

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Richland County
Court of Common Pleas

S.C. Supreme Court

The Hon. Alison R. Lee, Circuit Court Judge

Case No.: 2009-CP-40-3996

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

v.

CBI / Columbia Place Mall, LLC; and
ERMC II, LLP,.....Appellants.

RECORD ON APPEAL

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1 Q AND IF A MAN THAT YOU DON'T KNOW GRABS YOU, YOU'RE

2 GOING TO BE UPSET, AREN'T YOU?

3 A YES.

4 Q AND YOU'RE GOING TO HAVE A REACTION, AREN'T YOU?

5 A YES.

6 Q BECAUSE HE SHOULDN'T PUT HIS HANDS ON YOU, SHOULD HE?

7 A YES.

8 MR. LAKE: NO FURTHER QUESTIONS.

9 MS. BOBERTZ: I HAVE NOTHING FURTHER, YOUR HONOR.

10 THE COURT: YOU MAY STEP DOWN, THANK YOU.

11 (THE WITNESS LEAVES THE WITNESS STAND.)

12 MS. BOBERTZ: I'D LIKE TO CALL LIONELL PARISH.

13 LIONELL PARISH,

14 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

15 CLERK: HAVE A SEAT IN THE WITNESS BOX. STATE YOUR

16 NAME FOR THE RECORD PLEASE.

17 WITNESS: MY NAME IS LIONELL PARISH.

18 DIRECT EXAMINATION BY MS. BOBERTZ:

19 Q MR. PARISH, COULD YOU TELL THE JURY WHERE YOU'RE FROM

20 AND WHAT YOU DO?

21 A ORIGINALLY, I AM FROM FORT DIX, NEW JERSEY, MOVED TO

22 SOUTH CAROLINA WHEN I WAS 10, BEEN LIVING HERE EVER SINCE.

23 I AM CURRENTLY THE DIRECTOR OF SECURITY AT WESTGATE MALL IN

24 SPARTANBURG, SOUTH CAROLINA.

25 Q OKAY. HOW LONG HAVE YOU BEEN EMPLOYED WITH ERMIC?

1 DAY?

2 A TO HELP PROVIDE A SAFE AND FRIENDLY -- FAMILY FRIENDLY
3 -- ENVIRONMENT AT A SHOPPING CENTER; THAT'S WHAT I
4 CURRENTLY DO NOW AS THE DIRECTOR OF SECURITY AT WESTGATE.
5 I HAVE A STAFF THERE WHO AS OFFICERS ARE REQUIRED, OBSERVE,
6 REPORT, AND MAINTAIN THE PEACE AND SAFETY AND SECURITY OF
7 THE SHOPPING CENTER.

8 Q DO YOU -- DO THEY -- DID YOU HAVE A CHANCE TO TALK TO
9 THE FIGUEROA SISTERS ABOUT WHETHER THEY THOUGHT THEY WERE
10 DISCRIMINATED AGAINST?

11 A I MYSELF DIDN'T REALLY TALK DIRECTLY TO THEM ABOUT IT.
12 THEY SPOKE OF HAVING BEEN HARASSED IN OTHER PLACES, LIKE
13 PLACES THEY GO PEOPLE THINK THEY'RE MEXICAN OR BEING
14 HARASSED FOR BEING SOMETHING THAT THEY ARE NOT, PLACES LIKE
15 WAL-MART AND THINGS OF THAT NATURE. EVERYWHERE -- THEY
16 WERE SAYING EVERYWHERE WE GO, PEOPLE HARASS US. EVERY --
17 EVERYWHERE WE GO.

18 Q WHAT DID YOU END UP CHARGING BOTH OF THEM WITH THAT
19 DAY?

20 A I CHARGED THEM WITH BREACH OF PEACE.

21 Q OKAY. DID YOU FEEL THEY WERE VIOLATING ANY OTHER LAWS
22 AT THAT TIME?

23 A AT THAT TIME, NO.

24 Q OKAY. DO YOU FEEL YOU DID ANYTHING WRONG WHEN YOU
25 ARRESTED THE PLAINTIFFS THAT DAY?

- 1 A I DIDN'T PUT IT IN A DAILY ACTIVITY REPORT.
- 2 Q BECAUSE IT DIDN'T EXIST, IT DIDN'T HAPPEN, CORRECT?
- 3 A IT DID HAPPEN.
- 4 Q THE FIRST TIME YOU EVER STATED THEY EVER INDICATED
- 5 THAT, CORRECT?
- 6 A NO, IT IS NOT.
- 7 Q DID YOU TESTIFY AT ANOTHER HEARING MAKING THAT SAYING
- 8 -- THOSE ACCUSATIONS THAT THEY SAID THOSE EXACT WORDS?
- 9 A NO, I WAS NOT GIVEN THE OPPORTUNITY.
- 10 Q OH, YOU WERE NOT GIVEN THE OPPORTUNITY?
- 11 A NOT IN THE CRIMINAL.
- 12 Q AND YOU INDICATED THAT THEY ARE JUST CURSING IF YOU
- 13 ARE TO BE BELIEVED, THAT PEOPLE ARE PASSING WITHIN 2 TO 3
- 14 FEET BECAUSE YOU'RE 2 OR 3 FEET AWAY, CORRECT?
- 15 A THAT SOUNDS ACCURATE, YES.
- 16 Q SO 2 OR 3 FEET IS ABOUT THIS CLOSE?
- 17 A NO. YOU'RE CLOSER.
- 18 Q YOU WERE CLOSER THAN THAT?
- 19 A NO. YOU'RE CLOSER.
- 20 Q OKAY. WHERE IS 2 OR 3 FEET FOR YOU THEN?
- 21 A THAT'S ABOUT RIGHT.
- 22 Q THIS IS 2 OR 3 FEET AS FAR AS YOU'RE CONCERNED?
- 23 A THAT'S ABOUT -- THAT'S ABOUT 3 FEET.
- 24 Q AND SO ISN'T IT TRUE THAT BY FOLLOWING SOMEONE THAT
- 25 CLOSE, YOU GIVE THE IMPRESSION THAT THEY ARE ACTUALLY DOING

1 SHE WAS THE ONLY FEMALE UP THERE AT THAT TIME.

2 Q SO SHE DID IT AT HIS DIRECTION?

3 A AT THE DIRECTION OF THE RICHLAND COUNTY SHERIFF'S
4 DEPUTY.

5 Q IS CREECH OUT THERE ANY MORE?

6 MS. BOBERTZ: OBJECTION, YOUR HONOR. RELEVANCE.

7 THE COURT: I'VE ALREADY RULED ON THAT, MR. LAKE.

8 MR. LAKE: THANK YOU, YOUR HONOR.

9 BEG THE COURT'S INDULGENCE.

10 (PAUSE.)

11 MR. LAKE: NO FURTHER QUESTIONS.

12 THE COURT: GIVEN THE TIME, DO YOU HAVE BRIEF REPLY?

13 MS. BOBERTZ: JUST ABOUT TWO QUICK QUESTIONS.

14 REDIRECT EXAMINATION BY MS. BOBERTZ:

15 Q SERGEANT PARISH, YOU DIDN'T ARREST THE GIRLS JUST
16 BECAUSE THEY WERE CUSSING AT YOU THAT DAY, DID YOU?

17 A NO.

18 Q YOU ARRESTED THEM BECAUSE THEY WERE BEING LOUD, USING
19 PROFANITY, AND OTHER CUSTOMERS IN THE MALL WERE BEING
20 DISTURBED BY IT; IS THAT RIGHT?

21 A THAT'S CORRECT.

22 Q AND BECAUSE YOU DID NOT THINK THEY WERE HEADING TO
23 THEIR CAR?

24 A I HAD NO IDEA WHERE THEY WERE GOING AT THIS TIME.

25 MS. BOBERTZ: OKAY. THAT'S ALL THE QUESTIONS I HAVE.

1 THE COURT: NO. I'M WAITING FOR HIM RIGHT NOW.

2 DONOVAN BOLTON,

3 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

4 THE COURT: YOU MAY HAVE A SEAT. PLEASE STATE YOUR
5 NAME PLEASE.

6 AND AT THIS PARTICULAR POINT YOU CAN TREAT IT AS A
7 PROFFER.

8 MS. BOBERTZ: I'M SORRY.

9 THE COURT: I SAY, AT THIS POINT YOU CAN TREAT IT AS A
10 PROFFER.

11 WITNESS: MY NAME IS DONOVAN BOLTON.

12 DIRECT EXAMINATION BY MS. BOBERTZ:

13 Q MR. BOLTON, IF YOU COULD PLEASE TELL THE JUDGE WHAT
14 YOU DO AND WHERE YOU WORK?

15 A I'M A SECURITY OFFICER AT COLUMBIA PLACE MALL.

16 Q AND WHO'S YOUR EMPLOYER?

17 A COLUMBIA PLACE ERMIC.

18 Q HOW LONG HAVE YOU WORKED THERE?

19 A 12 TO 13 YEARS.

20 Q DO YOU CURRENTLY WORK ANYWHERE ELSE?

21 A YES, I CURRENTLY HOLD -- I'M SENIOR FIRE FIGHTER AT
22 COLUMBIA FIRE DEPARTMENT.

23 MS. BOBERTZ: CAN YOU ALL HEAR HIM OKAY?

24 THE COURT: UH-HUH.

25 Q ARE YOU CURRENTLY CERTIFIED BY SLED AS A POLICE

- 1 OFFICER?
- 2 A YES.
- 3 Q A SECURITY OFFICER, I'M SORRY?
- 4 A YES, I AM.
- 5 Q HOW LONG HAVE YOU BEEN CERTIFIED?
- 6 A FOR THE PAST 12 OR 13 YEARS ANNUAL RENEWAL.
- 7 Q OKAY. HAVE YOU EVER HAD ANY PROBLEMS GETTING
- 8 CERTIFIED BY SLED?
- 9 A NO, I HAVE NOT.
- 10 Q ALL RIGHT. COULD YOU PLEASE TELL THE JUDGE HOW YOU
- 11 CAME UPON OR CALLED TO ASSIST LIONELL PARISH THAT DAY WITH
- 12 THE FIGUEROA SISTERS?
- 13 A WHILE PATROLLING -- NORMAL PATROL OF THE MALL WITH THE
- 14 Y.E.P., A CALL FOR ASSISTANCE FROM LIONELL PARISH. I
- 15 RESPONDED. AS I WAS APPROACHING, YOU KNOW, THE NOISE, THE
- 16 PROFANITY, THE LANGUAGE, AND CUSTOMERS CROWDING AROUND
- 17 TRYING TO CLEAR -- TO GET THROUGH, I ASSIST WITH THE ARREST
- 18 WITH THE YOUNGER SISTER.
- 19 Q OKAY. SO WHERE DID YOU COME FROM?
- 20 A I BELIEVE I WAS UPSTAIRS JUST WALKING WIDE, AND I WAS
- 21 -- I BELIEVE I WAS IN THE FOOD COURT AREA.
- 22 Q OKAY. AT WHAT POINT DO YOU BEGIN TO HEAR THE SISTERS
- 23 OR THE COMMOTION? HOW CLOSE WERE YOU?
- 24 A I WOULD SAY PROBABLY FROM WHERE I'M SITTING NOW TO,
- 25 LIKE, MAYBE AT THE DOOR ENTRANCE, AS IF THEY WAS STANDING

1 THERE CARRYING ON.

2 Q OKAY. WHAT COULD YOU HEAR AT THAT TIME?

3 A A LOT OF PROFANITY, A LOT OF ARGUMENTS, AND WHAT THEY
4 NOT GOING TO DO, AND WHAT THEY'RE GOING TO DO, AND ---

5 Q OKAY. GIVE ME AN IDEA WHAT KIND OF PROFANITY YOU
6 HEARD AT THAT TIME?

7 A WHY YOU ALL FUCKING WITH ME AND ALL. YOU ALL NOT
8. FUCKING WITH NO ONE ELSE. AND YOU ALL NOT STOPPING THIS
9 BITCH. AND JUST ON AND ON.

10 Q DO YOU KNOW WHICH SISTER WAS SPEAKING AT THAT TIME?

11 A ACTUALLY, I WOULD HAVE TO SAY BOTH BECAUSE BOTH WAS
12 SPEAKING, SAYING WHAT WAS ON THEIR MIND, GIVING -- SAYING
13 WHATEVER THEY WANTED TO SAY.

14 Q AT POINT WAS LEHUA FIGUEROA ARRESTED? WAS SHE ALREADY
15 ARRESTED WHEN YOU CAME ONTO THE SCENE?

16 A THE OLDER SISTER, YES.

17 Q OKAY. AND YOU ASSISTED IN THE ARREST ---

18 A WITH THE ARREST WITH THE YOUNGER SISTER.

19 Q WHY DID YOU ARREST THE YOUNGER SISTER?

20 A DUE TO THE DISTURBANCE, THE PROFANITY, THE DISTURBING
21 -- DISTURBING THE PEACE, CAUSING A SCENE WHEN IT SHOULDN'T
22 HAVE BEEN.

23 Q OKAY. WHAT KIND OF THINGS WAS THE YOUNGER SISTER
24 SAYING?

25 A GET THE FUCK OFF MY SISTER. WHY YOU ALL DOING THIS?

1 YOU ALL ONLY FUCKING WITH US.

2 Q OKAY. TELL ME IF YOU CAN -- I KNOW THERE'S AN AUDIO
3 THAT'S BEEN TAKEN OF THE EVENT. CAN YOU TELL THE JUDGE HOW
4 THAT AUDIO WAS TAKEN, HOW YOU CAME TO HEAR IT, AND SORT OF
5 WHEN THAT AUDIO IN TIME AS FAR AS YOU ARRIVING ON THE
6 SCENE?

7 A IN THE PROCESS OF ARRESTING THE YOUNGER SISTER WITH
8 THE STRUGGLE WHILE SHE WAS RESISTING, AND AT THAT TIME IT
9 MUST HAVE STARTED THE RECORDING. AND I DIDN'T REALIZE IT
10 WAS RECORDING UNTIL AFTER MY CELL PHONE DROP.

11 Q WHEN DID YOUR CELL PHONE DROP?

12 A WHILE WE WAS WALKING THEM BACK TO THE D.S.T.

13 Q THAT'S THE SUBSTATION?

14 A YES, RICHLAND COUNTY.

15 Q NOW, HOW DID THIS COME TO BE RECORDED? I MEAN,
16 EXPLAIN TO THE JUDGE WHERE YOUR CELL PHONE WAS, HOW IT
17 RECORDED?

18 A IT WAS ON MY UTILITY BELT. AND THE WAY IT WAS PLACED,
19 I SUPPOSE WITH THE MOVEMENT IT WAS PRESSED.

20 Q NOW, IF YOU COULD TAKE OUT YOUR PHONE AND SHOW HER
21 WHAT BUTTON WAS PRESSED?

22 A OKAY. IT'S NOT ON THIS CURRENTLY PHONE, BUT THE PHONE
23 WAS ABOUT A LITTLE SMALLER. THE BUTTON WAS ON THE SIDE.
24 IT WAS IN THE HOLSTER SITTING LIKE THIS. IT WAS IN MY
25 HOLSTER MORE LIKE THIS. AND WITH ME DURING THE STRUGGLE

1 FOR RESISTING ARREST, IT APPARENTLY SET OFF THE RECORDING
2 ON THE PHONE.

3 Q OKAY. DID YOU HAVE -- WHAT -- WHEN YOU STARTED TO
4 ARREST HER, WAS ANYONE ELSE WITH YOU?

5 A SAY AGAIN?

6 Q WAS ANYONE ELSE WITH YOU WHEN YOU STARTED TO ARREST
7 HER?

8 A YES, IT WAS MYSELF AND OFFICER GRIFFITH. HE ASSISTED.
9 I HAD ONE ARM, AND OFFICER GRIFFITH WAS HELPING TRYING TO
10 GET THE OTHER ARM.

11 Q WHY WERE THERE TWO OFFICERS INVOLVED IN THE ARREST OF
12 ONE PERSON?

13 A NORMALLY, WHENEVER WE ARREST, WE TRY NOT TO USE 100
14 PERCENT POWER, STRENGTH-WISE TO OVERDUE THE SUBJECT. SO
15 OFFICER GRIFFITH WAS ASSISTING ME WHILE I WAS HOLDING ONE
16 ARM, HE WAS HOLD -- HE WAS TRYING TO GET CONTROL OF THE
17 OTHER.

18 Q DID YOU HAVE -- WHEN DID YOU REALIZE SOMETHING WAS
19 RECORDING ON YOUR PHONE?

20 A AFTER IT FELL. I PICKED IT UP; THAT'S WHEN I NOTICED.

21 Q OKAY. WHAT DID YOU DO AT THAT TIME?

22 A I JUST WENT AHEAD AND CLOSED IT UP. WHEN I CLOSED IT
23 UP, IT MUST HAVE SHUT IT OFF.

24 Q WHEN DID YOU ACTUALLY LISTEN TO THE RECORDING FOR THE
25 FIRST TIME?

1 A AFTER I WAS CLEARED FROM THE SCENE, I CHECKED TO SEE
2 IF THE PHONE WAS WORKING PROPERLY.

3 Q OKAY. AND AT THAT TIME DID YOU PLAY YOUR RECORDING
4 THAT HAD BEEN RECORDED?

5 A YES, AFTER -- AFTERWARDS.

6 Q ALL RIGHT. DID IT FAIRLY AND ACCURATELY REPRESENT
7 WHAT OCCURRED DURING YOUR ARREST OF THE SECOND SISTER?

8 A YES.

9 Q OKAY. DID YOU RECOGNIZE ANY VOICES ON THE RECORDING?

10 A YES.

11 Q OKAY. WHOSE VOICES DID YOU RECOGNIZE ON THAT?

12 A IT WAS THE YOUNGER SISTER AND ALSO THE OLDER SISTER,
13 NAVARRO AS WELL.

14 Q OKAY. WHAT CAN YOU HEAR ON THE RECORDING?

15 A A LOT OF PROFANITY, MORE LIKE NAME CALLING SO TO
16 SPEAK.

17 Q OKAY. HAVE YOU -- YOU ACTUALLY WERE ABLE TO SEND THAT
18 RECORDING -- WERE YOU ABLE TO SAVE THAT RECORDING?

19 A YES.

20 Q OKAY. AND YOU'VE HAD A CHANCE TO LISTEN TO THAT
21 RECORDING THAT'S BEEN SAVED?

22 A YES.

23 Q DOES IT -- HAS IT BEEN EDITED OR ALTERED IN ANY WAY,
24 YOUR RECORDING FROM THAT DAY?

25 A NO, IT HAS NOT.

1 Q OKAY. IS THE RECORDING DEMONSTRATIVE OF HOW LOUD THE
2 SISTERS WERE, CERTAINLY DURING THE ACTUAL ARREST OF THE
3 SECOND SISTER?

4 A YES, YOU COULD HEAR -- YOU CAN TELL WHERE IT WAS LIKE
5 ECHOING BECAUSE IT WAS WITHIN THE MALL, AND YOU CAN
6 IDENTIFY.

7 MS. BOBERTZ: OKAY. ALL RIGHT. I THINK THAT'S ALL
8 THE QUESTIONS I HAVE.

9 CROSS EXAMINATION BY MR. LAKE:

10 Q DID YOU DO A REPORT OR A STATEMENT OR ANYTHING LIKE
11 THAT, OFFICER BOLTON?

12 A YES, THE DAILY REPORT.

13 Q THAT'S THE ONLY REPORT YOU DID IN THIS PARTICULAR
14 CASE?

15 A I ALSO HAD ---

16 Q DID YOU WRITE A PERSONAL STATEMENT?

17 A YES.

18 Q WHERE IS YOUR PERSONAL STATEMENT?

19 MS. BOBERTZ: IT'S THERE SOMEWHERE.

20 (PAUSE.)

21 Q AND I'M TRYING TO FIND YOUR STATEMENT THERE. YOU
22 ESSENTIALLY -- YOU DID AN ACTIVITY REPORT, RIGHT?

23 A YES.

24 Q IN YOUR ACTIVITY REPORT YOU WRITE DOWN THE FACT THAT
25 YOU ACTUALLY WENT TO ASSIST SERGEANT PARISH AND OFFICER

1 GRIFFITH FOR THE ARREST AS OPPOSED TO YOU BEING THE
2 ARRESTING OFFICER, YOUR REPORT SAYS YOU GO TO ASSIST HIM.
3 YOU JUST TESTIFIED THAT YOU AND GRIFFITH WAS ASSISTING YOU.
4 THAT'S NOT EVEN IN YOUR REPORT, IS IT?

5 A WELL, I WAS ASSISTING OFFICER GRIFFITH. I WAS THE
6 ASSISTING OFFICERS.

7 Q SO YOU DIDN'T MAKE AN ARREST OUT THERE THAT DAY, YOU
8 ASSISTED THEM, CORRECT?

9 A WITH THE ARRESTS, YES.

10 Q BECAUSE THEY'RE ALREADY UNDER ARREST BECAUSE YOU'RE
11 JUST BASICALLY MORE OR LESS BACKUP, CORRECT?

12 A YES.

13 Q ISN'T IT TRUE -- YOU HEARD OFFICER PARISH TESTIFY THAT
14 IMMEDIATELY BEHIND HIM WAS OFFICER GRIFFITH.

15 A YES.

16 Q AND WERE YOU THERE AT THE ZALE'S WHEN MS. FIGUEROA WAS
17 GRABBED?

18 A NO.

19 Q WAS OFFICER NAVARRO THERE WHEN SHE WAS GRABBED?

20 A FROM MY UNDERSTANDING, NO.

21 Q DO YOU KNOW WHERE HE WAS AT AT THE TIME?

22 A NO.

23 Q AND SO WHEN YOU ACTUALLY GRABBED SOMEBODY, THAT MEANS
24 YOU'RE GETTING READY TO ARREST THEM, CORRECT?

25 A YES.

1 Q AND YOU'VE ALREADY TESTIFIED AT THAT PARTICULAR POINT

2 HE WAS ARRESTING HER, CORRECT?

3 A YES.

4 Q AND OFFICER NAVARRO IS NOWHERE AROUND AS IT APPLIES TO

5 MS. FIGUEROA, CORRECT?

6 A I BELIEVE SO.

7 Q AND AT THE TIME THAT OFFICER GRIFFITH AND OFFICER

8 PARISH GRAB MS. FIGUEROA -- BOTH MS. FIGUEROAS AT THE

9 SECOND LOCATION, WHERE ARE THE OTHER OFFICERS? THE

10 OFFICERS, I MEAN, MALL SECURITY OFFICERS?

11 A MALL SECURITY OFFICERS, THEY MAY HAVE BEEN WHERE THEY

12 WERE SUPPOSED TO BE IN THEIR POST WHEN THE Y.E.P. IS IN

13 EFFECT.

14 Q OKAY. AND ISN'T IT TRUE THAT OFFICER NAVARRO WAS NOT

15 RIGHT THERE WHEN THOSE GIRLS WERE PLACED IN HANDCUFFS, IS

16 HE, CORRECT?

17 A AT THAT TIME, NO.

18 Q THEY HAD ALREADY HAD -- BOTH OF THEM HAD HANDCUFFS ON

19 AND THEY WERE BEING TAKEN DOWN TO THAT CORNER, DOWN TO

20 WHERE THE DRUG SUPPRESSION TEAM, CORRECT?

21 A BY THE TIME NAVARRO SHOWED UP, HE WAS COMING THROUGH

22 THE DOORS.

23 Q HE WAS COMING THROUGH THE DOORS AND YOU ALL ARE TAKING

24 THEM DOWN THERE TO THAT DRUG SUPPRESSION TEAM?

25 A WE BASICALLY MET UP RIGHT THERE AT THE TOYS AND GAME

1 STORE LOCATION, NEAR THE CORNER.

2 Q AND BY THAT TIME THEY'VE ALREADY GOT CUFFS ON THEM AND
3 YOU ALL -- WHO'S LEADING WHO? WHO HAS WHO CUFFED? ARE YOU
4 TAKING HER?

5 A WELL, WE ALL HAVE OUR OWN CUFFS.

6 Q I GUESS WHAT I'M SAYING IS, AS YOU ALL ARE WALKING
7 TOWARDS WHERE NAVARRO IS, AS HE'S COMING THROUGH THE DOOR,
8 AND YOU ALL -- I GUESS IF HE'S COMING THROUGH THE DOOR, I
9 ASSUME THAT MEANS THAT FOR YOU TO BE ABLE TO SEE HIM, YOU
10 ALMOST HAVE TO BE RIGHT -- JUST SO THE JUDGE CAN SEE --
11 THIS IS STEVE AND BERRY'S, AND THIS IS THE SUBSTATION,
12 CORRECT, THIS AREA RIGHT HERE? THIS IS GOING TO BE WHERE
13 THAT ENTRANCE IS.

14 A OKAY. YEAH, UH-HUH.

15 Q AND THIS IS THE ENTRANCE, WOULD YOU AGREE WITH THAT?

16 A YES.

17 Q AND THAT STORE THAT YOU'RE REFERRING TO IS RIGHT
18 THERE, CORRECT?

19 A NO.

20 Q WHERE IS THAT ---

21 A THAT STORE WOULD BE LOCATED RIGHT HERE BY THE RAILS.

22 Q OKAY. BUT YOU SAY YOU FIRST SAW HIM AS HE'S COMING IN
23 THE ENTRANCE?

24 A NO. I SEEN HIM LOCATED MORE THE MIDDLE CENTER OF THE
25 HALL, HALFWAY TO THE CORNER.

1 Q OKAY. AS YOU ALL ARE WALKING TOWARD -- IS THIS A SEE-
2 THROUGH GLASS OR SOMETHING LIKE THAT?

3 A NO.

4 Q OKAY. SO FOR YOU TO SEE HIM THAT HE'S HALFWAY, YOU
5 HAVE TO AGREE THAT YOU'RE AT LEAST ---

6 A YOU HAVE TO COME TO THE CORNER.

7 Q OKAY. THEY'RE ALREADY IN CUFFS. WHO HAS MS.
8 NOHEALANI FIGUEROA AT THAT POINT?

9 A I DO NOT KNOW. YES, WE DID ESCORT THE FEMALES TO THE
10 RICHLAND COUNTY OFFICE. BUT TO IDENTIFY WHICH OFFICER HAD
11 WHO, I CAN'T SAY.

12 Q AND AT THE TIME THAT YOU ALL ARE ESCORTING THEM TO
13 THAT PARTICULAR POINT, DID NAVARRO MEET YOU AT THE CORNER,
14 DID HE STOP OR EXACTLY WHERE IS HE IN THAT HALL?

15 A WELL, HE PROCEED TO US.

16 Q OKAY. AND THEN YOU ALL WALK BACK DOWN ---

17 A YES.

18 Q --- TO THAT SUBSTATION, CORRECT? AND AT SOME POINT
19 THEY'RE SET DOWN AT A TABLE, CORRECT?

20 A YES.

21 Q AND THAT'S WHEN -- IS THAT WHEN OFFICER NAVARRO TALKS
22 TO THEM FOR THE FIRST TIME?

23 A SAY AGAIN, SIR?

24 Q YOU WERE PRESENT WHEN OFFICER NAVARRO TESTIFIED,
25 CORRECT?

1 A YES.

2 Q AND HE INDICATED WHEN HE TALKED TO THEM, HE TALKED TO
3 THEM WHILE THEY WERE AT THAT TABLE, CORRECT?

4 A THE INITIAL TIME HE SPOKE WITH THE YOUNG LADIES WAS IN
5 THE COMMON AREA OF THE MALL.

6 Q THE COMMON AREA OF THE MALL?

7 A YES, SIR.

8 Q DID YOU HEAR HIM TESTIFY THE FIRST TIME THAT HE HAD
9 COMMUNICATIONS WITH THEM WAS AT THE SHERIFF'S SUBSTATION AT
10 THAT TABLE?

11 A I MUST HAVE MISSED THAT.

12 Q YOU DIDN'T SEE THAT PART. THERE'S NO DOUBT THAT AT
13 THE TIME THAT YOU ALL MET UP WITH OFFICER NAVARRO THAT THE
14 CUFFS WERE ON BOTH OF THOSE GIRLS AND YOU ALL ESCORTED THEM
15 OUT THAT DIRECTION, CORRECT?

16 A YES.

17 Q AND YOU SAID THAT CELL PHONE THAT YOU HAVE, IS THAT
18 THE SAME PHONE?

19 A NO, IT'S A UPDATE.

20 Q WHAT TYPE OF PHONE DID YOU HAVE AT THAT POINT?

21 A I BELIEVE IT WAS A MOTOROLA.

22 Q DID YOU TELL OFFICER NAVARRO YOU HAD CAPTURED THAT
23 AUDIO?

24 A AT THAT TIME I DID NOT, NO.

25 Q ISN'T IT TRUE THAT YOU RECORDED THAT BECAUSE YOU

1 THOUGHT THAT WOULD BE BENEFICIAL FOR YOU ALL AT THAT
2 PARTICULAR POINT?

3 A IF YOU ARE SAYING THAT I RECORDED IT BECAUSE OF THE
4 SITUATION, NO.

5 Q ISN'T IT TRUE YOU TURNED THAT RECORDING OFF, CORRECT?

6 A IT FELL, WHICH TURNS ITSELF OFF, YES.

7 Q SO THE PHONE TURNS ITSELF ON AND TURNS ITSELF OFF?

8 A WELL, WHEN THE BATTERY JUMP OUT, YEAH, IT TENDS TO
9 TURN ITSELF OFF.

10 MR. LAKE: NO FURTHER QUESTIONS.

11 MS. BOBERTZ: YOUR HONOR, DO YOU WANT ME TO PLAY IT OR
12 JUST ---

13 THE COURT: I GUESS I STILL HAVE SOME QUESTIONS.

14 MS. BOBERTZ: OKAY.

15 CROSS EXAMINATION BY THE COURT:

16 Q YOU STATED THAT OFFICER NAVARRO TALKED TO THE GIRLS
17 WHEN THEY WERE IN THE CORRIDOR?

18 A IN THE COMMON AREA OF THE MALL AS HE -- AS WE WAS
19 MORE, LIKE, APPROACHING EACH OTHER. HE WAS TRYING TO GET
20 THE YOUNG LADIES TO SETTLE DOWN, BECAUSE OF THE PROFANITY
21 THAT THEY WAS USING.

22 Q WERE THEY UNDER ARREST AT THAT TIME?

23 A YES.

24 Q WERE THEY UNDER ARREST WHEN NAVARRO ARRIVED IN THE
25 COMMON AREA?

1 A ONCE WE MET HIM, YES.

2 Q AND WERE DID YOU SAY THE ARREST TOOK PLACE?

3 A IT TOOK PLACE IN FRONT OF A -- I WANT TO SAY JUST
4 CASUAL, IT'S AN URBAN STORE, CLOTHING STORE. WOULD YOU
5 LIKE FOR ME TO JUST GIVE YOU A BETTER VISUAL ON THE MAP?

6 Q I THINK I UNDERSTAND WHERE IT IS. AND WHERE WERE YOU
7 LOCATED AT THE TIME THAT YOU REALIZED -- AT THE TIME THAT
8 YOUR PHONE FELL AND YOU REALIZED IT WAS RECORDING?

9 A IN THE PROCESS OF WALKING TOWARDS THE D.S.T. WHEN IT
10 FELL.

11 Q WHERE EXACTLY WERE YOU LOCATED?

12 A THE COMMON AREA OF THE MALL. NOT QUITE AT THE D.S.T.
13 OFFICE, BUT IN ROUTE TO IT, BUT IT WAS IN THE COMMON AREA
14 OF THE MALL.

15 Q AND WHEN YOU SAY THE COMMON AREA, IS THAT DOWN A
16 CORRIDOR OR IS THAT ---

17 A NO. THAT'S THE HALLWAY.

18 Q SO WHEN YOU SAY HALLWAY, IS THAT IN THE CENTER AREA OR
19 IS THAT DOWN ONE OF THE SIDE ---

20 A THE HALL THAT WOULD BE CONSIDERED WHERE THE CUSTOMERS
21 GO STORES TO STORE, IN THE OPEN.

22 Q IF YOU'D SHOW ME THAT ON THE MAP PLEASE.

23 (THE WITNESS STEPS DOWN FROM THE WITNESS STAND.)

24 A OKAY. RIGHT HERE, RIGHT AT -- LOCATED RIGHT AT KIND
25 OF POINTED TO IT EARLIER. RIGHT AT THE CORNER OF OLD NAVY

1 -- AS WE WAS MAKING THAT CORNER, WALKING TOWARD THE D.S.T.
2 THE D.S.T. OFFICE IS RIGHT AT THE GLASS DOORS. AND AS WE
3 WAS COMING DOWN, THAT'S WHEN MY PHONE JUST DROPPED.

4 Q NOW WHERE -- SHOW ME EXACTLY WHERE IT WAS WHEN NAVARRO
5 WAS TRYING TO CALM DOWN THE PLAINTIFFS?

6 A WHEN HE WALKED UP TO US?

7 Q WELL, WHEN YOU FIRST SAID HE FIRST STARTED TALKING TO
8 THE PLAINTIFFS?

9 A THAT WAS IN THAT SAME GENERAL LOCATION, BECAUSE
10 SHORTLY AFTER HE ARRIVED, THAT'S WHEN IT WAS ALREADY
11 LOOSE ---

12 Q WHEN YOU CAME AROUND THE CORNER, WERE THEY UNDER
13 ARREST?

14 A YES.

15 Q AND SO DID OFFICER NAVARRO MEET YOU BEFORE YOU CAME
16 AROUND THAT CORNER OR AFTER YOU CAME AROUND THAT CORNER?

17 A IT WAS AFTER.

18 Q AND I THINK YOU SAID THAT ONE -- THE OLDER SISTER WAS
19 ALREADY UNDER ARREST WHEN YOU ARRIVED. SHE ALREADY HAD
20 HANDCUFFS ON WHEN YOU ARRIVED AT THE SCENE?

21 A I BELIEVE SO, YES.

22 THE COURT: THAT'S ALL THE QUESTIONS I HAVE.

23 MS. BOBERTZ: YOUR HONOR, DO YOU HAVE A COPY OF THE
24 TAPE?

25 THE COURT: YOU CAN PLAY IT IF YOU LIKE.

1 (THE WITNESS RETURNS TO THE WITNESS STAND.)

2 MS. BOBERTZ: OKAY.

3 THE COURT: YOU NEED TO PLAY WHICHEVER COPY IS GOING
4 TO BE INTRODUCED.

5 (DEFENDANTS' EXHIBIT NO. 5 WAS PLAYED IN OPEN COURT.)

6 REDIRECT EXAMINATION BY MS. BOBERTZ:

7 Q OKAY. IS THAT THE SAME RECORDING THAT YOU HEARD ON
8 YOUR TELEPHONE, IS THAT A COPY THAT'S NOT BEEN ALTERED OR
9 EDITED IN ANY WAY?

10 A YES.

11 Q OKAY. AND THAT FIRST MALE VOICE THAT YOU HEAR, IS
12 THAT FIRST MALE VOICE SERGEANT NAVARRO?

13 A YES, THAT WOULD BE NAVARRO.

14 MS. BOBERTZ: OKAY. I WOULD MOVE TO DEFENDANTS'
15 EXHIBIT NO. 5 IN EVIDENCE, YOUR HONOR.

16 MR. LAKE: YOUR HONOR, WE WOULD OBJECT TO ---

17 THE COURT: DO YOU HAVE ANY QUESTIONS YOU WANT TO ASK
18 OF THE WITNESS?

19 MR. LAKE: YES.

20 RECROSS EXAMINATION BY MR. LAKE:

21 Q IN THAT VIDEO (SIC) ESSENTIALLY YOU DON'T HEAR ANYBODY
22 IN THE BACKGROUND, DO YOU, BESIDES FROM THE YOUNG LADIES
23 TALKING, CORRECT?

24 A YES, SIR.

25 Q AND THAT'S BECAUSE THERE'S NOBODY ELSE AROUND AT THE

- 1 TIME THAT THEY ARE ACTUALLY -- THAT HE'S ASKING QUESTIONS,
2 CORRECT?
3 A NO, SIR, THAT'S NOT THE CASE.
4 Q THEY WERE ---
5 A THEY WERE JUST THAT LOUD.
6 Q AND IN THAT RECORDING, CAN YOUR PHONE BE HEARD HITTING
7 THE GROUND?
8 A IT DIDN'T STAY ON IF THE BATTERY CAME OUT, SIR.
9 Q AND THAT AUDIO DOESN'T CAPTURE EVERYTHING THAT WAS
10 SAID BETWEEN THE CONVERSATION BETWEEN OFFICER NAVARRO AND
11 THE FIGUEROA SISTERS, DOES IT?
12 A WELL, I DIDN'T START IT TO CAPTURE EVERYTHING. IT
13 STARTED ON ITS OWN IN THE PROCESS OF ME DOING THE ARREST --
14 CONSISTENT WITH THE ARREST.
15 Q IT DOES NOT CAPTURE THE ENTIRE CONVERSATION BETWEEN
16 OFFICER NAVARRO AND THE FIGUEROA SISTERS, DOES IT?
17 A WHAT CONVERSATION IS THAT?
18 Q THE CONVERSATION THAT'S ON THAT RECORDING; ISN'T THAT
19 CORRECT?
20 A THE CONVERSATION THAT TOOK PLACE ---
21 Q YOU HAD FURTHER CONVERSATION AFTER THAT PHONE WAS
22 TURNED OFF, WASN'T THERE?
23 A THE CONVERSATION THEY HAD IN MY OFFICE, WHICH I WAS
24 NOT THERE. THIS TOOK PLACE IN THE OPEN COMMON AREA.
25 Q AND YOU INDICATED THAT THEY'RE ALREADY UNDER ARREST.

- 1 NOW, YOU CAN'T SEE OFFICER NAVARRO AS HE'S APPROACHING,
2 CORRECT? YOU'VE ALREADY TESTIFIED WHEN I SPOKE WITH YOU
3 THAT HE IS ABOUT THIS WAY -- MIDWAY, CORRECT?
4 A YES.
5 Q WHEN YOU ALL FIRST SEE HIM COME AROUND THIS CORNER,
6 CORRECT?
7 A YES.
8 Q THESE GIRLS ARE ALREADY IN CUSTODY, CORRECT?
9 A YES.
10 Q AND YOU'RE WALKING THEM DOWN, YOU ALL ARE WALKING
11 TOGETHER, CORRECT?
12 A YES.
13 Q AND THERE'S NO DOUBT THAT THEY'RE IN CUSTODY AT THIS
14 PARTICULAR POINT, RIGHT?
15 A YES.
16 Q AND NOBODY HAS READ THEM THEIR MIRANDA RIGHTS,
17 CORRECT?
18 A (NO RESPONSE.)
19 Q YOU DIDN'T HEAR OFFICER NAVARRO READ THEM ANY RIGHTS
20 BEFORE HE STARTED ASKING THEM QUESTIONS, CORRECT?
21 A WELL, I WASN'T THERE WHEN THEY WAS TALKING AMONG EACH
22 OTHER. LIKE I SAID, AT THE -- AT THE TIME I WAS IN THE
23 COMMON AREA. I WAS THERE TO ASSIST. SO AFTER NAVARRO
24 ARRIVED OR BY THE TIME WE HAD WALKED DOWN TO THE OFFICE, I
25 RETURNED TO DUTY.

1 Q ISN'T IT TRUE THAT IN THAT VIDEO (SIC) YOU HEAR

2 OFFICER NAVARRO ASKING WHAT HAPPENED?

3 A I WAS OVERHEARD HIM SAYING TO CALM DOWN.

4 MR. LAKE: NO FURTHER QUESTIONS.

5 RECROSS EXAMINATION BY THE COURT:

6 Q THE FEMALE VOICE THAT WAS ON, THAT YOU HEARD

7 PRIMARILY, WHOSE VOICE WAS THAT, DO YOU KNOW?

8 A THAT WOULD BE THE YOUNGER SISTER.

9 Q AND THEN THE MALE VOICE IS OFFICER NAVARRO?

10 A YES.

11 Q AND THE PORTION OF THE TAPE IN WHICH THERE ARE PEOPLE

12 TALKING OVER EACH OTHER AT THE BEGINNING, WHEN WAS THAT?

13 A I BELIEVE THAT WAS IN THE PROCESS OF THE ARREST.

14 Q AND BY ARREST, YOU MEAN PLACING THE HANDCUFFS ON?

15 A YES.

16 Q AFTER THE HANDCUFFS WERE PLACED ON THE GIRLS, WAS

17 THERE CONTINUED CONVERSATION?

18 A AFTER THE HANDCUFFS, WE PROCEEDED TO ESCORT THEM TO

19 THE D.S.T. OFFICE, BUT IT WAS NOTHING COMMUNICATED BACK

20 FROM THE SISTERS TO THE OFFICERS.

21 Q SO ONCE YOU PLACED THE HANDCUFFS ON THEM, THEY DIDN'T

22 HAVE ANYTHING ELSE TO SAY UNTIL OFFICER NAVARRO SPOKE?

23 A OH, NO. THEY CONTINUED TO SAY WHAT THEY WERE SAYING

24 AFTERWARDS.

25 Q CAN YOU TELL ME WHO PLACED THE HANDCUFFS ON THE

1 YOUNGER SISTER?

2 A IT WAS MYSELF AND OFFICER GRIFFITH. OFFICER GRIFFITH.

3 Q SO BOTH OF YOU PLACED HANDCUFFS ON HER OR ---

4 A YES.

5 Q I'M TALKING ABOUT THE PERSON WHO ACTUALLY APPLIED THE
6 HANDCUFFS?

7 A I PUT THE HANDCUFFS ON ONE ARM AS HE WAS TRYING TO GET
8 CONTROL OF HER OTHER ARM.

9 Q OKAY. COULD YOU PLAY THAT AGAIN PLEASE?

10 MS. BOBERTZ: OKAY.

11 (DEFENDANTS' EXHIBIT NO. 5 WAS PLAYED IN OPEN COURT.)

12 THE COURT: ANYTHING FURTHER FROM ANYBODY? AND I
13 DON'T NEED TO HEAR ARGUMENTS REHASHING AGAIN WHAT YOU'VE
14 ALREADY TOLD ME. IS THERE ANYTHING NEW OR ADDITIONAL?

15 MS. BOBERTZ: JUST ONE OTHER THING, YOUR HONOR. WE
16 WOULD ALSO LIKE TO OFFER IT FOR IMPEACHMENT PURPOSES. THE
17 SISTER -- THE OLDER SISTER TESTIFIED THAT NONE OF THAT
18 LANGUAGE TOOK PLACE. AND IT'S ON THE TAPE.

19 THE COURT: NO, I WON'T ALLOW YOU TO USE IT FOR
20 IMPEACHMENT PURPOSES. IT TOOK PLACE AFTER THE ARREST. AND
21 WHAT WE'RE CONCERNED WITH IN THIS PARTICULAR LAWSUIT IS
22 WHAT OCCURRED LEADING UP TO PLACING THEM UNDER ARREST AND
23 WHAT INFORMATION AND CONDUCT GAVE THE OFFICERS PROBABLE
24 CAUSE TO PLACE THEM UNDER ARREST.

25 AS WE'VE HEARD, THE OLDER SISTER WAS ALREADY UNDER

1 ARREST AT THE TIME THAT THAT AUDIO BEGAN. AND I UNDERSTAND
2 THE TESTIMONY OF THIS PARTICULAR WITNESS, BUT GIVEN THE
3 VOICES ON THE RECORDING AND THE FACT THAT THERE IS NOT --
4 THE FACT THAT OFFICER NAVARRO HAD CONVERSATION WITH THEM
5 AFTER THEY WERE UNDER ARREST AND THE TIMING AND LOCATION OF
6 WHERE THE ARREST TOOK PLACE, NOTWITHSTANDING THE WITNESS'
7 TESTIMONY, I BELIEVE THAT THEY WERE UNDER ARREST AT THE
8 TIME THAT THAT RECORDING OCCURRED.

9 AND I DON'T -- I WON'T ALLOW THE AUDIO. I DON'T THINK
10 THAT IT FAIRLY AND ACCURATELY REPRESENTS THEIR CONDUCT THAT
11 LED UP TO THE ACTUAL ARREST.

12 I'VE HEARD THE TESTIMONY TODAY ABOUT THE YOUNGER
13 SISTER AND WHEN THE YOUNGER SISTER WAS ARRESTED AND WHAT
14 CAUSED HER TO BE ARRESTED. I'VE HEARD FROM SEVERAL
15 WITNESSES. I'VE HEARD FROM THE OFFICER WHO PLACED THEM --
16 WHO INTENDED TO PLACE THEM UNDER ARREST BEFORE THE
17 HANDCUFFS WERE PLACED ON THEM. I'VE HEARD FROM THIS
18 PARTICULAR OFFICER ABOUT WHEN AND WHERE THE HANDCUFFS WERE
19 PLACED ON THEM. AND I'VE HEARD THE AUDIO THAT WAS
20 SUPPOSEDLY CONTEMPORANEOUS WITH THAT. AND I'VE ALSO HEARD
21 OFFICER NAVARRO'S TESTIMONY AS TO WHAT HE HEARD AND
22 OBSERVED AND WHEN HE FIRST HAD CONTACT WITH THEM.

23 AND SO UNDER THE CIRCUMSTANCES I BELIEVE THAT THEY
24 WERE UNDER ARREST. THE ARREST -- THE ACTION OF THE ARREST
25 HAD BEEN COMPLETED; THAT THE PROBABLE CAUSE THAT GAVE RISE

1 TO PLACING THEM UNDER ARREST HAD BEEN COMPLETED AT THE TIME
2 THAT THE AUDIO CAME ABOUT.

3 AND I UNDERSTAND THAT THE DEFENSE WOULD CERTAINLY LIKE
4 TO USE IT AS CORROBORATION FOR THE CONDUCT. BUT IT WAS
5 CONDUCT THAT OCCURRED AFTER THE ARREST. AND WHILE IT MAY
6 GENERALLY BE PROBATIVE -- I BELIEVE IT IS PROBATIVE OF WHAT
7 OCCURRED AFTER. WHAT THE JURY HAS TO FOCUS ON IN THIS CASE
8 IS WHAT OCCURRED BEFORE AND WHAT LED UP TO THE PLACING OF
9 THE FIGUEROAS UNDER ARREST. AND THAT'S REALLY THE SOLE
10 ISSUE FOR THE JURY TO FOCUS ON, NOT WHAT HAPPENED AS THEY
11 WERE BEING ARRESTED, HOW LOUD THEY GOT WHILE THEY WERE
12 BEING ARRESTED.

13 I THINK NAVARRO'S TESTIMONY WAS THAT PEOPLE GET
14 EXCITED, THEY GET UPSET, THEY GET LOUD WHEN SOMEONE IS
15 BEING ARRESTED. SO I DON'T FIND THAT THAT'S PROBATIVE OF
16 THE CONDUCT BEFOREHAND.

17 AND I THINK THAT CURRENTLY IT IS A CONTEST OF
18 BELIEVABILITY, CREDIBILITY AS TO ALL THE WITNESSES WHO'VE
19 TESTIFIED. AND I'LL ALLOW IT TO GO TO THE JURY ON THAT
20 POINT. THEY'LL HAVE TO MAKE THAT DECISION AS TO WHO THEY
21 BELIEVE WAS TELLING THE TRUTH AND WHO WASN'T TELLING THE
22 TRUTH, AND BASED UPON EVERYTHING THAT THEY'VE HEARD AND
23 SEEN THUS FAR.

24 SO AT THIS PARTICULAR POINT I WILL NOT ALLOW
25 DEFENDANTS' EXHIBIT NO. 5 TO BE PLAYED TO THE JURY. I

1 BELIEVE YOUR ARGUMENTS AND THE TESTIMONY HAS BEEN PRESERVED
2 FOR THE RECORD.

3 ANYTHING ELSE WE NEED TO TAKE UP AT THIS POINT?

4 MS. BOBERTZ: NOTHING, YOUR HONOR.

5 MR. LAKE: NOTHING FROM THE PLAINTIFF.

6 THE COURT: I DO NOT HAVE ANY REQUEST TO CHARGE FROM
7 THE DEFENDANTS.

8 MS. BOBERTZ: I WILL, YOUR HONOR.

9 THE COURT: AND IF THERE IS ANY ADDITIONAL REQUEST TO
10 CHARGE FROM THE PLAINTIFF, THEN I NEED TO GET THOSE FIRST
11 THING IN THE MORNING.

12 MR. LAKE: YES, MA'AM.

13 THE COURT: ANYTHING ELSE WE NEED TO TAKE UP?

14 MS. BOBERTZ: NOTHING, YOUR HONOR.

15 MR. LAKE: NOTHING, YOUR HONOR.

16 THE COURT: THEN WE'RE DONE UNTIL 9:00 O'CLOCK
17 TOMORROW MORNING.

18 (COURT IS IN RECESS.)

19 (THURSDAY, OCTOBER 21, 2010.)

20 THE COURT: I BELIEVE YESTERDAY I DEFERRED RULING ON
21 THE DIRECTED VERDICT MOTIONS AS IT RELATED TO THE
22 DEFAMATION AND THE PUNITIVE DAMAGES.

23 WITH RESPECT TO THE DEFAMATION, I FIND THAT IT IS
24 SUBJECT TO A QUALIFIED PRIVILEGE, BUT THAT DOES NOT MEAN
25 THAT A DIRECTED VERDICT IS WARRANTED IN FAVOR OF THE

1 DEFENDANTS. IT'S A QUESTION OF LAW AS TO WHETHER OR NOT
2 THERE'S A PRIVILEGE. I THINK UNDER THIS PARTICULAR
3 CIRCUMSTANCE -- UNDER THESE CIRCUMSTANCES THE CONVERSATIONS
4 BETWEEN MS. FIGUEROA, THE MOTHER, AND THE OFFICERS WERE
5 SUCH THAT THERE WAS A DISCUSSION ABOUT A COMMON INTEREST.
6 THERE WAS A DISCUSSION ABOUT THINGS THAT WERE OF INTEREST
7 TO BOTH PARTIES, THE DEFENDANT AS WELL AS THE PLAINTIFFS.
8 IN THIS CASE THE PLAINTIFFS' MOTHER, SO THAT A QUALIFIED
9 PRIVILEGE DID EXIST.

10 HOWEVER, THE PLAINTIFFS CAN OVERCOME THAT QUALIFIED
11 PRIVILEGE BY SHOWING THAT THE CONVERSATION AND WHAT WAS
12 STATED EXCEEDED THE BOUNDARIES OF THAT PRIVILEGE. AND I
13 THINK THAT IS A QUESTION OF FACT FOR THE JURY. AND THAT
14 REALLY ONLY GOES TO WHETHER OR NOT THERE WAS ACTUAL MALICE.

15 AND SO I THINK THERE WAS -- I THINK THAT'S A QUESTION
16 OF FACT FOR THE JURY, AND THE JURY MUST DETERMINE WHETHER
17 THE PRIVILEGE WAS EXCEEDED. SO I'M GOING TO DENY THE
18 DIRECTED VERDICT ON THAT MOTION.

19 WITH RESPECT TO PUNITIVE DAMAGES, SEVERAL OF THESE
20 CAUSES OF ACTION HAVE ELEMENTS OF MALICE. AND IN A COUPLE
21 OF THEM, THEY'RE REQUIRED TO PROVE THAT BY CLEAR AND
22 CONVINCING EVIDENCE. AND I THINK IF THE JURY DETERMINES
23 THAT THERE IS ACTUAL MALICE AND AWARD DAMAGES, THEN I THINK
24 IT'S APPROPRIATE FOR THEM TO CONSIDER WHETHER THAT CONDUCT
25 WAS ALSO WILFUL, RECKLESS, WANTON, AND THAT STILL HAS TO BE

1 DONE BY CLEAR AND CONVINCING EVIDENCE.

2 AND SO I THINK THAT PUNITIVE DAMAGES WOULD BE
3 APPROPRIATE -- AN APPROPRIATE REQUEST UNDER THE
4 CIRCUMSTANCES. I THINK THAT THERE IS EVIDENCE THERE FROM
5 WHICH THE JURY MAY BE ABLE TO INFER THAT THERE WAS SOME --
6 SOME WILFUL, RECKLESS, WANTON CONDUCT AND THAT THE CONDUCT
7 WAS DONE WITH ACTUAL MALICE.

8 I'M ONLY CONCERNED WITH THE EXISTENCE OF EVIDENCE AND
9 NOT THE WEIGHT TO GIVE IT. SO I THINK IT'S AN APPROPRIATE
10 ELEMENT OF DAMAGE FOR THE JURY TO CONSIDER. SO I WILL DENY
11 THE MOTION ON THAT BASIS AS WELL.

12 IS THERE ANYTHING ELSE WE NEED TO TAKE UP AT THIS
13 TIME?

14 MR. LAKE: NOTHING FROM THE PLAINTIFF, YOUR HONOR.

15 MS. BOBERTZ: NOTHING, YOUR HONOR.

16 THE COURT: AND WHILE WE'RE ON THE SUBJECT, I'M SURE
17 THE PLAINTIFFS ARE AWARE THAT YOU HAVE TO ELECT YOUR
18 REMEDY.

19 MR. LAKE: YOUR HONOR, IT'S MY UNDERSTANDING THERE IS
20 NO REQUIREMENT AS TO -- MY UNDERSTANDING THAT THEY SHOULD
21 BE ABLE TO -- I GUESS ENTITLED TO A REMEDY AS TO EACH
22 ACTION THAT ---

23 THE COURT: YOU CAN'T RECOVER ON ALL THREE. THERE ARE
24 TWO WAYS I CAN APPROACH IT. I CAN REQUIRE YOU TO ELECT
25 BEFORE IT GOES TO THE JURY OR I COULD ALLOW IT TO GO TO THE

1 JURY AND THEN ONCE THE JURY RETURNS A VERDICT, THEN YOU'RE
2 REQUIRED TO ELECT. BUT YOU WILL BE REQUIRED TO ELECT
3 BECAUSE THE DAMAGES OVERLAP. THEY ARISE OUT OF THE EXACT
4 SAME SET OF FACTS.

5 MR. LAKE: YES, MA'AM.

6 THE COURT: AND SO I THINK YOU'RE GOING TO BE REQUIRED
7 TO ELECT YOUR REMEDIES. AND IF AND WHEN WE GET TO THAT
8 PARTICULAR POINT, I'LL BE HAPPY TO HAVE YOU ALL SUBMIT
9 MEMORANDA ON IT. BUT I'VE DONE ENOUGH ELECTION CASES THAT
10 I THINK YOU'RE REQUIRED TO ELECT. SO THAT'S SOMETHING THAT
11 WHEN WE GET TO THAT BRIDGE, WE CAN CROSS IT.

