

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

S.C. Supreme Court

Frank R. Addy, Jr., Circuit Court Judge

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Opinion No. 5264 (S.C. Ct. App. Filed October 19, 2012)

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Prakash & Urmila Solanki.....Respondents.

v.

Wal-Mart Store #2806.....Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

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## **INTRODUCTION**

This case presents the novel issues of (1) whether a retailer has a duty to investigate, analyze, and offer an explanation regarding a discrepancy in receipts pertaining to a transaction that are requested by law enforcement and (2) whether an alleged error by a cashier in hand-keying the credit card transaction of a customer can give rise to a finding of clear and convincing evidence of willful, wanton or reckless conduct sufficient to sustain an award of punitive damages. The trial court erred in imposing a heightened duty on retailers and finding that the retailer's alleged breach of the duty supported an award of punitive damages. The trial court further erred in concluding that the cashier's handling of the Respondent's transaction supported an award of punitive damages.

Based on the foregoing, Petitioner, pursuant to Rule 242, SCACR, Article V, § 5 of the South Carolina Constitution and S.C. Code Ann. § 14-3-310, respectfully submits this Petition for Writ of Certiorari, memorandum of law, and authorities in support of the Petition. Given the current state of the law as set forth in the decision of the Court of Appeals affirming the award of punitive damages, there will be a significant, unwarranted negative impact on retailers who do business in South Carolina and for this reason, this Court should grant this petition for a writ of certiorari and reverse the decision of the Court of Appeals.

## **CERTIFICATE OF COUNSEL**

The Court of Appeals issued its decision, Opinion No. 5264, on August 20, 2014. *See* (App.p. 793-803). Counsel for the petitioner certifies that the Petition for Rehearing

was made on September 4, 2014, *see* (App.p. 805-17), and denied on October 23, 2014. *See* (App.p. 818-19).

### **QUESTION PRESENTED**

Did the Court of Appeals err in concluding that the acts or omissions of Wal-Mart and/or its cashier gave rise to clear and convincing evidence of willful, wanton or reckless conduct to support a punitive damages award?

### **STATEMENT OF THE CASE**

Prakash and Urmila Solanki (the “Solankis”) initiated this civil action on November 18, 2010. All claims arise from the Spartanburg County Sheriff’s Department’s (“Sheriff’s Department”) arrest of Prakash Solanki (“Mr. Solanki”) involving a transaction at a Wal-Mart retail store. The Sheriff’s Department alleged that Mr. Solanki committed identity theft and credit card fraud after receiving a report of a lost or stolen credit card from a woman named Robin Martin. Ms. Martin was not a customer at Wal-Mart at any relevant time and Wal-Mart was not in any way involved in the criminal complaint regarding Mr. Solanki or the decision to arrest him.

Mr. Solanki testified he went shopping at Wal-Mart with his wife on November 27, 2009, which was the day after Thanksgiving, also known as “Black Friday.” (App.p. 70-71). After selecting several items in the store, Mr. Solanki walked to the self-checkout area. (App.p. 71-72). Mr. Solanki attempted to use a credit card to complete his purchase but was unsuccessful. (App.p. 76-77). Ryan Smalls, a Wal-Mart cashier, was working in the self-checkout area and attempted to assist Mr. Solanki. (App.p. 75-76). Mr. Smalls was also unsuccessful at the self-checkout register, and he led Mr. Solanki to the cashier-assisted register to complete the transaction. (App.p. 77-78). The

events of the transaction at the cashier-assisted register are unclear; however, Mr. Solanki maintained he used his credit card during the transaction and provided his identification and his credit card at the request of Mr. Smalls. (App.p. 79-81). After having difficulty with the cashier-assisted register, Mr. Smalls asked Mr. Solanki for his credit card and called for a customer service manager. (App.p. 80-84, 90-91, 153-58, 199-200). Mr. Solanki provided Mr. Smalls with a credit card, and Mr. Smalls hand-keyed the credit card information into the system. (App.p. 92, 199-200). Mr. Smalls asserted he only used the card or cards that Mr. Solanki provided at all times during the transaction. (App.p. 208-09). Mr. Smalls returned Mr. Solanki's credit card, but then asked for it again to make an impression. (App.p. 80-84, 91-92, 153-54, 156-58, 201). Mr. Solanki then signed a receipt that showed Ms. Martin's credit card information and reflected that the account was charged \$144.70 for the items purchased. (App.p. 92-93). The Solankis exited the store without incident. (App.p. 95). Mr. Solanki disputes that he ever provided Mr. Smalls with any credit card other than his own. (App.p. 73, 77).

