

**IN THE CIRCUIT COURT OF GILMER COUNTY, WEST VIRGINIA**

2018 APR 20 AM 11:28

**JOHN R. ZSIGRAY,**  
**Plaintiff,**

CIRCUIT CLERK  
GILMER COUNTY

v.

**Case No. 16-C-17**  
**Judge Richard A. Facemire**

**CINDY LANGMAN and**  
**J. W. EBERT CORPORATION,**  
**d/b/a "McDonalds,"**  
**Defendants.**

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**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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On or about September 14, 2017, the Defendants, Cindy Langman and J. W. Ebert Corporation, with the assistance of their counsel, Robert L. Greer and Greer Law Offices, PLLC, filed their Motion for Summary Judgment. The Plaintiff, John R. Zsigray, with the assistance of his counsel, William B. Summers, filed his Initial Response on or about February 1, 2018, and filed his Amended Response on or about February 6, 2018. The Defendants filed their Reply on or about February 12, 2018. The Court held a hearing on the Motion for Summary Judgment on February 22, 2018. The Court then took the motion under advisement. After considering the pleadings and arguments of counsel, the Court shall GRANT the Defendants' Motion for Summary Judgment. The Court makes the following findings of fact and conclusions of law:

1. May 23, 2016, the Plaintiff, John R. Zsigray, filed his Amended Complaint. The Amended Complaint centers on an incident occurring on May 8, 2015, when the Plaintiff was a customer at the McDonald's restaurant in Glenville, WV. McDonald's is owned and operated by Defendant, J. W. Ebert Corporation. Defendant Cindy Langman was an employee at McDonald's at that time, and interacted with the Plaintiff on May 8, 2015.
2. This incident resulted in Defendant Langman contacting law enforcement, and she gave a statement to Senior Trooper K. J. Varner, II of the West Virginia State Police.

3. Sr. Trooper Varner obtained a Criminal Complaint against the Plaintiff. The Plaintiff was charged in Gilmer County Magistrate Court case 15-M11M-00184 with Harassment in violation of W. Va. Code § 61-2-9a(b).
4. The Plaintiff's criminal case proceeded to a jury trial, and the Plaintiff was acquitted at trial.
5. The Plaintiff alleges that Defendant Langman gave false statements to Sr. Trooper Varner regarding the May 8, 2015, incident, and that her false statements are what formed the basis for his criminal prosecution. The Plaintiff claims that the criminal prosecution caused him stress and anxiety. The Plaintiff sets forth three causes of action in his Amended Complaint: Count II-Libel and Slander, Count III-Outrage, and Count IV-Intentional Infliction of Emotional Distress.
6. The Court dismissed Count II-Libel and Slander by prior Order entered on or about April 21, 2017.
7. The tort of outrage and the tort of intentional infliction of emotional distress have the same elements, and the Court will address Count III and Count IV together. "Intentional infliction or reckless infliction of emotional distress, also called the 'tort of outrage.'" *Travis v. Alcon Laboratories, Inc.*, 504 S.E.2d 419, 424-5 (WV 1998).
8. "In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant

caused the plaintiff to suffer emotional distress; and (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it." *Id.* at Syl. Pt. 3.

9. "In evaluating a defendant's conduct in an intentional or reckless infliction of emotional distress claim, the role of the trial court is to first determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination." *Id.* at Syl. Pt. 4.

10. On May 8, 2015, the Plaintiff and his wife, Jeanie Zsigray, travelled to the McDonald's in Glenville to purchase sandwiches. They ordered through the drive-thru window. The Plaintiff ordered a plain chicken sandwich. Instead of being given a plain chicken sandwich, the Plaintiff was given a plain chicken patty and no bun. A verbal confrontation between the Plaintiff and Defendant Langman ensued, and Defendant Langman contacted the police.

11. The Criminal Complaint in case 15-M11M-00184 which charged the Plaintiff with Harassment states in part, "Ms. Langman advised she spoke to Mr. Zsigray about the issue at which time Mr. Zsigray proceeded to cuss, saying, 'I want my fucking refund and shut the fuck up!' Ms. Langman stated she advised him he would get his money and not cuss at her workers. He replied, 'I fucking do what I fucking want and if you don't like it, I can come in there and show you how I can fucking cuss.' Ms. Langman stated she told him to leave and not come back to which his reply was he will do what he fucking wants and I can't stop him from coming in this store if I want to try, he will make sure I

will fucking know what he can and can't do. Ms. Langman stated she felt very threatened by him and his actions and behavior and does not feel safe with him."

12. The Criminal Complaint also refers to another incident occurring in mid-April of 2015, wherein the Plaintiff was alleged to have harassed workers at the McDonald's, including using racial slurs to an African-American employee.
13. Sr. Trooper Varner further states in the Criminal Complaint that he observed surveillance video of the May 8, 2015, incident that showed the Plaintiff opening the drive-thru window after a McDonald's employee had closed it to keep him from yelling into the business.
14. The Plaintiff denies this specific conduct as set forth in the Criminal Complaint. (*John Zsigray Deposition Pgs. 55-57*).
15. The Plaintiff admits that there was an incident between himself and Defendant Langman some six to eight months prior to the incident at issue in this case. This incident involved a dispute over extra pancake syrup. The Plaintiff states that this incident ended with Defendant Langman refunding his money and telling him not to return to McDonald's, and the Plaintiff calling her a, "stupid fucking bitch." (*Id.* at 25-27).
16. The Plaintiff stated in his deposition that the May 8, 2015, incident at McDonald's was over a mistake made with respect to his chicken sandwich order, which was made at the drive-thru window. He ordered a plain chicken sandwich, but was given just a plain chicken patty with no bun. (*Id.* at 27). When he made a complaint to the employee at the drive-thru window, he was directed to the next window, where he encountered Defendant Langman. (*Id.* at 37). Similar to the pancake syrup incident, the Plaintiff testified that

this incident ended with his receiving a refund and his calling Defendant Langman a "stupid fucking bitch." (*Id.* at 39).