12 ANYTHING ELSE WE NEED TO TAKE UP?

13 MR. LAKE: NOTHING FROM THE PLAINTIFF.

14 MS. BOBERTZ: NOTHING, YOUR HONOR.

15 THE COURT: YOU MAY ASK THE JURY TO COME IN.

16 (THE JURY RETURNS TO THE COURTROOM AT 9:30 A.M.)

17 BAILIFF: ALL JURORS ARE PRESENT, YOUR HONOR.

18 THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.

19 JURORS: GOOD MORNING.

20 THE COURT: WE ARE NOW READY TO CONTINUE ON WITH THE
21 TRIAL OF THIS MATTER. MS. BOBERTZ, YOU MAY CALL YOUR NEXT
22 WITNESS.

23 MS. BOBERTZ: YOUR HONOR, WE CALL DONOVAN BOLTON TO
24 THE STAND.

25 DONOVAN BOLTON,

1 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

2 CLERK: HAVE A SEAT IN THE WITNESS BOX. STATE YOUR
3 NAME FOR THE RECORD PLEASE.

4 WITNESS: MY NAME IS DONOVAN BOLTON.

5 DIRECT EXAMINATION BY MS. BOBERTZ:

6 Q OKAY. MR. BOLTON, WHAT DO YOU DO AND WHO ARE YOU
7 EMPLOYED WITH?

8 A I'M A SECURITY OFFICER AT COLUMBIA PLACE FOR ERMIC.

9 Q DO YOU HAVE ANY OTHER JOBS?

10 A YES, I ALSO WORK AT COLUMBIA FIRE DEPARTMENT AS A
11 SENIOR FIRE FIGHTER.

12 Q OKAY. HOW LONG HAVE YOU WORKED AT THE FIRE DEPARTMENT
13 AND HOW LONG HAVE YOU WORKED AT ERMIC?

14 A AT THE FIRE DEPARTMENT I HAVE BEEN THERE 7 YEARS. AT
15 THE COLUMBIA PLACE, IT'S BEEN 12, 13 YEARS.

16 Q OKAY. AND WHAT IS YOUR DUTIES AS A COLUMBIA PLACE
17 SECURITY GUARD?

18 A TO ENSURE SALES, TO DETER CRIME, KEEP PEACE PRETTY
19 MUCH ON THE PROPERTY.

20 Q OKAY. ARE YOU REGISTERED BY SLED AS A SECURITY
21 OFFICER?

22 A YES, I AM.

23 Q HOW LONG HAVE YOU BEEN REGISTERED WITH SLED AS A
24 SECURITY OFFICER?

25 A FOR THE PAST 12, 13 YEARS.

1 Q DID YOU HOLD CERTIFICATION IN THE PAST?

2 A YES, I HAVE.

3 Q OKAY. AND DO YOU CURRENTLY ALSO HOLD A CERTIFICATION
4 AS WELL?

5 A YES.

6 Q OKAY. HOW MANY PEOPLE DO YOU THINK YOU'VE ARRESTED IN
7 THE LAST 12 YEARS AT COLUMBIA PLACE MALL?

8 A FOR MYSELF, I WOULD SAY ABOUT 3.

9 Q OKAY. SO 3 IN THE ENTIRE 12 YEARS YOU'VE BEEN THERE?

10 A YES.

11 Q DO YOU WANT TO ARREST SOMEONE WHEN YOU COME TO WORK?

12 A I TRY NOT TO.

13 Q OKAY. SO WERE YOU INVOLVED IN THE ARREST OF THESE
14 SISTERS BACK IN JANUARY OF 2008?

15 A YES, I WAS.

16 Q OKAY. IF YOU COULD PLEASE JUST TAKE THE JURY THROUGH
17 -- I'M NOT SURE IF YOU NEED THIS MAP OR NOT. SORT OF WHERE
18 YOU WERE AND HOW YOU FIRST CAME UPON THE PLAINTIFFS AND THE
19 ARREST? DO YOU NEED THE MAP TO DEMONSTRATE ON?

20 A WELL, I CAN.

21 Q OKAY.

22 (THE WITNESS STEPS DOWN FROM THE WITNESS STAND.)

23 A ON THAT EVENING I WAS IN THE FOOD COURT AREA, WHAT'S
24 CONSIDERED CHARLIE, PATROLLING WHEN I RECEIVED A CALL FOR
25 BACKUP IN THE DELTA AREA, WHICH IS ON THE OTHER SIDE OF THE

1 MALL. AS I PROCEED TO ASSIST, I -- I WAS IN THIS VICINITY
2 AT THE TIME WHEN THE SITUATION WAS ACTUALLY RIGHT HERE
3 WHERE THE LADIES WAS LOUD, PROFANITY. SO I PROCEED TO GO
4 AHEAD A LITTLE BIT MORE FASTER.

5 ONCE I GOT THERE, OFFICER PARISH -- LIONELL PARISH HAS
6 THE OLDER SISTER. AND THE YOUNGER SISTER WAS CONSTANTLY
7 GOING ON, GOING ON WITH PROFANITY -- EXCUSE THE PROFANITY
8 IF I CAN.

9 Q SURE. GO AHEAD.

10 A WHY ARE YOU ALL FUCKING WITH US? THIS IS NOT RIGHT.
11 YOU ALL ARE NOT FUCKING WITH NO ONE ELSE. THE BLACK
12 BITCHES AROUND HERE ARE MOVING AND YOU ALL AREN'T STOPPING
13 THEM.

14 AND AT THAT TIME, YOU KNOW, WE HAD A CROWD. AND, FOR
15 ONE, I AM AT THE MALL TO MAKE SURE EVERYBODY IS
16 COMFORTABLE. I WANT EVERYBODY TO COME TO THE MALL OR STAY
17 HOME. YOU DON'T HAVE A LOT OF NOISE GOING ON AT YOUR
18 HOUSE. WE'RE NOT GOING TO HAVE IT AT THE MALL.

19 SO I PROCEED TO ASSIST OFFICER PARISH WITH THE ARREST
20 ON THE YOUNGER SISTER. AT THAT TIME I ARRESTED HER. IT
21 WAS A LITTLE -- SHE WAS RESISTING. SO OFFICER GRIFFITH
22 ASSISTED ME WITH THE ARREST ALSO.

23 Q AND YOU'RE TALKING ABOUT THE ARREST OF THE SECOND, THE
24 YOUNGER SISTER?

25 A THE YOUNGER SISTER.

- 1 Q NOHEALANI?
- 2 A YES.
- 3 Q OKAY. YOU CAN GO AHEAD AND HAVE A SEAT.
- 4 (THE WITNESS RETURNS TO THE WITNESS STAND.)
- 5 Q SO WHEN YOU -- COULD YOU HEAR THEM DOWN THE HALL WHEN
- 6 YOU WERE WALKING?
- 7 A YES.
- 8 Q HOW LOUD WAS IT AT THAT TIME?
- 9 A EXTREMELY LOUD.
- 10 Q AND THEY WERE USING PROFANITY?
- 11 A YES.
- 12 Q BOTH SISTERS OR JUST ONE?
- 13 A IT WAS KIND OF HARD TO DETERMINE AT THE TIME WHEN I
- 14 WAS ARRIVING. I WAS ABLE TO HEAR AS I GOT TO THE POINT
- 15 WHERE I WAS ABLE -- I WAS ON SCENE. THE YOUNGER SISTER WAS
- 16 CARRYING ON. THE OLDER SISTER SEEMED TO BE CALMED DOWN.
- 17 WELL, AT THAT TIME SHE WAS ALREADY UNDER ARREST.
- 18 Q OKAY. SO WHEN YOU ARRIVED, THE OLDER SISTER WAS
- 19 ALREADY UNDER ARREST AND YOU HAD TO PLACE THE YOUNGER
- 20 SISTER UNDER ARREST?
- 21 A YES.
- 22 Q OKAY. AND DID ANYONE ASSIST YOU IN THAT ARREST?
- 23 A OFFICER GRIFFITH.
- 24 Q WHY DID IT TAKE TWO OF YOU TO ARREST THE SECOND -- THE
- 25 YOUNGER SISTER?

- 1 A WELL, BEING WE HAD A CROWD, I DIDN'T WANT TO CAUSE ANY
2 MORE DISTURBANCE BY USING ANY FORCE. SO I WAS TRYING TO DO
3 IT AS EASY, AS POLITELY AS I CAN. AND I JUST -- I HAD ONE
4 OF HER ARMS. I ASKED HER TO GO AHEAD AND TURN AROUND, SHE
5 WAS UNDER ARREST. I HAD ONE OF HER ARMS. SHE RESIST.
6 OFFICER GRIFFITH ASSIST WITH THE OTHER ARM TO PUT THE CUFFS
7 ON.
- 8 Q OKAY. SO ONE OF YOU HAD ONE ARM, ONE OF YOU HAD THE
9 OTHER ARM?
- 10 A YES.
- 11 Q AND YOU ARREST HER. DID YOU FEEL THAT SECURITY WAS
12 BEING COMPROMISED AT THAT TIME IN THE MALL?
- 13 A WELL, AT THAT TIME WE DONE WHAT WE HAD TO DO.
- 14 Q OKAY. WAS THERE -- WERE YOU WORRIED ABOUT A CROWD
15 FORMING IN THE MALL AT THAT TIME?
- 16 A WELL, WE WAS TRYING TO ELIMINATE THE CROWD. SO, I
17 MEAN, IT WAS ALREADY THERE.
- 18 Q ALL RIGHT. DID YOU FEEL THAT YOU OR ANY OF THE OTHER
19 OFFICERS DID ANYTHING WRONG THAT DAY?
- 20 A NO, DID NOT.
- 21 Q OKAY. DID YOU FEEL THAT THE PLAINTIFFS WERE VIOLATING
22 THE LAW AND THEY NEEDED TO BE ARRESTED?
- 23 A YES.
- 24 MS. BOBERTZ: OKAY. THAT'S ALL THE QUESTIONS I HAVE.
25 THANK YOU.

1 SO I'M GOING TO DENY THE MOTION ON THAT BASIS.

2 MR. LAKE: THANK YOU.

3 MS. BOBERTZ: WE JUST RENEW OUR DIRECTED VERDICT
4 MOTIONS AS WE STATED EARLIER. THERE'S NO EVIDENCE OR THERE
5 IS EVIDENCE OF A PROBABLE CAUSE TO ARREST THESE GIRLS, AND
6 THERE'S NO EVIDENCE OF ANY DEFAMATORY STATEMENTS BY THE
7 DEFENDANTS.

8 THE COURT: AND AS I UNDERSTAND WHAT THE PLAINTIFF IS
9 SAYING THE DEFAMATION WAS, WAS -- AS I UNDERSTAND WHAT THE
10 PLAINTIFF IS CLAIMING THE DEFAMATION WAS BESIDES THE
11 WALKING THROUGH THE MALL PART, IT'S ALSO THE CONVERSATIONS
12 THAT THE PLAINTIFFS' MOTHER HAD WITH THE DEFENDANTS; IS
13 THAT CORRECT?

14 MR. LAKE: THAT'S CORRECT, YOUR HONOR.

15 THE COURT: OKAY. AND AGAIN, I'M GOING TO DENY THAT
16 MOTION. I THINK THERE'S EVIDENCE FOR THE JURY TO MAKE THAT
17 CONSIDERATION.

18 EVEN IF THE QUALIFIED PRIVILEGE APPLIES AND WERE
19 UPHELD, THERE'S STILL THE QUESTION ABOUT THE WALKING
20 THROUGH THE MALL PORTION.

21 I WILL SAY THAT I BELIEVE THAT THOSE DAMAGES OVERLAP
22 WITH THE DAMAGES FOR MALICIOUS PROSECUTION. AND THE
23 MALICIOUS PROSECUTION ALSO ADDRESSES SOME OF THE ELEMENTS
24 RELATING TO THE EMBARRASSMENT AND THE HUMILIATION.

25 BUT I THINK THAT THAT IS PART AND PARCEL, THAT THEY

1 CAN ESTABLISH THE DEFAMATION ON THAT BASIS. AT LEAST,
2 THERE'S EVIDENCE FOR THE JURY TO CONSIDER IT ON THAT BASIS.
3 AND THAT JUST COMES DOWN TO AN ELECTION OF REMEDIES.

4 ANYTHING FURTHER?

5 MS. BOBERTZ: NOTHING, YOUR HONOR.

6 MR. LAKE: NOTHING FROM THE PLAINTIFF.

7 THE COURT: I FRANKLY JUST RECEIVED THE DEFENDANTS'
8 REQUEST TO CHARGE THIS MORNING. AND I HAVEN'T EVEN HAD A
9 CHANCE TO READ THEM. AND SO I WOULD LIKE THE OPPORTUNITY
10 TO DO THAT. I CAN TELL YOU INITIALLY WHAT I WOULD INTEND
11 TO CHARGE. AND IT MAY COVER A GOOD NUMBER OF THOSE, BUT I
12 HAVEN'T HAD A CHANCE TO ACTUALLY READ IT.

13 IN TERMS OF -- LET ME JUST GIVE YOU IN TERMS OF THE
14 GENERAL CHARGE. I WILL CHARGE THEM THAT THEY HAVE TO
15 DETERMINE THE FACTS BASED UPON THE EVIDENCE. IN DOING
16 THAT, THEY HAVE TO JUDGE THE CREDIBILITY OF THE WITNESSES.

17 I WILL ALSO INSTRUCT THEM THAT A PERSON WHO HAS A PAST
18 CRIMINAL RECORD IS COMPETENT TO TESTIFY DURING THE TRIAL.
19 PAST RECORD DOES NOT AFFECT THE ABILITY OF THE WITNESS TO
20 TESTIFY. IT MAY BE CONSIDERED BY YOU ONLY IN DETERMINING
21 THE WITNESSES' BELIEVABILITY.

22 I WILL INSTRUCT THEM ON THE BURDEN OF PROOF; THAT
23 THESE ARE CAUSES OF ACTION RELATING TO FALSE IMPRISONMENT,
24 MALICIOUS PROSECUTION, AND DEFAMATION.

25 AS TO THE FALSE IMPRISONMENT, I WILL CHARGE THEM THAT

1 REMAIN, SINCE HE IS THE PRINCIPAL PARTY FOR WHICH ALL THESE
2 THINGS ARISE, BECAUSE HE IS THE PERSON THAT HAD CONTACT
3 WITH THEM AT THE ESCALATOR, HE'S THE ONE THAT PROSECUTED.
4 I'M JUST A LITTLE CONCERNED THAT MAYBE THE JURY MAY NOT
5 UNDERSTAND THAT PART OF IT.

6 THE COURT: I THINK THEY'LL UNDERSTAND IT JUST FINE,
7 ESPECIALLY SINCE YOU DIDN'T NAME ALL THE OTHER PEOPLE WHO
8 AIDED AND ASSISTED THEM IN MAKING THE ARREST. I MEAN, SO I
9 HAVE NO PROBLEM TELLING THEM THAT THE CORPORATION CAN ONLY
10 ACT THROUGH INDIVIDUALS, AND THAT THE INDIVIDUAL ACTS, THEY
11 ACT ON BEHALF OF THE CORPORATION, AND JUST LEAVE IT AT
12 THAT..

13 MR. LAKE: THAT WOULD BE FINE, YOUR HONOR.

14 MS. BOBERTZ: YOUR HONOR, I'D JUST LIKE TO PUT ON THE
15 RECORD WE OBJECT TO THE SPOILIATION CHARGE. THERE'S NO NEED
16 FOR THAT.

17 THE COURT: ANYTHING FURTHER?

18 MS. BOBERTZ: NOTHING, YOUR HONOR.

19 MR. LAKE: NOTHING, YOUR HONOR.

20 THE COURT: OKAY. AS SOON AS THE VERDICT FORM IS
21 PREPARED, I'LL HAVE COPIES GIVEN TO YOU SO YOU CAN TAKE A
22 LOOK AT IT. IN THE INTERIM I'M GOING TO LOOK AT THAT ONE
23 PART ON THE DEFAMATION.

24 I ASSUME THAT YOUR CLOSING ARGUMENTS WILL NOT BE
25 LENGTHY.

1 SCOPE OF THEIR EMPLOYMENT, AND EVEN IF THEY ARE ACTING
2 CONTRARY TO THE OBSTRUCTIONS OF THE EMPLOYER OR THE
3 CORPORATION.

4 ADDITIONALLY, LADIES AND GENTLEMEN, IN CONSIDERING THE
5 EVIDENCE IN THIS CASE, WHEN A PARTY FAILS TO PRESERVE
6 MATERIAL EVIDENCE FOR TRIAL, IT IS FOR YOU TO DETERMINE
7 WHETHER THAT PARTY HAS OFFERED A SATISFACTORY EXPLANATION
8 FOR THE FAILURE.

9 IF YOU FIND THAT EXPLANATION IS UNSATISFACTORY, THEN
10 YOU ARE PERMITTED BUT NOT REQUIRED TO DRAW THE INFERENCE
11 THAT THE EVIDENCE WOULD HAVE BEEN UNFAVORABLE TO THAT
12 PARTY'S CLAIM.

13 NOW, WHEN YOU'RE CONSIDERING THE EVIDENCE, LADIES AND
14 GENTLEMEN, AS WITH ALL CASES THAT ARE BROUGHT BY A
15 PLAINTIFF, ANY LAWSUIT, THE PLAINTIFF HAS THE BURDEN OF
16 PROVING EACH AND EVERY ELEMENT OF THEIR CLAIM BY WHAT WE
17 CALL THE GREATER WEIGHT OR PREPONDERANCE OF THE EVIDENCE.
18 IT'S TYPICALLY ILLUSTRATED BY LOOKING AT A SET OF OLD
19 FASHIONED, TRADITIONAL SCALES WHERE AT THE BEGINNING OF THE
20 TRIAL THE SCALES ARE EVEN. BUT THROUGHOUT THE COURSE OF
21 THE TRIAL AS THE EVIDENCE IS PRESENTED, THE SCALES MAY TIP
22 BACK AND FORTH.

23 IF AFTER ALL OF THE EVIDENCE HAS BEEN PRESENTED, THE
24 SCALES REMAIN EVEN OR THEY TIP EVER SO SLIGHTLY IN THE
25 FAVOR OF THE DEFENDANT, THEN THAT MEANS THAT THE PLAINTIFF

1 YOU, OF COURSE, YOU UNDERSTAND THAT YOU'VE ORDERED LUNCH
2 AND IT SHOULD BE HERE BY THIS TIME. ONCE YOU GO INTO THE
3 JURY ROOM, IF YOU WILL GIVE THE BAILIFFS AN OPPORTUNITY TO
4 MAKE SURE THAT EVERYONE HAS THEIR LUNCH AND EVERYTHING THAT
5 YOU NEED BEFORE YOU BEGIN YOUR DELIBERATIONS.

6 WHEN IT IS TIME FOR YOU TO BEGIN YOUR DELIBERATIONS,
7 THE VERDICT FORMS ALONG WITH THE EXHIBITS THAT HAVE BEEN
8 MADE A PART OF THE RECORD, WILL BE SENT TO YOU AND YOU MAY
9 BEGIN YOUR DISCUSSIONS AT THAT TIME.

10 NOW, MADAM FOREPERSON, IF DURING THE COURSE OF YOUR
11 DELIBERATIONS THERE ARE ANY QUESTIONS THAT COME UP THAT YOU
12 WOULD LIKE FOR US TO TRY TO ANSWER, IF YOU WILL WRITE THE
13 QUESTION ON A SHEET OF PAPER. SIGN YOUR NAME. KNOCK ON
14 THE DOOR AND GIVE IT TO THE BAILIFF, AND WE'LL TRY TO
15 ANSWER IT.

16 IF YOU HAVE NO QUESTIONS AND ONCE YOU HAVE COMPLETED
17 THE VERDICT FORMS, KNOCK ON THE DOOR AT THAT TIME AND TELL
18 THEM THAT YOU HAVE A VERDICT, AND WE'LL RECEIVE YOU BACK
19 INTO COURT TO RECEIVE YOUR VERDICT.

20 LADIES AND GENTLEMEN, I WILL TELL YOU THAT I DO NOT
21 INTERRUPT THE JURORS AT ALL DURING THE COURSE OF THEIR
22 DELIBERATIONS. I ASK THAT YOU TAKE AS MUCH TIME AS YOU
23 NEED TO BE ABLE TO CONSIDER ALL OF THE INFORMATION THAT HAS
24 BEEN PRESENTED HERE, AND THAT YOU NOT TRY TO RUSH THROUGH
25 IN AN EFFORT TO TRY TO GET DONE.

1 SO AT THIS TIME, LADIES AND GENTLEMEN, I ASK THAT YOU
2 RETIRE TO THE JURY ROOM AND AWAIT FURTHER INSTRUCTIONS.

3 (THE JURY RETIRES TO THE JURY ROOM AT 12:43 P.M.)

4 THE COURT: ARE THERE ANY EXCEPTIONS TO THE CHARGE BY
5 THE PLAINTIFF?

6 MR. LAKE: NOT FROM THE PLAINTIFF, YOUR HONOR.

7 THE COURT: BY THE DEFENDANT?

8 MS. BOBERTZ: I JUST RENEW MY OBJECTION TO THE
9 SPOILIATION CHARGE.

10 THE COURT: I ASK THAT YOU COME AND LOOK AT THE
11 EXHIBITS AND SEE WHICH ONES GO BACK. I KNOW THEY ALL DON'T
12 GO BACK. THERE WERE SEVERAL OF THEM THAT WERE NOT ASKED TO
13 BE ADMITTED.

14 (PAUSE.)

15 THE COURT: DO YOU ALL AGREE? ALL RIGHT. ASK THE
16 JURY TO BEGIN THEIR DELIBERATIONS. AND IF YOU NEED TO
17 LEAVE, PLEASE MAKE SURE THAT MY LAW CLERK HAS A CELL NUMBER
18 OR A NUMBER WHERE YOU CAN BE REACHED. I'D SAY WAIT ABOUT
19 5 MINUTES BEFORE YOU GO BECAUSE I USUALLY GET A COUPLE
20 QUESTIONS RIGHT OFF THE BAT.

21 (VERDICT FORMS AND EXHIBITS WERE SENT TO THE JURY TO
22 BEGIN DELIBERATIONS AT 12:47 P.M.)

23 THE COURT: AND WITH THAT, WE'LL JUST STAND AT EASE.

24 (COURT IS AT EASE AWAITING A VERDICT OF THE JURY.)

25 THE COURT: I JUST WANT TO LET YOU KNOW THAT I'VE GOT

1 TWO NOTES FROM THE JURY. ONE NOTE I GOT FROM THEM WAS
2 EARLIER THAT BASICALLY ASKED FOR A COPY OF THE CODE OF
3 CONDUCT.

4 AND I WROTE THEM BACK AND TOLD THEM THAT THEY HAD ALL
5 OF THE -- THAT THEY HEARD ALL OF THE EVIDENCE AND THEY HAVE
6 ALL OF THE EXHIBITS, AND THAT THEY HAVE TO MAKE THEIR
7 DECISION BASED UPON THE TESTIMONY AND THE EVIDENCE AND THE
8 EXHIBITS THAT THEY HAD. AND I SENT THAT TO THEM.

9 AND THEN I JUST GOT A NOTE THAT SAID THAT THEY WANT TO
10 HAVE A COPY OF MY -- A COPY OF THE LAW OR INSTRUCTIONS ON
11 DEFAMATION. AND I TOLD THEM THAT I DIDN'T HAVE A COPY THAT
12 I COULD GIVE TO THEM, BUT I'D BE HAPPY TO RE-INSTRUCT THEM
13 ON DEFAMATION AND THAT I COULD -- THEY NEEDED TO LET ME
14 KNOW WHETHER THEY WANTED TO HEAR ALL OF IT OR JUST PORTIONS
15 OF IT. AND SO I JUST SENT THAT OUT.

16 AND I JUST WANTED TO LET YOU KNOW. HAD IT BEEN
17 SOMETHING A LOT MORE INTERESTING, I WOULD HAVE GOTTEN INPUT
18 BEFOREHAND. BUT I JUST WANTED TO LET YOU KNOW THAT THOSE
19 NOTES HAD COME OUT.

20 THE LAST ONE I JUST SENT BACK AND, OF COURSE, HERE IT
21 COMES.

22 (PAUSE.)

23 THE COURT: OKAY. THE NOTE SAYS, CAN WE HAVE A COPY
24 OF THE INSTRUCTIONS OR ABOUT DEFAMATION.

25 AND I WROTE, I DO NOT HAVE A WRITTEN COPY OF THE

1 INSTRUCTIONS TO GIVE YOU, BUT I WILL BE HAPPY TO CHARGE YOU
2 ON THE LAW AGAIN. PLEASE LET ME KNOW IF YOU WANT TO HEAR
3 ALL OF IT OR JUST CERTAIN PORTIONS.

4 AND SHE WROTE BACK AND SAID, YES, WE WOULD LIKE TO
5 HEAR ABOUT THE DEFAMATION AGAIN. SO I TAKE THAT TO MEAN
6 THAT THEY WANT TO HEAR ALL OF IT.

7 AND WITH THAT I'M GOING TO PUT ON MY FROCK.

8 (PAUSE.)

9 (NOTE FROM JURY MARKED FOR IDENTIFICATION AS COURT'S
10 EXHIBIT NO. 1.)

11 (NOTE FROM JURY MARKED FOR IDENTIFICATION AS COURT'S
12 EXHIBIT NO. 2.)

13 THE COURT: IS THERE ANYTHING WE NEED TO TAKE UP
14 BEFORE I BRING THE JURY BACK IN?

15 MR. LAKE: NOTHING FROM THE PLAINTIFF, YOUR HONOR.

16 MS. BOBERTZ: NOTHING, YOUR HONOR.

17 THE COURT: YOU MAY ASK THE JURY TO COME IN PLEASE.

18 (THE JURY RETURNS TO THE COURTROOM AT 4:35 P.M.)

19 BAILIFF: ALL JURORS ARE PRESENT, YOUR HONOR.

20 THE COURT: MADAM FOREPERSON, YOU SENT ME A NOTE THAT
21 SAYS, CAN WE HAVE A COPY OF THE INSTRUCTIONS ABOUT
22 DEFAMATION.

23 AND THEN I WROTE BACK, I DO NOT HAVE A WRITTEN COPY OF
24 THE INSTRUCTIONS TO GIVE TO YOU. BUT I WILL BE HAPPY TO
25 CHARGE YOU ON THE LAW AGAIN. PLEASE LET ME KNOW IF YOU

1 WANT TO HEAR ALL OF IT OR JUST CERTAIN PORTIONS OF IT.

2 TO WHICH YOU RESPONDED, YES, WE WOULD LIKE TO HEAR
3 ABOUT DEFAMATION AGAIN.

4 IS THAT THE NOTE YOU SENT?

5 FOREPERSON: YES, MA'AM, THAT IS CORRECT.

6 THE COURT: OKAY. AS TO THE DEFAMATION CLAIM, THE
7 PLAINTIFF CLAIMS THAT THE DEFENDANT COMMUNICATED A
8 DEFAMATORY STATEMENT ABOUT THE PLAINTIFF TO ANOTHER PERSON.
9 THIS ACTION IS BASED UPON THE VIOLATION OF THE PLAINTIFF'S
10 RIGHT TO ENJOY GOOD REPUTATION WITHOUT FALSE AND DEFAMATORY
11 ATTACKS.

12 DEFAMATORY LANGUAGE IS LANGUAGE THAT TENDS TO INJURE
13 OR ADVERSELY AFFECT THE PLAINTIFF'S REPUTATION.

14 DEFAMATION MAY BE ACCOMPLISHED IN A DIRECT, OPEN, OR
15 POSITIVE MANNER. BUT INSINUATION CAN BE DEFAMATORY.

16 A DEFAMATORY INSINUATION MAY BE MADE BY ACTIONS OR
17 CONDUCT AS WELL AS BY WORDS. CERTAIN STATEMENTS ARE
18 CONSIDERED TO BE WHAT IS CALLED DEFAMATORY PER SE.

19 IF A STATEMENT IS DEFAMATORY PER SE, INJURY TO THE
20 PLAINTIFF IS PRESUMED AND THE PLAINTIFF DOES NOT HAVE TO
21 PROVE ANY SPECIAL DAMAGES.

22 STATEMENTS WHICH CHARGE THE PLAINTIFF WITH A CRIME OF
23 MORAL TURPITUDE OR UNFITNESS IN THE PLAINTIFF'S BUSINESS OR
24 PROFESSION ARE DEFAMATION PER SE.

25 IN DECIDING WHETHER A CRIME IS ONE OF MORAL TURPITUDE,

1 YOU SHOULD FOCUS ON THE DUTY TO SOCIETY WHICH IS BREACHED
2 BY THE COMMISSION OF THE CRIME.

3 IF YOU FIND THAT THE DEFENDANT HAS PROVED THAT THE
4 DEFENDANT SPOKE WORDS THAT ARE DEFAMATORY PER SE, THEN YOUR
5 NEXT QUESTION WOULD BE WHETHER THE WORDS WERE UTTERED IN
6 SUCH A MANNER THAT THEY WERE HEARD BY OTHER PARTIES.

7 AND WHEN I REFER TO WORDS, LADIES AND GENTLEMEN, I'M
8 ALSO REFERRING TO CONDUCT AS WELL.

9 A PUBLICATION IS DEFINED AS THE COMMUNICATION OF
10 DEFAMATORY MATTER TO A THIRD PERSON OR PERSONS. TO RENDER
11 THE PUBLICATION ACTIONABLE, THERE MUST BE A PUBLICATION TO
12 A THIRD PARTY. MOREOVER, IT IS NOT SUFFICIENT THAT THE
13 STATEMENT WAS MADE WITHIN THE HEARING OF A THIRD PARTY.

14 THE PLAINTIFF MUST PROVE THAT THE PUBLICATION WAS
15 HEARD BY A THIRD PARTY, WHO UNDERSTOOD THAT IT REFERRED TO
16 THE PLAINTIFF. A PUBLICATION IS INSUFFICIENT TO SUPPORT AN
17 ACTION FOR DEFAMATION IF IT IS INVITED OR PROCURED BY THE
18 PLAINTIFF OR BY A PERSON ACTING FOR HIM IN THE MATTER.

19 EVEN IF YOU WERE TO FIND THAT THE DEFENDANT MADE A
20 FALSE AND DEFAMATORY STATEMENT ABOUT THE PLAINTIFF AND
21 PUBLISHED IT TO A THIRD PARTY, NOT ALL DEFAMATORY
22 STATEMENTS PUBLISHED TO A THIRD PARTY ARE ACTIONABLE.

23 THE LAW RECOGNIZES THAT CERTAIN TYPES OF STATEMENTS
24 AND COMMUNICATIONS ON CERTAIN SUBJECTS ARE PRIVILEGED AND
25 MAY BE MADE REGARDLESS OF THEIR TRUTH OF FALSITY. THIS

1 MEANS THAT A PRIVILEGED STATEMENT EVEN THOUGH IT WOULD
2 OTHERWISE CONSTITUTE DEFAMATION, IS NOT ACTIONABLE AND THE
3 PLAINTIFF IS NOT ENTITLED TO RECOVER DAMAGES.

4 WHERE THE DEFAMATORY STATEMENT IS MADE IN GOOD FAITH
5 AND WITH PROPER MOTIVES, A DEFENDANT MAY CLAIM A QUALIFIED
6 OR CONDITIONAL PRIVILEGE. THE PRIVILEGE EXISTS IF THE
7 DEFENDANT CORRECTLY OR REASONABLY BELIEVES THAT SOME
8 IMPORTANT INTEREST OF ITS OWN OR A THIRD PARTY IS
9 THREATENED.

10 A QUALIFIED PRIVILEGE MAY EXIST WHERE THE PARTIES HAVE
11 A COMMON BUSINESS INTEREST.

12 THE QUALIFIED PRIVILEGE EXISTS ONLY WHEN THE
13 PUBLICATION HAS OCCURRED IN A PROPER MANNER AND TO PROPER
14 PARTIES.

15 THE PRIVILEGE MAY BE LOST WHEN THE PUBLICATION EXCEEDS
16 THE SCOPE OF ITS PURPOSE.

17 THE PRIVILEGE MAY ALSO BE LOST IF THE DEFAMATORY
18 MATTERS ARE PUBLISHED TO PERSONS OTHER THAN THOSE TO WHOM
19 THE PRIVILEGE APPLIES OR EXTENDS.

20 TO DETERMINE WHETHER THE DEFENDANT HAS PROVED BY A
21 GREATER WEIGHT OR PREPONDERANCE OF THE EVIDENCE THAT THE
22 STATEMENT WAS ONE THAT WAS PROTECTED BY SUCH A PRIVILEGE,
23 YOU MUST DECIDE: FIRST, WHETHER THE STATEMENT WAS MADE IN
24 GOOD FAITH, WHETHER IN MAKING THE STATEMENT THE DEFENDANT
25 HAD AN INTEREST TO BE UPHELD OR A DUTY TO FULFILL, WHETHER

1 THE STATEMENT WAS LIMITED TO THIS PURPOSE, WHETHER THE
2 STATEMENT WAS MADE ON A PROPER OCCASION, AND WHETHER THE
3 STATEMENT WAS MADE IN PROPER MANNER AND TO PROPER PARTIES
4 ONLY.

5 IF THE DEFENDANT HAS PROVED ALL OF THESE ELEMENTS,
6 THEN THE DEFENDANTS WILL HAVE REBUTTED ANY INFERENCE OF
7 MALICE. AND IN SUCH CASE THE PLAINTIFF CAN ONLY RECOVER IF
8 HE HAS PROVED ACTUAL MALICE OR MALICE IN FACT ON THE PART
9 OF THE DEFENDANT OR DEFENDANTS. THAT MEANS THAT THE
10 DEFENDANTS ACTED WITH IL-WILL TOWARD THE PLAINTIFF WHEN THE
11 STATEMENTS OR CONDUCT WAS PUBLISHED.

12 IF YOU CONCLUDE THAT THE PLAINTIFF HAS MET HER BURDEN
13 OF PROVING HER CASE, THEN YOU MAY RETURN A VERDICT FOR THE
14 PLAINTIFF. THE PLAINTIFF MAY RECOVER FOR THE INJURY TO HER
15 REPUTATION IF THE DEFAMATORY STATEMENT IS SLANDER PER SE.
16 AS DISCUSSED EARLIER, THIS INJURY IS PRESUMED BY THE LAW
17 AND YOU MAY AWARD THE PLAINTIFF FOR INJURY TO REPUTATION,
18 STANDING IN THE COMMUNITY, EMBARRASSMENT, PERSONAL
19 HUMILIATION, MENTAL ANGUISH AND SUFFERING, AND WOUNDED
20 FEELINGS.

21 AND AS I INDICATED TO YOU EARLIER, LADIES AND
22 GENTLEMEN, THE LAW DOES NOT PRESCRIBE AN AMOUNT BY WHICH TO
23 MAKE AN AWARD FOR THESE ELEMENTS. YOU AND YOU ALONE HAVE
24 THAT AUTHORITY. AND WHEN YOU EXERCISE THAT AUTHORITY, YOU
25 MUST DO SO WITH CALM AND RATIONAL JUDGMENT. AND ANY AWARD

1 THAT YOU MAKE FOR DAMAGES MUST BE REASONABLE IN LIGHT OF
2 ALL OF THE EVIDENCE THAT'S BEEN PRESENTED.

3 AND I WILL ONLY MENTION, LADIES AND GENTLEMEN, THAT IF
4 YOU MAKE AN AWARD FOR ACTUAL DAMAGES, THEN YOU MAY GO ON TO
5 CONSIDER PUNITIVE DAMAGES AS I'VE DISCUSSED THAT WITH YOU.

6 AND I WON'T GO THROUGH THE ELEMENTS OF PUNITIVE
7 DAMAGES UNLESS YOU WISH FOR ME TO DO THAT.

8 FOREPERSON: YES, YOUR HONOR, I WOULD LIKE FOR YOU TO
9 GO THROUGH THAT AS WELL.

10 THE COURT: AS TO PUNITIVE DAMAGES, PUNITIVE DAMAGES
11 AS I BELIEVE I INDICATED TO YOU WOULD APPLY TO ANY AND ALL
12 OF THE CAUSES OF ACTION THAT HAVE BEEN BROUGHT BY THE
13 PLAINTIFF; THAT WOULD INCLUDE THE FALSE IMPRISONMENT, THE
14 MALICIOUS PROSECUTION, AND THE DEFAMATION.

15 IF YOU AWARD ACTUAL DAMAGES, THEN YOU MAY ALSO
16 CONSIDER AN AWARD FOR PUNITIVE DAMAGES. PUNITIVE DAMAGES
17 ARE INTENDED TO PUNISH THE DEFENDANT FOR EXTRAORDINARY AND
18 OUTRAGEOUS MISCONDUCT, AND TO PREVENT THE DEFENDANT AND
19 OTHERS FROM COMMITTING SIMILAR ACTS IN THE FUTURE.

20 PUNITIVE DAMAGES CAN ONLY BE AWARDED WHEN THE CONDUCT
21 OF THE DEFENDANT HAS BEEN SOMETHING -- HAS BEEN RECKLESS,
22 WILFUL, AND WANTON.

23 PUNITIVE DAMAGES ARE AWARDED TO PUNISH, DETER, AND
24 VINDICATE THE RIGHTS OF THE PLAINTIFF WHEN THE CONDUCT IS
25 WILFUL, WANTON, AND RECKLESS.

1 THE EVIDENCE MUST ESTABLISH THAT THE DEFENDANT'S ACT
2 -- DEFENDANT'S ACTS WERE DONE WITH A CONSCIOUS FAILURE TO
3 EXERCISE DUE CARE OR A CONSCIOUS INDIFFERENCE TO THE RIGHTS
4 AND SAFETY OF OTHERS OR A RECKLESS DISREGARD THEREOF.

5 A PERSON WHOSE BEHAVIOR IS RECKLESS, WILFUL, AND
6 WANTON IS AWARE THAT THEIR CONDUCT IS WITH A CONSCIOUS
7 DISREGARD FOR THE RIGHTS AND SAFETY OF OTHERS.

8 IF YOU FIND THAT THE DEFENDANT'S CONDUCT WAS WILFUL,
9 RECKLESS, AND WANTON, AS I STATED YOU MAY AWARD PUNITIVE
10 DAMAGES.

11 THE PLAINTIFF MUST PROVE BY CLEAR AND CONVINCING
12 EVIDENCE THAT THE CONDUCT COMPLAINED OF INCLUDED A
13 CONSCIOUSNESS OF WRONGDOING AT THE TIME OF THE CONDUCT.

14 CLEAR AND CONVINCING IS MORE THAN JUST A PREPONDERANCE
15 OR GREATER WEIGHT OF THE EVIDENCE.

16 CLEAR AND CONVINCING PROOF LEAVES NO SUBSTANTIAL DOUBT
17 IN YOUR MIND. IT MEANS THAT THE EVIDENCE IS NOT AMBIGUOUS,
18 DOUBTFUL, EQUIVOCAL, OR CONTRADICTORY.

19 CONVINCING MEANS PERSUADING BY PROOF OR ARGUMENT,
20 CAUSING ONE TO BELIEVE IN THE TRUTH OF WHAT IS ASSERTED.

21 CLEAR AND CONVINCING PROOF ESTABLISHES IN YOUR MIND
22 NOT ONLY THAT THE FACT AT ISSUE IS PROBABLE, BUT THAT IT IS
23 HIGHLY PROBABLE.

24 BEFORE AWARDED PUNITIVE DAMAGES YOU MAY TAKE IN TO
25 ACCOUNT CERTAIN FACTORS. YOU MUST CONSIDER THE CHARACTER

1 OF THE WRONG. ANY PENALTY IMPOSED SHOULD TAKE INTO ACCOUNT
2 THE REPREHENSIBILITY OF THE CONDUCT, THE HARM CAUSED, THE
3 DEFENDANT'S AWARENESS OF THE CONDUCT'S WRONGFULNESS, THE
4 DURATION OF THE CONDUCT, AND ANY CONCEALMENT. THUS ANY
5 PENALTY IMPOSED SHOULD BEAR A RELATIONSHIP TO THE NATURE
6 AND EXTENT OF THE CONDUCT AND THE HARM CAUSED, INCLUDING
7 THE ACTUAL DAMAGE AWARD MADE BY YOU.

8 ANY PENALTY IMPOSED SHOULD ALSO TAKE INTO ACCOUNT AS A
9 MITIGATING FACTOR ANY OTHER PENALTY THAT MAY HAVE BEEN
10 IMPOSED OR WHICH COULD BE IMPOSED FOR THE CONDUCT INVOLVED,
11 INCLUDING ANY CRIMINAL OR CIVIL PENALTY OR ANY OTHER
12 PUNITIVE DAMAGES AWARD ARISING OUT OF THE SAME CONDUCT BY
13 THE DEFENDANT.

14 AND, FINALLY, ANY AWARD OF PUNITIVE DAMAGES MUST BE
15 LIMITED TO PUNISHMENT AND MUST NOT EFFECT ECONOMIC
16 BANKRUPTCY. TO THIS END THE DEFENDANT'S ABILITY TO PAY ANY
17 PUNITIVE DAMAGE AWARD SHOULD BE CONSIDERED. HOWEVER, THE
18 ECONOMIC BANKRUPTCY FACTOR IS NOT AN ABSOLUTE BAR TO AN
19 AWARD OF PUNITIVE DAMAGES.

20 LADIES AND GENTLEMEN, I HAVE NOW INSTRUCTED YOU AS TO
21 THE LAW OF DEFAMATION, ALONG WITH THE POSSIBLE DAMAGES THAT
22 COULD BE AWARDED. I ASK THAT YOU RETURN TO THE JURY ROOM
23 AND CONTINUE ON WITH YOUR DELIBERATIONS, AND I WILL WAIT TO
24 HEAR FROM YOU FURTHER. THANK YOU.

25 (THE JURY RETIRES TO THE JURY ROOM AT 4:46 P.M. TO

1 CONTINUE DELIBERATIONS.)

2 THE COURT: WITH THAT, WE'LL STAND IN RECESS UNTIL WE
3 HEAR FROM THEM FURTHER.

4 (THE COURT IS AT EASE AWAITING A VERDICT OF THE JURY.)

5 THE COURT: I GOT A NOTE THAT SAYS WE ARE UNABLE TO
6 RENDER A VERDICT AND WOULD LIKE A CONTINUANCE.

7 MS. BOBERTZ: WHAT DOES THAT MEAN?

8 THE COURT: I THINK WHAT THAT MEANS IS THAT, YOU KNOW,
9 WE HAVE A JUROR WHO IS A SINGLE MOTHER, WHO HAS CHILD CARE
10 ISSUES. AND I'M WILLING TO BET THAT THEY WANT TO GO FOR
11 THE EVENING; THAT'S THE ASSUMPTION I'M MAKING. I KNOW I
12 SHOULDN'T ASSUME. I GOT A SIMILAR NOTE LAST TIME AND SO I
13 SAID, AND SO WHAT DOES THAT MEAN IS WHAT I WROTE BACK. BUT
14 I THINK THAT'S WHAT THEY WANT TO DO.

15 I'M JUST GOING TO CALL THEM OUT AND TELL THEM THAT
16 THAT'S MY ASSUMPTION. AND EITHER THEY CAN CONFIRM IT OR
17 NOT. I THINK I KIND OF INDICATED TO THEM EARLIER THAT I
18 WAS AWARE OF THE CHILD CARE CONFLICT.

19 SO YOU MAY ASK THE JURY TO COME IN. AND I KNOW SHE
20 HAS TO GET TO IRMO BY 6:00. AND IT'S ABOUT TIME FOR HER TO
21 LEAVE.

22 (THE JURY RETURNS TO THE COURTROOM AT 5:11 P.M.)

23 BAILIFF: ALL JURORS ARE PRESENT, YOUR HONOR.

24 THE COURT: MADAM FOREPERSON, I RECEIVED A NOTE THAT
25 SAYS, WE ARE UNABLE TO RENDER A VERDICT AND WOULD LIKE A

1 CONTINUANCE. IS THAT WHAT YOU WROTE?

2 FOREPERSON: YES, MA'AM.

3 THE COURT: WE SMILED AT THAT. I'M MAKING THE
4 ASSUMPTION THAT WHAT THAT MEANS IS THAT YOU'D LIKE TO LEAVE
5 FOR THE EVENING AND COME BACK TOMORROW.

6 FOREPERSON: YES, MA'AM.

7 THE COURT: I THINK I'VE BEEN DOING THIS LONG ENOUGH
8 TO KIND OF FIGURE OUT WHAT THE NOTES MEAN.

9 AND I WILL BE HAPPY TO DO THAT. AS I TOLD YOU
10 EARLIER, I WAS AWARE THAT THERE WAS SOMEONE THAT HAD SOME
11 CHILD CARE ISSUES, AND SO WE NEEDED TO BE ABLE TO
12 ACCOMMODATE THOSE.

13 I'M GOING TO ASK THAT OVERNIGHT SINCE YOU HAVE BEGUN
14 YOUR DELIBERATIONS, THAT YOU CONTINUE TO FOLLOW THOSE
15 INSTRUCTIONS AND NOT DISCUSS IT WITH YOUR FAMILY AND
16 FRIENDS. YOU SHOULD NOT HAVE ANY DISCUSSIONS UNTIL YOU ARE
17 ALL ASSEMBLED TOMORROW BACK IN THE JURY ROOM TO BE ABLE TO
18 CONTINUE ON WITH YOUR DELIBERATIONS.

19 SO I'M GOING TO REMIND YOU THAT YOU SHOULD NOT ALLOW
20 ANYONE TO APPROACH YOU TO DISCUSS THIS MATTER WITH YOU.

21 AGAIN, DO NOT LISTEN TO CONVERSATIONS THAT YOU MAY
22 HEAR IN THE HALLWAYS AS YOU COME AND GO.

23 PLEASE REMEMBER NOT TO ENGAGE IN ANY INDEPENDENT
24 RESEARCH OR INVESTIGATION.

25 AND, AGAIN, TELL YOUR FAMILY AND FRIENDS THAT I'VE

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1 ASKED YOU NOT TO DISCUSS IT, THAT YOU'RE IN THE MIDDLE OF
2 YOUR DELIBERATIONS AND THAT HOPEFULLY TOMORROW YOU WILL BE
3 ABLE TO REACH A VERDICT AND YOU AT THAT TIME WILL BE FREE
4 TO DISCUSS THE CASE AS YOU SEE FIT.

5 LADIES AND GENTLEMEN, I'M GOING TO ASK THAT YOU REPORT
6 AT 9:30 TOMORROW MORNING. WHEN YOU REPORT AT 9:30 AND YOU
7 HAVE ALL ASSEMBLED, ALL 12 OF YOU HAVE ASSEMBLED BACK IN
8 THE JURY ROOM, THEN WE WILL BRING THE EXHIBITS IN TO YOU AS
9 WELL AS THE VERDICT FORM. AND THEN YOU MAY RESUME YOUR
10 DELIBERATIONS AT THAT PARTICULAR POINT.

11 I HOPE THAT YOU HAVE A PLEASANT EVENING. AND THEY
12 WILL COLLECT YOUR TELEPHONES FROM YOU TOMORROW, SO PLEASE
13 MAKE SURE YOU GIVE UP YOUR TELEPHONES.

14 I HOPE YOU HAVE A PLEASANT EVENING AND WE'LL SEE YOU
15 ALL TOMORROW AT 9:30.

16 FOREPERSON: THANK YOU.

17 (THE JURY EXITS THE COURTROOM AT 5:13 P.M.)

18 THE COURT: OKAY. WE WILL BE HERE TOMORROW MORNING AT
19 9:30. SO IS THERE ANYTHING THAT WE NEED TO TAKE UP BEFORE
20 WE FINISH FOR THE EVENING?

21 MR. LAKE: NOTHING FROM THE PLAINTIFF, YOUR HONOR.

22 MS. BOBERTZ: NOTHING, YOUR HONOR.

23 THE COURT: ALL RIGHT. AGAIN, YOU'RE FREE TO LEAVE
24 YOUR BELONGINGS HERE IF YOU WISH. THE COURTROOM WILL BE
25 LOCKED UP. AND WE'LL JUST CONTINUE ON.

1 THANK YOU.

2 (COURT IS IN RECESS.)

3 (FRIDAY, OCTOBER 22, 2010.)

4 (THE JURY RETURNED TO THE JURY ROOM AND CONTINUED
5 DELIBERATIONS AT 9:45 A.M.)

6 (THE COURT IS AT EASE AWAITING A VERDICT OF THE JURY.)

7 THE COURT: THE NOTE SAYS, WE ARE UNABLE TO AGREE TO A
8 MONETARY AMOUNT FOR EACH OF THE OFFENSES. ARE THERE OTHER
9 INSTRUCTIONS FOR DETERMINING THIS?

10 I CALLED THE FOREPERSON OUT AND I KIND OF ASKED HER
11 WHERE THEY WERE AND WHETHER ADDITIONAL CONVERSATIONS WOULD
12 HELP THEM.

13 SHE IMPLIED THAT THEY HAD DETERMINED LIABILITY ON TWO
14 CAUSES OF ACTION. THEY WERE STILL DISCUSSING THE
15 DEFAMATION CAUSE OF ACTION WHICH SHE FELT THAT THEY WOULD
16 BE ABLE TO COME TO A DECISION ON THAT. SHE SAID THEY HAD
17 NOT YET COME UP WITH A MONETARY AMOUNT ON THE OTHER TWO
18 CAUSES OF ACTION.

19 SHE DID INDICATE THAT THERE WERE SOME PEOPLE WHO WERE
20 AT ONE PLACE AND SOME WHO WERE IN ANOTHER PLACE. AND TO BE
21 HONEST, SEEM TO IMPLY THAT THERE WAS A -- THAT THERE WAS A
22 GROUP OF INDIVIDUALS THAT WERE AT A NO-MONETARY AMOUNT, TO
23 WHICH I INFORMED THEM THAT IF THEY CAME TO A DECISION IN
24 WHICH THEY WERE FINDING LIABILITY ON BEHALF OF THE
25 DEFENDANTS, THAT THEY WOULD HAVE TO AWARD A MONETARY

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1 AMOUNT.

2 SHE SAID, WELL THAT WAS HELPFUL.

3 AND I HAD HER CHECK TO SEE -- I TOLD HER THAT IF THEY
4 WANTED TO ORDER LUNCH, IT WOULD TAKE ABOUT AN HOUR. AND WE
5 WOULD ORDER THAT, AND I NEEDED TO KNOW THAT.

6 WHAT I GATHERED FROM HER WAS THAT THEY WERE STILL
7 WILLING FOR FURTHER DISCUSSION, AND THEY WERE NOT CURRENTLY
8 SITTING AT OPPOSITE ENDS OF THE ROOM WITH PEOPLE NOT
9 TALKING TO EACH OTHER.

10 SO I TOLD HER JUST TO CONTINUE ON WITH THE
11 DELIBERATIONS AND LET ME KNOW IF THEY WANTED LUNCH.

12 AND THAT'S THE WAY I LEFT IT. SO THAT MAY HELP YOU
13 ALL.

14 (PAUSE.)

15 THE COURT: AND TO BE HONEST, I TELL YOU THAT -- WELL,
16 I'LL TELL YOU THAT THE INITIAL IMPRESSION I GOT WAS THAT
17 THEY WERE INCLINED -- AND I KNOW THROUGH THE COURSE OF
18 THEIR DELIBERATIONS IT CAN CHANGE. THAT THEY WERE INCLINED
19 TO FIND THAT THE DEFENDANT COMPANY WAS RESPONSIBLE AT LEAST
20 ON IF THEY CAN'T COME TO A MONETARY AMOUNT, ALL THAT COULD
21 CHANGE IN THE COURSE OF THEIR DISCUSSIONS.

22 MR. LAKE: YES, MA'AM.

23 (NOTE FROM JURY MARKED FOR IDENTIFICATION AS COURT'S
24 EXHIBIT NO. 3.)

25 (THE COURT IS AT EASE AWAITING A VERDICT OF THE JURY.)

1 THE COURT: COUNSEL, IT'S MY UNDERSTANDING THAT THE
2 JURY HAS REACHED A VERDICT. IS THERE SOMETHING WE NEED TO
3 TAKE UP BEFORE WE BRING THEM IN?

4 MS. BOBERTZ: YOUR HONOR, MAY I JUST ADD ONE THING I
5 WAS THINKING ABOUT.

6 THE COURT: YOU NEED TO SPEAK UP LOUDLY. WE'VE GOT
7 ALL OF THIS OPEN UP.

8 MS. BOBERTZ: THEY HAD COME OUT, I THINK, AND ASKED
9 YOU IF -- OR MENTIONED A ZERO DAMAGE OR THOUGHT THEY WERE
10 AT ZERO. I REMEMBER INSTRUCTIONS TO THEM THAT INDICATED
11 THAT THEY COULD WRITE ZERO ON CERTAIN CAUSES OF ACTION.
12 MAYBE THE JURY -- BECAUSE THEY COULD FIND A DEFENSE
13 VERDICTS ON TWO OR ONE OR WHATEVER THE CAUSES OF ACTION
14 WOULD BE A ZERO, ESSENTIALLY ---

15 THE COURT: WHAT I TOLD HER IS THAT IF THEY DETERMINE
16 THAT THE COMPANY WAS RESPONSIBLE, THEY HAD TO GIVE A
17 MONETARY VERDICT.

18 MS. BOBERTZ: OKAY.

19 THE COURT: AND SO THEY COULDN'T SAY THE COMPANY WAS
20 LIABLE AND GIVE ZERO IN DAMAGES.

21 MS. BOBERTZ: OKAY.

22 THE COURT: BUT SINCE THEY'VE INDICATED THAT THEY HAVE
23 A VERDICT, WE'LL SEE WHERE WE ARE. IF THE FORM IS NOT
24 CORRECT, I'LL SEND THEM BACK AND HAVE THEM CONTINUE.

25 MS. BOBERTZ: OKAY.

1 THE COURT: MR. LAKE, IS THERE ANYTHING FROM YOU
2 BEFORE WE ---

3 MR. LAKE: NOTHING FROM THE PLAINTIFFS, YOUR HONOR.

4 THE COURT: OKAY. YOU MAY ASK THE JURY TO COME IN
5 PLEASE.

6 (THE JURY RETURNS TO THE COURTROOM AT 2:35 P.M.)

7 BAILIFF: ALL JURORS ARE PRESENT, YOUR HONOR.

8 THE COURT: MADAM FOREPERSON, I UNDERSTAND THAT YOU
9 ALL HAVE REACHED A VERDICT; IS THAT CORRECT?

10 FOREPERSON: YES, MA'AM, YOUR HONOR.

11 THE COURT: IF YOU WOULD PASS THE FORMS TO THE BAILIFF
12 PLEASE.

13 (PAUSE.)

