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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
William A. McKinnon, Judge

Case No. 2023-001427

Lisa Weston and Brandon Weston……..……...……Appellants,

v.

Wal-Mart Stores East, LP d/b/a Wal-Mart Supercenter #1286, John Does, Danica Adams and the City of Columbia……...……...……..……...Defendants,

Of Which, Wal-Mart Stores East, LP d/b/a Wal-Mart Store #1286 and Danica Adams are the ……..Respondents.

INITIAL BRIEF OF RESPONDENTS

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II. Did the trial court properly grant Respondents' Motion for Summary Judgment as Appellants' causes of action for defamation, false imprisonment, assault, negligence and intentional infliction of emotional distress where no genuine issue of material fact existed such that a reasonable jury could find in favor of Appellant?

STATEMENT OF THE CASE

This lawsuit arises out of Appellants' allegations that Walmart and City of Columbia officers unlawfully stopped Appellants Lisa and Brandon Weston (hereinafter, "Appellants") at the Walmart store located at 7520 Garners Ferry Road, Columbia, South Carolina. Plaintiffs Lisa and Brandon Weston filed identical but distinct Complaints in this Court on June 2, 2021, alleging causes of action of false imprisonment, intentional infliction of emotional distress, assault and battery, negligence, negligent supervision, training and retention, and gross negligence against the Walmart Defendants. The parties engaged in the exchange of written discovery and depositions prior to filing a Proposed Order to Consolidate the two actions on August 30, 2022. Before the Order to Consolidate was filed in this Court, all Defendants filed separate Motions for Summary Judgment in both actions. Subsequently, the two cases, *Lisa Weston v. Wal-Mart, John Doe, Danica Adams, and the City of Columbia* and *Brandon Weston v. Wal-Mart, John Doe, Danica Adams, and the City of Columbia* were consolidated into one case under Civil Action Number: 2021-CP-40-2663 by order of Judge Jocelyn Newman signed December 29, 2022 and filed with this Court on December 30, 2022.

On July 26, 2023, a hearing on Respondents' Motion for was held before the Honorable William A. McKinnon via WebEx. Before the Court was Respondents' Memorandum in Support of Summary Judgment and supporting exhibits, and deposition transcripts from Respondent Danica Adams, Officer Mihelich and Appellants. Based upon the pleadings and memorandum, the footage of an officer's body worn camera, as well as arguments of counsel, and the statutory, procedural and common law, Respondents' motion was granted in full by an Order dated August 8, 2023.

Appellants subsequently filed a Motion for Reconsideration on August 18, 2023 which was denied without a hearing by Judge McKinnon on August 29, 2023. Appellants filed their Notice of Appeal on September 6, 2023.

STATEMENT OF FACTS

On June 11, 2019, Appellants Lisa and Brandon Weston, shopped at the Walmart store located at 7520 Garners Ferry Road, Columbia, South Carolina. *See* Pl. Compl. The Appellants proceeded to the store's exit at 8:55 pm, with Appellant Lisa pushing a shopping cart of unbagged merchandise and Appellant Brandon pushing a flatbed cart that carried three large, high-value televisions. *See* Walmart Surveillance Clip 1. A Walmart customer host requested to see the Appellants' receipt at the store exit pursuant to Walmart policies regarding unbagged and high-value merchandise. *Id. See also* Walmart's Receipt Checking Policy. The Appellants brushed past the Walmart customer host, and she did not attempt to block the Appellants from exiting. *Id.* After the Appellants were allowed to continue, the customer host alerted Asset Protection Associate, Danica Adams, (hereinafter, Respondent Adams) that two customers exited the store with unbagged merchandise and would not produce a receipt. *See* Walmart Surveillance Clip 1; *see also* Mihelich Body Camera Footage; and Adams Depo. Tr. 18:7-10. The customer host's actions were consistent with Walmart's receipt checking policy. *See* Walmart's Receipt Checking Policy