17. The Plaintiff testified that Defendant Langman did give him a "lecture" regarding the making of the chicken sandwich, but that she did not use any foul language or call him any names. (*Id.* at 40).
18. The Plaintiff denies that he ever threatened Defendant Langman. (*Id.* at 44).
19. Defendant Langman contacted law enforcement regarding the May 8, 2015, incident, and the Plaintiff was charged with a violation of W.Va. Code § 61-2-9a(b), which states, "Any person who repeatedly harasses or repeatedly makes credible threats against another is guilty of a misdemeanor..." The statute states in subsection (f)(3) that, "Harasses means willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress." In subsection (f)(5), "Repeatedly," is defined as, "two or more occasions."
20. As set forth in Syl. Pt. 4 of the *Travis* case, the Court performs a gatekeeper function in cases involving claims for intentional infliction of emotional distress, and the Court must look to the conduct of Defendant Langman and determine if her conduct may reasonably be regarded as so extreme and outrageous as to constitute intentional or reckless infliction of emotional distress.
21. "The first element of the cause of action is a showing by the plaintiff that the defendant's actions towards the plaintiff were atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency. The defendant's conduct must be more than unreasonable, unkind, or unfair; it must truly offend community notions of acceptable

conduct.” *Travis* at 425, (quoting *Grandchamp v. United Air Lines, Inc.*, 854 F.2d 381, 383 (10<sup>th</sup> Cir. 1988)).

22. The Court finds that Defendant Langman’s conduct cannot reasonably be considered as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Defendant Langman was working in a public place, and she had just encountered the Plaintiff for a second time, wherein the Plaintiff, by his own admission, for a second time used inappropriate and aggressive language towards her. It does not exceed the bounds of decency or offend community notions of acceptable conduct for an individual working in a restaurant to report an incident with a customer to law enforcement. Seeking the assistance of law enforcement and the criminal justice system is not extreme and outrageous conduct as a matter of law.

23. The Plaintiff contends that Defendant Langman was not truthful when she described the incident to law enforcement, and that her untruthful account of the incident led to his arrest, charge, trial, and ultimately his emotional distress. Even if just considering the Plaintiff’s version of his interactions with Defendant Langman, the Court does not find that it was extreme or outrageous for Defendant Langman to report the incident to law enforcement. The behavior acknowledged by the Plaintiff at the least sets out a prima facie case for Harassment under W. Va. Code § 61-2-9a(b). Sr. Trooper Varner and Magistrate Carol Wolfe (who issued the Arrest Warrant), and the Gilmer County Prosecuting Attorney obviously believed there was sufficient evidence to proceed with the Harassment charge. The fact that the Plaintiff was ultimately acquitted at trial, does not have bearing on whether or not Defendant Langman’s conduct in reporting the incident and pursuing the prosecution was extreme or outrageous.

24. As the Court has found that the conduct of Defendant Langman cannot reasonably be considered outrageous, which is the first element of a claim for intentional infliction of emotional distress, it is not necessary for the Court to address the merits of the remaining three elements.

25. The proper method to seek damages resulting from a criminal prosecution or an alleged misuse of the legal system is through a malicious prosecution claim. The Plaintiff however, did not state a claim for malicious prosecution.

26. In opposition to the Motion for Summary Judgment, the Plaintiff argues in part that counsel for the Defendant failed to make his witnesses available for testimony through deposition. The Court notes that this case was initiated May 6, 2016. The Plaintiff did not file any motions requesting the Court to assist with discovery issues, and the Plaintiff did not exercise subpoena power to compel the testimony of witnesses. This case was previously scheduled for trial in November of 2017. The Plaintiff has had sufficient time prior to the Motion for Summary Judgment to conduct discovery or to request additional time for discovery, and the Plaintiff has not set forth good cause why additional discovery was not pursued earlier.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Defendants' Motion for Summary Judgment shall be GRANTED, and case 16-C-17 shall be DISMISSED and stricken from the Court's docket.
2. This is a FINAL ORDER, and any party aggrieved by this ruling may file a petition for appeal with the West Virginia Supreme Court of Appeals.
3. The Court shall note and preserve all parties' objections and exceptions to the Court's rulings.

- 4. The Clerk of this Court shall provide a certified copy of this Order to counsel for the Plaintiff, William B. Summers; and to counsel for the Defendants, Robert L. Greer, Greer Law Offices, PLLC.

It is accordingly so ORDERED.

ENTERED this the 20<sup>th</sup> day of April, 2018.

Entered: 20 April 2018

[Signature]  
 Richard A. Facemire, Judge 4/20/18

STATE OF WV  
COUNTY OF GILMER, to-wit:

I, ~~Karen Eika~~, Clerk of the Circuit Court and Family Court of Gilmer County, do hereby certify that the foregoing is a true copy of an order entered in the above styled action on the 20 day of April, 20 18.

Given under my hand and official seal this the 20 day of April 20 18.

[Signature]  
 Clerk of the Circuit Court  
 By [Signature]  
 Deputy Circuit Court Clerk