14 THE COURT: THE ONLY THING THAT I'M GOING TO DO, MADAM
15 FOREPERSON, IS TO ASK THAT YOU WRITE THE WORDS ON THE LINE
16 LIKE YOU WOULD A CHECK. YOU'VE PROVIDED ME THE NUMBERS.

17 FOREPERSON: OKAY.

18 THE COURT: I JUST NEED FOR YOU ON THE LINE TO WRITE
19 THE WORDS LIKE YOU WOULD A CHECK.

20 FOREPERSON: YES, MA'AM.

21 (PAUSE.)

22 THE COURT: MADAM CLERK, IF YOU WOULD PUBLISH THE
23 VERDICTS PLEASE.

24 VERDICTS OF THE JURY:

25 CLERK: STATE OF SOUTH CAROLINA, COUNTY OF RICHLAND.

1 CASE NO. 2009-CP-40-3996, LEHUA FIGUEROA AND NOHEALANI
2 FIGUEROA VERSUS CBL/COLUMBIA PLACE MALL LLC, AND ERMCO, II,
3 LLP. WE THE JURY UNANIMOUSLY FIND FOR THE PLAINTIFF, LEHUA
4 FIGUEROA, ON THE CAUSES OF ACTION FOR FALSE IMPRISONMENT,
5 \$6,500.

6 MALICIOUS PROSECUTION, \$8,000.
7 AND PUNITIVE DAMAGES \$25,000.

8 SIGNED BY THE FOREPERSON, JUROR 159, DENOLIS SULLIVAN
9 KING THE FOREPERSON ON 10/22 2010.

10 THE COURT: MADAM CLERK, WOULD YOU READ THE VERDICT AS
11 TO THE DEFAMATION PLEASE.

12 CLERK: I'M SORRY. DEFAMATION, ZERO DOLLARS.

13 ON NOHEALANI FIGUEROA, WE THE JURY UNANIMOUSLY FIND
14 FOR THE PLAINTIFF ON THE CAUSES OF ACTION FOR FALSE
15 IMPRISONMENT, \$6,500.

16 MALICIOUS PROSECUTION, \$8,000.

17 DEFAMATION, ZERO DOLLARS.

18 AND PUNITIVE DAMAGES, \$25,000.

19 SIGNED BY THE FOREPERSON, JUROR 159, DENOLIS KING
20 SULLIVAN, ON OCTOBER 22, 2010.

21 MADAM FORELADY, IS THIS THE VERDICT OF THE ENTIRE
22 JURY?

23 FOREPERSON: YES, IT IS.

24 THE COURT: DO THE PARTIES WISH TO POLL THE JURORS?

25 MR. LAKE: NOT FROM THE PLAINTIFF.

FIGUEROA VS. CBL/COLUMBIA PLACE MALL, ET AL

1 MS. BOBERTZ: WE DO, YOUR HONOR.

2 THE COURT: LADIES AND GENTLEMEN, THE CLERK WILL CALL
3 YOUR NAME INDIVIDUALLY. SHE WILL ASK YOU TWO QUESTIONS.
4 THOSE QUESTIONS WILL BE: WAS THIS YOUR VERDICT? AND IS IT
5 STILL YOUR VERDICT? AND I ASK THAT YOU ANSWER ACCORDING TO
6 YOUR CONSCIOUS.

7 CLERK: JUROR 159, DENOLIS SULLIVAN KING, WAS THIS
8 YOUR VERDICT?

9 JUROR: YES.

10 CLERK: IS IT STILL YOUR VERDICT?

11 JUROR: YES.

12 CLERK: 285, LOTTIE WESLEY, WAS THIS YOUR VERDICT?

13 JUROR: YES.

14 CLERK: IS IT STILL YOUR VERDICT?

15 JUROR: YES.

16 CLERK: NO. 1, DEBORAH ANDERSON, WAS THIS YOUR
17 VERDICT?

18 JUROR: YES.

19 CLERK: IS IT STILL YOUR VERDICT?

20 JUROR: YES.

21 CLERK: JUROR 174, CECILIA MANER, WAS THIS YOUR
22 VERDICT?

23 JUROR: YES.

24 CLERK: IS IT STILL YOUR VERDICT?

25 JUROR: YES.

1 CLERK: 191, VALERIE MITCHELL, WAS THIS YOUR VERDICT?
2 JUROR: YES.
3 CLERK: IS IT STILL YOUR VERDICT?
4 JUROR: YES.
5 CLERK: 53, DELLA COOPER, WAS THIS YOUR VERDICT?
6 JUROR: YES.
7 CLERK: IS IT STILL YOUR VERDICT?
8 JUROR: YES.
9 CLERK: 243, MICHAEL SCOTT, WAS THIS YOUR VERDICT?
10 JUROR: YES.
11 CLERK: IS IT STILL YOUR VERDICT?
12 JUROR: YES.
13 CLERK: 138, LORREN JACKSON, WAS THIS YOUR VERDICT?
14 JUROR: YES.
15 CLERK: IS IT STILL YOUR VERDICT?
16 JUROR: YES.
17 CLERK: 241, TINA SCALAMOGNA, WAS THIS YOUR VERDICT?
18 JUROR: YES, MA'AM.
19 CLERK: IS IT STILL YOUR VERDICT?
20 JUROR: YES, MA'AM.
21 CLERK: 156, DANIEL KIEFER, WAS THIS YOUR VERDICT?
22 JUROR: YES.
23 CLERK: IS IT STILL YOUR VERDICT?
24 JUROR: YES.
25 CLERK: 63, TIFFANY DEVANE, WAS THIS YOUR VERDICT?

1 JUROR: YES.

2 CLERK: IS IT STILL YOUR VERDICT?

3 JUROR: YES.

4 CLERK: AND, 77, FRANK ENGLISH, WAS THIS YOUR VERDICT?

5 JUROR: YES.

6 CLERK: IS IT STILL YOUR VERDICT?

7 JUROR: YES.

8 CLERK: THE JURY'S BEEN POLLED, YOUR HONOR.

9 (THE JURY WAS EXCUSED.)

10 THE COURT: ARE THERE ANY MOTIONS AT THAT PARTICULAR

11 POINT?

12 MS. BOBERTZ: WE REQUEST 10 DAYS, YOUR HONOR.

13 THE COURT: YES, MA'AM, I'LL GIVE YOU THAT

14 OPPORTUNITY. IF YOU CAN BRIEFLY STATE THE GROUNDS AT THIS

15 PARTICULAR POINT.

16 MS. BOBERTZ: YOUR HONOR, NUMBER ONE, THE FALSE

17 IMPRISONMENT AND MALICIOUS PROSECUTION I BELIEVE, THERE

18 SHOULD BE AN ELECTION OF THESE.

19 NUMBER TWO, WE DON'T THINK THERE WAS ANY BASIS FOR THE

20 PUNITIVE DAMAGES AWARD.

21 THE COURT: AND YOU ALL ARE AWARE THAT UNDER OUR

22 CURRENT CASE LAW THAT I HAVE TO CONDUCT A POST-TRIAL REVIEW

23 OF PUNITIVE DAMAGES THAT HAVE BEEN AWARDED IN THIS CASE.

24 AND SINCE THE PLAINTIFF IS -- I'M SORRY, THE DEFENDANT IS

25 GOING TO FILE POST-TRIAL MOTIONS, I ASK THAT BOTH PARTIES

1 WOULD ADDRESS THE CRITERIA THAT'S BEEN SET FORTH IN
2 MITCHELL VERSUS FORDUS (PHONETIC), WHICH WAS A 2009 SUPREME
3 COURT CASE THAT DISCUSSED PUNITIVE DAMAGES AND ALL OF THE
4 FACTORS THAT ARE TO BE ENCOMPASSED WITHIN THAT. AND IF
5 YOU'LL PROVIDE THAT WITHIN THE 10-DAY PERIOD.

6 IN ADDITION, I ASK THAT THE PLAINTIFFS PROVIDE
7 INFORMATION WITH RESPECT TO THE ELECTION OF REMEDIES. AND
8 AT THAT PARTICULAR POINT, THEN I CAN CONSIDER ALL YOUR
9 MOTIONS.

10 AND I'LL CONSIDER AT THAT PARTICULAR TIME WHETHER I
11 NEED TO HAVE AN ORAL ARGUMENT AS TO THOSE MOTIONS AS WELL.

12 IS THERE ANYTHING ELSE WE NEED TO TAKE UP AT THAT
13 PARTICULAR POINT?

14 MR. LAKE: NOTHING.

15 MS. BOBERTZ: NOTHING, YOUR HONOR.

16 THE COURT: I'LL MAKE A NOTATION THAT POST-TRIAL
17 MOTIONS WILL BE FILED ALONG WITH THE POST-TRIAL REVIEW OF
18 THE PUNITIVE DAMAGE AWARD. AND PLEASE REMEMBER THAT YOU
19 NEED TO SEND IT TO ME DIRECTLY AS WELL AS FILE IT WITH THE
20 CLERK OF COURT'S OFFICE.

21 AND IF THERE'S NOTHING FURTHER, THEN WE ARE ADJOURNED
22 IN THIS PARTICULAR MATTER.

23 --- END OF TRANSCRIPT OF RECORD ---

24

25

ERMC

@ Columbia Place

SLED Core + Training Curriculum



By James Goins

South Carolina Law Enforcement Division

Core + Training Curriculum

Index

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(23-13-60)

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Section Five: Report Writing

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Section Seven: South Carolina Laws of arrest

Section One

Lesson Plan Cover Sheet

Class Title: Law Enforcement Authority of Private Security Officers

Lesson Purpose: To inform private security officers of the SC law concerning the law enforcement authority of security officers on the property that they are hired to protect.

Performance Objectives: After a classroom explanation of SC law concerning the law enforcement authority of private security officers, the security officer will, with 100% accuracy on a written examination:

1. Cite the SC statute giving him/her law enforcement authority (40-18-110)
2. Name the elements of the law giving him/her law enforcement authority
 - a. must be properly registered as a security officer (40-18-110)
 - b. to arrest for violations of state law (40-18-110)
 - c. only on the property he/she is hired to protect (40-18-110)
 - d. for suspected freshly committed crime upon view or prompt information (23-30-16)
3. Describe his/her proper actions after making an arrest (Reg 73-415)
 - a. immediately notify specified law enforcement agency after suspect and scene are secured
 - b. define *immediately* for his/her specific site.
4. Describe the restrictions on transport of a prisoner (Reg 73-416)
 - a. not authorized to transport prisoner of the protected property
 - b. define the protected property relevant to his/her assignment
5. Describe the security officer responsibility for cooperation with law enforcement post-arrest or incident
 - a. full cooperation
 - b. with prosecution and disposition of case
 - c. furnish statements
 - d. preserve and provide evidence
 - e. bail hearing and court appearances
 - f. prohibited from hindering, obstructing, interfering, with an official law enforcement matter

Section One Lesson Plan

Class Title: Law Enforcement Authority of Private Security Officers

Once one is registered as a Security Officer in the State of South Carolina, he/she is granted the same authority and arrest powers of sheriff's deputies. This authority can be found in the following SC statute:

SECTION 40-18-110. Authority and arrest powers of those licensed or registered under chapter. [SC ST SEC 40-18-110]

A person who is registered or licensed under this chapter and who is hired or employed to provide security services on specific property is granted the authority and arrest power given to sheriff's deputies. The security officer may arrest a person violating or charged with violating a criminal statute of this State but possesses the powers of arrest only on the property on which he is employed.

This may seem like a very simple statute, but a more thorough review reveals four important and distinct elements that combine to grant this law enforcement authority. Let us examine those four elements individually so that we may better understand the authority and limitations incorporated in the statute:

1. **One must be properly registered as a Security Officer-** If one is not actively registered or licensed as a security officer, or if one's registration or license has expired, then one is no longer in compliance with this statute. Therefore, the implied authority no longer applies.
2. **The registered Security Officer may only make arrests that are violations of state law-** This means that arrests are limited to violations of state law. The authority of arrests does not extend to things like violations of *Mall Policy* (unless such policies are in compliance with or supported by state law).
3. **The authority only exists on the property that the registered officer is hired to protect-** The authority of arrest applies only to those registered officers that are on the property they are hired to protect. In the past, there have been officers that erroneously believed that they possessed this authority wherever they happened to be as long as they were in uniform. This flawed interpretation of the statute allowed misguided officers to make what was later proven to be unlawful arrests.
4. **The arrest power is equal to those given to sheriff's deputies-** The power of arrests given to deputies is not unlimited. To understand those limitations let us refer to SC statute 23-30-60:

SECTION 23-13-60. Power of arrest. [SC ST SEC 23-13-60]

The deputy sheriffs may for any suspected freshly committed crime, whether upon view or upon prompt information or complaint, arrest without warrant

and, in pursuit of the criminal or suspected criminal, enter houses or break and enter them, whether in their own county or in an adjoining county.

For our purposes, the important parts of this statute refer to the fact that security officers may only make arrests for suspected freshly committed crimes upon view or prompt information. Arrests may **not** be made for crimes that are not freshly committed.

South Carolina Regulations also dictate what is considered to be "proper actions" that a security officer must employ immediately after an arrest. Let us refer to Regulation 73-415 for clarification:

73-415. Arrest Reporting; Private Security. [SC ADC 73-415]

Arrests made by private security officers must be reported to the law enforcement agency of primary jurisdiction immediately after the suspect and the scene of the incident are secured.

This regulation is very clear. Law enforcement agencies must be made aware of the arrest as soon as the suspect and scene of the incident are secured. The regulation doesn't say that the arresting officer must be the one who notifies Law Enforcement. Therefore, notification of the arrest may be made by a dispatch officer or any other officer who is free to notify the authorities.

Once an arrest is made, a security officer may find that he/she may need to remove or transport the prisoner from one location to another. For example, this is often the case when officers separate and arrest combatants who were engaged in a fight in the common area of a mall. It will be necessary to remove the arrested parties to a secured area of the mall (usually a Police sub-station, Security Office, or designated holding area) away from public view. Regulation 73-416 dictates the restrictions on transport of a prisoner as such:

73-416. Transportation of Prisoners; Off-Property Authority; Private Security. [SC ADC 73-416]

Private security officers exercising law enforcement authority of South Carolina Code Chapter 18, Title 40 must not transport prisoners or pursue suspects off the protected property.

Simply stated, regulation 73-416 prohibits security officers from transporting prisoners off of the property that they are hired to protect. The *protected property* will be clearly defined by the Security Director. It generally refers to those areas owned by the mall developer and those areas (like department store parking lots) that the mall developer may be contractually obligated to provide security for. Transport off of the protected property will be conducted by local law enforcement.

Lastly, it must be noted that the responsibility of the security officer does not end once the prisoner has been turned over to the local law enforcement agency. In fact, some of the most important parts of the arrest are just beginning. Regulation 73-417 states the responsibility of security officers after an arrest or incident as such:

73-417. Cooperation with Law Enforcement Agencies and Officers; Private Security.
[SC ADC 73-417]

Private security officers must fully cooperate in the prosecution and disposition of cases resulting from activities of the security officer, including but not limited to the furnishing of statements, provision of evidence, bail or bond hearings and court appearances. Private security officers are prohibited from hindering, obstructing or failing to cooperate with an investigation or other official law enforcement matter.

Imbedded in this regulation are six things that the security officer is responsible for:

1. **Full cooperation-** The security officer should be prepared to work closely with the law enforcement agency. His/her cooperation isn't just expected. It's mandatory!
2. **Complete involvement with prosecution and disposition-** Remember that the prosecution and disposition of the case is a direct result of the arrest made by the security officer. Law enforcement will need his/her assistance to effectively prosecute the case.
3. **Furnishing of statements-** The security officer may be required to furnish statements concerning the arrest or incident.
4. **Preserve and provide evidence-** The security officer may be required to provide evidence (reports, testimony, camera footage etc.). Any such evidence must be kept in a secure location, and be made available to law enforcement upon request.
5. **The security officer will be required to be present at bail hearings and court appearances-** Failure to appear will jeopardize the case. Furthermore, it may lead to prosecution against the security officer, prosecution against ERM, and termination of that security officer.
6. **Prohibited from hindering, obstructing, and/or interfering with an official law enforcement matter-** It should be noted that non-compliance with any of the responsibilities listed above may be classified as *hindering, obstructing or interfering*. Providing false information is also an unacceptable, not to mention unlawful, form of interference.

Clearly, the law enforcement authority of private security officers as granted by the State of South Carolina involves a lot of responsibility. It is not a responsibility to be handled lightly. It is imperative that one understands the full depth of the obligation, and the level of commitment and dedication necessary in order to comply with the responsibility that accompanies such authority. Welcome to profession of Security in South Carolina. Your journey begins here!

SECTION ONE TEST

Law Enforcement Authority of Private Security Officers

Name: _____ Date: _____

1. Circle the statute that gives law enforcement authority to Security Officers?
 - a. 23-14-810
 - b. 16-17-922
 - c. 40-18-110
 - d. 17-29-1415
2. As a private security officer, you are properly using law enforcement authority when and if you (circle the letter(s) of the correct answer):
 - a. are properly registered with SLED
 - b. make arrests only for violations of state law
 - c. make arrests only on property you are hired to protect
 - d. for suspected crimes freshly committed in your view or upon prompt information from a witness
3. Describe the requirements you must meet after making an arrest. After making an arrest, I am required to report the arrest to the _____ immediately after the _____ and the _____ are secured.
4. I may transport a prisoner off of the property if I am taking them directly to jail.
True _____ False _____
5. After making an arrest and turning the prisoner over to law enforcement, I am required to: (circle the correct answer)
 - T F Give full cooperation to law enforcement
 - T F Furnish written statements to that are required
 - T F Appear as requested at bail hearings and court proceedings
 - T F Preserve and protect all evidence in the case
 - T F Comply with all requirements of this Regulation. Failure to do so is considered hindering, obstructing, and interfering with an official law enforcement matter.

Score: _____ Instructor: _____

Section Two

Lesson Plan Coversheet

Class Title: Private Security Officer Registration Cards

Lesson Purpose: To inform private Security Officers of the SC law concerning security registration cards.

Performance Objectives: After a classroom explanation of the requirements of the law concerning security officer registration cards, the Security Officer will, with 100% accuracy on a written examination:

1. Cite the selection of law requiring registration cards for private security officers.
(41-18-80)
2. Describe the only time a private security officer can legally work a post without a registration card in possession and the restrictions on his/ her activity during that time
(41-18-80(A) (2))
 - a. For twenty days after receipt by SLED of the registration application
 - b. But not armed, nor with the power of arrest
3. Describe the requirements for having the registration card in possession (40-18-80(A) (5))
 - a. possession is required while on duty
5. Describe the actions that a private security officer must take to make his/her registration card comply with SC law (SLED Reg 73-407)
 - a. affix a recent facial photograph of the registered person
 - b. laminate the card
6. Identify the period of time the registration card is valid (SLED Reg 73-407)
 - a. one year from date of issuance
7. Describe the penalty for violating the provisions of SC law regarding registration cards (40-18-130(A) (3)), (40-18-150)
 - a. up to one year imprisonment and a \$5,000 fine

Section Two Lesson Plan

Class Title: Private Security Officer Lesson Plan

Objective # 1

Once one is hired as a Security Officer for ERM in South Carolina, it will be necessary to apply for a security registration card before performing any of the duties of a Security Officer. Part of the statute describing this is italicized to below.

SECTION 40-18-80. Security officer registration certificates; application; qualifications of applicants; report of arrests; exemptions. [SC ST SEC 40-18-80]

(A) Persons performing the duties of security officers must also obtain valid security officer registration certificates. Except as provided in Section 40-18-90, a licensee may not authorize a person to perform the duties of a security officer unless that person holds a valid security officer registration certificate or has applied for a security officer registration certificate and meets the requirements of Section 40-18-80(A)(2). A contract or proprietary security business licensee must verify that each security officer immediately upon hiring possesses a valid security officer registration certificate or has applied for one. The licensee may apply and pay the fee for the security officer registration certificate or may require the person to be employed as a security officer to apply and pay the fee. For purposes of the penalties provisions of this chapter, the licensee and the person to be employed as a security officer are both responsible for ensuring that the person performing duties of a security officer is registered or has made application to be registered.

Objective # 2

There is only one time that that a private security officer can legally work without a registration card in his/her possession. (40-18-80(A) (2))

2) Pending issuance of a registration certificate, a security officer may perform the duties of a security officer for up to twenty days after receipt by SLED of his application for registration; however, a person authorized to perform duties under this section has no arrest authority and must not carry a firearm until SLED issues a registration certificate. If SLED does not issue a registration certificate within twenty days of receipt of the application, a security officer must cease performing all security-related activities.

This statute says that a private security officer may perform the duties of a security officer for up to 20 days after the security registration card application has been submitted to SLED. However, the security officer will **not** have the authority of arrest nor will that officer be allowed to carry a firearm. Furthermore, the security officer **must** **cease performing any and all security related functions** if he/she has not received the registration card within 20 days.

Objective # 3

Security Officers in SC must keep their registration cards with them (physically in their possession) while on duty.

(5) While on duty, a registered person must have his registration certificate in possession. (40-18-80(A) (5))

Objective # 4

When one receives a newly printed security registration card, one will notice that it is not in its completed state. There are two things that must be done to the card in order to make it comply with SC Regulations. Refer to the following Regulation for clarification.

73-407. Registration Cards; Private Security; Private Investigations. [SC ADC 73-407]

1. Private security and private investigation employee registration cards must display a recent and recognizable facial photograph of the registered individual, must be fully laminated, and must legibly display all information placed on the card by SLED.

2. Registration cards that are altered or otherwise not in compliance with these requirements are invalid.

You will receive your card in an unfinished state. This regulation makes it clear that in order to bring the card into compliance you must place a recent photograph on it and laminate it. Any other changes made to the card will make it invalid.

Objective # 5

Once the card meets the Regulations noted in Objective # 4, it becomes a valid document. However, there are still restrictions on its use.

(8) Registration is valid for one year; however, the registered person may perform the duties of a security officer only while employed by a person licensed under this chapter to provide security services or while working in a self-employed capacity provided that the officer is also a licensee. 40-18-80(8)

This statute says that the registration card is only valid while the registered security officer is employed by a licensed private security company. Once your employment has been terminated, the licensed private security company (ERMC) will notify SLED of your unemployed status, and your registration will no longer be valid.

Objective # 6

There is yet one more restriction on the newly registered card. It is only valid for one year from the date of issuance (SLED Reg 73-408)

73-408. License and Registration Period; Renewal; Private Security; Private Investigations. [SC ADC **73-408**]

- 1. Licenses and registrations issued by SLED are valid for one year from date of issue.*
- 2. Failure to file a timely application for renewal renders the license or registration card invalid and, unless otherwise authorized by SLED, the holder is no longer licensed, registered or authorized to conduct the licensed or registered activity.*
- 3. Application for renewal of licenses and registrations must be received by SLED at least thirty days, but not more than sixty days, prior to the date of expiration.*
- 4. Required fees must be received with the application form and must be in the form of a valid business check, cashier check or money order.*

This Regulation says that your security registration card is valid for one year from the date of issuance, and that the renewal application must be submitted **at least 30 days** prior to the expiration of the card.

Objective # 7

The previous six Objectives all covered the regulations and statutes that govern the security registration cards. This final Objective covers the penalties for violating those laws. Refer to the following for clarification.

SECTION 40-18-30. Powers and duties of South Carolina Law Enforcement Division (SLED). [SC ST SEC 40-18-30(A) (3)]

(A) The Chief of SLED has the following powers and duties as they relate to the practice of security businesses:

- (1) to determine the qualifications of applicants for licenses or registration under this chapter;*
- (2) to promulgate regulations necessary to carry out this chapter;*
- (3) to investigate alleged violations of this chapter and regulations promulgated by SLED;*

AND

SECTION 40-18-150. Violation of chapter as misdemeanor. [SC ST SEC 40-18-150]

A person who violates a provision of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than one year, or both.

Combined, these two statutes make a very powerful point. **SLED** has the authority to investigate any violations of the provisions of SC law, and the penalty for any violation is up to one year of imprisonment and a \$5,000 fine.

SECTION TWO TEST

Private Security Officer Registration Cards

Name: _____ Date: _____

1. Circle the statute in SC law requires a private security officer to have a registration card.
 - a. 16-23-30
 - b. 17-40-160
 - c. 23-21-170
 - d. 41-18-80
2. After getting a job, a security officer can work a post for up to _____ days after SLED receives his application for a registration card.
3. **T F** While waiting for his registration card to be delivered from SLED, a security officer is authorized to fully perform private security duties, including carrying a gun and making arrests.
4. While on duty a security officer's registration card: (circle the correct answer(s))
 - a. may be kept in a file at the corporate office
 - b. may be kept in a file in the mall office
 - c. must be on the person of the security officer
 - d. may be left at home for safe keeping
5. In order for one's card to be in compliance with SC law, one must (circle the correct answer(s))
 - a. affix a recent facial photograph to the card
 - b. make a duplicate of the card
 - c. verify the registration number of the card
 - d. laminate the card
6. **T F** Between jobs with private security companies, your registration card entitles you to accept temporary security work from other types of businesses.
7. How long is your registration card valid for? _____
8. **T F** Violating any requirements of law related to my registration card is a misdemeanor crime punishable by suspension or revocation of my card, a \$5,000 fine, and one year in jail.

Score: _____ Instructor: _____

Section Three

Lesson Plan Coversheet

Class Title: Training Documentation

Lesson Purpose: To acquaint private security officers of the law as it pertains to the handling of his/her training documents.

Performance Objectives: After a classroom explanation of the requirements of law governing the handling and retention of training documentation, the security officer will, with 100% accuracy on a written examination:

1. Cite the Regulation requiring training officers to furnish the security officer with copies of hi/her training documents.
2. Identify what the requirements are for handling and disposition of his/her training documents by a private security officer.
3. Identify what the security officer must do with his training documents that are furnished to him by the training officer.
4. Cite the possible penalties of law for failing to comply with requirements regarding handling and disposition of training material.

Section Three Lesson Plan

Class Title: Training Documentation

Objective # 1

Regulation 73-420(5) speaks specifically about the private security officer training. Inasmuch as the training is new, it should come as no surprise that the documentation and its handling are new as well.

73-420(5). Training; Private Security Officers. [SC ADC §73-420]

5. Accurate and complete documentation of all training of each private security officer must be retained by the employer and submitted to SLED as required. Complete and legible copies of each employee's training records must be furnished by the employer to the employee and must be retained by the employee as his permanent training record. Upon request by SLED, training documentation must be made available by the employing entity and the employee for inspection.

Upon termination of employment, the employer must furnish the security officer with the **Private Security Officer Training Certification**. This document will serve as the official training record, and satisfy the requirements of Regulation 73-420.

Objective # 2

You will also notice (as stated in 73-420) that the security officer must retain this document as his/ her **permanent training record**. It is imperative that it be kept in a safe environment because it will be needed to satisfy the next Objective.

Objective # 3

Regulation 73-420(6) says the registered private security officer will be required to give a copy of the Private Security Officer Training Certification form to the new employer.

6. Upon change of employer, a registered private security officer must furnish to the new employer documentation of all training received. If such documentation is not available and cannot be secured from the immediate past employer, the new employer is required to conduct and document currently required minimum training.

If this document cannot be provided by the security officer or the immediate previous employer, then the security officer must be completely retrained. Possession of the registration card no longer serves as proof of training!

Objective # 4

8. Failure of an employer and registered security officer to retain required training records is a violation punishable by suspension or revocation of the company license and the security officer's registration.

Failure to comply with Regulation 73-420 is a violation that may result in SLED suspending or revoking the Company License and the security officer's registration!

SECTION THREE TEST

Training Documentation

Name: _____ Date: _____

1. Circle the Regulation that requires training officers to furnish security officers with copies of hi/her training documents.
 - a. 28-28-660
 - b. 73-420
 - c. 180-43-480
 - d. 75-129
2. Upon termination: (circle the correct answer)
 - a. the security officer may throw away all training documents
 - b. may alter the training documents to fit his/her liking
 - c. must retain the training document as his/her permanent training record
 - d. the security officer need only keep his/her registration card
3. T F Regulation 73-420(6) says the registered private security officer will be required to give a copy of the Private Security Officer Training Certification form to the new employer.
5. The possible penalties of law for failing to comply with the requirements regarding handling and disposition of training documentation are: (circle the correct answer(s))
 - a. Suspension or revocation of the company license
 - b. Suspension or revocation of the security officers registration
 - c. No penalty at all
 - d. Answers A and B

Score: _____ Instructor: _____

Section Four

Lesson Plan Coversheet

Class Title: Crime Reporting to Local Law Enforcement

Lesson Purposes: To acquaint private security officers with the laws for reporting crimes to local law enforcement, and to discuss the working definitions of some of the terms and words incorporated in the laws.

Performance Objectives: After a classroom explanation of the requirements of law for reporting crimes to local law enforcement, the security officer will, with 100% accuracy:

1. Correctly define in writing what "protected property" means as is used in Reg 73-418.
2. Correctly cite the section of SC law requiring their reporting of criminal activity to local law enforcement.
3. Correctly define the term "suspected criminal activity" as relevant to Reg 73-418.
4. Correctly define in writing the term "discovered crime" as relevant to Reg 73-418.
5. Correctly describe in writing to whom a security officer must report crimes.
6. Correctly describe in writing one's company policy concerning reporting crimes to local law enforcement.
7. Correctly name the specific law enforcement "agency of jurisdiction" relevant to his/her assigned security post(s)
8. Correctly define in writing the term "primary jurisdiction" as it pertains to Police Departments and County Sheriff's Departments.
9. Correctly describe in writing the "securing of a crime scene" as used in Reg 73-418.
10. Correctly define in writing the word "immediately" as used in Reg 73-418 and as relevant to his/her assigned post.

Section Four Lesson Plan

Class Title: Crime Reporting to Local Law Enforcement

On any given day, there are generally more Security Officers patrolling the property than there are Police Officers. For this reason, it is very likely that a Security Officer will discover a crime scene before a Police Officer will. Therefore, it is imperative that security officers are well versed in how to report crimes to the local law enforcement agency and how to preserve crime scenes. These issues are discussed lightly in the following Regulation:

73-418. Discovered Criminal Activity; Private Security. [SC ADC §73-418]

1. Private security officers are required to immediately secure the scene of a discovered crime on protected property, to immediately notify the law enforcement agency of jurisdiction, and to report suspected criminal activity on the protected property to the primary law enforcement agency of jurisdiction as soon as reasonably possible.

2. Private security officers must receive training by their employer sufficient to ensure adequate knowledge to properly and competently secure and preserve a crime scene.

In order to understand the Regulation as a whole, it is best to analyze its many parts. This will allow us to correctly gauge the intent of the regulation.

Objective # 1

Reg 73-418 refers to "**protected property**". Specifically, SLED is referring to the area inside the formal boundaries of the property the security officer is hired to protect.

Objective # 2

All security officers should be able to cite the section of law requiring their reporting of criminal activity to local law enforcement. Reg 73-418 mentions the securing of a crime scene, and the reporting of both discovered and suspected criminal activity to local law enforcement.

Objective # 3

Reg 73-418 refers to "**suspected criminal activity**". This term implies that there is a reasonable suspicion that a violation of state law has occurred, is occurring, or is about to occur.

Objective # 4

Reg 73-418 refers to "**discovered crime**". This term implies that there is a reasonable suspicion that evidence or witnesses indicate a violation of state law has occurred.

Objective # 5

Reg 73-418 states that "*discovered crimes*" or "*suspected criminal activity*" must be reported to the "**primary law enforcement agency of jurisdiction**". This agency would very likely be the Police or Sheriff's Department.

Objective # 6

Different companies have different policies concerning reporting crimes to local law enforcement. ERM Security Officers are expected to report crimes as soon as it is possible to do so safely effectively. Keep in mind that it isn't mandatory for the officer who discovered the crime to be the one who reports it. For example, the reporting officer may be a dispatch officer who is maintaining a visual on the scene through a camera system. It is also reasonable to conceive of a scenario where the discovering officer is busy securing the crime scene. Any officer who is free to do so is expected to coordinate the communication effort with the discovering officer so that the crime may be reported in a manner that is in compliance with state law.

Objective # 7

It is not enough to know that a police or sheriff's department must be notified of the existence of a crime. It is important to know the primary "agency of jurisdiction". Just as security officers in SC have authorities that exist only on the property that they are hired to protect, so too are law enforcement agencies similarly bound by jurisdictions. For example: Columbia Place is located in Columbia, SC. One might erroneously assume that crimes committed on Columbia Place property should be reported to the Columbia Police Department. Actually, crimes that are committed on Columbia Place property must be reported to the **Richland County Sheriff's Department**.

Objective # 8

Reg 73-418 refers to "primary jurisdiction". Inside a municipality that has a police department, it is the police department who has jurisdiction. Outside of an incorporated municipality, the County Sheriff's Department has jurisdiction.

Objective # 9

Until now, much mention has been made of the reporting of crimes. However the first line of Reg 73-418 speaks to the securing of the scene of a discovered crime on protected property. Securing a crime scene refers to the prevention of entry onto the immediate scene of a crime by unauthorized persons and taking the steps necessary to protect and preserve in place any evidence that might be on the scene until the arrival of law enforcement officers.

Objective # 10

Finally, Reg 73-418 says that crime scenes should be secured "immediately" and that crimes should be reported to the local law enforcement agency "immediately". Simply put, this means that the security officer is expected to carry out these tasks as soon as he/she can do so safely and effectively.

SECTION FOUR TEST

Crime Reporting to Local Law Enforcement

Name: _____ Date: _____

1. **T F** Protected property is the area inside the formal boundaries of the property that one is hired to protect.
2. The section of law requiring the reporting of criminal activity to law enforcement is:
a. 73-216-456 c. 73-418
b. 23-21-170 d. 129-68
3. **T F** Suspected criminal activity refers to that "gut feeling" that all good police use to solve crimes.
4. **T F** A "discovered crime" is reasonable suspicion that evidence or witnesses indicate that a violation of state law has occurred.
5. To whom must crimes be reported?
a. the media c. No one
b. local law enforcement d. other security officers only
6. **T F** Crimes should be reported to law enforcement immediately.
7. What specific law enforcement department must you report crimes to?

8. Inside a municipality with a police department, the Police Department has _____ over the County Sheriff's Department.
a. more professionalism c. primary jurisdiction
b. less professionalism d. bragging rights
9. **T F** It is ok to let your curious friends onto a crime scene as long as they are responsible enough not to touch or disturb any evidence.
10. Reporting a crime "immediately" means that you should:
a. Take your time. There's no real rush
b. Report it as soon as you can do so safely and effectively.
c. Report it as soon as you catch the suspects.
d. Report the crime only if you can't catch the suspects yourself.

Score: _____ Instructor: _____

Section Five

Lesson Plan Cover Sheet

Class Title: Report Writing

Lesson Purpose: To teach the security officer the techniques proven to be essential parts of proper report writing.

Performance Objectives: After a classroom explanation of the proper techniques for writing reports, the security officer will, with 100% accuracy on a written examination:

1. Correctly define the term field notes.
2. Correctly describe in writing his/her company policy concerning the carrying of note taking supplies.
3. Correctly describe in writing the five reasons for taking and keeping field notes:
 - a. memory aid
 - b. key to other records
 - c. investigative aid
 - d. protection
 - e. evaluation
4. Correctly describe in writing the company policy regarding the writing of reports.
5. Correctly name the requirements of a good report :
 - a. Factual
 - b. Neat
 - c. Clear
 - d. Concise
 - e. Complete
 - Who
 - What
 - When
 - Where
 - Why
 - How

Section Five Lesson Plan

Class Title: Report Writing

One of the most important functions of writing is to act as an instrument through which one conveys ideas and information from one entity to another. With that in mind, it is the writers obligation to write in a manner that will allow the reader to understand the meaning clearly and logically. Observing the following "objectives" in your report writing practices will assist you greatly in that endeavor.

Objective # 1

Field Notes are relevant facts, written impressions, and personal observations that the reporting officer observes after arriving on the scene of an incident. The collecting of facts is a relatively simple procedure. The fine tuning of first impressions and personal observations are skills that must be developed over time. Remember however, that while field notes are the perfect home for impressions and personal observations, they should never be included in the final report.

Objective # 2

ERMC Security Officers are expected to carry at least one pen and a small notepad with them at all times while on duty. Business related notes are the **only** entries that should be kept in this notepad. The security officer should then refer to the field notes when writing his/her report.

Objective # 3

As mentioned earlier, field notes are relevant facts, written impressions, and personal observations that the reporting officer observes after arriving on the scene of an incident. In general, there are six reasons why a security officer takes field notes:

- **Memory Aid** – No one can remember everything. Information written down while it is fresh will be accurate and dependable when it is needed later for a report.
- **Key to Other Records** – Field notes can supplement photographs, maps, and sketches giving them a degree of detail and clarity that they wouldn't otherwise have possessed.
- **Investigative Aid** – By studying one's field notes, the security officer will be in a position to investigate the incident, evaluate all of the available information, and write a report that logically and accurately represents the incident as it occurred.
- **Evaluation** – By reviewing one's field notes, the security officer may be better able to evaluate the fine details of an incident or those that occurred immediately before, and perhaps be better able to influence a more favorable outcome in the future.

- **Protection** – The security officer's field notes are the building blocks of the final report that will become a part of the official record describing the incident. Those reports may become an essential part of your employer's defense against lawsuits that falsely accuse them of negligent or even criminal activities. This value has been proven repeatedly as Security Officers for ERM C have written Injury Reports that have helped minimize or eliminate the company's liability during certain incidents.
- **Memorandum** – The organized field notebook is an ideal place for the security officer to keep up with important dates like upcoming schedules, court dates, changes in department store hours, mall promotions, or other often overlooked events.

Objective # 4

ERM C's official policy on the writing of reports is detailed below:

Security personnel are often required to prepare written documents. The documents should contain factual relevant information, which may be important in a future case. Documents should not contain strikeouts, misspelled words or incomplete information. Cases are sometimes won or lost on the strength of reports.

Documents should be prepared, whenever possible, while the officer is still on duty and the events and information are still fresh in his/her mind.

Officers should ensure all the required information is completed prior to closing the report.

Objective # 5

Finally, it is worth mentioning that every good report has five elements or requirements:

- Reports must be **NEAT** – A security officer's report should project a professional image. The finished document should be neatly printed and free of grammatical and spelling errors.
- Reports must be **CLEAR** – A security officer's report should not be difficult or challenging to read. The language should be simple and easy to understand.
- Reports must be **FACTUAL** – A Security Officer's report should be an accurate representation of what transpired. The report should not contain impressions, assumptions, theories, guesses, intuitions etc.
- Reports must be **CONCISE** – A security officer's report should only be as long as needed to effectively communicate the point. The conveying of information shouldn't be any longer than necessary.

- Reports must be **COMPLETE** – A complete report answers six questions:
 1. Who – Who is the suspect? Who is the victim? Who is the witness? Who was injured? etc.
 2. What – What happened? What was damaged? What was taken from the scene? etc.
 3. When – When did it happen? When was the crime discovered? When did the last ERMC associate pass through this area? etc.
 4. Where – Where did it happen?
 5. How – How did it happen?
 6. Why – Why did it happen? (*WHY* is an important question, but it often relies heavily on opinions and assumptions? Therefore, while it may be an important part of an officer's field notes, it should only be included in the final report if it can be **supported by facts**.)

SECTION FIVE TEST

Report Writing

Name: _____ Date: _____

1. Relevant facts, written impressions, and personal observations that the reporting officer observes after arriving on the scene of an incident are called _____.
2. T F Security Officers have such observation and memory skills that it isn't necessary for them to carry a pen and notepad.
3. Five reasons for taking field notes are: (circle the correct answer).
 - a. memory aid, key to other records, investigative aid, protection, evaluation
 - b. memory aid, protection, just because, professionalism, practice
 - c. who, what, when, where, how
 - d. neat, clear, factual, concise, why

4. T F The following statement accurately states the ERM C policy on writing reports:

Security personnel are often required to prepare written documents. The documents should contain factual relevant information, which may be important in a future case. Documents should not contain strikeouts, misspelled words or incomplete information. Cases are sometimes won or lost on the strength of reports.

Documents should be prepared, whenever possible, while the officer is still on duty and the events and information are still fresh in his/her mind.

Officers should ensure all the required information is completed prior to closing the report.

5. The five requirements of a good report are: factual, neat, clear, concise, and _____.

Score: _____ Instructor: _____

Section Six

Lesson Plan Cover Sheet

Class Title: Crime Scene Preservation for Security Officers

Lesson Purpose: To acquaint private security officers with requirements and techniques for preserving scenes of criminal acts pending arrival of law enforcement personnel.

Performance Objectives: After a classroom explanation and discussion, the security officer will, with 100% accuracy, on a written examination:

1. Define the term "*crime scene*".
2. Define the term "*evidence*".
3. Identify the proper actions necessary to preserve a crime scene:
 - Recognize a crime scene
 - Take actions necessary to protect or preserve life or public safety
 - Determine crime scene boundaries
 - Establish a crime scene perimeter
 - Secure the crime scene
 - a. control access to scene
 - b. prevent tampering of evidence
 - c. prevent contamination of crime scene
 - Identify and record all persons entering the scene
 - a. Name and Title
 - b. purpose of entry
 - c. entrance and departure times
 - Record the identities of everyone present at the scene
 - Notify law enforcement
 - Guard the scene until relieved by law enforcement personnel
 - Fully cooperate with law enforcement as needed

Section Six Lesson Plan

Class Title: Crime Scene Preservation for Private Security Officers

The most important aspect of evidence collection and preservation is protecting the crime scene. It is essential to keep evidence uncontaminated until it can be recorded and collected. The successful prosecution of a case can hinge on the state of the physical evidence at the time it is discovered and collected. The process of protection and preservation begins with the arrival of the first security officer.

Objective # 1

In the opening paragraph we mentioned the term **crime scene**. It may be defined as *the area immediately surrounding the site of a suspected criminal act*.

Objective # 2

Also mentioned was the term **evidence**. It may be defined as *an object at the scene that is connected to or resulting from the criminal act*.

Objective # 3

If you recall, we discussed "discovered crimes" and how to report those crimes in "Section Four". The state of South Carolina has recognized approximately nine (9) actions that are necessary to preserve a freshly discovered crime scene. The following is a detailed listing of those actions:

1. **Recognize the crime scene:** Remember that a *discovered crime* implies that there is a reasonable suspicion that evidence or witnesses indicate a violation of state law has occurred. The area in which this evidence rests may be considered to be the crime scene (or at least a part of the scene).
2. **Take actions necessary to preserve public safety:** Maintaining the integrity of a crime scene is not as important as preserving life or public safety. Crime scene preservation may begin in earnest once the security officer is sure that public safety has been addressed. If the crime scene is altered during this process, those changes must be noted in the security officer's report.
3. **Determine the crime scene boundaries:** The security officer must try to determine how much of the immediate area was exposed to the commission of the crime.
4. **Establish a physical crime scene perimeter:** Once you have decided what the boundaries of the crime scene are, a physical barrier should be established to physically define the area, and to prohibit people from entering the area. This could be as simple as closing the door to a room that is a crime scene or more involved like roping off an area with "caution" or "keep out" tape.
5. **Secure the scene:** *If possible, create only one entrance/exit to the crime scene.*
 - Only allow emergency personnel to enter the area.
 - Prevent anyone from altering, destroying, or removing evidence.
 - Prevent the crime scene from being contaminated in any way.

6. **Identify and record all persons entering the crime scene:**
 - Note the name and Title of those entering the crime scene
 - Note the purpose of entry of all who enter the crime scene
 - Note the entrance and departure times of all who enter the crime scene.
7. **Record the identities of everyone present at the crime scene:** This is important because witnesses sometimes, after reflection, become reluctant to be involved in investigations later. Their names, addresses, phone numbers, and the description of their vehicles should be documented in the security officer's report.
8. **Notify Law Enforcement:** Now that the scene is secured, the law enforcement agency that has primary jurisdiction should be notified.
9. **Guard the scene until relieved by law enforcement:**
 - Full cooperation must be given to law enforcement.

SECTION SIX TEST

Crime Scene Preservation

Name: _____ Date: _____

1. The area immediately surrounding the site of a suspected criminal act is a _____.
2. An object that is connected to or resulting from a criminal act is _____.
3. To preserve the crime scene, the security officer must: (circle the correct answer)
 - a. return to the office, and call the police
 - b. remove items that he/she thinks might be useful as evidence
 - c. rope off the crime scene
 - d. immediately begin the criminal investigation
4. **T F** After the security officer arrives at the crime scene, ropes it off, and calls the police, he may return to his other assigned duties.
5. A security officer must _____ all persons who enter the scene.
6. **T F** A security officer must not take notes at a crime scene because he might later Have to testify about what he saw.
7. **T F** As a sign of respect and sensitivity, a security officer should cover the body of a deceased person.
8. **T F** Security officers involved with any criminal matter must cooperate fully with law enforcement.

Score: _____ Instructor: _____

Section Seven

Lesson Plan Cover Sheet

Class Title: Laws and Procedures Involving Arrests in South Carolina

Lesson Purpose: To inform the private security officer of the SC law concerning arrests and several other actions that the security officer may engage in during the process of conducting an arrest.

Performance Objectives: After a classroom explanation of South Carolina law and regulations, the security officer will, with 100% accuracy on a written examination:

1. Know the elements of a legal arrest and the consequences of an illegal arrest.
2. Understand the courts ruling in *Terry v. Ohio*, and how that ruling governs investigative stops and detentions.
3. Understand how much force the law allows him/her to use in making an arrest.
4. Understand when it is lawfully acceptable to use *Deadly Force*.
5. Become familiar with basic First Aid.
6. Be able to cite the SC Regulation that governs the transporting of prisoners. (Reg 73-416) (also covered in Section One)
7. Understand his/her obligation to report arrests to local law enforcement as noted in Reg 73-418. (also covered in Section Four)

Section Seven Lesson Plan

Class Title: Laws and Procedures Involving Arrests in South Carolina

Objective # 1

As discussed earlier, South Carolina Law (40-18-110) grants the same arrest powers to Security Officers that Sheriff's Deputies possess under specific circumstances. However, until now, we have not discussed what constitutes a *legal arrest*. South Carolina has determined that a *Legal Arrest* has five distinct elements:

1. The intent of an officer to make an arrest.
2. Authority to make an arrest.
3. Seizure or restraint (this restraint does not need to be physical)
4. Understanding of the person being seized that he is being arrested.
5. The arrest must be made within the proper jurisdiction.

All five elements must be present in order for the state to recognize the arrest as legal. Conversely, any arrest that does not contain all five elements is considered to be illegal. Very serious consequences may follow an illegal arrest. Some of those consequences are:

1. Any evidence gathered incident to an illegal arrest is inadmissible in criminal prosecution.
2. The arresting officer may be civilly or criminally prosecuted.
3. The arresting officer cannot be compensated for injuries received during the arrest.
4. The officer's actions may expose him/her to harsh public criticism.

Objective # 2

Terry v. Ohio

Background:

In 1963 a Cleveland Police officer named McFadden was patrolling the downtown Cleveland area when he observed three men displaying behavior which he knew to be consistent with the actions of those who would be "casing" a store. McFadden felt that it was his duty to investigate the incident further, but he also feared that the men may be armed. He approached the men, identified himself as a Police Officer, and asked them for their names. One of the men "mumbled something" in response to his inquiries, and McFadden became even more concerned about their intentions. He quickly grabbed the closest of the three men (later identified as Mr. Terry), spun him around so that Terry was in between him and the other two men, and patted down the outside of his clothes. While patting him down he felt a pistol in the pocket of Terry's coat. He removed Terry's coat, and took possession of the pistol. The second man, Chilton, also had a pistol in his coat. The third man did not. Terry and Chilton were charged with carrying a concealed weapon.

The Argument:

The Fourth Amendment protects people against unreasonable searches and seizures by upholding and protecting an individual's expectation of privacy from unreasonable government intrusion. The strict constitutionalist would argue that McFadden's search and seizure should not be allowed since the actions he witnessed fall short of the probable cause standard required for an arrest.

The Police would argue that they deal with dangerous situations that require their responses to be more flexible and in proportion to the amount of information that they have at their disposal on the scene. The police want the courts to make a distinction between a "stop" and an "arrest" and between a "frisk" and a "search". The police argue that it should not be unlawful to "stop" a person briefly and question his possible connection to criminal activity. It should also not be unlawful to "frisk" a person upon suspicion that he may be armed.

The Court's Decision:

The court has decided that there is a need for the police to be able to conduct a search and seizure, but the intrusion into one's expected privacy must be justified. The intruding officer must be able to articulate specific facts upon which rational inferences might be drawn which would cause a reasonable person to conclude that the intrusion was warranted.

Objective # 3

It is inconsistent with responsible practices, and perhaps even negligent, to discuss arrests without also discussing the *Use of Force* when effecting an arrest. South Carolina law says that an officer may use the amount of force that is reasonably necessary to make a legal arrest. The force should not be more than is needed to overcome the amount resistance the offender is using. What is reasonably necessary is based on three things:

- The nature of the offense
- The classification of the offense
- And the amount of forceful resistance being used by the offender.

Of course, excessive force is never justified!

Objective # 4**The Use of Deadly Force**

South Carolina Law says that *Deadly Force* may only be used under two conditions:

1. If a suspect poses an immediate threat of death or serious bodily harm to oneself or others, then deadly force may be used against the suspect.

OR

2. If it becomes necessary to stop a fleeing felon who possesses a **significant threat of death or serious physical harm** to the officer or others. The officer must have probable cause that a significant threat exists.

Objective # 5

Basic First Aid

The American Safety and Health Institute defines First Aid as the immediate but temporary assistance given to an injured or ill person until competent medical care arrives. Competent medical care will usually arrive in the form of EMS or the local Fire Department. EMS should be called if the victim:

- Is unconscious
- Has chest pain or pressure
- Has a hard time breathing
- Is bleeding badly
- Has severe pain in the abdomen
- Is vomiting blood
- Has slurred speech, headache, or seizures
- Has head, neck or back injuries
- Has broken bones
- Has been poisoned
- Requests EMS attention.

In the past, liability concerns have prevented some from offering First Aid, but Good Samaritan laws will generally protect you from liability as long as:

1. You act in good faith
2. You are neither reckless or negligent
3. You act as a prudent person would
4. **You provide only that care which is in the scope of your training**
5. You do not abandon the victim once care is initiated and
6. You accept nothing in return for your services

You will notice that this section doesn't address specific First Aid techniques because it is not intended to replace the training that you, as an ERM Security Officer, will eventually receive from a certified trainer. This training will be offered to you free of charge, and upon completion of the training you will be better prepared to respond appropriately to medical emergencies. The quick recognition of an emergency along with the proper response from the First Aid provider may help ensure the best medical outcome possible for the person receiving First Aid.

Objective # 6

Transport of Prisoners

Once an arrest is made, a security officer may find that he/she may need to remove or transport the prisoner from one location to another. For example, this is often the case when officers separate and arrest combatants who were engaged in a fight in the common area of a mall. It will be necessary to remove the arrested parties to a secured area of the mall (usually a Police sub-station, Security Office, or designated holding area) away from public view. Regulation 73-416 dictates the restrictions on transport of a prisoner as such:

73-416. Transportation of Prisoners; Off-Property Authority; Private Security. [SC ADC §73-416]

Private security officers exercising law enforcement authority of South Carolina Code Chapter 18, Title 40 must not transport prisoners or pursue suspects off the protected property.

Simply stated, regulation 73-416 prohibits security officers from transporting prisoners off of the property that they are hired to protect. The *protected property* will be clearly defined by the Security Director. It generally refers to those areas owned by the mall developer and those areas (like department store parking lots) that the mall developer may be contractually obligated to provide security for. Transport off of the protected property will be conducted by local law enforcement.

Objective # 7

South Carolina Regulations also dictate what is considered to be "proper actions" that a security officer must employ immediately after an arrest. Let us refer to Regulation 73-415 for clarification:

73-415. Arrest Reporting; Private Security. [SC ADC §73-415]

Arrests made by private security officers must be reported to the law enforcement agency of primary jurisdiction immediately after the suspect and the scene of the incident are secured.

This regulation is very clear. Law enforcement agencies must be made aware of the arrest as soon as the suspect and scene of the incident are secured. The regulation doesn't say that the arresting officer must be the one who notifies Law Enforcement. Therefore, notification of the arrest may be made by a dispatch officer or any other officer who is free to notify the authorities.

SECTION SEVEN TEST

Laws and Procedures Involving Arrests in South Carolina

Name: _____ Date: _____

1. The five elements of a legal arrest are:
 - a. the intent of an officer to make an arrest
 - b. Authority to make an arrest
 - c. Seizure or restraint
 - d. Understanding of the person being seized that he is being arrested
 - e. proper jurisdiction
 - f. none of the above
 - g. all of the above
2. **T F** The court has decided that there is a need for police to be able to conduct a "search and seizure", but the intrusion into one's expected privacy must be justified.
3. **T F** Once an offender resists arrest, a Security Officer may use as much force as he wishes to make a legal arrest because a resisting offender has no rights.
4. Under which two conditions may Deadly Force be used:
 - a. When a suspect poses an immediate threat of death or serious bodily harm to oneself or others.
 - b. When the items he is stealing is worth more than \$10,000.
 - c. If it becomes necessary to stop a fleeing felon who poses a significant threat of death or serious bodily harm to the officer or others.
 - d. only A and B
 - e. only A and C
5. **T F** Security Officers can provide First Aid to victims even if they aren't trained to do so because Security Officers have the same emergency treatment authority as doctors.
6. **T F** Private Security Officers are expected to transport their own prisoners to jail because the police are often too busy.
7. Arrests made by private security officers must be reported to _____ immediately after the suspect and the scene and the scene of the incident are secured.

Score: _____ Instructor: _____

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CREATING SAFE, CLEAN & WORRY-FREE ENVIRONMENTS

PLAINTIFF'S
EXHIBIT
51
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CREATING SAFE, CLEAN & WORRY-FREE ENVIRONMENTS

SITE SECURITY POCKET MANUAL

Mission Statment

ERMC provides a full range of innovative services delivered with unsurpassed attention to customer service. We forge strong partnerships with our clients through a committed, motivated experienced team.

Revised 2008

- ◆ This manual is the property of ERM, LP, and this manual contains proprietary information and may not be shared with anyone outside ERM employment without the written permission of ERM legal counsel.

"Throughout the years ERM has been noted for professionalism, quality service, attention to detail and our ability to tailor our programs to meet the needs of our customers. We have a dedicated team of professionals committed to customer satisfaction. We strive to reach higher levels of service and continually improve our management and operating standards."

Emerson Russell
President and CEO, ERM

FOREWARD

This revised copy of the ERM Security Policy and Procedure manual replaces all previous manuals and is the official manual at all ERM centers.