At the time the customer host conveyed this information, Respondent Adams was in the asset protection office with City of Columbia Police Officers Chelsea Bowen and Gabrielle Mihelich (hereinafter, Officer Bowen and Officer Mihelich) regarding an unrelated incident. *See* Mihelich Body Camera Footage; *See* Bowen Depo. Tr. 12:19-23; 17:22-18:1. Officer Bowen and Officer Mihelich heard the greeter's communication to Respondent Adams, and Officer Bowen directed Officer Mihelich to make contact with the Appellants. *See* Bowen Depo. Tr. 13:2-5. Respondent Adams initially spoke to Appellants and requested to see the Appellants' receipt. *See* Mihelich Body Camera Footage, 21:56:40. Appellant Lisa indicated her refusal to Respondent Adams' request, and Officer Mihelich, who had followed Respondent Adams to the scene, then

directed the Appellants to show their receipt. *Id. at* 21:56:45. It is uncontroverted that at no time did Respondent Adams or anyone else from Walmart direct law enforcement to intervene in the situation. *See* Mihelich Body Camera Footage, 21:56:24 (reflecting that a Walmart associate told Respondent Adams that "they won't show me their receipt" and Respondent Adams walked out of the office without saying anything to either of the officers standing in the AP office). Despite Officer Bowens and Officer Mihelich's testimony that Respondent Adams or the other Walmart associate may have asked for their assistance with Appellants, the objective video provided by Office Mihelich's body worn camera clearly shows that no one asked law enforcement for assistance with this incident. *See id.* Rather, Office Mihelich followed Respondent Adams out of the and engaged with Appellants on her own accord. *See id* at 21:56:32.

Appellant Lisa responded to Officer Mihelich that she did not need to show her receipt as Appellant Brandon continued to push the televisions towards the parking lot. *Id. at* 21:56:48. In response to Appellant Brandon's movement, Officer Mihelich stated that he could not leave the parking lot with the merchandise. *Id. at* 21:57:04. Appellant Lisa then raised her voice and proclaimed that Respondent Adams and Officer Mihelich were trying to "embarrass" her. *Id. at* 21:57:24. The video further shows that Appellant Lisa located her receipt in her purse approximately one minute into the encounter but refused to show the receipt or any proof of the purchase to either Respondent Adams or Officer Mihelich. *Id. at* 21:57:50. Instead, while she clutched her receipt, Appellant Lisa started to "livestream" the interaction to her Facebook followers. *See* Pl. Facebook Livestream Footage. Simultaneously, Appellant Lisa shouted, "I don't want to show y'all my receipt" and loudly instigated a verbal argument with Officer Mihelich over Walmart's receipt policy. *Id. at* 21:58:13; Pl. Lisa Weston Depo. Tr. 50:2-12. Appellant Lisa continued to live stream while also drawing attention to herself to any nearby shoppers;

meanwhile, Appellant Brandon lit a cigarette while he engaged in small talk with another customer and an unidentified Walmart associate. *See* Mihelich Body Camera Footage, 21:58:53. After additional back and forth between Appellant Lisa and Officer Mihelich, Appellant Lisa indicated that she wanted Respondent Adams to tell her why she had to show her receipt. *Id.* at 21:58:41. Respondent Adams proceeded to explain Walmart's receipt checking policy regarding un-bagged, high value merchandise. *Id. at* 21:59:45; *see also* Walmart's Receipt Checking Policy. After Appellant Lisa listened to this explanation, she then handed Respondent Adams the receipt. *See* Mihelich Body Camera Footage*,* 21:59:58. Officer Mihelich took the receipt from Respondent Adams and inspected the merchandise and receipt. *Id*.

While Officer Mihelich examined the receipt, Appellant Lisa continued to live stream and loudly exclaimed "they approached me, why? Because I'm Black." *Id. at* 22:00:19. In response to Appellant Lisa's statement, Officer Mihelich paused her examination of the receipt in order to inform Appellants that "this is not a race issue" as Respondent Adams is black and she, Officer Mihelich is also black. *Id. at* 22:00:30. Officer Mihelich compared the receipt to the televisions while Appellant Lisa bragged that she had "1.4k views right now" on her live stream and Appellant Brandon made the remark, "these things go viral." *Id. at* 22:00:47. After Officer Mihelich concluded her brief investigation with the receipt, she handed the receipt back to Appellant Brandon and ended the encounter. *Id. at* 22:01:28. The video footage timestamps show the entire encounter lasting approximately five minutes, even though Appellant Lisa located her receipt one minute into the interaction. *Id.*

