

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-50859
Summary Calendar

CHARLES CADDELL, Individually
and on behalf of his mother, Mildred Caddell,

Plaintiff-Appellant,

VERSUS

WAL-MART STORES, INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Texas
(MO-96-CV-82)

April 9, 1998

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:¹

Charles Caddell had a shirt taken off his back in an Odessa Wal-Mart store when he was detained as a shoplifting suspect. He appeals from a jury verdict that found Wal-Mart was not liable for conversion of the shirt. He also appeals the district court's grant of a partial summary judgment dismissing his claims on behalf of his deceased mother under the theories of negligent infliction of emotional distress and bystander recovery and the denial of his motion for a new trial based upon jury misconduct and newly

¹Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

discovered evidence.

We have carefully reviewed the record and considered the briefs of the parties. There was sufficient evidence presented that a reasonable juror could find that the Baja shirt alleged to have been shoplifted was not owned by Caddell and thus was not converted by Wal-Mart. See Pagan v. Shoney's, Inc., 931 F.2d 334, 337 (5th Cir. 1991).

Further, the district court did not err in dismissing claims brought on behalf of Mildred Caddell. Texas law does not recognize negligent infliction of emotional distress as a cause of action. Nor did the court err in finding that no dispute of material fact existed that she did not witness a serious or fatal accident and in dismissing her bystander recovery claim.

Whether a new trial should be granted because of alleged jury misconduct is left to the sound discretion of the trial court and must be decided on an ad hoc basis. Vezina v. Theriot Marine Service, Inc., 554 F.2d 654 (5th Cir. 1977). In a review of the hearing conducted on the motion for a new trial, we find no abuse of discretion in the denial of that motion.

Accordingly, the decisions of the district court are AFFIRMED.