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EMERGENCY CONTACT LIST

In the event of an emergency, the contact order will be followed in this sequence. Each individual on this list will be responsible for contacting the person or persons in their designated group. Continue down the list until you reach a live person. Do not stop with recorded messages.

Group 1: Dispatch and/or Security Supervisor will contact:

911

Director of Security

Corporate office #423-899-2753

Group 2: Director of Security will contact:

1. Director of Operations # _____
2. Customer Site Representative # _____
3. VP ERM # _____

Director of Operations

Regional ERM Manager # _____

General Manager # _____

Regional Mall Manager # _____

Additional personnel will be called as needed under the direction of the Director of Security and Director of Operations.

Any incident involving personal injury, property damage in excess of \$50.00, and arrest/detention of individual shall also be reported within 24 hours to the Corporate Risk Department.

EMERGENCY ORGANIZATIONS

1. FBI # _____
2. POISON CONTROL _____
3. FIRE DEPARTMENT _____
4. POLICE # _____
5. TOXIC CHEMICAL AND OIL SPILL
1-800-863-3300
6. HOSPITALS _____

7. STORM WATER MAINTENANCE

8. ELECTRIC POWER # _____
9. RED CROSS # _____
10. HOMELAND SECURITY # _____

INTRODUCTION

Security personnel should be familiar with these procedures and when questions occur, ask the supervisor for clarification. The supervisor is responsible for providing the correct information.

Responsibility

Security personnel should follow all established procedures designed to accomplish the following:

- Serve as a representative of the owner, providing assistance to customers, tenants and employees.
- Help provide for the safety of customers, tenants and employees in the common area.
- Help protect the property, and other business interest of the owner, the customers, tenants and employees.

The Difference between Security and Law Enforcement

Security officers must understand the difference between the duties of security personnel and those of law enforcement officers. Although both work toward similar goals, the duties of each are quite different.

The duty of a security officer is to observe and report. What security officers observe should dictate their actions. Officers may be required to personally respond or to contact paramedics, fire personnel or law enforcement. When these outside resources arrive on property, officers must communicate with them and assist them as requested. Law enforcement personnel are sworn to uphold the law and are primarily reactionary in nature.

Security personnel are not law enforcement officers and should refer all situations of a dangerous or criminal nature to law enforcement as soon as circumstances permit. Law enforcement personnel may be hired to augment the security staff. They remain law enforcement personnel and are required to immediately respond to criminal situations.

Security personnel do not ordinarily become involved with situations inside tenant spaces, but might be called upon to stand by and assist tenants pending the arrival of the police as warranted.

The Importance of Customer Service

As a security officer, most of your time should be spent providing service to the tenants and visitors to the property. You are the most visible employee of ERM. Most individuals will rarely see or interact with the property management staff; however, nearly everyone who comes to the property will see or interact with security. Your behavior will influence the perception of those working and visiting the property. Security officers must be courteous and professional at all times. Your demeanor will influence those around you. You should acknowledge tenants and employees as they arrive or leave each day. You should make eye contact and acknowledge visitors as you patrol the property. Incorporate polite language into your conversation: "yes ma'am", "sir", "thank you" and "please".

As a representative of ERM and the property it is never appropriate to use sarcasm, profane language or otherwise convey your anger or impatience with an individual or situation. Likewise it is not appropriate to use overly familiar phrases such as, "hey dude" or "buddy" or "Honey" when addressing individuals. Professionalism is the key to good public

relations. Customer Service is an essential element of Security.

Security officers are an important part of site operations. Officers are responsible for observing and reporting activity within the property. The primary objective of the security department is to help prevent injuries to persons and property, and to help deter crime and other undesirable activities. Prevention is the anticipation, recognition and evaluation of risk and initiation of an action to remove or reduce the risk. As the most visible representative of property management the officer is the goodwill ambassador to customers, tenants and employees.

Duties and Responsibilities of an officer

- Follow all lawful instructions and orders from his/her supervisors or other management personnel
- Be mentally alert and able to recognize the unusual
- Act quickly and calmly to take corrective action
- Maintain a confident and professional attitude

USE OF FORCE

One mission of security is to help deter improper activity. This goal is accomplished primarily through non-physical means. Officers may be confronted with circumstances in which all means, except physical force, have been ineffective. In such cases reasonable physical force may be appropriate.

Reasonable force is defined as the least amount of force necessary to overcome the actual resistance encountered and which a reasonable person would consider appropriate. To apply force appropriately it is important to understand the various levels of force and the legal guidelines associated with each level. The authorization to use force requires answering three questions:

Is it lawful?

Is it reasonable?

Is it permitted by policy?

LAWFUL:

The law regulates the use of force against any person. These laws are included in the penal code and can be summarized as follows:

- A. Reasonable force for self defense or defense of another;

- B. Reasonable force to overcome resistance to a lawful arrest;

REASONABLE:

Reasonable force will be measured against the resistance which is being met by the officer. Officers may only use the amount of force necessary to overcome the resistance and gain compliance. Officers who are authorized to carry chemical spray must ensure they use the least amount of force necessary to overcome resistance and protect themselves and/or others.

POLICY:

ERMC discourages the use of physical force. Law enforcement should be called whenever circumstances require the use of physical force. Realizing that there may be a delay in the law enforcement response, officers will escalate force in the following sequence:

- A. Presence
- B. Verbal Interaction
- C. Weaponless Defense
- D. Impact weapons

PRESENCE:

Simply being visible in the area. The presence of a security officer is force and may deter crime and

prevent an escalation of events. Presence will never be used to harass.

VERBAL INTERACTION

This is communicating with individuals, directing their actions, giving instructions. This is not shouting or arguing and is not to be used to harass or intimidate individuals.

WEAPONLESS DEFENSE

This is using one's hands/body to control the individual and gain compliance. Handcuffs where authorized may be used as a part of this defense strategy. Use of weaponless defense can escalate the use of force and should only be used in defense of the officer, another individual or when making a lawful arrest and the subject is resisting.

IMPACT WEAPONS:

This includes the use of chemical spray. These may only be used when lesser forms of compliance have failed or are ineffective against the level of resistance being met and the officer is protecting himself/herself, or other individuals against assault. Officers may only use chemical spray where approved by the corporate security director and only after appropriate training.

ERMC policy relies on local law enforcement when confronting physical force.

Officers should rely primarily on presence and verbal skills to effectively perform their duties.

In those rare circumstances when physical force is necessary, the officers should use restraint and respond with the least amount of force necessary to gain control of the situation and restore order.

LICENSES

All security personnel, whose duties include driving a vehicle, will possess a valid driver's license from the state in which the property is located or in a neighboring state in which the applicant legally resides. The only exceptions are active duty military personnel or students who may possess a valid driver's license from their home state of residence. Prior to hiring an employee, the Security Director will ensure the applicant possesses or is eligible to obtain a valid driver's license and the employee must provide his/her current drivers record, which must be re-submitted on his/her anniversary date. The Security Director will ensure all security personnel are properly licensed, where applicable. Employees will notify the Security Director immediately if the driver's license

or guard card as been lost; suspended, revoked or otherwise restricted, where applicable. The employee is financially and administratively responsible for obtaining and maintaining any individual license(s) required by any particular state. Each security guard must immediately notify his/her supervisor of an arrest for any criminal offense.

PERSONNEL POLICIES

In order to maintain the daily schedule, security personnel will follow the published work schedule, assume responsibility for their area at the appointed time and remain on duty until properly relieved. The work schedule should be published in advance of the start date and should be in effect for no less than one week from the start date. Schedules should not ordinarily change from week to week unless dictated by the needs of the site. Shift assignments and days off will be based upon the needs of the site. Employees required to appear in court or participate in investigative law enforcement procedures related to their employment at the property may be compensated. Employees are required to read the Policy and Procedure Manual which is available at each site.

ABSENCES

Employees are expected to be on duty and in uniform at the assigned time. Officers should notify the site immediately when there is a possibility the officer will be late or absent for his/her assigned shift. Please see the "Absence/Tardiness Notification Form" posted near the time clock.

UNIFORMS AND APPEARANCE

The security uniform is a public statement. The condition of the uniform reflects on the professionalism of the security department and the attitude of the individual officer. All security officers will be in an appropriate uniform. Employees must comply with all state uniform requirements and it is the responsibility of the Security Director to be knowledgeable of the requirements in his/her particular state. Grooming and hygiene standards must be maintained at an acceptable level. Only authorized uniform items will be worn while on duty. These items are to be clean, pressed, in good repair and worn properly. Employees will be held financially responsible for the loss or deliberate damage to all issued items. Employees should either cover the uniform shirt when going to and from work OR change into the uniform prior to the beginning of the shift and out of the uniform at the end of the shift.

Officers will be in a complete uniform and ready for duty at the beginning of the assigned shift.

EQUIPMENT

Equipment may vary between properties. Equipment should be inspected regularly by the Security Director to ensure continued effectiveness. Sites which use handcuffs and chemical spray will ensure all officers are properly trained and certified (if required by the state) before issuing the items. The Security Director should establish and document training to ensure the officers are proficient in the use of the safety equipment.

HANDCUFFS

Handcuffs are to be worn by officers who have taken and passed a Certified Handcuff Training Course by a Certified Trainer, and approved by the VP of Corporate Security or the designee. Handcuffs are safety equipment designed to protect officers and others from the potentially violent actions of a subject. If handcuffs are used, an incident report must be completed prior to the officer going off duty. Local law enforcement must be called whenever handcuffs are applied and the person must be turned over to law enforcement. Handcuffs, one applied, should not be removed until the individual has been turned over to

law enforcement. All adults under arrest should be handcuffed and juveniles should be handcuffed if the officer is concerned about his/her safety or the safety of others.

CHEMICAL SPRAY

Chemical spray can only be carried by officers who have taken and passed a Certified Chemical Spray Training Course given by a Certified Instructor and approved by the VP of Corporate Security or his/her designee. Chemical spray will only be used as a defensive weapon to prevent harm to the officer or in defense of another individual. Use of the spray for any other reason will be grounds for disciplinary action. Individuals in handcuffs should not be sprayed unless posing immediate risk of serious bodily harm and no other reasonable means are available.

WEAPONS

Firearms are not authorized at any site; the only exceptions are law enforcement officers employed by the property or as otherwise authorized by the Corporate Security Director, or at armed posts. Firearms are not authorized to be worn or carried by Security Directors, even when the Security Director is in possession of a valid state permit. Other weapons such as stun guns, knives or martial art weapons are

prohibited and possession of such while on duty will be grounds for disciplinary action. The Security Director may authorize officers to carry a small utility knife; this authorization must be noted in the officer's local file.

DISCIPLINE

The company's discipline policy is stated in the ERM Policy and Procedure manual and each employee is expected to read and understand the company's policies.

SLEEPING ON DUTY

Officers must be alert at all times; therefore, any sleeping on duty will be grounds for disciplinary action up to and including termination. All instances of sleeping on duty will be evaluated by the Security Director to determine the appropriate disciplinary measure.

JOB PERFORMANCE GUIDELINES

Due to the highly visible nature of the security profession, security personnel are subject to the following regulations. Failure to adhere to these guidelines may result in disciplinary action up to and including termination.

Personnel shall:

- Maintain the highest professional standards of good judgment, courtesy and diplomacy.
- Ensure their appearance; grooming and behavior are consistent with a professional security image.
- Have a thorough understanding of and adhere to all published procedures.
- Comply with the instructions issued by the supervisor.
- Report all on duty injuries as soon as possible to the supervisor on duty.
- Notify the Security Director immediately of any arrest and/or conviction, whether Federal, state or local and including but not limited to the suspension or revocation of a driver's license or state or local guard cards.
- Park in employee parking areas whenever same are designated.
- Be highly visible to the public while on patrol.
- Be alert to activity on the site including the parking area.
- Have the security radio on at all times, in a volume audible only to the officer. Communicate professionally and

appropriately over the radio. Never use profanity, make jokes, or have a conversation that should be conducted face-to-face.

- Remain on post until properly relieved by either another officer or supervisor.
- While on duty, do not fraternize with the tenants or enter a tenant's place of business unless on official business.
- Neither ask for nor accept favors, discounts, and loans or merchandise samples from any tenant, vendor, clients or customers.
- Maintain a calm and professional tone of voice when dealing with the public, including uncooperative individuals.
- Use only the minimum physical force necessary under the circumstances.
- Refer all inquiries regarding the property to the Property Manager or designated representative.
- Promptly and properly account for all found property.
- Not discuss security issues or incidents outside the security office. Information should be shared on a need to know basis only.

- Not abuse or misuse company equipment including vehicles. Negligent or careless use of company property can constitute abuse.
- Not make false, slanderous or malicious statements concerning other employees or ERM to other employees, clients, customers or tenants.
- Be prohibited from working on the property, for any tenant, in any capacity, either full time or part time, without the written approval of the corporate HR department.
- Not enter any bar areas located on the property while on duty or while in uniform unless directed to do so by a supervisor or designated dispatch center.
- Not gamble on duty.
- Not patrol in pairs unless specifically directed to do so by the security supervisor or in training.
- Not congregate in one area including the security and/or management offices unless specifically directed to do so by a supervisor.
- Not have visitors while on duty.
- Not permitted to make any purchases while in uniform with the exception of food and drink.

- 
- Not eat, drink, chew gum, smoke or use smokeless tobacco products while on duty in view of the public.
 - Not open any desk drawer, cabinet or other furniture, examine, rearrange or copy any papers on the desk in any office or permit any unauthorized person to do so.
 - Not carry any equipment unless specifically authorized by the Security director and the officer has received training in the proper use of the equipment.
 - Not pursue suspects off the property.
 - Not use ERMV or customer vehicles for personal use nor allow any unauthorized persons to drive or ride in a company vehicle.
 - Abide by all work rules and regulations published in the ERMV Policy and Procedure Manual.

RADIO COMMUNICATIONS

Radio transmissions broadcast over FM frequencies, which are licensed and monitored through the FCC, 24 hours a day, and 7 days a week. Use of the airwaves for any purpose other than official business is strictly prohibited. The security supervisor or dispatcher on duty should identify the station by its call letters at



least once an hour as close as possible to the beginning of each hour. The call letters for each site will be clearly posted on the security bulletin board. Radio equipment is essential to the performance of the security function and the equipment should be treated with care.

PATROL OPERATIONS

Security Officers patrol for the purpose of deterring crime, detecting safety hazards and unsecured valuables, providing fire watch, preventing trespass and property loss. Security personnel assigned to patrol duties should continually patrol the assigned area in a thorough, steady manner. Officers should be observant and alert to any items, events or persons which appear out of the ordinary. The officer should investigate unusual activity and note the same in his/her Daily Activity Report and when warranted notify the supervisor. The patrol of the grounds and parking areas surrounding the building or property is an important security function. The patrol should be a slow paced cruise through the parking area, the trash court and delivery alleys. These areas should be patrolled vigorously and continuously. Security personnel should be suspicious of activity that draws their attention from assigned duties. Attempts may be made to commit offenses by staging a distraction. Do



not leave an assigned area if an incident occurs outside that area without checking with the senior officer on duty. Call security headquarters for assistance and remain alert for other activity. Many properties have a posted Behavioral Code of Conduct, which prohibits certain offensive behavior other and activities. Officers should be alert for and respond appropriately to prohibited behavior.

ASSISTANCE ANIMALS

Assistance animals are permitted. The most common animals are guide dogs for the blind; however, other animals including small mammals, primates and birds are used to assist individuals with a wide range of physical challenges. Small mammals such as rats and hamsters are being used as therapeutic animals to calm individuals. Assistance animals are allowed throughout the center including the food court as long as the owner properly controls them.

ASSISTING TENANTS WITH SHOPLIFTERS

The apprehension and detention of shoplifters is not the primary role of security. Security officers only become involved in such situations at the request of merchant employees and respond to provide assistance only. Security officers should not make arrests in cases of shoplifting from a store—only the store



employee who actually witnessed the shoplifting occur should make an arrest under that person's citizen arrest powers. If the store clerk sees the theft and elects to make an arrest, he/she must also be the complainant when the police arrive. When security is contacted to assist with a shoplifting arrest, the merchant will be asked if the police have been called and if prosecution will occur. If prosecution is not anticipated, security will attempt to diffuse the situation and cease involvement. Security officers may become involved if the suspect leaves the store and enters the common area; however, this involvement shall be limited to observation of the situation to ensure the peace. If the merchant employee makes an arrest, the merchant should ask the individual to return to store. Security officers are not authorized to chase a suspect through the building. Security officers should not physically detain or restrain a suspect unless the security officer witnessed a crime and is personally making the arrest using his/her citizen arrest authority. An example of this would be an arrest for disorderly conduct, assault or trespassing. If the suspect attempts to leave the center and ignores a request to accompany the merchant employee back to the store the officer will not attempt to stop the suspect. The officer will follow the suspect and obtain a physical description of the suspect and/or any vehicle, which may be involved.



Law enforcement should be notified immediately.
Security officers will not pursue any suspect off the property!

If the suspect does accompany the merchant employee to the store, the officer may remain on the scene until the police arrive in the interest of the safety of the merchant employee and the suspect.

BAN NOTICES

Occasionally it may be necessary to ban an individual from the property because of his/her actions. For minor violations of the properties' rules of conduct, a verbal warning may be sufficient. It is the responsibility of the Security Director to ensure the property is in compliance with local ordinances. In the absence of local/state ordinances offenses will be handled in the following manner: Minor, non-criminal offenses - (i.e. violation of the code of conduct) which could result in injury to others or damage to property or negatively impact business AND failure to stop the behavior after a verbal warning can result in a ban notice up to 6 months. Criminal behavior, which results in an arrest or citation by local law enforcement, will result in a ban notice ranging from 6 months to 1 year and even longer if warranted by the circumstances. Bans over 1 year should be only after



counsel with the corporate security director. When an individual is banned from the property he/she is prohibited from entering the property and may face an arrest for trespass if he/she does so. A modified ban notice may be given if the individual banned is an employee or a tenant and approval is obtained from the corporate security director. In such cases, the banned individual may have access to the property for employment purposes only. A photograph may be taken of a banned individual and attached to the ban notice. These should be maintained out of public view and under the controlled access of the security supervisor. Some states and cities may have particular ordinances or other laws banning individuals, and those specific restrictions shall apply.

CCTV

The CCTV system installed is for the purpose of enhancing the security cooperation at a specific property and is considered proprietary. Security video should not be released without permission from the legal department or corporate security director, unless under lawful subpoena. Requests to review archived tapes should be forwarded in writing by the requesting agency to ERM Corp Security/Legal Department. This policy recognizes there may be extraordinary circumstances which require



the immediate release of a tape or CD's to protect the public. Tapes/CD's can be released without a subpoena with the approval of the VP of Corporate Security or Corporate Legal Counsel. Any video request which depicts an injury, crime or arrest on the property should be immediately preserved and sent to the corporate legal department.

DEMONSTRATORS

Security personnel are instructed to immediately advise their Regional Manager in the event of demonstrators, picketers, handbill distribution, political or other disturbing behavior of the property. The Regional Manager shall coordinate the appropriate response with the corporate office and the property owner.

DISPUTES BETWEEN TENANTS AND CUSTOMERS

Security Officers should not ordinarily become involved in disputes inside a tenant space. Customers who wish to make a complaint regarding a tenant should be referred to the management office and offered a Personal Statement form. If it becomes necessary to enter a tenant space to preserve the peace, prevent an assault or restore order, the local police department should be called immediately. Walk-thru




are only permitted when there has been a threat to safety and not for the protection of property, such as the prevention of shoplifting.

EMPLOYEE ACCIDENTS

Any accident, which results in an on-duty employee being injured, should be reported to the corporate office on an ERMCAccident/Injury report form. Reports should be made to the supervisor on duty, or if no supervisor is on duty at the time, the injury should be reported within 24 hours to the Security Director. The supervisor shall complete an ERMCAccident Report form. All injured workers or workers involved in any accident shall be drug tested following established company procedures.

LOITERING IN SHOPPING CENTERS

The offense of loitering may be enforced. However, no one should be asked to leave the property for this unless he/she is disturbing the peace or public safety is being endangered. All persons should be treated with courtesy and respect. In the event you ask an individual to leave the property and he/she refuses to do so, that individual may be committing the offense of trespassing. In such an event immediately notify your supervisor of the situation and request police assistance. Do not attempt to make an arrest except in

those situations where preserving the peace requires it.

MEDIA REQUEST

The Property Manager or Marketing Director should handle all media requests for information. If members of the media come on the property, the officer should immediately notify the security supervisor on duty, who should notify the Property Manager or his/her designated representative along with the regional manager. Ordinarily, only management personnel should make contact with media personnel. If media or commercial photographic activity takes place after the management office has closed, and if the officer has not been told of such activity, the officer should tell the individuals that they must stop photographing/filming and must have management permission prior to photographing or filming. Officers should not over react if the media does not stop as requested. Do nothing to escalate a situation and provoke a confrontation with the media. Officers should not attempt to cover the camera lens or block a reporter. Site personnel should make no comments other than the above and shall defer any inquiries concerning our security to the ERM Corp. office.

MEDIA SPOKESPERSON

The Property Manager and/or Marketing Director are typically the only persons authorized to represent the

property owner to the media. Officers should refer all requests from the media to the management office.

MEDICAL EMERGENCIES

Security officers are often called to respond to varying types of medical emergencies. Officers should respond in a professional manner. It is important to behave in such a way as to instill confidence in those who are being assisted. The safety of the officer is also important and no officer will be expected to perform first aid unless he/she has the appropriate training and feels comfortable doing so.

SECURITY PERSONNEL SHOULD NOT ADMINISTER FIRST AID WITHOUT THE APPROPRIATE SAFETY EQUIPMENT

Employees exposed to any bodily fluid (body fluids most commonly encountered are blood, saliva or semen) while on duty should be referred to the medical facility designated by ERM. Employees are required to follow all OSHA guidelines regarding Blood Borne Pathogens that are applicable to the company.

NOTIFICATION PROCESS

It is important that potentially serious situations be reported as soon as possible. The following are the



types of situations which should be reported:
The on-duty supervisor should be notified if any of the following are observed:

- ◆ Suspicious individuals, driving or loitering in the parking area.
- ◆ Tow vehicles not called by security personnel.
- ◆ Pre-teen children or animals left unattended in a vehicle.

The ERM Security or Operations Director should be contacted immediately and based upon the circumstances should contact Property Management personnel when any of the following circumstances exist:

- ◆ Any individual is taken into custody by ERM security.
- ◆ Any use of physical force by a security officer.
- ◆ Any physical injury to a security officer requiring medical attention.
- ◆ Any officer requesting assistance from the local law enforcement, fire department or paramedics.
- ◆ Any altercation involving known or suspected gang members.

- 
- ◆ Any serious injury to anyone on the property.
 - ◆ Any complaints against officers by the public, any tenant or customer.
 - ◆ Suspected workplace violence.
 - ◆ Contact with hazardous material including body fluids.
 - ◆ Emergencies and crimes of any nature, which occur on property.

It is the responsibility of the ERM Security or Operations Director to notify ERM Regional and Corporate personnel regarding situations which may result in media inquiries, merchant or customer inquiries or litigation. Any death or injury to three or more persons on the property regardless of the circumstances must be reported immediately to the Legal Department and the Corporate Safety Director.

PHOTOGRAPHS

The taking of photographs is authorized as follows:

- (1) Individuals subject to a ban notice.
- (2) Pursuant to an official investigation by the security department.
- (3) As directed by ERM corporate. All photographs and/or videos, taken in the course of duty, are



property of ERM C and may not be used, copied or disseminated in any manner not authorized by the corporate office.

POWERS OF ARREST

Security guard powers of arrest vary from state to state. The security director at each site is responsible for knowing and training officers on the appropriate state law. Under certain circumstances it may be necessary for a security officer to make an arrest. A security officer generally has the same powers of arrest as does an ordinary citizen. In most states, an ordinary citizen may arrest another person for an offense that constitutes a misdemeanor or felony which was committed or attempted in his/her presence. You can follow a lawful order of a police officer and assist law enforcement in making an arrest.

SEARCH INCIDENT TO AN ARREST

After a lawful arrest has been made, security officers may conduct a pat down search for weapons, but the search should not extend beyond this. Personal items of persons being arrested, such as bags, purses, or other items, should not be searched and should be removed from the immediate control of the arrested individual. Vehicles should not be searched. Searches for stolen property located in purses, bags etc. should

be left to the person who witnessed the crime or police authorities.

SLIP AND FALLS

All accidents which involve injury or property damage should be reported on the ERMCA Accidental Injury/Property Damage report form and forwarded to the corporate office, attention Risk Department. When responding to an accident involving injury, try to assess those injured and offer to call the paramedics. If trained, offer first aid assistance. If the person is unconscious or incoherent call the paramedics immediately. Take notes, record any comments and/or statements made by the injured person regarding the cause of the accident. Observe the type of shoes the injured person is wearing. Attempt to determine the cause of the accident but report only facts, not conjecture or speculation. For example, if you see a spilled coke, you can report it. If the person says they slipped in it, you can report what they say. But don't say they slipped on the coke unless you saw it happen. Take photographs of the area and any contributing causes to the accident. Locate any witnesses to the accident or fall. Obtain the name, address and phone number of any witnesses. Ask the individual involved to complete a Personal Statement Form. Refer all



questions regarding payment or insurance to the ERM Corp. Office. Do not refer to an injured party as the "victim". Be considerate at all times, but do not make statements regarding fault, payment of medical or other expenses or prior problems, if any, in the area. Refer any inquiries from the injured person and/or their family members to the ERM Risk Department. Check for any video of the accident and preserve it, plus any video for 2 hours preceding the incident.

SOLICITING

Soliciting funds for any purpose is not allowed on client property without written approval of the Property Managers, and individuals violating this policy will be directed to cease the activity.

TRESPASS

No one should be arrested for trespassing unless the following conditions are satisfied:

The individual has been banned from the center and has violated the ban. (See section on Ban Notices).
The individual is involved in illegal or unauthorized activity* and AFTER having been asked to leave the property and having the trespass law explained, fails or refuses to leave. Contact the police and if necessary have the individual arrested. Do not attempt to arrest



someone for trespassing. Leave that up to the police.
* Unauthorized activity is behavior in violation of the center Code of Conduct.

JUVENILES

Behavior which violates the center's Code of Conduct or which is unlawful is a legitimate reason to ask an individual to leave the center, regardless of their age. The laws of arrest pertain to juveniles as well as adults. Always attempt to notify a parent of a juvenile that has been arrested at your center. Juveniles can present challenging situations to the most trained officer and always require calm, deliberate and thoughtful response. Remember the old saying about "sticks and stones." If available, two officers or other employees should be with the juvenile at all times. If a female juvenile is involved, a female employee, if available, should be assigned to remain with the juvenile.

TRUANCY

Juveniles with or without adult supervision should not be questioned about their school attendance. They should not be banned from the center unless their specific behavior warrants such action. This does not preclude the questioning of unaccompanied pre-teens by security personnel. Preteen children may be



questioned as to their status, such as "Where are your parents?" "How did you get to the center?" etc.

UNATTENDED CHILDREN

Officers will immediately contact local law enforcement if children twelve (12) and under are found unattended on the property. Officers will stand by until law enforcement or a responsible parent arrives to take custody of the child.

EMERGENCY RESPONSE

LIFE SHALL NOT BE RISKED TO PROTECT PROPERTY

Emergencies cannot always be predicted, but the response to emergencies can be planned. Each property should have specific plans regarding the procedures to be implemented. During an emergency remain calm and follow the instructions of your Security Director or other designated supervisors. ERM employees should provide accurate data on damage and injury and remain observant to a changing situation. Security officers should be familiar with the evacuation plans for the center and the designated assembly points.



DOCUMENT PREPARATION

Security personnel are often required to prepare written documents. The documents should contain factual relevant information and be as accurate and complete as possible. Do not make judgments or give opinions. Examples:

Poor Example: The victim broke her ankle.

Good Example: Ms. Jones complained of pain in her ankle.

Poorly written inaccurate or illegible reports must be rewritten. Report writings must be done on the clock. Documents should be prepared, whenever possible, while the officer is still on duty and the events and information are still fresh in his/her mind.

DOCUMENT RETENTION AND DESTRUCTION

ERMC policy requires all security documents to be retained per state requirements and applicable ERMC retention policies. Any security documents to be destroyed should be destroyed by secure and confidential methods, typically shredding. Permission from the ERMC Legal Dept. must be obtained before any documents are destroyed.

REPORT TYPES

The following are standard reports used within ERMIC.

Any variance or use of additional forms must have the approval of the VP Corporate Security, Legal Department and/or HR.

ACCIDENTAL INJURY/PROPERTY DAMAGE

This form should be completed whenever there is an injury, claim of injury or property damage over \$50 to ERMIC or to customer's property. A copy of this report must be forwarded to the corporate office within 24 hours.

BAN NOTICE

This will be completed whenever an individual is banned from the property. A copy will be provided to the individual, a copy will be maintained at security headquarters, and a copy will be forwarded to the local law enforcement agency that supports the property. If the banned individual is a juvenile, a copy of the notice should be sent to the parents or guardian.



BOMB THREAT CHECK LIST

Individuals who receive a bomb threat via phone will complete this form. The form will be readily available to all employees.

DAILY ACTIVITY REPORT (SECURITY OFFICERS)

This report serves as a permanent record of the officer's activity. It also serves to alert management to items/situations requiring attention. Officers will complete their shift report at the end of their shift and before leaving the worksite.

DAILY DISPATCH LOG

This report serves as a permanent record of the security department's activity. The officer(s) assigned to the dispatch center will record all calls received and the assignment of officers.

DAILY SECURITY CHECKLIST

This report serves as a checklist for all critical daily security functions.

INCIDENT REPORT

This report will be prepared for any incident where there is an actual or suspected damage to property, bodily injury, or any unlawful action.



REQUEST FOR MEDICAL ASSISTANCE

This form will be completed whenever a non-ERMC individual is involved in an accident on the property. Ask but do not insist that the involved individual complete this form whenever possible. A friend or relative may complete if the injury prevents the affected person from filling it out.

VEHICLE ASSISTANCE

Do not assist mall patrons and tenants in unlocking their vehicles or jump start their vehicles unless they have signed a waiver of liability and only if you can do so without risking damage to person or property.

LOST AND FOUND REPORT

This form is to be completed in full by the officer taking possession of or releasing property. All found property, money, credit cards, jewelry or other items of value, will be verified by two officers and turned over to the Mall manager to be locked in a secure location. Other found items will be secured in a locker or storage. The Lost and Found report will also be used when individuals are reporting lost items. At no time may officers keep as their own property anything considered lost or stolen property.



PERSONAL STATEMENT

This form provides an opportunity for individuals to make a statement regarding any incident or other situation occurring at the property. It may also be used to report incidents of harassment or other employee issues. All issues involving claims of discriminatory, retaliation and/or harassment must be reported to the Corporate Human Resource Department at once in writing.

VEHICLE CHECK LIST

Each officer prior to taking possession of the vehicle will prepare this report. The inspection log will be attached to the officer's daily activity report. Vehicles are to be properly maintained and not misused. Oil changes, tire rotation, and brake service shall not be overlooked or ignored.

VEHICLE WARNING

This form will be placed on vehicles parked on the property overnight. On the second consecutive night the vehicle is parked on the property, the block "notice to tow" will be checked. A copy will be left on the vehicle and a copy attached to the officer's Daily Activity Report. Decisions to tow shall be made by the Security Director.



SITE SEARCH PROCEDURES

PURPOSE

The purpose of the mall search procedures is to organize ERM C personnel to systematically look for any possible foreign or unknown objects and/or substances on mall property.

SEARCH PROCEDURE

In the event the property owner request a search of the area for supervisor packages or items, the Security Supervisor or Supervisor on duty will assemble all ERM C personnel on duty and have them assist in the search, instructing them not to pick up any unidentified object that is suspected of containing an explosive or biological agent. When searching the mall, ERM C staff will search in groups of two. If a suspicious object is found, one staff member will stay at a safe distance from the object and warn others to stay away, while the others report the location. When conducting a search through mall stores, only the employees of that store will do the search. Advise all staff and/or store employees that any suspicious item is not to be moved or touched by anyone. LEAVE IT ALONE. Advise Authorities of any location with suspicious objects.

**SECURITY PERSONNEL SHOULD SEARCH
THE FOLLOWING AREAS: (Do not enter an area
unless you have received appropriate training.)**

- A. All lockers in the area.
- B. Electric rooms and water rooms
- C. Corridor areas
- D. Elevator shafts and pit
- E. Restrooms
- F. Access doors and crawl spaces in restrooms
- G. Plumbing fixtures
- H. Electrical fixtures
- I. Utility and other closets
- J. Areas under stairwells
- K. Fire hose racks
- L. Indoor trash receptacles
- M. Mail rooms
- N. Ceiling lights with easily removable panels
- O. All ceiling areas
- P. Mall roof
- Q. Any abandoned items such as backpacks, shopping bags, etc. should be reported to the police.

Search areas that are especially sensitive to
biological agents:



Do not conduct any searches for biological/chemical agents unless you have received appropriate training.

- A. All ventilation and air systems
- B. All Mail receiving points (Mail stores and Mail offices)

What to look for when searching for Packages and Letters:

- A. Excessive postage
- B. Handwritten or poorly typed addresses
- C. Incorrect titles
- D. Title, but no name
- E. Misspellings of common words
- F. Oily stains, discolorations or odor
- G. No return address
- H. Excessive weight
- I. Lopsided or uneven envelope
- J. Protruding wires or aluminum foil
- K. Excessive security material such as masking tape, string, etc.
- L. Visual distractions

**DO NOT ATTEMPT TO OPEN OR LOOK
INSIDE ANY SUSPICIOUS PACKAGE. CALL
THE POLICE!**



EVACUATION PROCEDURES:

PURPOSE

The purpose of this evacuation procedure is for the safe, orderly and expedient removal of customers and employees from the mall. This may include a partial or complete evacuation.

PROCEDURE

In the event an incident occurs at the mall, such as fire, terror incident, explosion, earthquake, etc., which requires the evacuation of the Mall or part of the Mall, the Director of Security, Operation Director and the General Manager should be contacted immediately. Any evacuation will not be undertaken without input from the General Manager or his/her designee unless circumstances are such that the safety of customers and employees warrants immediate action. Police contact should be immediately established and an outline of the mall with entrances and stores identified should be made available to the police. In the event of a shooter at the mall tenants should be advised to secure and lock their gates at once.

DISPATCH

- A. Once a serious incident occurs, dispatch should call 911 immediately.

- 
- 
- B. Using the cameras, view the effected area and relay the information to 911 and the security supervisor.
 - C. Continue to monitor the situation using all resources available and follow the directions of the supervisor.
 - D. Contact the Director of Security, Operations Director and Mall Manager.
 - E. Continue to monitor both radio channels.
 - F. Communicate via channel 1 with emergency responders.

SECURITY SUPERVISOR

- A. After receiving the information concerning the nature of the incident, decide whether the Security Supervisor would be more effective responding to the scene or (if your mall is equipped) the monitor room.
- B. Have all Mall employees switch to channel 2.
- C. Direct staff to areas where they are needed, including mobile units to respond inside, if necessary.
- D. If the order from the General Manager is given to evacuate part of or the entire Mall, or if conditions warrant immediate action, the security supervisor will direct the

evacuation until received by local police or homeland security.

- E. The security supervisor may use all materials available, such as the public address system located in the Director of Security's office, to assist in the evacuation.
- F. Contact the major department stores and inform their loss prevention personnel of the situation and the need for assistance, if necessary.
- G. Coordinate efforts with the local police and fire departments.

THE EVACUATION

- A. If an evacuation is ordered, determine a priority for the evacuation, moving persons quickly from the danger area to safe exits or more secure locations.
- B. Advise merchants to leave their businesses, directing them to the closest safe exit.
- C. Continue to remove people until the danger area has been cleared.
- D. Keep ERMIC personnel at exits and corridors to keep customers from reentering the danger area.
- E. Once outside, keep persons at a safe distance away from the affected area.

- 
- F. Assist handicapped persons as needed. *
See handicap assistance
- G. Security and mall personnel shall make a complete and thorough search for disabled and/or handicapped people and evacuate them appropriately. *
- H. The security Supervisor will be responsible for documenting all issues, from incident to "all clear."
- I. The Security Supervisor will announce the "all clear" to all employees when it has been deemed safe inside the Mall.

*** HANDICAP ASSISTANCE**

In the event you are required to assist with mentally and physically challenged customers, you should make every effort to relocate them to a safe area. The Director of Security and Operations, Assistant Director of Security and Operations, and/or supervisor will make a reasonable effort to verify that no person(s) are left behind in the facility who can be evacuated safely.

Announcement

"Ladies and Gentlemen, may I have your attention please. There is currently an emergency situation occurring in the (name of closest major) wing of the mall. Because of this situation, the Police are

asking everyone to leave the mall immediately using the closest exit. All stores are asked to evacuate their spaces. Once the store has been completely evacuated, secure the space. If you need assistance please ask any mall employee."

Repeat as often as necessary.

BIOTERRORISM

PRODECURE

Bioterrorism at your mall will be handled in accordance with the local health advisory and the guidelines set forth here by the Security Director. Be aware that the following steps are subject to change and are not meant to be all-inconclusive.

If the threat comes by phone seek to obtain the following information:

1. What type of agent is being used?
2. How is the agent packaged?
3. Where is the package?
4. What does the package look like?
5. What will cause the agent to be released?
6. Why did you place this agent at the mall?
7. What is your address?
8. What is your name?



Attempt to have someone else (on a pre-arranged signal) quietly pick up an extension and listen to the conversation. However, only the person taking the original call should speak.

Notify the Mall Security Director, the Operations Director and the General Manager.

The Security Director, or on duty security officer, will notify police and/or the fire department; depending on their assessment of the phone conversation, they may instruct the mall security staff to proceed with an investigation to determine the validity of the threat, or they may dispatch officers to the mall.

If ordered by the General Manager, Operations Director or Security Director to conduct a mall search, follow the Mall Search Procedures established by the company. If a suspicious letter or package is found, follow steps below:

If the threat is a suspicious letter marked with threatening Messages:

Notify the Supervisor on duty. The Supervisor on duty will notify the Mall Security Director, Operations Director, the General Manager and the proper authorities.

Do not shake or empty the contents of any suspicious envelope or package.



LEAVE the room and CLOSE the door, or section off the area to prevent others from entering (i.e., keep others away).

WASH your hands with soap and water to prevent spreading any powder to your face.

Stand by for further instructions.

The Security and/or Operations Director or ranking security/operation director will notify the authorities. It is strongly suggested that only the Mall Manager should order an evacuation. However, some emergencies require immediate evacuation. In the case of an evacuation, follow the **Evacuation Procedures**.

If the threat is an Envelope with Powder and Powder Spills out On Surface:

Notify the Supervisor on duty. The Supervisor on duty will notify the mall Security Director, Operations Director, the General Manager and the proper authorities.

If an evacuation is ordered, follow the **Evacuation Procedures**.

DO NOT try to CLEAN UP the powder. COVER the spilled contents immediately with anything (e.g., clothing, paper, trash can, etc.) and do not remove this cover! Then LEAVE the room and CLOSE the door, or section off the area to prevent others from entering.



WASH your hands with soap and water to prevent spreading any powder to your face.

REMOVE heavily contaminated clothing as soon as possible and place in a plastic bag or some other container that can be sealed. This clothing bag should be given to the emergency responders for proper handling.

SHOWER with soap and water as soon as possible. Do not use bleach or other disinfectant on your skin.

RINSE EYES thoroughly with clear water.

If possible, list all people who were in the room or area, especially those who had actual contact with the powder. Give a copy of this list to both the local public health authorities so that proper instructions can be given for medical follow-up, and to law enforcement officials for further investigation.

Room or Facility Contaminated by Aerosol.

Notify the Supervisor on duty. The Supervisor on duty will notify the Mall Security Director, Operations Director, the General Manager and the proper authorities.

If an evacuation is ordered, follow **Evacuation Procedures**.

Notify Maintenance to assist in turning off local fans and air handling system in the building. **LEAVE** area immediately. If possible, list all people who were in



the room or area. Give this list to both the local public health authorities so that proper instructions can be given for medical follow-up, and to law enforcement officials for further investigation.

TERRORISTS AND OTHER SERIOUS INCIDENTS

Experience has taught us that the time between the inception of a terrorist incident and its conclusion may be very small. Only minutes may separate the beginning from the end of any attack. This emphasizes the importance of

- A. recognizing individuals who appear out of place, act inappropriately, and otherwise behave in a manner to arouse suspicion – obtain eye contact, asks questions, and reacts to unusual behavior; and
- B. recognizing that the appropriate response may depend on quick action

The time period before the matter is turned over to local police or homeland security or fire/emergency personnel may be very brief. Stay informed as to evacuation and other emergency procedures and be prepared at all times.



EVACUATION

Follow Tornado Evacuation Procedures.

FIRE/EXPLOSION PROCEDURES

***LIFE SHALL NOT BE RISKED TO PROTECT
PROPERTY***

PROCEDURE

Dispatch

Once notified of a fire or explosion at the mall by radio, alarm/strobes, or camera, dispatch will immediately call 911.

While calling 911, the dispatcher will use the camera and monitors to locate the problem area and relay all information to the 911 dispatcher and our Security Supervisor.

Start emergency call procedures.

Dispatch will also contact the major loss prevention groups by phone and advise them of the situation and the need for assistance, if necessary.

If evacuation is needed, refer to **Evacuation Procedures**.

Fire or Explosion in Mall Office or Monitoring Room

Dispatcher will radio supervisor and have them call 911 and start the emergency calling procedures. The monitoring room officer will take his/her mobile radio and assist office personnel in evacuation procedures.

Security Supervisor

The Security Supervisor will immediately respond to the scene of the fire/explosion to evaluate the scene. All injured parties will be treated and a triage area will be set up in a safe area if needed. If a partial or complete evacuation of the Mall is needed, the Security Supervisor will direct the evacuation, as referred to in the **Evacuation Procedure**.

Communicate with emergency responders and relay needed information to dispatch. Direct employees as needed. The Security Supervisor will act as liaison with the responding members of the Police Department and the Fire Department. Document all issues of the incident. The Security Supervisor will be responsible for notifying all employees of the "all clear" after conferring with the police and fire departments.

PROCEDURE

Beginning at the scene, determine a priority of needs. If an evacuation is called for, refer to the Evacuation Procedures. Assist any injured



person. Establish a triage area in a safe location and notify all emergency responders. Secure area inside the Mall using any ERM employees to stop any reentry to area. Secure parking lot around emergency vehicles. Assist firefighters and police officers as needed. Assist all handicapped persons as needed. Security and mall personnel shall make a complete and thorough search for disabled and/or handicap person(s) and evacuate appropriately.

EARTHQUAKE PROCEDURES

PROCEDURE

Notify the Security Director immediately. The Security Director will notify the Operations Director and the General Manager. Respond to injuries of customers and/or employees of the mall. Inspect the property by using security and maintenance. Look for any structural damage, such as, cracked wall, ceilings, cracked/broken windows, loose or hanging wires, unusual odors, leaking pipes, etc. Complete the inspection log. (Use a blank Activity Log).

OPERATIONS DIRECTOR

The Operations Director under the guidance of the Mall manager will issue an evacuation of the mall.



However, under extreme conditions the decision to evacuate may fall to either the Operations Director or his/her subordinates.

DISPATCH:

Immediately check in with Security Supervisor to account for your safety and his/hers.

View monitors to check for structural damage, employee and customer injuries.

Log time of quake and monitor radio that is in the mall office. If a local police officer is available and has not been activated to duty, have officer monitor police channels. Report information gathered to the Security Supervisor. Activate the Emergency Contact Procedures.

SECURITY SUPERVISOR

Have all officers/maintenance "check-in" so that you know that all personnel are safe and are accounted for. Have a personnel search interior and exterior of the mall for injuries and obvious structural damage. If injuries are found, make sure injured are clear of any danger and begin first aid. Radio dispatch to call for EMS. (Expect possible delay due to emergency priorities.) If the Operations Director cannot be reached during non-mall hours, and it is deemed



necessary by emergency personnel, (e.g. the fire department, etc.) to evacuate the mall to insure public safety, then the Security Supervisor is cleared to begin evacuation procedures. **Determine safe area based upon the least area affected or will be affected by earthquake/aftershocks.**

While injured are being helped, excess officers and maintenance will continue to look for structural damages. Document any findings. **Remember that after shocks will occur and may cause damage to an already weakened structure. BE CAREFUL!**

Bomb Threat Procedures

Receiving the Call

Keep the caller on the line as long as possible. **Remain calm and listen carefully.** Note which line the call is on. Using the bomb threat checklist, (All mall office employees should have a check list at his/her desk) ask the caller the series of questions listed on the form. As soon as the caller hangs up, use *69 on the same line and document the information received. It is very important to get the information received. It is very important to get the information before another call comes in on that line. Go into the monitoring room and inform Security of the threat and



all information from * 69.

The officer in the monitoring room will do the report. The officer in the monitoring room will also check the pay phone numbers located at the mall. If a match occurs, cameras should be positioned immediately at the proper location.

Dispatch will then notify the Security Supervisor on duty of the situation by using the proper code for a bomb threat. The Security Supervisor will then respond to the mall office. He/She will then contact the Director of Security/Assistant Security director as soon as possible to give his/her all of the information that is available at the time. The Security Director will then notify the Mall Manager and the director of Operations of the situation. Further action will be conducted under the guidance directions of the Mall Manager.

The Search

Based on information gathered to this point and after consultation with the management staff, a search of the mall may be in order. If the mall management decides to search the mall, follow Mall Search Procedures.



Remember it is the decision of the Mall Manager as to the size and the extent of an evacuation.

If an Explosion Occurs:

Follow Fire/Explosion Procedures.

Tornado/Severe Weather Procedures

***LIFE SHALL NOT BE RISKED TO PROTECT
PROPERTY***

PROCEDURE

In the event of severe weather, the following procedures shall be followed.

Dispatch

The security dispatcher on duty will monitor weather information when the National Weather Service for the area issues severe weather or tornado warnings/watches. The dispatcher will notify the Security Supervisor of all such warnings/watches that might include the mall. Dispatch will also monitor weather conditions using the outside cameras as needed. The dispatcher will continue to monitor the weather.



Security Supervisor

If dangerous weather is forecasted, all officers will be notified of the existing weather conditions. All employees will respond as directed by the Security Supervisor.

PROCEDURE

Security officers assigned to patrolling the parking lots will keep watch until such time they feel it is necessary to move inside the facility or they are directed to do so by their supervisor. After consultation with the Mall Manager, the director of Operations or the director of Security, the Security Supervisor or his/her designee will make the proper announcement * using the intercom system at customer service. All security officers and other Mall employees will immediately begin moving customers and employees away from windows and to the designated "safe areas" inside the Mall. Customers are to be urged to remain in the safe area; however, no customer will be forced to remain on Mall property. All employees are to remain in these areas until notified by the Security supervisor of the "all clear". (The designated "safe areas" are any corridor area). In the event of any injuries to employees or customers, the proper emergency responders will be contacted by dispatch. In the event of any injuries or damage



to Mall property, the General Manager, Director of Marketing, Director of Operations, the Director of Security and the Director of Maintenance will be notified.

If damage or injuries occur and after they have been properly dealt with, refer to the ERM Security Manual for corporate contacts that are to be notified. The director of Marketing will be kept abreast of all situations and any media inquiries should be directed to him/her. In the event of a prolonged power outage and at the discretion of the General Manager or his/her designee, the Mall generator will be used to power designated areas in the Administration office.

*** ANNOUNCEMENTS**

"Ladies and gentleman, May I have your attention please. Due to the severe weather conditions, the mall management is asking everyone to move to the nearest corridor location. We ask that no one leave the mall at this time. We are monitoring the National Weather Radio and will notify everyone when the severe weather has passed. Thank you" (Repeat)



SPRINKLER FLOODING PROCEDURE

PROCEDURE

In the event a sprinkler head accidentally discharges, the following procedure shall be followed.

Security Supervisor

When notified that a sprinkler head has accidentally discharged, immediately contact the mobile unit to respond to the appropriate Risor Room to shut down the system. Make sure that another officer is notified to keep a visual of the area that is being flooded. The Security Supervisor will respond first to Compactor area to check the Enunciator box to make sure that the appropriate light for that sprinkler zone has been triggered. Then the Security Supervisor will respond to scene of the discharge to oversee clean up. Contact the maintenance staff immediately giving them the exact location of the discharge. The maintenance staff will respond to the scene with all available equipment, such as wet vacs and the Keovac system to handle the clean up. If the maintenance staff is not on property at the time of the discharge, the Maintenance Director will be notified as soon as possible.

After the system has been shut down and the clean up has begun, the Security director should be notified and given details about the sprinkler head discharge.



The Security Supervisor, naming all persons and companies involved, will make a detailed report. If the sprinkler head discharge occurs inside a tenant space, the same procedure applies. If the store is closed and secure, the system should be immediately shut down to stop the flow of water and the store management notified to respond as soon as possible. If no one can respond, the local fire department should be contacted to gain entry into the space. If this occurs, cameras should be positioned on the store entrances to record all activity.

Remember to advise any company hired by the property to work on the sprinkler system that they must determine if water lines have been turned off/on and that ERMC will not be responsible for any damage during any repair procedure.

System Shut Down

Go to the riser room that controls the effected sprinkler zone. The riser rooms and their numbers, for example, might be identified as follows:

- b. Riser room at 106 – Controls zone 1,2,3
- c. Riser room at 108 – Controls zones 4,5,6
- d. Riser room at 109 – Controls zone 7,8,9
- e. Riser room at 105 – Controls zones 10, 11, 12
- f. Riser room at 103 – Controls zones 13, 14, 15

Once at the correct riser room you will first turn off



the outside **RED** Wheel that will be numbered for the correct sprinkler zone. Use the small key that is marked with the white tape to unlock the chains. Next, go inside the riser room using the key marked "Riser Room". Once inside, turn off the Large Yellow Wheel at the bottom of the pipes. Next, look up and turn off the Small Blue Wheel that will be numbered for the corresponding sprinkler zone.

Lost Child Procedure/Parents Need Assistance

Awareness: (Party contacts a security/police officer)

- A. Security/police officer will gather information of last known location and description (age, sex, ethnic origin, hair color, height, and type and color of clothes) of child.
- B. The security and police officer will then "Break Traffic" and send out last known location and description of child to all officers.
- C. For centers with a camera system, the monitor room will immediately scan all anchor store entrances for child. (Inside and out).

Search: (internal and external building search)

- A. The Security Supervisor will now assume search procedures.



- B. Inside security and police officers will pay careful attention to exit areas as well as corridors in their assigned zones.
- C. One of our outside mobile units will report to parking area in which the party's car is located. He/she will then search the car for the missing child. If child is not found he/she will continue to patrol the immediate area while the other mobiles search the rest the property.

Time Sensitive Procedures:
(Child not found within 5 minutes)

- A. Security Supervisor will contact Customer Service and have all stores inside the mall notified of the lost child and given description.
- B. Security and police personnel will begin store-to-store searches within the mall.

NOTE: If child is not found, then local law enforcement will take over.

Child Needs Assistance

If a child needs assistance the child is immediately taken to the customer service booth to have his/her parent(s) paged. A description of the parents will be communicated to all security and police personnel. Once the parents are found they are asked to go to the



customer service booth to be reunited with their child.

When a child is too young or unable to talk or cannot speak English; the child shall be brought to the customer service booth and kept there until the parents are found.

NOTE: If the parents are not found before the mall closes or within a reasonable time, notify the police.

SAFETY TIPS TO GIVE PARENTS

1. Ensure your child knows his/her name and the name of his/her parents.
2. Make sure your child knows his/her phone number.
3. Have a designated meeting place in case you separate.
4. Inform your child to go to the nearest police or security officer if they become lost.
5. Park in well lit areas.
6. Stay alert at all times and pay attention to your surroundings.
7. Don't overload yourself with packages.
8. Keep your doors locked and all packages in your trunk or underneath a blanket.
9. Have your keys ready before you get to your vehicle.
10. Once inside your vehicle always lock your doors.

ERMC

CREATING SAFE, CLEAN & WORRY-FREE ENVIRONMENTS



SECURITY POCKET MANUAL

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♦ This manual is the property of
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♦ This manual contains proprietary information and may
not be shared with anyone outside ERMC employment
without the written permission of ERMC legal counsel.

♦ "Tenant" refers to all who lease property including stores,
office businesses and not for profit organizations.

♦ Property Manager refers to the senior client
management person at each site.

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♦ This manual is the property of ERM, LP.

♦ This manual contains proprietary information and may not be shared with anyone outside ERM employment without the written permission of ERM legal counsel.

♦ "Tenant" refers to all who lease property including stores, office businesses and not for profit organizations.

♦ Property Manager refers to the senior client management person at each site.

"Throughout the years ERM C has been noted for professionalism, quality service, attention to detail and our ability to tailor our programs to meet the needs of our customers. We have a dedicated team of professionals committed to customer satisfaction. We strive to reach higher levels of service and to continually improve our management and operating standards."

Emerson Russell
President and CEO, ERM C

FOREWORD

This revised copy of the ERM C Security Policy and Procedure manual replaces all previous manuals and is the official manual at all ERM C centers.

This is a working document, which will be modified as needed. Nothing in this document is intended to alter or amend the employment at will relationship, which exists between ERM C and its employees. Please contact the Director of Corporate Security with comments, questions or concerns.

SECTION ONE

SCOPE

These procedures cover the duties common to all security organizations regardless of the site location. This manual will be a standard source of guidance for all security personnel employed by ERM.

Security personnel should be familiar with these procedures and when questions occur, ask the supervisor for clarification. The supervisor is responsible for providing the correct information.

Deviations from this manual should be reported in writing within 24 hours to the Director, Corporate Security. Requests for permanent deviations to the manual should be made in writing to the Director of Corporate Security.

All references in this manual requiring reporting to the Corporate Security Department assume the information has been passed along the chain of command and that local and area managers have been notified prior to the Director of Corporate Security. However, notification to the Director of Corporate Security should not be delayed while attempting to contact other individuals.

RESPONSIBILITY

Security personnel should follow all established procedures designed to accomplish the following:

- Serve as a representative of the owner, providing assistance to customers, tenants and employees.

- Help provide for the safety of customers, tenants and employees in the common area.
- Help protect the property, and other business interest of the owner, the customers, tenants and employees.

The Difference between Security and Law Enforcement

Security officers must understand the difference between the duties of security personnel and those of law enforcement officers. Although both work toward similar goals, the duties of each are quite different.

The duty of a security officer is to observe and report. What security officers observe should dictate their actions. Officers may be required to personally respond or to contact paramedics, fire personnel or law enforcement. When these outside resources arrive on property, officers must communicate with them and assist them as requested. Law enforcement personnel are sworn to uphold the law and are primarily reactionary in nature.

