

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:98-CV-260-H

RUTH ANN WUERTH TRIMBUR

PLAINTIFF

V.

THE KENTUCKY LOTTERY
CORPORATION, et al.

DEFENDANTS

MEMORANDUM OPINION

Remaining Defendants, Kentucky Lottery Corporation (“Lottery”), Rite Aid of Kentucky, Inc. and Rite Aid Corporation (together “Rite Aid”), have moved for summary judgment.¹ They argue that Plaintiff’s false arrest, false imprisonment and malicious prosecution claims should be dismissed because Plaintiff has stipulated, and this Court has found, probable cause for her arrest. Moreover, they contend that their conduct was not negligent nor did it cause Plaintiff’s harms. Plaintiff counters that her stipulation was limited to the police and the Lottery did not have probable cause to report her tickets stolen. She also argues that causing an innocent person to be publicly arrested is outrageous and that the Defendants’ disregard for the accuracy of their statements and failure to implement a more accurate anti-theft system was negligent.

Summary judgment is appropriate when there is no genuine issue of material fact and the

¹April 23, 1999, this Court dismissed Plaintiff’s claims against the Jefferson County Police and the Jefferson County Judge/Executive. The Court concluded that based upon the information available to the officers, there was probable cause for the arrest, even though the information provided to them may have been faulty or incomplete. While in retrospect, the arrest may have been unnecessary, the Court’s decision was based upon the “unbroken chain of facts and logical inferences” confronting the officers when they made the arrest. The issues which the Court addresses now bear little relationship to those concerning the police officers.

moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56 (c). For purposes of summary judgment, any factual dispute must be resolved in favor of the non-moving party, in this case Plaintiff, unless the evidence presented is so one-sided that reasonable people could not find for the non-moving party. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989); *Betkerur v. Aultman Hospital Ass'n.*, 78 F.2d 1079, 1087-88 (6th Cir. 1996).

I.

The Court will once again briefly summarize the relevant facts. Plaintiff purchased two Kentucky Lottery tickets, numbered 32-002691-4-200 and 32-002692-4-201, from Rite-Aid on March 8, 1997. The next day, someone stole a large number of lottery tickets from the same Rite-Aid store. When Rite-Aid first reported the stolen tickets to the Indian Hills Police it was unable to provide the amount of loss or the serial numbers of the stolen tickets. Later that same day, someone redeemed 107 of the stolen tickets at eighteen different Lottery retailers. On March 10, 1997 an unnamed person, possibly an employee of Rite-Aid, reported to the Lottery that more than eight hundred instant lottery tickets, including those numbered 32-002691-4-200 and 32-002691-4-201, had been stolen from Rite-Aid.

Almost two months later, Plaintiff attempted to redeem her two winning tickets for prizes worth \$3.00 at a local Party Mart. Plaintiff was unaware that any tickets had been stolen from Rite Aid. When Party Mart scanned Plaintiff's tickets into the Lottery's computerized database, the system identified the tickets as stolen. Based on this identification, a Lottery agent called the Jefferson County police.

Within a few minutes police officers arrived at Party Mart and, after a verbal

confrontation, arrested Plaintiff for disorderly conduct, resisting arrest and second degree criminal possession of a forged instrument. Plaintiff was handcuffed and questioned in full view of other customers in Party Mart before being taken outside, frisked and placed in a police cruiser. Plaintiff's purse was searched, and she had to wait an hour before she was transferred to jail in a paddy wagon. Plaintiff remained in jail until 2:00 am. All charges against Plaintiff were eventually dismissed in exchange for a stipulation of probable cause for the arrest.

II.

