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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0457n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1069

[Filed November 15, 2022]

NAYONN GRAY, Plaintiff-Appellant,	)
v.	)
AUTOZONERS, LLC, a foreign profit corporation; NICHOLAS ISLES, Defendants-Appellees.	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: GIBBONS, GRIFFIN, and STRANCH, Circuit Judges.

PER CURIAM. Mr. Nayonn Gray, an African American man, alleges that he was discriminated against when AutoZone assistant store manager Nicholas Isles refused to provide a fourth exchange of

a battery that was covered by a one-year warranty. Gray filed a complaint against both Gray and AutoZoners, LLC, alleging racial discrimination under state and federal law, and negligent supervision and intentional infliction of emotional distress in violation of Michigan common law. The district court granted Defendants' motion for summary judgment in full. Gray now appeals the district court's judgment as to his discrimination and intentional infliction of emotional distress claims.

For the reasons below, we **AFFIRM.**

I. BACKGROUND

On May 9, 2020, Gray purchased a 75-VL Valucraft battery from an AutoZone location in Lincoln Park, Michigan. The battery was protected by a one-year warranty that excluded damage caused by "misuse, abuse, other faulty parts, improper installation or off-road, commercial or marine use," and did not specify the number of exchanges that a customer could request. Between May and July, Gray returned to the store three times to request new batteries under the warranty exchange policy. Each time, he received a new battery.

On Gray's July 22 visit to exchange the battery for the third time, Gray was helped by AutoZone employee Darlene Garcia, who is biracial and part African-American. Garcia tested Gray's battery, found that it held a charge, and advised Gray that she would not exchange the battery because it was not defective. In response, Gray "immediately" accused Garcia of refusing to exchange the battery because of his race;

Garcia also heard Gray say that she "had a mouth on [her]," and call her "a Mexican b****." Another store employee who overheard the commotion stepped in and granted Gray's warranty exchange, providing him with a new battery.

On August 7, Gray returned to the store with his friend, Demetrius Stone, to request a fourth warranty exchange. Gray approached Garcia for assistance, but Garcia "did not wish to assist [Gray]" because she did not want to be harassed or "baselessly accused of race discrimination again." Garcia asked Isles to assist Gray instead. Isles was aware of Garcia's negative experience with Gray and agreed to assist Gray in her place.

After reviewing Gray's warranty history of three exchanges in three months, Isles explained that he would not grant an additional warranty exchange because he thought that the history of exchanges indicated either that the battery was functional but not performing because Gray had a different problem with his vehicle, or that the battery was defective because Gray misused it. Isles suggested that Gray might instead have a problem with his vehicle's alternator, or that he might have installed an "aftermarket sound system[]" that the battery could not support. In his deposition, Isles explained that he thought that Gray might have installed an aftermarket sound system because it was "pretty common" for the store's customer base to do so. When asked to describe the customer base, Gray characterized it as working class and largely "[B]lack and Hispanic."

Isles then offered to try to charge Gray's battery and honor the warranty with a new battery if it did not function, but Gray did not want "any type of service other than the requested exchange." Gray then accused Isles of discriminating against him because of his race and AutoZone of discriminatory business practices. Isles placed the battery on the charger, and circular argument ensued over the course of two or three hours.

Gray alleges that at some point during the argument, Isles accused Gray of using the battery to make methamphetamines. Isles "vehemently" contests this allegation, arguing that it was in fact either Gray or Stone who accused Isles of making meth. After this comment, Gray left the store briefly, then returned and pulled out his phone to record his conversation with Isles, saying that he wanted Isles on video saying that he could not return the battery. Isles responded by telling Gray his name while pointing at his nametag, then stating: "Put me on Facebook, the white power oppressor, man."

Although Isles and another employee testified that the battery was fully charged when they returned it to Gray, Gray maintains that it still did not work in his car. Gray came back the next day, returned the battery, and bought a different type of battery and an alternator.

As part of an AutoZone investigation, Isles acknowledged that he was frustrated during his interaction with Gray, that he "should have been calmer," and that his recorded statement "was combative," but he denied that it expressed racial animus. Isles instead explained that his comment was

a "deeply sarcastic" reaction to Gray's accusations of racism, not an admission of racism.

Gray's operative complaint against Defendants Isles and AutoZone alleges four claims: (1) denial of equal rights, in violation of 42 U.S.C. § 1981; (2) denial of public accommodation, in violation of Michigan's Elliott-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.2101, *et seq.*; (3) negligent supervision under Michigan common law; and (4) intentional infliction of emotional distress (IIED) under Michigan common law. Defendants separately moved for summary judgment. The district court granted the motions in full, holding that Gray: failed to establish a claim under § 1981 or the ELCRA; abandoned his negligent supervision claim; and failed to establish extreme and outrageous conduct or severe emotional distress sufficient to establish an IIED claim. Gray appeals the grant of summary judgment only as to his § 1981 claim, ELCRA claim, and intentional infliction of emotional distress claim.

For the reasons below, we affirm the district court's judgment in full.

II. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo, drawing all reasonable inferences in favor of the nonmoving party. *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 234 (6th Cir. 2003). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact

is one "that might affect the outcome of the suit," and a genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "At the summary judgment stage, the moving party bears the initial burden of identifying those parts of the record which demonstrate the absence of any genuine issue of material fact." *Johnson v. Ford Motor Co.*, 13 F.4th 493, 502 (6th Cir. 2021) (quoting *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 389-90 (6th Cir. 2008)). Once the moving party has met its burden, the burden shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial," although the evidence need not be in a form that would be admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e) (1967) (amended 2010)).