Security personnel are not law enforcement officers and should refer all situations of a dangerous or criminal nature to law enforcement as soon as circumstances permit. Law enforcement personnel may be hired to augment the security staff. Although law enforcement officers are a part of the security organization, they remain law enforcement personnel and are required to immediately respond to criminal situations.

Security personnel do not ordinarily become involved with situations inside tenant spaces.

However, law enforcement personnel may be required by their law enforcement department policy to assist tenants when requested to do so.

The Importance of Customer Service: as a security officer, most of your time should be spent providing service to the tenants and visitors to the property. You are the most visible employee of ERM. Most individuals will rarely see or interact with the property management staff; however, nearly everyone who comes to the property will see or interact with security. Your behavior will influence the perception of those working and visiting the property. Security officers must be courteous and professional at all times. Your demeanor will influence those around you. You should acknowledge tenants and employees as they arrive or leave each day. You should make eye contact and acknowledge visitors as you patrol the property. Incorporate polite language into your conversation: "yes ma'am", "sir", "thank you", and "please".

As a representative of ERM and the property it is never appropriate to use sarcasm, profane language or otherwise convey your anger or impatience with an individual or situation. Likewise it is not appropriate to use overly familiar phrases such as, "hey dude" or "buddy" or "Honey" when addressing individuals. Professionalism is the key to good public relations. Customer Service is an essential element of Security.

General Responsibilities

Security officers are an important part of site operations. Officers are responsible for observing and reporting activity within the property. Security officers are not police officers and should not act as law enforcement officers. The

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primary objective of the security department is to help prevent injuries to persons and property, and to help deter crime and other undesirable activities. Prevention is the anticipation, recognition and evaluation of risk and initiation of an action to remove or reduce the risk. As the most visible representative of property management an officer is the goodwill ambassador to customers, tenants and employees. It is therefore critical that each officer:

Know the duties and responsibilities of his/her position
Follow all instructions and orders from his/her supervisors or other management personnel, Be mentally alert and able to recognize the unusual, act quickly and calmly to take corrective action, Maintain a confident and professional attitude.

SECTION TWO

USE OF FORCE:

One mission of security is to help deter improper activity. This goal is accomplished primarily through non-physical means. Officers may be confronted with circumstances in which all means, except physical force, have been ineffective. In such cases reasonable physical force may be appropriate.

Reasonable force is defined as the least amount of force necessary to overcome the actual resistance encountered and which a reasonable person would consider appropriate. To apply force appropriately it is important to understand the various levels of force and the legal guidelines associated with each level. The authorization to use force requires answering three questions:
Is it lawful?

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Is it reasonable?
Is it permitted by policy?

LAWFUL:

The law regulates the use of force against any person. These laws are included in the penal code and can be summarized as follows:

- A. Reasonable force for self defense or defense of another;
- B. Reasonable force to overcome resistance to a lawful arrest;
- C. Reasonable non-physical force to prevent violation of rules on private property.

REASONABLE:

Reasonable force will be measured against the resistance, which is being met by the officer. Officers may only use the amount of force necessary to overcome the resistance and gain compliance.

Officers who carry chemical sprays (see page 15), must ensure they use the least amount of force necessary to overcome resistance and protect themselves and/or others.

POLICY:

ERMC discourages the use of physical force. Law enforcement should be called whenever circumstances require the use of physical force. Realizing that there may be a delay in the law enforcement response, officers will escalate force in the following sequence:

PRESENCE:

Simply being visible in the area. The presence of a security officer is force and may deter crime and prevent an escalation of events. Presence will never be used to harass.

VERBAL INTERACTION:

This is communicating with individuals directing their actions, giving instructions. This is not shouting or arguing and is not to be used to harass or intimidate individuals.

WEAPONLESS DEFENSE:

This is using one's hands/body to control the individual and gain compliance. Handcuffs where authorized may be used as a part of this defense strategy. Use of weaponless defense can escalate the use of force and should only be used in defense of the officer, another individual or when making a lawful arrest and the subject is resisting.

IMPACT WEAPONS:

This includes the use of chemical sprays (see page 15, chemical sprays). These may only be used when lesser forms of compliance have failed or are ineffective against the level of resistance being met and the officer is protecting himself/herself, or other individuals against assault.

ERMC policy relies on local law enforcement when confronting physical force.

Officers should rely primarily on presence and verbal skills to effectively perform their duties.

In those rare circumstances when physical force is necessary, the officers should use restraint and respond with the least amount of force necessary to gain control of the situation and restore order.

SECTION THREE

ADMINISTRATIVE LICENSES/CARDS

All security personnel will possess a valid driver's license from the state in which the property is located or in a neighboring state in which the applicant legally resides. The only exceptions are active duty military personnel or students who may possess a valid driver's license from their home state of residence. Prior to hiring an employee, the Security Director will ensure the applicant possesses or is eligible to obtain a valid state or other locally required guard card. The Security Director will ensure all security personnel are properly licensed, where applicable. Employees will notify the Security Director immediately if the driver's license or guard card has been lost, suspended, revoked or otherwise restricted, where applicable. The employee is financially and administratively responsible for obtaining and maintaining any individual license(s) required by any particular state.

PERSONNEL POLICIES

In order to maintain the daily schedule, security personnel will follow the published work schedule, assume responsibility for their area at the appointed time and remain on duty until properly relieved.

The work schedule should be published in advance of the start date and should be in effect for no less than one week from the start date. Schedules should not ordinarily change from week to week unless dictated by the needs of the site.

Shift assignment and days off will be based upon the needs of the site. Shifts are ordinarily eight hours in length. Sites working other than 8-hour shifts must have the approval

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of the Corporate HR department. State labor laws vary and it is the responsibility of the Security Director to ensure security is in compliance with the appropriate labor codes. Employees will be compensated for all hours worked in accordance with the appropriate federal and state requirements. Employees will work over time only when approved by the ERM site supervisor and the Property Manager, or his/her designated representative. All hourly employees will clock in/out each day. Failure to punch in/out is a violation of company policy and may subject the employee to discipline, up to and including discharge. Employees who forget to clock in/out must immediately notify the shift supervisor and note the time in or out on the daily report. Two statements are required verifying employee attendance in order to process employee time, which is not shown on the time clock. Employees required to appear in court or participate in investigative law enforcement procedures related to their employment at the property, on their days off, will be paid for the actual time but not less than two hours. Appropriate overtime will apply. Employees called in on their days off to attend meetings/training will clock in/out and will be paid for the actual time but not less than two hours. Appropriate overtime will apply. Errors in the paycheck should be brought to the immediate attention of the Security Director.

ABSENCES

Employees are expected to be on duty, in uniform at the assigned time.

Employees should provide a minimum four-hour advance notification to the on duty supervisor when unable to report to work. Officers should notify the on duty supervisor immediately when there is a possibility the officer will be late for his/her assigned shift. Three (3)

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unexcused absences in a 90-day period may result in disciplinary, up to including termination.

UNIFORMS AND APPEARANCE

The security uniform is a public statement. The condition of the uniform reflects on the professionalism of the security department and the attitude of the individual officer. All security officers will be in uniform, either an ERM C uniform or in the case of sworn peace officers, an authorized law enforcement uniform. Security Directors may wear appropriate business attire. Employees must comply with all state uniform requirements and it is the responsibility of the Security Director to be knowledgeable of the requirements in his/her particular state. Grooming and hygiene standards must be maintained at an acceptable level. Only authorized uniform items will be worn while on duty. These items are to be clean, pressed, in good repair and worn properly. Supervisors are the final authority for interpreting such conditions as clean, good repair, and other subjective conditions. Employees may return worn/torn uniform items to their supervisor and receive replacement items. All uniform items provided by ERM C are the property of ERM C and must be returned immediately upon request. Employees will be held financially responsible for the loss or deliberate damage to all issued items. Employees should either cover the uniform shirt when going to and from work OR change into the uniform prior to the beginning of the shift and out of the uniform at the end of the shift. Officers will be in a complete uniform and ready for duty at the beginning of the assigned shift.

EQUIPMENT

Equipment may vary between properties. Officers are issued the equipment necessary to be effective at their

specific property. Equipment should be inspected regularly by the Security Director to ensure continued effectiveness. Sites, which use handcuffs and chemical spray, will ensure all officers are properly trained and certified (if required by the state) before issuing the items. The Security Director should establish and document training to ensure the officers are proficient in the use of the safety equipment.

HANDCUFFS

The following MUST be approved by Corporate Office- Handcuffs are to be worn by officers who have taken and passed a Certified Handcuff Training Course by a Certified Trainer, and approved by the VP of Corporate Security or his designate. Handcuffs are safety equipment designed to protect officers and others from the potentially violent actions of a subject. The unnecessary use of handcuffs on an individual will be grounds for disciplinary action. If handcuffs are used an incident report must be completed prior to the officer going off duty. Local law enforcement must be called whenever handcuffs are applied and the person must be turned over to law enforcement. Handcuffs should not be removed until the individual has been turned over to law enforcement. All adults under arrest should be handcuffed and juveniles should be handcuffed if the officer is concerned about his/her safety or the safety of others.

CHEMICAL SPRAY

The following MUST be approved by ERM C Corporate office. Chemical spray can only be carried by officers who have taken and passed a Certified Chemical Spray Training Course given by a Certified Instructor.

Chemical spray will only be used as a defensive weapon to prevent harm to the officer or in defense of another individual. Use of the spray for any other reason will be grounds for disciplinary action. Individuals in handcuffs should not be sprayed unless posing immediate risk of serious bodily harm and no other reasonable means are available.

WEAPONS

Firearms are not authorized at any site; the only exceptions are law enforcement officers employed by the property or ERM, or as otherwise authorized by the Corporate Security Director, or at armed posts. Firearms are not authorized to be worn/carried by Security Directors, even when the Security Director is in possession of a valid state permit. Other weapons such as stun guns, knives or martial art weapons are prohibited and possession of such while on duty will be grounds for disciplinary action. The Security Director may authorize officers to carry a small utility knife; and this should be noted in the officer's local file.

DISCIPLINE

The company's discipline policy is stated in the ERM Policy and Procedure manual and is as follows:

"The employer or the Company may terminate the employment relationship at any time for any reason, with or without cause or without notice. The Company reserves the right to change, alter or amend the work rules and disciplinary procedures at any time and from time to time and without prior notice. The purpose of this policy is to state the Company's position on administering equitable and consistent discipline for unsatisfactory conduct or performance in the workplace or while performing duties on behalf of the company. The best disciplinary measure

is one that does not have to be enforced and comes from good leadership and fair supervision at all employment levels. Disciplinary action may call for any of four steps: (1) verbal warning; (2) written warning; (3) probationary retention/suspension and (4) termination. The decision whether to exercise progressive discipline lies strictly within the discretionary power of the company. The company may elect, in any given instance, to by-pass one or more of the preceding steps and immediately terminate or otherwise discipline an employee. The company recognizes that each employment problem is unique and depends on the facts and circumstances at hand. For this reason, some types of actions and/or behavior may result in immediate suspension and/or termination by the company. The company reserves the right to utilize progressive discipline in those cases where the company considers it appropriate and beneficial to both the employee and the company. In no event shall the use or lack of use of progressive discipline be deemed to create any employment except that of employment at will. No employee shall be deemed to be entitled to progressive discipline as a matter of right, contractual or otherwise. Each employee shall read and be familiar with the work rules and regulations contained in ERM Policy and Procedures manual.

SLEEPING ON DUTY

Officers must be alert at all times; therefore, any sleeping on duty will be grounds for disciplinary action up to and including termination. All instances of sleeping on duty will be evaluated by the Security Director to determine the appropriate disciplinary measure.

JOB PERFORMANCE GUIDELINES

Because of the highly visible nature of the security profession, security personnel are subject to the following regulations. Failure to adhere to these may result in disciplinary action up to and including termination.

1. Security personnel should maintain the highest professional standards of good judgment, courtesy and diplomacy.
2. Security personnel should ensure their appearance, grooming and behavior are consistent with a professional security image.
3. Security personnel should not intentionally have provided false or misleading information to obtain employment.
4. Security personnel should have a thorough understanding of and adhere to all published procedures.
5. Security personnel should comply with the instructions issued by the supervisor.
6. Security personnel should notify the supervisor of the use of medication, which may impair performance, whether prescribed, or over the counter.
7. Security personnel should report all on duty injuries immediately to the supervisor on duty. In a situation not requiring immediate medical attention and where an officer may be working alone, the injury should be reported to the supervisor the next working day.
8. Security personnel should notify the Security Director immediately of any arrest and/or conviction, whether Federal, state or local and including but not limited to the suspension or revocation of a driver's license or state or local guard cards.
9. Security personnel should park in employee parking areas with the exception of the officer(s) working the

midnight shift. They may, with the approval of the Property Manager, park near an entrance.

10. Security personnel should be highly visible to the public while on patrol.
11. Security personnel should be alert to activity on the site including the parking area.
12. Security personnel should have the security radio on at all times, in a volume audible only to the officer.
13. Security personnel should remain on post until properly relieved by either another officer or supervisor.
14. Security personnel while on duty should not fraternize with the tenants or enter a tenant's place of business unless on official business.
15. Security personnel should neither ask for nor accept favors, discounts, and loans or merchandise samples from any tenant or vendor.
16. Security personnel should maintain a calm and professional tone of voice when dealing with the public, including uncooperative individuals.
17. Security personnel should use only the minimum physical force necessary under the circumstances.
18. Security personnel should refer all inquiries regarding the property to the Property Manager or designated representative.
19. Security personnel shall promptly and properly account for all found property.
20. Security personnel should not discuss security issues or incidents outside the security office. Information should be shared on a need to know basis.
21. Security personnel should not abuse or misuse company equipment including vehicles. Negligent use of company property may constitute abuse.
22. Security personnel will not make false, slanderous or malicious statements concerning other employees or ERM to other employees, clients, customers or tenants.

23. Security personnel are prohibited from working on the property, for any tenant, in any capacity, either full time or part time, without the written approval of the corporate HR department.

24. Security personnel will not report for duty under the influence of alcohol or drugs. Security personnel will not use or purchase alcohol or drugs while on duty or in uniform.

25. Security personnel will not enter any bar areas located on the property while on duty or while in uniform unless directed to do so by a supervisor or designated dispatch center.

26. Security personnel should not gamble on duty.

27. Security personnel should not make personal calls except on designated breaks. Security personnel will not make long distance or toll calls on ERM or client telephones.

28. Security personnel will not conduct personal business while on duty. This includes schoolwork, private business, or otherwise.

29. Security personnel will not patrol in pairs unless specifically directed to do so by the security supervisor.

30. Security personnel will not congregate in one area including the security and/or management offices unless specifically directed to do so by a supervisor.

31. Security personnel will not have visitors while on duty.

32. Security personnel will not violate ERM's harassment policy.

33. Security personnel are not permitted to make any purchases while in uniform with the exception of food and drink.

34. Security personnel, including officers assigned to the vehicles, will not eat, drink, chew gum, smoke or use smokeless tobacco products while on duty in view of the

public. These activities are permitted only in designated areas.

35. Security personnel when on patrol in any office area will not open any desk drawer, cabinet or other furniture nor will security personnel examine, rearrange or copy any papers on the desk in any office or permit unauthorized person to do.

36. Security personnel will not carry any equipment unless specifically authorized by the Security Director and the officer has received training in the use of the equipment.

37. Security personnel will not pursue suspects off the property.

38. Security personnel will not use ERM or customer vehicles for personal use.

39. Security personnel will not commit any fraudulent or deceptive act.

40. Security personnel will not utilize any computer or other equipment for any personal use or in violation of the company's policy and procedure manual

41. Security personnel will abide by all work rules and regulations published in the ERM Policy and Procedure Manual.

SECTION FOUR

RADIO COMMUNICATIONS

Radio transmissions broadcast over FM frequencies, which are licensed and monitored through the FCC, 24 hours/day, 7 days a week. Use of the airwaves for any purpose other than official business is strictly prohibited. The security supervisor or dispatcher on duty should identify the station by its call letters at least once an hour as close as possible to the beginning of each hour. The call letters for each site will be clearly posted on the security bulletin board.

Radio equipment is essential to the performance of the security function and the equipment should be treated with care. Refer to the ERMIC training materials on the proper use of radio equipment.

SECTION FIVE

DOCUMENT PREPARATION

Security personnel are often required to prepare written documents. The documents should contain factual relevant information, which may be important in a future case. Documents should not contain strikeouts, misspelled words or incomplete information. Documents should be prepared, whenever possible, while the officer is still on duty and the events and information are still fresh in his/her mind. Officers should ensure all the required information is completed prior to closing the report.

DOCUMENT RELEASE

No security documents will be released or provided for review to anyone other than the ERMIC client or ERMIC employees. All other requests for documents must be made via subpoena unless the VP of Corporate Security or the Legal Department authorizes the release. This also applies to CCTV copies and other related documents.

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DOCUMENT RETENTION AND DESTRUCTION

ERMIC policy requires all security documents to be retained per state requirements and applicable ERMIC retention policies. Any security documents to be destroyed should be destroyed by secure and confidential methods, typically shredding. The ERMIC VP of Corporate Security should be obtained before any documents are destroyed.

SECTION SIX

PATROL OPERATIONS

Security Officers patrol for the purpose of deterring crime, detecting safety hazards and unsecured valuables, providing fire watch, preventing trespass and property loss and for detecting other non-routine activities. Security personnel assigned to patrol duties should continually patrol the assigned area in a thorough, steady manner. Officers should be observant and alert to any items or events or persons, which appear out of the ordinary. The officer should investigate unusual activity and note the same in his/her Daily Activity Report and when warranted notify the supervisor. The patrol of the grounds and parking areas surrounding the building or property is an important security function. The patrol should be a slow paced cruise through the parking area, the trash court and delivery alleys. These areas should be patrolled vigorously and continuously. Security personnel must always be suspicious of activity that draws their attention from assigned duties. Attempts may be made to commit offenses by staging a distraction. Do not leave an assigned area if an incident

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occurs outside that area without checking with the senior officer on duty. Call security headquarters for assistance and remain alert for other activity. Many properties have a posted Behavioral Code of Conduct, which prohibits offensive behavior and activities, which adversely impact business. Officers should be alert for and respond appropriately to prohibited behavior. Security officers face many different situations each day; this section is designed to help the officer understand ERM policies in specific situations.

ASSISTANCE ANIMALS

Assistance animals are permitted in the building. The most common animals are guide dogs for the blind; however, other animals including small mammals, primates and birds are used to assist individuals with a wide range of physical challenges. Small mammals such as rats and hamsters are being used as therapeutic animals to calm individuals. Assistance animals are allowed throughout the center including the food court as long as the owner properly controls them.

ASSISTING TENANTS WITH SHOPLIFTERS

The apprehension and detention of shoplifters are not the primary roles of security. Security officers only become involved in such situations at the request of merchant employees and respond to provide assistance only, as set forth below. Security officers should not make arrests in cases of shoplifting from a store — only the store employee who actually witnessed the shoplifting occur should make an arrest under that person's citizen arrest powers. If the store clerk sees the theft and elects to make an arrest, he/she must also be the complainant when the police arrive. When security is contacted to

assist with a shoplifting arrest, the merchant will be asked if the police have been called and if prosecution will occur. If prosecution is not anticipated security will attempt to diffuse the situation and cease involvement. Security officers may become involved if the suspect leaves the store and enters the common area; however, this involvement shall be limited to observation of the situation. If requested by the merchant employee, the security officer should keep the individual under observation in the common area until the merchant employee makes contact with the suspect. If the merchant employee makes an arrest, the merchant should ask the individual to return to the store. Security officers are not authorized to chase a suspect through the building. Security officers should not physically detain or restrain a suspect unless the security officer witnessed a crime and is personally making the arrest using his/her citizen arrest authority. If the suspect attempts to leave the center and ignores a request to accompany the merchant employee back to the store the officer will not attempt to stop the suspect. The officer will follow the suspect and obtain a physical description of the suspect and/or any vehicle, which may be involved. Law enforcement should be notified immediately.

Security officers will not pursue any suspect off the property

If the suspect does accompany the merchant employee to the store, the officer may remain on the scene until the police arrive in the interest of the safety of the merchant employee and the suspect.

SUMMARY

- ◆ Security officers have no greater arrest power than any private citizen unless greater power is given by State law.
- ◆ The person making the arrest MUST have witnessed the crime of it is a misdemeanor under State law.
- ◆ The officer should not physically restrain or detain anyone unless the officer is making an arrest for a crime committed in the presence of the officer or if necessary to preserve the peace or prevent immediate threat or personal injury.
- ◆ Police should be called once an arrest decision has been made and whenever an officer feels for safety reasons law enforcement is needed.
- ◆ Pursuits through the center or off center property are strongly discouraged.

BAN NOTICES

Occasionally it may be necessary to ban an individual from the property because of their actions. For minor violations of the properties' rules of conduct, a verbal warning may be sufficient. It is the responsibility of the Security Director to ensure the property is in compliance with local ordinances. In the absence of local/state ordinances offenses will be handled in the following manner: Minor, non-criminal offenses - (i.e. violations of the code of conduct) which could result in injury to others or damage to property or negatively impact business AND failure to stop the behavior after a verbal warning can result in a ban notice up to 6 months. Criminal behavior, which results in an arrest or citation by local law enforcement, will result in a ban notice ranging from 6 months to 1 year and even longer if warranted by the circumstances. Bans over 1 year should be only after

counseled with the corporate security director. When an individual is banned from the property he/she is prohibited from entering the property and may face an arrest for trespass if he/she does so. A modified ban notice may be given if the individual banned is an employee of a tenant and approval is obtained from the security director. In such cases, the banned individual may have access to the property for employment purposes only. A photograph may be taken of a banned individual and attached to the ban notice. These should be maintained out of public view and under the controlled access of the security supervisor. Some states and cities may have particular ordinances governing banning individuals and those specific restrictions shall apply.

CCTV

The CCTV system installed is for the sole purpose of enhancing the security cooperation at a specific property and is considered proprietary. Security video should not be released without permission from the legal department or corporate security director, unless under lawful subpoena. Requests to review archived tapes should be forwarded in writing by the requesting agency to ERM/C Corporate Security/Legal department. This policy recognizes there may be extraordinary circumstances, which require the immediate release of a tape or CD's to protect the public. Tapes/CD's can be released without a subpoena with the approval of the VP of Corporate Security or Corporate Legal Counsel. Nothing in this policy prohibits the casual viewing of the CCTV operation by customers, merchants or employees. Ordinarily tapes/CD's should be maintained for ninety (90) days and then recycled. Copies of any video depicting an arrest detention, or

injury on the property should be retained until released by the Legal/Risk Department.

DEMONSTRATORS

Most of ERM sites are private property and non-labor picketing is not permitted. Picketers must confine their activities to the public sidewalk(s) and/or street(s). If demonstrators move onto the property, block driveways, or create situations threatening to persons entering the property, security units should notify the security supervisor and if necessary request emergency assistance from the local law enforcement agency. Security should monitor the crowd and be ready to react to any change in the crowd's demeanor. Special rules apply to union activities and security officers should check with the Property Manager before taking any action.

DISPUTES BETWEEN TENANTS AND CUSTOMERS

Security Officers should not ordinarily become involved in disputes inside a tenant space. Customers who wish to make a complaint regarding a tenant should be referred to the management office and offered a Personal Statement form. If it becomes necessary to enter a tenant space to preserve the peace, prevent an assault or restore order, the local police department should be called immediately.

EMPLOYEE ACCIDENTS

Any accident, which results in an on-duty employee being injured, should be reported to the corporate office on an ERM Accident/Injury report form. Reports should be made to the supervisor on duty or if no supervisor is on duty at the time, the injury should be

reported within 24 hours to the Security Director. The supervisor shall complete an ERM Accident Report form. All injured workers shall be drug tested as soon as practical following established company procedures.

LOITERING IN SHOPPING CENTERS

Loitering is defined as remaining in an area for no particular purpose—to hang out. Centers often attract individuals who loiter and yet do not create disturbances. No one should be asked to leave unless he/she is creating a disturbance. A disturbance is any activity which interferes with the operation of the center and/or causes customers to leave the center. Individuals engaged in such activity should be asked to stop the offending behavior; individuals who refuse to stop their behavior should be asked to leave the center. The security officer should call law enforcement officers to remove an individual from the center if the individual fails to stop the offending behavior and/or refuses to leave when asked to do so. Individuals quietly enjoying the ambience of the property should not be asked to leave regardless of the duration of the stay. Officers should defer any arrest or restraint of a trespassing party to the local police department.

MEDIA REQUESTS

ERM security personnel should comply with site guidelines. The Property Manager or Marketing Director should handle all media requests for information. If members of the media come on to the property, the officer should immediately notify the security supervisor on duty, who should notify the Property Manager or his/her designated representative along with his regional manager. Ordinarily, only

management personnel should make contact with media personnel. If media or commercial photographic activity takes place, after the management office has closed, and if the officer has not been told of such activity, the officer should tell the individuals that they must stop photographing/filming and must have management permission prior to photographing or filming. Officers should not over react if the media does not stop as requested. Do nothing to escalate a situation and provoke a confrontation. Officers should not attempt to cover the camera lens or block a reporter; these actions only escalate the situation. Site personnel should make no comments other than the above and shall defer any inquiries concerning our security to the ERM C corporate office.

MEDIA SPOKESPERSON

The Property Manager and/or Marketing Director are typically the only persons authorized to represent the property owner to the media. Officers should refer all requests from the media to the management office.

MEDICAL EMERGENCIES

Security officers are often called to respond to varying types of medical emergencies. Officers should be prepared to respond in a professional and competent manner. It is important to behave in such a way as to instill confidence in those who are being assisted. The safety of the officer is also important and no officer will be required to perform first aid. When responding to a medical emergency an officer should put on latex protective gloves prior to any contact with the injured individual, regardless of whether blood is visibly present. If necessary the officer should notify the dispatch/management office to call 911 and request the

paramedics. Officers who have the appropriate training should begin first aid and/or CPR and the use of AED, (Automated External Defibrillator) awaiting the arrival of the paramedics

NO SECURITY PERSONNEL SHOULD ADMINISTER FIRST AID WITHOUT THE APPROPRIATE SAFETY EQUIPMENT

Employees exposed to any body fluid (body fluids most commonly encountered are blood, saliva or semen) while on duty should be referred to the medical facility designated by the ERM C. Employees are required to follow all OSHA guidelines regarding Blood Borne Pathogens that are applicable to the company.

NOTIFICATION PROCESS

It is important that potentially serious situations be reported as soon as possible. The following are the types of situations, which should be reported:

The on-duty supervisor should be notified if any of the following are observed:

- ◆ Suspicious individuals, driving or loitering in the parking area.
- ◆ Tow vehicles not called by security personnel.
- ◆ Pre-teen children or animals left unattended in a vehicle for any period of time.

The ERM C Security or Operations Director should be contacted immediately and based upon the circumstances should contact Property Management

personnel when any of the following circumstances exist:

- ♦ Any individual is taken into custody by ERM security.
- ♦ Any use of physical force by a security officer.
- ♦ Any physical injury to a security officer requiring medical attention.
- ♦ Any officer requesting assistance from the local law enforcement, fire department or paramedics, which may lead to media or merchant inquiries.
- ♦ Any altercation involving known or suspected gang members.
- ♦ Any injury, which results in the hospitalization or death of a customer, merchant or employee.
- ♦ Complaints against officers alleging excessive force, harassment or illegal activity.
- ♦ Suspected workplace violence.
- ♦ Contact with hazardous material including body fluids.
- ♦ Emergencies and violent crimes of any nature, which occur on property.

It is the responsibility of the ERM Security or Operations Director to notify ERM Regional and Corporate personnel regarding situations which may result in media inquiries, merchant or customer inquiries or litigation. Any death on the property regardless of the circumstances must be reported immediately to a corporate representative.

PHOTOGRAPHS

The taking of photographs is authorized as follows: (1) Individuals subject to a ban notice. (2) Pursuant to an official investigation by the security department. (3) As directed by ERM corporate. All photographs and/or videos, taken in the course of duty, are property of

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ERM and may not be used, copied or disseminated in any manner not authorized by the corporate office.

POWERS OF ARREST

Security guard powers of arrest vary from state to state. The security director at each site is responsible for knowing and training officers on the appropriate state law. Under certain circumstances it may be necessary for a security officer to make an arrest. A security officer generally has the same powers of arrest as does an ordinary citizen. In most states, an ordinary citizen may arrest another person for an offense that constitutes a misdemeanor or felony which was committed or attempted in his/her presence. That is, you are a witness to the crime. If someone just told you someone else did something wrong, you cannot arrest them unless there is an outstanding warrant for the arrest of that person for a theft constitutes a felony. You can follow a lawful order of a police officers in assisting law enforcement, but under no circumstances can you utilize any more force that is necessary to effectual the arrest. Do not chase shoplifters or other crime violators through the mall property. You can follow such individuals and obtain information which will assist the police in undergoing lawful arrest.

SEARCH INCIDENT TO AN ARREST

ERM employees are prohibited from conducting any searches outside the scope of a "pat down" for personal safety after an arrest has been made. Officers are authorized to "pat down" individuals of the same sex after an arrest has been made. The "pat down" is only for weapons, which may be within reach of the subject. A "pat down" is conducted on the outside of clothing. Personal items of persons being arrested, such as bags,

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purses, or other items, should not be searched and should be removed from the immediate control of the arrested individual. Vehicles should not be searched. Searches for stolen property located in purses, bags, etc. should be left to the person who witnessed the crime or police authorities.

SLIP AND FALLS

All accidents, which involve personal injury or property damage, should be reported on the ERMCC Accidental Injury/Property Damage report form and forwarded to the corporate office, attention Risk Department. When responding to an accident involving injury, try to assess those injured and offer to call the paramedics. If trained, offer first aid assistance. If the person is unconscious or incoherent call the paramedics immediately. Take notes, record any comments and/or statements made by the injured person regarding the cause of the accident. Observe the type of shoes the injured person is wearing and include the type of sole and the condition. Note any cracks, liquid or food spilled on the floor. Take photographs of the area and any contributing causes to the accident. Locate any witnesses to the accident or fall. Do not speculate or guess as to the cause of any accident. Include only the facts in the report and obtain the name, address and phone number of any witnesses. Ask the individual involved to complete a Personal Statement Form. Refer all questions regarding payment or insurance to the ERMCC Corporate Office. Do not refer to an injured party as the "victim". Be considerate at all times, but do not make statements regarding fault, payment of medical or other expenses or prior experience. Refer any inquiries from the injured person and /or their family

members to the ERMCC Risk Department. Check for any video of the accident and preserve it.

SOLICITING

Soliciting funds for any purpose is not allowed on client property without written approval of the Property Manager and individuals violating this policy will be directed to cease the activity.

TRESPASS

No one should be arrested for trespassing unless the following conditions are satisfied: The individual has been banned from the center and has violated the ban. See section on Ban Notices

The individual is actively involved in illegal or unauthorized activity* and AFTER having been asked to leave the property and having the trespass law explained, fails or refuses to leave. Contact the police and if necessary have the individual arrested. Do not attempt to arrest someone for trespassing. Leave that up to the police.

Unauthorized activity is behavior in violation of the center Code of Conduct.

SECTION SEVEN

JUVENILES

Behavior which violates the center's code of conduct or which is unlawful is a legitimate reason to ask an individual to leave the center, regardless of their age. The laws of arrest pertain to juveniles as well as adults. Always attempt to notify a parent of a juvenile that has been arrested at your center. Juveniles can present

challenging situations to the most trained officer and always require calm, deliberate and thoughtful response. Remember the old saying about "sticks and stones". If available two officers or other employees should be with the juvenile at all times. If a female juvenile is involved, a female employee, if available, should be assigned to remain with the juvenile.

TRUANCY

Juveniles with or without adult supervision should not be questioned about their school attendance nor should they be barred from the center unless their specific behavior warrants such action. This does not preclude the questioning of unaccompanied pre-teens by security personnel. Preteen children may be questioned as to their status, "Where are your parents?" "How did you get to the center?" etc.

UNATTENDED CHILDREN

Officers will immediately contact local law enforcement if children under the age of twelve (12) are found unattended in a vehicle or unaccompanied on the property. Officers will stand by until law enforcement or a responsible parent arrives to take custody of the child.

SECTION EIGHT

EMERGENCY RESPONSE

LIFE SHOULD NOT BE RISKED TO PROTECT PROPERTY

Emergencies cannot always be predicted, but the response to emergencies can be planned. Each property should have specific plans regarding the procedures to be implemented. During an emergency remain calm and follow the

instructions of your Security Director or other designated supervisors. ERM C employees should provide accurate data on damage and injury and remain observant to a changing situation.

Security officers should be familiar with the evacuation plans for the center and the designated assembly points.

SECTION NINE

REPORT TYPES

The following are standard reports used within ERM C. Any variance or use of additional forms must have the approval of the VP Corporate Security, Legal Department and/or HR. Samples of all reports/forms are included here.

ACCIDENTAL INJURY/PROPERTY DAMAGE

This form should be completed whenever there is an injury, claim of injury or property damage over \$50 to ERM C or customer property. A copy of this report must be forwarded to the corporate office within 24 hours.

BAN NOTICE

This will be completed whenever an individual is banned from the property. A copy will be provided to the individual, a copy will be maintained at security headquarters, and a copy will be forwarded to the local law enforcement agency that supports the property. If the banned individual is a juvenile, a copy of the notice should be sent to the parents or guardian.

BOMB THREAT CHECK LIST

Individuals who receive a bomb threat via phone will complete this form. The form will be readily available to all employees.

DAILY ACTIVITY REPORT (SECURITY OFFICER'S)

This report serves as a permanent record of the officer's activity. It also serves to alert management to items/situations requiring attention. Officers will complete their shift report before leaving the worksite and the end of a shift.

DAILY DISPATCH LOG

This report serves as a permanent record of the security department's activity. The officer(s) assigned to the dispatch center will record all calls received and the assignment of officers.

DAILY SECURITY CHECKLIST

This report serves as a checklist for all critical daily security functions.

INCIDENT REPORT

This report will be prepared for any incident where there is an actual or suspected damage to property, loss of property, bodily injury or an unlawful action.

LIABILITY RELEASE

This form will be completed whenever assistance is provided to a customer and the assistance has the potential for damage.

Do not assist mall patrons and tenants in unlocking their vehicle or jump start their vehicle unless they have signed a waiver of liability and you can do so without risking damaging person or property. ERM employees shall at no time take as their own, property and property reported as lost. Disposal of lost property shall be according to ERM issued guidelines.

LOST AND FOUND REPORT

This is to be completed in full by the officer taking possession of or releasing property. All found property, money, credit cards, jewelry or other items of value will be verified by two officers and turned over to the Mall manager to be locked in a secure location. Other found items will be secured in a locker or storage. The Lost and Found report will also be used when individuals are reporting lost items.

PERSONAL STATEMENT

This form provides an opportunity for individuals to make a statement regarding an incident or other situation occurring at the property. It may also be used to report incidents of harassment or other employee issues. All issues involving claims of harassment must be reported to the Corporate Human Resources Department at once and in writing.

VEHICLE CHECK LIST

Each mobile officer prior to taking possession of the vehicle will prepare this report. The inspection log will be attached to the officer's daily activity report.

VEHICLE WARNING

This will be placed on vehicles parked on the property overnight. On the second consecutive night the vehicle

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EMERGENCY CONTACT LIST

In the event of an emergency, the contact order will be followed in this sequence. Each individual on this list will be responsible for contacting the person or persons in their designated group. Continue down the list until you reach a live person. Do not stop with recorded messages.

Group 1: Dispatch and/or Security Supervisor will contact:

911 Director of Security
Corporate office # 423-899-2753
Cell# _____

Group 2: Director of Security will contact:

1. Director of Operation # _____
2. Mall Manager # _____
3. VP ERM Security Corporate # (423) 899-2753

Director of Operations

Regional ERM Manager # _____

General Manager # _____

Regional Mall Manager # _____

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Additional personnel will be called as needed under the direction of the Director of Security and the Director of Operations.

Any incident involving personal injury, property damage in excess of \$50.00, and arrest/detention of individual shall also be reported within 24 hours to the Corporate Risk Department.

EMERGENCY ORGANIZATIONS

1. FBI # _____
2. Poison Control - 1-800-288-9999
3. Fire Department - # _____
4. Police: # _____
5. Toxic Chemical and Oil Spill
1-800-868-3300
6. Hospitals: _____
7. Storm Water Maintenance: # _____
8. Electric Power: # _____
9. Red Cross: # _____

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MALL SEARCH PROCEDURES

PURPOSE

The purpose of the mall search procedures is to organize ERMCM personnel to systematically look for any possible foreign or unknown objects and/or substances on mall property.

PROCEDURE

The Security Supervisor or Supervisor on duty will assemble all ERMCM personnel on duty and have them assist in the search, instructing them not to pick up any unidentified object that is suspected of containing an explosive or biological agent. When searching the mall, officers and maintenance staff will search in groups of two. If a suspicious object is found, one staff member will stay with the object while the other goes to inform security. When conducting a search through mall stores, only the employees of that store will do the search. Advise all staff and/or store employees that any suspicious item is not to be moved or touched by anyone. LEAVE IT ALONE. Advise Authorities of any location with suspicious objects.

Areas that should be searched for Explosives: (Do not enter an area unless you have received appropriate training.)

- A. All lockers in the area
- B. Electric rooms and water rooms
- C. Corridor areas
- D. Elevator shafts and pit
- E. Restrooms
- F. Access doors and crawl spaces in restrooms
- G. Plumbing fixtures

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- H. Electrical fixtures
- I. Utility and other closets
- J. Areas under stairwells
- K. Fire hose racks
- L. Indoor trash receptacles
- M. Mail rooms
- N. Ceiling lights with easily removable panels
- O. All ceiling areas
- P. Mall roof
- Q. Backpacks, abandoned packages, etc.

Search areas that are especially sensitive to biological agents:

Do not conduct any searches for biological/chemical agents unless you have received appropriate training.

- A. All ventilation and air systems
- B. All Mail receiving points
(Mall stores and Mall offices)

What to look for when searching for Packages and Letters:

- Excessive postage
- Handwritten or poorly typed addresses
- Incorrect titles
- Title, but no name
- Misspellings of common words
- Oily stains, discoloration or odor
- No return address
- Excessive weight
- Lopsided or uneven envelope

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Protruding wires or aluminum foil
Excessive security material such as masking tape, string, etc.

Visual distractions

Notes:

EVACUATION PROCEDURES:

PURPOSE

The purpose of this evacuation procedure is for the safe, orderly and expedient removal of customers and employees from the mall. This may include a partial or complete evacuation.

PROCEDURE

In the event an incident occurs at the mall, such as fire, bioterrorism, explosion, serious bomb threat, etc., which requires the evacuation of the Mall or part of the Mall, the Director of Security, Operations Director and the General Manager should be contacted immediately. Any evacuation will not be undertaken without the input from the General Manager or his/her designee unless circumstances are such that the safety of customers and employees warrants immediate action.

DISPATCH

- A. Once a serious incident occurs, dispatch should notify 911 immediately.
- B. Using the cameras, view the effected area and relay the information to 911 and the security supervisor.

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- C. Continue to monitor the situation using all resources available and follow the directions of the supervisor.
- D. Contact the Director of Security, Operations Director and Mall Manager.
- E. Continue to monitor both radio channels.
- F. Communicate via channel 1 with emergency responders.

SECURITY SUPERVISOR

- A. After receiving the information concerning the nature of the incident, decide whether he/she would be more effective responding to the scene or (if your mall has) the monitor room.
- B. Have all Mall employees switch to channel 2.
- C. Direct staff to areas where they are needed, including mobile units to respond inside, if necessary.
- D. If the order from the General Manager is given to evacuate part or the entire Mall, or if conditions warrant immediate action, the security supervisor will direct the evacuation.
- E. The security supervisor may use all materials available, such as the public address system located in the Director of Security's office, to assist in the evacuation.
- F. Contact the major department stores and inform their loss prevention personnel of the situation and the need for assistance, if necessary.
- G. Coordinate efforts with the local police and fire departments.

THE EVACUTATION

- A. Beginning at the incident, determine a priority for the evacuation, moving persons quickly from the danger area to safe exits or more secure locations.

- B. Advise merchants to secure their receipts and leave their businesses, directing them to the closest safe exit.
- C. Continue to remove people until the needed area has been cleared.
- D. Keep personnel at exits and corridors to keep customers and employees from reentering the danger area, using any ERM employee.
- E. Once outside, keep persons at safe distance away from the affected area.
- F. Assist handicapped persons as needed. * See handicap assistance
- G. Security and mall personnel shall make a complete and thorough search for disabled and/or handicap people and evacuate appropriately. *See handicap assistance
- H. The Security Supervisor will be responsible for documenting all issues, from incident to "all clear".
- I. The Security Supervisor will announce the "all clear" to all employees when it has been deemed safe inside the Mall.

*** HANDICAP ASSISTANCE**

In the event you are required to assist with mentally and physically challenged customers, you should make every effort to relocate them to a safe area. The Director of Security and Operations, Assistant Director of Security and Operations, and/or supervisor, will make a reasonable effort to verify that no person(s) are left behind in the facility that can be evacuated safely.

Announcement

"Ladies and Gentlemen, may I have your attention please. There is currently an emergency situation occurring in the (name of closest major) wing of the mall. Because of this situation, the Police

Department is asking everyone to leave the mall immediately using the closest exit. All stores are asked to secure their receipts and evacuate their spaces. Once the store has been completely evacuated, secure the space. Please ask any mall employee if you need assistance."

Repeat as often as necessary.

BIOTERRORISM

PROCEDURE

Bioterrorism at your mall will be handled in accordance with the local health advisory and the guidelines set forth here by the Security Director. Be aware that the following steps are subject to change and are not meant to be inconclusive.

Type 1 - Threat by Phone:

A. If the threat comes by phone follow this checklist:

1. What type of agent will be used?
2. How is the agent packaged?
3. Where is the package?
4. What does the package look like?
5. What will cause the agent to be released?
6. Why did you place this agent at the mall?
7. What is your address?
8. What is your name?

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B. Attempt to have someone else (on pre-arranged signal) quietly pick up an extension and listen to the conversation. However, only the person taking the original call should talk.

C. Notify the Mall Security Director, the Operations Director and the General Manager.

D. Security Director, or on duty security officer, will notify police and/ or fire department - depending on their assessment of the phone conversation, they may instruct the mall security staff to proceed with an investigation to determine the validity of the threat, or they may dispatch officers to the mall.

E. If ordered by the General Manager, Operations Director or Security Director to conduct a mall search. Follow the Mall Search Procedures established by the company. If a suspicious letter or package is found, go to the next step.

Type 2 - Suspicious Letters Marked with Threatening Messages:

A. Notify the Supervisor on duty. The Supervisor on duty will notify the Mall Security Director, Operations Director, the General Manager and the proper authorities.

B. Do not shake or empty the contents of any suspicious envelope or package.

C. Then LEAVE the room and CLOSE the door, or section off the area to prevent others from entering (i.e., keep others away).

D WASH your hands with soap and water to prevent spreading any powder to your face standby for further instructions.

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E The Security and/or Operations Director or ranking security/operation director will notify the authorities.
F It is strongly suggested that only the Mall Manager should order an evacuation. However, some emergencies require immediate evacuation. In the case of an evacuation, follow the **Evacuation Procedures** in this manual.

Type 3 - Envelope with Powder and Powder Spills out On Surface:

- A. Notify the Supervisor on duty. The Supervisor on duty will notify the Mall Security Director, Operations Director, the General Manager and the proper authorities.
- B. If an evacuation is ordered, follow the **Evacuation Procedures** found elsewhere in this manual.
- C. DO NOT try to CLEAN UP the powder. COVER the spilled contents immediately with anything (e.g., clothing, paper, trash can, etc.) and do not remove this cover!
- D. Then LEAVE the room and CLOSE the door, or section off the area to prevent others from entering.
- E. WASH your hands with Soap and water to prevent spreading any powder to your face.
- F. REMOVE heavily contaminated clothing as soon as possible and place in a plastic bag, or some other container that can be sealed. This clothing bag should be given to the emergency responders for proper handling.
- G. SHOWER with soap and water as soon as possible. Do not use bleach or other disinfectant on your skin.
- H. If possible, list all people who were in the room or area, especially those who had actual contact with the powder. Give this list to both the local public health

authorities so that proper instructions can be given for medical follow-up, and to law enforcement officials for further investigation.

Type 4 - Room or Facility Contaminated by Aerosol.

- A. Notify the Supervisor on duty. The Supervisor on duty will notify the Mall Security Director, Operations Director, the General Manager and the proper authorities.
- B. If an evacuation is ordered, follow the **Evacuation Procedures** found elsewhere in this manual.
- C. Notify Maintenance to assist in turning off local fans and air handling system in the building.
- D. LEAVE area immediately.
- E. If possible, list all people who were in the room or area. Give this list to both the local public health authorities so that proper instructions can be given for medical follow-up, and to law enforcement officials for further investigation.

TERRORIST ATTACK

The following procedure will utilize the **Fire and Emergency Services Preparedness Guide for the Homeland Security Advisory System**.

In addition, any strategies and/or plans developed on terrorist attacks in collaboration between the mall and any local, state and/or federal law enforcement agencies shall supersede the following evacuation procedures.

PROCEDURE

In the event of a terrorist attack at the mall, such as fire, Bioterrorism, explosion, serious bomb threat, etc., which requires the evacuation of the Mall, the Director of Security, Operations Director and the General Manager should be contacted immediately. Any evacuation will not be undertaken without the input from the General Manager or his/her designee unless circumstances are such that the safety of customers and employees warrants immediate action.

DISPATCH

- A. Once a serious incident occurs, dispatch should notify 911 immediately.
- B. If the mall is equipped with a CCTV system, view that affected area and relay the information to 911 and the security supervisor.
- C. Continue to monitor the situation using all resources available and follow the directions of the Supervisor.
- D. Contact the Director of Security, Operations Director and Mall Manager.
- E. Continue to monitor all radio channels.
- F. Communicate via channel 1 with emergency responders.

SECURITY SUPERVISOR

- A. After receiving the information concerning the nature of the incident, decide whether he/she would be more effective responding to the scene or (if your mall has) the monitor room.
- B. Make the protocol calls to the ERM Corp Team
- C. Have all Mall employees switch to channel 2.

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D. Direct staff to areas where they are needed, including mobile units to respond inside, if necessary.

E. If the order from the General Manager is given to evacuate the entire Mall, or if conditions warrant immediate action, the Security Supervisor will direct the evacuation.

F. The Security Supervisor may use all materials available, such as the public address system and/or dispatcher located within the Customer Service Area, Mall Managers' office and/or Director of Security's office, to assist in the evacuation.

G. Contact the major department stores and inform their loss prevention personnel of the situation and the need for assistance.

H. Coordinate efforts with the local police and fire departments.

EVACUATION

Follow evacuation procedures found elsewhere in this manual.

FIRE/EXPLOSION PROCEDURES

Life will never be risked to protect property.

PROCEDURE

Dispatch

- A. Once notified of a fire or explosion at the mall by radio, alarm/strobes, or camera, dispatch will immediately call 911.
- B. While calling 911, the dispatcher will use the camera and monitors to locate the problem area and relay all

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information to the 911 dispatcher and our Security Supervisor.

C. Start emergency calling procedures.

D. Dispatch will also contact the major loss prevention groups by phone and advise them of the situation and the need for assistance, if necessary.

E. If evacuation is needed, refer to the **Evacuation Procedure** found elsewhere in this manual.

F. Continue to monitor the scene and assist Security Supervisor as needed.

Fire or Explosion in Mall Office or Monitoring Room

A. Dispatcher will radio supervisor and have them call 911 and start the emergency calling procedures.

B. Monitoring room officer will grab his/her mobile radio and assist office personnel in evacuation procedures.

Security Supervisor

A. The Security Supervisor will immediately respond to the scene of the fire/ explosion to evaluate the scene.

B. All injured PARTIES will be treated and a triage area will be set up in a safe area, if needed

C. If a partial or complete evacuation of the Mall is needed, the Security Supervisor will direct the evacuation (see **Evacuation Procedure** found elsewhere in this manual).

D. Communicate with emergency responders and relay needed information to dispatch.

E. Direct Employees as needed.

F. The Security Supervisor will act as liaison with the responding members of the Police Department and the Fire Department.

G. Document all issues of the incident.

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H. The Security Supervisor will be responsible for notifying all employees of the "all clear" after conferring with the police and fire departments.

PROCEDURE

A. Beginning at the scene determine a priority of needs. If an evacuation is called for, refer to the **Evacuation Procedures** in this manual.

B. Assist any injured person.

C. Establish a triage area in a safe location and notify all emergency responders.

D. Secure area inside the Mall using any ERM employee's to stop any reentry to area.

E. Secure parking lot around emergency vehicles.

F. Assist firefighters and police officers as needed.

G. Assist all handicapped persons as needed. Security and mall personnel shall make a complete and thorough search for disabled and/or handicap person (s) and evacuate appropriately. See handicap elsewhere in this manual.

EARTHQUAKE PROCEDURES

PROCEDURE

Notify the Security Director immediately. The Security Director will notify the Operations Director and the General Manager. Respond to injuries of customers and or employees of the mall. Inspection of property by security and maintenance. Look for any structural damage, such as, cracked walls/ceilings, cracked/broken windows, loose or hanging wires, unusual odors, leaking pipes, etc.

Inspection log completed. (Use a blank Activity Log)

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OPERATIONS DIRECTOR

The Operations Director under the guidance of the Mall Manager will issue an evacuation of the mall. However, under extreme conditions the decision to evacuate may fall to either the Operations Director or his subordinates.

DISPATCH:

- A. Immediately check in with Security Supervisor to account for your safety and his/hers.
- B. View monitors to check for structural damage, employee and customer injuries.
- C. Log time of quake and monitor radio that is in the mall office. Gather such information as to the epicenter, Richter scale measurement, etc.
- D. If a local police officer is available and has not been activated to duty, have officer monitor police channels.
- E. Report information to the Security Supervisor.
- F. Activate the Emergency Contact Procedures, found elsewhere in this manual.

SECURITY SUPERVISOR:

- A. Have all officers/maintenance "check-in" so that you know that all personnel are safe and are accounted for.
- B. Have personnel search interior and exterior of the mall for injuries and obvious structural damage.
- C. If injuries are found, make sure injured are clear of any danger and begin first aid. Radio dispatch to call for EMS. (Expect possible delay due to emergency priorities.)
- D. If the Operations Director cannot be reached during non-mall hours, and it is deemed necessary by emergency personnel (e.g. the fire department, etc.) to evacuate the mall to insure public safety, then the Security Supervisor is cleared to begin evacuation

procedures. Determine safe area based upon the least area affected or will be affected by earthquake/after shocks.

- E. While injured are being helped, excess officers and maintenance will continue to look for structural damages. Document any findings.
 - F. Remember that after shocks will occur and may cause damage to an already weakened structure.
- BE CAREFUL!**

Bomb Threat Procedures

Receiving the Call

- A. Keep the caller on the line as long as possible. **Remain calm and listen carefully.** Note which line the call is on. Using the bomb threat checklist, (All mall office employees should have a check list at his/her desk) ask the caller the series of questions listed on the form.
- B. As soon as the caller hangs up, use *69 on the same line and document the information received. It is very important to get the information before another call comes in on that line.
- C. Go into the monitoring room and inform Security of the threat and all information from *69.

The officer in the monitoring room will do the report. The officer in the monitoring room will also check the pay phone numbers listed below. If a match occurs, cameras should be positioned immediately at the proper location.

Pay Phone List

Food Court _____

Tenant Locations _____

Cinema _____

Entrance _____

Other Locations _____

D. Dispatch will then notify the Security Supervisor on duty of the situation by using the proper code for a bomb threat. The Security Supervisor will then respond to the mall office.

E. The Security Supervisor will contact the Director of Security/Assistant Security director as soon as possible to give him/her all of the information that is available at the time.

F. The Security Director will then notify the Mall Manager and the director of Operations of the situation. Further actions will be conducted under the guidance/direction of the Mall Manager.

The Search

Based on information gathered to this point and after consultation with the management staff, a search of the mall may be in order. If the mall management decides to search the mall, follow the Mall Search Procedures found elsewhere in this manual. Evacuation If an object is found and the Mall Manager has issued an evacuation of the mall, follow the Evacuation Procedures found elsewhere in this manual.

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Remember it is the decision of the Mall Manager as to the size and the extent of an evacuation.

If an Explosion Occurs:

Follow the Fire/Explosion Procedures found elsewhere in this manual.

Lost Child Procedure

PROCEDURE

Parents Need Assistance

Awareness: (Party contacts a security/police officer)

A Security/police officer will gather information of last known location and description (age, sex, ethnic origin, hair color, height, and type and color of clothes) of child.

B. The security and police officer will then "Break Traffic" and send out last known location and description of child to all officers.

C. The monitor room will immediately scan all anchor store entrances for child. (Inside and out)

Search: (internal and external building search)

A. The Security Supervisor will now assume search procedures.

B. Inside security and police officers will pay careful attention to exit areas as well as corridors in their assigned zones.

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C. One of our outside mobile units will report to parking area in which the party's car is located. He/she will then search the car for the missing child. If child is not found he/she will continue to patrol the immediate area while the other mobiles searches the rest of the property.

Time Sensitive Procedures:
(Child not found within 5 minutes)

A. Security Supervisor will contact Customer Service and have all stores inside the mall notified of the lost child and given description.

B. Security and police personnel will begin store-to-store searches within the mall.

NOTE: If child is not found, then local law enforcement will take over.

Child Needs Assistance

If a child needs assistance the child is immediately taken to the customer service booth to have his/her parent(s) paged. A description of the parents is communicated to all security and police personnel. Once the parents are found they are asked to go to the customer service booth to be reunited with their child.

When a child is too young or unable to talk or cannot speak English, the child shall be brought to the customer service booth and kept there until the parents are found.

NOTE: If the parents are not found before the mall closes, notify the police.

SAFETY TIPS TO GIVE PARENTS

1. Ensure your child knows his/her name including the parents.
2. Make sure your child knows his/her phone number.
3. Have a designated meeting place in case you separate.
4. Inform your child to go to the nearest police or security officer if they become lost.
5. Park in well lit areas.
6. Stay alert at all times and pay attention to your surroundings.
7. Don't overload yourself with packages.
8. Keep your doors locked and all packages in your trunk or underneath a blanket.
9. Have your keys ready before you get to your vehicle.
10. Once inside your vehicle always lock your doors.

Tornado/Severe Weather Procedures

Life will never be risked to protect property.

