

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**S.C. Supreme Court**

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Alison R. Lee, Circuit Court Judge

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Case No.: 2009-CP-40-3996

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Lehua Figueroa and Nohealani Figueroa,.....Respondents,

v.

CBL/Columbia Place Mall, LLC; and  
ERMC II, LLP,.....Petitioners.

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RESPONDENTS RETURN TO PETITION

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## COUNTER-STATEMENTS TO QUESTIONS PRESENTED

1) The Court of Appeals did not err in affirming the Circuit Court's denial of the Petitioners' request for a new trial based upon no evidence of juror misconduct.

2) The Court of Appeals did not err in affirming the Circuit Court's denial of the Petitioners' request for a new trial based upon the exclusion of a non-relevant audio recording.

3) The Court of Appeals did not err in affirming the Circuit Court's denial of the Petitioners' request to set aside or reduce the punitive damages award.

## STATEMENT OF THE CASE

Lehua Figueroa and Nohealani Figueroa were arrested without probable cause on January 19, 2008, for Breach of Peace. The Breach of Peace charges were judicially dismissed against both Respondents on May 20, 2009; the Petitioners lacked the power to arrest the Respondents for common law Breach of Peace. [S.C. Code Ann. § 40-18-110.]

The Respondents filed a Summons and Compliant on June 3, 2009. [R.pp. 025-031.] The initial Defendants were CBL & Associates Properties, Columbia Place Mall, and Lionell Parish. [R.pp. 026-031.] The Petitioners filed a Motion to Strike and Dismiss on July 9, 2009. [R.pp. 032-031.] By agreement of the Respondents and the Petitioners on October 23, 2009, the Respondents agreed to amend the Complaint by order of October 26, 2009. [R.p. 001, p. 035-042.] The Respondents filed an Amended Complaint and Summons on November 2, 2009, for which only the Defendant Parish Answered the Complaint. [R.pp. 035-051.] The Respondents filed a Motion to Compel on January 13, 2010. [R.pp. 054-055.] The Respondents filed a Motion to Compel, a Motion for Default Judgment, and Motion for Joinder on February 4, 2010. [R.pp. 065-074.] On February 24, 2010, the Respondents and Petitioners appeared for a status conference and the following

was determined: 1) the Petitioners would provide complete discovery within ten (10) days; 2) the Petitioners withdrew their Motion to Compel; 3) the Respondents and Petitioners agreed to consent to amending the Complaint to reflect the actual named Defendants; and 4) the parties would engage in mediation before the Respondents' default motion and Motion to Compel would be heard. The Consent Order for amending the Complaint and joinder of an additional party was filed with the Court on March 10, 2010. [R.p. 002.] The Petitioners' Answer to the amended Complaint was filed on March 30, 2010. [R.pp. 080-088.] The Petitioners failed to comply with the instructions from the status conference. The Court granted the Respondents' Motion to Compel on June 2, 2010, but denied the Respondents' Motion for Default Judgment. [R.p. 003; p.006-007.] The Court instructed counsel for the Petitioners to prepare the Order. [R.p. 003.]<sup>1</sup> A consent order substituting counsel was filed with the Court on June 23, 2010. [R.p. 005.] Counsel for the Respondents engaged in numerous conversations with new counsel for the Petitioners up to the date of trial by phone and by email; Respondents' counsel also met at the office of Petitioners' counsel on October 1, 2010. Counsel for the Respondents advised counsel for the Petitioners on each occasion that the Petitioners had not provided complete discovery or complied with the order compelling discovery. The Respondents subpoenaed a Melvin Browman the week before the trial was scheduled to start. After Melvin Browman was served his subpoena, the Respondents received some new discovery from the Petitioners.

