FBT-CV22-6117735-S CONNECTICUT SUPERIOR COURT

FELICIA MCCREE JUDICIAL DISTRICT OF BRIDGEPORT

VS. AT BRIDGEPORT

STLJ LLC May 20, 2024

**MEMORANDUM OF DECISION re MOTION FOR SUMMARY JUDGMENT** (#153.00)[1]

Background

This is an action arising from an incident that occurred when the plaintiff attempted to enter the Stew Leonard's store in Norwalk. The plaintiff initially had been engaged in something of an argument with another patron, based on that individual's concern that the plaintiff had parked her vehicle in a handicap parking spot but should not have done so. The argument between the patrons continued as they approached the entrance to the store, and the individual defendant, performing security-related functions, became involved. At some point, the individual defendant indicated that he would not allow the plaintiff to enter. Words were exchanged and the plaintiff attempted to get past the individual defendant who was attempting to prevent her from doing so.

There is some dispute as to whether there was any physical contact between the plaintiff and the defendant trying to prevent her from entering the store, and that is a critical if not necessarily dispositive issue. The defendant claimed and continues to claim that there was physical contact, variously described as constituting

[1] At the time the motion was filed, all four original defendants were parties. As of the date of argument, the plaintiff had withdrawn her claims as directed to the named defendant and defendant Ross. For purposes of this motion, then, the defendants are Edward Marcos (generally described in this decision as the security guard or individual defendant) and defendant Stew Leonard's, A General Partnership, as the employer/principal of defendant Marcos (with claimed derivative liability for the conduct of defendant Marcos).

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Jean Lorenzo Asst. Clerk



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something in the nature of an assault or as being pushed; the plaintiff claimed and continues to claim that there was no physical contact whatsoever.

The police were called and were on scene when the plaintiff attempted to leave the store. There was a level of discussion with the police as to what had or had not happened, and electronic recordings of what happened and were reviewed. The police eventually concluded that the incident did not warrant treatment as a criminal matter. The plaintiff was cautioned that the security officer had stated that the plaintiff was banned from the store such that any return to the store might constitute a form of criminal trespass.

The plaintiff has sued the individual defendant and the employer/store as claimed principal; two other defendants no longer are in the case. As to each of the remaining defendants, the plaintiff has asserted claims of slander and intentional infliction of emotional distress.

Legal standards

The court need not recite, in detail, the well-established legal standards applicable to a motion for summary judgment. See, e.g., *Kinity v. US Bancorp*, 212 Conn. App. 791, 835-836 (2022). Somewhat simplified, the burden is on the moving party to demonstrate that there are no material issues of fact and that based on those undisputed facts, the moving party is entitled to judgment as a matter of law. The non-moving party has no burden unless and until the moving party has satisfied its burden.

Discussion

*I. Defamation*

The court starts with a common-sense framework: with limited exceptions, if a complainant calls the police, seeking to have another person arrested, the person about whom the complaint is made is likely to be upset or worse, and the self-assessment of whether anything wrong had been done likely has a magnifying or multiplier effect. Stated in a more direct if simplistic manner (and subject to limited exceptions): no one wants to have the police called for the purpose of being arrested. (Some people, such as protestors, may want to be arrested, to make a point.)

The police have discretion as to whether to arrest an individual based on another individual's complaint. When an arrest is not made, the claimed perpetrator of a wrong may, him/herself, feel wronged by the fact that the police were called. Of course, having the ability to call the police lessens the likelihood of self-help to resolve a conflict, which may, from a societal perspective, be an important and desirable basis for limiting the ability to complain about instances where to police have been called (an underlying rationale for the qualified privilege to do so).

This impacts not only the emotional distress claim but also, to an extent, the defamation claim.

With respect to the defamation claim, there must be a narrowed focus on the defamatory statement itself, and the need to distinguish between a statement that is defamatory and a statement reflecting opinions or beliefs of the speaker. This type of distinction was recently addressed in great detail by our Supreme Court (if in a commercial context):

> "Context is a vital consideration in any effort to distinguish a nonactionable statement of opinion from an actionable statement of fact.