PROCEDURE

In the event of severe weather, the following procedures shall be followed:

Dispatch

- A. The security dispatcher on duty will monitor weather information when the National Weather Service for the area issues severe weather or tornado warnings/watches.
- B. The dispatcher will notify the Security Supervisor of all such warnings/watches that might include the mall.
- C. Dispatch will also monitor weather conditions using the outside cameras as needed.
- D. The Dispatcher will continue to monitor the weather.

Security Supervisor

- A. If dangerous weather is forecasted, all officers will be notified of the existing weather conditions.
- B. All employees will respond as directed by the Security Supervisor.

Procedure

- A. Security officers assigned to patrolling the parking lots will keep watch until such time they feel it is necessary to move inside the facility or they are directed to do so by their supervisor.
- B. After consultation with the Mall Manager, the Director of Operations or the Director of Security, the Security Supervisor or his/her designee will make the proper announcement (see Announcements at the end of this section) using the intercom system at customer service.
- C. All security officers and other Mall employees will immediately begin moving customers and employees away from windows and to the designated "safe areas" inside the Mall. Customers are to be urged to remain in the safe area; however, no customer will be forced to remain on Mall property. All employees are to remain in these areas until notified by the Security Supervisor of the "all clear". (The designated "safe areas" are any corridor area.)
- D. In the event of any injuries to employees or customers, the proper emergency responders will be contacted by dispatch. In the event of any injuries or damage to Mall property, the General Manager, Director of Marketing, Director of Operations, the Director of Security and the Director of Maintenance will be notified.

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E. If damage or injuries occur and after they have been properly dealt with, refer to the ERM Security Manual for corporate contacts that are to be notified.

F. The Director of Marketing will be kept abreast of all situations and any media inquiries should be directed to him/her.

G. In the event of a prolonged power outage and at the discretion of the General Manager or his/her designee, the Mall generator will be used to power designated areas in the Administration office.

H. Extra radios will be assigned on an "as need" basis by the Director of Security.

ANNOUNCEMENTS

"Ladies and gentleman, may I have your attention please. Due to the severe weather conditions, the mall management is asking everyone to move to the nearest corridor location. We ask that no one leave the Mall at this time. We are monitoring the National Weather Radio and will notify everyone when the severe weather has passed. Thank you." (Repeat)

SPRINKLER FLOODING PROCEDURE

PROCEDURE

In the event a sprinkler head accidentally discharges, the following procedure shall be followed.

Security Supervisor

- A. When notified that a sprinkler head has accidentally discharged immediately contact the mobile unit to respond to the appropriate Riser Room to shut down the system. Make sure that another officer is notified to keep a visual of the area that is being flooded. The

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Security Supervisor will respond first to Compactor area to check the Enunciator Box to make sure that the appropriate light for that sprinkler zone has been triggered. Then the Security Supervisor will respond to the scene of the discharge to oversee clean up.

B. Contact the maintenance staff immediately giving them the exact location of the discharge. The maintenance staff will respond to the scene with all available equipment, such as wet vacs and the Kava system, to handle the clean up.

C. If the maintenance staff is not on property at the time of the discharge, the Maintenance Director will be notified as soon as possible.

D. After the system has been shut down and the clean up has begun, the Security Director should be notified and given details about the sprinkler head discharge.

E. The Security Supervisor, naming all persons and companies involved, will make a detailed report.

F. If the sprinkler head discharge occurs inside a tenant space, the same procedure applies. If the store is closed and secure, the system should be immediately shut down to stop the flow of water and the store management notified to respond as soon as possible. If no one can respond, the local fire department should be contacted to gain entry into the space. If this occurs, cameras should be positioned on the store entrances to record all activity.

System Shut Down

A. Go to the riser room that controls the effected sprinkler zone. The riser rooms and their numbers, for example, might be identified as follows:

- a. Riser room at 106 - Controls zones 1, 2, 3
- b. Riser room at 108 - Controls zones 4, 5, 6

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c. Riser room at 109 - Controls zones 7, 8, 9

d. Riser room at 105 - Controls zones 10, 11, 12

e. Riser room at 103 - Controls zones 13, 14, 15

B. Once at the correct riser room you will first turn off the outside RED Wheel that will be numbered for the correct sprinkler zone. Use the small key that is marked with the white tape to unlock the chains.

C. Next, go inside the Riser Room Using the Key Marked "Riser Room". Once inside, turn off the Large Yellow Wheel at the bottom of the pipes.

D. Next, Look up and turn off the Small Blue wheel that will be numbered for the corresponding sprinkler zone.

GLOSSARY

(Abridged definitions of commonly used legal terms).

Note: Many terms have multiple applications according to the contextual usage.

Assault:

Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do. Frequently used to describe illegal force that is technically a battery.

Assault & Battery:

Any unlawful touching of another, which is without justification or excuse. It is both a tort, as well as a crime.

Auto Theft:

The taking and carrying away of a motor vehicle from the owner or possessor with intent to deprive him permanently of it.

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Bad Check:

A check which is dishonored on presentation for payment because of no, or insufficient funds or closed bank account.

Ban; Bar from Property (see private property, criminal trespass):

That which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. More specifically, ownership; the unrestricted an exclusive right to thing; the right to dispose of a thing in every legal way, to possess it, to use it and to exclude every one else from interfering with it.

Criminal Trespass:

Criminal trespass is entering or remaining upon or in any land, structure, vehicle, aircraft or watercraft by one who knows he is not authorized or privileged to do so; and (a) he enters or remains therein in defiance of an order not to enter or to leave such premises or property personally communicated to him by owner thereof or other authorized person.

Breaking & Entry:

Terms used to describe the necessary elements of common law burglary, which consisted of breaking and dwelling of another in nighttime with intent to commit a felony therein.

Burglary:

A person is guilty of burglary if he enters a building or occupied structure, or unoccupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises

are at the time, open to the public or the actor is licensed or privileged to enter:

Care:

Watchful attention; concern; custody; diligence; discretion; caution; opposite of negligence or carelessness; prudence; regard; preservation; security; support; vigilance; in the law negligence, amount of care demanded by the standard or reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it.

Common Law:

Law found in the decisions of the courts rather than in statutes; judge-made law.

Disorderly Conduct:

An act that breaches the peace, grossly offends public morality, or endangers public safety or public health.

Due Diligence:

Vigilant activity; attentiveness; or care, of which there are infinite shades. The attention and care required of a person in a given situation and is the opposite of negligence.

Due Care:

The degree of care which a person of ordinary prudence would exercise in similar circumstances.

Felony vs. Misdemeanor:**Felony:**

A crime of more serious nature than those designated as misdemeanors; e.g., aggravated assault (felony) as

contrasted with simple assault (misdemeanor). Under many state statutes, any offense punishable by death or imprisonment for a term exceeding one year.

Misdemeanor:

Offenses lower than felonies and generally those punishable by fine, penalty, forfeiture or imprisonment otherwise than in penitentiary. Under federal law, and most state laws, any offense other than a felony is classified as a misdemeanor.

Forgery:

The false making or the material altering of a document with the intent to defraud. A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he/she is facilitating a fraud or injury to be perpetrated by anyone, the actor.

Fraud:

Deceit, deception, or trickery that is intended to induce, and does induce, another to part with anything of value, or surrender some legal right.

Harassment:

A person commits a petty misdemeanor if, with purpose to harass another, he/she: makes a telephone call without purpose of legitimate communication; or (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly responses; or (3) makes repeated communication anonymously or at extremely inconvenient hours, or inoffensively course language; or (4) subjects another to an offensive touching; or (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.

Indecent Exposure:

Exposing one's private parts in a manner, and at a time and place, which is offensive to public decency.

Intoxication:

A substance-induced impairment of a person's judgment or sense of responsibility due to the use of alcohol, drugs, or other substances.

Legal Negligence:

The failure to do something that a reasonable person would do in the same situation or the doing of something a reasonable person would not do. A wrong generally occurring due to carelessness, not paying attention, and neglectfulness rather than intent to cause injury.

Liability:

An obligation one is bound in law or justice to perform.

Robbery:

Felonious taking of money, personal property, or any other article of value, in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Shoplifting:

Larceny of merchandise from a store or business establishment. Essential constituents of "shoplifting" are (1) willfully taking possession of merchandise offered for sale in mercantile establishment, (2) with intention of converting merchandise to taker's own use without paying purchase price.

Subpoena:

A subpoena is a command to appear at a certain time and place to give testimony upon a certain matter and/or requires production of books, papers and other things.

Theft:

A popular name for larceny. The act of stealing. The taking of property without the owner's consent. The fraudulent taking of personal property belonging to another, from his possession, or from the possession of some person holding the same for him/her, with out his/her consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

Vandalism:

Such willful or malicious acts as are intended to damage or destroy property. Willful or ignorant destruction of property of another, commonly referring to artistic or literary treasures. Vandalism connotes act of vandal and in ordinary usage is destruction of property generally.

yep

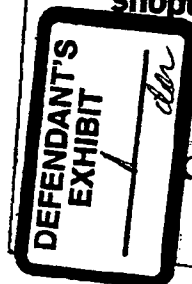
youth escort policy

who:
shoppers under
18 years

what:
must be accompanied by
a parent, or guardian
21 years or older

when:
fridays and saturdays
5 pm till close

where:
see details here or
shopcolumbiaplace.com



COLUMBIA
PLACE

attention parents:



**Columbia Place
Youth Escort Policy
Fridays and Saturdays
5 pm until close**

1. Columbia Place visitors under 18 are required to be accompanied by a parent, or guardian 21 years or older, on Friday and Saturday evenings after 5 pm.
2. Security will begin monitoring those entering the property at 5 pm on Friday and Saturday evenings.
3. Unescorted youth shopping prior to 5 pm on Friday and Saturday evenings must leave the property by 5 pm or be joined by a parent, or guardian 21 years or older.
4. Unescorted youth will be asked to leave the property after 5 pm on Fridays and Saturdays.
5. Individuals utilizing public or other forms of transportation on Friday or Saturday night must schedule their departure time to ensure compliance with the Youth Escort Policy.
6. Any person violating the posted Youth Escort Policy or Code of Conduct will be asked to leave the property.
7. Individuals in violation of the Youth Escort Policy or in violation of any posted rules who refuse to leave the property when requested to do so by security officers may be prosecuted for trespassing.
8. Proof of age will be required if the age of the youth and/or parent(s) or guardian is not easily determined. Those whose age cannot be determined and who lack identification will be asked to leave the property.
9. Anyone appearing to be 18 years or younger should be prepared to show valid identification (with picture and date of birth). Acceptable identification includes a driver's license, state or military identification card, passport or visa.
10. Youth under 18 working on property will be allowed access without a parent, or guardian. Proof of work status will be required, and youth employees must go directly to the place of employment and must leave the property at the conclusion of their work shift if the shift ends after 5 pm on Friday and/or Saturday evenings.
11. One parent, 18 years or older, may escort all of his/her children. Additionally, one parent, or guardian 21 years or older, may escort up to three youths. At least one of these youths must be the child of the parent or guardian.
12. Parents or guardians are accountable for the actions of youth they escort.
13. If an escorted youth is banned from the center, the adult escort will also be banned for the same period of time.
14. Security personnel are responsible for enforcing this policy and related procedures.
15. The Youth Escort Policy is posted at all mall entrances.

Thank you for your cooperation.

Effective April 23, 2004

PERSONAL STATEMENT

Make two copies, 1-individual making the statement 2-security

Name: LEAH H. Thompson

Address: 7201 Ten Notch Rd (Columbia Place)

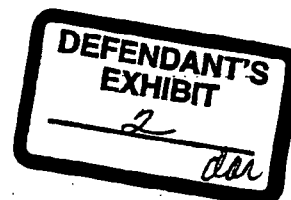
Phone: _____

Date: 19 JANUARY 2008

I, Officer Leah Thompson, was going to work Lower Level Center Court the evening of January 19, 2008. At 1100 hrs we start enforcing the Youth Exclusion Policy. Two young ladies came out of Billiards so I asked them if they were aware of the policy. They didn't know so I let them know. The young lady in the white jacket began to get an attitude so I informed her that since the other young lady wasn't of age that she couldn't stay in the mall. The young lady in the white jacket started shouting at me so I asked her to leave for the evening and not return. They started walking away before I could get Officer Mullins to escort them out of the mall. When Sgt. Parish called me and asked where they were I asked and what entrance they were supposed to exit at and I informed him of the entrance.

Signature: Leah Thompson

Date: 19 Jan 08



PERSONAL STATEMENT

Make two copies. 1-individual making the statement 2-security

Name: Sgt P. Creek
Address: _____
Phone: _____
Date: 1/19/08

On 1/19/08 @ approximately 5:15 respond to very loud profanity yelling. Officer saw a female Portuguese, resisting arrest by officers once for once I observe the female wearing white jacket being very obstinate. I explained if she would calm down maybe we would be able to help her. She began yelling why did we stop them not the other black bitches that were passing by. At this point she had drawn a cloud with cursing & very obscene profanity. The officers proceed to escort both women to nearest police station. Once there myself and Officer Navarro began to talk to her to calm down. While explaining to her the policy & why she was stop. She began to state that we stopped her because of her race. The arresting officer began all necessary paperwork while I & Sgt Creek being only female officers there searched her & property.

DEFENDANT'S
EXHIBIT

4

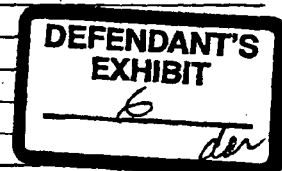
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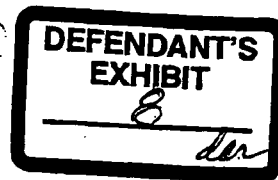
PERSONAL STATEMENT

Make two copies, 1-individual making the statement 2-security

Name: GRIFFITH RICARDO
Address: Columbia place mall
Phone: 863 788 4676
Date: 19 JAN 07

On the even of 19 JAN 08 at 1730 I was
call to ASSET OFFICE PARISH with a problem
that he was having with a couple of Black
customer, as I was getting closer to them
I hear the officer stop to them, please
stop lady and they refuse to stop and they
start cuss and saying the only reason
that they were stop because they weren't
dark enough, then I was told to arrest
them and took them to place in the
mall area.





On Saturday January 19th 2008,
me (Lehua) and my sister (Neha)
needed to go to the mall. Our
intentions was to go to the
Columbia Mall to get a belt,
and look for boots/shoes. We
got to the mall. We parked
near Burlington Coat factory. We
went to Burlington Coat factory
and were looking around. I purchased
a belt from there at 16:34, so
we must have got to the mall
about 16:00. After Burlington Coat
factory we were walking around.
We went to Charlotte's purse and
stores. We then went

into Dillards and look around
in there for a while. as we
were coming out of Dillards (on
the side by Man Alive) a female,
black security guard approached
us w/ an attitude, and was
aggressive. she said that after
5:00 on sat/sun if your not
18 you couldn't be there. I ~~told~~
~~don~~ ask her why? she said that
is ~~it~~ was their policy. I said
okay well "we are going to
leave now," we then turned and
started walking away. She then
got loud and started yelling
and said i need to see your

ID'S. I said we are leaving, although she was being very loud and causing a bit of a scene. so I showed her my military ID. she took it out and looked at it. she then asked for my sisters ID and I told her shes w/ me and doesnt have ~~any~~ an ID. she said then you two need to leave and I told her that's exactly what we are trying to do. so me and noher proceeded to walk to air vehicle. we then got onto the escalator

and a black male security guard was following ~~at~~ two steps behind us. I said what are you doing? stop following us! were leaving! He then began to ~~say~~ make remarks. We kept on walking and then all of a sudden he assaulted me by grabbing my arm and my jacket. He began to twist on my jacket, which caused it damage, he stretched it out and also ~~at~~ made it dirty. At no time did he say i'm under arrest for anything. so when he assaulted me my response

(~~about~~ 30)
V.A.
Beard

Was, what are you doing? Get
off me? Let me go? etc. Me
and my sister kept walking
approximately a ^{distance} ~~1/4 mile~~ less
of a mile away 4 to 5 big
black ~~security~~ security guards
came up to us throwing us
against stores and windows. There
were being extremely rough and
hurting me. I ~~all~~ told the security
guards several times that they
were hurting me. My BlackJack
also got broken. (approximately \$300).
By this time there was a
huge scene of people watching.
The security guards kept

hurting my hands even after
I was handcuffed. They were
pushing us around. They then
took us to a ~~to the~~ office
near Old Navy and said we
were going to be arrested for
[Breach of Peace]. We both sat
there for about an hour or
more handcuffed. Then a different
female security came then and
began to act very unprofessional.
As I was talking to a county
sheriff, she kept jumping in and
trying to add comments. I would
describe her as loud, unprofessional,
and I believe the word was

be called ghetto. She then told me to stand up and to go into the next room because she needed to pat me down and search me. She told me to walk in the room first, she then assaulted me by pushing me in the back. She told me to spread my legs, ~~and then~~ (I had my hands cuffed behind my back), and I opened the door and said that someone else needed to be in there. A male security guard came in there. I then sat down after. They were then threatening to throw me

car. ~~They~~ ~~and~~ we called my
mother and sister so they
can come and get the truck.
It takes approximately 15/20
minutes to get to the mall
from our home. They told us
to call again to see where
they were. They were near the ^{mall}
Bluff road. They had called and
a [female security guard] w/
an attitude told them we
had been long gone to bluff Rd.
so now they had to turn around
and come to the mall. The
police officer who escorted us
told us this was ludicrous

we just really couldn't believe
we were arrested. we got
to the **JAIL**, and got out
about 3:00^{PM} the next day. we
had to sleep next to criminals,
drug dealers, alcoholic, and crazy
people. security guard Parish
was at the court before we
appeared at the judge. he
went into his chambers and
spoke w/ him. My mother and
sister ~~at~~ saw that I have
never been so discriminated or
humiliated in my life. I
was tortured, assaulted, and
went to jail. I want Justice

- Harassed
discriminated - lots of other young people in
assaulted
humiliated / shame
embarrassed
- ~~deleted~~ cell phone recorded
(they played for our sister + mother)
- sister and mother caught them in lies
- mother talked to female security who
was rude and loud on the phone.
(mother can tell ~~the~~ exactly what
she said)
- Broken
 - Jacket
 - phone
- Racial
 - all security guards except 1 ~~are~~ are
black, and he ~~was~~ was present
~~after~~ when he were being put into
the police van.
- I couldn't sleep all night in Jail.
- I could never see myself in Jail.
- she got loud. she had an
attitude, which caused us to react.
- I went through my family went thru -
- very upset
- singled out
- I know if I was a black girl I
wouldn't have been treated that way
- All about color of skin

- hand cuffed, patty wagon, Jail.
- a girl I went to school w/
saw it. she asked me about it
- There was other black females walking by
while we were being harassed by the security
and they were not stopped.

DAILY SECURITY SUMMARY

DEFENDANT'S
EXHIBIT

10

der

Site Name: Columbia Place

Date:

Category	Today	Officer(s) Involved	Time of Incident
Arrests by Security	2	Sgt Parish	17 ⁰⁰ - 5 ⁰⁰ pm
Assaults	0		
Auto Burglary	0		
Auto Thefts	0		
Ban Notice Issued	2		
Facility Emergencies	0		
Fights	0		
Graffiti	0		
Medical Assists	0		
Robberies	0		
Sexual Incidents	0		
Shoplifting Assists	0		
Slip & Falls	0		
Weapons Displayed or Used	0		

Autos Towed	0
Mileage: Vehicle 1	04 54901-54931
Mileage: Vehicle 2	05 64867-64946
Vehicle Accidents ERMC	0

Comments: 2 female were arrested by Sgt Parish several
minutes involved daily reports not highlighted about 1st
accident till the end.

Signature: Sgt P Creech

Date: 1/19/08

Daily Activity Report

Officer Name Bolton, D.

Shift 4-10

Date 01/19/08

Patrol Assignment

(Circle One) Interior / Exterior (A) (B) (C) (D) [Attachment Yes/No]

In	Out	Int./Ext.	Description of Event or Activity
4pm	4:05	Sec.	Begin tour of duty;
4:05		Int.	Patrol the upper level area of the mall;
			Checked the restrooms in the food court area;
			2 store directions; Checked the food court
	5:00		area;
5:00		Int.	~~Patrol the common area of the mall. Checked~~
			~~the food court area of the mall. Stop~~
			~~and turn around customers that were~~
			~~underage, No F.D.S or Property. I desire to~~
			~~the D.S.T. - Youth Escort Program; 4351st~~
			~~St. L. Parish and St. Anthony's and~~
			~~arrest. Suspect was wearing probationary band.~~
			~~after been asked not to wear probationary.~~
			~~Escort subjects to the D.S.T. - Drug Suppression~~
			~~Team office so the report can be~~
	7:00		~~done.~~
7:00		Int.	Patrol the common area of the
			mall; S/o Tidwell turnover a black
			umbrella to me for lost an Found
			at customer service; At 19:15 stand
			by Delta Glass Doors til S/o Brown
			return from break (Lunch Break);
			Step into the Security office for
			a moment; Patrol the upper level
	8:00		area of the mall; 3 store direction
8:00		Int.	Patrol the common area of the mall;
			Checked the parking lot area at Charlie
			and Delta Glass Doors; 2 store
			directions; Semi-lock Delta, Alpha, Bravo
	9:00		and Charlie glass doors;

Daily Activity Report

Officer Name

Bolton, D.

Shift

4-12

Date 01/19/08

Patrol Assignment

(Circle One)

Interior

Exterior

[A]

[B]

[C]

D

1

Attachment

Yes./ No]

[illegible]

Daily Activity Report

Officer Name

Sgt P. Meek

Shift

Date / /

Patrol Assignment

(Circle One)

Interior

/ Exterior

[47]

[В]

[C]

[D]

[At

Attachment

Yes / No

In	Out	Int./Ext.	Description of Event or Activity
14 ⁰⁰			Start of Shift spoke w/ Maint & briefly, also I.T. began to assign zones, then reported to patrol
	15 ⁰⁰		mall wide.
15 ⁰⁰			Continuous patrolling all patrolman complying w/ policy nothing out of ordinary to report.
	16 ⁰⁰		Officers arriving for shift reporting to zones, assist patrolman with finding restroom.
16 ⁰⁰			~~Start of policy assist w/ patrons, assist~~
	17 ⁰⁰		~~Respond to an disturbance in Data area~~
	18 ⁰⁰		~~What officers are needed report for further to~~
18 ⁰⁰			~~respond in a fashion when was made over~~
			~~purchase zone and being info, spoke to inform~~
	19 ⁰⁰		~~not problems station~~
19 ⁰⁰			Start of relieving officers for lunch break, implemented policy at charter.
	20 ⁰⁰		All of upper level officers complete with breaks, nothing unusual to report at this time.
20 ⁰⁰			Closing of mall, assigned closing duties to officers, monitoring returned staff employees
	21 ⁰⁰		as they exit property - monitor women's rest
22 ⁰⁰			END tour of duty.

Daily Activity Report

Officer Name

Shift

Date / /

Patrol Assignment

(Circle One)

Interior

1

Exterior

[A]

[B]

[C]

[D]

[Attachment

Yes / No]

100

[illegible]

1600-2100

Date 1/19/08

(Circle One)

/ Exterior

[4]

В

[CI]

D

1.

[Attachment Yes / No]

Yes / No]

706

760-280

Date/ 11/9/08

[Attachment Yes / No]

6

Daily Activity Report

Officer Name Shompson, Leah

Shift 4-10

Date 1/19/2008

Patrol Assignment

(Circle One)

Interior

/ Exterior

[A7]

[B]

[C]

[D]

1

[Attachment Yes / No]

In	Out	Int./Ext.	Description of Event or Activity
1601			Began tour of duty. Clock in at the time clock then reported to the Security Office. I got my zone assignments and a radio. I talked to Mr. Hains, Lt. Grossman and some other officers before I went on the floor. I went to my zone of Davis Hall Center Court and patrolled that area. I then took a bathroom break in Dillard's and then returned to my zone. Before starting the YEP in Center Court I went to Dollar down to get some water. I then returned to Center Court.
1700			~~Started looking into the 4th and 5th floors. I saw many things that were County property. I told them that I would take care of them. I then had two females that were really nasty and didn't want to stop and let me check them out. I told them that the young lady that wasn't by age had let them so they said they were leaving and off their ass. I then went to the camera room to monitor them and they were so nasty so I told the camera room and told them that they were not authorized to be in the mall for life. I then went to the 4th floor.~~

Daily Activity Report

Officer Name _____

Shift _____

Date / /

Patrol Assignment

(Circle One)

Interior

1

Exterior

[A]

[B]

[C]

[D]

[Attachment

Yes / No}

[illegible]

Daily Activity Report

Officer Name _____

Shift _____

Date / /

Patrol Assignment

(Circle One)

Interior

/

Exterior

(A)

(B)

(C)

(D)

[Attachment Yes / No]

In	Out	Int./Ext.	Description of Event or Activity
			~~unsub. He stopped in the~~
			~~house of church about five miles for~~
	1800		~~and having lots of being underage.~~
1800			Patrolled, lower level Center Court
			and checked ids for the YEP. I turned
	1900		away four people this hour.
1900			While checking ids turned no one
			away this hour everyone ok age.
			When Mullins came to relieve
			me so I could take a dinner break
	2000		He finished I returned to my zone.
2000			I had to tell Man. Olive to turn
			the music down because it was
			too loud. She said she is doing
	2100		down. I checked this. The waiter that
			was leaving from the dining in back area
2100			I went to the service station that
			10-89 hour so I would check some
			papers and then after that I
			turned the escalators off. The
			unlocked the rear level. The
			front back door was open but
			smoke was still inside. I had
			to tell host to turn their
	2200		music off because of the lyrics

Daily Activity Report

Officer Name

Shift

Date / /

Patrol Assignment

(Circle One)

Interior

1

Exterior

[A]

[B]

[C]

[D]

[Attachment

Yes / No]

[illegible]

Daily Activity Report

Officer Name Ramsey, Louano

Shift 3rd

Date 1/19/08

Patrol Assignment

(Circle One)

Interior

/ Exterior

[A]

[B]

[C]

[D]

[Attachment

Yes / No]

In	Out	Int./Ext.	Description of Event or Activity
2400		Security	Begin Tour of Duty.
	2400		
2400		EXT.	Patrolled an Parking lots lower to upper level wide. checking all glass doors, All service dock doors, All sprinkler gauges, The crab house and sticky fingers. All area are in order. Got Clinton contacted Central Station.
	0100		
0100		EXT.	Patrolled exterior wide covering an Parking lots Between Pole #1 + Pole #22 monitoring all service dock doors, All glass doors, The crab house and sticky fingers. Contacted Jordan Kirk at central station 0105 Hrs.
	0200		
0200		EXT.	Patrolled lower to upper level wide monitoring an Parking lots Between Pole #22 to Pole #1, All service dock doors, All glass doors, The crab house and sticky fingers. Contacted J. Kirk at central station 0203 Hrs.
	0300		
0300		EXT.	Patrolled exterior wide covering an Parking lots Between Pole #1 + Pole #22, monitoring all glass doors, All service dock doors, The crab house and sticky fingers. Nothing to report at this time. contacted J. Kirk at central station 0300 Hrs.
	0400		
0400		INT.	Conducted Detail Round covering interior wide. checking all stored back doors, All stored back doors are secure. Found trash at finish line, Piccadilly (Pallets), Foot locker, Bathing Body work, Things to remember, water on floor by Elevator, sports-

(over)

Daily Activity Report

Officer Name

Ramsey, L. L.

Shift 3 10

Date 1 / 19 / 08

Patrol Assignment

(Circle One)

Interior

Exterior

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[Attachment Yes / No]

Yes / No]

In	Out	Int/Ext	Description of Event or Activity
	0500	CONT.	Attn. Charlotte Russe, D.C. Place, Lory, side old store, ESES by ESES, Claire's and under ground STATION. Contacted J. Kirk at central STATION 0400hrs.
0500		EXT.	Patrolled all parking lots upper to lower level wide. monitoring all service dock doors, all glass doors, the crab house and sticky fingers, nothing to report at this time. contacted J. Kirk at central STATION 0500hrs.
0600		EXT.	Patrolled all parking lots exterior wide. monitoring all glass doors, all service dock doors, the crab house and sticky fingers, nothing to report. contacted J. Kirk at central STATION 0600hrs.
0700		INT.	OPEN all glass doors for business. standing by security office monitoring the security cameras covering interior to exterior wide. all areas are in order. contacted Jordan Kirk at central STATION 0640hrs.
0800		INT.	Ending Tour of Duty.

Daily Activity Report

Officer Name

CLINTON L

Shift

8-4

Date

1/19/18

Patrol Assignment

(Circle One)

Interior

/

Exterior

[A]

[B]

[C]

[D]

[Attachment

Yes/No]

In	Out	Int./Ext.	Description of Event or Activity
9:00			SECURITY BEGIN TOUR OF DUTY
			PATROL CAMERA ROOM AREA
			B-CLASSROOM AREA
			FOOD COURT AREA GYM AREA
			OLD NAUTY AREA LEFT AREA
			EXPRESS AREA C-CLASSROOM
	9:00		AREA
9:00			PATROL FOXMOORE AREA FIRE AREA
			STEVE BARRY AREA CENTER COURT
			AREA REED AREA DILLARD AREA
	10:00		A-CLASSROOM AREA LINDS AREA
10:00	10:30		ESCOAT MALL OFFICE AREA
11:00			PATROL CAMERA ROOM AREA
	12:00		B-CLASSROOM AREA
12:00			PATROL FOOD COURT AREA DEMO AREA
			CENTER COURT AREA OLD NAUTY AREA
			BURKINSON AREA FOOT LOCKER AREA
			BLOOM AREA FINISH LINE AREA
	1:00		B-CLASSROOM AREA
1:00	1:30		ESCOAT MALL OFFICE AREA

Officer Name

Shift

Patrol Assignment

(Circle One)

Interior

/ Exterior

[A]

[B]

71

9.

[Attachment

Yes / No]

Yes / No]

715

Officer Name

Shift 8-4

Date 6/1/05

(Circle One)

Interior

~~Exterior~~

[A]

131

CI

CD?

[Attachment

Yes / No]

716

Daily Activity Report

Officer Name

Shift

Date / /

Patrol Assignment

(Circle One)

Interior

/ Exterior

[A]

[B]

[C]

D

Attachment

Yes / No

[illegible]

Daily Activity Report

Officer Name TENNY T. McERAY

Shift 2

Date 1/19/08

Patrol Assignment

(Circle One)

Interior

/ Exterior

(A)

(B)

(C)

(D)

[Attachment

Yes

No

In	Out	Int./Ext.	Description of Event or Activity
4:00		INT	I WAS in the Camera Room from 4:00pm
			to 10:00pm NO problem at this time EVERYONE
	4:30		IS Good in the Mall.
5:00		INT	two young men not of AGE and was ask
	5:15		to leave for the Day.
5:16		INT	ONE young man not of AGE and was ask to
	5:19		leave for the Day.
5:20		INT	got Parish Call for Camera time about two
			young lady was to going to be ARREST
	5:25		for Beach of police.
5:30		INT	Lina's Call for A OFFICER had a problem
			INT in the Store got CROWN was the opt at
	5:35		the Store.
5:40		INT	two young men no I.D and was ask
	5:45		to leave for the Day.
5:50		INT	two young men not of AGE and was ask
	5:51		to leave for the Day.
5:54		INT	two young men not of AGE and was ask
	6:00		to leave for the Day.
6:20			ONE young man not of AGE and was
			ask to leave the mall for the Day.
	6:21		

Daily Activity Report

Officer Name

Shift

Date / /

Patrol Assignment

(Circle One)

Interior

Exterior

[A]

[B]

[C]

[D]

[Attachment : Yes / No]

Yes / No1

In	Out	Int./Ext.	Description of Event or Activity
6:25		Int	NO PROBLEM at this time EVERYONE IS GOOD in the mall. NO NEWS to be Report at this time.
6:45			
7:00		Int	NO PROBLEM at this time EVERYONE IS GOOD in the mall. AND NO NEWS to be Report at this time
7:30			
7:31		Int	OFFICER McMillan moved a car out of the FIRE LANE by making the person moved the car out of the FIRE LANE NO PROBLEM.
7:40		Int	two young lady and one young man Not of AGE and was ask to leave the mall for the Day.
7:45			
8:10		Int	three young man Not of AGE and was ask to leave for the day.
8:15			
8:30		Int	NO PROBLEM in the mall at this time EVERYONE IS GOOD for the Night.
9:00		Int	All ZONE two DOOR will be LOCK for the Night and at 10:00pm All DOOR will be LOCK for the Night.

Daily Activity Report

Officer Name Mullias + # 26

Shift 4-9

Date 01/17/08

Patrol Assignment

(Circle One)

Interior

Exterior

~~A~~ ~~B~~ [C] [D]

[Attachment Yes/No]

In	Out	Int./Ext.	Description of Event or Activity
4 ⁰⁰		Int	called low level hide in make sure
	5 ⁰⁰		my zone was clear no report.
5 ⁰⁰		Int	spotted two small mice under gate near
			center court and took them out
			by District 5. Unit 44 called me to
			assist in line and unit 28 came
	6 ⁰⁰		and I went on with my duty
6 ⁰⁰		Int	unit 19 called me to escort two
			small Faded and take them to
			food court. Unit 44 called
			me and the small Faded list
			went to kitchen and called officer
	7 ⁰⁰		Black to assist them to leave
7 ⁰⁰		Int	checked unit 44 for 4 23 and
			make sure his zone was safe at
	7 ²⁰		all time.
7 ²⁰		Int	checked unit 19 for 4 23.
	7 ³⁵		
7 ³⁵		Int	checked unit 32 for 4 23.
	8 ⁰⁰		
8 ⁰⁰		Int	went on my 2).
	8 ¹⁶		
8 ¹⁶		Int	back on the floor and make sure my
			zone was clear. spotted water bucket from the
			top of it.

Daily Activity Report

Officer Name Samuel Gibson

Shift 2nd

Date 11/19/08

Patrol Assignment Burlington

(Circle One)

Interior

/ Exterior

[A]

[B]

[C]

[D]

(Attachment

Yes

No)

In	Out	Int./Ext.	Description of Event or Activity
13:58		Dignitar	stepped into headquarters to get assignment.
	14:00		
14:05		alpha	headed to Burlington area.
15:00		alpha	still patrolling alpha area.
16:00		alpha	still monitoring Burlington area and assisting customer with directions.
17:00		alpha	conducted seg at Burlington area.
18:00		alpha	still conducting seg and assisting customer with directions.
18:25		alpha	stepped in to line to assist with a mall shopper who was creating a disturbance.
19:20		alpha	took a break.
	19:15		
19:20		alpha	patrolled back to zone.
20:00		alpha	Patrole Burlington area and conducting seg.
21:00		Dignitar	ended tour of duty for the night.

Daily Activity Report

Officer Name _____ **Shift** _____ **Date** / /

Patrol Assignment

(Circle One) Interior / Exterior [A] [B] [C] [D] [Attachment Yes / No]

[illegible]

Daily Activity Report

Officer Name K. Harris

Shift 4-10

Date 1/19/08

Patrol Assignment

(Circle One)

Interior

/ Exterior

[A]

[B]

(C)

[D]

[Attachment

Yes

(No)

In	Out	Int./Ext.	Description of Event or Activity
1600		INT	STARTED shift at Charlie's glass doors and signed for Radio # 0
	/		
1700		INT	STARTED monitoring for the Youth Escort Policy and assist patrons.
	/		
1710		INT	TURNED AWAY Two (2) black males for NO I.D.
	/		
1750		INT	TURNED AWAY Two (2) black males for NO I.D.
	/		
1800		INT	TURNED AWAY ONE (1) black male for NO I.D.
	/		
1900		INT	CONTINUED to ~~just~~ monitor for the YEP and assist patrons.
	/		
2000		INT	CONTINUOUS monitoring for the YEP and assist patrons.
	/		
2100			WENT to lunch. Relieved by SGT Cusack.
	/		
2100		INT	WENT to office to do daily report.
	/		
2130			END of shift

Daily Activity Report

Officer Name

Shift

Date / /

Patrol Assignment

(Circle One)

Interior

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Exterior

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13

[illegible]

Daily Activity Report

Officer Name Tom Anderson

Shift 2nd

Date 1/17/08

Patrol Assignment

(Circle One) Interior / Exterior [A] (B) [C] [D] [Attachment Yes / No]

In	Out	Int./Ext.	Description of Event or Activity
1550		INT.	Punched in and signed for radio.
	1600	INT.	Started patrol from Bravo at dollar store 1615
			directed shopper to Bear Patch, at 1630 directed
			shopper to Walden Books, Bravo area all secure
			to include visual of parking area. Patrol ended
			at Ritz camera, proceeded to Standby between
			Cataes and dollar store.
1700		INT.	
	1700	INT.	Posted at Land Rover for youth escort policy.
			1735 turned away two Bravo mikes incoming. At
			1745 directed customer to food court. Area secure.
1800		INT.	
	1800	INT.	Standing by Bravo area, Area all secure.
1900		INT.	
	1900	INT.	Posted at Land Rover area all secure, took
			lunch at 1940. Returned 1955.
2000		INT.	
	2000	INT.	Standing by Bravo area, all secure.
2100		INT.	
	2100	INT.	Proceeded to Bravo glass doors, Unit 23
			locked side and middle door at 2105. Areas
			secure.
2200		INT.	
	2200	INT.	End Tour of Duty.

Daily Activity Report

Officer Name _____

Shift _____

Date / /

Patrol Assignment

(Circle One)

Interior

1

Exterior

[A]

[B]

[C]

[D]

[A

(Attachment

Yes / No]

[illegible]

Daily Activity Report

Officer Name Brown, Marcus

Shift 1700-2200

Date *01/19/08*

Patrol Assignment

(Circle One)

Interior

/ Exterior

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[Attachment]

Yes / ~~No~~Yes / ~~No~~

In	Out	Ind/Ext.	Description of Event or Activity
1744	/	Int.	Assumed duties as Security Officer (20) @ post 7. Given security duties to stand guard @ Delta glass doors.
	1800		
1800	/	Int.	Began standing @ Delta exits/entrance to enforce mall youth escort policy. Gave (2) Bravo Foxhats directions to Sears pick-up area.
	1900		
1900	/	Int.	Continued to stand guard @ Delta exits/entrance to enforce mall youth escort policy. Relieved for my 15 min lunch break by officer 23. Returned to Delta exits/entrance to enforce mall youth escort policy. Turned (1) Bravo Mike away @ Delta exits/entrance w/o proper identification.
	2000		
2000	/	Int.	Alerted (3) Bravo Mikes and (1) Bravo Foxhat on Columbia mall youth escort policy and procedures. Relieved for quick signal @ 2000 by officer who warned (2) Bravo Foxhats about rolling devices (baby stroller) on the escalators. Returned to Delta glass doors to continue security duties.
	2100		
2100	/	Int.	Officer 23 secured 2/3's of Delta exits/entrances for mall closing. Officer 37 secured 100% of Delta exits/entrances. End Security Duties @ Post-1 7
	2200		

Daily Activity Report

Officer Name

Shift

Date / /

Patrol Assignment

(Circle One)

Interior

Exterior

[A

[B]

[C]

[D]

[Attachment

Yes / No]

[illegible]

Daily Activity Report

Officer Name DAVIS, Paul E.

Shift _____

Date 2/19/08

Patrol Assignment

(Circle One)

Interior

/ Exterior

[A]

[B]

[C]

[D]

[Attachment

Yes / No]

In	Out	Int./Ext.	Description of Event or Activity
1820	/	INT	Denied Access to three underage youths
1855	/	INT	The three individuals who had the dispute with Kim's manager returned to the store after speaking with the owner. They were given permission to exchange the damaged merchandise.
1905	/	INT	Denied Access to Two patron with NO PROOF OF ID.
1925	/	INT	Relieved of duty for lunch break by SGT Parrish.
1940	/		
2005	/	INT	Denied Access to Three Underage youths
2035	/	INT	Assisted a patron with locating the ATM's in the MALL.
2050	/	INT	Assisted an elderly patron from Alpha Glass Doors to her vehicle.
2100	/	INT	Remained at Alpha Glass Doors for security protocol once the mall closed
2115	/	EXT	Cautioned a driver for parking in the Fire lane near Alpha Glass Doors
2200	/	RRT	END OF TOUR OF Duty

Daily Activity Report

Officer Name DAVIS, Paul E. Shift _____ Date 01/19/08

(Circle One) Interior / Exterior (A) (B) (C) (D) [Attachment Yes/No]

In	Out	Int./Ext.	Description of Event or Activity
1600		INT	Clocked in for TOUR OF Duty
	1605	INT	Began Patrolling lower level wide
	1615	INT	Notified Lower Level Housekeeping of a spill near the Game STOP.
	1630	INT	Notified lower level Housekeeping of a spill in front of Glamour NAILS.
	1700	INT	Reported to Alpha Glass Doors in Support of the Youth Escort Policy
	1720	INT	Notified the exterior Patrol of a Fire Lane Violation in front of the Alpha Glass Doors.
	1735	INT	Denied entry to a patron with no identification
	1750	INT	Denied Access to two patrons who did not possess an identification card.
	1805	INT	Rendered assistance to Officer Gibson at Lim's Department store. A customer had a dispute with the manager about some merchandise he just purchased. Sgt Creech advised him to contact the store's owner after the working manager refused to service him. The subjects were escorted from the store.

Daily Activity Report

Officer Name C. Stevenson

Shift 11E-2200

Date 01/19/08

Patrol Assignment

(Circle One) Interior / Exterior [A] [B] [C] [D] [Attachment Yes/No]

In	Out	Int./Ext.	Description of Event or Activity
1556			Reported for duty, clocked in, and reported to the security office for core assignment. Reported to the rear office briefly. Reported to exterior and completed a vehicle checklist. Had Lt. Brannen to sign checklist. Monitored bravo, alpha, theater, Party City, Marshalls, Sticky Fingers, and Charleston Crab House.
	1700		
1700			Continued monitoring exterior lower. Advised an individual about blocking the aisle. Monitored exterior wide while Officer McMillan assisted Sears.
	1800		
1800			Off property to the fuel point. Met with Officer McMillan to give him the jump pack. Reported back to the fuel point. Continued on exterior lower. Heard screams coming from near Marshalls.
	1900		
1900			Continued monitoring exterior lower. Heard screams coming from near Marshalls. Checked and realized they were coming from Marshalls. Continued on patrol while Officer McMillan spoke with the individual who was screaming. Spoke with five block ^{moles} near roll 7 that a customer asked were about to fight. Lunch break. Locked service doors in bravo and alpha.
	2000		
2000			Continued on exterior lower patrol. Monitored exterior wide while officer McMillan was on his lunch break. Assisted a patron with transit information that Officer Thompson provided. Reported back to zone and continued monitoring.
	2100		
2100			Monitored exterior wide. Started on daily activity report while in Charlie dock. Continued on patrol. Gave Officer Davis keys to secure Alpha doors. Ended tour of duty.
	2200		

Daily Activity Report

Officer Name _____

Shift _____

Date / /

Patrol Assignment

(Circle One)

Interior

1

Exterior

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Attachment

Yes / No]

[illegible]

Daily Activity Report

Officer Name William Tidwell

Shift 2

Date 1/19/08

Patrol Assignment

(Circle One)

Interior / Exterior

[A] [B] [C] [D]

[Attachment Yes/No]

In	Out	Int/Ext	Description of Event or Activity
16:00			Start tour of duty, sign out, radios 15, assign to under ground station
	16:30		
16:30			notice children playing in play area writing on floor with chalk or street rock from wall radio 7 for visual talk to house keeping. close play area for safety. reason
	16:45		
16:45			resume duties
	17:27		
17:27			Bravo make black jacket, black jean. no ID
	17:29		
17:29			resume duties
	18:50		
18:50			Bravo make black jacket, black jean no ID
			have a problem with policy radio 7 and officer Creech, ask him to leave the mall
	18:53		
18:53			resume duties
	19:00		
19:00			2 Bravo for brown jacket, blue jean / black jacket, blue jean not 18 yrs of age escort to Macy's
	19:03		
19:03			resume duties
	19:15		
19:15			Break
	19:30		
19:30			resume duties
	20:03		
20:03			2 Bravo for black, gold jacket, blue jean / black jacket, blue jean not 18 yrs escort to Macy's
	20:25		
20:25			resume duties
	21:00		
21:00			Corridor check for upper level checks, Delta turn in report, sign in radio, off duty
	22:13		

Daily Activity Report

Officer Name _____

Shift _____

Date / /

Patrol Assignment

(Circle One)

Interior

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Exterior

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Attachment

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/ No

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Officer Name Dwelle WRIGHT

Shift 2nd

Date 01/19/08

(Circle One)

Interior

Exterior

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[C]

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[Attachment

Yes / No]

736

Daily Activity Report

Officer Name

Shift

Date / /

Patrol Assignment

(Circle One)

Interior

/

Exterior

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[D]

[Attachment

Yes / No]

La

Out

Int./Ext.

Description of Event or Activity

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Hon. Alison R. Lee, Circuit Court Judge

Case No.: 2009-CP-40-3996

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

v.

CBI / Columbia Place Mall, LLC; and
ERMC II, LLP,.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

SEP 21 2012

Appeal from Richland County
Court of Common Pleas

S.C. Supreme Court

The Hon. Alison R. Lee, Circuit Court Judge

Case No.: 2009-CP-40-3996

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

v.

CBI / Columbia Place Mall, LLC; and
ERMC II, LLP,.....Appellants.

SUPPLEMENTAL RECORD ON APPEAL

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Index to Supplemental Record on Appeal

Trial Transcript:

Testimony of Melroy Broman
Direct Examination..... 738

Testimony of Lionell Parish
Direct Examination..... 739

- 1 A THE ONLY PERSON THAT CAN GO INTO THE SYSTEM IS ERM
2 CORPORATE WORKERS.
- 3 Q AND WHAT ABOUT MR. GOINS?
- 4 A MR. GOINS CAN REVIEW WHAT I HAVE TAPED.
- 5 Q OKAY. AND IN FACT, HE ACTUALLY DID THAT IN THIS
6 PARTICULAR CASE, DIDN'T HE?
- 7 A YES, SIR.
- 8 Q HE REVIEWED THAT TAPE, CORRECT. AND WHEN DID HE
9 ACTUALLY REVIEW THAT?
- 10 A I CAN'T TELL. I CAN ONLY TELL WHAT HE SAID. I WAS
11 NOT THERE.
- 12 Q OKAY. AND ON THIS PARTICULAR DATE THAT YOU WERE
13 ACTUALLY RECORDING THEM, WHERE DID YOU ACTUALLY FIRST
14 RECORD THEM AT?
- 15 A WHEN SHE CALLED THE FIRST TIME, I ---
- 16 Q WHEN YOU SAY SHE CALLED, WHO IS SHE? DO YOU MEAN
17 OFFICER THOMPSON?
- 18 A OFFICER THOMPSON, YES.
- 19 Q OKAY. YOU CAN'T SAY WHAT YOU SAW ON THE VIDEO OR
20 ANYTHING LIKE THAT.
- 21 A OKAY.
- 22 Q BUT WHEN DID YOU ACTUALLY FIRST PICK UP NOHEALANI AND
23 LEHUA FIGUEROA?
- 24 A IN THE PROCESS -- OKAY. IN THE PROCESS OF ME
25 LOOKING FOR THE INCIDENT -- BECAUSE THAT'S MY JOB, I

1 A YES.

2 Q OKAY. WHAT DO YOU PEOPLE SAY?

3 A OH, THEY SAY, YOU KNOW, THEY MAKE, YOU KNOW, THE NAMES
4 MALL COP. THERE WAS A MOVIE JUST RECENTLY AND THEY -- THEY
5 -- THEY CALL YOU PAUL BLART. THEY CALL YOU FLASHLIGHT COP,
6 TOY COP, ROBO COP. I COULD GO ON AND ON. AND IT'S AMUSING
7 TO ME.

8 Q DOES IT BOTHER YOU IN SOMEONE SORT OF SAID THAT YOU'RE
9 NOT A REAL POLICE OFFICER?

10 A NO.

11 Q OKAY. TELL ME, LET ME BACK UP. HOW DID YOU FIRST GET
12 INVOLVED WITH THE PLAINTIFFS? TAKE US THROUGH THE MAP OF
13 THE MALL, WHERE YOU CAME FROM AND WHAT YOU SAW AND WHAT YOU
14 HEARD?

15 A NO PROBLEM.

16 (THE WITNESS STEPS DOWN FROM THE WITNESS STAND.)

17 Q THIS IS THE FIRST FLOOR. THERE'S THE SECOND FLOOR
18 RIGHT THERE.

19 A OKAY. UPON RECEIVING A RADIO TRANSMISSION FROM
20 SERGEANT THOMPSON, OFFICER THOMPSON AT THAT TIME, SERGEANT
21 THOMPSON, GIVING A DESCRIPTION AND THE ACTIVITIES OF THE
22 YOUNG LADIES IN QUESTION. I ENCOUNTERED THEM -- I -- I
23 MADE A VISUAL BASED THE DESCRIPTION GIVEN ON THE RADIO AS I
24 WAS COMING AROUND THE CORNER AND SAW THEM GETTING ON THE
25 ESCALATOR HERE.

1 Q WHAT DID YOU HEAR FROM THE TRANSMISSION?

2 A WHAT I HEARD FROM THE TRANSMISSION INITIALLY WAS THAT
3 THE LADIES WERE NO LONGER WELCOME DUE TO THEIR BEHAVIOR AND
4 HAVE BEEN ASKED TO LEAVE. AND THEY WERE SUPPOSED TO LEAVE
5 THROUGH THE B ENTRANCE, OF THIS AREA. THEY WERE SUPPOSED
6 TO COME THIS WAY, UP, AND OUT.

7 Q WERE THEY DOING THAT WHEN YOU FIRST SPOTTED THEM?

8 A NO. WHEN I FIRST SPOTTED THEM, THEY WERE ALREADY ON
9 THE ESCALATOR.

10 Q OKAY. AND THAT WOULD BE GOING?

11 A UP.

12 Q OKAY.

13 A TO THE NEXT LEVEL.

14 Q OKAY. AND DO YOU NEED THAT NOW OR ---

15 A YES.

16 Q OKAY. SO WHEN IS THE FIRST TIME YOU SPOKE TO YOU
17 (SIC)?

18 A THE FIRST TIME THEY ACTUALLY SPOKE TO ME ---

19 Q OR YOU SPOKE TO THEM?

20 A WELL, THE FIRST TIME I SPOKE TO THEM, I DIDN'T
21 INITIALLY SAY ANYTHING TO THEM ON THE ESCALATOR ITSELF. I
22 WAS JUST ENTERING THE ESCALATOR AS THEY WERE MAKING TOWARD
23 THE TOP AND THEY TURNED AND SAW ME. ONCE THEY ---

24 Q COULD I INTERRUPT YOU ONE SECOND.

25 A YES.

1 Q WHAT WERE YOU WEARING?

2 A I WAS WEARING A STANDARD SECURITY UNIFORM LIKE THE
3 ONES THAT SERGEANT THOMPSON AND OFFICER BOLTON ARE WEARING
4 CURRENTLY RIGHT NOW, INCLUDING A HAT.

5 Q OKAY. GO AHEAD.

6 A OKAY. I WAS WEARING A UNIFORM, AND I WAS COMING UP ON
7 THE ESCALATOR, AND THEY HAD ALREADY STARTED MAKING IT TO
8 THE TOP. ONCE I GOT THERE -- ONCE I WAS MAKING IT UP
9 THERE, THEY TURNED AND MADE A VISUAL OF ME. THEY SAW ME,
10 SO THEY COULD TELL WHO I WAS OR WHAT I WAS. AND HERE AND
11 GOING ON DOWN THIS LINE HERE WHICH IS THE COMMON AREA OF
12 THE MALL, THERE ARE SEVERAL STORES HERE. THEY TURNED --
13 THE OLDER SISTER TURNED AND SAID, DON'T FUCKING FOLLOW US.

14 I SIMPLY TOLD THEM THAT I WAS THERE AND I WAS REQUIRED
15 TO ESCORT THEM OFF THE PROPERTY -- OR TO WHERE THEY PARKED.
16 WE CONTINUED. AND I HAD TO ASK THREE SEPARATE TIMES FOR
17 THE YOUNG LADIES -- WELL, THE OLDER SISTER BECAUSE THE
18 YOUNGER SISTER HADN'T REALLY SAID MUCH OF ANYTHING AT THIS
19 POINT -- TO REFRAIN FROM USING SUCH LANGUAGE -- YOU KNOW,
20 CONTINUOUSLY -- CONTINUOUSLY USING LANGUAGE. I -- I -- I
21 LET THEM KNOW THAT THAT WOULD CONSTITUTE IN A POSSIBLE
22 ARREST FOR BREACH OF PEACE; THAT'S WHERE I TOLD THEM THIS,
23 GOING -- MAKING -- MAKING CENTER COURT UPPER LEVEL.

24 BY THE TIME WE HAD GOTTEN TO -- THIS IS ZALE'S
25 JEWELERS RIGHT HERE. BY THE TIME WE'D GOTTEN TO ZALE'S

1 JEWELERS, I HAD INFORMED THE OLDER SISTER THAT I WAS GOING
2 TO PLACE HER UNDER ARREST FOR BREACH OF PEACE BECAUSE OF
3 HER CONTINUED FOUL LANGUAGE IN THE PRESENCE OF PASSERS BY,
4 CUSTOMERS, STORE MERCHANTS. AND I REACHED FOR -- SHE
5 TURNED TO FACE ME, AND I REACHED FOR -- IF I'M NOT MISTAKEN
6 -- HER LEFT WRIST.

7 WHEN I DID THIS, SHE JERKED BACK AND KIND OF TWISTED.
8 AND THE GARMENT PULLED, AND IT MAY HAVE TORN, I HEARD A
9 SOUND. IT MAY HAVE TORN. AND WITHIN AN INCH OR TWO OF MY
10 FACE IN THE PRESENCE OF STORE MERCHANTS AND PEOPLE PASSING
11 BY WHO WERE JUST CURIOUS, SHE AT THE TOP OF HER LUNGS RIGHT
12 HERE TOE TO TOE SAID, YOU ARE JUST A FUCKING SECURITY
13 GUARD. YOU CAN'T DO SHIT TO ME.

14 HER SISTER THEN GOT UPSET AND BEGAN TO USE OBSCENITIES
15 AS WELL. AND THEY CONTINUED TO WALK AWAY FROM ME IN THIS
16 DIRECTION. THEY CONTINUED ON. AND RIGHT ABOUT HERE, STILL
17 AT CENTER COURT, I PAUSED FOR A SECOND AND RADIOED FOR
18 ASSISTANCE FROM OTHER SECURITY OFFICERS.

