UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOSEPH CARROLL, Plaintiff,	§	
v.	§	Cause No. 1:15-cv-1057
LEIF BJORKHEIM and BJORKHEIM'S DIAMONDS Defendants.	§	

PLAINTIFF JOSEPH CARROLL'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE SAM SPARKS:

Mr. Joseph Carroll has brought claims against Defendant Lief Bjorkheim under 42 U.S.C. § 1981 ("Section 1981"), common law assault, and negligence *per se*. Mr. Carroll has presented evidence to establish disputed issues of material facts for each element of these claims. Therefore, Defendant's motion should be denied.

BACKGROUND

Joseph Carroll is suing Leif Bjorkheim because when Mr. Carroll and a companion entered Bjorkheim's store to buy jewelry, Bjorkheim brandished shotgun and ordered them to leave, saying "I don't feel comfortable with you niggers in my store." *Exhibit A, Declaration of Joseph Carroll*. It is a strange world where a person can argue it was legal to threaten someone with a shotgun because he merely brandished it – as though brandishing a firearm is just horseplay. Stranger still to argue he was free to judge a customer based on the color of their skin because of the content of his bank account.

The law, however, does not support Defendant's arguments and his motion should be denied.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment shall be rendered when the pleadings, the discovery and disclosures materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 248 (1986).

Defendant's motion, understandably, argues Defendants' theory of the case, but in doing so asks the Court to resolve disputed issues of fact in Defendant's favor, which it cannot do. When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Washburn,* 504 F.3d at 508. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254-55.

ARGUMENT

A. <u>A merchant violates Section 1981 when he denies service to, or outright refuses to engage in business with, a consumer because of the consumer's race.</u>

"[W]hen a merchant denies service or outright refuses to engage in business with a consumer attempting to contract with the merchant, that is a violation of § 1981." *Causey v. Sewell Cadillac-Chevrolet, Inc*., 394 F.3d 285, 290 (5th Cir. 2004). Defendant's parsing of Mr. Carroll's finances and other minutia does not reflect the law of this Circuit. Bjorkheim ordered Mr. Carroll and his friend to leave his store because they were black, and doing so was actionable under Section 1981.

The elements of a consumer's Section 1981 claims are: "(1) he or she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the

discrimination concerned one or more of the activities enumerated in [Section 1981]." *Causey*, 394 F.3d at 288-89. It is unnecessary for the Court to engage in the *McDonnell Douglas* test in this instance, which Defendant has suggested, because Defendant's use of the N-word is direct evidence of discrimination against Mr. Carroll. *See Swierkiewicz v. Sorema N.A.*, 534 US 506, 511 (2002).

Defendant's motion does not contest the first element – that Mr. Carroll is a member of a racial minority – but it does deny the second element, which that Defendant intended to discriminate on the basis of race. This element is, however, quickly dispensed with by Defendant's use of a racial epithet. "[A] racial epithet does demonstrate racial animus." *Causey*, 394 F.3d at 289; *see also Brown v. Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir.1993) (the use of a racial slur is direct evidence that a person's related actions were motivated by racial animus). Therefore, a jury could reasonably conclude Defendant intended to discriminate on the basis of race because of the words that came out of his mouth: "I don't feel comfortable with you niggers in my store. You need to leave." *Exhibit A, para 6-10.* The jury could also infer Defendant was acting with a guilty mind because he took subsequent actions that are inconsistent with his story: he failed to preserve security camera footage of the incident, and he never filed a police report even though he claims to believe Mr. Carroll and his companion intended to rob his store. *Exhibit C (Responses 13 and 14).* A reasonable jury could infer Defendant would have done one or both if he was telling the truth.

Mr. Carroll's evidence establishes the third element because it shows Defendant "outright refuse[d] to engage in business" with him by ordering him out of the store. *See Causey*, 394 F.3d at 290. The Fifth Circuit made that clear in *Causey* when it waived away a question about whether an obscure fact scenario satisfied Section 1981 and instead adopted the common sense approach that when a business bars its doors to a consumer who is pursuing its services, and does so because

of the consumer's race, that violates Section 1981. *Id*. The cases Defendant offers are easily distinguishable because in those cases the plaintiffs were not pursuing the businesses' services.[1]

Further, if Defendant's argument was accepted it would create an absurd result: it would be legal for Defendant to turn away all black customers so long as he did so quickly enough – or perhaps by hanging a "no blacks allowed" sign on his door – so that no African American customer ever had an opportunity to view his merchandise. But those actions are clearly within the scope of what the Fifth Circuit proscribed when it wrote "outright refus[al] to engage in business" because of race violates Section 1981. *Causey*, 394 F.3d at 290.