> As this court previously has recognized, [t]his distinction between fact and opinion cannot be made in a vacuum ... for although an opinion may appear to be in the form of a factual statement, it remains an opinion if it is clear from the *context* that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated. . . . Thus, while this distinction may be somewhat nebulous ... [t]he important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact. A central feature of the analysis undertaken by virtually every court called on to distinguish opinion from fact involves a careful examination of the overall context in which the statement is made." *Netscout Systems v. Gartner, Inc.*, 334 Conn. 396, 412, 223 A.3d 37 (2020).

The *Netscout* decision focused on the distinction between fact and opinion, and affirmed the trial court (on an alternate basis) precisely because the Supreme Court deemed the statements being challenged to have been in the nature of opinions ("In our view, all of the statements that the defendant made about the plaintiff were expressions of nonactionable opinion." Id. at 431.)

The parties focus on different aspects of the limited statements in issue. Somewhat condensed and distilled, the individual defendant stated to the police that the plaintiff had pushed him and that he wanted her arrested for assault. Much attention is paid to whether the plaintiff did, in fact, "push" the individual defendant, including whether the available video clearly demonstrates that there had been conduct reasonably characterized as a push. The characterization of whatever contact there may have been as a "push" itself is dependent on a determination of whether there was any physical contact at all between the parties.

To the extent that the parties urged the court to review the video so as to determine the extent, if any, of contact between the parties, the court must make the

following preliminary observations. As particularly reflected in replay of aspects of basketball and football games on television, a perception of "what happened" can depend upon the viewpoint of the camera with respect to the event being depicted. Sometimes there appears to be a "definitive" view but at other times, there are views that are less than definitive precisely because of the angle/viewpoint of the camera. Relevant or potentially relevant to this case is that if there is a viewpoint from which there appears always to be a gap between the two individuals, that likely would be perceived to be in the nature of definitive proof of a lack of contact. Images from a viewpoint seeming to show contact might or might not be definitive, depending upon precisely what is being shown and whether it may simply be that a continual separation between the parties simply is not shown by a camera positioned as was the case.

An additional factor is the ability to view a video in slow motion or even in a frame-by-frame manner. Again, using televised sports as a reference point, sometimes only when a video is viewed in slow motion or in a frame-by-frame manner can there be a precise determination of what happened (with an overlay of having an appropriate viewpoint). The court does not have the capacity for slow motion and especially a frame-by-frame viewing of the video exhibits provided.

In something of a rigorous analytic sense, there are sequential issues of a factual nature:

1. Was there any contact between the parties?
2. If there was contact, was it reasonably characterized as a push/pushing?
3. If the contact was reasonably characterized as a push/pushing, would it then be reasonable to characterize the incident as an assault?
4. As a refinement of ¶ 3, would the use of the word "assault" in connection with this incident be perceived to have the meaning set forth in criminal statutes or

in civil jurisprudence relating to assault and battery or as a vernacular term without regard to legal interpretations in the criminal or civil legal context?

5. Did the defendant ever state that the plaintiff assaulted him, as a factual matter, whatever definition/usage is deemed applicable?

The plaintiff's arguments tend to blur the distinction implicit in ¶ 5 in the context of earlier paragraphs – the defendant stated that the plaintiff had pushed him and that he wanted her arrested/prosecuted for assault. The statement relating to pushing is factual – that is the act that the defendant states occurred. The reference to assault, by contrast, is the name of an offense for which he wanted her to be arrested/prosecuted – effectively an opinion as to which criminal offense had been committed.

