

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

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

Prakash & Urmila Solanki Respondents.

v.

Wal-Mart Store #2806 Petitioner.

APPENDIX

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1 Q Right.

2 But also that they have brought you all the relevant
3 documents?

4 A Not necessarily all the relevant. But enough to
5 establish probable cause.

6 Q Right.

7 If an officer has some knowledge that the individual,
8 that there's some evidence, for example, that an individual
9 didn't commit the particular offense, and that evidence had
10 been brought to you, would you sign the warrant?

11 A No, if they had evidence that the person they were
12 seeking a warrant for did not commit the crime, of course
13 not.

14 Q Okay. And you would -- you would never want to sign a
15 warrant on somebody that was innocent, correct?

16 A Absolutely. We take this job very seriously, sir.

17 Q Exactly.

18 And although you're not in a position to judge
19 necessarily whether a person will ultimately be acquitted of
20 something, you do expect the officers, if they have a piece
21 of evidence that is exculpatory as it were, that they bring
22 that and show it to you as well, right?

23 A Absolutely.

24 Q And you don't want them holding that back, right?

25 A Of course not.

James Pasley - Cross-examination
by Mr. Hawkins

1 Q Okay. And then as far as this case today, you're
2 aware, as a judge, thirty --?

3 A Thirty-nine and a half years.

4 Q Thirty-nine and a half years, you are aware that there
5 are certain issues that the jury decides and certain issues
6 that the judge decides, right?

7 A Yes, sir.

8 Q And in this particular proceeding, I will tell you that
9 the judge, Judge Addy, has ruled that the ultimate---

10 MR. SMITH: Your Honor, I object to this particular
11 question for lack of foundation.

12 THE COURT: All right.

13 MR. HAWKINS: They, they called the judge.

14 THE COURT: I understand.

15 Y'all approach real quick.

16 (WHEREUPON, a bench conference was held out of the
17 hearing of the jury at this time.)

18 THE COURT: All right. Please continue, Mr. Hawkins.

19 Q Judge, once you sign a warrant, numerous things can
20 happen with the case, correct?

21 A Yes, sir.

22 Q It can be prosecuted to its fullest and a conviction
23 obtained, right --

24 A That's one possibility.

25 Q -- or it can be dismissed by the, by the State,

1 correct?

2 A The State has that option in every instance, yes.

3 Q That's right.

4 And all this says is that, at the time that the case
5 was brought to you, that you felt there was probable cause
6 at that point in time, correct?

7 A That's correct.

8 Q But there are times where subsequently it's determined
9 that indeed, whether it was, whether it's in a civil
10 proceeding or whatever, that there was no probable cause,
11 correct?

12 A That's right. Probable cause is a very low standard.
13 It doesn't take much to reach probable cause. So, yes, the
14 next standard is much higher---

15 Q Right.

16 A ---to convict.

17 Q And in the 15-minutes that you have with an officer, I
18 mean, in other words, I take it there are hundreds of these
19 done in a month?

20 A I've probably done 750,000 in my career, yes, sir.

21 Q 750,000.

22 So, you don't necessarily have the time to make the
23 inquiry that is the fullest inquiry possible, is that
24 correct?

25 A Mr. Hawkins, I will tell you that I would never put

1 someone in jail unless I fully was satisfied that at least
2 that standard of probable cause is met.

3 Q Right.

4 So, you wouldn't want anybody to be convicted unless
5 there was guilt beyond a reasonable doubt---

6 A Absolutely.

7 Q ---right?

8 And my point to you is that, at the time -- of course,
9 you're doing your job, and you're doing it well.

10 At the time you signed these, these warrants, if you
11 don't -- if you, obviously, that the inquiry you have, my
12 point to you is a, is a more limited one, perhaps, than one
13 that can be made later on in the more expansive tribunal?

14 A Well, of course.

15 Q Right.

16 A Not every piece of evidence and not to full expanse of
17 the testimony necessary is gonna be presented at that time.