On or about December 1, 2009, Ms. Martin reported to the Sheriff's Department that her credit card had been stolen and charged with two unauthorized purchases. (App.p. 301). Ms. Martin further reported that she last possessed the credit card at approximately 4:30 p.m. on November 27, 2009. (App.p. 303-06). One of the two unauthorized charges was in the amount of \$144.70, which was eventually determined to be from Mr. Solanki's transaction in Wal-Mart on November 27, 2009. (App.p. 302, 308).

Deputy Gina Cashion, with the Sheriff's Department, investigated the unauthorized charge at Wal-Mart.<sup>1</sup> (App.p. 301). She contacted Wal-Mart and requested surveillance video and receipts for the date and time of the transaction involving Ms. Martin's card. (App.p. 303-06). Specifically, Deputy Cashion asked for receipts involving a credit card with the last four digits of Ms. Martin's credit card as well as purchases made on November 27, 2009, in the amount of \$144.70. (App.p. 303-06). Wal-Mart complied with her requests and located one transaction in the amount of \$144.70 on the date in question. (App.p. 303-06). Wal-Mart provided Deputy Cashion with video surveillance that showed the transaction along with three related 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. (App.p. 303-06, 410-18). After receiving the surveillance video and documents from Wal-Mart, Deputy Cashion had no further contact with Wal-Mart regarding the transaction, and Wal-Mart had no further involvement with the Sheriff's Department's investigation. (App.p. 435-36).

Based on the time of the transaction and the timestamp in the surveillance video, Deputy Cashion determined that Mr. Solanki was involved in the alleged unauthorized charge on Ms. Martin's credit card. (App.p. 421-25). Deputy Cashion attempted to contact Mr. Solanki by calling him and leaving a business card with a note at his South

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<sup>1</sup> The second unauthorized charged was a \$10.00 charge made at a Murphy's gas station on the same day. (App.p. 306). Deputy Cashion testified she was assigned to investigate only the unauthorized charge made at Wal-Mart in the amount of \$144.70. (App.p. 314-15).

Carolina address, but Mr. Solanki did not contact her. (App.p. 422-25). Subsequently, Deputy Cashion sought and received an arrest warrant for Mr. Solanki based upon the surveillance video and documents from Wal-Mart, as well as bank statements from Ms. Martin. (App.p. 425-26). Mr. Solanki was arrested in Georgia in April 2010. (App.p. 100). He testified he spent six (6) nights in jail until he was transported to South Carolina, where he was released on bond. (App.p. 104, 109-10). Mr. Solanki was indicted for financial transaction card theft and financial transaction card fraud on June 11, 2010. (App.p. 431). On August 24, 2010, the Solicitor dismissed the indictments. (App.p. 113, 431). Following the dismissal of the charges, the Solankis instituted this action against Wal-Mart and the Sheriff's Office alleging (1) negligence, (2) gross negligence and recklessness, (3) false imprisonment, (4) intentional infliction of emotional distress, (5) defamation/defamation *per se*, (6) assault, (7) battery, (8) malicious prosecution, and (9) loss of consortium.

The trial was held from March 6-9, 2012. (App.p. 41). At the close of all the evidence, the trial court granted Wal-Mart's Motion for Directed Verdict on all the Solankis' causes of action except negligence and gross negligence. (App.p. 485). The trial court also ruled the issue of punitive damages would be presented to the jury. (App.p. 510). The trial court granted a directed verdict in favor of the Sheriff's Department on all claims except false imprisonment and malicious prosecution. (App.p. 484-85). The jury returned a defense verdict on all counts as to Defendant Spartanburg County Sheriff's Office, (App.p. 705), and the jury returned a verdict in favor of the Solankis as to the negligence cause of action against Wal-Mart. (App.p. 705-06). The jury awarded the Solankis actual damages in the amount of \$50,000 and punitive

damages in the amount of \$225,000. (App.p. 706). The jury also found that Mr. Solanki was comparatively negligent and apportioned 25% fault to him. (App.p. 706).

