

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

73430
RECEIVED

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SEP 04 2014

SC Court of Appeals

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-213247

Prakash and Urmila Solanki.....Respondents,

v.

Wal-Mart Store #2806, and Spartanburg
County Sheriff's Office, Defendants of
Whom Wal-Mart Store #2806 is the Appellant.....Appellant.

**APPELLANT'S PETITION FOR REHEARING
AND MEMORANDUM IN SUPPORT**

Pursuant to Rule 221(a) and Rule 240(i), SCACR, Appellant Wal-Mart Store #2806 ("Appellant") respectfully petitions this Court for a rehearing of Opinion No. 5264, dated August 20, 2014. Rehearing is appropriate where, as here, the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The Petition for Rehearing should be granted because the Court's Opinion (1) misapprehends the evidence in light of the applicable standard for the submission of punitive damages to the jury, and (2) overlooks the trial court's failure to make a finding of reckless, wanton or willful misconduct prior to submitting the issue of punitive damages to the jury as required. Appellant hereby incorporates by

reference its previously filed briefs and the Record on Appeal for a substantive review of the facts and procedural history relevant to this matter.

I. Background Facts.

This case arises out of the arrest of Respondent Prakash Solanki (“Mr. Solanki”) by the Respondent Spartanburg County Sheriff’s Department (“the Sheriff’s Department”) several months after a transaction occurred at a Wal-Mart retail store during which it was alleged by the Sheriff’s Department that Mr. Solanki committed identity theft and credit card fraud. Mr. Solanki testified that he went shopping at Wal-Mart with his wife on November 27, 2009, “Black Friday,” the day after Thanksgiving. The Solankis selected several items and Mr. Solanki went to the self-checkout area to pay for the items. (R. at 64, 66, 68–70). Mr. Solanki scanned the items and attempted to proceed to pay for them; however, there was a problem with the register. A Wal-Mart associate, Ryan Smalls, who was working in the self-checkout area attempted to assist Mr. Solanki at the register and when the attempt was unsuccessful, Mr. Smalls suspended the transaction and took Mr. Solanki to a cashier-assisted register to complete the transaction. (R. at 71–82). It is unclear exactly what transpired during the transaction; nevertheless, Mr. Solanki testified that he used his credit card during the transaction and provided his identification and his credit card at the request of Mr. Smalls. (R. at 88–93). At some point, apparently because of a malfunction with the register, a credit card in Mr. Solanki’s name was manually stenciled and thereafter, credit card information from the credit card of a woman named Robin Martin was manually entered into the register by Mr. Smalls. A receipt with Ms. Martin’s credit card information was then signed by Mr. Solanki for the items he purchased, totaling \$144.70, and the amount was charged to Ms.

Martin's credit card. Mr. Solanki and his wife left the store without incident. (R. at 88–93).

Subsequently, on or about December 1, 2009, Ms. Martin reported to the Spartanburg County Sheriff's Department that her credit card had been stolen and that two unauthorized charges had been made using her credit card. (R. at 213–216, 299–301). One of the two charges was the charge in the amount of \$144.70 that had been charged during Mr. Solanki's transaction at Wal-Mart on November 27, 2009. (R. at 300, 306). Ms. Martin reported that the card was last in her possession at approximately 4:30 p.m. on November 27, 2009. (R. at 218).

Deputy Gina Cashion was assigned to investigate the unauthorized charge made at Wal-Mart on December 1, 2009.¹ (R. at 299). On that day, she contacted Wal-Mart and asked if they would pull video surveillance and receipts for the date and time of the transaction involving Ms. Martin's card. Specifically, Deputy Cashion requested receipts for any transaction involving a credit card with the last four digits of Ms. Martin's card, 4094. She also requested that Wal-Mart check for purchases made on November 27, 2009 in the amount of \$144.70. Wal-Mart complied with the deputy's requests and located one transaction in the amount of \$144.70. (R. at 301–04). Wal-Mart provided Deputy Cashion with video surveillance showing the transaction and three documents: 1) a copy of the stenciled impression of Mr. Solanki's credit card; 2) a receipt showing an itemized list of the items purchased by Mr. Solanki in an amount totaling \$144.70; and 3) the store's copy of a receipt showing Ms. Martin's credit card number with Mr. Solanki's signature for a purchase in the total amount of \$144.70. (R. at 301–04, 408–16). After

¹ The second unauthorized charge was a \$10.00 charge made at a Murphy's gas station on the same day. (R. at 304). Deputy Cashion testified that she was assigned to investigate only the unauthorized charge made at Wal-Mart in the amount of \$144.70 (R. at 312–13).

obtaining the documents and video from Wal-Mart, Deputy Cashion had no further contact with Wal-Mart about the transaction. After providing the requested information to Deputy Cashion, Wal-Mart took no further action with regard to the transaction or the investigation by law enforcement. (R. at 433).