Plaintiff's false arrest, false imprisonment and malicious prosecution claims are premised upon the Lottery's false statements which caused the police to wrongfully arrest her.² Under Kentucky law, Plaintiff must prove there was no probable cause for her arrest. *See Myers v. City of Louisville*, 590 S.W.2d 348, 349 (Ky.App. 1979) (false arrest and imprisonment) and *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981) (malicious prosecution). In its previous opinion the Court relied upon the facts available to the officers. Reliance upon *Broaddus v. Campbell*, 911 S.W.2d 281 (Ky. App. 1995) was unnecessary to find probable cause. In this instance, however, the rule from *Broaddus* appears more germane. Its holding bars Plaintiff's false arrest, false imprisonment and malicious prosecution claims against the Lottery. While Plaintiff argues that her probable cause stipulation only applies to the police, in *Broaddus*, the court specifically held that a probable cause stipulation bars such claims against all involved parties, not just the police.³ The court reasoned that the probable cause stipulation could have been limited but was

² Plaintiff's complaint does not include Rite Aid in the false arrest, false imprisonment or malicious prosecution claims.

³One cannot help but have sympathy for those wrongly accused, but as the *Broaddus* court noted, "actions for malicious prosecution have traditionally been disfavored due to the chilling effect on those considering reporting a crime." *Id.* at 285 (citing *Reid v. True*, Ky., 302 S.W.2d 846 (1957)). While *Broaddus* specifically addressed

not. Absent an explicit limitation, the court found that stipulations apply generally. Because Plaintiff did not limit her probable cause stipulation, the Court must conclude that it applies to the Lottery. Therefore, Plaintiff cannot maintain a claim for false arrest, false imprisonment or malicious prosecution.

III.

To establish a claim for outrage or intentional infliction of emotional distress, Plaintiff must present evidence from which a reasonable jury could conclude that Defendants intentionally or recklessly acted in a manner that offends “generally accepted standards of decency and morality”. *See Craft v. Rice*, 671 S.W.2d 247, 249 (1984). Plaintiff has not presented evidence that satisfies this stringent standard. There is simply no evidence that either Rite Aid or the Lottery intentionally injured Ms. Trimbur, nor that Defendants’ conduct can be characterized as outrageous.

Plaintiff has produced some evidence that Rite Aid may not have exercised sufficient care safeguarding its lottery tickets or reporting the numbers on the stolen tickets, but reasonable people would not categorize this conduct as “atrocious and utterly intolerable in civilized society”. *See Humana v. Seitz*, 786 S.W.2d 1, 4 (Ky. 1990) (describing the standard for the tort of outrage). Similarly, while the Lottery may not have taken enough steps to verify the ticket numbers reported stolen nor developed an accurate enough system for tracking stolen tickets, its actions can hardly be described as indecent or immoral. Plaintiff’s claim must be dismissed because no reasonable jury could conclude from the evidence presented that Defendants’ conduct was outrageous.

malicious prosecution, the same reasoning applies to Plaintiff’s claims for false arrest and imprisonment.

IV.

In order to prove a claim for negligence against Rite Aid, Plaintiff must establish that it failed to exercise the care a reasonably prudent retailer would have exercised reporting a customer theft.⁴ In this case, Plaintiff argues that Rite Aid is negligent for failing to properly train and supervise its agents and employees, failing to secure their Lottery tickets in a safe place, failing to keep accurate accounts of their ticket sales, and for filing a false and erroneous theft report with the Lottery. Plaintiff has not produced evidence to show that Rite Aid's employees were improperly trained or supervised. This allegation must be dismissed. Similarly, it was not reasonably foreseeable that failing to keep the Lottery tickets in a safe place would cause someone to be wrongly arrested. Therefore, this charge must be dismissed. The disposition of these charges serves as a reminder that the negligence analysis must focus on the report to the Lottery, not on general negligent operations.

The sole remaining charge raises that issue. Plaintiff says that Rite Aid negligently filed a false theft report with the Lottery, based on records it knew might be inaccurate.⁵ Normally, a person is not liable for mistakenly filing a false report. A store, however, owes its customers a duty not to report as stolen goods that they have legitimately purchased. The key element of this negligence charge is proof that Rite Aid knew its records were inaccurate. Plaintiff has presented evidence from which a reasonable jury could conclude that Rite Aid knew its records

⁴ Plaintiff also pleads gross negligence and negligent infliction of emotional distress. These are both types of negligence, not separate claims. The Court will instruct the jury on these claims if Plaintiff presents sufficient evidence to support them at trial.