For these reasons, forcibly ejecting Mr. Carroll while he was shopping violated Section 1981.

B. Brandishing a shotgun is a threat of imminent bodily injury.

There are people in prison who would be surprised to learn it is legal to threaten a person with a firearm as long as you brandished but do not point it. That, however, is not an accurate statement of the law. Brandishing a firearm, as Defendant did, is enough to convey a threat of imminent bodily injury, and is assault.

---

[1] In *Morris v. Dillard Department Stores*, the plaintiff was arrested in the store, and after she was arrested, banned from returning for a set period of time. 277 F.3d 743, 751 (5th Cir. 2001). There was, however, no evidence that the plaintiff had any interest in returning to the store or doing business there during the time frame in which the ban was in effect. *Id.* at 753. In *Arguello v. Conoco, Inc*., the evidence did not show the plaintiff was prevented from making his purchase from the store, because although the store clerk's conduct was offensive, she did not eject him from the store. 330 F.3d 355, 358–59 (5th Cir. 2003). Further, although she locked the door when he attempted to go back inside, the plaintiff testified he wasn't returning because he wanted to buy something, but rather to get the store clerk's name. *Id*. In this case, Mr. Carroll was actively shopping for jewelry when Defendant forced him to leave the store.

Williams v. Dillard's Department Stores, 211 Fed. Appx. 327, 329 (5th Cir. 2006) is an unpublished opinion, and under 5th Cir. R. 47.5.4, unpublished opinions are not precedent "except under the doctrine of res judicata, collateral estoppel or law of the case." It is also factually distinguishable, in that the plaintiff did not allege the owner barred someone from his establishment.

"The elements of assault are the same in both the criminal and civil context." *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 SW 3d 636, 649 (Tex.App.–Houston, 1st Dist. 2005) (citing Tex. Pen. Code § 22.01(a)). A person commits assault when he intentionally or knowingly threatens another with imminent bodily injury. The question to scrutinize is wehther a defendant intends to convey a threat with his actions. *Knight v. State*, 406 SW 3d 578, 587 (Tex.App.–Eastland 2013). "Mental culpability is of such a nature that it generally must be inferred from the circumstances under which the prohibited act occurred… [and] may be inferred by the trier of fact from the accused's acts, words, and conduct."

In similar cases, courts have held that brandishing (but not pointing) a shotgun is enough to support a conviction for aggravated assault with a deadly weapon. *See In re MC*, 237 SW 3d 923, 927 (Tex.App.-Dallas 2007). Robbery convictions[2] have been upheld on the theory that the robber claimed to have a gun – which was never actually brandished, let alone pointed at the victim. *Robinson v. State*, 817 SW 2d 822, 824 (Tex.App.-Fort Worth 1991). Similarly, there are a series of cases in which a perpetrator was found to have threated imminent harm when a victim merely feared the robber had a firearm, even though they did not claim to have one. *See Welch v. State*, 880 SW 2d 225, 227 (Tex.App. –Austin 1994) (robber passed a note to the bank teller who feared he had a gun); *see also Williams v. State*, 886 SW 2d 495, 497 (Tex.App.-Fort Worth 1994) (officer assumed a perpetrator he was chasing might have a gun).

Finally, conduct significantly less provocative than brandishing gun can convey a threat of imminent bodily harm:

[2] The Texas Court of Criminal Appeals has said it is reasonable to analogize a threat of imminent bodily injury within the assault statute to the same requirement in the statutes for robbery and terroristic-threats. *Olivas v. State*, 203 SW 3d 341, 346 (Tex.Crim.App. 2006).

> [R]eaching over the counter and taking money from the cash register was threatening because his actions were "a menacing indication of (something dangerous, evil, etc.)."