Despite Appellants' testimony to the contrary, the objective video evidence fails to show Respondent Adams ever saying that the televisions were not paid for or telling the Appellants that they were not allowed to leave with the televisions until they showed their receipts. *See* Mihelich

Body Camera Footage; *see also* Pl. Facebook Livestream Footage. Instead, it is undisputed that it was Officer Mihelich who told Appellants that they were not free to leave. *See id.*

STANDARD OF REVIEW

"'An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP.'" *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 651, 780 S.E.2d 263, 272 (Ct. App. 2015) (quoting *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009)). "'Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting *Bovain*, 383 S.C. at 105, 678 S.E.2d at 424); *see also Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023) (holding that the "mere scintilla" standard does not apply under Rule 56(c), and the correct standards is the "genuine issue of material fact" standard). The purpose of summary judgment is "to expedite disposition of cases which do not require the services of a factfinder." *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (Ct. App. 2005) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ellis v. Davidson*, 358 S.C. 509, 517-18, 595 S.E.2d 817, 821 (Ct. App. 2004); *Rumph v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004).

In determining whether a genuine issue of fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); *Rumph v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should

be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004); *Rumpf*, 357 S.C. at 393, 593 S.E.2d at 186.

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS MOTION FOR SUMMARY JUDGMENT AS APPELLANTS FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT REGARDING THE AGENCY RELATIONSHIP BETWEEN WALMART AND CITY OF COLUMBIA POLICE OFFICERS.

To the extent that Appellants argue the trial court erred in granting summary judgment to Respondents, *see* App. Br. p. 6, Appellants fail to identify any evidence in the record that raises a genuine issue of material fact regarding the purported agency relationship between Walmart and the City of Columbia Police officer(s). Thus, this Honorable Court must affirm the trial court's ruling.

Respondents agree that whether an agency relationship exists is typically a question of fact. *Bank of N.Y. Mellon Tr. Co. v. Grier*, 416 S.C. 63, 70-71, 785 S.E.2d 208, 212 (Ct. App. 2016). However, a question of fact can become a question of law if the facts are undisputed. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014); *Whitworth v. Window World, Inc.*, 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008). "'A party asserting agency as a basis of liability must prove the existence of the agency, and ***the agency must be clearly established by the facts***.'" *Fraiser v. Palmetto Homes*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996) (quoting *Orphan Aid Society v. Jenkins,* 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987)) (emphasis added). "The test to determine agency is whether or not the purported principle ***has the right to control the conduct of the alleged agent***." *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982) (emphasis added). Appellants rely heavily on *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984) as analogous support for their positions regarding agency. However, *Gathers* can be distinguished from the instant case. In finding that there was a genuine issue of materials

fact to submit the question of agency to the jury, the Court in *Gathers* cited the following evidence in the record: Ackerman was employed by another Harris Teeter store as a security guard; even though he was employed as a police officer at the time of the incident, Ackerman was ***off-duty*** and taking a coffee break at the Harris Teeter store in question; Marks, the assistant manager of the subject store, allowed Ackerman to take the coffee break in his office; Ackerman specifically told Marks he was about to catch a shoplifter and stated that Marks was aware of what he was going to do ***prior to the detention of Ms. Gathers***; Ackerman sought and received permission to use Marks' office to detain Ms. Gathers; and Ackerman sought and received approval to use a female employee to conduct Ms. Gathers' body search. *See id*. at 226-27 (emphasis added). The Court in *Gathers* made it clear there were materials facts that could establish coordination between Ackerman and store employees, as employees knew, approved, and consented to Ackerman's actions both before and during Ms. Gathers' detention. *Id*.

Contrary to Appellants' assertion otherwise, the present case is not analogous to *Gathers*. Here, it is undisputed that these two City of Columbia officers were not employed as security guards with the subject Walmart or any other Walmart store at the time of this incident. At all relevant times, they were present on the premises in their capacity as on-duty law enforcement officers. *See* Mihelich Body Camera Footage, 21:56:24–22:01:28. Appellants fail to proffer any genuine issue of material fact that establishes that Respondents were working with law enforcement and in fact, the surveillance video shows that Respondent Adams stood to the side and remained largely silent during the interaction. *See* Mihelich Body Camera Footage, 21:58:41. Also, Officer Michelich took Appellants' receipt from Respondent Adams and did not allow Respondent Adams to assist or participate in the investigation in any way. *Id*. Additionally, unlike the *Gathers* case, where store management was aware of the off-duty officer's intent to investigate