Based on the time of the transaction and the time shown in the video, Deputy Cashion determined that Mr. Solanki was involved in the transaction. She attempted to contact Mr. Solanki by calling him and leaving a business card with a note at his South Carolina address but was unsuccessful in her attempts.² (R. at 420–23). Deputy Cashion testified that thereafter, based upon the video and documents received from Wal-Mart as well as bank statements obtained from Ms. Martin, she sought and received an arrest warrant for Mr. Solanki. (R. at 423–24). Thereafter, in April 2010, Mr. Solanki was arrested in Georgia. He testified that he spent six nights in jail until he was transported to South Carolina where he was released on bond. (R. at 98–102, 105, 107–08). The matter was reviewed by the Grand Jury and on June 11, 2010, indictments were issued charging Mr. Solanki with financial transaction card theft and financial transaction card fraud. On August 24, 2010 the indictments were dismissed by the Solicitor. (R. at 429). Subsequently, Mr. Solanki instituted the subject action.

II. Procedural Posture.

The case was tried before a jury from March 6 – 9, 2012. At the close of all of the evidence the trial court granted directed a verdict in favor of Wal-Mart on all causes of action except negligence, gross negligence and loss of consortium. (R. at 481). The court indicated that it would take the directed verdict motion under advisement with

² Mr. Solanki testified that he and his wife owned a home in South Carolina and rented an apartment in Georgia, where his wife worked and that they traveled back and forth between the two residences.

regard to the gross negligence and loss of consortium claims. (R. at 481). Thereafter, the court granted the motion on the loss of consortium claim and, over the objection of Wal-Mart, determined that it would submit the issues of gross negligence and punitive damages to the jury. (R. at 506). The court also granted a directed verdict on all claims against the Sheriff's Department except for the claims of false imprisonment and malicious prosecution. (R. at 480–81).

The jury returned a verdict in favor of the Sheriff's Department on both claims against it and returned a verdict against Wal-Mart on the claim of negligence. The jury awarded Mr. Solanki \$50,000 in actual damages and \$225,000 in punitive damages against Wal-Mart. The jury also found that Mr. Solanki was comparatively negligent in the amount of 25 percent. (R. at 702).

Wal-Mart timely filed post-trial motions including a Motion for Judgment Notwithstanding the Verdict, Motion for New Trial Absolute, for New Trial *Nisi Remittitur*, for Reversal or Reduction of Punitive Damages, or for New Trial pursuant to the Thirteenth Juror Doctrine. (R. at 19). By Order filed on October 12, 2012, the trial court denied Wal-Mart's post-trial motions. (R. at 1–18). This appeal followed.

On August 20, 2014, the Court of Appeals issued an opinion affirming the award of punitive damages in a 2-1 decision by the Honorable Aphrodite K. Konduros with the Honorable James E. Lockemy concurring. *Solanki v. Wal-Mart Store #2806*, No. 2012-213247, 2014 S.C. App. LEXIS 216 (S.C. Ct. App. Aug. 20, 2014). A dissenting opinion was filed by the Honorable H. Bruce Williams. *Id.* at *14.

III. The Court of Appeals Misapprehended the Standard for Submitting the Issue of Punitive Damages to the Jury and Erred in Concluding that Clear and Convincing Evidence of Willful, Wanton or Reckless Misconduct Existed to Support the Punitive Damages Award.