18 Q And, again, if there's a piece of exculpatory evidence
19 or something indicating contradictory evidence of a person's
20 guilt, you want that as well, right---

21 A Absolutely.

22 Q ---and brought to you?

23 A If that was existing I certainly would want to see,
24 hear that.

25 Q Okay. Thank you.

1 MR. ROZELSKY: Defendant Wal-Mart has no questions for
2 this witness.

3 THE COURT: Anything on redirect?

4 MR. SMITH: No, Your Honor.

5 May the witness be excused?

6 THE COURT: Judge, thank you so much for coming.

7 WITNESS: Thank you.

8 THE COURT: You're free to go. Appreciate it.

9 No additional witnesses, Mr. Smith?

10 MR. SMITH: No, Your Honor. That is it.

11 THE COURT: Anything in reply?

12 MR. HAWKINS: No, Your Honor.

13 THE COURT: Very good.

14 Ladies and gentlemen of the jury -- Mr. Rozelsky,
15 nothing in reply based on---

16 MR. ROZELSKY: Nothing in reply, Your Honor.

17 THE COURT: Very good.

18 Ladies and gentlemen of the jury, we have reached the
19 point where we have received all the testimony that we are
20 going to receive in this particular case. I need to take up
21 with the attorneys the question of what I'm going to charge
22 you based upon the testimony that's been presented, the law
23 that's gonna apply, and the rules require me to consult with
24 them before I charge you on the law and before we go into
25 the closing arguments.

1 So, I have to ask that you, again, adjourn from the
2 courtroom for a period of time. I don't know how long this
3 is gonna take. I'm hoping it's not gonna take anymore than
4 twenty or thirty minutes. At that point in time we'll bring
5 you back out in here. We'll proceed with closing arguments,
6 my charge to you on the law, and then you'll have the case.

7 So, don't discuss the case yet. I'll see you shortly.
8 Thank you for your patience.

9 Please excuse us.

10 (WHEREUPON, the following takes place outside the
11 presence of the jury.)

12 THE COURT: All right. The jury is out.
13 Additional motions from anyone?

14 MR. SMITH: Your Honor, we'd renew all the motions we
15 made just an hour ago for a directed verdict at this time.
16 We believe that Pasley's testimony, and the Cashion's
17 testimony yesterday conclusively establishes that there were
18 probable cause found for the arrest warrants to be issued
19 based on sworn testimony of the police officer in this
20 judicial process.

21 So -- and there's no evidence been offered on the side
22 of the plaintiff that, that contradicts what we've heard
23 today, yesterday, or anything other than sworn testimony and
24 that that testimony found probable cause. Judge Pasley says
25 that his signature's on it. He found probable cause. And,

1 so, we think all the causes of action against the sheriff,
2 particularly the ones that, malicious prosecution, false
3 imprisonment must be dismissed in light of the case law of
4 Gist case and the Law case, which I'll explain probable
5 cause in the supplementation of the oral testimony to
6 support any problem that there may be with that one document
7 we have up on the wall, that the conclusions in it, if
8 they're not sufficient, the sworn testimony is all that's
9 needed to establish probable cause.

10 So, we think this is the state of the trial and then
11 some directed verdict should be and must be issued in this
12 case dismissing all causes of action against the sheriff.

13 THE COURT: All right. I agree with you concerning
14 your assertions concerning probable cause, and for those
15 reasons your motions are denied again.

16 You renew your motions?

17 MR. ROZELSKY: I renew my motions especially as to the
18 gross negligence, and, and I think, in addition, I would, I
19 would move to exclude any attempts to publish any -- unless
20 Your Honor's going to let it go, if you're gonna let it go,
21 then I have another argument. If you're not, then I'll sit
22 down and shut up.

23 But I think there's just simply, at best, what they've
24 established is there's circumstantial evidence of
25 negligence. Circumstantial evidence can't rise -- there's

1 not a case out there that says that circumstantial gross
2 negligence or circumstantial, not that, not that I've seen,
3 circumstantial gross negligence or recklessness or
4 willfulness or wantonness. There's just simply no evidence
5 of that, Your Honor.

6 THE COURT: Help me out, again.

7 How is their evidence that can go to the jury on the
8 issue of gross negligence?

9 MR. ROLLINS: Well, the standard is that there is not
10 even a slight exercise of care, and under these
11 circumstances, when Wal-Mart presents a self-contradictory
12 document, and knowing that it will be acted upon by the
13 appropriate authority to arrest Prakash Solanki, it has to
14 take some action to explain that document or, in some way,
15 to prevent his being arrested. When they, when they create
16 the mechanism that will irrevocably lead to his arrest, they
17 have some duty to notify the Sheriff's Department upon what
18 ground Mr. Solanki will be arrested on.

19 MR. ROZELSKY: Again, Your Honor, there's no evidence
20 that they notified the Sheriff's Department of anything
21 cause no -- all they did was give evidence to the Sheriff's
22 Department. If there's a, a derelict of duty, it's the
23 Sheriff's Office not coming back and asking about that
24 document.