A trial involving the Respondents and the Petitioners was held in a Richland County court on the week of October 18, 2010, before the Honorable Alison R. Lee. At the start of trial, the Respondents made a motion to strike the Petitioners' Answer and enter judgment

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<sup>1</sup> The Order granting the Respondent's Motion to Compel discovery was not filed with the Court until October 18, 2010. [R.pp. 006-007.]

against the Petitioners for discovery rules violations. [R.p. 145, line 10 - p. 171, line 17.] In a pre-trial hearing involving Melvin Browman, it was determined that additional discovery was not provided to the Respondents. [R.p. 210, line 24 - p. 215, line 21.] Mr. Browman's pre-trial testimony revealed that he was training a security officer when he was requested to monitor the Respondents as they were leaving the mall. [R.p. 200, line 22 - p. 201, line 10.] Mr. Browman's testimony revealed that the mall's video recording system records everything that happens within its view and that information is stored in their database; furthermore, Mr. Browman testified that he followed the Respondents throughout this incident with multiple cameras. [R.p. 201, line 10 - p. 202, line 12; p. 204, line 7 - p. 207, line 21.] Mr. Browman would later testify that the video was reviewed by James Goins, head of security, several days after the Respondent's arrest. [R.pp. 738, lines 1 - 18.] Both Mr. Browman's and Mr. Goins' testimony was consistent with the existence of a video. This pre-trial hearing further revealed that the Petitioners had not provided multiple pocket manuals or registration cards or certificates for 2008. [R.p. 220, line 15 - p. 222, line 20; p. 225, line 12 - p. 234, line 25.] After the pre-trial hearing, counsel for the Respondents requested that the Court strike the Petitioners' Answer and issue judgment in the Respondents' favor based upon violations of the Motion to Compel Order and discovery rules. Counsel for the Petitioners argued that a spoliation charge was the proper remedy in this case for failing to provide discovery in lieu of striking the Petitioners' Answer and granting judgment to the Respondents. [R.p. 165, lines 3 - 5; p. 224, lines 10-12.] Counsel for the Petitioners admitted in her argument that James Goins had seen the Respondents going up the elevator [R.p. 163, lines 5-25.]<sup>2</sup> The Court denied the Respondents request for default

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<sup>2</sup> James Goins testified that he believed that he saw the Respondents on the escalator. [R.p. 189, lines 18-23.]

judgment and agreed to charge spoliation. [R.p. 233, line 23 - p. 234, line 25.]

The Respondents presented evidence of their unlawful detention, loss of freedom, malicious prosecution, dismissal of criminal charges, and embarrassment from their arrests in front of mall patrons and embarrassment from the being viewed as criminals because of the arrests. [R.p. 237, line 1 - p. 289, line 21; p.290, line 16 - p. 294, line 25; p. 295, line 8 - p.299, line 19; p. 300, line 14 - p. 305, line 16; p. 398, line 3 - p. 445, line 11.] At the conclusion of the Respondents' case, the Court heard and denied the Petitioners' directed verdict motions as to Petitioners CBL/Columbia Place Mall and ERMC; however, the Court did grant a directed verdict as to Defendant Lionell Parish as it was acknowledged by the parties that Parish was acting within the scope of his employment and therefore protected. [R.p. 450, line 19 - p. 463, line 18.]

The Petitioners presented their facts as to what they alleged the Respondents' did that led to their arrests. Lionell Parish testified that there were no other charges for which he could have charged the Respondents. [R.p. 480, lines 18 -23.] The Petitioners sought to enter an audio into evidence which they alleged was recorded some time after their arrests; however, the Court exercised its discretion in excluding the audio after objection by the Respondents and a hearing and testimony on the matter. [R.p. 483, line 13 - p. 505, line 2.]

Three causes of actions were submitted to the jury: 1) malicious prosecution, 2) false imprisonment, and 3) defamation. The jury returned with three (3) notes with no objections from either counsel as to the form in which the Court addressed these notes. [R.p. 519, line 25 - p. 534, line 25.] The jury returned the following verdicts to each Respondent: a) malicious prosecution - \$8000.00; b) false imprisonment - \$6500.00; and c) defamation - \$0.00. Each respondent was awarded \$25,000.00 in punitive damages; also, the jury was polled after their verdict. [R.pp. 008 - 010; p. 535. line 24 - p. 539, line

8.] There are no objections on the record from counsel for the Petitioners about either the Court's responses to the juror notes or the Court's comment to the jury foreperson.