In affirming the award of punitive damages the Court of Appeals misapprehended the standard for submitting punitive damages to the jury and erroneously concluded that clear and convincing evidence existed to support an award of punitive damages. The Solankis failed to present clear and convincing evidence from which a jury could reasonably conclude that the Wal-Mart cashier acted recklessly or with a conscious disregard for Mr. Solanki's rights when he handled Mr. Solanki's transaction. Moreover, there is no evidence that Wal-Mart acted recklessly or consciously disregarded Mr. Solanki's rights by complying with law enforcement's request for information related to the transaction. In concluding that Wal-Mart "was in the best possible position to point out discrepancies to the police officers," *Id.* at *10, and that "Wal-Mart had the opportunity to explain the odd nature of the transaction throughout the criminal process," *Id.* at *13, the Court of Appeals misapprehended Wal-Mart's duty and imposed what is now essentially a heightened duty on retailers to investigate receipts and other documents turned over in response to requests by law enforcement even where, as here, the retailer has no actual or constructive knowledge from which to explain an apparent discrepancy in such receipts.

As the Court of Appeals correctly observed, "[t]o receive an award of punitive damages, the plaintiff has the burden of proving by *clear and convincing evidence* the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Solanki*, 2014 S.C. App. LEXIS 216 at *6 (citing *Austin v. Specialty Transp.*

Servs., Inc., 358 S.C. 298, 313, 594, S.E.2d 867, 875 (Ct. App. 2004) (emphasis added).

When initially considering the issue of punitive damages, the trial court opined that the actions of the cashier, if negligent, amounted to simple negligence:

I see that as simple negligence. I don't know that's failure to use the slightest care especially in light of the fact that it certainly appears to me, that, that efforts were made to verify the identification of Mr. Solanki. That seems more like negligence on my, from, in my mind than anything else, and we're dealing with two credit cards.

(R. at 460–61) (emphasis added). Thereafter, however, without further explanation, the trial court ruled that both gross negligence and punitive damages would be submitted to the jury because of the “weirdness” of the transaction:

There's evidence, based upon the weirdness of this transaction, for lack of a better word, in the record, there's evidence from which the jury could conclude that, in some way, plaintiff was grossly negligent in the way they or, sorry, that the defendant Wal-Mart, was grossly negligent in the way they handled this transaction. There is evidence from which they could reasonably conclude that. I'll charge gross negligence and punitives.

(R. at 506).

The Court of Appeals' Opinion affirming the trial court's decision to submit the issue of punitive damages to the jury rests on two facts: (1) the Wal-Mart's cashier's taking of the credit card information for the sale; and (2) Wal-Mart's turning over of the receipts related to the transaction credit card information to law enforcement in response to a request from law enforcement for the documents. *Solanki*, 2014 S.C. App. LEXIS 216, at *8-9. Neither of these occurrences was sufficient to establish willful, wanton, or reckless conduct by clear and convincing evidence as a matter of law. Accordingly, the Court of Appeals should have reversed the punitive damages award.

A. The Handling of the Transaction by the Cashier Did Not Rise to the Level of Willful, Wanton or Reckless Conduct to Support a Punitive Damages Award.

The Court of Appeals first points to the cashier's handling of the Solankis' transaction as a basis for a finding of willful, wanton or reckless conduct. *Id.* at *9. The Court reasoned that the cashier attempted to run Mr. Solanki's credit card several times and when that was unsuccessful, the cashier hand-keyed credit card information into the system. The Court does not conclude, nor is there any evidence, that the cashier's actions in this regard were improper. Rather, the cashier testified that he followed the store's procedures in handling the transaction. The Court then notes that the information hand-keyed into the system was that of Ms. Martin rather than Mr. Solanki and that the receipt signed by Mr. Solanki contained Ms. Martin's credit card information. Based on these facts and Mr. Solanki's testimony that he did not use Ms. Martin's card, the Court of Appeals erroneously concluded that there was sufficient evidence from which a jury could find gross negligence by the cashier. *Id.* at *9-10.

This evidence is not sufficient to establish willful, reckless or wanton misconduct by clear and convincing evidence. Rather, as Judge Williams correctly observed in the dissent, "testimony from trial negates the Solankis' claim that Wal-Mart acted in a reckless manner." *Id.* at *16. Judge Williams noted that the cashier, Ryan Smalls, testified regarding Wal-Mart's internal procedures for handling credit card transactions and the procedure to be followed if a credit card did not swipe at a self-checkout station. After viewing the video during the trial, Smalls affirmed that he followed Wal-Mart's procedure in handling the Solanki transaction by attempting to process the transaction at his register and then by hand-keying the credit card number into the system, including the

expiration date. In accordance with the procedure, Smalls also asked a customer service manager to manually perform an override, which he did in the Solankis' transaction. *Id.* at *16-17.