Boston v. State, 410 SW 3d 321, 327 (Tex.Crim.App. 2006). Clearly, menacing a person with a shotgun with the intent of conveying the potential for imminently bodily harm satisfies the elements of assault, regardless the angle at which the shotgun was held. Whether Defendant acted with intent can be inferred from his actions. *Exhibit A, para 7-11.*

C. The Court should recognize the City of Austin's anti-discrimination ordinance as the appropriate standard of care and that Defendant's violation of it was negligence *per se*.

The typical negligence cause of action requires a plaintiff to show a defendant (1) had a duty of care, (2) breached the duty, and (3) the breach resulted in the plaintiff being harmed. "Negligence per se is a tort concept whereby a legislatively imposed standard of conduct is adopted by the civil courts as defining the conduct of a reasonably prudent person," such that if defendant violates that standard and a plaintiff is harmed as a result, the defendant is liable to the plaintiff. *Johnson v. Enriquez*, 460 SW 3d 669, 673 (Tex.App.-El Paso 2015) (evaluating liability for a dog bite pursuant to a city ordinance requiring that dogs be restrained).

The City of Austin's municipal code prohibits discrimination in public accommodations (including retail establishments). It says:

> A person, including the owner, operator, or lessee of a public accommodation may not directly or indirectly exclude, segregate, limit, refuse or deny a person the accommodations, advantages, facilities, benefits, privileges, services, or goods of the public accommodation based on race, color, religion, sex, sexual orientation, gender identification, national origin, age, or disability.

Austin City Code § 5-2-4 (B).[3] A person who violates the ordinance may be prosecuted in the municipal court (*id.* at § 5-2-8) for a Class C misdemeanor. *Id.* at § 1-1-99 (B).

[3] The Austin City Code is available at:
https://www.municode.com/library/tx/austin/codes/code_of_ordinances

The Texas Supreme Court has set forth factors to consider when deciding whether to accept a statute or ordinance as the duty of care under negligence *per se*. *Cerda v. RJL Entertainment*, 443 S.W.3d 221, 227 (Tex.App-Corpus Christi 2013). In *Cerda*, an adult-oriented business failed to prevent a minor from being brought into the establishment and coerced into performing, and the appellate court concluded is was appropriate to rely on state law and local ordinances to hold the defendant liable for negligence *per se*. *Id.* at 231. There was no equivalent common law duty, but the Supreme Court's other factors weighed in favor of using the statutes and ordinance – they clearly defined the proscribed conduct, they only imposed liability when a defendant is at fault, wouldn't impose ruinous liability, and the victim's injury was a direct result of law breaking. *Id.* at 228.

The same factors weigh in favor of accepting Austin's ordinance as the standard of care in this case. The prohibition on racial discrimination in public establishments is widely established and understood; defendants would only be held liable for fault; and Mr. Carroll's injuries ("sleep problems, trouble concentrating, uneasiness and difficulty with crowds, an accelerated heart rate, and nausea," see *Exhibit A, para 12*) were a direct result of Defendant's law breaking, similar the victim in *Cerda* (who experienced "lost peace of mind, depression, neurosis, nervousness, weight fluctuations, nightmares, irritability, upset stomach, pains in her stomach, sleep loss, and/or anxiety"). *Id*. at 224.

For these reasons, Defendant should be held liable for violating the City of Austin's proscription on discrimination in public accommodations.

CONCLUSION

For these reasons, Mr. Carroll has presented evidence to establish disputed issues of material facts for each element of his claims. Therefore, Defendant's motion should be denied.

DATED: November 4, 2016

Respectfully submitted,

/s/ Brian McGiverin
Brian McGiverin
Texas Bar No. 24067760
brian@lawcenterofaustin.com

DIETZ, LAWRENCE & MCGIVERIN
2221 Hancock Drive
Austin, TX 78756
Telephone: (512) 387-0718
Fax: (512) 597-0805

Judith Bohr
Admitted pro hac vice
Texas Bar No. 24092153
501 N IH 35 Austin, TX 78702
Telephone: 512-840-8900

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served on all counsel of record who have appeared in this matter through the Electronic Case Files System of the Western District of Texas.

/s/ Brian McGiverin
Brian McGiverin