Counsel for the Petitioners filed several motions and affidavits after the trial supported by briefs and each motion was denied by court Orders of January 27, 2011 and February 17, 2011. [R.pp. 89-116.] The Court considered the affidavits of two jurors submitted by Counsel for the Petitioners before denying the Petitioners' motion. [R.pp. 117-120.] Counsel for the Respondents responded to the Petitioners' brief by memorandum and also requested to not be required to elect remedies. [R.p. 121- 128; p. 129-137.] The Respondents' request as to the election remedies was denied by the Court. [R.pp. 011-016.] Respondents' counsel elected to recover under the malicious prosecution. [R.p. 138.] The Petitioners filed their Notice of Appeal on February 28, 2011.

On May 24, 2012, the Court of Appeals heard oral arguments in this appeal. The Court of Appeals affirmed the Circuit Court's decision in an unpublished *per curiam* opinion on July 25, 2012. The Court of Appeals denied the Petitioners' petition for rehearing on August 22, 2012. The Petitioners filed their Writ of Certiorari on September 21, 2012.

### ARGUMENTS

#### I.

THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE CIRCUIT COURT'S DENIAL OF THE PETITIONERS' REQUEST FOR A NEW TRIAL BASED UPON NO EVIDENCE OF JUROR MISCONDUCT.

The Petitioners are not entitled to a new trial as there was no misconduct by any juror during the deliberations. The Circuit Court examined the affidavits and exercised its discretion in determining that no juror misconduct occurred in this case. This very argument was brought before the Court of Appeals on oral arguments and the Court of Appeals still affirmed the Circuit Court's discretionary decision that no juror misconduct occurred in the

jury deliberations. There is no evidence that the jury foreperson misrepresented any communications from the Circuit Court to other members of the jury to force an award of punitive damages. Counsel for the Respondents and the Petitioners were both aware of all the questions from the jury and were aware of all answers provided to the jury by the Circuit Court. Neither counsel objected to any type of communications from the Circuit Court to the jury during jury deliberations or after the verdict was rendered. The Petitioners are required to prove both the misconduct and resulting prejudice if they are seeking a new trial and the Petitioners have yet to meet that burden of showing either misconduct or prejudice.

#### Juror Misconduct

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any jury. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes." Rule 606 (b), South Carolina Rules of Evidence.

The general test for evaluating alleged juror misconduct is whether or not there was misconduct and, if so, whether any harm resulted to the defendant as a consequence. *State v. Bantan*, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010). Where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice. *State v. Ziegler*, 364 S.C. 94, 610 S.E.2d 859 (Ct.

App.2005). “Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case.” *Id.*

On appeal, the denial of a new trial motion will be disturbed only upon a showing of an abuse of discretion. *State v. Zeigler*. The trial court has broad discretion in assessing allégations of juror misconduct. *Id.* Furthermore, “a defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury, as such misconduct ... does not *ipso facto* justify the grant of a new trial; but in order that a new trial may be granted on such ground the misconduct of the jury must relate to a material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors.” *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 384 S.C. 441, 682 S.E.2d 489 (S.C 2009) (quoting C.J.S. New Trial § 54 (1998)).

Juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence. see *Ziegler*. Furthermore, juror testimony or affidavits regarding internal misconduct is generally inadmissible to impeach a verdict unless it is necessary to ensure fundamental fairness. *Ex Parte Greenville News*, 326 S.C. 1, 482 S.E.2d 556 (1997). The Supreme Court designed this exception to be narrow and limited to those few situations which implicate due process raising the issue of fundamental fairness. see *Ziegler*.

In *Shumpert v. State of South Carolina*, 378 S.C. 62, 661 S.E.2d 369 (S.C.2008), the Supreme Court addressed a similar issue regarding the admissibility of a juror affidavit to attack a jury verdict. In *Shumpert*, the defendant sought to admit an affidavit of a juror in his criminal trial as evidence of jury misconduct at his PCR hearing. The PCR Court and the Supreme Court both held that the exclusion of this type of affidavit by a juror to attack a verdict does not violate fundamental fairness when there is no proof that the conduct of the

party's jury rendered the trial fundamentally unfair. Furthermore, the Supreme Court in *Shumpert* states that trial courts should "exercise a degree of caution before entertaining such evidence in an attack on a jury's verdict." Citing *State v. Pittman*, 373 S.C. 554, 647 S.E.2d 158 (S.C. 2007), the Court further states that "the occurrence of a significant degree of jury misconduct calling for the admission of jury testimony has proved to be quite rare."