a shoplifting on their behalf prior to his investigation, the objective video in the present case shows that Respondent Adams did not consult law enforcement regarding Appellants or seek law enforcement's assistance as to Appellants. *See* Mihelich Body Camera Footage, 21:56:24. To the extent Appellants alleged otherwise in their depositions, their testimony is in direct contradiction to the objective evidence in the record; thus, such testimony should be discounted for purposes of determining whether evidence existed to defeat summary judgment. *See Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 580, 629 S.E.2d 375, 377 (Ct. App. 2006) ("Testimony that contradicts undisputed physical evidence generally lacks probative value."); *see also Hodges v. Federal-Mogul Corp.*, 621 Fed. Appx. 735, 741 (4th Cir. 2015) ("Where a witness's deposition testimony 'is blatantly contradicted by the record, so that no reasonable jury could believe it," an alleged factual dispute created by the testimony need not be credited and "will not defeat an otherwise properly supported motion for summary judgment.'" (quoting *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)). Appellants also argue that Respondent Adams' and Officer Mihelich's references to Walmart's receipt checking policy is evidence of an agency relationship; however, this argument is not persuasive. An agency relationship may not be established solely by the declarations and conduct of an alleged agent. *Muller v. Myrtle Beach Golf and Yacht Club,* 303 S.C. 137, 142-43, 399 S.E.2d 430, 433 (Ct. App. 1990). Appellants cannot use Officer Mihelich's statements or conduct as their only evidence to establish that Respondents controlled her. They cite no other evidence of cooperation or coordination, other than Officer Mihelich's references to Walmart's policy—that is because there was no cooperation or coordination. The objective video of the incident clearly establishes that once Officer Mihelich intervened, she alone controlled the remaining interactions with Appellants. *See* Mihelich Body Camera Footage, 21:58:41.

Appellants argue that the officers' presence on the premises at Respondent Adams' request is evidence of Respondents' right to control the acts of the officers. However, it is undisputed that officers were on-duty with the Columbia Police Department and were responding to an unrelated shoplifting incident. *See* Bowen Depo. Tr. 9:4-5; 9:21-25. Law enforcement's presence in response to a report of a crime does not create an agency relationship between the victim/witness and law enforcement. Indeed, Appellants cannot provide any authority that supports such a contention. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory). Appellants also argue that Respondent Adams' presence in the vicinity at the time of law enforcement's investigation and failure to intervene establishes a question of fact as to her control over law enforcement. But Appellants cite no authority to support their contention that Respondents had an affirmative duty to intervene to stop the officers' investigation. Appellants once again fail to cite any authority supporting their arguments, therefore their arguments that an agency relationship is created by mere presence on another's premises and that agency is based upon a failure of one party to intervene should be deemed abandoned. *See First Sav. Bank*, 314 S.C. at 363, 444 S.E.2d at 514; *R & G Constr., Inc.*, 343 S.C. at 437, 540 S.E.2d at 120. Further, the presiding trial judge specifically held that Walmart "did not have any affirmative [duty] to stop the police from conducting an investigation." *See* Mot. for Summ. J. Hearing Tr. 19:7-9. Appellants fail to cite any law to support their arguments contradicting this finding. Thus, this Court should affirm the trial court's grant of summary judgment because it is the law of the case. *See First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App.