III. ANALYSIS

A. Discrimination Claims: 42 U.S.C. § 1981 and Elliott-Larsen Civil Rights Act

"Section 1981 prohibits intentional race discrimination in the making and enforcing of contracts with both public and private actors." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 867-68 (6th Cir. 2001). The statute specifically protects against discrimination in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). To prevail on a § 1981 claim, a plaintiff must establish: (1) that "he belongs to an identifiable class of persons who are subject to discrimination based on their race;"

(2) that "the defendant intended to discriminate against him based on his race;" and (3) that "the defendant's discriminatory conduct abridged his right to contract." *Amini v. Oberlin Coll.*, 440 F.3d 350, 358 (6th Cir. 2006). Similarly, Michigan's ELCRA provides that, except when permitted by law, a person shall not "[d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status." Mich. Comp. Laws § 37.2302(a).

This case turns on whether Gray can establish that Defendants intended to discriminate against him. Under both statutes, this element can be established either by direct evidence or circumstantial evidence. *Amini v. Oberlin Coll.*, 440 F.3d at 358; *In re Rodriguez*, 487 F.3d 1001, 1007 (6th Cir. 2007) (citing *DeBrow v. Century 21 Great Lakes, Inc.*, 620 N.W.2d 836, 838 (Mich. 2001) (per curiam)). When a plaintiff seeks to prove intentional discrimination through circumstantial evidence, courts generally evaluate § 1981 and ELCRA discrimination claims under the same standard as Title VII of the Civil Rights Act of 1964. *See Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004) (1981 claims); *Perry v. McGinnis*, 209 F.3d 597, 602 n.3 (6th Cir. 2000) (ELCRA claims). But unlike Title VII, § 1981 and the ELCRA both require plaintiff to establish that race is a "but-for" cause of the injury. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1013 (2020); *Hecht v Nat'l Heritage Acads., Inc.*, 886 N.W.2d 135, 146 (Mich. 2016).

1. Direct Evidence

Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was the but-for cause of an adverse action. *Amini*, 440 F.3d 350, 359. "In other words: 'Direct evidence is evidence that proves the existence of a fact without requiring any inferences.'" *Scheick v. Tecumseh Pub. Schs.*, 766 F.3d 523, 530 (6th Cir. 2014) (quoting *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004)). Racially insensitive statements constitute direct evidence of discrimination "only if they have some connection" to the adverse action alleged. *Griffin v. Finkbeiner*, 689 F.3d 584, 595 (6th Cir. 2012).

Gray argues that Isles's "white power oppressor" statement is direct evidence of racially discriminatory intent, relying on our decisions finding direct evidence of discrimination based on use of racial epithets and explicit expressions of discriminatory motivation. *See DiCarlo v. Potter*, 358 F.3d 408, 417 (6th Cir. 2004), *overruled on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (finding direct evidence of discrimination where the defendant called the plaintiff a slur for Italian-Americans three weeks before terminating him from his job); *Scheick*, 766 F.3d at 531-32 (finding direct evidence that age discrimination was the but-for reason for termination where a board member told an employee that the board wanted "someone younger" instead).

Unlike *Dicarlo*, however, Isles did not use racial epithets, which Gray admitted in deposition testimony. And before Isles made the "white power oppressor"

comment, he had already stated that he would deny an exchange because the battery was either misused or not defective and was therefore not covered by the warranty. Where statements are unconnected to action in a particular contract, they are not direct evidence of discriminatory intent with respect to that contract. *See Spokojny v. Hampton*, 589 F. App'x 774, 778 (6th Cir. 2014) (City officials' statements in favor of awarding city contracts to minority-run businesses were not direct evidence of discrimination against a white attorney because they were unconnected to his contract).

Isles's comments were neither directly expressive of racial animus nor directly tied to Isles' decision to deny the warranty exchange. Accordingly, Gray fails to establish a discrimination claim based on direct evidence.

2. Circumstantial Evidence

To establish a § 1981 race discrimination claim relying on circumstantial evidence, a plaintiff must meet the burden-shifting standard of proof for Title VII cases established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Christian*, 252 F.3d at 868. *McDonnell Douglas* requires a plaintiff to "first establish a prima facie claim of discrimination." *Id.* If Gray can establish a prima facie case, the burden then shifts to the Defendants to produce a legitimate, non-discriminatory reason for the adverse treatment. *Id*. If the Defendants satisfy this burden, the presumption of discrimination disappears, and Gray must establish that the nondiscriminatory reason proffered by the Defendants is a pretext for discrimination. *Id.*

Throughout this framework, Gray bears the ultimate burden of proving by a preponderance of the evidence that he suffered illegal discrimination. *Id.*

To establish a prima facie case of discrimination in a commercial establishment, plaintiffs must show that: (1) they are a member of a protected class; (2) they made themselves "available to receive and pay for services ordinarily provided by the defendant to all members of the public in the manner in which they are ordinarily provided; and" (3) they "did not enjoy the privileges and benefits of the contract[] . . . under factual circumstances which rationally support an inference of unlawful discrimination." *Id.* at 871 (quoting *Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694, 705 (D.Md. 2000)). It is undisputed that Gray meets the first two prongs of the three-part prima facie test. The pertinent question is whether Gray "did not enjoy the privileges and benefits" of the warranty contract, under circumstances that rationally support an inference of unlawful discrimination. A plaintiff can fulfill this element either by establishing (a) that he was deprived of services while similarly situated persons outside the protected class were not deprived of those services, or (b) that he received services in a "markedly hostile manner" that "a reasonable person would find objectively discriminatory." *Id.* at 872.

To prevail on a similarly situated person theory, a plaintiff must identify a comparator person "of a different race, who was similarly situated to him, but who was treated better" by a defendant. *Smith v. City of Toledo*, 13 F.4th 508, 515 (6th Cir. 2021). Alternatively, a "markedly hostile" treatment theory

"account[s] for situations in the commercial establishment context in which a plaintiff cannot identify other similarly situated persons," and considers factors including whether service is so contrary to the establishment's financial interests, so far outside of widely acceptable business norms, and so arbitrary on its face that it supports a rational inference of discrimination. *Christian*, 252 F.3d at 871.