Our courts have noted the lack of precision in describing incidents involving physical contact between people, recognizing that the technical distinction between a civil assault and a battery often is ignored; see, e.g., *Maselli v. Regional School District Number 10*, 198 Conn. App. 643, 660, 235 A.3d 599 (2020). That is compounded by the distinction between the civil concept of assault and the criminal concept of assault, and in particular Connecticut's categorization of offenses, where the term "assault" generally requires an intent to injure or actual injury. From the perspective of Title 53a of the General Statutes – and in turn the perspective of a knowledgeable police officer or prosecutor – the events as described by the individual defendant would seem to be no more than a violation of General Statutes § 53a-181 ( Breach of the peace in the second degree (a class B misdemeanor)) -- or a violation of § 53a-182 (Disorderly conduct (a class C misdemeanor)) and possibly no more than a violation of General Statutes § 53a-181a (creating a public disturbance (an infraction)).

If a customer accuses a merchant of "robbery" in the course of a dispute about a transaction – with or without a plausible element of wrongful overcharging – is that

to be deemed an accusation of a felony, for purposes of defamation, even though robbery, as a criminal offense, requires force or threat of force (General Statutes § 53a-133)? Vernacular expressions may vary from defined criminal offenses – what in common usage may be considered "rape" is, under Connecticut's current penal code, a form of "sexual assault" (there being varying degrees of that denominated offense).

Whatever blurring of the distinction between a factual claim of being pushed and a desire for an arrest based on a characterization of the event as an assault if communicated in almost any other context, in the context of a statement/complaint to the police, the distinction cannot be ignored. No reasonable individual in a Police Department would likely interpret a request for an arrest for assault, after an incident had been described as involving pushing (with no mention or suggestion of injuries), as one rising to the level of a criminal assault under the Connecticut Penal Code; it is in the nature of an opinion of the complainant that the offense (pushing) is or should be punishable as some variation on an "assault."

The court cannot ignore context:

> "Whether a published article is libelous per se must be determined upon the face of the article itself. The statements contained therein, taking them in the sense in which common and reasonable minds would understand them, are determinative, and they may not for this purpose be varied or enlarged by innuendo. . . . Two of the general classes of libel which, it is generally recognized, are actionable per se are (1) libels charging crimes and (2) libels which injure a man in his profession and calling." (Internal quotation marks and citation, omitted.) *Battista v. United Illuminating Co.,* 10 Conn. App. 486, 492, 523 A.2d 1356 (1987).

Although without much discussion, a recent trial court decision, in somewhat analogous circumstances, determined that conduct alleged did not satisfy the minimum standards for defamation per se:

> "As to count three, which sounds in 'libel per se, charging with a crime,' the plaintiff alleges that the defendant provided a written statement made a part of the public document of a police report by knowingly, intentionally, and maliciously stating to Officer Fuller that the plaintiff had stalked, threatened, and harassed employees of the Pequot Library and had trespassed. The allegations do not involve 'moral turpitude' as that concept has been defined in the relevant case law, nor is there an 'infamous penalty' attached as is required to set forth a claim of libel per se." *Berry v. Fried*, Docket No. CV205043441S, 2022 Conn. Super. LEXIS 94, at *13-14 (Super. Jan. 25, 2022).

(*Berry* is indirectly of relevance to this case. Although it was not a basis for the complaint to the police, to the extent that the plaintiff may have ignored a directive to the effect that she could not enter the premises, she would appear to have violated General Statutes § 53a-110a, an offense designated as an infraction.)

Recognizing that some cases have characterized any crime for which imprisonment might be a penalty, in *Moriarty v. Lippe*, 162 Conn. 371, 383-84, 294 A.2d 326 (1972), the court seems to have required a felony-level crime to satisfy the "infamous crime" prong:

> "While the precise statute involved is not given, the crime of assault charged here, occurring in 1966, appears to be a violation of § 53-174 of the General Statutes (repealed October 1, 1971) which is punishable by imprisonment for not more than one year or merely by a fine of not more than $ 500. Such a crime, involving no moral turpitude, is not an infamous crime under any of the definitions of that term. *Drazen* v. *New Haven Taxicab Co.*, supra; see *Heating Acceptance Corporation* v. *Patterson*, 152 Conn. 467, 472, 208 A.2d 341.