1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Lastly, Appellants assert that Respondent Adams' presence and failure to intervene reasonably led them to believe that officers were acting on Walmart's behalf. *See* App. Br. p. 9. But the law is clear that *either the principal must intend* to cause the third person to believe that the agent is authorized to act for him, or *he should realize that his conduct is likely to create such belief*. *See* Restatement (Second) of Agency § 27 (1958); *see also Muller v. Myrtle Beach Golf and Yacht Club,* 303 S.C. at 142, 399 S.E.2d at 433. There is no evidence of any such intent in this matter. In fact, Appellant Lisa's actions during the altercation make it clear that she saw a distinction between Respondent Adams and Officer Mihelich, as she directed questions directly to Respondent Adams, stating, "I want her to answer", indicating that she wanted to hear what Respondent Adams would say, despite Officer Mihelich's statements explaining why she was being asked for a receipt. *See* Mihelich Body Camera Footage, 21:58:41. Also, although she was repeatedly asked by Officer Mihelich for her receipt, Appellant Lisa pointedly handed the receipt to Respondent Adams after Respondent Adams explained Walmart's receipt checking policy to her, again making it clear that Appellant Lisa did not believe that the officer and Respondent Adams' were one and the same. *See id*. Thus, based on the foregoing, there is no factual evidence of an agency relationship between Respondents and City of Columbia Police officers. Based on the foregoing, this Court must affirm the trial court's grant of summary judgment in favor of Respondents.

II. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' CLAIMS OF DEFAMATION, FALSE ARREST, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND NEGLIGENCE BECAUSE THEY FAILED TO PRESENT ANY ISSUE OF MATERIAL FACT AS TO THOSE CAUSES OF ACTION.

To the extent that Appellants (hereinafter "the Westons") argue the trial court erred in granting summary judgment to Respondents (hereinafter "Walmart"), as to their causes of action for defamation, false arrest, intentional infliction of emotional distress, and negligence, *see* App. Br. p. 10, the Westons fail to identify any evidence in the record that raises a genuine issue of material fact as outlined more fully below.

A. The Westons' claims of defamation against Walmart fail as the record is devoid of any evidence that Walmart published any false or defamatory statements against the Westons.

The Westons argue that there is evidence Walmart defamed them *via* innuendo or unprivileged communication to a third party. *See* App. Br. p. 10-11. Walmart disagrees. To prove defamation, the Westons must show "(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *McBride v. Sch. Dist. of Greenville Cty.*, 698 S.E.2d 845, 852 (S.C. Ct. App. 2010).

First and foremost, Walmart denies that Respondent Adams ever made statements that the Westons did not pay for the televisions. *See* App. Br. p. 11. The Westons assert that Respondent Adams communicated they had not paid for the televisions in their possession; however, to support this allegation, the Westons cite only the self-serving deposition testimony of Appellant Lisa. *Id.* (citing Appellant Lisa's testimony where she repeatedly testified that Respondent Adams either said or insinuated that the televisions were not paid for.). However, Appellant Lisa's self-serving testimony is contradicted by the objective surveillance video that captured the entire interaction between the Westons and Respondent Adams. *See*, Mihelich Body Camera Footage, 21:56:24 – 22:01:28; *see Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 580, 629 S.E.2d 375, 377 (Ct. App.

2006) ("Testimony that contradicts undisputed physical evidence generally lacks probative value."); *see also Hodges v. Federal-Mogul Corp.*, 621 Fed. Appx. 735, 741 (4th Cir. 2015) ("Where a witness's deposition testimony 'is blatantly contradicted by the record, so that no reasonable jury could believe it," an alleged factual dispute created by the testimony need not be credited and "will not defeat an otherwise properly supported motion for summary judgment.'" (quoting *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)). As established by the surveillance video, Respondent Adams never makes any statements accusing the Westons of shoplifting or not paying for merchandise. *Id.* Rather, she explained that she was requesting to see their receipt in accordance with Walmart's receipt checking policy. *Id*.

Even if Respondent Adams told a law enforcement officer that she suspected a shoplifting was in progress, which Walmart denies, "[i]n a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 514 S.E.2d 126, 134 (S.C. 1999). Under a qualified privilege defense, "one who publishes defamatory matter concerning another is not liable" if there is a conditional privilege that is not abused. *Id*. It is the duty of the court to determine if the statement is privileged as a matter of law. *Murray v. Thornton*, 542 S.E.2d 743, 749 (S.C. Ct. App. 2001). Communications made in a criminal investigation for the purpose of detecting the suspects are privileged. *Bell v. Bank of Abbeville*, 38 S.E.2d 641, 643 (S.C. 1946). "Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery*, 514 S.E.2d at 134. Here, the only alleged published communications were to the City of Columbia Police Department. Accordingly, Walmart's communications are privileged as a matter of law. Further, the Westons have shown no evidence that Walmart abused or exceeded

the scope of the privilege or that Walmart provided any defamatory information to anyone other than law enforcement. Merely providing information to police does not rise to the level of a defamatory publication. *See Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 274, 826 S.E.2d 609, 616 (2019) (holding that public policy encourages the public to cooperate with police and finding that "'the law allows wide latitude for honest action' by parties who assist law enforcement.") (quoting *Jones v. Autry*, 105 F. Supp. 2d 559, 561 (S.D. Miss. 2000).