In this case, like the case in *Shumpert*, the jury returned a unanimous verdict, and the Circuit Court polled the jury after the jury returned its' verdict and the verdicts still remained unanimous. There is no evidence of any misconduct. No jurors have ever come forward to the Circuit Court on their own initiative to allege any juror misconduct either after trial or during this appellate process. The Petitioners in their arguments appear to acknowledge that there was no evidence of external factors which influenced the jury's verdict; and, typically affidavits are only admissible when external factors or influences affect a jury verdict. The reason affidavits are not appropriate on most non-external factors or influences on a jury deliberations is because it would open up a Pandora's box of attacks on the credibility of every jury verdict, both criminal and civil. It is a very high standard and a rare occurrence when a jury affidavit should be introduced in a case of alleged juror misconduct and the Petitioners have not met this burden and this is not such a rare occurrence.

There was no evidence of any internal factors or misconduct which influenced the jury's verdict. The two (2) juror affidavits arose only because the Petitioner questioned at least two jurors about their verdict. The Petitioners prepared the very affidavits which were signed by the two (2) jurors. The Circuit Court examined the jurors' affidavits and determined that no jury misconduct had occurred during the deliberations. The analysis ended once the Circuit Court determined that there was no evidence of juror misconduct

based upon two (2) affidavits prepared by the Petitioners. The Circuit Court exercised its broad discretion in examining the affidavits and circumstances surround the affidavits and did not abuse its discretion by denying the Petitioners' request for a new trial based upon juror misconduct.

Furthermore, this Court has indicated that a defendant also must demonstrate prejudice from jury misconduct in order to be entitled to a new trial. See *Shumpert*; see also *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999). There is no evidence of any prejudice to the Petitioners based upon the Court's communications with the jury foreperson, nor was there any objection made by Petitioners' counsel about any communication or inquiry made to the jury panel by the court. As with the juror in *Shumpert*, the jurors' affidavits in this case "closely resemble a case of buyer's remorse from a guilty verdict to be given much credence." These two (2) jurors out of twelve (12) may have buyer's remorse from their verdict; however, it is not sufficient grounds to warrant a new trial. The Petitioners carried the burden to show that that the Petitioners were denied a fair and impartial trial based upon the jury foreperson's conduct and the Petitioners have not met that burden. see *Vestry*.

The unanimity of the verdicts and lack of prejudice is further evident by the fact that all twelve (12) jurors returned a zero (\$0.00) dollar verdict on the defamation cause of action. The jurors were polled on all of their verdicts and the verdicts remained the same as to each action, including the defamation cause of action. The Petitioners have never alleged that the verdict for the defamation cause of action was caused by internal juror misconduct or that the jury foreperson forced the other jurors to return a zero (\$0.00) verdict on the defamation action.

A closer examination of the Petitioner's argument reveals that the Petitioner's are only claiming internal juror misconduct as to the punitive damage award itself, but are not claiming internal juror misconduct as to the overall verdict in favor of the Respondents or the compensatory award for the malicious prosecution or the zero (\$0.00) verdict on the defamation action. The Petitioner's argument appears flawed and the Petitioners have never provided any rationale or explanation as to this glaring inconsistency. The Petitioner has the burden of proof to show both misconduct and the resulting prejudice. see *Zeigler*. The Petitioner argues that absent juror misconduct, the Respondents would have received an award of \$8000.00 a piece for a total of \$16,000.00. The Respondents would contend that the Petitioner's argument as to this award amount is completely speculative without any factual support. Even the juror affidavits submitted by the Petitioners do not state a specific amount that the jurors would have or had agreed upon before this alleged misconduct by the jury foreperson. The Petitioner's arguments as to what the jurors would have done "but for" were similar to the ones made in *Shumpert* and which were rejected by this Court.