25 There's no affirmative duty for Wal-Mart, once they

1 give a document, to explain each and every element of that
2 document, and certainly not gross negligence or gross --
3 yeah, gross negligence or recklessness in not explaining
4 that.

5 MR. ROLLINS: Gross negligence is a relative term under
6 the circumstances, and when the offense or when the
7 consequence of the action is gonna be the arrest of a
8 suspect, as we saw in Mr. Solanki's case, six days in
9 prison, it's sort of a sliding scale at which providing this
10 apathetical document that requires, under even a gross
11 negligence standard, it requires some action. Wal-Mart took
12 none whatsoever except to provide the documents and then
13 wash its hands of it and say now what happens to our
14 customer is, is irrelevant to us at this point.

15 MR. ROZELSKY: While Your Honor's looking at that, I
16 just want to make sure that I'm on the record having renewed
17 both the negligence directed verdict motion and the loss of
18 consortium.

19 THE COURT: All right. I took note of the fact that
20 you were renewing all motions---

21 MR. ROZELSKY: Thank you, Your Honor.

22 THE COURT: ---including the ones that I ruled against
23 you on earlier.

24 MR. SMITH: And the same here, Your Honor.

25 THE COURT: Yes, sir.

1 (Pause.)

2 THE COURT: Mr. Hawkins, do you truly believe this is a
3 punitives case?

4 MR. HAWKINS: Yes, sir, Your Honor. Absolutely.

5 THE COURT: All right. As a general rule, issues of
6 gross negligence are properly for the jury to determine.
7 There's evidence, based upon the weirdness of this
8 transaction, for lack of a better word, in the record,
9 there's evidence from which the jury could conclude that, in
10 some way, the plaintiff was grossly negligent in the way
11 they or, sorry, that the defendant, Wal-Mart, was grossly
12 negligent in the way that they handled this transaction.
13 There is evidence from which they could reasonably conclude
14 that. I'll charge gross negligence and punitives.

15 MR. HAWKINS: Thank you, Your Honor.

16 MR. ROZELSKY: Your Honor, at this point I would move
17 to exclude any remarks in Mr. Hawkins closing about the net
18 worth of Wal-Mart. It's not been put into evidence under
19 any witness, and I would move to exclude it as being
20 improperly before the jury. It's highly prejudicial and I
21 anticipate that's he's likely going to want to do that.

22 MR. HAWKINS: Absolutely, judge. It clearly comes in
23 and, you know, I couldn't -- how was I suppose to get it in
24 before as punitives weren't even at issue in the case?

25 We -- he provided us -- we asked, in our discovery

1 requests, that he provide us with the net worth of Wal-Mart.
2 He directed us to a website that has a filing on there,
3 and -- but either way. I think the jury can figure out
4 Wal-Mart can pay whatever. So --.

5 MR. ROZELSKY: Well, Your Honor, my, my question is, is
6 there's been lots of remarks both from Mr. Hawkins, from the
7 Court, about Wal-Mart's size. I think Your Honor may of
8 even suggested that it was worth more than all of South
9 Carolina.

10 However, I object to him publishing to the jury the
11 number. It's not been put in evidence. Mr. Hawkins knows
12 how to proffer that testimony if that was desired.

13 He called the Wal-Mart witness to the stand in his case
14 in chief. He is not asked a request to admit despite
15 showing the Court or the jury a whole bunch of request to
16 admit. He never asked a request to admit to that number,
17 and, Your Honor, I don't believe it's properly before the
18 jury, and I don't think that he can then argue it, and I
19 think, if it, if he does, it is so highly prejudicial as to
20 require reversal.

21 THE COURT: All right. Mr. Hawkins, technically
22 there's no evidence in the record in this case as to
23 Wal-Mart's net worth. I see no problem -- I imagine that,
24 at some point, you will argue to the jury that they may use
25 their common sense and their life experiences in arriving at

1 a verdict. That's typically part of my charge too.

2 I think it would be common sense that Wal-Mart is worth
3 money and you can argue that, a lot of it.

4 MR. HAWKINS: Yes, sir.

5 THE COURT: But I'll let you do that. But stay away
6 from any particular number if you don't mind.

7 MR. HAWKINS: Yes, Your Honor. I will. Judge---

8 MR. ROZELSKY: Your Honor, I just want to make sure I
9 understand your ruling.

10 He's allowed to say a lot of it without putting any
11 evidence in?

12 THE COURT: He's allowed to -- and let's be clear. The
13 remarks that I made about how much Wal-Mart's worth, those,
14 of course, were not in the presence of the jury. That was
15 just us.