⁵It is not reasonably foreseeable that keeping inaccurate records by itself would cause a customer to be wrongly arrested, but it is foreseeable that reporting merchandise as stolen based on inaccurate records might lead to a wrongful arrest.

were inaccurate and, therefore, failed to use reasonable care in reporting the stolen ticket numbers. In order to establish negligence against the Lottery, Plaintiff will have to prove that the Lottery failed to exercise the care an ordinarily prudent corporation would exercise asking police to arrest a customer. Here, Plaintiff argues that the Lottery is negligent for failing to investigate the stolen ticket report before entering all reported numbers into its database and for telling the police that Plaintiff's tickets were stolen when all of the stolen tickets were redeemed on the day of the theft. Plaintiff has presented evidence that the Lottery had reason to know that its system for tracking and identifying stolen ticket numbers was sometimes inaccurate. The Lottery owes Plaintiff a duty because she purchased their tickets. Implicit in any sales transaction is the agreement that the seller will not later pursue the buyer for theft of the goods sold. A reasonable jury could conclude from this evidence that an ordinary, prudent lottery corporation would not have reported stolen tickets without a more rigorous investigation or without investigating the redemption pattern of allegedly stolen tickets.

By denying this motion, the Court is not deciding the specific duties owed Plaintiff by the Lottery or Rite Aid. The Court anticipates further discussion and argument about the precise scope of those duties. However, the factual disputes and some legal uncertainty preclude summary judgment.

V.

The Lottery also argues that this claim should be dismissed because Defendants' conduct was not the proximate cause of Plaintiff's alleged injuries.⁶ The Lottery says that Plaintiff's

⁶Plaintiff's constitutional and 42 U.S.C. § 1983 claims against the Lottery have never been formally dismissed, but as the Court stated in its prior opinion, Plaintiff has not pled facts to support a First, Fifth or Eighth Amendment claim. Moreover, Plaintiff's Fourth and Fourteenth Amendment claims would require the Court to find that Plaintiff was illegally arrested or searched. This Court has already determined that Plaintiff's search and arrest

injuries stem from police conduct for which it cannot be held liable. Moreover, the Lottery claims that it did not instruct the police to arrest Plaintiff. Instead, the police made that decision themselves, after they arrived at the scene and investigated. The Lottery urges the Court to find that Plaintiff's disorderly conduct was the superseding cause of her arrest and the damages that flowed from it.

Superseding cause is a legal question decided by the court. *See House v. Kellerman*, 519 S.W.2d 380 (Ky. 1974). Whether these facts present a superseding cause is a very close question. On one hand, the arresting officer has testified that he would have arrested Plaintiff for disorderly conduct regardless of the lottery charge. On the other hand, Plaintiff's arrest was a reasonably foreseeable because the police would not have been questioning Plaintiff if the Lottery had not given them allegedly false information. On balance, at this time the Court concludes that the officers' actions were not a superseding cause. It seems reasonably foreseeable that the report of stolen materials could result in the arrest of those possessing the materials. The Court will re-evaluate this decision should the evidence at trial show that Plaintiff was arrested solely or primarily due to her public disturbance.

was legal. As such, these claims must be dismissed.

The Court will enter an order consistent with this Memorandum Opinion.

JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

Having read Defendants' motions for summary judgment and Plaintiff's response and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is SUSTAINED as to Plaintiff's claims for false arrest, false imprisonment, malicious prosecution, and outrage and those claims are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is SUSTAINED as to Plaintiff's claim for outrage and that claim is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Kentucky Lottery Corporation and Rite Aid's motions for summary judgment are DENIED with regard to Plaintiff's negligence claim.

This ___ day of March, 2000.

JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record