The Petitioners' couch their petition as a novel analysis of the Court of Appeals reference to "intentional" versus unintentional misconduct; however, the Petitioner fails to recognize that once the trial court determines that no juror misconduct occurred then the trial court's analysis ends. In this case, the Circuit Court found that there was no juror misconduct after examining the circumstances in the case; therefore, no analysis of intentional versus unintentional misconduct was required. see *Ziegler*. There are no novel questions of law in the Court of Appeals determination that the Circuit Court was correct in finding no evidence of juror misconduct. The Circuit Court exercised its discretion and determined that the affidavits were not admissible or reliable. The Court of Appeals merely

added to its analysis by stating that even if the affidavits were admissible, that there was still no evidence of juror misconduct based upon those two (2) juror affidavits.

The Trial Court did not abuse its discretion and properly exercised its discretion in denying the Petitioners' request for a new trial based upon juror misconduct. The circumstances surrounding the case show that the Petitioners failed to meet its burden of proof in either establishing juror misconduct or that the Petitioners did not receive a fair and impartial trial. The Court of Appeals did not err in affirming the Circuit Court's denial of the Petitioner's request for a new trial based upon juror misconduct after its review of the record and oral arguments. The decision of the Court of Appeals does not conflict with any prior decisions of this Court; therefore, the Petitioners' request for a writ of certiorari should be denied.

## II

### THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE CIRCUIT COURT'S DENIAL OF THE PETITIONERS' REQUEST FOR A NEW TRIAL BASED UPON THE EXCLUSION OF A NON-RELEVANT AUDIO RECORDING.

Determinations as to the admissibility and/or relevance of evidence are left to the sound discretion of the court. A trial court's determination as to the admissibility of evidence will not be disturbed unless there is evidence of abuse of discretion. *Burbach v. Investors Management Corp. International*, 326 S.C. 492, 484 S.E.2d 196 (Ct. App. 1996). In addition, relevant evidence may be excluded on the grounds of prejudice, confusion, or waste of time. *Rule 403, South Carolina Rules of Evidence*.

The Circuit Court properly excluded an audio tape secretly recorded by the Petitioners' security officer after the Respondents were arrested and taken to a nearby sheriff's department substation located in the mall. It is not disputed by either the Respondents or the Petitioners or the trial record that the properly excluded audio recording

depicted Lt. Dave Navarro, with the Richland County Sheriff's Department, questioning the Respondents after their arrest. Furthermore, it is clear by the evidence and record that Lt. Navarro was not present at the time the Respondents were seized and handcuffed in the mall. Lt. Navarro testified that he was in his vehicle outside near the food court when he first received a call for assistance. [R.p. 374, line 14 - p.375, line 20.] Furthermore, Lt. Navarro testified that his first visual contact with the Respondents occurred as he entered the building and the Respondents were turning the corner of a retail outlet; the Respondents were already under arrest at the time of his first visual contact. [R.p. 375, line 21 - p.376, line 23.] In addition, Lt. Navarro testified that he did not know where the arrest occurred. [R.p. 390, lines 19 - 22.]

The Circuit Court heard the proffered testimony offered by the Petitioners and properly determined that the audio recording did not occur contemporaneously with the arrests; furthermore, the Circuit Court had questions and doubt about the circumstances surrounding the recording itself. The audio recording was not complete as to the entire custodial interview between Lt. Navarro and the Respondents nor was the device or phone used to record this incomplete custodial interview presented or made available to either the Circuit Court or the Respondents. In addition, the Circuit Court determined that the audio recording was not probative of the Respondents' conduct before or at the time of the arrest, but reflected conduct after the arrest based upon Lt. Navarro's testimony that the Respondents were already under arrest when he first visually saw them and based upon Lt. Navarro testimony that he did not know where the arrest of either Respondent occurred. Since it is not disputed that Lt. Navarro is the one questioning the Respondents on the audio recording, the Circuit Court did not abuse its discretion in determining that the recording was not made contemporaneously with the Respondents' arrests.