On April 20, 2012, the trial court heard Wal-Mart's post-trial Motions for Judgment Notwithstanding the Verdict (JNOV), New Trial Absolute, New Trial *Nisi Remittitur*, Reversal or Reduction of Punitive Damages, and New Trial Pursuant to the Thirteenth Juror Doctrine. (App.p. 23). On October 12, 2012, the trial court denied all of Wal-Mart's post-trial motions, (App.p. 5-22), and Wal-Mart appealed the trial court's decision and jury verdict to the Court of Appeals. Wal-Mart's appeal was limited to the decision by the trial court to submit the issue of punitive damages to the jury over Wal-Mart's objection.

After oral argument, the Court of Appeals issued a published opinion, *Solanki v. Wal-Mart Store #2806*, Op. No. 5264 (S.C. Ct. App. filed August 20, 2014) (Shearouse Adv. Sh. No. 123 at 123-31), affirming the trial court by a 2-1 decision with the Honorable Aphrodite K. Konduros authoring the majority opinion and the Honorable James E. Lockemy concurring. (App.p. 793-801). The Honorable H. Bruce Williams filed a dissenting opinion. (App.p. 801-03); *Solanki*, Shearouse Adv. Sh. No. 123 at 131-33 (Williams, J., dissenting). After finding the trial court did not impose a heightened duty of care upon Wal-Mart, the majority held the Solankis presented sufficient evidence to allow the issue of punitive damages to go to the jury and that the trial court properly denied Wal-Mart's post-trial motions. (App.p. 798, 800-01); *Solanki*, Shearouse Adv. Sh. No. 123 at 128-31.

## ARGUMENT

In a decision that will have a far-reaching, negative impact on retailers who do business or seek to do business in South Carolina, the Court of Appeals erred by concluding that “taking of the credit card information for the sale” by Wal-Mart’s cashier and “the turning over of the credit card information to law enforcement” by Wal-Mart were sufficient to support an award of punitive damages. (App.p. 798); *Solanki*, Shearouse Adv. Sh. No. 123 at 128. In so doing, the Court of Appeals affirmed the trial court’s having effectively created and imposed a heightened duty of care for all retailers involved in police investigations initiated by a third-party, which will wreak havoc upon retailers who attempt to comply with requests for information from law enforcement.

### **I. The Court of Appeals Erred in Finding There Was Evidence to Support the Trial Court’s Submission of Punitive Damages to the Jury.**

The Court of Appeals erred in affirming the award of punitive damages because, as Judge Williams correctly observed in his dissent, “[t]he Solankis failed to submit *any* evidence at trial that Wal-Mart’s actions in processing Mr. Solanki’s credit card or in complying with law enforcement’s request were ‘willful, wanton, or in reckless disregards of [Mr. Solanki’s] rights.’” (App.p. 801); *Solanki*, Adv. Sh. No. 123 at 132-33 (Williams, J., dissenting) (emphasis in original).

At the close of all the evidence, Wal-Mart argued that there was insufficient evidence to submit the issue of punitive damages to the jury based on either the cashier’s handling of the transaction or Wal-Mart’s provision of documents to law enforcement. (App.p. 467-70). The trial court initially appeared to agree that there was insufficient evidence to support a punitive damages award and commented that it thought the alleged actions would only support a claim of simple negligence. (App.p. 466-67). Later,

without making the required determination of whether Wal-Mart's conduct rose to the level of culpability to warrant a punitive damages award, the trial court simply concluded that there was sufficient evidence of *gross negligence* and that both gross negligence and punitive damages would be submitted to the jury:

As a general rule, issues of gross negligence are properly for the jury to determine. 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.... Wal-Mart, was grossly negligent in the way that they handled this transaction. There is evidence from which they could reasonably conclude that. I'll charge gross negligence and punitives.

(App.p. 600) (emphasis added). The decision of the trial to submit the issue of punitive damages to the jury was patently erroneous and effectively imposed a heightened duty on Wal-Mart to identify and explain conflicting documents when there is no evidence that Wal-Mart had knowledge or information with which to explain the discrepancy. The trial court's decision also erroneously allows for a finding of punitive damages based on what was indisputably, at best, an inadvertent error by the cashier. The Court of Appeals erred in affirming the decision and this Court should intervene.