Gray argues that he can establish discriminatory intent under either the "similarly situated" or the "markedly hostile treatment" standards. But both arguments raise contested claims that are better resolved in the "pretext" stage of the *McDonnell Douglas* test. For the purposes of this analysis only, therefore, we presume Gray's prima facie case based on circumstantial evidence.

Thus, the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for their actions. *Christian*, 252 F.3d at 879. Defendants assert that Gray was denied a fourth battery exchange based on AutoZone's warranty policy. This satisfies their burden. The presumption of discrimination therefore disappears, and the burden shifts back to Gray to prove by a preponderance of the evidence that the Defendants' stated reasons are a pretext for racial discrimination. *Christian*, 252 F.3d at 879. He may establish pretext by showing that Defendants' stated reasons have no basis in fact, are not the actual reasons, or are insufficient to explain their actions. *Id.*

Gray argues that Defendants' stated reason for denying the exchange has no basis in fact.[1] He contends that: Defendants' explanation conflicts with the warranty policy, which does not limit the number of exchanges during the warranty period; customers "including white customers" frequently required multiple warranty exchanges in short time periods; there were "many occasions" when customers requested exchanges; and, store employees generally made exchanges even when batteries tested as functional. Gray also argues that a reasonable jury could infer an unlawful motive from the "white power oppressor" comment and Gray's alleged statements about drugs and aftermarket sound systems.

The record includes general testimony that customers could receive more than one exchange under the warranty, and that there was a gray area in which customers could insist on receiving a new battery even though the battery was functional. But no record evidence shows that any employee granted a customer of any race a fourth battery exchange within a three month period, particularly when the current battery tested functional and could hold a charge. And regardless of any informal policy generally allowing exchanges, the written policy guarantees replacement of only non-functional batteries, and its plain language excludes damage caused by misuse or abuse. Here,

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[1] Gray also argues on appeal that Defendants' stated reason is insufficient to explain Defendants' actions. But Gray did not present that argument before the district court. He therefore cannot raise it now. *See Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 501 (6th Cir. 2017) (en banc).

Isles reasonably concluded from the repeated exchanges in Gray's warranty history that either the battery was not the issue and something else was wrong with Gray's car, or that the battery was repeatedly failing because of misuse. Further, Isles's decision to deny the warranty exchange was in AutoZone's financial interests: AutoZone loses money on a battery that is returned under a warranty because exchanged batteries cannot be resold as new even if they are not defective.

In sum, Defendants have pointed to evidence that the written policy excluded exchanges of functional batteries or batteries damaged by misuse; that Isles had a reasonable basis for his belief that there was something else wrong with Gray's car or that the battery had been misused; that the battery tested functional; and that it was in AutoZone's financial interest not to allow a fourth exchange of the battery. This evidence provides a factual basis for Isles's denial of the exchange.

Some of Isles's comments, if true, suggest troubling stereotypes about African Americans. But even viewing the record in the light most favorable to Gray, a reasonable jury could not find that Defendants' proffered reason for the warranty denial was not based in fact. At most, a reasonable jury could conclude only that Isles would have refused to provide Gray a fourth battery regardless of any such stereotypes. This is insufficient to establish that race discrimination was the "but-for" cause of Isles's denial of the warranty exchange. The district court properly granted Defendants summary judgment with respect to Gray's

racial discrimination claims under § 1981 and the ELCRA.

B. Intentional Infliction of Emotional Distress Claim

To establish a claim of intentional infliction of emotional distress under Michigan law, a plaintiff must prove: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v. Auto-Owners Ins. Co.*, 374 N.W.2d 905, 908 (Mich. 1985). Conduct is extreme and outrageous where it is "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." *Graham v. Ford*, 604 N.W.2d 713, 716 (Mich. Ct. App. 1999). "[L]iability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Roberts*, 374 N.W.2d at 909 (quoting Restatement (Second) of Torts § 46 (1965)). Gray has established that Isles's comment was unprofessional and inappropriate. Based on the analysis of Isles's comments above, however, this evidence falls short of "extreme and outrageous" conduct that is utterly intolerable in society.

Even if Gray had established extreme and outrageous conduct, moreover, the law only intervenes when the distress inflicted is so severe that no reasonable person could be expected to endure it. *Id.* at 911. Being upset or angry is insufficient—more than usual outrage is required when a claim is based on emotional injury. Gray testified that he felt embarrassed and degraded, and that he purchased

various books to "get [his] mind off of" the incident. But Gray has not sought psychiatric treatment or counseling and admits that he did not know what "white power oppressor" meant at the time of the comment. The impact that Gray alleges is markedly less acute than distress that "no reasonable person could be expected to endure." Gray has failed to establish that he is experiencing "severe emotional distress" sufficient to make out a claim for intentional infliction of emotional distress under Michigan law. The district court did not err in granting Defendants' motion for summary judgment as to Gray's intentional infliction of emotional distress claim.

IV. CONCLUSION

Even presuming that Gray sets forth a prima facie case of discrimination, he has failed to establish that Defendants' proffered reason for the warranty denial was pretext for race discrimination. Gray has also failed to establish extreme and outrageous conduct and severe emotional distress that could support a claim for intentional infliction of emotional distress. We therefore **AFFIRM** the district court's decision granting summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20-CV-12261
HON. BERNARD A. FRIEDMAN

[Filed January 4, 2022]

NAYONN GRAY,
Plaintiff,

vs.

AUTOZONERS LLC and
NICHOLAS ISLES,
Defendants.

OPINION AND ORDER
GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

This matter is presently before the Court on defendants' motions for summary judgment. (ECF Nos. 21, 30). Plaintiff has responded to each and defendants have replied. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide these motions without a hearing. For the reasons stated below, the Court shall grant both motions.