The Circuit Court did not abuse its' discretion in excluding the audio recording from being admitted into evidence; therefore, the Circuit Court's finding should be given great deference and should not be disturbed absent a showing of abuse. *Hunter v. Staples*, 335 S.C. 93, 102, 515 S.E.2d 261, 266 (Ct. App. 1999). The Court of Appeals determined that the Circuit Court did not abuse its discretion after a review of the record and oral arguments. The audio recording was not relevant because it was recorded some time after the Respondents were arrested for Breach of Peace. Furthermore, the probative value of the audio recording was far exceeded by its prejudicial effect since the recording was not made contemporaneously to the Respondents' arrest. Since the Circuit Court expressed its' concern surrounding all of the issues involving the audio recording after its balancing test after hearing proffered testimony and listening to the recording, it is a reasonable conclusion that the admission of the audio recording would have only served to only confuse the jury. It should be noted that even relevant evidence, which this audio recording was not, may be excluded on the ground of confusion. *Rule 403, South Carolina Rules of Evidence.*

The record also reflects that the Petitioners did not suffer any prejudice as the Petitioners presented testimony at trial as to the alleged specific language and specific conduct they attributed to the Respondents' which resulted in the Respondents' arrests; therefore, the jurors had a full opportunity to judge the credibility of all the witnesses.

The Petitioners failed to demonstrate to the Court of Appeals that the Circuit Court abused its discretion in excluding the audio recording. The Court of Appeals did not err in affirming the Circuit Court's denial of the Petitioner's request for a new trial based upon the exclusion of the audio recording after its review of the record and oral arguments. The decision of the Court of Appeals does not conflict with any prior decisions of this Court; therefore, the Petitioners' request for a writ of certiorari should be denied.

### III.

THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE CIRCUIT COURT'S DENIAL OF THE PETITIONERS REQUEST TO SET ASIDE OR REDUCE THE PUNITIVE DAMAGES AWARD.

A de novo review must be conducted when evaluating the constitutionality of a punitive damage award. Punitive damages serve as a deterrent for offenders and to prevent others from committing certain or similar wrongs in the future. This Court in *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (S.C. 2009), outlined the following test to be conducted in the de novo review of punitive damages: 1) Reprehensibility; 2) Ratio; and 3) Comparative Penalty Awards.

In analyzing the first prong of reprehensibility, this Court is concerned with the Defendant's conduct and what type of harm was done to the Plaintiffs, whether that conduct was reflective of indifference or reckless disregard for the safety of others, whether the Plaintiffs were financially vulnerable, whether the conduct involved repeated actions or was isolated in nature; and whether the harm was the result of intentional malice, deceit, etc. or was a mere accident.

This case involves reprehensible conduct on the part of Petitioners. The harm to the Respondents was economic and physical. As a result of the arrests, Respondent Lehua Figueroa was held back in her military service and promotions while Respondent Nohealani Figueroa was prevented from entering the military with the pending arrests. Furthermore, both Respondents testified as to their emotional state of mind after the arrests and prosecution. The conduct of the Appellants reflected an indifference or reckless disregard for the safety of the Respondents in not determining if the Appellants could arrest the Respondents for a common law offense and in conducting searches of the Respondents' person. The Respondents' were financially vulnerable because of their age and lack of work

history. An arrest and potential conviction would limit their ability to get certain jobs. The Petitioners' actions were repetitive and intentionally malicious and deceitful in that the Petitioners' agents repeatedly did not follow company policy regarding record keeping for training and registration certificates, or their policy in not using physical force, or their policy in not pursuing individuals through the mall, or their policy to not destroy material evidence in the form of the videos. A negative inference could be drawn from either failing to produce those videos, or from failing to produce policy information until trial, or possibly from the conduct of the Petitioners' officers in the arrests of the Respondents.

The ratio prong of the test considers the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The United States Supreme Court, though not adhering to any bright line rules, has stated that few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408, 124 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

In the Respondents' case, the ratio is a significantly low single-digit ratio approaching 3.1 to 1 on the malicious prosecution only, 3.8 to 1 on the false imprisonment only, and 1.7 to one if both awards for the plaintiffs were combined. The Respondents would argue that there is evidence to support the \$25,000.00 punitive damage awards and that the awards are not excessive or in violation of any due process based upon the low ratio amount.

The comparative penalty award allows the Court to consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The Court may consider the type of harm sustained by the plaintiffs, the reprehensibility of the defendant's conduct, the ratio of harm to punitive damages, the size of the award, and any other factors the court may deem relevant.