It is well-established that "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). "Punitive damages are quasi-criminal in nature and are imposed to punish a wrongdoer and to deter like conduct." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (citing *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004)). "Although appellate review of an award of

punitive damages is limited to the correction of errors of law, an award of punitive damages must be proven under a significant burden of proof: clear and convincing evidence.” *Id.* (citing *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310, 594 S.E.2d 867, 873 (Ct. App. 2004); *Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 311, 529 S.E.2d 45, 59 (Ct. App. 2000)). “Furthermore, the plaintiff must prove the defendant’s misconduct was willful, wanton, or in reckless disregard of his rights.” *Id.* ““Trial 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).”” *Id.* (quoting *S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 152, 478 S.E.2d 57, 58 (1996)).

In affirming the trial court’s decision to submit the issue of punitive damages to the jury, the Court of Appeals found there were two factual circumstances that supported an award of punitive damages—(1) the manual inputting of credit card information by the cashier Mr. Smalls and (2) the supplying of potential evidence to law enforcement. (App.p. 798); *Solanki v. Wal-Mart Store #2806*, Op. No. 5264 (S.C. Ct. App. filed August 20, 2014) (Shearouse Adv. Sh. No. 123 at 128). Neither of these circumstances is sufficient to show clear and convincing evidence that Wal-Mart acted in a willful, wanton or reckless manner and the award of punitive damages should be reversed.

**1. The Hand-Keying of Credit Card Information by the Cashier was, at Best, Simple Negligence and Could Not Give Rise to a Clear and Convincing Finding of Willful, Wanton or Reckless Conduct.**

In its decision, the Court of Appeals first agreed with the trial court’s conclusion that the hand-keying of the credit card by the cashier supported an award of punitive

damages. (App.p. 798); *Solanki*, Shearouse Adv. Sh. No. 123 at 128. In support of this conclusion, the Court of Appeals noted that the cashier attempted to run Mr. Solanki's credit card at least three times and when that was unsuccessful, the cashier resorted to manually stenciling the card. (App.p. 798); *Solanki*, Shearouse Adv. Sh. No. 123 at 128. The Court of Appeals further noted that the cashier then hand-keyed information from a credit card belonging to Ms. Martin and that at the end of the transaction, there was a receipt signed by Mr. Solanki that contained Ms. Martin's credit card information. (App.p. 798); *Solanki*, Shearouse Adv. Sh. No. 123 at 128. The Court concluded that these facts, combined with Mr. Solanki's testimony that he never had Ms. Martin's credit card "could allow a reasonable jury to determine Wal-Mart's actions amounted to *gross negligence*." (App.p. 798); *Solanki*, Shearouse Adv. Sh. No. 123 at 128 (emphasis added). Thus, as did the trial court, the Court of Appeals erred in failing to specifically find that the handling of the transaction by the cashier gave rise to clear and convincing evidence to support a punitive damages award. Notably, even if such a specific finding was made, the Court of Appeals' conclusion constitutes an error of law that must be corrected to avoid simple inadvertent errors by cashiers and similarly-situated retail employees from giving rise to punitive damages awards.

Here, as noted by Judge Williams in the dissenting opinion, the cashier, Mr. Smalls, testified that he followed the procedures Wal-Mart had in place for hand-keying a credit card. (App.p. 202-03); *Solanki*, Shearouse Adv. Sh. No. 123 at 132. Specifically, Mr. Smalls testified Wal-Mart trained its employees using a set of policies, including a policy regarding credit card transactions. (App.p. 181). The credit card transaction policy provided that when hand-keying a customer's credit card into the system, an

associate must: (1) enter the credit card account number twice; (2) enter the expiration date; (3) request a customer service manager to perform an override for the keyed credit card; and (4) enter the CVV number located on the back of the credit card. (App.p. 182-85). Mr. Smalls also testified the system would prompt him to complete each one of these steps before proceeding and that he followed each of the required steps. (App.p. 185-87). Wal-Mart met any duty it had to its customers by the enactment of these procedures and Mr. Small's adherence to them.<sup>2</sup> To the extent Mr. Smalls made an error in failing to notice that the card he hand-keyed into the system was that of Robin Martin and not Mr. Solanki, such an error amounted to simple negligence, as was initially noted by the trial court:

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.