> "We conclude then that, as a matter of law, the utterance involved here, even if false, does not charge a crime which constitutes a slander actionable per se." *Moriarty v. Lippe*, 162 Conn. 371, 383-84, 294 A.2d 326 (1972).

As noted above, at least some trial courts have concluded that any crime is sufficient for satisfaction of a per-se standard for defamation:

> "In *Moriarty v. Lippe*, supra, our Supreme Court narrowly held, as a matter of law, that the crime of assault, although punishable by imprisonment, "lacks in the element of moral turpitude," and therefore, cannot form the basis of a charge that is slanderous per se. *Moriarty v. Lippe*, supra, 162 Conn. 383. The *Moriarty v. Lippe* decision, however, pre-dates *Battista v. United Illuminating Co.*, supra, and is squarely at odds with the 'modern view,' which only requires that the charged crime be punishable by imprisonment. Indeed, under the modern view, the charge made by the defendant in *Moriarty v. Lippe* would be actionable per se because assault was punishable by imprisonment.
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> "This court, therefore, is faced with conflicting appellate authority as to whether the crime of assault could ever form the basis for a slanderous charge per se. In this court's view, however, it is apparent that the appellate courts favor adoption of the modern view. Accordingly, if the complaint is read so as to allege that the defendant charged the plaintiff with committing crimes which warrant imprisonment, then as a matter of law, it is legally sufficient." *Hueblein v. Burgess*, 1999 Conn. Super. LEXIS 1719, *5-6 (Super. 1999).

This court has little difficulty in rejecting this interpretation of the scope of infamous crimes for purposes of determining applicability of a per-se standard. Starting with the most general, if "infamous crime" includes every offense punishable by imprisonment, then the term "infamous" is redundant, as would be the "moral turpitude" aspect as well.

Pursuant to General Statutes § 53a-24, "[t]he term "crime" comprises felonies and misdemeanors." General Statutes §§ 43a-25 and 53a-26 define felonies and misdemeanors in a manner inclusive of all offenses for which a term of imprisonment is a potential penalty – felonies, including unclassified felonies, are offenses punishable by more than one year of imprisonment, and misdemeanors are offenses for which the maximum punishment is not more than one year. Therefore, all crimes are punishable by imprisonment such that modifiers such as "infamous" or "moral turpitude" are redundant if the potential for imprisonment is, by itself, sufficient to satisfy a per-se standard for defamation.

On another level, the suggestion that the Appellate Court decision in *Battista v. United Illuminating Co.* impliedly overrules (?) the Supreme Court decision in *Moriarty v. Lippe* – because that is perceived to be the modern view – is a procedural leap. Aside from the absence of any suggestion in *Battista* that it is modifying or overruling the *Moriarity* decision, the Appellate Court generally does not have the authority to change Supreme Court precedent. The Appellate Court can distinguish or address gaps left by Supreme Court decisions, but the Appellate Court is careful to note its inability to overrule or reject Supreme Court precedent on its own initiative. See, e.g., *Jezouit v. Malloy*, 193 Conn. App. 576, 593 n.12, 219 A.3d 933 (2019).

Finally, this appears to be a misreading of *Battista*. In *Battista*, the crime being discussed was a class D felony:

> "The charge falls within the legislative definition of larceny by theft of services in the third degree, in violation of General Statutes §§ 53a-124 (a) (1) and 53a-119 (7) (4), a class D felony punishable by one to five years imprisonment. General Statutes § 53a-35a (6)." *Battista v. United Illuminating Co.*, 10 Conn. App. 486, 493, 523 A.2d 1356 (1987).

The decision used somewhat general language relating to what constitutes a "crime" but was not addressing a situation where there might be a need to distinguish between serious crimes such as felonies, and less-serious crimes punishable by a maximum of 90 days or less (class C or class D misdemeanor). The crime at issue was a class D felony.