19 I WAS THEN JOINED BY OFFICERS GRIFFITH AND OFFICER
20 BOLTON. AND JUST A FEW FEET BEHIND THE YOUNG LADIES AS
21 THEY CONTINUED, WE MADE CONTACT WITH THEM IN THIS AREA ON
22 THIS CORNER AND PROCEEDED TO CONTINUE TO MAKE THE ARREST.

23 Q OKAY. SO YOU TALKED ABOUT -- YOU CAME UP THE
24 ESCALATOR AND BEGAN WALKING THIS WAY, AND YOU TOLD THEM
25 THREE TIMES TO STOP USING LANGUAGE, THAT YOU COULD BE

1 A YES.

2 Q DO YOU HAVE PEOPLE WHO CUSS AT YOU IN THE MALL
3 ARRESTED?

4 A NO. THEY ARE USUALLY GIVEN AN OPPORTUNITY TO LEAVE
5 THE PROPERTY. WE WILL ASK THEM, OKAY. YOU'VE STEPPED
6 ACROSS THE LINE. IT'S TIME FOR YOU TO GO.

7 Q OKAY. WHAT MADE THIS INCIDENT DIFFERENT WITH LEHUA
8 FIGUEROA THAN ANY OTHER KID THAT'S CUSSING AT YOU, SAYING,
9 DON'T FUCKING FOLLOW ME AROUND?

10 A AFTER BEING WARNED MORE THAN ONCE -- THREE TIMES IN
11 FACT -- I GAVE -- I GAVE THE WARNING THAT REPEATED USAGE OF
12 THE OFFENSIVE AND OBSCENE LANGUAGE WOULD RESULT IN AN
13 ARREST FOR BREACH OF PEACE.

14 Q WERE THEY BEING LOUD? WAS THE OLDER SISTER BEING
15 LOUD?

16 A INCREASINGLY LOUD, YES.

17 Q CAN YOU GIVE THE JURY AN IDEA OF HOW LOUD SHE WAS?

18 A WHILE WALKING BEHIND THEM AND WITH THEM, IT WAS LOUD
19 ENOUGH -- IF I CAN GIVE YOU AN EXAMPLE. I -- I GIVE THE
20 EXAMPLE OF PASSERS BY, CUSTOMERS, AND STORE MERCHANTS BEING
21 CURIOUS ENOUGH TO WONDER WHAT'S GOING ON. NOW, WHEN I SAY
22 THAT, IT'S -- IT'S -- IT'S LOUD ENOUGH TO BE HEARD IN THE
23 COMMON AREA AS SOMEONE'S PASSING WITHIN 2 OR 3 FEET OF
24 PASSING EACH PERSON AS WE'RE GOING BY.

25 I'M NOT SURE IF I CAN ACTUALLY DEMONSTRATE THAT FOR

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Hon. Alison R. Lee, Circuit Court Judge

Case No.: 2009-CP-40-3996

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

v.

CBI / Columbia Place Mall, LLC; and
ERMC II, LLP,.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Richland County
Court of Common Pleas

S.C. Supreme Court

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FINAL APPELLANTS' BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court err in failing to grant a new trial, where a juror had an inappropriate *ex parte* conversation with the trial judge during deliberations, and that conversation directly affected the jury's verdict?
- II. Did the trial court err in refusing to admit evidence of an audio recording that depicted a portion of the incident from which the Respondents' claims arose?
- III. Did the trial court err in failing to set aside or reduce the punitive damages award, where the record did not support a finding of reprehensible conduct, and the improper actions of a juror during deliberations demonstrated a bias against the Respondents?
- IV. Did the trial court err in failing to grant the Appellants judgment as a matter of law on the false arrest and malicious prosecution claims, where the only reasonable inference from the evidence was that the Appellants had probable cause to detain and charge the Respondents?
- V. Did the trial court err in giving the jury a "spoliation of evidence" charge, where the evidence did not demonstrate that the Appellants intentionally lost or destroyed a videotape that actually depicted the incident?
- VI. Did the trial court in failing to grant a new trial absolute or new trial *nisi remittitur*, where the damages awarded by the jury were excessive (or grossly excessive) in light of the record evidence?

STATEMENT OF THE CASE

This case arose from an incident that occurred on January 19, 2008, at the Columbia Place shopping mall. In an attempt to enforce the mall's Youth Escort Policy, which prohibits unaccompanied minors after 5:00 pm, a mall security officer asked the Respondents Lehua Figueroa and Nohealani Figueroa to leave the mall. The Respondents did not immediately leave after being asked to do so, and they became boisterous and profane when the officer tried to escort them to an exit. At that point, mall security officers placed the Respondents under arrest. The Respondents were later charged with breach of the peace, although those charges were later dismissed by a magistrate.

The Respondents filed a Summons and Complaint in 2009. [R. pp. 25-31.] That pleading included the Appellants as defendants, along with security officer Lionel Parrish. [R. pp. 25-31.] The Complaint purported to state three causes of action: false arrest, malicious prosecution, and defamation. [R. pp. 25-31.] The Appellants filed and served an Answer that asserted a general denial and several affirmative defenses. [R. pp. 43-53.]

During the discovery process, the original attorney for the Appellants failed to provide timely responses to some of the Respondents' interrogatories and production requests. This led the Respondents to file a motion to compel. [R. pp. 65-67.] The trial court's file did not contain any order granting the motion to compel or otherwise instructing the Appellants to produce any information or materials. [R. p. 184.]

Shortly after the motion to compel, the Appellants' original attorney withdrew from the case, and a new attorney appeared on their behalf. This new attorney met with the Appellants and subsequently provided full and good faith responses to the Respondents' discovery requests. However, the Appellants were unable to provide the Respondents with everything they requested because some of the materials being sought either did not exist or could not be located.

A few days before trial began, the attorney for the Appellants learned for the first time that the Appellants possessed some additional materials that might be responsive to the Respondents' discovery requests. The attorney immediately notified the Respondents' counsel and provided copies of those materials. The Respondents' attorney did not file a motion to compel in response to those supplemental discovery answers.

One of the materials the Respondents' attorney sought, but the Appellants could not produce, was an alleged video recording taken from the mall's security cameras on the date of the incident. The Respondents' attorney claimed a security officer had stated, shortly after the incident, that video footage of the incident existed. [R. p. 174.] However, the security director explained that no video of the incident was ever recorded. [R. pp. 332-35.] The security director viewed the footage from the security cameras for the date and time of the incident, and although he thought he might have briefly seen the Respondents at one point, he did not see the incident itself. [R. pp. 53-54.] Thus, no videotape of the incident existed, which meant the Respondents could not produce one.

The case came before the Honorable Alison R. Lee for trial on October 18, 2010. Before the trial began, the Respondents' attorney moved to strike the Appellants' Answer based on their alleged failure to produce certain materials (including a videotape of the incident) during discovery. [R. pp. 146-47.] The judge denied that request, but ultimately granted the Respondents a "spoliation of evidence" jury charge as a sanction for not producing a videotape. [R. p. 234.]

At the close of the Respondents' case, the Appellants' attorney moved for a directed verdict on both liability and punitive damages. [R. pp. 451-52.] She also moved for a directed verdict on behalf of Lionell Parrish, one of the security officers originally listed as a defendant. [R. p. 456.] The judge denied the motion as to liability and punitive damages, but granted it as to the individual defendant. [R. pp. 455-57; 463.] The Respondents did not subsequently challenge the ruling regarding the individual defendant.

During the Appellants' case-in-chief, their attorney sought to introduce an audiotape, which contained a sound recording of part of the Respondents' arrest. [R. pp. 484-98.] One of the security officers had made the recording on his cell phone while the arrest was taking place. [R. pp. 487-89.] On the recording, the Respondents could be heard yelling and using profanity and racial terms. [R. pp. 484-85, 498.] The Appellants offered the recording both as evidence to support the security officers' version of what happened during the incident, and also as impeachment evidence against the Respondents, who claimed they did not use profanity or racially-charged language. [R. pp. 498-505.] After hearing a proffer

of the proposed testimony and the recording, the judge excluded the recording from evidence. [R. pp. 503-05.]

At the conclusion of the Appellants' case, the judge submitted the case to the jury on three causes of action: (1) false arrest, (2) malicious prosecution, and (3) defamation. While the jury was deliberating, the foreperson spoke privately with the trial judge. [R. pp. 532-33.] The judge disclosed this conversation to the parties and their attorneys, but gave only general details of what was said. [R. pp. 532-33.]

According to two of the jurors, who presented affidavits after the trial, the foreperson told the rest of the jurors that she had spoken with the judge. [Affidavits.] The foreperson then informed the jurors that the judge had told her the jury was obligated to award punitive damages to the Respondents if they found any liability at all. [R. pp. 117-20.] The jurors' affidavits indicated that, prior to the foreperson's statements, the jury was not going to award any punitive damages. [R. pp. 117-20.] But after being told they were required to award punitive damages, the jury voted to do so. [R. pp. 117-20.] The belief that the judge had instructed the foreperson to tell them to award punitive damages was the motivating factor. [R. pp. 117-20.]

Not long after the foreperson's misrepresentation of her conversation with the judge, the jury returned verdicts for the Respondents. The jury awarded each Respondent \$6,500 in actual damages for the false arrest cause of action and \$8,000 in actual damages for the malicious prosecution cause of action. [R. pp. 535-36.] The jury did not award any damages for the defamation claim. The jury

did, however, award each Respondent \$25,000 in punitive damages for both the malicious prosecution and false imprisonment claims. [R. pp. 535-36.]

The Appellants filed extensive post-trial motions, which alleged numerous errors during the trial. [R. pp. 89-116, 139.] The Appellants requested a new trial based on the judge's decisions to exclude the audiotape, to give a "spoliation of evidence" charge, and to deny the Appellants' motion for a directed verdict based on the existence of probable cause for the arrest. [R. pp. 89-116, 139.] The Appellants also claimed entitlement to a new trial based on the misconduct of the jury foreperson, which only came to light after the trial was over. [R. pp. 89-116, 139.] The Appellants further requested that the judge strike or reduce the punitive damages awards, grant a new trial nisi remittitur, and/or require the Respondents to elect their remedies. [R. pp. 89-116, 139.]

In an Order filed on January 27, 2011, the judge upheld the award of punitive damages, but obligated the Respondents to elect their remedies. [R. pp. 11-16.] The Respondents did not challenge that portion of the Order, and both of them elected to recover under the malicious prosecution cause of action. Subsequently, on February 17, 2011, the judge issued a second Order, in which she addressed and denied all of the Appellants' other post-trial motions. [R. pp. 17-24.] The Appellants then filed and served a timely Notice of Appeal on February 28, 2011. [R. pp. 142-144.]

STATEMENT OF THE FACTS

The Respondent Columbia Place Mall is a large shopping and dining complex located in Richland County. The Respondent ERM II, L.P. provides

property management services at the mall, including security. [R. p. 323.] All of ERMCo's security employees are licensed by the South Carolina Law Enforcement Division as security officers. [R. pp. 349-50.] Under state law, this means the security officers have the same arrest powers as police officers while on the mall's premises. [R. pp. 349-50.]

In the early 2000s, Columbia Place Mall experienced a rash of violent incidents, including shootings. [R. pp. 355-58.] Most of those problems involved juveniles, who congregated after hours at the mall without any adult supervision. [R. pp. 355-58.] The violent crimes, and the bad publicity arising from them, began to drive customers away from the mall, and the businesses suffered. [R. pp. 355-58.]

To address the problem, Columbia Place Mall adopted a Youth Escort Policy ("YEP") in 2004. [R. p. 358.] The YEP prohibits anyone under the age of 18 from staying in the mall after 5:00 pm on Fridays and Saturdays without a parent or legal guardian accompanying them. [R. pp. 349-55.] Pursuant to this policy, the mall's security officers conduct regular patrols after 5:00 pm on weekends to look for underage patrons. [R. pp. 349-55.] If an officer sees someone that looks to be under 18, the officer approaches that person and asks for identification. [R. pp. 349-55.] Any person who cannot prove they are at least 18 is asked to leave the mall. [R. pp. 349-55.] A security officer escorts the juvenile to an exit in order to prevent him or her from simply walking to another area of the mall. [R. pp. 365-66.] In the years since its implementation, the YEP

has been a tremendous success and has greatly improved the atmosphere and safety of the mall. [R. pp. 358-59.]

On January 19 2008, the Respondents Lehua Figueroa and Nohealani "Lani" Figueroa went to the Columbia Place Mall around 4:00 pm to go shopping. [R. p. 239.] Although Lehua was over the age of 18, her sister Lani was 17 at the time. [R. p. 400.] The sisters were not familiar with the YEP. [R. p. 247.]

After the Respondents had shopped for roughly an hour, they exited a store on the ground level of the mall. [R. p. 244.] A security officer named Leah Thompson noticed the sisters and suspected at least one of them was underage. [R. p. 469.] Since it was past 5:00 pm and the YEP was in force, Thompson called out to the Respondents, "Excuse me, ladies." [R. p. 469.] The Respondents did not acknowledge her and tried to walk away. [R. p. 469.] Thompson repeated her statement a little louder, and this time, Lehua responded, "What the fuck you want?" [R. p. 469.] Thompson asked for the Respondents' identification cards, explained the YEP, and then told them they would have to leave because Lani was not 18. [R. pp. 469-70.]

Lani agreed to leave, but Lehua protested loudly, using another expletive. [R. p. 470.] Thompson then told Lehua she would also need to leave for using profanity, which is against the mall's code of conduct. [R. p. 470.] Thompson further indicated that the sisters would need to be escorted out of the mall. [R. p. 471.] At that point, the sisters walked away from Thompson and disregarded her instructions about being escorted out. [R. p. 471.] Lehua used profanity again as she left. [R. p. 471.]

The sisters initially walked in the direction of the exit where they told the officer they had parked, but then they turned and walked towards another area of the mall. [R. p. 472.] Thompson radioed a description of the sisters to other security officers so that someone could intercept them and escort them out. [R. p. 471.] Another security officer, Lionell Parish, responded that he had seen the sisters and would handle it. [R. p. 471.]

When Parish next saw the sisters, they were getting onto an escalator. [Supp. R. p. 739.] Since the escalator did not lead to the exit where Parish had been told they were supposed to be going, he decided to follow them. [Supp. R. p. 740.] When the sisters had reached the top of the escalator, Lehua noticed Parish behind them and said loudly, "Don't fucking follow us!" [Supp. R. p. 741.] Parish said he was required to escort them out of the mall, but Lehua responded with more obscenities at a high volume. [Supp. R. p. 741.] At that point, Parish told Lehua to stop using that kind of language and said he would arrest her for breach of peace if she did not. [Supp. R. p. 741.] Despite this warning, Lehua continued to curse at Parish, and her outburst was loud enough that Officer Thompson heard it, even though she was still downstairs. [R. p. 473; Supp. R. pp. 741-42.]

Seeing his warning ignored, Parish stated his intention to place Lehua under arrest for breach of peace. [Supp. R. pp. 741-42.] He reached for Lehua's wrist, but she pulled away and cursed at him again, saying he was only a security guard who could not detain her. [Supp. R. pp. 741-42.] The younger sister

(Lani) also began cursing loudly, and then both sisters walked away from Parish. [Supp. R. pp. 741-42.]

Parish radioed for assistance, and other officers met up with him. [Supp. R. pp. 741-42.] The group of officers located the Figueroa sisters and approached them. [Supp. R. pp. 741-42.] The sisters loudly asked why the officers were not stopping other people in the mall and accused the officers of a racial bias. [R. pp. 397-401; Supp. R. pp. 741-42.] Specifically, one of the sisters asked, "You think we're fucking Mexican?"¹ [R. p. 377.] The officers again warned the sisters to stop using loud, profane language. [Supp. R. p. 743.] When the sisters continued to curse at the officers, they were placed under arrest for breach of peace. [R. p. 480, Supp. R. pp. 743.] The sisters continued to shout profanities and racial statements as the officers attempted to take them into custody. [R. pp. 376, 484-85, 511; Supp. R. pp. 741-42.]

Around the time the officers were approaching the Respondents, Lieutenant Dave Navarro of the Richland County Sheriff's Department was entering the mall. [R. p. 375.] Lt. Navarro was assigned to patrol the mall and conduct law enforcement activities. [R. p. 375.] As soon as Lt. Navarro walked into the mall, he heard the Respondents shouting and creating a commotion. [R. p. 376.] Lt. Navarro found the source of the noise and asked the officers what was happening. [R. p. 376.] The officers told him they were arresting the Respondents for breach of peace. [R. p. 376.] All the while, the Respondents

¹ At trial, one of the Figueroa sisters expressed her belief that people in South Carolina sometimes fail to recognize her Hawaiian ethnicity and assume she is Hispanic.

"were being very, very loud and obnoxious," and they repeatedly told Lt. Navarro, "These black bitches thought we were fucking Mexicans." [R. p. 377, lines 17, 24-25.] Based on what Lt. Navarro personally observed and heard, he also could have arrested the Respondents for breach of peace. [R. p. 380.]

While the incident with the Respondents was taking place, one of the security officers (Donovan Bolton) inadvertently hit the "record" button on his cell phone. [R. pp. 487-89.] As a result, the cell phone recorded a few seconds of the incident. [R. pp. 487-89.] The recording reveals the Respondents cursing loudly and making racially-charged statements. [R. pp. 498; 688.] Bolton preserved the recording after the incident and did not alter it in any way. [R. pp. 487-89.]

After the arrest, the officers took the Respondents to a security station in the mall. [R. p. 267.] From there, officers of the Richland County Sheriff's Department transported the sisters to the Alvin Glenn Detention Center, where they spent the night before leaving the next day. [R. p. 285.] Some time later, at a court hearing, a magistrate dismissed the breach of peace charges against the Respondents. [R. p. 299.] The apparent basis for the dismissal was the magistrate's erroneous belief that the mall's security officers did not possess the authority to charge the Respondents with that specific offense. Thus, the magistrate never made a merits decision on the breach of peace charges.

ARGUMENT

I.

The trial court erred in failing to grant a new trial based on an inappropriate *ex parte* conversation between the trial judge and the jury foreperson, which directly affected the verdict.

As explained above, an inappropriate *ex parte* conversation took place between the trial judge and the jury foreperson during deliberations. Afterwards, the foreperson returned to the jury room and used that conversation as a basis for coercing the other jurors into awarding punitive damages – something the jurors had previously decided not to do. As soon as the Appellants discovered evidence of the foreperson's improper actions, they moved for a new trial. The trial judge's decision to deny that motion was erroneous, and this Court should reverse.

(A) Standard of Review

The granting or denial of a new trial motion based on juror misconduct is addressed to the sound discretion of the trial judge. *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 384 S.C. 441, 446, 682 S.E.2d 489, 492 (2009). Although appellate courts grant broad deference to the trial judge on this issue, an appellate court should reverse if the trial judge's decision constituted an abuse of discretion amounting to an error of law. *Id.*

(B) Inappropriate Conversation

As a threshold matter, the conversation between the trial judge and the jury foreperson was inappropriate in and of itself. After receiving a note from the jury, the judge called the foreperson out of the jury room to discuss the note

privately. [R. p. 532.] The normal process would have been for the judge to discuss the note with the attorneys and then decide how best to respond.² This standard procedure ensures that all substantive communications with the jury are part of the record. Indeed, for this reason, the Supreme Court has recently expressed its disapproval of off the record discussions between a judge and the jury. See *Bailey v. State*, 392 S.C. 422, 430, 709 S.E.2d 671, 675, n. 5 (2011) (“we emphasize that we do not condone a judge’s off-the-record discussions with a juror.”).

In the present case, however, the judge did not follow the usual procedure. The judge opted instead for the type of direct communication that the Supreme Court discouraged in *Bailey*. Although the Appellants do not allege any improper intent or motives on the judge’s part, the fact remains that the private conversation with the foreperson should never have occurred. But it did take place, and it resulted in misconduct by the foreperson and prejudice to the Appellants, as discussed more fully below.

Because the discussion between the judge and the foreperson took place off the record, there is no way to know exactly what they said. The trial judge disclosed the conversation after the fact and gave the attorneys a brief, general description of it. No other account of the meeting appears in the record, which makes it impossible to determine whether the judge gave the foreperson accurate statements of the law, or whether the foreperson understood what the judge said. Only two people know the substance of that conversation, and

² Indeed, the trial judge described this procedure and told the jury to follow it during the jury charges. [R. p. 517.]

neither of them was subject to questioning in the lower court. This is precisely the reason why the Supreme Court has warned against such discussions. They create an opportunity for abuses, and they deprive the litigants of trials that are completely open and transparent.

Yet, even if one assumes the judge gave correct legal explanations (and nothing else) to the foreperson, the conversation itself still constitutes error because it set the stage for the foreperson's misconduct. While we do not know exactly what the foreperson heard from the judge, we do know how the foreperson abused the meeting with the judge. As explained below, the foreperson returned to the jury room and forced the other jurors to change their verdict. This is the prejudice to the Appellants, which did not come to light until after the judge had published the verdict and dismissed the jury. Again, though, the prejudice originated in the judge's failure to follow the standard procedure for communicating with the jury on legal issues.

(C) Juror Misconduct

Juror misconduct during the trial or deliberations can entitle the losing party to a new trial. *State v. Bantan*, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010). "The general test for evaluating alleged juror misconduct is whether or not there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence." *Id.* at 422, 692 S.E.2d at 206. Thus, the Court must determine whether any misconduct occurred and whether it improperly influenced the jury. *Id.* This second prong is satisfied by a showing that the misconduct affected the jury's verdict. *Vestry & Church Wardens of the Church*

of the Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 447, 682 S.E.2d 489, 493 (2009). In other words, a party must demonstrate prejudice as a result of the juror misconduct. *Shumpert v. State*, 378 S.C. 62, 69, 661 S.E.2d 369, 372, n. 2 (2008).

"Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case." *State v. Zeigler*, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2008). "[J]uror testimony regarding external prejudicial information or improper outside influence is allowed." *Id.* at 109, 610 S.E.2d at 867 (citing Rule 606(b), SCRE). "Thus, juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence." *Id.* (emphasis added). "External influence on a jury involves situations where jurors receive information during deliberations from some outside source." *Id.*

Although not contemplated by Rule 606(b), SCRE, juror testimony is also admissible in some situations involving "internal influence." *Zeigler*, 364 S.C. at 108-09, 610 S.E.2d at 867. "Internal influences involve information coming from the jurors themselves." *Id.* "[J]uror testimony is competent in cases involving internal misconduct when necessary to ensure due process, i.e., fundamental fairness." *Id.* See also *Shumpert*, 378 S.C. at 67, 661 S.E.2d at 371 (evidence of internal misconduct is admissible when it is necessary to ensure "fundamental fairness").

The Appellants meet both prongs of the test for a new trial based on juror misconduct. As explained in the affidavits of Deborah Anderson and Valerie K. Mitchell, the jury had reached a decision not to award any punitive damages after

extensive deliberations. At that point, the jury's foreperson (Denolis Sullivan King) had a private conversation with the trial judge.³ The circumstances of that conversation are not entirely clear, but the affidavit plainly demonstrates what happened as a result of it. The foreperson returned to the jury room and told the other jurors the judge had said an award of punitive damages was required if the jury returned any verdict for the Respondents. Only then did the jury change its original decision and vote to award punitive damages.

The foreperson acted improperly when she sought out the judge for a private conversation about the case. Any questions the foreperson had (on her own or for the jury as a whole) should have gone to the judge through the proper channels, *i.e.*, a written note. At that point, the judge could have consulted with the attorneys and then communicated with the jury on the record. The foreperson's failure to follow that procedure constituted misconduct. See *State v. Ashley*, 121 S.C. 15, 113 S.E. 305 (1922) (finding juror misconduct where the foreperson had a private telephone conversation with the judge during deliberations).

The foreperson then acted improperly a second time when she coerced the jury into awarding punitive damages by misrepresenting (or misconstruing) the judge's comments.⁴ Again, the foreperson was not supposed to speak privately with the judge in the first place, but once she violated that prohibition,

³ The judge subsequently notified the attorneys on the record that such a conversation had taken place. [R. p. 532.]

⁴ Although the record does not reveal what the judge actually said, it is safe to assume the judge did not instruct the foreperson that punitive damages were required if the jury found in favor of the Respondents.

she at least should have given the jury accurate information. The failure to do that constituted misconduct. As a result, the first prong of the test is met.

The satisfaction of the second prong is even clearer. The affidavits demonstrate the jury had decided not to award punitive damages prior to the foreperson's misconduct. Afterwards, however, the jury believed it was required to award punitive damages. This erroneous belief was the only reason the jury gave the Respondents punitive damages. But for the foreperson's interference, the verdicts would not have included the \$25,000 in punitive damages for each Respondent. This is not speculation; it is a fact established by the jurors' affidavits. Thus, the foreperson's misconduct had an undeniable effect on the verdict.

This evidence of a prejudicial impact upon the Appellants separates the present situation from previous cases in which the Supreme Court found no basis for a new trial. For example, in *Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.*, supra, a juror consulted outside sources, tried to get the other jurors to deliberate prematurely, and conducted her own site visit. While those actions were improper, the record demonstrated they had no effect or influence on the other jurors. Those other jurors ignored the outside information and based their decision on the evidence presented at trial. Thus, the one juror's misconduct did not result in any fundamental unfairness.

A similar situation occurred in *Shumpert v. State*, supra. There, the evidence indicated that some of the jurors openly discussed the criminal defendant's failure to testify as an indication of guilt. This led to an initial vote of

10-2 in favor of conviction. One juror who initially voted "guilty" submitted an affidavit suggesting he might have given a different preliminary vote had he known the jury was not supposed to consider the defendant's decision not to testify. But the affidavit did not state that the initial confusion had any effect on the jury's final decision to vote "guilty." As a result, the Court concluded there was no basis for a new trial.

The Court reached the same conclusion in *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995). In *Hunter*, there was evidence that a juror used a racial slur and indicated a racial bias during the deliberations. But the evidence did not demonstrate that the juror's racial prejudice affected the other jurors' decision to convict the defendant. This fact convinced the Court to affirm the conviction.

The case at bar presents a much different scenario. Unlike their counterparts in *Vestry*, the jurors did not ignore the foreperson and seek to follow the judge's on the record instructions. Instead, they gave undue credence to the foreperson's outside source. In addition, whereas the records in *Shumpert* and *Hunter* gave no indication that the misconduct had any impact on the verdicts, the current record shows that the foreperson's improper action was the sole basis for the punitive damages awards. The jurors had decided not to give the Respondents any punitive damages, but changed their minds after hearing the foreperson's purported message from the judge. This evidence of a direct and quantifiable effect on the ultimate verdict distinguishes the present case from *Vestry*, *Shumpert*, and *Hunter*. Therefore, a new trial is warranted here, despite the holdings in those cases.

Significantly, the result is the same whether this is viewed as a case of "external influence" or "internal influence." The Appellants contend the "external influence" standard applies because the foreperson used outside information (*i.e.*, the supposed statements of the judge) to improperly influence the jury. However, even if the Court applies the stricter "internal influence" standard, the Appellants are still entitled to relief. A total punitive damages award of \$50,000 (nearly twice the total combined actual damages) is certainly an issue involving "fundamental fairness," especially when the affidavits reveal the jury had decided to award no punitive damages before the misconduct occurred. Thus, the "internal influence" standard for a new trial also applies in this case.

Furthermore, this is not a situation in which the Court is required to speculate about what the jury might have done but for the juror misconduct. As discussed above, the record leaves no room for doubt that the decision to award punitive damages resulted directly from the foreperson's actions. This meant the total verdict against the defendants increased by \$50,000 as a direct result of the misconduct. Again, this is not conjecture; it is a clearly demonstrated fact.

This is also not a case in which a more forceful juror merely persuaded others to follow her lead. The foreperson did not persuade the other jurors to award punitive damages based on arguments about the evidence or the judge's actual charges. Rather, she forced them to accept her view by claiming to speak on behalf of the judge. Given the affinity jurors tend to feel towards the trial judge, and the accompanying influence the judge holds over them, the foreperson's misconduct was especially egregious. By cloaking herself in the

judge's authority (albeit falsely), the foreperson essentially ordered the other jurors to disregard the law and follow a nonexistent rule regarding punitive damages. This type of misconduct, and the harm it caused, requires a new trial in the interests of fundamental fairness.

After hearing all of the evidence and deliberating for a substantial amount of time, the jury decided not to award punitive damages. At that point, however, the foreperson's misconduct changed everything. Claiming the speak for the judge, the foreperson told the other jurors any verdict for the Respondents had to include punitive damages. This erroneous statement led to a decision that increased the judgment against the Appellants by \$50,000. As a result, the Respondents were punished based on the whim of the foreperson. This is precisely the type of "fundamental unfairness" that our courts are supposed to guard against. Therefore, this Court should reverse and remand for a new trial.

II.

The trial court erred in failing to grant a new trial due to the erroneous exclusion of an audio recording of the incident.

(A) Standard of Review

"The exclusion of evidence is within the sound discretion of the trial court." *Hollins v. Wal-Mart Stores, Inc.*, 381 S.C. 245, 250-51, 672 S.E.2d 805, 807 (Ct. App. 2008). Therefore, an appellate court will not reverse the trial court's decision "absent an abuse of discretion." *Id.* at 251, 672 at 807. "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

(B) Exclusion of Audio Tape

When a trial court erroneously excludes evidence offered by a party and the party is prejudiced by that decision, a new trial is warranted. See *North Greenville College v. Sherman Constr. Co.*, 270 S.C. 553, 243 S.E.2d 441 (1978). This is exactly what happened in the present case. The trial court excluded an audio tape depicting a portion of the Respondents' arrest, which was recorded on a security officer's cell phone. Essentially, the trial court concluded the tape was not relevant to the issues in dispute, and that any relevance it had was outweighed by its prejudicial impact. This decision was erroneous because the tape had clear relevance to the Respondents' behavior during the arrest, and the trial court's concerns about the tape went to its weight, not its admissibility. Therefore, the trial court's decision constituted a prejudicial error of law, and this Court should reverse.

The audio recording is relevant to the question of how the Figueroa sisters conducted themselves at the time of the arrest. The tape is also relevant to the issue of the various witnesses' credibility, since the security officers testified the Respondents were using profane language, while the Respondents denied it. Without hearing the tape, the jury had an incomplete basis upon which to resolve those key issues. The tape directly contradicts the Respondents' testimony, and it confirms the officer's account of what happened. Thus, it was clearly relevant to the matters in dispute at trial. See Rule 401, SCRE ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

The recording is also relevant to the credibility of the Respondents' version of the arrest. Not only did the Figueroa sisters deny being loud and using profanity, but they also claimed the security officers mocked and laughed at them during and after the arrests. The audio tape contradicts both of those assertions and, consequently, calls the Respondents' entire account into question. The jury should have been permitted to hear the tape, which was directly relevant to the key issue of whether the plaintiffs or the security officers were testifying truthfully about how the arrests occurred.

The trial court concluded the tape was not relevant because there was debate about when it was actually recorded (*i.e.*, during the arrest or afterwards). This conclusion was erroneous for at least three reasons. First, it should have been the jury's job to determine when the recording took place and what it depicted. The Appellants presented testimony that the recording occurred during the arrest itself, while the Respondents claimed it took place afterwards. Given that dispute, the trial court should have permitted the Appellants to play the tape for the jury and present testimony from the security officer who recorded it. Then the Respondents would have had an opportunity to submit testimony or other evidence supporting their theory of when the tape was created. That way, the jury would have been able to decide what weight, if any, to give the tape. By denying the jury the chance to make that determination, the trial court essentially usurped the role of fact-finder on this issue.

Second, the trial court erred by focusing exclusively on conduct that occurred before the first arrest. The trial court concluded the Respondents' conduct after that first arrest had no bearing on the issue of whether probable cause existed. But this conclusion overlooks a significant fact: the arrests did not occur simultaneously. As explained in the Statement of Facts, the security officers initially arrested only Lehua (the older sister), who was shouting profanities at them. This first arrest triggered a loud, profanity-laced tirade from Lani (the younger sister), and that outburst caused the officers to arrest her as well. Thus, assuming *arguendo* the audio recording was not relevant to Lehua's arrest, it still had significant probative value for Lani's arrest. The trial court abused its discretion in failing to consider that separate relevance, especially when each sister was asserting her own claims for her own damages.

Third, the audio recording was relevant to the Respondents' credibility, no matter what part of the incident it covered. The Respondents denied using loud profanity or racial comments at any time, not just before the arrest. Indeed, their attorney repeatedly questioned the security officers about why some of the official reports did not contain the profanity and racial terms they claimed the Respondents used. Clearly, then, the Respondents attempted to persuade the jury that the security officers fabricated their account of the Respondents' behavior. In light of that strategy, it was especially important for the Appellants to present the recording, which proved the Respondents did use profane and racially charged language. Thus, the tape went straight to an issue lying at the heart of the case: the Respondents' credibility. In a "he said, she said" case,

where the parties presented very different versions of the facts, the Respondents' credibility was vitally important. The trial court's decision that the recording was not relevant, therefore, constituted a reversible abuse of discretion.

As for the second prong of the governing standard, the prejudicial nature of the trial court's decision is self-evident. The audio recording corroborated the security officers' version of the incident, and it contradicted the Respondents' denials of having used profanity or other inflammatory statements. For this reason, the tape was a crucial part of the Appellants' case. Its exclusion deprived the Appellants of the opportunity to support their employees' testimony and to call the Respondents' reliability into question. As a result, the trial court's decision on this issue substantially prejudiced the Appellants' case.

The trial court's fundamental error on this issue was playing the gatekeeper role too vigorously. Even if the trial judge had questions about when the recording took place, she should have allowed the Appellants to play the tape and explain it. The Respondents could have challenged the tape's credibility by questioning the Appellants' witness about its timing and contents. Then, having heard the evidence and the competing theories about its relevance, the jury could have decided whether or not to give the tape any weight. But the jury never got that opportunity because the trial court overstepped its bounds and excluded the tape. This was an abuse of discretion amounting to an error of law, and this Court should reverse and remand for a new trial.

III.

The trial court erred in failing to set aside or reduce the punitive damages awards.

After conducting a post-trial review, the trial court allowed the two punitive damages awards (\$25,000 each) to stand. Although the court used the correct legal standards in reviewing those awards, it reached the wrong conclusions. As discussed below, this was not a case in which punitive damages were warranted, and the evidence certainly did not justify duplicative awards of such size. Therefore, this Court should reverse the punitive damages awards.

(A) Standard of Review

"In evaluating the constitutionality of a punitive damages award, [the appellate court] conduct[s] a de novo review." *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010).

(B) No Support for Punitive Damages

As a threshold matter, the trial court should not have submitted the issue of punitive damages to the jury in the first place. Punitive damages are not recoverable absent clear and convincing evidence of intentional or reckless conduct by a defendant. See *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009). This clear and convincing standard is the highest burden of proof found in civil law. *Id.* Here, the Respondents did not present any such evidence at trial. Even taken in the light most favorable to the Respondents, the record does not demonstrate any reprehensible conduct by the security officers. At worst, the evidence shows the officers mistakenly believed the Respondents had breached the peace and arrested them for that reason.

There is nothing to even suggest, let alone prove, that the officers arrested the Respondents without any basis or reason. There is also no evidence the officers targeted the Respondents or acted maliciously. Thus, there is nothing to support a valid punitive damages claim. See Longshore v. Saber Security Services, Inc., 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (reversing punitive damages award against security company, where evidence showed that internal corporate policies and agency regulations were violated, but the company's conduct still could not reasonably be construed as anything more than negligent).

In addition, the Respondents' trial strategy created a very real risk that the jury decided to "punish" the defendants not for false arrest or malicious prosecution, but for other things unrelated to those torts. For example, the Respondents' attorney focused heavily on the alleged missing video tape of the incident. The attorney questioned almost every defense witness about the tape and called several witnesses whose primary function was testifying about the video. The attorney also spent considerable time asking the security officers why they did not have their SLED license certificates from past years. This had no bearing at all on the actual claims in the case.

The problem created by the Respondents' approach is obvious. By focusing on the missing video and the past license certificates, the Respondents attempted to inflame the jury based on things that were not relevant to the actual causes of action. As a result, it is entirely possible the jury awarded punitive damages (or awarded an increased amount) not because of the arrest or the criminal charges, but because the jury believed the Appellants attempted to

conceal evidence. Even if one assumes the Appellants did just that, it would still be improper for the jury to award punitive damages based on that conduct. Although it is not certain the jury did so, the heavy emphasis on that issue at trial taints the punitive damages awards and serves as an additional basis for reversal on this issue.

(C) Punitive Damages Review

The South Carolina Supreme Court set forth the standards that currently govern post-trial reviews of punitive damages awards in *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). There, the Court held trial courts should consider the following three elements when evaluating punitive damages awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the award to the actual or potential harm suffered by the plaintiff; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *Id.* at 587, 686 S.E.2d at 185-86. Applying these three factors to the present case, it is clear this Court should set aside the awards of punitive damages or reduce those awards significantly.

(1) Reprehensibility

The degree of reprehensibility involved in a defendant's conduct is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (quoting *BMW of North America v. Gore*, 517 U.S. 559, 565 (1996)). When analyzing this factor, a trial court should consider whether:

- (i) the harm caused was physical as opposed to economic;
- (ii) the tortious conduct evidenced an

indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than a mere accident.

Id. In the present case, all of these considerations support the Appellants' position.

At trial, the Respondents claimed primarily economic damages. They offered no evidence of any bodily injuries, and they made no allegations of any excessive force by the security officers.⁵ The Respondents testified only that the incident upset and humiliated them, which is, at most, a quasi-physical harm. On the other hand, the Respondents testified extensively about the money they spent to retain criminal defense attorneys, as well as the perceived effects of the incident on their employment and career advancement. Those claimed damages are economic, not physical. Thus, this is not a case involving "physical harm" in the sense that term is used in the case law addressing punitive damages.

On the second factor, the defendants' conduct did not demonstrate "an indifference to or a reckless disregard for the health and safety of others." To the contrary, the security officers attempted to protect the health and safety of mall patrons by removing the plaintiffs from the public areas when they became loud and unruly.⁶ Granted, this meant placing the Respondents under arrest for charges that were later dismissed. But the arrest never jeopardized the

⁵ Indeed, the Respondents did not include any causes of action for assault or battery in their Complaint.

⁶ Here, it should be noted that Lt. Navarro of the Richland County Sheriff's Department testified he heard the Respondents being loud and using profanity. [R. pp. 376-77.] This testimony was undisputed at trial.

Respondents actual health or safety, and there was certainly no evidence the Appellants intended it to do so. Consequently, there is no basis for any reasonable conclusion that the officers acted with indifference or a reckless disregard for safety.

Third, the Respondents were not financially vulnerable. Granted, both Respondents were young and did not have extensive financial resources. But both plaintiffs had steady employment at the time of the incident, and both of them continued to work afterwards. Simply put, although the Respondents were not wealthy, there is no evidence the security officers targeted them for mistreatment due to any perceived financial vulnerability. The officers detained them for being loud and using profanity. The Respondents' financial situation had no bearing whatsoever on that decision.

The fourth factor also favors the Appellants because this incident was not part of any pattern of repeated conduct. In fact, there was undisputed testimony from the officers that arrests occur very rarely, and they do as much as they can not to arrest anyone. [R. p. 467.] There was also no evidence of any other incidents in which the security officers arrested mall patrons without probable cause. As a result, there is no basis for concluding this arrest was anything other than an isolated incident.

In the trial court, the Respondents offered a creative, albeit flawed, argument that the arrest involved repeated conduct because the officers violated more than one company policy. This argument fails for at least two reasons. First, there was undisputed testimony that the corporate policies to which the

Respondents referred were not intended to supersede local laws of a particular jurisdiction. [R. pp. 344-46.] This means that in South Carolina, the alleged policy violations were not violations at all. For example, South Carolina gives licensed security officers more arrest powers than some other states. Thus, what might be a violation of a corporate policy for arrests in Georgia would not be a violation here.

Second, even if there were multiple policy violations, the arrests still constituted only a single incident. This factor does not focus on how many things a defendant allegedly did wrong in one instance; it examines whether the incident at issue was part of a larger pattern of wrongful conduct. The clear rationale for this factor is that repeat offenders deserve greater punishments than a defendant who commits a single wrongful act. Thus, the Respondents' position on this issue is without merit.

As to the fifth factor, the security officers did not act with any intentional malice, trickery, or deceit. Taking the evidence in the light most favorable to the Respondents, the harshest reasonable conclusion is that one of the officers overreacted to an insult and arrested the Respondents for breach of peace when another officer might have acted differently. Even under this view of the evidence, there was no premeditated malice or deceit by the security officers. There was only a mistake by one of the officers that was at best a poor decision, and at worst a rash snap judgment. Either way, the conduct was neither malicious nor fraudulent, and it does not warrant the type of punitive damages imposed in this case.

Stated simply, the security officers' conduct did not involve the degree of reprehensibility to support such a large punitive damages award. The officers arrested two mall patrons who had been asked to leave the mall under a valid policy and who became loud and uncooperative when an officer attempted to escort them off the premises. The jury obviously concluded the officers should not have arrested the Respondents under those circumstances, but there is no evidence the officers made the arrest out of spite, or for no reason at all. The officers believed the Respondents were committing a criminal offense, and even if the decision to arrest them was faulty, it was not reckless or malicious. Nor was it reprehensible to pursue what the officers believed to be valid criminal charges in the magistrate's court. Thus, this case does not justify an award of punitive damages, and it certainly does not warrant the excessive amounts of punitive damages the jury awarded. For this reason, this Court should reverse the punitive damages award, or in the alternative, the Court should reverse and remand with instructions to reduce those awards.

(2) Ratio

This factor requires the trial court to "consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award." *Mitchell*, 385 S.C. at 587-88, 686 S.E.2d at 185. In essence, the trial court can compare the actual damages award to the punitive damages award to determine whether the amount of punitive damages award is constitutionally excessive. See *State Farm v. Campbell*, 538 U.S. 408 (2003). Neither the United States Supreme Court nor the South Carolina Supreme Court

has established any bright-line rules for what ratios pass constitutional muster. *Id.*; see also *Mitchell, supra*.

The jury awarded each of the Respondents \$8,000 on the malicious prosecution claim and \$25,000 in punitive damages.⁷ Thus, the punitive damages award is more than three times higher than the damages for malicious prosecution. This ratio is unreasonably high in light of the evidence presented at trial and the types of actual damages the Respondents claimed. The jury clearly did not accept the Respondents' claims that they had suffered extensive actual damages or that the security officers' alleged conduct had any serious lingering effects on them. Taking that into consideration, along with the very low degree of reprehensibility involved in this case, a ratio of 3:1 is excessive and constitutionally impermissible. Accordingly, this Court should reverse the punitive damages awards, or at least reduce them to a much lower amount.

It is also significant that the punitive damages awards essentially punish the Appellants twice for the same incident. Each plaintiff was entitled to separate actual damages because they claimed separate (though basically identical) personal damages. However, punitive damages are intended to punish and deter wrongful conduct. *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183. They are not personal damages, such as economic losses and physical injuries. Punitive damages serve a very different function from actual damages, and this difference is relevant under the "ratio factor."

⁷ The jury also awarded each Respondent \$6,500 for their false imprisonment claims, but the trial judge ordered the Respondents to elect their remedy. Both of them elected to recover under the malicious prosecution claim.

Although the security officers arrested and charged both Respondents, the alleged wrongful conduct (*i.e.*, arresting and charging the Respondents without probable cause) was identical and constituted a single incident. This is not a situation in which the officers arrested one of the sisters and then, on some other occasion, arrested the other. Everything occurred at the same time and involved the same actions. In other words, the officers did not commit separate wrongful acts against each Respondent. Both of the sisters were simply the subjects of a single incident. Yet, by awarding each Respondent \$25,000 in punitive damages, the jury punished the Appellants twice for that single incident. This results in a type of "damages overkill" that this Court should not permit to stand.

(3) Comparative Civil Penalties

For this factor, "the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186. "When identifying 'comparable cases' a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio or actual or potential harm to the punitive damages award; and other factors the court may deem relevant." *Id.* at 588-89, 686 S.E.2d at 186.

The cases cited and relied upon in the trial court's Order are inapposite to the punitive damages review. In *Smith v. Harris-Teeter Supermarkets, Inc.*, 285 S.C. 445, 330 S.E.2d 316 (Ct. App. 1985), this Court listed the actual and punitive damages awards in the opinion's procedural statement (\$1,000 and \$9,000, respectively), but the Court did not undertake any review of the punitive

damages award. The opinion gives no indication that the defendant even requested any such review, and, of course, the current standards were not in force when the Court decided that case. Thus, *Smith* does not represent a 9:1 ratio being “upheld” for a malicious prosecution case under the presently applicable law.

Although the Supreme Court did examine the damages award in *Patterson v. Bogan*, 261 S.C. 87, 198 S.E.2d 586 (1973), it did so only in a general, cursory manner. The case involved the denial of a new trial motion based on a claim of excessive damages – not a constitutional review of the punitive damages award in and of itself. Indeed, the Court’s discussion of punitive damages focuses almost exclusively on the defendant’s perceived ability to pay the full award. *Id.* at 94-95, 198 S.E.2d at 590. In *Mitchell*, the Court indicated that while a defendant’s ability is still a factor for courts to consider, it should not be the primary focus. As the Court stated, “[w]ealth alone cannot justify an otherwise unconstitutional punitive damages award. ... While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant’s net worth.” *Mitchell*, 385 S.C. at 588, 686 S.E.2d 185, n. 8. Thus, it is not at all certain that the facts in *Patterson* would lead to the same result under the current law.

Both of the cases cited in the trial court’s Order predated the authorities that led to the current rule in *Mitchell*. Neither case applied the *Mitchell* factors, and, consequently, they have no bearing on the current review. If they have any

value at all for purposes of this issue, it is purely anecdotal, and there are just as many similar cases, if not more, that support the Appellants' position. See, e.g., *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991) (upholding 1½:1 ratio in false imprisonment / malicious prosecution case); *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983) (affirming result where jury awarded \$1,550 in actual damages, and trial court reduced \$8,450 punitive damages award to \$3,450); *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 166 S.E.2d 297 (1969) (affirming award of \$40,000 actual damages and \$15,000 punitive damages in abuse of process case); *Wright v. Gilbert*, 227 S.C. 334, 88 S.E.2d 72 (1955) (affirming award of \$24,000 actual damages and \$1,000 punitive damages in abuse of process case). Therefore, the trial court's reliance on the cases cited in the Order was misplaced.

(4) Other Factors

In addition to the *Mitchell* elements, this Court should consider at least two other factors that weigh heavily against the punitive damages awards. Both factors appear in other sections of this brief, and the Appellants will not fully repeat them here. Nevertheless, the Appellants will call those factors to the Court's attention for purposes of its de novo review of the punitive damages award.

First, there are legitimate concerns about the jury foreperson's misconduct, which forced the jury to reverse its original decision not to award punitive damages. The Appellants should not be required to pay \$50,000 in punitive damages (when the jury first decided they should not pay any) simply

because the foreperson either misunderstood or intentionally mischaracterized her conversation with the trial judge. Allowing the punitive damages awards to stand under these circumstances would violate the Appellants' due process rights. Punitive damages, especially in such high amounts, should not be awarded unless the Appellants received full and fair judicial proceedings, and this did not happen in the present case.

Second, there is also the danger that the jury used improper considerations when determining the punitive damages amounts. At trial, the Respondents' attorney focused on a missing video tape, repeatedly brought up other discovery issues, and even commented on the Appellants' decision not to call two of its officers as witnesses. None of those matters had anything to do with the actual allegations of wrongdoing – *i.e.*, arresting and charging the Respondents without probable cause. Yet, the Respondents' attorney emphasized all of them at trial, to the point where the trial court several times had to instruct him to discontinue certain lines of questioning.

The problem with this tactic is that it invited the jury to punish the Appellants for conduct unrelated to the actual incident at issue in the case. If the Respondents committed any discovery offenses, this was a matter for the trial court to address, not the jury. In fact, the trial court did address those claimed abuses, determining a spoliation charge was appropriate with regard to the purported videotape. But the Respondents' trial tactics created the risk that the jury would feel obligated to punish the Appellants not for the arrest and its immediate aftermath, but for events that occurred during discovery. This risk

necessarily taints the punitive damages awards, and the Court should reverse the punitive damages award.

(5) Conclusion

This is not a case that justifies punitive damages, let alone such large amounts of them. The Appellants' employees did not prey upon vulnerable victims, nor was the alleged misconduct part of a larger pattern or scheme. At worst, the security officers reacted badly to a tense and chaotic situation. While that might arguably be sufficient for an award of actual damages for false arrest or malicious prosecution, it is not the kind of reprehensible conduct that warrants punitive damages. And it certainly does not justify a punitive damages award that is more than three times higher than the actual damages. Therefore, this Court should reverse the award of punitive damages entirely, or, in the alternative, the Court should reverse and remand with instructions for the trial court to reduce the punitive damages award.

IV.

The trial court erred by failing to grant the Appellants judgment as a matter of law due to the existence of probable cause.

At the close of the evidence, the Appellants moved for a directed verdict on the malicious prosecution and false arrest claims. The Appellants argued the evidence taken as a whole supported only the conclusion that the security officers had probable cause to detain the Respondents. The trial court denied the motion and also denied the Appellants' post-trial motion on this issue. The trial court's decision constituted an error of law, and this Court should reverse.

A judgment as a matter of law (or JNOV) is warranted where there is either no evidence to support the verdict, or the trial court's legal conclusions were controlled by errors of law. *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 512-13, 698 S.E.2d 822, 826-27 (Ct. App. 2010). Here, the trial court erred in failing to conclude, as a matter of law, that the Appellants' employees had probable cause to arrest the Respondents for at least one criminal offense.

The existence of probable cause for an arrest is fatal to claims for false imprisonment and malicious prosecution. See *McBride v. School Dist. of Greenville Co.*, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise." *Id.* at 567, 698 S.E.2d at 856. "Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." *Jackson v. City of Abbeville*, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005). As this Court further explained in *Jackson*:

Probable cause is determined as of the time of the arrest, based on facts and circumstances – objectively measured – known to the arresting officer. The determination of probable cause is not an academic exercise in hindsight.

Id. at 667, 623 S.E.2d at 659. In other words, "[t]he question before the Court is not whether plaintiff was guilty ... but whether defendant had probable cause to believe him guilty." *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d

607, 609 (1965) (emphasis added). Furthermore, "it is permissible to rely on an uncharged offense to establish probable cause," and this rule "applies in a false imprisonment or malicious prosecution claim." *Jackson*, 366 S.C. at 669, 623 S.E.2d at 660.

In the present case, the various accounts of the incident differed in some ways, but one fact was undisputed. A security officer told the Respondents to leave the mall, and they did not immediately do so. At the very least, the record supports the reasonable inference that a reasonable security officer in that situation would have believed the Respondents were not leaving the mall when they walked away from her. If nothing else, this reasonable belief provided probable cause for an arrest based on a charge of "trespass after notice." A criminal trespass occurs when "any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent" S.C. Code Ann. § 16-11-620.

Even when considered in the light most favorable to the Respondents, the evidence supports the conclusion that the security officers had probable cause to arrest the Respondents for violating § 16-11-620.⁸ A security officer instructed the Respondents to leave, and they did not immediately go to an exit. They also objected when another security officer came to escort them out of the mall.

⁸ Of course, the Appellants also contend the security officers had probable cause to arrest the Respondents for breach of the peace and/or disorderly conduct.

According to Lieutenant Dave Navarro of the Richland County Sheriff's Department, this scenario would have supported an arrest for trespass after notice. [R. pp. 387-89.] The Respondents did not present any witnesses or other evidence to dispute Lt. Navarro's assertion. Thus, the record supports only a conclusion that the security officers had probable cause to arrest the Respondents for trespass after notice.

It is of no consequence that the officers instead charged the Respondents with breach of the peace. As *Jackson* demonstrates, all that matters is whether the security officers had probable cause to arrest the Respondents for any charge. The evidence plainly shows that they did. It is also irrelevant whether or not the Respondents were actually guilty of any offense. As long as the security officers reasonably believed a crime was being committed, probable cause existed. And again, that probable cause defeats the malicious prosecution and false imprisonment claims as a matter of law. Therefore, the trial court erred in failing to grant the Appellants judgment as a matter of law. See *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 436, 629 S.E.2d 642, 649 (2006) ("Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion.").

Regardless of whether the Respondents shouted profanities or breached the peace in other ways prior to their arrest, the evidence is clear that they did not immediately leave the mall when told to do so. The Respondents claimed they were walking to the exit closest to their car, but the security officer did not

know that. All the security officer knew was that she told the Respondents to leave, and they objected and walked away from her. It was perfectly reasonable for the security officer to believe the Respondents were committing an offense by doing that (*i.e.*, trespass after notice). For this reason, probable cause existed, and the Respondents' claims failed as a matter of law. This Court should now reverse the result below and remand with instructions to enter judgment in the Appellants' favor.

V.

The trial court erred by charging the jury on spoliation of evidence.

Early in the trial, the trial judge granted the Respondents' request for a sanction against the Appellants based on a purportedly "missing" videotape from the mall's security cameras on the day of the incident. This decision was erroneous because there was never any conclusive evidence that a videotape depicting the incident (or even part of it) ever existed. In addition, there was no evidence that the Appellants intentionally destroyed or concealed any videotape. Therefore, the trial judge should not have sanctioned the Appellants by giving a spoliation charge to the jury, and this Court should reverse.

A party objecting to a jury charge is entitled to a new trial if the substance of the charge was both erroneous and prejudicial. See *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002). The spoliation charge in the present case meets both of those criteria. Not only was the charge erroneous and unnecessary, but its inclusion also resulted in significant prejudice to the Appellants. Accordingly, a new trial is warranted.

The spoliation charge was erroneous because there was no direct evidence a surveillance tape containing relevant information existed in the first place. None of the trial witnesses had ever seen video footage of the arrests, and there was no testimony that a video containing that type of footage was ever created and then destroyed. The trial record contained the following evidence regarding a video: (1) one or more of the Appellants' employees allegedly told the Respondents' representatives they thought there was a video; (2) the employees who allegedly made those statements never actually watched such a video or checked to see if one in fact existed; and (3) the only employee who actually checked to see if there was video of the incident did not find one. This is not sufficient evidence to prove a videotape existed.

Granted, another security officer testified that he was monitoring the cameras on the date of the incident and attempted to find the Respondents on those camera when the alert call came in. But even that employee never testified that the cameras recorded video footage of the incident. He did not go back after the arrest to see if the cameras actually recorded anything, and he never saw video footage of the Respondents or their arrest. Indeed, the officer testified he did not know whether or not a videotape existed.