(App.p. 465). In short, the evidence regarding the handling of the transaction by the cashier simply does not and cannot give rise to a punitive damages award.

As Judge Williams correctly observed in his dissent, "[a]lthough I believe the error in hand-keying Mr. Solanki's credit card information would give rise to a negligence claim against Wal-Mart, no evidence was introduced at trial to show Wal-Mart's conduct was so gross or reckless of consequences that punitive damages were warranted." (App.p. 801); *Solanki*, Shearouse Adv. Sh. No. 123 at 132 (Williams, J.,

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<sup>2</sup> Mr. Solanki did not present any evidence to refute Mr. Smalls' testimony. As such, to the extent Mr. Solanki is relying upon the theory of *res ipsa loquitur*, Wal-Mart notes this Court does not recognize the doctrine. See *Snow v. City of Columbia*, 305 S.C. 544, n.7, 409 S.E.2d 797, n.7 (Ct. App. 1991).

dissenting). Judge Williams' analysis is correct, and this Court should grant the petition for certiorari and reverse the punitive damages award.

**2. Wal-Mart's Compliance with Law Enforcement's Request for Information was Insufficient to Support a Finding of Clear and Convincing Evidence of Willful, Wanton or Reckless Conduct.**

The Court of Appeals next concluded that punitive damages were warranted because "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," that "Wal-Mart was in the best position to point out the hand-keying of the credit card information to the Sheriff's Office," and that "Wal-Mart had the opportunity to explain the odd nature of the transaction throughout the criminal process." (App.p. 800); *Solanki*, Shearouse Adv. Sh. No. 123 at 130. The majority further found the trial court correctly determined Wal-Mart knew of the "dangerous condition" it created by its employee hand-keying the transaction, and that Wal-Mart was required to point out the discrepancies to law enforcement because it was responsible for the creation and production of the evidence used to arrest Mr. Solanki. (App.p. 798); *Solanki*, Shearouse Adv. Sh. No. 123 at 128. In so ruling, the Court of Appeals has effectively created a heightened duty upon retailers to initiate their own investigation into evidence requested by law enforcement and to "point out the discrepancies" and "explain the odd nature" of a transaction even where, as here, there is no evidence that the retailer had any knowledge or information that would have precluded an arrest.

First, as indicated, the record is absolutely devoid of any evidence that Wal-Mart had any information from which it could "explain the odd nature" of the transaction. At best, Wal-Mart would have been able to provide nothing more than the information the

deputy already had, *i.e.*, that the credit card number on the hand-keyed credit card receipt did not match the credit card number on the stenciled receipt from the credit/debit card in Mr. Solanki's name. There is simply no evidence to show that a review of the documents by Wal-Mart would have gleaned information that would have precluded Mr. Solanki's arrest. To assert that somehow Mr. Solanki would not have been arrested if Wal-Mart had provided some additional unspecified information to the deputy is speculation and conjecture and does not at all support a finding that Wal-Mart acted in a reckless, wanton or willful manner sufficient to support an award of punitive damages.

Second, and importantly, Wal-Mart did not file the criminal complaint with law enforcement that initiated the investigation into Ms. Martin's credit card. To the contrary, law enforcement only began probing into Mr. Solanki's transaction because Ms. Martin, a third-party, non-customer, filed a police report asserting that her card stolen. Deputy Cashion requested specific items as part of the Sheriff's Department's investigation of this third-party claim, and Wal-Mart fully complied with law enforcement's request. The Court of Appeals' decision that a retailer must first investigate requested evidence prior to giving it to law enforcement and offer an explanation for any discrepancy even where they have no knowledge regarding the discrepancy would impose an unreasonably heavy burden for retailers across the state.

Moreover, the trial court's conclusion, affirmed by the Court of Appeals, that Wal-Mart somehow created a dangerous condition that supported an award of punitive damages is patently erroneous and warrants review by this Court. Because the trial court misapplied the decision of *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 621 S.E.2d

363 (Ct. App. 2005), this Court should grant the petition for certiorari and reverse the award of punitive damages.