The court cannot help but note that this interpretation of "infamous" parallels the treatment of impeachment of a witness by proof of conviction of a crime – under Connecticut Code of Evidence § 6-7, only convictions for offenses punishable by more than one year can be the predicate for impeachment. Given that dichotomy of offenses, it borders on self-contradictory to say that a class C or class D misdemeanor is an "infamous" crime but at the same time too trivial to warrant use for impeachment of credibility.[2]

The court considers *Moriarty* to continue to be controlling law, precluding a non-felony offense to be deemed an infamous crime, and there is no moral-turpitude aspect of the offense(s) claimed, in the context of the facts of this case.

At this point, the court will identify an aspect of the preparation of this decision. The foregoing analysis was drafted, in an initial form, based on the court's review of the submissions of the parties, but prior to viewing the three video submissions – two were police video (body-cams) of responding officers, starting with officers in their vehicles driving to the location and extending through the officer interactions with participants in this occurrence (the plaintiff, her husband, the security guard, and the individual with whom there had been an exchange of words leading to involvement of

[2] Arguably, prior to adoption of the Code of Evidence in 2000, there was an additional parallel – pre-Code, impeachment could be accomplished by non-felony convictions involving honesty, somewhat corresponding to the "moral turpitude" branch of the per se crimes for defamation; see, e.g., *State v. Dawkins*, 42 Conn. App. 810, 819-20, 681 A.2d 989 (1996).

the security guard). The third video clip is from a security camera on the premises, showing the plaintiff moving past the security guard and into the store (the interaction during which the disputed pushing allegedly occurred).

The relevance of the videos to the foregoing analysis is that one of the officers, while on his way to the office where the security camera video could be observed, made a comment consistent with the above. Recognizing uncertainty as to what the video might show, and based on the information provided by the participants, the officer commented that if there was any basis for action (an arrest), it would be for the misdemeanor of disorderly conduct. (The court's recollection is that his words were "misdemeanor disorderly" in describing the possible offense.)

This tends to confirm that any reasonably trained police officer or other law enforcement personnel would not perceive a complaint of being pushed and seeking an arrest for a generic concept of "assault" as constituting an accusation of conduct constituting a felony or otherwise within the scope of "moral turpitude" or "an infamous crime." There is no "per se" potential to a complaint to the police for purposes of a defamation analysis.

The plaintiff has made it clear that she is relying on a claim of per se defamation ("The plaintiff is not going to pivot to a claim of Slander Per Quod, as the defendants claim to anticipate, because the plaintiff has properly pled a claim of Slander Per Se.") For the foregoing reasons, the allegations of the complaint, as amplified by the undisputed facts, demonstrate that the factual allegation of being pushed, which the security guard believed/claimed rose to the level of an assault (his opinion), does not constitute defamation per se.

The motion for summary judgment is granted as to the defamation claims.

II *Intentional infliction of emotional distress*

> "In order for the plaintiff to prevail in a case for liability under ... [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe....
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> "Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society.... Liability has been found only where the conduct 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. Generally, the case is 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! Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 442-43 (2003) (internal quotation marks, citations, and footnote, omitted)

The egregious nature of the conduct required to state a cause of action for intentional infliction of emotional distress is a continuing theme of appellate cases. *Di Teresi v. Stamford Health System, Inc.*, 142 Conn. App. 72, 86-89 (2013). In connection with pretrial motion practice, this court relatively rarely finds that the facts as alleged satisfy the stringent requirements for IIED; an underlying basis for that rarity may be the lack of sufficient intentionality in most fact patterns for which such a cause of action is claimed. For example, in *Di Teresi*, the court noted that even if there had been an intentional delay in notification of family members and that the

delay had been for reasons related to public relations, the delay had not been sufficiently egregious as to support a possible claim of IIED.