The Westons also allege that "[a] reasonable jury could insinuate from the actions of Walmart when its employees asked for their receipt that Wal-mart [sic] had made a false and defamatory statement about appellants." *See* App. Br. p. 10. Despite the Westons' conclusory assertions, they fail to present any evidence that a retailer asking a customer to review their receipt constitutes a false and malicious insinuation that the customer has shoplifted. *See Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment."). The Westons cannot support this assertion with supporting evidence because there is none. "'The Court will not hunt for a forced and strained construction to put on ordinary words, but will construe them fairly, according to their natural and reasonable import, in the plain and popular sense in which the average [person] naturally understands them. There is no presumption of defamation.'" *See Timmons v. News & Press, Inc.*, 103 S.E.2d 277, 280-81, 232 S.C. 639, 644-45 (1958) (citing *Hospital Care Corporation v. Commercial Casualty Insurance Company,* 194 S.C. 370, 9 S.E.2d 796, 800 (1940). In other words, the defamatory "imputation must be in actuality and not wholly imaginary." *Hospital Care Corporation*, 194 S.C. 370, 9 S.E.2d at 800. Here, both Respondent Adams and Officer Michelich made it clear to the Westons that they were requesting their receipt based upon a Walmart policy regarding customers leaving the store with

unbagged, high-value merchandise. Further, the presiding trial court judge expressly held that it was acceptable for Walmart to ask to see the Westons' receipt. *See* Mot. for Summ. J. Hearing Tr. 6:16-17. The Westons have not proffered any genuine issue of fact or law that contradicts this finding. No one ever stated or used words insinuating that either of the Westons had stolen merchandise. Rather, Respondent Adams clearly explained she requested the receipt based on store policy. For the Westons to aver that the request, in and of itself, is an insinuation of shoplifting is at best a strained or imaginary inference of Walmart's receipt request. Accordingly, the Westons fail to establish a genuine issue of material fact as to their cause of action for defamation and this Court must affirm the trial court's grant of summary judgment in favor of Walmart.

B. The Westons' claims of false arrest against Walmart fail as there is no evidence that Walmart wrongfully detained them.

To the extent that the Westons argue the trial court erred in granting summary judgment to Walmart as to their cause of action for false imprisonment, *see* App. Br. p. 11-13, they fail to identify any evidence in the record that raises a genuine issue of material fact as to all three of the required elements of a false imprisonment claim. The Westons fail to present any genuine issue of material fact as to whether (1) Respondent Adams restrained the them (2) such restraint was intentional and (3) the restraint was unlawful. *See Caldwell v. K-Mart Corp.,* 306 S.C. 27, 30, 410 S.E.2d 21, 23 (Ct. App. 1991). The Westons argue that Respondent Adams stated they were not free to leave until they showed their receipt; however, the objective surveillance video shows that it was Officer Michelich, not Respondent Adams, who told them that they were not free to leave. *See* Mihelich Body Camera Footage, 21:56:24 – 22:01:28. Tr.32:15-21. The record is devoid of any evidence of an alleged detention by Walmart. Rather, the Westons concede that they were

detained by Officer Mihelich but allege that she was Walmart's agent when she detained them. As outlined in the sections above, the record lacks support for this assertion.

The Westons also argue that Respondent Adams and Officer Mihelich intended to confine them and prevent them from leaving Walmart. App. Br. p. 12. However, the Westons cite no factual evidence in support of this assertion. As argued extensively above, there is no evidence of an agency relationship between Walmart and Officer Mihelich. Rather, while on the premises for a previous, unrelated shoplifting, Officer Mihelich heard Respondent Adams ask for the Westons' receipt and when they ignored the request, Officer Mihelich took over the interaction. *See* Mihelich Body Camera Footage, 21:56:24– 22:01:28. Despite the Westons' conclusory assertions to the contrary, there is no evidence of any intent to restrain on behalf of Walmart.