In *Mishoe*, the court acknowledged that “[w]hen evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness.” 366 S.C. at 201, 621 S.E.2d at 366. The plaintiff suffered serious injuries due to a hazardous condition in the defendant’s parking area. *Id.* at 199, 621 S.E.2d at 365. The evidence demonstrated that the head of defendant’s maintenance department provided actual, written notice of the existence of the hole in question almost a year prior to the accident, and the defendant did not take any action to repair it after receiving that notice. *Id.* at 201, 621 S.E.2d at 366. Further, the court found the defendant took no precautions to warn visitors of the existence of the hole. *Id.* at 201-02, 621 S.E.2d at 366. Thus, the court ruled there was sufficient evidence to submit the issue of the defendant’s willful, wanton, and reckless conduct to the jury. *Id.* at 202, 621 S.E.2d at 366.

In stark contrast to the present case, there was no inherently dangerous condition created by Wal-Mart. *Mishoe* involved a tangible, dangerous condition posing a foreseeable physical safety threat to customers—a hole in the ground known to the retailer for a year prior to the plaintiff’s injury; here, the so-called dangerous condition, according to the Court of Appeals, must either be (1) the hand-keying of a credit card in to the computer system or (2) the providing of requested potential evidence to law enforcement. Neither of these instances could reasonably be considered a dangerous condition as is defined in *Mishoe*. To find differently would open the flood gates to

claims of punitive damages. In short, Wal-Mart's conduct in both the handling of the transaction by the cashier and providing requested information to law enforcement do not present an inherently dangerous condition and any conduct on the part of Wal-Mart is far removed from the willful, wanton, or reckless conduct required for the imposition of punitive damages.

South Carolina courts have defined the parameters of conduct by retailers that is necessary to support a claim for punitive damages when handling internal matters. While Wal-Mart has located no case with the specific factual scenario presented here, cases in which punitive damages have been upheld against a retailer illustrate the type of actions that may properly give rise to a clear and convincing finding of willful, wanton or reckless conduct to support an award of punitive damages. *See Caldwell v. K-Mart Corporation*, 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991) (punitive damages awarded where defendant's employee accused plaintiff of stealing and after finding no stolen items detained plaintiff and walked her through various areas of the store for fifteen minutes while continuing to accuse her of stealing); *Jones v. Winn-Dixie Greenville*, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995) (punitive damages awarded where defendant's employee accused plaintiff of stealing, escorted him out of the store, threatened to "kick his [a ]" if he came back into the store again , grabbed plaintiff by the arm, escorted him back into the store, took him to the bathroom and told him to take down his pants so that defendant's employee could look for stolen merchandise).

Moreover, historically, cases where punitive damages have been allowed in a retail setting for false arrest involve investigations or arrests that were **initiated** by the retailer, unlike here, where law enforcement initiated the investigation after the report of

Ms. Martin and Wal-Mart merely complied with law enforcement's request for documents and video. *See e.g. Falls v. Palmetto Power and Light Company*, 117 S.C. 327, 328-33, 109 S.E. 93, 93-95 (1921) (finding punitive damage award against retailer was warranted where retailer initiated and actively participated in the law enforcement investigation that ultimately resulted in plaintiff's arrest).

In stark contrast with *Caldwell*, *Still*, and *Falls*, the facts of the present case do not contain any evidence of intentional, willful conduct. Wal-Mart did not detain or take any action against Mr. Solanki. Rather, Wal-Mart acted in accordance with its store policies and procedures in handling Mr. Solanki's transaction, and when requested by law enforcement, the store provided documents and video to Deputy Cashion pertaining to a report of a lost or stolen credit card brought by a non-customer, third-party (Robin Martin). Simply put, the Court of Appeals erred in concluding that Wal-Mart's compliance with their own policies and procedures in hand keying a transaction and/or cooperation with law enforcement's investigation initiated by a third-party supported the punitive damages award; thus, the petition for writ of certiorari should be granted and the punitive damages award reversed.

**3. The Court of Appeals erred in affirming the trial court's incorrect application of the gross negligence standard in determining that the issue of punitive damages should be submitted to the jury.**

Also of note is that in assessing punitive damages, the trial court erred as a matter of law by failing to determine whether there was evidence to show the alleged grossly negligent conduct rose to the level of willful, wanton, or reckless **before** submitting the issue of punitive damages to the jury. The trial court must make this separate and distinct determination because mere gross negligence alone does not allow for an award of

punitive damages. *See Sample v. Gulf Ref. Co.*, 183 S.C. 399, 411, 191 S.E. 209, 214 (1937). Despite this clear mandate, the trial court in this case failed to address the sufficiency of the evidence for punitive damages until the post-trial motions hearing.