This evidence, even when viewed in the light most favorable to the Respondents, is not sufficient to prove any "spoliation," which is "[t]he intentional destruction of evidence". *Black's Law Dictionary* (6th ed. 1991) (emphasis added). The record simply does not demonstrate the type of willful destruction of clearly existing evidence that was present in the cases where South Carolina's

appellate courts have found spoliation. See, e.g., Kershaw County Bd. of Educ. v. United States Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990); QZO, Inc. v. Moyer, 358 S.C. 246, 256-57, 594 S.E.2d 541, 546-47 (Ct. App. 2004).

The present case also lacks another element that was present in both *Kershaw County* and *QZO*. In both of those cases, the offending parties intentionally destroyed evidence despite the existence of court orders forbidding such destruction. Thus, the parties not only covered up evidence, but they also violated court orders in the process. Here, on the other hand, the trial court never ordered the Appellants to produce the alleged videotape. The Respondents' attorney claimed such an order existed, but nothing to that effect was in the court's file. Consequently, there was no basis for the trial court to conclude that the Appellants had violated a court order, and the trial court's decision to impose a sanction on the Appellants was erroneous.

The spoliation charge was clearly prejudicial to the Appellants because it forced them to "prove a negative." The Appellants had to attempt to justify the failure to produce a video that never existed, but that very attempt made them appear to be evasive. Indeed, the Respondents' attorney seized upon the videotape issue and made it one of the focal points of his case. This tactic, coupled with the spoliation charge, made it more difficult, if not impossible, for the Appellants to present a credible defense in the jury's eyes.

Adding to the prejudicial impact was the trial court's refusal to admit the audio recording of the incident. Those two rulings combined to create the following scenario: the jurors heard they were permitted to draw a negative

inference from a phantom videotape, but they never even knew an audio recording existed. This gave the Respondents an unfair advantage in a case where the jury heard two very different versions of the incident and had to decide which one to believe.

Again, the situation might have been different if the Appellants had lost or destroyed a piece of evidence that clearly existed and was in their possession at one time. In that scenario, a spoliation charge might be appropriate (assuming the destruction was intentional). But here, the Appellants did not lose or destroy anything. Their employees searched for video footage of the incident and could not find any. This was bad luck, not spoliation, and the trial court should not have punished the Appellants for it. Therefore, this Court should reverse and remand for a new trial.

VI.

The trial court erred by not granting a new trial absolute or new trial remittitur.

In addition to the grounds discussed above, the Appellants moved for a new trial for several other reasons. The trial court erred in failing to grant a new trial on at least one of these bases, and this Court should reverse.

(A) Thirteenth Juror Doctrine

"In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. The doctrine 'entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts.' ... As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's

otherwise unanimous verdict.” *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009). A trial judge does not have to set forth specific reasons for a decision to grant a new trial based on the thirteenth juror doctrine. *Id.* However, a trial judge will typically grant a new trial under this doctrine based upon a conclusion that the evidence does not support the jury’s verdict. *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005).

Here, the evidence presented at trial does not support the jury’s verdict. Whether or not the Respondents were actually committing a criminal offense, it is clear the security officers had a reasonable basis to believe they were. This reasonable belief created probable cause for the arrest and criminal charges, which prevents any claim for false arrest or malicious prosecution. Therefore, by returning verdicts for the Respondents, the jury either overlooked this evidence or misunderstood the law charged to them. It is also likely the jury failed to grasp the real issue in the case (*i.e.*, probable cause) due to the Respondents’ focus on an alleged missing videotape and other discovery-related matters. Accordingly, this Court should reverse and remand for a new trial under the thirteenth juror doctrine.

(B) New Trial Absolute

“A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. ... The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive as to shock the conscience of the court and clearly

indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." *Swicegood v. Lott*, 379 S.C. 346, 355, 665 S.E.2d 211, 215-16 (Ct. App. 2008).

The verdict in the present case satisfies that standard. The Respondents presented no evidence of any tangible damages other than the \$1,000 each of them paid for an attorney in the magistrate's court criminal case. The Respondents did testify about things such as discomfort and humiliation, but their testimony did not provide a sufficient basis for the amount of damages awarded by the jury. Although the amount of actual damages might arguably not "shock the conscience" of the Court, the grossly excessive punitive damages award must also be considered. This is the area in which the verdict justifies a new trial absolute.

Including the punitive damages, the jury awarded each Respondent \$33,000 on the malicious prosecution claim and \$31,500 on the false imprisonment claim. Those amounts are excessive and unreasonable in light of the evidence presented at trial. Indeed, the amounts suggest the jury based its decision on "passion, caprice, prejudice, partiality, corruption or some other improper motives." *Swicegood, supra*. Only a jury motivated by such things could have awarded such excessive amounts of damages after hearing the evidence presented at trial, which failed to reveal any malice or gross misconduct by the Respondents. In addition, there is a very real danger the jury was inflamed by the Respondents' emphasis on the absence of a videotape, even

though that issue had nothing to do with the actual causes of action. Therefore, this Court should grant the Appellants a new trial absolute.

(C) New Trial Nisi Remittitur

A trial court has the authority to grant a new trial *nisi remittitur* when it finds the amount of the verdict to be merely excessive. *RRR, Inc. v. Toggas*, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." *Id.* at 183, 662 S.E.2d at 442-43. Nevertheless, "[t]he circuit court has wide discretionary power to reduce the amount of a verdict which, in its judgment, is excessive." *Id.* at 183-84, 662 S.E.2d at 443. When considering whether a verdict is excessive for purposes of a new trial *nisi remittitur*, the trial court should consider punitive damages as well as actual damages. *Id.* at 184, 662 S.E.2d at 443.

Here, even if the Court determines the amount of punitive damages is not "grossly excessive," the amount is sufficiently excessive to warrant a new trial *nisi remittitur*. As discussed in the preceding section, the evidence presented at trial did not justify any award of punitive damages, let alone the excessive amounts included in the verdicts. The lack of any correlation between the alleged conduct by the Appellants' employees and the large punitive damages award provides a sufficiently "compelling reason" to grant the defendants a new trial *nisi remittitur*.

Without the relief, the Appellants will suffer a severe punishment, simply because its employees attempted to do their job – *i.e.*, protect the peace and

security of the mall. Meanwhile, the Respondents will obtain a windfall, even though they used loud profanity and racially charged language in a public place. The Court should prevent this inequitable result by reversing and remanding with instructions to grant a new trial *nisi remittitur* based on the elimination of the punitive damages awards.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the verdicts in favor of the Respondents and remand this action to the trial court with instructions to grant the Appellants judgment as a matter of law, strike the punitive damages awards, or conduct a new trial.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

Hon. Alison R. Lee, Circuit Court Judge

Case No.: 2009-CP-40-3996

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

vs.

CBI/Columbia Place Mall, LLC, and
ERMC II, LLP.....Appellants.

RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellants, certifies that this Final Appellants' Brief is identical to the Initial Appellants' Brief, except for inclusion of references to the Record and correction of typographical errors and/or misspellings, and it otherwise conforms to the requirements of Rule 211(b), SCACR.

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In the Court of Appeals

S.C. Supreme Court

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Court of Common Pleas

The Honorable Alison R. Lee, Circuit Court Judge

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v.

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FINAL BRIEF OF RESPONDENTS

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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 Appellants 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 Defendants filed a Motion to Strike and Dismiss on July 9, 2009. [R.pp. 032-031.] By agreement of the Respondents and the Defendants 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 Appellants 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 Appellants appeared for a status conference and the following was determined: 1) the Appellants would provide complete discovery within ten (10) days; 2) the Appellants withdrew their Motion to Compel; 3) the Respondents and Appellants 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 Appellants' Answer to the amended Complaint was filed on March 30, 2010. [R.pp. 080-088.] The Appellants 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 Appellants to prepare the Order. [R.p. 003.]¹ 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 Appellants up to the date of trial by phone and by email; Respondents' counsel also met at the office of Appellants' counsel on October 1, 2010. Counsel for the Respondents advised counsel for the Appellants on each occasion that the Appellants 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 Appellants.

A trial involving the Respondents and the Appellants 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 Appellants' Answer and enter judgment against the Appellants 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

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

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 Appellants 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 Appellants' Answer and issue judgment in the Respondents' favor based upon violations of the Motion to Compel Order and discovery rules. Counsel for the Appellants argued that a spoliation charge was the proper remedy in this case for failing to provide discovery in lieu of striking the Appellants' Answer and granting judgment to the Respondents. [R.p. 165, lines 3 - 5; p. 224, lines 10-12.] Counsel for the Appellants admitted in her argument that James Goins had seen the Respondents going up the elevator [R.p. 163, lines 5-25.]² The Court denied the Respondents request for default 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 Appellants' directed verdict motions as to Appellants CBL/Columbia Place Mall and ERM; however, the Court

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

did grant a directed verdict as to Appellant 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 Appellants presented their facts as to what they alleged the Respondents' did that lead 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 Appellants 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 Appellants about either the Court's responses to the juror notes or the Court's comment to the jury foreperson.

Counsel for the Appellants 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.] Counsel for the Respondents responded to the Appellants' brief by memorandum and also requested to not be required to elect remedies. [R.p. 121- 128; p. 129-137.] The Respondents' request to not be required to elect remedies was denied by the Court. [R.pp. 011-016.] Respondents' counsel elected to recover under

the malicious prosecution. [R.p. 138.] The Appellants filed their Notice of Appeal on February 28, 2011.

STATEMENT OF THE FACTS

The Respondents were shopping at the Appellants' place of business on January 19, 2008. [R.p. 239, lines 11-20.] Columbia Place Mall has a Youth Escort Policy which requires all persons under the age of eighteen (18) to be accompanied by either a parent, or guardian twenty-one (21) years or older, on Friday and Saturday evenings after 5:00 p.m. [R.pp. 684-685.] All accompanied minors are only asked to leave the mall after 5:00 p.m. if they are not in compliance with the Youth Escort Policy. [R.pp. 684-685.] Appellant ERMCO II, L.P. provides security, security officers, and other services for the Appellant CBL/Columbia Place Mall, LLC. [R.p. 323, lines 15-20.]

At approximately 5:00 p.m., both Respondents were approached by a mall security officer on the first level of the mall; the officer first asked for the Respondents' identification and then advised the Respondents about the Youth Escort Policy. [R.p. 244, line 7 - p. 248, line 13.] The Respondent Lehua Figueroa was nineteen (19) years old and Nohealani Figueroa was seventeen (17) years old at the time of this incident. [R.p. 398, lines 1-5; p. 400, lines 5-25.] The Respondents were asked to leave the mall and each complied by heading towards the nearest escalator to exit the mall on the second level where there vehicle was located. [R.p. 249, lines 3-24; p. 405 line 11 - p. 406 line 12.]³

The Respondents encountered security officer, Lionell Parish, as they were riding and exiting the escalator. [R.p. 250, lines 1 - 21; p. 407, lines 7-22.] Officer Parish was approximately two to three feet behind the Respondents as they were riding and exiting the

³ Contrary to Appellants' assertion, the Respondents were not disorderly as they were walking towards the exit. [R.p. 249, lines 3-14; p. 251, lines 6-23; p. 253, lines 3-22; p. 406, lines 4 - p. 407, line 25.]

escalator. [R.p. 251, line 24 - p. 252, line 13; p. 407, lines 24-25; p. 409, lines 1-21.] The Respondents never stopped at any other locations as they were exiting the mall. [R.p. 254, lines 1-22.] Officer Parish appeared to become upset when Respondent Lehua Figueroa mistakenly referred to him as a "security guard." [R.p. 255, lines 1-14.] Officer Parish stated that he was "a security officer" and could "arrest you;" Officer Parish then grabbed the Respondent Lehua Figueroa by the arm and jacket without warning and attempted to bend the Respondent Lehua Figueroa's arm behind her back. [R.p. 255, line 18 - p. 256, line 17; p. 409, line 22 - p. 411, line 23.] The Respondents were thrown up against a store window as they were nearing their exit and handcuffed and escorted to a Richland County Sheriff's Department substation within the mall. [R.p. 259, line 4 - p. 260, line 5 ; p. 412, line 1 - p. 417, line 21; p. 420, lines 1-20.]⁴ The Respondents were also interrogated by Lt. Dave Navarro, Richland County Sheriff's Department, while they were in custody and the audio recording and record reflect that no Miranda warnings administered to the Respondents. [R.p. 688.] Lt. Navarro was located outside of the mall when the Respondents were arrested. [R.p. 374, line 14 - p. 375, line 24.]⁵

The Respondents were charged with Breach of Peace and were transported to the Alvin S. Glenn Detention Center where they were held until the next afternoon. [R.p. 290, lines 16-22.] The Breach of Peace charges were dismissed against both Respondents on May 20, 2009. [R.p. 298, line 1 - p. 299, line 19; p. 444, line 12 - p. 455, line 11] Both Respondents sustained injuries from the arrests and malicious prosecution. [R.p. 266, line

⁴ The Respondents were frisked by Sgt. Patricia Creech, of ERM, in a separate room of the substation without any other officers being present. [R.p. 272, line 1 - p. 276, line 24; p. 420, line 17 - p. 424, line 15.]

⁵ The Respondents admitted that they were upset after their arrests. [R.p. 264, line 1 - p. 265, line 19; p. 415, lines 1-12.]

2 - p. 267, line 23; p. 269, lines 1-21; p. 271, line 10 - p. 276, line 24; p. 281, line 8 - p. 289, line 21; p. 290, line 16 - p. 294, line 24; p. 417, line 1 - p. 418, line 24; p. 420, lines 1-25; p. 433, line 2 - p. 444, line 11.]

The Appellants possessed only the power to arrest or charge a person for violating a criminal statute of the State of South Carolina. [R.pp. 541-575; S.C. Code Ann. § 40-18-11O.] Breach of Peace is not a codified statute of the State of South Carolina. "Persons performing the duties of security officers must also obtain valid security officer registration certificates ... a licensee may not authorize a person to perform the duties of a security officer unless that person holds a valid security officer registration certificate or has applied for a security officer registration certificate ... pending issuance of a registration certificate, a security officer may perform the duties of a security officer for up to twenty days after receipt by of SLED of his application for registration; however, a person authorized to perform duties under this section has no arrest authority ..." [S.C. Code Ann. § 40-18-80.] The agents of the Appellants were not authorized to perform the duties of a security officer because the agents of the Appellants could not and did not produce a valid State Law Enforcement Division (SLED) issued registration certificate for the year 2008. [R.p. 327, line 22 - p. 331, line 1.]⁶ The Appellants are required to retain their training records or be subject to a suspension or revocation of the officer's registration. [South Carolina Law Enforcement Division Regulation 73 - 420 (2006).]⁷

The Appellants' company policy discouraged the use of physical force and advises security officer to not pursue anyone in the mall or fleeing the mall. [R. pp, 576-645; pp.

⁶ The Appellants were required to produce these registration cards pursuant to both discovery motions in 2008, 2009, and 2010 and Order to Compel. [R.p. 003; pp. 006-007.]

⁷ The record is absent of any training records for its security officers involved in the arrest of the Respondents.

646-683.]⁸ Also, the Appellants' manual states that a security officer must undergo specialized training before the officer can handcuff individuals and cannot conduct any searches outside of a pat down for weapons. [R. pp, 576-645; pp. 646-683;] The Appellants' agents failed to follow any of its Appellants company's policies in the following particulars: 1) by pursuing the Respondents in the mall, 2) by failing to contact law enforcement before engaging the Respondents, 3) by using physical force against the Respondents; and 4) by handcuffing the Respondents without any training; [R.p. 252, line 3 - p. 256, line 17; p. 258, lines 5-21; p. 261, line 2 - p. 263, line 20; p. 414, line 1- p. 416 line 20.]

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' REQUEST FOR A NEW TRIAL BASED UPON NO EVIDENCE OF JUROR MISCONDUCT.

The Appellants have produced no evidence of juror misconduct. There is no evidence that the jury foreperson misrepresented any communications from the Court to other members of the jury to force an award of punitive damages. Counsel for the Respondents and the Appellants were both aware of all the questions from the jury and were aware of all answers provided to the jury by the Court. Neither counsel objected to any types of communications from the Court to the jury. Furthermore, counsel for the Appellants did not raise any objections about the trial court's contact with the jury foreperson in the Appellants' post trial motions. The issue of any prejudice from any impermissible contact between the

⁸ The Appellants' pocket manual advised its security staff that "they are not law enforcement officers and should refer all situations of a dangerous, criminal nature to law enforcement as soon as circumstances permit. [R. pp, 576-645; pp. 646-683.]

Court and the jury foreperson is therefore not preserved since this issue was not raised at the trial court level.

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, supra*. The trial court has broad discretion in assessing allegations 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. *State v. Ziegler, supra*. 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 a trial courts should "exercise a degree of caution before entertaining such evidence in an attack on a jury' 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 trial court polled the jury after the jury returned its' verdict and the verdicts still remained unanimous. There is no evidence of internal misconduct; furthermore, the Court has indicated that a defendant 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 Appellants based upon the Court's communications with the jury nor was there any objection made by defense 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 unanimity of the verdicts and lack of prejudice is further indicated by the fact that all twelve (12) jurors returned a zero (\$0.00) dollar verdict on the defamation cause of action. The Appellants have not alleged that the verdict for the defamation cause of action was caused by juror misconduct or that the jury foreperson forced the other jurors to return a zero (\$0.00) verdict on the defamation action. No jurors came forward to the trial court to allege juror misconduct. The two (2) juror affidavits arose from the Appellants' affirmative actions to question the jurors about their verdict.

There was no evidence of external factors which influenced the jury's verdict. Furthermore, there was no evidence of any internal factors misconduct which influenced the jury's verdict. The trial court examined the jurors' affidavits and determined that no jury misconduct had occurred during the deliberations. The trial court exercised its broad discretion in examining the affidavits and did not abuse its discretion by denying the

Appellants' request for a new trial based upon juror misconduct. This Court should affirm the trial court's denial of the Appellants request for a new trial based upon juror misconduct.

II.

THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' 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 trial court properly excluded an audio tape secretly recorded by the Appellants' 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 Appellants 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's first contact with the Respondents came while the Respondents were being escorted to the Richland County Sheriff's Department substation from the location where the Respondents were seized and handcuffed.

The trial court heard the proffered testimony offered by the Appellants and properly determined that the audio recording did not occur contemporaneously with the arrests; furthermore, the trial 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 trial court or the Respondents. Also, the trial 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. There is no evidence that the Court abused its discretion on the lack of relevancy of this audio recording; therefore, the Court's finding should not be disturbed absent abuse. Also, even if this Court did believe this audio was relevant, it should still be excluded based upon its confusion as to when it was recorded; this confusion would result in audio recording's prejudicial effect exceeding its probative value.

The audio recording also would properly be excluded since law enforcement failed to provide Miranda warnings to the Respondents. Law enforcement is required to administer *Miranda* warnings to inform a detained accused of his/her right against self incrimination in custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. "Failure to give Miranda warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Missouri v. Seibert*, 124 S.Ct. 2601, 542 U.S. 600 (2004).

The record is clear that the Respondents were under arrest and in custody at the time Lt. Navarro interrogated them. Lt. Navarro was attempting to elicit an incriminating statement from the Respondents when he questioned them about what happened; therefore, Lt. Navarro was required to administer *Miranda* warnings to the Respondents. The audio recording did not reflect that the Respondents were given their Miranda warnings by Lt. Navarro before he interrogated them; therefore, any statements the Respondents made to him should be excluded as violating the Miranda requirement. Though this is a civil

case, these actions arose out of a criminal arrest thereby making the Miranda warnings and its requirements applicable in this civil action since any statements by the Respondents would be excluded in a criminal case for a *Miranda* violation.

The audio tape also would be properly excluded under Rule 404(b) of the South Carolina Rules of Evidence which excludes any evidence of other wrongdoing from being admitted into evidence unless certain exceptions apply. Evidence of other wrongdoing may be admitted if it is introduced to show motive, or the absence of mistake or absence, or identity, or common scheme and plan or intent.

Any evidence of other wrongdoing which alleged to have occurred after the Respondents' arrest for Breach of Peace does not meet the exceptions articulated in *Rule 404(b)*. The excluded audio recording contains the Respondents using some profanity while they were being interrogated by Lt. Navarro. The Appellants contend that since the audio recording contains the Respondents using some profanity when being interrogated by Lt. Navarro, then the audio recording was relevant and should be admitted to prove the Respondents' character before their arrest. *Rule 404(b)* was specifically designed to exclude this type of conformity evidence which the Appellants sought to enter into evidence at trial. Here, the audio recording would also be inadmissible since the statements on the recording did not fall into any of the exceptions set out under *Rule 404 (b)* or *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

The trial court did not abuse its' discretion in excluding the audio recording from being admitted into evidence. The audio recording was not relevant because it was recorded some time after the Respondents were arrested for Breach of Peace. 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 trial

court expressed its' concern surrounding all of the issues involving the audio recording, it is a reasonable conclusion that the admission of the audio recording would have only served to confuse the jury; furthermore, even relevant evidence, which this audio recording was not, may be excluded on the ground of confusion. *Rule 403, South Carolina Rules of Evidence*. Also, the Appellants did not suffer any prejudice as the Appellants 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. Furthermore, the audio recording would be excluded properly for violating the evidentiary rules of *Miranda*, *Rule 404 (b)*, and *Lyle*. This Court should affirm the trial court's denial of the Appellants request for a new trial based upon the exclusion of the audio recording.

III.

THE TRIAL COURT PROPERLY DENIED THE APPELLANTS 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. The South Carolina Supreme 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, the 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 Appellants. 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 Appellants' actions were repetitive and intentionally malicious and deceitful in that the Appellants' 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 in 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 Appellants' 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 Plaintiff'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 trial 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 Appellants' conduct in destroying the video; 2) the Appellants' agents' disregard for their own internal policies regarding pursuit, training, licensing, and arrests; 3) the Appellants inconsistent testimony at trial; 4) other discovery violations; 5) the economic harm to the Respondents' job prospects for the present and the future; and 6) 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 determined that the Appellants acted wantonly, willfully, and maliciously in this incident; therefore, this court should affirm the decision of the trial court.

IV.

THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' REQUEST FOR A JUDGMENT AS A MATTER OF LAW

Judgment as a matter of law is warranted where there is no evidence to support the verdict or where the trial court's legal conclusions were controlled by errors of law. *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 512-13, 698 S.E.2d 822, 826-27 (Ct. App. 2010). The court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party in ruling a JNOV motion. *Bishop Logging Co. v. John Deere Industrial Equipment Co.*, 317 S.C. 520, 450 S.E.2d 183 (Ct. App. 1995). Furthermore, the court in *Bishop Logging* stated that the case must be submitted to the jury if more than one inference can be drawn from the evidence. An appellate court will only reverse the trial

court's ruling on a JNOV motion whether there is no evidence to support the ruling or where it is controlled by an error of law. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 629 S.E.2d 642 (2006).

The Respondents aver that this case was properly submitted to the jury as more than one inference could be drawn from the evidence and because there was no error of law made by the court in submitting the case to the jury. The issue of whether probable cause existed is mostly a question for the jury. *Supra Law v. S.C. Dep't of Corr.* In this case, whether the issue of whether probable cause existed for any crime was a jury question because the jury was free to decide whether the Respondents were leaving the mall or not when they were asked to leave. There was no evidence that the Plaintiffs refused to leave the mall when asked to do so; to the contrary, there was testimony by the Respondents that there were leaving the mall and communicated that to the security officers; there was testimony by the security officers Parrish and Thompson that the Respondents told them that they were going to leave. Furthermore, Sgt. Parrish in his own testimony in the record testified that there were no other charges for which he could have charged the Respondents. This testimony by Sgt. Parrish indicates that he did not believe the Respondents were either refusing to leave after notice or were trespassing after notice.

A clear distinction can be made from this case and the case in *Jackson v. City of Abbeville*, 623 S.E.2d 656 (S.C. App. 2005). In the *Jackson* case, the defendant refused to leave after being asked to leave several times by the store owner in the presence of the officer and outside of the presence of the officer. The issue was clear in that case that the Defendant was trespassing after notice to leave. In this case, the Respondents were in the act of leaving the mall when this incident occurred. Furthermore, there was no evidence that the Respondents refused to leave or made any attempts to stop or shop at any other

locations while leaving the mall. The evidence at trial was that the Respondents were heading to the exit where their car was located, the Respondents did not stop at any other stores or locations, and the Respondents were not trespassing. Contrary to the Appellants position, it was not unreasonable for the Respondents to want to the exit the mall where their vehicle was located. Furthermore, Lt. Navarro defined trespass after notice as either a refusal to leave after notice or a return to the property after notice has already been given. [R.p. 388, line 18 - p. 390, line 22.] No probable cause existed to arrest the Respondents on any charge; therefore, this Court should affirm the trial court's denial of the Appellants request for a judgment as a matter of law as the trial court's legal conclusion that the case should go to the jury was not controlled by any errors of law.

V.

THE TRIAL COURT PROPERLY CHARGED THE JURY ON
SPOILIATION OF EVIDENCE.

Our Courts have upheld a jury charge which advised that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 629 S.E.2d 675 (S.C.App. 2006), citing *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 396 S.E.2d, 369 (1990). Furthermore, a court "must consider the jury charge as a whole, in light of the evidence and issues presented at trial" when determining if a court erred in a jury charge. See *Stokes*. The Court goes on to say, citing *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (Ct.App.2002) that an erroneous jury charge will not result in a verdict being reversed unless the charge prejudiced the party's case.

In this case, there was sufficient evidence in the record to warrant a spoliation charge which language reflects the law of South Carolina. There was sufficient evidence to indicate that a videotape existed as there was testimony by the Defendants' agent James Goins that he observed the Respondents on the escalator on the video and further testimony by Goins that he did not keep the recording because he did not feel that there was anything relevant on the recording. [R.p. 331, line 4 - p. 338, line 17; p. 366, line 20 - p. 369, line 12.] It appears that Lt. Goins destroyed the video(s) since his testimony was that he did not keep the video(s) of the Respondents. There was testimony by an agent (Browman) of the Appellants that the cameras recorded nonstop and that he followed the Plaintiffs throughout the mall by multiple video recording devices. Criminal defense counsel for Respondent Nohealani Figueroa and the mother of the Respondents both testified that they were told that a video existed which captured the entire incident.⁹ Criminal defense counsel for Nohealani testified about multiple conversations he had with various agents of the Appellants concerning both the existence of the video and securing it for criminal discovery purposes. The Appellants' agents testified that the video cameras recorded non-stop; furthermore, the Appellants presented no evidence that the video recording equipment for each camera was not functioning properly on the date the Respondents were arrested; therefore, videos from each camera that followed the Respondents through the mall would and should have been available. The Appellants produced no videos as required by the Court's Order to compel.

The Defendants did not comply with the discovery Order to turn over complete discovery within ten (10) days after the Respondents' Motion to Compel was granted on or about June

⁹ Bryan Jeffries, criminal defense counsel for Nohealani Figueroa, testified at trial that he was told that a video tape existed; furthermore, Mr. Jeffries met with Lt. Goins and was told that the video would have to come from ERM's corporate office. [R.p. 448, line 3 - p. 449, line 18.]

2, 2010. The Defendants turned over daily activity reports and logs the week before trial and turned over a policy manual after the jury was selected and after the trial had begun. These numerous discovery violations occurred after the Court's Order to turn over discovery. Counsel for the Respondents requested that the Appellants' Answer be struck and default entered in against the Appellants for numerous discovery violations. Counsel for the Appellants argued that a spoliation charge was the proper remedy for the Appellants' discovery violations instead of striking the Appellants' Answer and entering default. The trial court agreed with counsel for the Appellants' argument and granted counsel's request that spoliation was the proper remedy instead of default. The trial court did not error in charging spoliation in this case as the Appellants clearly violated the Court's order compelling discovery; furthermore, this charge was exactly the same as the charge given in *Stokes* which also made no mention of the specific evidence. The spoliation charge was consistent with counsel for the Appellants' request at a pretrial hearing concerning the striking of the Appellants' Answer. This Court should affirm the trial court's decision to charge the jury on spoliation of evidence because the trial court's ruling was not erroneous or prejudicial.

VI.

THE TRIAL COURT PROPERLY DENIED THE APPELLANTS
REQUEST FOR A NEW TRIAL ABSOLUTE OR NEW TRIAL
REMITTITUR.

Thirteenth Juror Doctrine

The thirteenth juror doctrine entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely on the facts. *Lane v. Gilbert Const. Co., Ltd.*, 383 S.C. 590, 681 S.E.2d 879 (2009).

There was ample evidence in the record to support the submission of all cause of actions to the jury and the trial court found as such. There was evidence that the Respondents were arrested without probable cause, evidence that criminal proceedings were instituted against the Respondents by the Appellants, evidence that those proceedings were resolved in favor of the Respondents, and that malice was prevalent in these proceedings as a result of a lack of probable cause. There was also ample evidence that the Appellants engaged in willful, wanton, or reckless conduct to warrant punitive damages. This court should affirm the trial court's denial of the Appellants' request for a new trial under the thirteen juror doctrine.

New Trial Absolute

A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly excessive as to shock the conscience of the court and clearly indicates the verdict amount reached was the result of passion, caprice, partiality, corruption or some other improper motives. *Id.*

The trial court had discretion to deny the Appellants' motion for a new trial. A trial court's decision to either deny or grant a new trial motion will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Swicegood v. Lott*, 379 S.C 346, 355, 665 S.E.2d 211, 216-216 (Ct. App. 2008). The appellate court must consider the testimony and reasonable inferences to be drawn there from in the light most favorable to the nonmoving party when determining whether the trial court's ruling was controlled by an error of law. *Id.*

There was sufficient evidence in the record to indicate that the jury's verdict was not excessive. Both Respondents testified as to economic loss from defending their criminal case, from lost opportunities on the job, and from missed days from work to attend court. Furthermore, both Respondents testified as to their loss of freedom and as to their embarrassment and humiliation from the arrest and prosecution. This type of testimony is evidence of damages to warrant the verdicts in this case. The trial court did not abuse its discretion in finding that the awards were neither excessive as to shock the conscience nor were the awards the result of passion, caprice, partiality, corruption or some other improper motives. This Court should affirm the trial court's denial of the Appellants' request for a new trial absolute as there was sufficient evidence in the record to indicate that the awards were not excessive.

New Trial Remittitur

A trial court may grant a new trial *nisi remittitur* whenever it finds the amount of the verdict excessive; however, substantial deference must be afforded to the jury's determination of damages and the trial court must offer compelling reasons for invading the jury's province. *Todd v. Joyner*, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008).

There was sufficient evidence in the record for the trial court to determine that the awards were neither excessive as to shock the conscience nor were the awards the result of passion, caprice, partiality, corruption or some other improper motives. The trial court conducted a de novo review and evaluated the constitutionality of a punitive damage award in this case. The trial court, after review, determined that a punitive award to each Respondent was proper and that the awards did violate any due process concerns. The trial court found that 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 trial court determined that there was sufficient evidence in the record to indicate that the Appellants acted wantonly, willfully, and maliciously in this incident.¹⁰ The trial court properly denied the Appellants' request for a new trial *nisi remittitur*. This Court should affirm the trial court's denial of the Appellants' request for a new trial *nisi remittitur* as there was sufficient evidence in the record for the awards to both Respondents and there was also sufficient evidence in the record to indicate that the awards were not excessive.

VII.

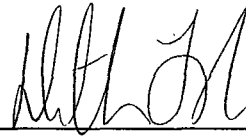
THIS COURT SHOULD AFFIRM THE TRIAL COURTS
RULINGS ON ANY GROUNDS APPEARING IN THE
RECORD

Pursuant to *Rule 220 (c)*, the Respondents request that this court affirm the trial court's decisions based upon any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

CONCLUSION

For the reasons stated above, this Court should affirm all of the judgments of the trial court.

Respectfully submitted,



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October 24, 2011

¹⁰Furthermore, the trial court required that the Respondents elect a remedy between the malicious prosecution and false imprisonment awards; thereby, reducing the awards given to each Respondent by the jury.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison R. Lee, Circuit Court Judge

Case No.: 2009-CP-40-3996

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

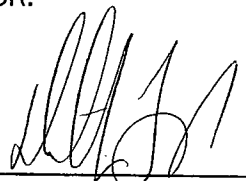
v.

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

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Plaintiffs-Respondents hereby certifies that the
Respondents' Brief complies with Rule 211 (b) SCACR.

October 24, 2011



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

S.C. Supreme Court

Appeal from Richland County
Court of Common Pleas

The Hon. Alison R. Lee, Circuit Court Judge

Case No.: 2009-CP-40-3996

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

v.

CBI / Columbia Place Mall, LLC; and
ERMC II, LLP,.....Appellants.

FINAL REPLY BRIEF

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ARGUMENT

In their brief, the Respondents attempt to deflect attention from the real issues by focusing on matters having nothing to do with the incident that gave rise to their claims. As they did at trial, the Respondents overlook crucial evidence and base their positions on red herrings. Although the Appellants anticipated and addressed most of the Respondents' arguments in their primary Appellants' Brief, a few points require clarification and emphasis in light of the Respondents' efforts to confuse the issues.

I. The record clearly demonstrates misconduct by the jury foreperson, as well as resulting prejudice to the Appellants.

As a threshold matter, this issue is preserved for this Court's review. The Appellants did not know – and could not possibly have known – about the jury foreperson's misconduct until after the trial ended. The Appellants only learned of the misconduct when two of the jurors came forward several days later to describe what happened. At that point, the Appellants raised this issue (including detailed affidavits) and included it in their comprehensive post-trial motion. [Post-Trial Motion and Affidavits.] The trial judge considered the issue before denying the Appellants' request for relief in an Order filed on February 17, 2011. Thus, the juror misconduct issue was raised and ruled upon in the lower court. This was all that was required for the issue to be preserved for appellate review. See *Linda Mc Co. v. Shore*, 390 S.C. 543, 556-56, 703 S.E.2d 499, 506 (2010).

The Respondents claim this issue is not preserved because the Appellants' trial attorney did not object when the judge disclosed that she had engaged in an off-the-record discussion with a juror. This argument

misconstrues the "raised to the trial court" requirement and seeks to impose an impossible burden on a party faced with this kind of situation. Simply put, the Appellants could not have raised this issue at the time of the judge's disclosure because the actual misconduct (i.e., the foreperson's coercion) remained unknown. This undisputed fact is crucial for purposes of issue preservation.

The Respondents' argument implies a much different statement from the trial judge than the one that actually occurred. The judge did not state that she gave an inaccurate legal instruction to the foreperson. Instead, the judge made the following disclosure on the record:

I called the foreperson out and I kind of asked her where they were and whether additional conversations would help them.

She implied that they had determined liability on two causes of action. They were still discussing the defamation cause of action which she felt that they would be able to come to a decision on that. She said they had not yet come up with a monetary amount on the other two causes of action.

She did indicate that there were some people who were at one place and some people were in another place. And to be honest, seem [sic] to imply that there was a – that there was a group of individuals that were at a no-monetary amount, to which I informed them that if they came to a decision in which they were finding liability on behalf of the defendants, that they would have to award a monetary amount.

She said, well that was helpful.

* * *

What I gathered from her was that they were still willing for further discussion, and they were not currently sitting at opposite ends of the room with people not talking to each other.

So I told her just to continue on with the deliberations and let me know if they wanted lunch.

And that's the way I left it.

[R. p. 532, line 10 – p. 533, line 12.] The judge did not provide any other details of the conversation regarding the legal issue (*i.e.*, a finding for the plaintiffs on liability mandated some sort of monetary award).¹

The actual content of the judge's statement is important because it demonstrates why no objection was necessary (or warranted). Although the judge's decision to speak with the foreperson was unorthodox, the only legal principle she claimed to have expressed to the juror was accurate. Thus, there was no basis for an objection. Even if the discussion with the juror was erroneous in and of itself, there was no indication of any prejudice at that time.

The grounds for objection did not arise until after the trial was over, when two jurors revealed what the foreperson had done to force the jury to award punitive damages. That revelation demonstrated prejudice for the first time, as it became clear the jurors awarded punitive damages only because the foreperson misrepresented the judge's instructions to them. As soon as the Appellants learned what had transpired in the final stages of deliberations, they raised this issue to the trial court in a timely post-trial motion. The trial judge then ruled on the issue. At that point, the issue was preserved for appellate review, and the Respondents' arguments to the contrary are without merit.

¹ In a brief omitted passage, the judge revealed that she asked the foreperson to find out if the jury thought lunch needed to be ordered.

The Respondents' substantive arguments on this issue are also erroneous. For example, the Respondents claim there is no evidence of any misconduct by the jury foreperson, but they completely ignore the affidavits submitted by the two jurors. [R. pp. 117-20.] Those affidavits establish that the foreperson misrepresented the judge's private conversation with her when the foreperson spoke to the other jurors. Based on her disclosure quoted above, the trial judge did not say anything to the foreperson about punitive damages. Yet, when the foreperson addressed the jurors, she told them the judge had said punitive damages were mandatory if they found any liability at all against the Appellants. Regardless of whether this was a deliberate attempt to deceive her colleagues, or just poor recollection on her part, the foreperson's conduct was improper. Either way, the foreperson brought private outside information into the jury room and used it to influence deliberations. This is more than a sufficient basis for a finding of juror misconduct.

There is also ample evidence of prejudice resulting from that misconduct. As previously explained, the foreperson's statements directly altered the jury's verdict. The jurors had already decided not to award punitive damages before the foreperson, claiming to speak for the judge, told them they were required to do so. [R. pp. 117-20.] Only then did the jury change its mind and include punitive damages in the verdicts. [R. pp. 117-20.]

This situation is not, as the Respondents suggest, a simple case of "buyer's remorse" from a couple of jurors. Buyer's remorse occurs when someone willingly decides to purchase something, but later regrets that decision

after further reflection. Here, the jury did not willingly vote to award punitive damages. Indeed, the jury had decided not to award punitive damages before the foreperson's misconduct occurred. [R. pp. 117-20.] After that, the jury voted to include punitive damages in the verdicts, but only because they erroneously believed the judge had instructed them they had to do it. Thus, this is not analogous to a situation in which a consumer makes an impulse purchase and later has second thoughts. The proper analogy is to a consumer whom a dishonest salesperson coerces into purchasing something he never wanted in the first place.

Based on what the judge told the parties on the record, and the eventual verdicts, it is clear the jury originally decided to award each Respondent \$8,000 in actual damages on the malicious prosecution claim and \$6,500 in actual damages on the false imprisonment claim. The jury did not intend to award any punitive damages for either cause of action. But after the foreperson's misconduct, the verdicts changed to include \$25,000 in punitive damages for each Respondent. In other words, each Respondent's recovery increased by nearly threefold as a direct result of the misconduct. Therefore, the foreperson's improper actions resulted in clear and substantial prejudice to the Appellants, and this Court should reverse and remand for a new trial.

II. The trial court erred in excluding the audio recording of the incident.

The trial judge concluded the audio recording was inadmissible because it depicted only the arrest's aftermath, not the arrest itself. The Respondents take this assertion one step further, however, claiming "it is not disputed" that the

recording occurred after the arrest. [Respondents' Brief, p. 12.] This is patently false. The Appellants have always maintained that the recording occurred at least partially during the arrests. The trial judge did not agree, but the Appellants never conceded that point. Thus, the Respondents' efforts to paint this as an undisputed fact are without merit.

This is significant because the disputed nature of the recording lies at the heart of the issue on appeal. The trial judge believed the recording occurred after the arrest, but there was conflicting testimony on that issue. As a result, the trial judge should not have unilaterally resolved this dispute in one side's favor. Instead, the judge should have admitted the recording and permitted the jury to decide what weight, if any, to give it. If it concluded the recording accurately depicted the Respondents' conduct before or during the arrest, the jury could have considered the recording as vital evidence. If the jury believed the recording depicted only events after the arrest, it could have disregarded the recording. But either way, the jury should have resolved this factual dispute, not the trial judge.

The Respondents also claim the prejudicial impact of the recording outweighed its probative value. The Respondents base this argument on the faulty premise that the recording's probative value was minimal because it "undisputedly" occurred after the arrest. Again, though, the timing of the recording (and what exactly it depicted) was very much in dispute. This means the probative value is not something the Respondents can simply dismiss without a second thought. If, as the Appellants contend, the recording showed how the

Respondents were acting during the arrest, it has tremendous relevance to the central factual dispute – *i.e.*, whether the Respondents breached the peace while in the mall. This probative value outweighed, or was at least equal to, the prejudicial impact it might have had.

Furthermore, the recording was relevant to the Respondents' credibility as witnesses. The Respondents consistently denied using profanities and racially charged language during this incident. The recording, however, depicts the Respondents loudly and repeatedly doing both – just as the Appellants' witnesses said they did. Thus, the recording provided an important piece of evidence the jurors should have been able to use in determining whether to believe the Respondents or the Appellants' employees.

This is true even if the recording took place during the arrest, rather than before it. The Respondents' fallback position at trial was to claim that if they used loud, inappropriate language, they only did so after the arrest made them angry. The Respondents' story required the jury to believe that they were completely calm, obedient, and reserved until the arrest occurred. But the sheer ferocity of the language on the recording calls that story into serious doubt. Listening to the recording, it is difficult to believe the Respondents could go from perfectly docile to raging in such a short span of time. The recording makes it much more likely the Respondents were being loud and profane before the arrest, just as the Appellants' witnesses said. For this reason, the audio recording had substantial relevance, and the trial judge erred in excluding it.

The Respondents also rely on Rule 404(b), SCRE, claiming the recording was inadmissible as evidence of "other wrongdoing" by the Respondents. The obvious flaw in this argument is that the Appellants offered the recording to prove this wrongdoing (*i.e.*, the very conduct at issue in the case), not some other incident. The Appellants did not present the recording to question the Respondents' "character," as the Respondents charge in their brief. Rather, the Appellants offered the recording as evidence of what the Respondents did to warrant detention by the Appellants' employees. The recording also challenged the credibility of the Respondents' version of events. Therefore, Rule 404(b) has no bearing on this issue.

Finally, the Respondents' arguments based on *Miranda v. United States*, 384 U.S. 436 (1966), are completely off-base. The Respondents have never cited any authority for the proposition that *Miranda* applies to civil cases, and, in fact, the case law supports the opposite conclusion. See, e.g., *In re Pittman*, 561 S.E.2d 560, 564 (N.C. Ct. App. 2002) ("Because a juvenile abuse and neglect proceeding is a civil proceeding, we hold that *Miranda* is inapplicable."); *Birdsey v. Grand Blanc Community Schools*, 344 N.W.2d 342, 344 (Mich. Ct. App. 1983) ("A statement taken without benefit of *Miranda* warnings is not barred from evidence in a civil proceeding."). Accordingly, the Respondents' reliance upon *Miranda* in this civil case is misplaced.

The audio recording of the arrest was a crucial piece of evidence that went to the heart of the factual dispute in this case. It bore directly on the issue of which witnesses were being truthful, and the jury should have been allowed to

hear it. Any doubts about what events the recording actually depicted went merely to the recording's credibility, not its admissibility. Therefore, the trial court abused its discretion in excluding the recording, and this Court should reverse and remand for a new trial.²

III. The record does not support the punitive damages awards.

As discussed in the Appellants' Brief, the trial court erred in refusing to set aside or reduce the punitive damages awards. The Appellants rely primarily on the positions and authorities asserted in their primary brief, and they will not repeat those arguments here. However, the Appellants will respond to some of the points the Respondents raise in their brief.

First, the Respondents' Brief improperly attempts to justify the award of punitive damages by discussing events that occurred well after the incident giving rise to the Respondents' claims. Continuing a theme that began during trial, the Respondents repeatedly mention and rely upon the Appellants' purported misconduct during the discovery phase. Specifically, the Respondents argue the Appellants' failure to produce certain records and materials supports a punitive damages award. But this assertion misses the crucial distinction between what happened to give rise to the Respondents' claims and what transpired after litigation began. The former is relevant to the issue of punitive damages, whereas the latter is not.

² The prejudicial impact of this error is clear, as the Appellants lost a chance to allow the jury to actually hear the Respondents using the kind of language they had denied using. This was a crucial piece of evidence the Appellants were not allowed to present.

When deciding whether or not to award punitive damages, the jury was required to focus exclusively on the evidence involving the incident itself. After examining that evidence, the jury had to determine whether it believed the Appellants should be punished for arresting and attempting to prosecute the Respondents. Again, though, the answer to that question had to come from the testimony and other evidence regarding the actual arrest.

On the other hand, what the Appellants did or did not produce during discovery had absolutely no bearing on, or relevance to, the jury's decision. Assuming *arguendo* the Appellants did not follow the applicable discovery rules, it was the trial court's job to impose any necessary sanctions.³ This was not the jury's concern, and the jury should never have even heard about what took place during discovery. By repeatedly inserting those discussions into the trial, the Respondents essentially poisoned the well and invited the jury to base its decision on irrelevant matters. Thus, the discussion of alleged discovery violations in the Respondents' Brief does not demonstrate any basis for upholding the punitive damages award. If anything, that discussion merely calls attention to the Respondents' improper approach at trial and provides further support for reversing that award.

Along similar lines, the Respondents also base their defense of the punitive damages award on an unfounded claim that the Appellants' employees were not licensed as security guards when the arrest occurred. There was never

³ Indeed, this is precisely what happened here, as the trial court granted the Respondents a "spoliation of evidence" jury charge based on the Appellants' failure to produce any video footage.

a shred of evidence at trial to suggest (let alone prove) the officers did not hold the proper SLED licenses. The officers were not able to show the Respondents' attorney their license cards from the year of the incident, but as they explained, this was because SLED issues new cards every year. This means there was no reason for the officers to keep their old, expired cards. Furthermore, the Appellants' local director of security testified the officers involved in this incident had valid and current licenses when the incident occurred. [R. p. 349.] The Respondents offered no evidence to dispute that testimony, and therefore, any suggestion that punitive damages were proper because the Appellants used unlicensed officers is wholly without merit.

In addition, the Respondents ignore the fact that the jury's verdicts effectively punish the Appellants twice for the same single incident. As discussed in the Appellants' Brief, punitive damages are not designed to make a plaintiff "whole," and, in that sense, they are not personal damages. The purpose of punitive damages is to punish and deter conduct a jury deems intolerable. By giving the same amount of punitive damages to each Respondent, the jury went beyond that purpose and "double-punished" the Appellants. This is enough to make the punitive damages award excessive and unconstitutional.

At worst, the record evidence suggests that one or more of the Appellants' employees took the Respondents into custody and charged them with breach of peace, when more prudent officers would have refrained. Even if this evidence

could support an award of punitive damages in general,⁴ it does not justify the excessive amount imposed in this case. The degree of reprehensibility required to sustain such a large award simply is not present here, as a very recent decision by this Court demonstrates.

In *Hollis v. Stonington Development, LLC*, Op. No. 4869 (S.C. Ct. App., filed Aug. 17, 2011), the Court performed a constitutional review of a punitive damages award. The case involved a dispute over damages to the plaintiffs' property, caused by the defendant's reckless performance of a nearby development project. The evidence at trial revealed the defendant had spent four years misleading, threatening and harassing the plaintiffs in an attempt to get them to grant an easement, all the while refusing to correct the problems that led to repeated flooding of their land. The evidence also showed the defendant had flagrantly violated its own policies and disregarded numerous warnings from government agents to stop its harmful practices.

After considering the record, the Court concluded there was an adequate basis for a punitive damages award and affirmed the trial court's decision to submit that issue to the jury. Yet, despite overwhelming evidence of the defendant's intentional misdeeds, the Court found the record demonstrated only "moderately reprehensible" conduct. This finding provided one of the bases the Court used to reduce the amount of the punitive damages award after its constitutional review.

⁴ As discussed in their primary brief, the Appellants certainly do not concede this point, but rather contend the trial court erred in submitting the issue of punitive damages to the jury.

The result in *Hollis* supports a reduction of punitive damages in the present case. As discussed above, *Hollis* involved a defendant that engaged in a pattern of willful and destructive behavior. Although the defendant knew what it was doing was wrong and harmful to the plaintiffs, it repeatedly committed the misconduct over a period of four years. In short, there was a deliberate attempt by the defendant to "bully" the plaintiffs into giving the defendants what they wanted.

Here, on the other hand, the facts are much different. Even taking those facts in the light most favorable to the Respondents, they do not demonstrate the pattern of serious abuses found in *Hollis*. The Appellants' employees arrested the Respondents and charged them with breach of peace. Although a magistrate later dismissed those charges, there is no evidence the Appellants made the arrest based on any improper motives. To the contrary, the record shows the officers made the arrest because they believed the Respondents were breaching the peace. In addition, there is no evidence the officers targeted the Respondents for any non-behavior related reason, and the record also does not reveal any pattern of repeated misconduct.⁵ Therefore, the elements that made the conduct in *Hollis* so egregious are absent in the case at bar. And if the facts

⁵ In fact, the testimony showed that arrests at the mall are exceedingly rare, and there was no evidence of any other false arrest incidents involving the Appellants' officers.

in *Hollis* warranted only a finding of “moderately reprehensible” conduct, the current case necessarily falls into a much milder category.⁶

In conclusion on this issue, the record does not support an award of punitive damages against the Appellants. Although the trial judge conducted a review of those damages pursuant to *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), her conclusions were legally erroneous and should be reversed. But even if the record could be deemed to support punitive damages in general, the amounts awarded by the jury are excessive and unconstitutional and should be reduced. Therefore, this Court should reverse the trial court’s decision and strike the punitive damages awards or, alternatively, reduce the punitive damages awards to a constitutionally acceptable level.

IV. The trial court erred by instructing the jury on spoliation of evidence.

As they do with the other issues on appeal, the Respondents overlook crucial evidence in their arguments regarding spoliation of evidence. The primary shortcoming of the Respondents’ position (and also the trial court’s) is that it assumes something the evidence never established: the existence of video footage depicting this incident. This obviously has tremendous bearing on whether the trial court should have given a spoliation charge.

The evidence demonstrated that one of the officers saw the Respondents from a surveillance room after another officer had asked them to leave the mall. The officer operating the security cameras attempted to follow the Respondents

⁶ As argued in their primary brief, the Appellants contend their conduct, even if it could be considered tortious, was not at all reprehensible and did not warrant any punitive damages.

as they continued to walk through the mall, and he caught further glimpses of them during that process. Later, another officer reviewed video footage recorded on the date of the incident and thought he "might" have seen the Respondents riding an escalator for a couple of seconds. But he could not locate, and never viewed, any footage of the incident itself. [R. pp. 188-89; 332-35.] Thus, there was no testimony from any witness who had actually seen video footage of the arrest.

Despite that absence of supporting evidence, the trial court assumed a video recording had existed and sanctioned the Appellants for not providing a copy of it to the Respondents during discovery. This decision punished the Appellants for not producing something they never possessed in the first place. The Appellants conducted a search for video footage of the incident and never found any. There is absolutely no basis for any conclusion that the Appellants willfully destroyed "evidence" or attempted to conceal it. Consequently, the trial court erred in giving a spoliation jury charge as punishment for misconduct during discovery. There is simply no indication any misconduct ever occurred, and the Respondents have failed to present a sufficient basis for any other conclusion.

In addition, the Respondents are incorrect to the extent they claim the Appellants' trial attorney consented to the spoliation charge. Taking excerpts from the record out of context, the Respondents suggest the Appellants' attorney agreed to accept the spoliation charge during the pretrial hearing on this issue. Viewed in the proper context, however, the statements by the Appellants' attorney served a much different purpose. The attorney merely told the trial court

that if some sort of sanction were warranted, a spoliation charge (not striking the Appellants' Answer) would be the proper remedy. [R. p. 224.] Significantly, though, the Appellants' attorney never conceded such a sanction was justified, and she consistently denied any spoliation had occurred. [R. p. 223.] Therefore, the Respondents' reliance on this consent-based argument is misplaced.

The trial court's erroneous decision to give a spoliation charge had a tremendous impact on the outcome of the case. It lent undue credence to the Respondents' wild theories of cover-ups and other supposed post-incident transgressions that had nothing to do with the actual incident. In doing so, the decision created a very real risk the jury would find against the Appellants based not on the relevant evidence, but on a low opinion of the Appellants stemming from the irrelevant matters injected into the trial. Therefore, the trial court's decision on this issue was both erroneous and prejudicial, and this Court should reverse and remand for a new trial.

V. The trial court erred in failing to find the existence of probable cause as a matter of law.

As did the trial court, the Respondents place their emphasis on the wrong perspective when discussing whether or not the Appellants' officers had probable cause to arrest them. Perhaps understandably, the Respondents focus on arguments that they had not committed any crime and should not have been arrested. But that focus reveals a fundamental misunderstanding of the proper inquiry for a probable cause defense.

As the Supreme Court has explained, the key question for this issue "is not whether [the] plaintiff was guilty ... but whether [the] defendant had probable

cause to believe him guilty." *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 609 (1965) (emphasis added). To make this determination, a court must consider the facts known to the arresting officer at the time of the arrest and then decide whether a reasonable officer under those circumstances would have believed probable cause existed. *Jackson v. City of Abbeville*, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005).

Here, the record demonstrates the officers had probable cause to arrest the Respondents. Based on earlier reports from their colleagues, the officers knew (or reasonably believed) the Respondents had used loud, abusive language and had not left the mall as instructed. The officers also witnessed the Respondents continuing to use profanities and racially-charged language, even after being told to stop. This gave the officers a reasonable basis to conclude the Respondents were breaching the peace and should be arrested. Whether or not the Respondents actually committed that offense is immaterial for purposes of this inquiry. The record clearly demonstrates the officers acted reasonably in believing they had, and this is all that matters for a probable cause defense. Therefore, the trial court erred in failing to grant the Appellants judgment as a matter of law on the false arrest and malicious prosecution causes of action, and this Court should reverse and remand with instructions to enter judgment in the Appellants' favor.

VI. The Appellants are entitled to a new trial absolute or new trial nisi remittitur.

The trial court also erred in refusing to grant the Appellants a new trial absolute or a new trial nisi remittitur. The Respondent's Brief does not raise any

arguments on this issue that the Appellants have not previously addressed. Therefore, the Appellants rely upon their primary brief to support their arguments for reversal on these grounds.

CONCLUSION

For all the reasons discussed above and in the Appellants' primary brief, this Court should reverse the result below and either remand with instructions to enter judgment in the Appellants' favor, or remand for a new trial. Alternatively, the Court should reduce the punitive damages awards to an amount that comports with the Appellants' constitutional rights.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

Hon. Alison R. Lee, Circuit Court Judge

Case No.: 2009-CP-40-3996

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

vs.

CBI/Columbia Place Mall, LLC, and
ERMC II, LLP.....Appellants.

RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellants, certifies that this Final Reply Brief is identical to the Initial Reply Brief, except for inclusion of references to the Record and correction of typographical errors and/or misspellings, and it otherwise conforms to the requirements of Rule 211(b), SCACR.

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