This conduct simply does not constitute clear and convincing evidence of willful, wanton or reckless conduct as is required to support a punitive damages claim. While the receipts from the Solankis' transaction reflect charges to the credit card of Ms. Martin, this fact, at best, supports a finding of simple negligence by the cashier and is woefully inadequate to establish clear and convincing evidence of willful, wanton or reckless conduct to support a punitive damages award. Accordingly, the Court of Appeals misapprehended the standard for assessing punitive damages and erred in affirming the trial court's submission of the issue of punitive damages to the jury.

B. Wal-Mart's Compliance With Law Enforcement's Request for Receipts and Video from the Transaction Did Not Rise to the Level of Willful, Wanton or Reckless Conduct to Support a Punitive Damages Award.

The Court of Appeals next relies on the conduct of Wal-Mart in providing law enforcement officers with requested receipts and video in concluding that the punitive damages award was proper. In so doing, the majority opinion refers to the trial court's conclusion that "Wal-Mart was responsible for the creation and production of the evidence used to arrest Mr. Solanki and it was in the best possible position to point out the discrepancies to the police officers." *Id.* at *10. The Court of Appeals concluded that the "record contains no evidence the trial court imposed a heightened duty of care on Wal-Mart." *Id.* at *8. However, the appellate court's conclusion that Wal-Mart somehow should have pointed out discrepancies for which there is no evidence Wal-Mart knew even existed does in fact impose a heightened duty on Wal-Mart and other retailers in

complying with requests by law enforcement. Moreover, the Court of Appeals' points to no evidence to support a finding of wanton, reckless or willful misconduct by Wal-Mart in complying with the request by law enforcement for documents related to the Solankis' transaction. There is no evidence that Wal-Mart had knowledge of any information that would have explained the discrepancy in the credit card receipts or that would have exonerated Mr. Solanki in any way. At best, Wal-Mart could have told law enforcement what law enforcement already knew, *i.e.*, that there were two credit cards numbers from two different persons -- Mr. Solanki and another person (later identified as Robin Martin), involved in the transaction. The determination by law enforcement that the receipts and video gave rise to probable cause to arrest Mr. Solanki cannot be attributed to Wal-Mart. Simply put, Wal-Mart's compliance with law enforcement's request for receipts and video cannot give rise to punitive damages as a matter of law.

In short, neither the action of the cashier in handling the transaction nor the action of Wal-Mart in providing requested receipts and video to law enforcement gives rise to clear and convincing evidence of willful, wanton or reckless misconduct by Wal-Mart to support a punitive damages award. As aptly stated by Judge Williams, "the 'weirdness of the transaction,' standing alone, is insufficient as a matter of law to substantiate a gross negligence claim or to support an award of punitive damages." *Id.* at *18. Accordingly, the petition for rehearing should be granted and the award of punitive damages should be reversed.

IV. The Court of Appeals Erroneously Overlooked the Trial Court's Failure to Find, as Required, that there was Clear and Convincing Evidence of Willful, Reckless or Wanton Misconduct by Wal-Mart Prior to Sending the Issue of Punitive Damages to the Jury.

As discussed, the alleged conduct relied upon by the Court of Appeals to affirm the award of punitive damages does not rise to the level of willful, wanton or reckless conduct as a matter of law and the issue of punitive damages should not have been submitted to the jury. Further, as Judge Williams' correctly observed in the dissenting opinion, "[t]he trial court erred when it failed to adequately assess the culpability of Wal-Mart's conduct *before* charging the jury on punitive damages." *Id.* at *17 (emphasis in original). Specifically, in submitting the issue of punitive damages to the jury, the trial court merely concluded that the issue of gross negligence, *i.e.*, whether or not Wal-Mart failed to exercise even the slightest care, was an issue of fact for the jury based on the "weirdness" of the transaction without making a finding as to whether there was evidence of reckless, wanton or willful misconduct. In so doing, the trial court erred as South Carolina courts have long observed that "[w]hile punitive damages are recoverable for negligence so gross or reckless of consequences as to imply or to assume the nature of wantonness, willfulness, or recklessness, yet they are not awarded in this state for mere gross negligence." *Sample v. Gulf Ref. Co.*, 183 S.C. 399, 411, 191 S.E. 209, 214 (1937). In affirming the award of punitive damages, the majority overlooked the trial court's error in this regard.