This is a civil rights case. Plaintiff is a 22-year-old African-American male and a Michigan resident. (ECF No. 1, ¶¶ 1, 12). Defendant AutoZoners LLC ("AutoZone") is a corporation headquartered in Tennessee and organized in Delaware. (*Id*., ¶ 2). Defendant Nicholas Isles is a former assistant store manager at AutoZone store #2256, which is located in Lincoln Park, Michigan. (*Id*., ¶¶ 3, 13; ECF No. 30, PageID.805). Plaintiff's complaint contains four claims: (1) denial of equal rights, in violation of 42 U.S.C. § 1981; (2) denial of public accommodation, in violation of Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"), MICH. COMP. LAWS § 37.2302; (3) negligent supervision, in violation of Michigan common law; and (4) intentional infliction of emotional distress, also in violation of Michigan common law. (ECF No. 1, ¶¶ 35-69).

I. Background

Plaintiff alleges that on May 9, 2020, he purchased a Valuecraft car battery ("the battery") from AutoZone store #2256. (ECF No. 22-2 (Gray Dep.), PageID.411). This product is protected by a one-year warranty that excludes damage caused by "misuse, abuse, other faulty parts, improper installation or off-road, commercial or marine use." (ECF No. 30-5 (Warranty Pol'y), PageID.991). There is no limit to the number of exchanges a customer may request under the warranty. Prior to August 7, 2020, plaintiff returned to AutoZone store #2256 three times, on May 11, July 1, and July 22, to request a new battery under the warranty exchange policy. (ECF No. 30-6 (Pl.'s Warranty Hist.),

PageID.993). He received a new battery each time. (*Id.*).

However, on August 7, 2020, when plaintiff returned to the store to request a fourth warranty exchange on the battery, his request was denied by then assistant store manager Isles. (ECF No. 1, ¶ 15). Isles stated that prior to testing the battery, he "review[ed] [plaintiff's] warranty file, and . . . told him that unfortunately, I would not be able to process a warranty exchange for him because he had already availed himself of the warranty repeatedly and I was not going to grant an additional warranty exchange." (ECF No. 21-2 (Isles Dep.), PageID.224-25). Isles added that "the extensive warranty history was indicative of a different problem with Mr. Gray's vehicle, and that . . . it was indicative of some use for the battery other than the intended use." (*Id.*, PageID.225). Isles "advised Plaintiff that he thought the alternator might be the issue or that Plaintiff might be using a sound system that the battery could not support."[1] (ECF No. 21, PageID.157; ECF No. 22, PageID.381). In response, plaintiff told Isles that "he felt he was being denied a battery exchange under the warranty due to his race." (ECF No. 22, PageID.383). The resulting argument between plaintiff and Isles culminated in plaintiff recording a short video of Isles on his

[1] According to defendants' records, plaintiff returned to AutoZone on August 8, 2020, upgraded his Valuecraft battery for a Duralast Gold battery, and purchased a Duralast Gold alternator. (ECF No. 21-3 (Gray Dep.), PageID.301-04, 339). Plaintiff did not confirm or deny returning to the store or making these purchases. (*Id.*).

cellphone. Plaintiff allegedly wanted Isles "on video saying that [he could not] return the battery." (ECF No. 22-2 (Gray Dep.), PageID.435). Isles responded by stating "put me on Facebook, I'm the white power oppressor." (ECF No. 21, PageID.158; ECF No. 21-2 (Isles Dep.), PageID.233-34).[2] There were other customers in the store during this exchange, one of whom later told plaintiff that he should "call in on" the incident. (ECF No. 22-2 (Gray Dep.), PageID.434).

Instead of providing plaintiff with another new battery on August 7, Isles offered to charge the battery. If the battery could not be charged, Isles said that he would honor the warranty and provide plaintiff with a new battery. (ECF No. 22-2 (Gray Dep.), PageID.432-33). Isles indicated that the battery "tested completely charged" when it was returned to plaintiff (ECF No. 21-2 (Isles Dep.), PageID.246), although plaintiff could not recall whether it was charged. (ECF No. 22-2 (Gray Dep.), PageID.433). Plaintiff adds that defendant Isles misled him about the time it would take for the battery to fully charge, causing plaintiff to return to the store

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[2] The twelve second cellphone video, which plaintiff included in his response brief as Exhibit K (ECF No. 27), captured the following exchange between plaintiff and Isles:

> Gray: I just wanted to get you saying that, you know? And what's your name?
>
> Isles: My name is Nicholas Isles. Yeah. Put me on Facebook, the white power oppressor, man.
>
> Gray: White power?
>
> Isles: Go ahead.

"several times over the span of almost four hours." (ECF No. 1, ¶¶ 21-27).

Plaintiff alleges that when the battery was re-installed in his car, it did not work. (ECF No.22, PageID.387).

Plaintiff further alleges that "other employees of Defendants witnessed the racist remarks [and] denial[] and delay of service to Plaintiff, and failed to step in to provide Plaintiff the service that is afforded to others that are not black." (ECF No. 1, ¶ 29). Plaintiff adds that he and his mother "reported Defendants' conduct to their Corporate Office, including but not limited to, emails and a phone conversation, however even then Defendant AutoZone tried to excuse its manager's conduct" and took no further action. (*Id.*, ¶¶ 30-31).

In an investigation conducted by AutoZone following the filing of this lawsuit, Isles acknowledged that his recorded statement "was combative" and that he "should have been calmer." (ECF No. 22-10, PageID.724). However he denied any racial animus behind the remark. Isles argued that his statement "was an acknowledgment that [plaintiff] had accused [him] of racism (discrimination), but [it was] not actually an admission of such." (*Id.*). Rather, it "was deeply sarcastic." (*Id.*). Defendant Isles was discharged on September 19, 2020, for speaking to the press about plaintiff's lawsuit, in violation of AutoZone's media policy. (ECF No. 30, PageID.831).