16 MR. ROZELSKY: Understood.

17 THE COURT: But it is argued -- he is -- I think he's
18 allowed to argue because it is common knowledge that
19 Wal-Mart's a big company.

20 MR. ROZELSKY: Well, Your Honor, a big company and a
21 net worth are two very different things.

22 THE COURT: Agreed.

23 MR. ROZELSKY: General Motors showed that to us just
24 recently.

25 THE COURT: Agreed.

1 MR. ROZELSKY: I think there are -- Lehman Brothers
2 showed us that recently. The, the lack of evidence -- he
3 can say use your common sense about Wal-Mart. But he can't
4 say they're a big company, they're worth a lot of money,
5 anything like that because it's not in evidence.

6 MR. HAWKINS: This guy---

7 THE COURT: I think he's entitled to say it's a big
8 successful company.

9 MR. ROZELSKY: Your Honor, what evidence has he put
10 into the record that it is a big successful company?

11 Your Honor, I guarantee you that there were lawyers,
12 plaintiff's lawyers, on the eve of General Motors bankruptcy
13 saying it's General Motors, look how big and successful they
14 are.

15 I think, in the absence of credible evidence, Your
16 Honor, he can only argue you can punish Wal-Mart. He can't
17 argue how big they are. He can't argue how many stores they
18 have because that's not in evidence.

19 THE COURT: All right. If you feel like he's crossing
20 the line, object. I'm asking him to stay away from any
21 mention of the actual net worth, which I hope to mean, by
22 your motion, that that's what you were aimed at or that's
23 what you were most concerned with, that Wal-Mart is a, worth
24 ten trillion dollar company, whatever the case may be. So,
25 he can not go into specifics as far as the numbers.

1 MR. ROZELSKY: Your Honor, I believe, under Brannon
2 versus Ford Motor Company, that our Supreme Court has
3 decided recently where they overturned this big verdict in
4 Greenville or not in Greenville. Hampton.

5 Okay. The only relevant issue in that case, the
6 Supreme Court said, was net worth.

7 All right. In that case, Johnny Parker and Ronnie
8 Crosby said to the jury that this CEO, Mr. Ford, makes
9 5.3 million dollars, and then the CFO makes X million
10 dollars, and then so and so makes. And the Court said the
11 only relevant factor is net worth. And there has been no
12 testimony to the jury of net worth.

13 THE COURT: I do realize that is the law. That
14 decision has widely been criticized because net worth is
15 something that can be manipulated extensively. And, so, I
16 know what the Supreme Court said. I realize that my Court
17 is bound by that.

18 MR. ROZELSKY: Your Honor, it's a publically traded
19 company by the SEC. Okay.

20 THE COURT: Mr. Hawkins, how do you intend to argue
21 this question to the jury?

22 MR. HAWKINS: I think, just to put it plainly to them,
23 that wal-Mart is a very large company with many many stores
24 and that there is one and only one way to get their
25 attention, and that is to send a large punitive verdict,

1 give a large punitive verdict so as to get their attention
2 that would accompany the size of wal-Mart and the power of
3 wal-Mart, that, that the only thing they're going to respect
4 is a very large number against them that will help make sure
5 that they treat their customers and protect their customers
6 from this kind of credit card fraud.

7 MR. ROZELSKY: And, Your Honor, my objection would be
8 there's no evidence how many stores wal-Mart has. Mr.
9 Hawkins knows how to do that. He ran a Google search for
10 Mrs. Cashion. He could of done the same Google search and
11 handed it up to Mr. Smalls. He could of done any of that
12 what he's now going to try to argue.

13 The jury can use their common sense, but I don't
14 believe that it's proper for him to argue it's a large
15 store, that it's a powerful store. I'm not sure how you
16 determine power with regard to a corporation to begin with.
17 But there's certainly no testimony -- Your Honor, in the
18 cases that have gone up on appeal, there typically is an
19 expert, Oliver Wood or one of those economist, who gets up
20 on the stand and says you know how you want to punish
21 wal-Mart. Well, wal-Mart, this store, the net profit is x
22 or the net worth is x.

23 None of that is in the record. Your Honor, I continue
24 to believe that it's improper for punitives to go to the
25 jury. But this highly inflammatory anticipated testimony

1 is, is, I think, is greatly prejudicial. And, so, I would
2 ask that Mr. Hawkins be very -- the difficulty -- and Your
3 Honor's right.