The Court of Appeals affirmed the trial court on the basis that the trial court's analysis of the *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), factors during post-trial motions was sufficient to sustain the submission of punitive damages to the jury. (App.p. 799-801); *Solanki v. Wal-Mart Store #2806*, Op. No. 5264 (S.C. Ct. App. filed August 20, 2014) (Shearouse Adv. Sh. No. 123 at 130). However, this was also error, as the *Gamble* factors are a "post-judgment due process review of any punitive damages award," *Mitchell v. Fortis*, 385 S.C. 570, 586, 686 S.E.2d 176, 184 (2009), which is a separate assessment than whether there is clear and convincing evidence of willful, wanton, or reckless conduct.

In affirming the trial court's assessment of punitive damages, the Court of Appeals has effectively lowered the legal standard of proof for a plaintiff alleging punitive damages by allowing the issue to go before the jury without the requisite finding by the trial court. Judge Williams noted the error in his dissenting opinion and correctly stated the applicable law:

Moreover, I believe the trial court erred when it failed to adequately assess the culpability of Wal-Mart's conduct *before* charging the jury on punitive damages. *See S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996) ("*First*, the [trial] 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." (emphasis added)); *Longshore*, 365 S.C. at 564, 619 S.E.2d at 11 ("[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)." (emphasis added) (quoting *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 152, 478 S.E.2d 57, 58 (1996))).

(App.p. 802); *Solanki*, Shearouse Adv. Sh. No. 123 at 132. The trial court's error in this regard should have been reversed on appeal. In any event, there was no evidence to support the submission of punitive damages to the jury. Judge Williams succinctly stated it best when he concluded, "I believe 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. Thus, I respectfully disagree with the majority and would hold the trial court erred in submitting the issue of punitive damages to the jury." (App.p. 803); *Solanki*, Shearouse Adv. Sh. No. 123 at 133.

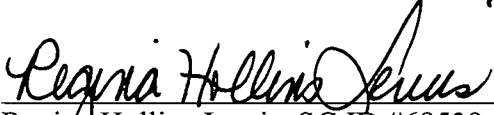
#### **CONCLUSION**

For the foregoing reasons, the Court of Appeals erred in affirming the trial court's submission of punitive damages to the jury. The Court's decision imposes an unreasonable burden on retailers that will negatively impact their ability to do business in the State of South Carolina and result in a chilling effect on retail cooperation with law enforcement investigations. Accordingly, this Court should grant this petition for a writ of certiorari and reverse the award of punitive damages.

*(Signature page to follow)*

Respectfully submitted,

November 20, 2014

  
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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Frank R. Addy, Jr., Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5264 (S.C. Ct. App. Filed October 19, 2012)

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Prakash & Urmila Solanki.....Respondents.  
v.  
Wal-Mart Store #2806.....Petitioner.

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**PROOF OF SERVICE**

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I do hereby certify, on this 20<sup>th</sup> day of November, 2014, that a copy of the foregoing Petition for A Writ of Certiorari, Appendix and Proof of Service were served via electronic mail and by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to: John D. Hawkins, Esquire (john@jdhawkinspa.com) and Charles Logan Rollins, II, Esquire (logan@jdhawkinspa.com), The Hawkins Law Firm, P.O. Box 5048, Spartanburg, South Carolina 29304.

  
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November 20, 2014

*Via Hand Delivery*

The Honorable Daniel E. Shearouse  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201

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**S.C. Supreme Court**

**Re: *Prakash and Urmila Solanki v. Wal-Mart Store #2806, et al***  
**S.C. Court of Appeals Case No : 2012-213247**  
**Opinion No: 5264**

Dear Mr. Shearouse:

Enclosed please find the original and six (9) copies of Appellant's Petition for A Writ of Certiorari along with four (4) copies of the Appendix along with our Proof of Service. Also enclosed is our firm's check in the amount of \$100.00 for the filing fee. Please file the original and required copies with the Court and return the additional 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,

  
Regina Hollins Lewis

RHL/kfs

Enclosures

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

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