Westons assert there is a genuine issue of materials fact as to whether their detention was unlawful because Respondent Adams failed to investigate prior to stopping them, thereby making the reasonableness of the stop a question for the jury. App. Br. p. 12. The Westons again cite Appellant Lisa's self-serving and unsubstantiated deposition testimony to argue that an accusation of shoplifting formed the basis for the stop, App. Br. p. 11. However, the surveillance video indisputably shows Respondent Adams requested the Westons receipt based upon a store policy regarding large, high-value, unbagged merchandise. *See* Mihelich Body Camera Footage, 21:56:24 – 22:01:28; *see* Adams Dep. Tr. 20:18-21; *see also* Walmart Receipt Checking Policy. As she was following store policy and procedure, there was nothing to investigate prior to making the receipt request. The Westons fail to produce any evidence that contradicts Respondent Adams' proffered motive for the receipt request. Even if asking for a receipt implies a belief that a shoplifting has occurred, which Walmart denies, South Carolina law is clear that a witness or victim is not required "to conduct their own investigation into the offense committed in order to verify the information

they provide [to law enforcement]." *Huffman v. Sunshine Recycling*, 426 S.C. 262, 274, 826 S.E.2d 609, 615 (2019). The Westons have proffered no authority or support for their contention of a duty to investigate because there simply is none. Thus, the Westons have failed to establish a genuine issue of material fact as to their cause of action for false imprisonment, therefore this Court must affirm the trial court's grant of summary judgment in favor of Walmart.

C. The Westons failed to establish an issue of material fact as to their causes of action for intentional infliction of emotional distress.

The Westons argue that Respondent Adams' failure to review surveillance video or call back to the electronics department to verify Appellants' purchase prior to requesting their receipt creates a genuine issue of material fact such that their intentional infliction of emotional distress claim should proceed to a jury. *See* App. Br. p. 13. However, whether a defendant's conduct may be reasonably regarded as so extreme and outrageous to permit recovery is initially one for ***a court***, and only where reasonable persons might differ is it a question for a jury. *Hawkins v. Greene*, 427 S.E.2d 692, 693 (Ct. App. 1993) (emphasis supplied). "Where evidence is undisputed that the defendant acted in good faith and in a reasonable manner, his conduct cannot be characterized as so extreme and outrageous as to exceed all possible bounds of decency and atrocious and utterly intolerable in a civilized community." *Id.* The facts in the record are clear that Respondent Adams' did not stop the Westons because she suspected that they were shoplifting. Rather, she was complying with the store's receipt checking policy given the nature of the items they were pushing out of the store. *See* Walmart's Receipt Checking Policy. Appellants have proffered no evidence that shows that following Walmart's policy was unreasonable. *See generally State v. Miller*, 423 S.C. 95, 110 (2018) (finding law enforcement's actions to be reasonable in light of compliance with departments recognized policy). Here, other than their own self-serving assertions, the Westons have not proffered any evidence that it was unreasonable for Respondent Adams to ask

for their receipt without investigating their purchase.[1] The Westons have also offered no evidence that Respondent Adams violated any store policy or procedure or that she violated any duty owed to them. Rather, they make blanket assertions that Respondent Adams' inaction is a material fact that creates an issue for a jury, which is inconsistent with current South Carolina law. *See Huffman v. Sunshine Recycling*, 426 S.C. 262, 274, 826 S.E.2d 609, 615 (2019).

Instead of outrageous conduct, the record is full of undisputed evidence that Respondent Adams at all times remained courteous, professional and calm in all of her interactions with the Westons. *See* Mihelich Body Camera Footage, 21:56:24 – 22:01:28. She also tried to verify their purchase utilizing the quickest and most efficient means, by asking to see their receipt. All of Respondent Adams' actions were made in a good faith attempt to follow store policies and done in a reasonable manner. Accordingly, the Westons have failed to establish a genuine issue of material fact as to their cause of action for intentional infliction of emotional distress and this Court must affirm the trial court's grant of summary judgment in favor of Walmart.