Plaintiff contends that "Defendants' racist conduct constitutes clear and blatant discrimination towards Plaintiff on the basis of his race" and "caused Plaintiff

to suffer, among other things, loss of confidence, mental anguish, embarrassment, and extreme emotional distress." (ECF No. 1. ¶¶ 33-34). Defendants presently seek summary judgment on all of plaintiff's claims.

II. Abandonment of Negligent Supervision Claim (Count III)

As a threshold matter, "a party may abandon claims by failing to address or support them in a response to a motion for summary judgment." *Bauer v. Cnty. of Saginaw*, 111 F. Supp. 3d 767, 782 (E.D. Mich. 2015) (citing *Clark v. City of Dublin, Ohio*, 178 F. App'x 522, 524-25 (6th Cir. 2006)). *See also Cruz v. Capital One, N.A.*, 192 F. Supp. 3d 832, 838-39 (E.D. Mich. 2016) ("A plaintiff abandons undefended claims."). Here, plaintiff has failed to defend Count III – negligent supervision, in violation of Michigan common law. "The Court will thus deem [Count III] abandoned, and Defendants' motion[s] for summary judgment will be granted with respect to that claim." *Bauer*, 111 F. Supp. 3d at 782. Accordingly, the only claims that remain at issue are Counts I, II, and IV – denial of equal rights under § 1981, denial of public accommodation under the ELCRA, and intentional infliction of emotional distress under Michigan common law, respectively.

III. Summary Judgment

In deciding a motion for summary judgment, the Court

> must view the evidence in the light most favorable to the party opposing the motion for summary judgment. *Kirilenko-Ison v. Bd. of Educ. of Danville Indep. Schs.*, 974 F.3d 652, 660

> (6th Cir. 2020). "This includes drawing 'all justifiable inferences' in the nonmoving party's favor." *George*, 966 F.3d at 458 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Jackson-VHS*, 814 F.3d at 775 (quoting *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505).

Strickland v. City of Detroit, 995 F.3d 495, 503 (6th Cir. 2021).

A. Discrimination Claims: Violation of 42 U.S.C. § 1981 (Count I) and Violation of Michigan's Elliott-Larsen Civil Rights Act (Count II)

"Section 1981[3] prohibits intentional race

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[3] Section 1981 states in full:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits,

discrimination in the making and enforcing of contracts with both public and private actors. The statute's protection extends to the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 867-68 (6th Cir. 2001) (internal quotation marks omitted).

> In order to establish a claim for racial discrimination under section 1981, a plaintiff must plead and prove that (1) he belongs to an identifiable class of persons who are subject to discrimination based on their race; (2) the defendant intended to discriminate against him on the basis of race; and (3) the defendant's discriminatory conduct abridged a right enumerated in section 1981(a).

Amini v. Oberlin Coll., 44 F.3d 350, 358 (6th Cir. 2006) (citation omitted).

> The ELCRA states in relevant part:
>
> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities,

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> privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

> privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

Section 37.2302(a).

Courts evaluate discrimination claims pursuant to § 1981 and the ELCRA under the same standard as Title VII of the Civil Rights Act of 1964. *See Perry v. McGinnis*, 209 F.3d 597, 602 n.3 (6th Cir. 2000). Both claims may be established either by direct evidence or inferentially. *See Amini*, 44 F.3d at 358 (regarding § 1981); *In re Rodriguez*, 487 F.3d 1001, 1007-08 (6th Cir. 2007) (regarding the ELCRA).

To prevail on a racial discrimination claim relying on direct evidence, a plaintiff must present evidence "which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the [defendant's] actions. It does not require the fact finder to draw any inferences to reach that conclusion. . . . Evidence of discrimination is not considered direct evidence unless a racial motivation is explicitly expressed." *Amini*, 44 F.3d at 359. *See also In re Rodriguez*, 487 F.3d at 1007 (applying the same standard under the ELCRA).

If, instead, a plaintiff relies on circumstantial evidence to support a claim of racial discrimination, he

> must meet the burden-shifting standard of proof . . . established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S.

> 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Under this standard, a plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence.

Christian, 252 F.3d at 868 (citation omitted). *See also In re Rodriguez*, 487 F.3d at 1007-08 (applying the same standard under the ELCRA). To establish a prima facie claim of discrimination in a commercial establishment, a plaintiff must show:

> (1) []he is a member of a protected class;
> (2) []he made [him]self available to receive and pay for services ordinarily provided by the defendant to all members of the public in the manner in which they are ordinarily provided; and
>
> (3) []he did not enjoy the privileges and benefits of the contracted for experience under factual circumstances which rationally support an inference of unlawful discrimination in that
>
> > (a) []he was deprived of services while similarly situated persons outside the protected class were not deprived of those services, and/or
> >
> > (b) []he received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.

* * *

> Factors relevant to subpart (3)(b)'s "markedly hostile" component include whether the conduct is (1) so profoundly contrary to the manifest financial interests of the merchant and/or [its] employees; (2) so far outside of widely-accepted business norms; and (3) so arbitrary on its face, that the conduct supports a rational inference of discrimination.

Christian, 252 F.3d at 871 (internal quotation marks omitted).[4] If a plaintiff presents sufficient evidence to establish a prima facie case, "[t]he burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. To prevail, the plaintiff must then prove by a preponderance of the evidence that the defendant's proffered reason is not its true reason but a pretext for discrimination." *Id.* at 868. To prove pretext, a plaintiff must show "that 1) the stated reasons had no basis in fact; 2) the stated reasons were not the actual reasons; and 3) that the stated reasons were insufficient to explain the defendant's action." *Id.* at 879.

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[4] The Sixth Circuit has explained that

> Subpart (3)(b) is written as an alternative to (3)(a) to account for situations in the commercial establishment context in which a plaintiff cannot identify other similarly situated persons. Under this subpart, a retailer's "markedly hostile" conduct may "give rise to a rational inference of discrimination sufficient to support a prima facie case" without any evidence of how similarly situated persons were treated.