In light of the recognized need for some level of "outrageousness" in conduct as a threshold for a claim of intentional infliction of emotional distress (IIED), this court often is asked to perform something of a gatekeeping role (by way of motion to strike or motion for summary judgment) with respect to a claim of intentional infliction of emotional distress. While not intending to belittle the nature of emotional distress that may have been sustained in any case, the court often finds the conduct in question not to satisfy the legal threshold required for such a claim. On occasion, however, conduct with an outrageous quality can pass through initial screening mechanisms, and can result in trial on the merits. See, e.g., *Tice v. Bish*, Docket No. FSTCV146023210S, 2016 Conn. Super. LEXIS 1981 (Super. July 14, 2016), where this court declined to set aside a verdict in favor of the plaintiff, on a count asserting intentional infliction of emotional distress.

Invoking involvement of the police, while potentially distressing, is not automatically or necessarily something that elevates or aggravates conduct to the level required for a claim of IIED. Having a terminated employee escorted from the premises by security personnel has been recognized to be insufficiently egregious to support a claim of IIED, and summoning the police in the face of a "disturbance" is similar if not more appropriate. Similar to *Tice*, however, is the concern about the actual motivation for what otherwise might be generically permissible conduct. In other words, conduct that may be permissible or acceptable or even expected in some circumstances, might form the basis for IIED when occurring for inappropriate reasons.

The security officer might well have called the police because he believed that the plaintiff inappropriately had pushed him or because she had entered the store

while he was trying to prevent her from doing so – if based on a perception that the conduct, itself, warranted police assistance or intervention. While the court appreciates candor, in this instance, the security guard candidly acknowledged that he had called the police because of the plaintiff's attitude.

Probably no one – other than the responding police officers – can look back at this incident as an exemplary moment. The customer who complained about the plaintiff parking in a handicap parking

space may have been venting a general frustration about people parking in handicap parking spaces when they are not actually handicapped – likely a not-uncommon frustration for those in need of such a parking spot[3] – but the plaintiff apparently had a suitable permit. That some people use permits issued for other family members (or may have an accommodating physician), and/or that the plaintiff and her husband may not have appeared to be in need of a permit, may have fed into that frustration, but as the plaintiff's husband noted, the complaining individual did not know the actual situation of the plaintiff and her husband.[4]

The security guard may well have thought it appropriate to try to prevent the plaintiff and/or her husband from entering due to the verbal altercation that was ongoing as they approached the entrance to the building, and believed that calling

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[3] The individual recounted a prior experience at Stew Leonard's where there had been no available handicap spaces, and that his wife truly needs one. He further indicated that on this occasion, he had parked some distance from the store entrance, implying that there was a handicap permit in the car but he did not use it because he was not accompanied by his wife.

[4] Nothing in the body-cam video or the brief video of the actual interaction between the parties revealed any level of apparent difficulty of the plaintiff or her husband in standing or walking; given the approximate time lag between the incident and the police arriving on scene and the length of the police involvement, the overall events took place over a period of well in excess of 15-20 minutes (including the plaintiff and her husband walking through the store (if not viewable)).

the police was an appropriate response to the perception of having been pushed while trying to block entry, but the conduct itself does not appear to have been the motivation for calling the police. Rather, it was the plaintiff's attitude that he identified as motivating the call to the police.

The plaintiff, in turn, chose to disregard the security guard's effort to prevent entry. In waving her arms as she passed him, she was adopting a mannerism suggesting a "get out of my way" or generalized frustration or otherwise willful disregard of the message as she moved past him. She denies having made any physical contact with the guard, but in the process of waving her arms as she did, she certainly created a risk of doing so, and may (if inadvertently) have done so. Instead of attempting to de-escalate, she defied the guard and his authority, as an exercise of her perceived right to enter the store.