A review of case law reflects a case which presents similar issues present in the Respondent's case. See *Smith v. Harris-Teeter Supermarkets, Inc.*, 285 S.C. 445, 330 S.E.2d 316 (S.C.App.1985). In that *Smith* case, the jury returned a verdict for the Plaintiff for \$1000.00 actual and \$9000.00 punitive damages. The ratio in that malicious prosecution case was 9 to 1 in a trial where the plaintiff was prosecuted for bad checks. Also, See *Patterson v. Bogan*, 261 S.C. 87, 198 S.E.2d 586 (S.C.1973), where the Plaintiff was awarded \$5000.00 actual and \$15000.00 punitive damages for a malicious prosecution case. The ratio was 3 to 1 in that case.

In the case at hand, the Circuit Court was presented with a low ratio from actual to punitive damages. Furthermore, the award was not excessive so as to be the result of passion, caprice, prejudice, or some other influence outside of the evidence. In addition, the jury returned a zero (\$0.00) verdict on the defamation cause of action for both Respondents which further illustrates that the award was consistent with the facts and factors presented in the case. Those facts and factors the Respondents asked the trial court to consider: 1) the reprehensibility of the Petitioners' conduct in destroying the video; 2) the Petitioners' agents' disregard for their own internal policies regarding pursuit, training, licensing, and arrests; 3) the Petitioners' inconsistent testimony at trial; 4) the economic harm to the Respondents' job prospects for the present and the future; and 5) the emotional injuries to the Respondents in the form of embarrassment, humiliation, and fear.

The award of \$25,000.00 punitive damage for each Respondent was proper in this case and did not violate any due process concerns. Furthermore, the awards were supported by the evidence and not excessive so as to be the result of passion, caprice, prejudice, or some other influence outside of the evidence. The jury unanimously determined that the Petitioners acted wantonly, willfully, and maliciously in this incident.

It appears that the Court of Appeals determined that the Petitioners' argument concerning the punitive damage award had no merit after determining the Circuit Court properly conducted its *de novo* review of the punitive award; furthermore, the Court of Appeals contended that if one or more inferences could be drawn based upon whether the Defendant's conduct was reckless, willful, or wanton, then the matter should go to the jury. More than one inference could be drawn based upon the Petitioner's own reckless, willful, and wanton conduct; therefore the jurors unanimous rendering of the punitive award was proper.

The Petitioners failed to show that the Circuit Court abused its discretion in denying the Petitioner's motion for a new trial based upon the punitive damage awards . The Court of Appeals did not err in affirming the Circuit Court's denial of the Petitioner's request for a new trial based upon the punitive damage awards after its review of the record and oral arguments. The decision of the Court of Appeals does not conflict with any prior decisions of this Court or the United States Supreme Court; therefore, the Petitioners' request for a writ of certiorari should be denied.

#### CONCLUSION

The Petitioners' writ of certiorari contains no novel questions of law nor does it contain any substantial constitutional issues or raise any federal questions. The Court of Appeals affirmation of the Circuit Court's decisions was unanimous and did not conflict with any prior decisions of this Court or with a decision of the United States Supreme Court. The Court of Appeals did not err in either of the following: 1) affirming the Circuit Court's decision not to grant a new trial based upon juror misconduct; 2) affirming the Circuit Court's decision to exclude an audio recording which did not capture the Respondents' arrest; or 3)

affirming the Circuit Court's decision not to set aside or reduce the amount of the punitive damage award.

For the reasons stated above, this Court should deny the Petitioners' request for a writ of certiorari.

October 4, 2012

Respectfully submitted,



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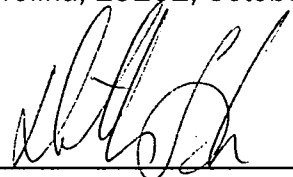
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PROOF OF SERVICE

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I certify that I have served copies of the Respondents' Return to Petition upon R. Hawthorne Barrett and Shannon F. Bobertz by delivering these copies by U.S. Mail to the following address: PO Box 1473, Columbia, South Carolina, 29202, October 4, 2012.

October 4, 2012

  
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