Christian, 252 F.3d at 871 (citation omitted).

Here, defendants argue that plaintiff lacks direct or circumstantial evidence to support his discrimination claims. (ECF No. 21, PageID.162-66; ECF No. 30, PageID.815-20). As to plaintiff's direct evidence, defendants contend that Isles' recorded statement "does not prove, without inference, that discrimination was a motivating factor in the decision to prohibit Plaintiff from returning his battery for a fourth time." (ECF No. 30, PageID.816; ECF No. 31, PageID.1030). As to plaintiff's circumstantial evidence, defendants argue that (1) plaintiff was not denied service on August 7, 2020; (2) "Plaintiff has no evidence of similarly situated individuals outside of his protected [class] receiving more favorable treatment than [he did]"; and (3) plaintiff cannot show "that he was subjected to 'markedly hostile' treatment." (ECF No. 21, PageID.163-64; ECF No. 30, PageID.818-20). Defendants contend that their conduct aligned with AutoZone's financial interests, as the company cannot resell exchanged batteries at the original retail price. (ECF No. 21, PageID.163-64; ECF No. 30, PageID.818). Defendants add that given plaintiff's warranty history and accusations against Isles immediately preceding his recorded comment, their conduct was not "so far outside of widely-accepted business norms," nor was it arbitrary. (ECF No. 21, PageID.164-66; ECF No. 30, PageID.819). Defendants further argue that even if plaintiff could establish a prima facie case of discrimination, he cannot establish that defendants' legitimate, non-discriminatory reason for their conduct – enforcing AutoZone's warranty policy – was a pretext for race discrimination. (ECF No. 21, PageID.166-67; ECF No. 30, PageID.820-23).

In response, plaintiff contends that he has presented both direct and circumstantial evidence sufficient to overcome defendants' motions for summary judgment. He argues that "in direct response to Plaintiff's request for an explanation as to why he could not exchange his warranty-protected battery, Defendant[] Isles responded to 'put me on Facebook, the white power oppressor, man,'" which constitutes "palpable" direct evidence. (ECF No. 22, PageID.385, 391; ECF No. 34, PageID.1209-10). Plaintiff further argues that "a genuine issue of material fact exists as to whether [defendants] deprived Plaintiff of service while similarly situated persons outside the protected class were not" and "whether Plaintiff received services in a markedly hostile and objectively discriminatory manner." (ECF No. 22, PageID.392-97, ECF No. 34, PageID.1211-12). Finally, plaintiff contends that defendants' non-discriminatory reason for their conduct has "no basis in fact" because the warranty did "not limit the number of battery exchanges during the warranty period" and another employee testified to the fact that customers have, on "many occasions," requested multiple warranty exchanges over a short period of time. (ECF No. 22, PageID.398-99, ECF No. 34, PageID.1217-18; ECF No. 22-5 (Segovia Dep.), PageID.545).

Having reviewed the briefs, exhibits, and relevant case law, the Court concludes that plaintiff has failed to establish a claim under § 1981 or the ELCRA. First, plaintiff lacks direct evidence that discrimination motivated defendants' actions. Although inappropriate, Isles' statement – "put me on Facebook, the white power oppressor" – does not, without inference, lead to

the conclusion that defendants were denying plaintiff services based on his race. Plaintiff compares the instant case to *DiCarlo v. Potter*, 358 F.3d 408 (6th Cir. 2004) and *Scheick v. Tecumseh Pub. Sch.*, 766 F.3d 523 (6th Cir. 2014). (ECF No. 22, PageID.391; ECF No. 34, PageID.1209). In the former, a supervisor allegedly called the Italian-American plaintiff a "dirty wop" and complained of there being too many "dirty wops" working at his place of employment shortly before plaintiff was terminated. *DiCarlo*, 358 F.3d at 413. In the latter, prior to the 56-year-old principal's termination, the school superintendent allegedly twice told him that the board "wanted someone younger" and once informed him that the board wanted him to retire. *Scheick*, 766 F.3d at 527. In the instant video, Isles does not name-call or directly tie race to his service decisions that day. Isles' comment appears to be in response to plaintiff's decision to record him on a cellphone following plaintiff's remark that "he was being denied a battery exchange under the warranty due to his race." (ECF No. 22, PageID.383).

Second, plaintiff lacks circumstantial evidence to support his claim. Plaintiff has presented no evidence that similarly situated individuals outside of his protected class receive more favorable treatment from defendants than members of the protected class. Rather, plaintiff stated that he was never previously treated unfairly at store #2256, he never saw another African-American customer being treated unfairly at the store, he was never previously treated poorly by Isles, and he was not aware of any similar accusations against Isles. (ECF No. 21-2 (Gray Dep.), PageID.300, 324-25).

Further, plaintiff has failed to show that he received services in a "markedly hostile" manner. On August 7, plaintiff requested his fourth warranty exchange – his fifth new battery in a three-month period. Isles stated that it appeared something apart from the battery was causing the problem, such as a faulty alternator or incompatible sound system. Isles said that he would charge the battery and, if it could not hold a charge, he would honor the warranty exchange. As another employee testified, this was "the protocol." (ECF No. 22-5 (Segovia Dep.), PageID.545). Based on plaintiff's warranty history and the fact that AutoZone cannot resell exchanged batteries at the original retail price, Isles' decision to charge plaintiff's battery, rather than provide a fifth new battery, was not "(1) so profoundly contrary to the manifest financial interests of the merchant and/or [its] employees; (2) so far outside of widely-accepted business norms; [or] (3) so arbitrary on its face, that the conduct supports a rational inference of discrimination." *Christian*, 252 F.3d at 871.