The police officers methodically did their job, talking to all participants, checking ID's, viewing the security video, etc. On at least one occasion, the body-cam audio picks up someone, seemingly an officer, using the word "silly" – it is not clear whether that was a reference to the initial verbal altercation between customers or the overall situation or some unidentified interaction. Regardless of magnitude of the problem being addressed or personal evaluation of what had transpired, the officers did a thorough job, including clarifying the desire of the security officer to have the plaintiff banned from the premises such that any return would be subject to treatment as a criminal trespass.

The security video does not provide sufficient detail and perspective to allow a conclusive determination of whether there was contact between the plaintiff and the security guard. The court does not have the ability to view the video on a frame-by-frame basis, and the angle of the camera is such that even such a review might not provide a conclusive answer to the question of whether there was any physical

contact between the plaintiff and the security guard. For purposes of this motion, then, the court must assume that the video does not demonstrate physical contact, as the non-moving party is entitled to the benefit of reasonable inferences to be drawn from the available evidence, and the defendants have not established that there is no material issue of fact as to the existence of physical contact.

As repeatedly identified, a focus of concern is the motivation for contacting the police. Even assuming/accepting that there might have been some physical contact, it was not the contact itself that caused the police to be called. It was her attitude that was identified as motivating the call to the police (ignoring his effort to stop her from entering?). Even if there had been some physical contact, the video seems to show that it was not a "directed" push (e.g., arms extended towards the defendant).

The assumption in the preceding paragraph itself, however, is contrary to summary judgment jurisprudence. The court must accept the plaintiff's version, that there had been no physical contact. While it could be argued that it is more likely that the plaintiff did not realize some minimal contact had been made with the security guard as she waved her arms and passed him than that he imagined or made up the existence of some level of physical contact, the court does not make factual determinations of that nature in the context of a motion for summary judgment. (If incidental contact were to be assumed, there would be a secondary question of whether that might reasonably be characterized as a "push.")

Again, there is a recognized societal value in recourse to the police rather than self-help or other mechanisms for addressing perceived-to-be-inappropriate conduct. The concern is when discretionary-but-appropriate mechanisms are invoked based on an unreasonable motivation, that the situation might approach or cross the threshold for IIED. Although the security guard is not directly comparable to a police officer, the nature of the position suggests a need to be less "sensitive" to less-than-

cooperative conduct – if not offensive conduct – of those with whom there is contact within the scope of employment. If there actually had been no physical contact, then that threshold potentially would seem to have been crossed, at least from the perspective of whether summary judgment can be granted.

As implicit in the earlier discussion of the use of the word "assault," different people may use a term technically or colloquially, and even then, usage may be somewhat variable. Attention to the word "push" is appropriate at this juncture. Some of the definitions for "push" in the sense of physical conduct include "to press against with force in order to drive or impel" or "to move or endeavor to move away or ahead by steady pressure without striking"[5] or " to thrust forward, downward, or outward."[6]

"Push" generally has some level of intentionality and direction; when one pushes an object or target, there is a focused effort to move it or at least apply pressure to it. The force applied may be from the body as a whole as when one applies a shoulder to a door, or when, with arms outstretched, there is an application of force from the body with the arms somewhat acting as fixed projections. The force may be more narrowly applied by the act of stretching out an arm, using shoulder and elbow joints to provide some of the force (with the body essentially a leverage point for the arm movement).

These common descriptions of what likely is understand by the claim that one person pushed another should be contrasted with what actually occurred or is claimed to have occurred – in the context of what is shown on the security video. There does not appear to have been any directed contact with the security guard in the sense of

[5] That the definition of "push" often excludes striking reinforces the distinction between a complaint of conduct described as a push and the opinion that that might constitute some level of criminally-assaultive behavior.
[6] https://www.merriam-webster.com/dictionary/push (last visited on May 15, 2024).

directing a hand or shoulder or outstretched arm in his direction. If anything, the plaintiff is trying to get past the security guard, waving her arms as if to signify "get out of my way" or as a demonstration of generalized frustration.