4 My only option is to object in the middle of his
5 closing, okay, and, and we see how that goes on appeal. I
6 think with the exception of calling Toyota -- with that --
7 with the exception of drawing Asian faces against Toyota in
8 the Toyota Florence case, that's the only case I'm aware of
9 where they looked at the conduct during closing.

10 And, so, that's why I'm asking for an admonition right
11 now that says if it's not in the record, if it's not in the
12 evidence, you can't publish it to the jury.

13 THE COURT: Just one second, Mr. Smith.

14 (Pause.)

15 THE COURT: I will be instructing the jury that, of
16 course, the argument of counsel is not evidence. I will be
17 instructing them that they may use their common experience,
18 their common sense. I'm gonna instruct them that they're to
19 judge this case based upon the evidence that has been
20 presented. I'm going to instruct them, again, that argument
21 of counsel is not evidence, but at the same time they can
22 use their common sense.

23 If Mr. Hawkins wants to argue that Wal-Mart needs to be
24 punished, and it's a large corporation, I'll allow him to do
25 that because I think that's within the realm of someone's

1 common sense, an average citizen's common sense.

2 At the same time, if you want to argue, Mr. Rozelsky---

3 MR. ROZELSKY: Rozelsky.

4 THE COURT: I'm sorry, sir.

5 MR. ROZELSKY: That's okay.

6 THE COURT: Mr. Rozelsky, if you want to argue that
7 Wal-Mart is not a large corporation, you are free to do
8 that.

9 MR. ROZELSKY: Your Honor, I just want to make sure I'm
10 clear on the record.

11 Under Brown versus Ford Motor Company, are you saying
12 that it's okay for him to use large in lieu of net worth?

13 THE COURT: I am saying that it is okay for him to
14 argue that the plaintiff in this case, Wal-Mart, should pay
15 a punitive damages verdict based upon the reprehensibility
16 of the conduct involved in this case, and that you can take
17 into account, whether the jury is entitled to take into
18 account their common sense and their life experiences in
19 evaluating the factors that I'm gonna provide to you prior
20 to the argument in arriving at a punitive damages verdict.

21 That's a really long way to avoid answering your
22 question. But I'm gonna allow him a little bit of latitude
23 on this. I am not definitively saying that the door is wide
24 open.

25 Mr. Hawkins, I would suggest that you couch any

1 comments that you make under the heading of you can draw
2 upon your life experiences, you can draw upon your logic and
3 good common sense in arriving at a verdict of punitive
4 damages. I think that is the only basis that you should be
5 arguing there.

6 And if you feel like he's stepping over the line, let
7 me know and I'll reel him in. But I do believe that the
8 success of Wal-Mart is something which is commonly known.

9 MR. ROZELSKY: Your Honor, I understand that. But so
10 was the success of General Motors and, and I don't think---

11 THE COURT: And it became commonly known that General
12 Motors wasn't quite as successful as it had been. I mean---

13 MR. ROZELSKY: Well, Your Honor, at one point Apple was
14 \$2.00 a share. I mean it, it can be at \$2.00 a share again.
15 The fact that there's no evidence as to the net worth of
16 Wal-Mart, and our Supreme Court has said the only, only
17 factor to be considered is net worth. That's what they say.

18 THE COURT: You want to speak to that, Mr. Hawkins?

19 MR. HAWKINS: Your Honor, I'm not sure which case he's
20 talking about. We have the net worth right here. You can
21 exercise your judicial discretion to allow me to publish
22 this to the jury. It is stipulated that it is the correct
23 net worth by Mr. Rozelsky's email to me, and that he
24 provided this in response to my discovery request. It's
25 right here.

1 He's -- if he's insisting that we put in the net worth,
2 then we can reopen our case for the limited purpose, since
3 you've ruled now that there's punitive damages in place, we
4 can reopen our case and put in the net worth or he can
5 stipulate to the same right now.

6 MR. ROZELSKY: Your Honor, they, they've closed their
7 case twice.

8 THE COURT: I think---

9 MR. ROZELSKY: Well, they closed twice and then they
10 said they had no rebuttable.

11 THE COURT: Oh, yeah.

12 MR. HAWKINS: But I mean you---

13 THE COURT: Was this provided during the course of some
14 discovery request?

15 MR. ROZELSKY: Yes, Your Honor. But it's not in
16 evidence.

17 THE COURT: I understand that, Mr.---

18 MR. ROZELSKY: I mean I've got a box of discovery
19 that's not in evidence.

20 THE COURT: I understand that.

21 MR. ROZELSKY: I've got a notebook---

22 THE COURT: But is it---

23 MR. ROZELSKY: ---of procedures that aren't in
24 evidence. So, to suggest that because it was provided,
25 provided in discovery now gets it in evidence is, is, is

1 certainly improper, Your Honor. Mr. Hawkins knows how to
2 try his case. He knows how to put up the evidence and he
3 didn't put it up.