Plaintiff attempts to draw parallels between the instant case and three cases that were decided by other courts within this circuit: *Unroe v. Bd. of Educ. Rock Hill Loc. Sch.*, No. 1:040-CV-00181, 2006 WL 22081 (S.D. Ohio Jan. 4, 2006); *Airbrush Express, Inc. v. Jefferson Mall Co., L.P.*, No. Civ.A. 03-691-C, 2005 WL 1567324 (W.D. Ky. June 30, 2005); and *Leach v. Heyman*, 233 F. Supp. 2d 906 (N.D. Ohio 2006). In *Unroe*, the school's superintendent said "I don't want them kind around here," allegedly referring to African-American students with disabilities, including plaintiff's adopted children. *Unroe*, No. 1:04-CV-00181,

at *16. In *Airbrush Express*, the assistant manager of a shopping mall allegedly indicated that plaintiff, an operator of an airbrush t-shirt and car tag kiosk, attracted too many "African-American" or "African" clients, which was a "concern to the mall" and was "not a good image." *Airbrush Express*, No. Civ.A. 03-691-C, at *1. And in *Leach*, a convenience store clerk allegedly called an African-American customer a "N****r" and threatened to "kick his ass" following a tense interaction between the parties. *Leach*, 233 F. Supp. 2d at 908. Plaintiff contends that these cases present "less serious examples of racially charged conduct" compared to Isles' statement and conduct on August 7. (ECF No. 22, PageID.394; ECF No. 34, PageID.1213). The Court disagrees.

Here, plaintiff's allegations against defendants are as follows: (1) Isles denied plaintiff a fourth warranty exchange, stating that he would charge the existing battery and exchange it if it could not hold a charge; (2) plaintiff accused Isles of being racist and began filming Isles on his cellphone; (3) Isles stated, "put me on Facebook, the white power oppressor." As noted above, Isles did not name-call or directly tie race to his service decisions that day. Although the altercation between the parties was unprofessional and inappropriate, the facts of this case are far less serious than those cited by plaintiff and are neither direct nor circumstantial evidence of race discrimination.

Moreover, even if plaintiff could establish a prima facie case of discrimination, he has failed to show by a preponderance of the evidence that defendants' proffered reason for their conduct is not their true

reason but a pretext for discrimination. Here, the stated reason – enforcing AutoZone's warranty policy – has a basis in fact and is sufficient to explain defendants' actions. Although the warranty at issue does not limit the number of exchanges that can be made during the warranty period, the exchange policy excludes damage caused by "misuse, abuse, or other faulty parts." Based on plaintiff's extensive warranty history and Isles' professional experience, Isles concluded that plaintiff's request fell within one of the warranty exceptions. Plaintiff has failed to present sufficient evidence to cast doubt on this rationale. For these reasons, the Court concludes that there is no genuine issue for trial as to Counts I and II.

B. Intentional Infliction of Emotional Distress (Count IV)

> To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. The conduct complained of must be 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.

Hayley v. Allstate Ins., Co., 686 N.W.2d 273, 276 (Mich. Ct. App. 2004). "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . [Rather,] plaintiffs [are] expected and required to be hardened to a certain amount of rough language, and to occasional acts that

are definitely inconsiderate and unkind." *Roberts v. Auto-Owners Ins. Co.*, 374 N.W.2d 905, 909 (Mich. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d). *See also Mroz v. Lee*, 5 F.3d 1016, 1019-20 (6th Cir. 1993) (compiling examples of allegations that could be considered "extreme and outrageous conduct").

As to the degree of emotional distress that must be suffered to trigger liability, the Michigan Supreme Court has explained that liability "applies only where the emotional distress has in fact resulted, and where it is severe. . . . The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Roberts*, 374 N.W.2d at 911 (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. j).

Based on the briefs, exhibits, and relevant case law, the Court concludes that plaintiff has failed to make the requisite showing as to either "extreme and outrageous conduct" or "severe emotional distress." Plaintiff relies on the following facts to establish Count IV: (1) defendants refused to allow a fourth warranty exchange – plaintiff's fifth new battery in a three-month period; (2) defendants instead charged the existing battery and offered to provide a new battery if it could not hold a charge; (3) plaintiff indicated that he was being denied service because of his race, which resulted in an argument between him and Isles; (4) plaintiff began recording Isles on his cellphone; (5) in response, Isles stated, "put me on Facebook, the white power oppressor." Plaintiff alleges that as a result of this exchange, he "had to go home embarrassed" and felt "degraded almost kind of." (ECF

No. 22-2 (Gray Dep.), PageID.416). Plaintiff also indicated that he purchased various books to "get [his] mind off of" the incident. (*Id*., PageID.417). He otherwise does not elaborate on the severity, nature, or manifestations of the distress he suffered.

While Isles' comment was definitely inconsiderate, it was not "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." Further, plaintiff provides "no evidence of grief, depression, disruption of life style, or of treatment for anxiety or depression." *Roberts*, 374 N.W.2d at 912. "[T]he reaction testified to does not even approach the level of emotional distress contemplated by the Restatement drafters in requiring that 'no reasonable man could be expected to endure it.'" *Id*. The Court therefore concludes that there is no genuine issue for trial as to Count IV.

IV. Conclusion

Accordingly,

IT IS ORDERED that defendants' motions for summary judgment (ECF Nos. 21, 30) are granted.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: January 4, 2022
Detroit, Michigan

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20-CV-12261
HON. BERNARD A. FRIEDMAN

[Filed January 4, 2022]

NAYONN GRAY,	)
Plaintiff,	)
	)
vs.	)
	)
AUTOZONERS LLC and	)
NICHOLAS ISLES,	)
Defendants.	)
	)

JUDGMENT

The Court has issued an opinion and order in this matter granting defendants' motions for summary judgment. Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for defendants and against plaintiff.