D. The Westons failed to establish an issue of material fact as to their causes of action of negligence.

To establish a cause of action for negligence "a plaintiff must show ... three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Trotter v. State Farm Mut. Auto. Ins. Co.,* 297 S.C. 465, 474, 377 S.E.2d 343, 348 (Ct. App. 1988). The Westons argue that Walmart owed them a duty to not falsely imprison them or accuse them of not

[1] The Westons also fail to acknowledge that it would have taken time to verify their purchases via video or contacting sales departments of the store. By the time Respondent Adams conducted this type of search, it is likely that the Westons would have already left the premises. Asking for a receipt, which is a printed proof of purchase, was the most efficient way to verify the Westons' purchases.

making purchases in the store. App. Br. p. 14. As an initial matter, it is well settled under South Carolina law that intentional torts "cannot be committed in a negligent manner." *See State Farm Fire and Cas. Co. v. Barrett*, 340 S.C. 1, 11, 530 S.E.2d 132, 137 (2000). The Westons complain of the same actions in support of their claims for false imprisonment and defamation as they do to support their negligence claim. Consequently, all of the actions the Westons complain of constitute intentional conduct. In *Wannamaker v. Traywick*, 136 S.C. 21, 24, 134 S.E. 234, 235, (1926), the Supreme Court explained that the term negligence is "ordinarily used in common-law terminology to express the foundation for civil liability for injury to person or property, when such injury is not the result of premeditation and formed intention." Thus, intentional conduct and negligent conduct are mutually exclusive and there is no claim of negligence that flows from conduct amounting to an intentional tort. *See State Farm Fire & Cas. Co*., 340 S.C. at 11, 530 S.E.2d at 137 ("'[I]n the context of a cause of action alleging an intentional tort, which by definition cannot be committed in a negligent manner, the allegation of negligence is surplusage.'") (quoting *USAA Property and Cas. Ins. Co. v. Rowland*, 312 S.C. 536, 540, 435 S.E.2d 879, 882 (Ct. App. 1993). Because the Weston's allegations in support of negligence are nothing more than a restatement of the same conduct they allege in support of their intentional tort claims, they have not stated a negligence claim.

As evidence of breach of the purported duty to not falsely imprison or defame them, the Westons assert that they were stopped and could not leave. As extensively outlined above, the Westons have asserted no facts that prove that Respondent Adams detained them or told them they could not leave. Instead, the Westons are relying solely on the actions of City of Columbia Police officers to support their claims. Therefore, the Westons have failed to allege a material issue of fact that proves Walmart breached any duties owed to her.

Even if the Westons could establish that Walmart breached a duty owned to them, which Walmart denies, they cannot establish any damages as a result of the alleged breach. The Westons argue that their testimony regarding their purported harm is sufficient to establish damages. However, according to Appellant Lisa's own deposition testimony, she did not suffer any physical injuries. *See* Pl. Lisa Weston Depo. Tr. 56:20-25. She further testified that she has not sought any medical treatment as a result of the alleged incident. *Id.* at 57:1-6. Appellant Brandon made the same admissions in his sworn deposition testimony. *See* Pl. Brandon Weston Depo. Tr. 40:20-41:7. The law is clear that the Westons may not recover damages for mental anguish or emotional distress absent a physical injury. *Dooley v. Richland Memorial Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984); *see also Babb v. Lee Cty. Landfill SC, LLC*, 405 S.C. 129, 141, 747 S.E.2d 468, 474 (2013) (South Carolina jurisprudence does not permit recovery for sheer annoyance and discomfort); *accord Andrews v. Piedmont Air Lines*, 297 S.C. 367, 370, 377 S.E.2d 127, 129 (Ct. App. 1989) (emotional discomfort is not an actionable damage in tort even if it results from the defendant's negligence). The Westons have failed to offer any evidence of any physical or reputational damages resulting from this incident because they do not have any. Even though Appellant Lisa testified about extreme humiliation" and "irreparable harm to their reputations", the record is void of evidence that this is the case. *See*, Pl. Lisa Weston Depo. Tr. 49:2-7. Because the Westons have failed to raise a genuine issue of material fact as to several elements required to prove negligence, this Court must affirm the trial court's grant of summary judgment in favor of Walmart.

CONCLUSION

For the reasons set forth herein, Walmart respectfully requests that this Honorable Court affirm the trial court's grant of summary judgment in favor of Respondents on all of the Westons' causes of action.

Respectfully submitted,

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