The court recognizes that the security guard may have perceived any form of contact as a "push" or may have perceived the contact as sufficiently directional (and intentionally so) so as to come within the above definition(s). The point is that if there were some objective basis for a claim of intentional application of force/contact, there might be some sense of an objective basis to characterize the conduct as a matter warranting police action. Treating some level of physical contact arising from the plaintiff waving her arms about as worthy of police intervention, and calling the police because of the plaintiff's perceived inappropriate attitude, seemingly is a different matter.

The foregoing, of course, actually skews the analysis, if moderately, in favor of the defendant. As already noted, the plaintiff contends that there was no physical contact, and for purposes of this motion, the court must accept the plaintiff's version of events; the court must view the evidence in a manner most favorable to the non-moving party, giving her the benefit of all reasonable inferences. Whether based on the plaintiff's version of events or based on the court's review of the video, there was no apparent intentional "push"; while a jury might perceive the video as showing contact constituting a "push," this court at this time and in the context of this motion, must view the interaction as either involving no contact or at most, inadvertent contact. The court cannot deem the video to demonstrate the absence of a material issue of fact as to the existence of any contact and especially as to contact properly characterized as a push; it remains a material issue of fact.

Therefore, the court must evaluate the situation as one in which the police had been called despite no contact (or because of an at-most inadvertent contact), with the motivation for calling the police having been the perceived attitude of the plaintiff.

The court already has noted the relative rarity of asserted claims of IIED surviving the gatekeeping function served by motion practice, due to lack of sufficient outrageousness. There is a level of irony in this case. The typical flaw in a claim of IIED is that the plaintiff is attempting to characterize a non-trivial incident as something out of proportion to the reality. Here, there was what may have been a relatively trivial underlying incident – with a dispute as to whether there even was physical contact between the participants – being characterized as a form of assaultive-type behavior warranting police intervention, with the plaintiff's attitude as the direct cause of the police being summoned. It is the excessive reaction to an initial minor incident, rather than the often-inadequate seriousness/outrageousness of primary conduct, that makes this case different.

The court cannot conclude, definitively, that this scenario, viewed from the perspective most favorable to the plaintiff (as non-moving party), does not have an element of outrageousness sufficient to preclude judgment in favor of the defendants as a matter of law. Even assuming some level of impropriety in the extent to which the plaintiff had been waving her arms in the air, an inadvertent touching (or phantom touching) should not be escalated into a call to the police, with a claim of potential criminal wrongdoing, because a security guard found the plaintiff's attitude to have been inappropriate. The motion for summary judgment must be denied as to the claim of intentional infliction of emotional distress.

Conclusion

The court is satisfied that the only factual description of the interaction between the plaintiff and the security guard, as communicated to the police, was that the plaintiff had "pushed" the complainant. The complainant expressed his belief that that warranted an arrest for some generic form of assault, but particularly when directed to the police, no reasonable law enforcement official would construe being pushed, with no suggestion of injury, as even possibly rising to the felony level of a criminal assault. If viewed in a vernacular sense (difficult to justify in a communication with the police), there is nothing inherently rising to the per se level of the use of the word "assault" and again, especially when clearly linked to a factual accusation of being pushed.

The allegedly defamatory statement was made to the police; it was in the context of a phoned-in complaint to the police (possibly with elaboration once the police arrived on scene). The audience for the statement was limited to law enforcement professionals and the only factual assertion was that the plaintiff had pushed the defendant. Especially given the need for a contextual evaluation, the court can only conclude that the statement did not constitute defamation per se.

The intentional infliction of emotional distress claim, by contrast, in a sense, is strengthened by the weakness of the defamation claim. The more trivial the underlying interaction may be perceived to have been, the more unreasonable it may have been to involve the police. That is accentuated by the requirement that the court view the evidence in a manner most favorable to the non-moving party which, in this case at this time, means that the court must accept the absence of any physical contact between the parties. Calling the police to complain about contact so trivial that it may not actually have occurred, with a motivation based on the plaintiff's