duty officer for purposes of vicarious liability. *See id.* As a result, Walmart cannot be vicariously liable for McNeil's actions.

### *ii. Huynh's Claims*

In Texas, to prove a claim of false imprisonment a plaintiff must demonstrate (1) willful detention (2) performed without consent and (3) without authority of law. *Wal-Mart Stores, Inc. v. Resendez*, 962 S.W.2d 539, 540 (Tex. 1998) (citing *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985)). The shopkeeper's privilege "permits a shopkeeper to detain a person to investigate the ownership of property if the shopkeeper

reasonably believes that the person has stolen or is attempting to steal store merchandise so long as the detention is in a reasonable manner and for a reasonable period of time." *Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 372 (Tex. 2004) (citing TEX. CIV. PRAC. & REM. CODE § 124.001; *Resendez*, 962 S.W.2d at 541). The privilege therefore operates as a defense to a claim of false imprisonment by granting the shopkeeper authority reasonably to detain a suspected shoplifter. *Resendez*, 962 S.W.2d at 540.

Huynh contends that Walmart did not establish that her detention by Rock was reasonable and thus could not assert the shopkeeper's privilege. Much of her argument rests on her allegation that Rock violated Walmart's internal policies in detaining her, rendering his actions inherently unreasonable. But the Texas Supreme Court has rejected the notion that "internal policies of a private business define the permissible scope of a detention authorized under the law." *Id.* at 541. Regardless, De La Cruz's unrefuted deposition testimony establishes the reasonable belief that Huynh was attempting to steal store merchandise. He testified that he saw Huynh putting clothing items in her purse, watched Huynh proceed to the store's exit without paying for the items, and then told Rock about his observations so Rock could intervene to prevent her exit.

And the entire altercation, from Rock first jogging out to stop Huynh to Houston Police removing Huynh from the store, lasted fifteen minutes, as evidenced by the timed store video footage. The Texas Supreme Court has determined that a "ten to fifteen minute detention . . . [is] not unreasonable as a matter of law." *Id.* at 540 (citing *Dominguez v. Globe Discount City, Inc.*, 470 S.W.2d 919, 920 (Tex. Civ. App. 1971); *Meadows v. F.W. Woolworth Co.*, 254 F. Supp. 907, 909 (N.D. Fla. 1966)). Given that just over three minutes after the altercation began neither Rock nor De La Cruz had any contact with Huynh, as a matter of law their detention of her cannot be unreasonably long.

This leaves just the reasonableness of the manner of the detention in question. *See Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 520 (Tex. App. 1996). Huynh contends that Rock's grabbing her purse and dragging it back into the store while she held onto it was unreasonable. She offers *Odem* to support her position, noting that the shopkeeper's privilege does not extend "to conduct constituting assault[,]" and that "an intentional snatching of an object from one's hand is as clearly an offensive invasion of one's person as would be an actual contact with the body." *Id.* at 522 (citing *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967)). She asserts that Rock's conduct here constitutes an assault and therefore cannot be a reasonable means of detention.

In Texas, the definition of assault is the same regardless of whether the charge is pursued in a criminal or civil trial. *Id.* (citing *Moore's, Inc. v. Garcia*, 604 S.W.2d 261, 264 (Tex. Civ. App. 1980)). The Texas Penal Code defines assault as follows:

> (a) A person commits an offense if the person:
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX. PENAL CODE § 22.01(a). The Texas Supreme Court has noted that this codification "combines common-law concepts of assault and battery under its definition of 'assault[,]'" and "[r]eliance on [the Penal Code] has led several Texas civil courts to meld common-law concepts of assault and battery under the rubric of assault." *City of Watauga v. Gordon*, 434 S.W.3d

586, 589 (Tex. 2014). This appears to be what the Texas Court of Appeals did in *Odem*, because *Fisher*, the case relied on by the *Odem* court, actually stated that the offensive conduct was sufficient to "constitute a battery." *Fisher*, 424 S.W.2d at 629. The first and third offenses outlined in section 22.01(a) delineate two forms of common-law battery, and it is the third offense that the Texas Supreme Court was considering in *Fisher*. *Gordon*, 434 S.W.3d at 590.

In *Fisher*, the offensive physical contact consisted of a restaurant manager ripping a plate out of a black patron's hand while loudly declaring the black patron would not be served there. 424 S.W.2d at 628-29. What made this contact "offensive or provocative" was the "highly embarrass[ing]" way in which the contact occurred. *Id.* at 628. The Texas Supreme Court recently confirmed this in *Gordon* by recalling *Fisher* and stating that "it was the offensive nature of the contact, not its extent, that made the contact actionable: 'Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting.'" *Gordon*, 434 S.W.3d at 590 (quoting *Fisher*, 424 S.W.2d at 628-29). For Rock's actions to fall under section 22.01(a)'s third offense then, his actions must have intentionally or knowingly caused Huynh physical harm or been taken in such a manner as to humiliate or embarrass her. But Huynh does not allege this in her briefing or anywhere in the record.