KINIKIA D. ESSIX
CLERK OF COURT

By: s/Johnetta M. Curry-Williams
Deputy Clerk

Approved: s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1069

[Filed December 19, 2022]

NAYONN GRAY,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
AUTOZONERS, LLC, A FOREIGN PROFIT CORPORATION; NICHOLAS ISLES,	)
Defendants-Appellees.	)

O R D E R

BEFORE: GIBBONS, GRIFFIN, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[*] No judge has

[*] Judge Davis recused herself from participation in this ruling.

requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20-CV-12261
HON. BERNARD A. FRIEDMAN

[Filed April 18, 2022]

NAYONN GRAY,
Plaintiff,

vs.

AUTOZONERS LLC and
NICHOLAS ISLES,
Defendants.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION TO STAY TAXATION OF COSTS PENDING APPEAL

This matter is presently before the Court on plaintiff's "motion for a stay pending appeal with respect to taxation of costs." (ECF No. 53). Defendants have each responded (ECF Nos. 54, 55) and plaintiff has replied (ECF Nos. 56, 57). Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide this motion without a hearing. For the reasons stated below, the Court shall deny the motion.

This is a civil rights dispute between plaintiff Nayonn Gray, defendant AutoZoners LLC ("AutoZone"), and defendant Nicholas Isles, a former assistant store manager at an AutoZone store located in Lincoln Park, Michigan. Plaintiff alleges that defendants denied him service and refused to honor his car battery warranty due to his race. Both defendants filed motions for summary judgment, which the Court granted on January 4, 2022. (ECF No. 38). On February 10, 2022, the Court granted defendants' motions for review and award of costs, awarding $1,576.25 to defendant Isles and $2,659.50 to defendant AutoZone. (ECF No. 52).

In the instant motion, plaintiff requests a stay of "any further taxation proceedings, including collection attempts, until the conclusion of appellate proceedings." (ECF No. 53, PageID.1481). Plaintiff contends that his motion should be granted because (1) "the prevailing party may change" if his appeal is successful, and (2) "given the financial disparity of the parties." (*Id.*). In response, defendants argue that plaintiff is merely attempting to avoid his obligation to provide a bond or other security in order to obtain a stay. (ECF No. 54, PageID.1481; ECF No. 55, PageID.1496). Defendants add that they would not oppose the motion if plaintiff complied with this obligation. (ECF No. 55, PageID.1469).

Pursuant to Fed. R. Civ. P. 62(b), "[a]t any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in

the bond or other security." But "th[is] Rule in no way necessarily implies that filing a bond is the only way to obtain a stay. It speaks only to stays granted as a matter of right, it does not speak to stays granted by the court in accordance with its discretion." *Arban v. W. Pub. Corp.*, 345 F.3d 390, 409 (6th Cir. 2003). "[I]t is within the district court's discretion to reduce the amount of the bond, substitute an alternate form of security for the bond, or dispose of the bond requirement entirely. . . . [However,] [c]ourts have found it appropriate to dispose of the bond requirement only in extraordinary circumstances." *Dubuc v. Green Oak Twp.*, No. 08-13727, 2010 WL 2908616, at *1 (E.D. Mich. Oct. 1, 2010).

As another judge in this district has explained:

> While the Sixth Circuit has not outlined a specific test to guide the decision of a district court when considering whether to grant a request for an unsecured stay, courts have tended to examine the purpose of Rule 62(d).[1] The bond requirement of this Rule serves to protect both parties. *See Hamlin v. Charter Tp. of Flint*, 181 F.R.D. 348, 351 (E.D. Mich. 1998). It protects the appellant from "the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal" while protecting the appellee "from the risk of a later uncollectible judgment and also

[1] Fed. R. Civ. P. 62(d), as referenced in *Transp. Ins. Co. v. Citizens Ins. Co. of Am.*, No. 08-15018, 2013 WL 4604126 (E.D. Mich. Aug. 29, 2013), is now Fed. R. Civ. P. 62(b).

provid[ing] compensation for those injuries which can be said to be the natural and proximate result of the stay." *Id.* (internal quotation marks omitted). Thus, "Rule 62(d) establishes not only the appellant's right to a stay but also the appellee's right to have a bond posted. Because of Rule 62(d)'s dual protective role, a full supersedeas bond should almost always be required." *Id.*; *see also Pucci v. Somers*, 834 F. Supp. 2d 690, 706 (E.D. Mich. 2011) (quoting *Hamlin*, 181 F.R.D. at 351).

Despite this presumption as it relates to a supersedeas bond, two circumstances exist in which courts are urged to consider foregoing the requirement: namely, where (1) "the [appellant's] ability to pay the judgment is so plain that the cost of the bond would be a waste of money" and (2) "the requirement would put the [appellant's] other creditors in undue jeopardy." *Pucci*, 834 F. Supp. 2d at 707 (quoting *Olympia Equip. Leasing Co. v. W[.] Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir.1986)); *see also Arban*, 345 F.3d at 409 (affirming decision to grant stay without bond "[i]n light of the vast disparity between the amount of the judgment in this case and the annual revenue of the [defendant]"); *cf. Dubuc v. Green Oak Twp.*, No. 08- 13727, 2010 WL 3908616, at *2 (E.D. Mich. Oct. 1, 2010) (preferring an analysis that "looks to whether there are 'extraordinary circumstances' that justify deviating from the bond requirement").

Transp. Ins. Co. v. Citizens Ins. Co. of Am., No. 08-15018, 2013 WL 4604126, at *3 (E.D. Mich. Aug. 29, 2013).

Here, plaintiff has not argued that his ability to pay the judgment is plain, that the bond requirement places other creditors in undue jeopardy, or that restitution would be impossible in case of reversal on appeal. Rather, he merely contends that the financial disparity between the parties warrants a waiver of the bond requirement. Plaintiff does not cite any relevant precedent in support of this proposition and the Court is aware of none. Under these circumstances, the Court does not believe that granting plaintiff's requested waiver would serve Rule 62(b)'s dual protective role. Accordingly,

IT IS ORDERED that plaintiff's motion to stay taxation of costs pending appeal (ECF No. 53) is denied.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: April 18, 2022
Detroit, Michigan