As reiterated in Judge Williams' dissent, it is well-established that "[f]irst, the court must determine whether the defendant's conduct rises to the level of culpability warranting a punitive damages award. If not, the issue of punitive damages may not be submitted to the jury." *S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C.

149, 154, 478 S.E.2d 57, 59 (1996) (emphasis added). “[T]rial judges in this state have long been required, *as a threshold matter*, to assess the culpability of a defendant’s conduct to determine whether punitive damages are available in a given case (i.e., whether the issue should be submitted to the jury).” *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (emphasis added). The majority opinion specifically references the trial court’s Order Denying Wal-Mart’s Post-Trial Motions as the only occasion when the trial court explored the sufficiency of the evidence to submit the issue of punitive damages for the jury’s consideration but does not address the trial court’s failure to conduct the analysis other than to state that the trial court’s post-trial analysis was correct. *Solanki*, 2014 S.C. App. LEXIS 216, at *9. The *ex post facto* determination in the Order Denying Wal-Mart’s Post-Trial Motions did not follow proper procedure, did not cure the failure of the trial court to conduct a proper analysis, and constituted reversible error that was overlooked by the Court of Appeals in affirming the decision.

V. Conclusion

As the Court of Appeals misapprehended the standard for punitive damages and overlooked the trial court's erroneous application of the gross negligence standard, the petition for rehearing should be granted and the punitive damages award should be reversed.

Respectfully submitted,



Regina Hollins Lewis, SC ID #75366
Mary D. LaFave SC ID #68539
Gaffney Lewis & Edwards, LLC
3710 Landmark Dr., Suite 109
Columbia, SC 29204
(803) 790-8838

Attorneys for Appellant

September 4, 2014
Columbia, South Carolina

RECEIVED

SEP 04 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-213247

RECEIVED

SEP 04 2014

SC Court of Appeals

Prakash and Urmila Solanki..... Respondents,

v.

Wal-Mart Store #2806, and Spartanburg
County Sheriff's Office, Defendants of
Whom Wal-Mart Store #2806 is the Appellant..... Appellant.

PROOF OF SERVICE

I do hereby certify, on this 4th day of September, 2014, that a copy of the foregoing Appellant's Petition for Rehearing and Memorandum in Support were served by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to: John D. Hawkins, Esquire and Charles Logan Rollins, II, Esquire, The Hawkins Law Firm, P.O. Box 5048, Spartanburg, South Carolina 29304.



Regina Hollins Lewis, Esquire
Mary D. LaFave, Esquire
Gaffney, Lewis & Edwards, LLC
3710 Landmark Dr., Suite 109
Columbia, SC 29204
(803) 790-8838

Attorneys for Appellant
Wal-Mart Stores East, L.P.



**GAFFNEY LEWIS
& EDWARDS**

3710 Landmark Drive, Suite 109, Columbia, SC 29204 | O: 803.790.8838 | F: 803.790.8841
www.glelawfirm.com

September 4, 2014

HAND DELIVERED

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED

SEP 04 2014

SC Court of Appeals

Re: *Prakash and Urmila Solanki v. Wal-Mart Store #2806, et al*
Case No : 2012-213247

Dear Clerk Kitchings:

Enclosed please find the original and six (6) copies of Appellant's Petition for Rehearing and Memorandum in Support along with our Proof of Service. Please file with the Court and return stamped copies to our courier.

By copy of this letter, I herewith serve all counsel of record with same. Should you have any questions or need additional information please do not hesitate to contact our office.

Sincerely,

Mary D. LaFave

MDL/kfs
Enclosures

cc: John D. Hawkins, Esq.
Charles Logan Rollins, II, Esq.

Amy L. Gaffney, agaffney@glelawfirm.com | Regina Hollins Lewis, rlewis@glelawfirm.com

Susan Rawls Edwards, sedwards@glelawfirm.com | Lee Ellen Bagley, lebagley@glelawfirm.com | Mary D. LaFave, mlafave@glelawfirm.com

Robert Blain, rblain@glelawfirm.com | John H. Strom, jstrom@glelawfirm.com