Separately, Texas courts have also recognized that when physical contact is used only for the purpose of directing a detainee into the store and preventing the detainee from leaving custody, it is reasonable. *Henry v. J.C. Penney Co., Inc.*, No. 01-99-00739-CV, 2000 WL 375346 (Tex. App. 2000) (not designated for publication). Further, Texas courts have also specifically recognized a right by shopkeepers to detain customers and "make contemporaneous search[es] of the person and objects within that person's

immediate control." *Wal-Mart Stores, Inc. v. Cockrell*, 61 S.W.3d 774, 778 (Tex. App. 2001) (citing *Raiford v. The May Dep't Stores Co.*, 2 S.W.3d 527, 531 (Tex. App. 1999); *Douglas v. State*, 695 S.W.2d 817, 820 (Tex. App. 1985)). This establishes that Rock's means of detaining Huynh, grabbing her purse after she attempted to leave the store with it, was reasonable. In turn, because Huynh's detention was reasonable, Walmart can assert the shopkeeper's privilege against her claim of false imprisonment, and summary judgment was appropriate.

Huynh also alleges that Rock's and De La Cruz's conduct amounted to assault, battery, or offensive contact. But in her own affidavit testimony, Huynh conceded that neither Rock nor De La Cruz ever touched or injured her. Further, she has not alleged that Rock or De La Cruz threatened her. Together with the above analysis, this establishes that as a matter of law, Huynh cannot state a prima facie case for assault, battery, or offensive contact, and summary judgment for Walmart was proper as to these claims.

### *iii. Bustos's Claims*

The video evidence definitively demonstrates that Bustos was never detained by Rock or De La Cruz. Rock grabbed Huynh's purse and dragged it back into the store while Huynh pulled the other side of it. By contrast, Bustos voluntarily followed her mother and Rock back into the store, and then *she* attacked Rock, bit him on the arm, and was only detained when McNeil intervened. Because the video footage demonstrates that Bustos chose to reenter the store, she cannot prove the elements of false imprisonment under Texas law. *Resendez*, 962 S.W.2d at 540 (citing *Castillo*, 693 S.W.2d at 375).

The video further demonstrates, and Bustos's deposition confirms, that neither Rock nor De La Cruz ever made any contact with Bustos or anything she was holding, caused her any injury, or threatened her.

Therefore, Bustos's claims for offensive contact and assault and battery by definition fail because she cannot establish their elements. *See* TEX. PENAL CODE § 22.01(a). Summary judgment was therefore also appropriate for Walmart on Bustos's claims.

## III.

Huynh and Bustos conclude by asserting that the district court erred by allowing Walmart to attach new evidence to its summary judgment reply brief. We review "evidentiary rulings for abuse of discretion." *Hewlett-Packard Co. v. Quanta Storage, Inc.*, 961 F.3d 731, 736 (5th Cir. 2020). But even if the district court abused its discretion, "we will not reverse erroneous evidentiary rulings unless the aggrieved party can demonstrate 'substantial prejudice.'" *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 767 (5th Cir. 2002) (quoting *Kona Tech Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 602 (5th Cir. 2000)).

Huynh and Bustos do not meaningfully argue the district court abused its discretion. Rather, they ask this court to "speak to [the] issue" of the lack of a "'per se rule' or any standard" disallowing the submission of evidence in a reply brief. They do not provide any argument that they were harmed, let alone substantially prejudiced, by allowing Walmart to attach portions of Bustos's deposition, portions of Huynh's deposition, an asset protection case record sheet, and body camera footage from a Houston police officer to its summary judgment reply.[3] Because they present no argument on these

[3] Indeed, plaintiffs did not even seek leave from the district court to file a sur-reply to raise their challenge to the evidentiary materials Walmart attached to its summary judgment reply brief, which would have allowed the district court to consider this issue in the first instance.

points, there is no basis for the court to find an abuse of discretion. *See Roy*, 950 F.3d at 251 (quoting *Procter & Gamble Co.*, 376 F.3d at 499 n.1).

## IV.

Huynh and Bustos have failed to demonstrate the necessary elements for any of their claims. Therefore, the district court did not err in dismissing their Texas Deceptive Trade Practices & Consumer Protection Act claim and granting summary judgment to Walmart on their claims for false imprisonment, offensive contact, assault and battery, negligence, and gross negligence.

AFFIRMED.