4 MR. HAWKINS: Since Mr. Rozelsky is saying that there's
5 no net worth, we have the net worth that he provided. And,
6 so, I can certainly call him as a witness and ask him to say
7 whether he gave this to me and this is net worth.

8 THE COURT: Yeah, I'm not gonna allow you to do that.

9 MR. ROZELSKY: Your Honor, for the record, Mr. Rozelsky
10 never said anything other than there's no evidence of net
11 worth, and, Your Honor, a trial is about finding the truth
12 based on the evidence.

13 MR. HAWKINS: I've just never thought Wal-Mart would
14 take the position they weren't a very large, rich company.

15 THE COURT: Mr. Hawkins, I'm gonna ask that you stay
16 away from the reference -- his point is well taken. I
17 understand the criticism that's been lodged against that
18 decision. But net worth is the guiding thing. There's no
19 evidence of that in the record.

20 MR. HAWKINS: Will you allow us to reopen the record
21 for the brief purpose of publishing this since you have and
22 we -- since you have allowed punitives damages to be
23 discussed to the jury?

24 I'm just asking you to use your judicial discretion,
25 reopen the case for that limited purpose since he's raised

1 the issue of saying that I can't talk about a document that
2 he gave me during discovery, and he's the one making this an
3 issue as far as the net worth goes.

4 THE COURT: Yes, I will allow that.

5 MR. HAWKINS: Thank you, Your Honor.

6 THE COURT: Over your objection.

7 You got another matter, Mr. Smith?

8 MR. SMITH: Oh, yeah, since all this talk of punitive
9 damages, of course, Your Honor's well aware of the, there's
10 no punitive damages allowed, and I would hope that, during
11 the course of closing arguments, there'd be no appeal to the
12 jury for punitive damages against the Sheriff's Office.

13 THE COURT: I will be instructing the jury that you
14 can't give punitive damages against the Sheriff's
15 Department, and I imagine Mr. Hawkins will stay away from
16 that as well.

17 MR. ROZELSKY: Your Honor, before we go forward, I'm
18 just curious---

19 THE COURT: Yes, sir.

20 MR. ROZELSKY: ---as to what witness you're going to
21 use for that purpose just so I know whether I need to
22 cross-examine or whether I need to go ahead and call someone
23 from Wal-Mart to come and explain this. I'm not sure that
24 the taking judicial notice of the 10-Q that's filed with the
25 SEC is the proper way to show net worth. I don't know cause

1 I don't know what that document actually says.

2 THE COURT: How do you intend to---

3 MR. ROZELSKY: I produced a public document to him. In
4 fact, I produced a link is what I produced.

5 MR. HAWKINS: We actually asked for information of
6 Wal-Mart's net worth. They didn't provide it. We
7 threatened a motion to compel. Then he produced the link
8 and he said it's all right there, there's what you need.
9 So, if he's going to object to it coming in, I'll just call
10 the lady at the table there and ask her whether or not that
11 this is net worth.

12 MR. ROZELSKY: Your Honor, she's not been listed as a
13 witness at any point. She's not been identified as a
14 competent witness on this issue. This is expert testimony.

15 Your Honor -- can I see that?

16 It talks about current cash and cash equivalents,
17 receivables, net, inventory, prepaid expenses and others,
18 current assets of discontinued operations, property and
19 equipment, less accumulated depreciation, property under
20 capital leases, liability, short term borrowings, account
21 payable, dividends payable, accrued liability, accrued
22 income taxes, long term debt due within a year.

23 Mr. Hawkins---

24 THE COURT: As you correctly point out, as you
25 correctly point out, the only relevant factor is net worth.

1 so, what's the bottom line?

2 what are they worth, Mr. Hawkins?

3 Bottom line.

4 MR. HAWKINS: Bottom line.

5 THE COURT: According to the Supreme Court, if that's
6 what the Supreme Court is limiting me to---

7 MR. HAWKINS: Total---

8 THE COURT: ---then that's what we're limited to.

9 MR. HAWKINS: Total equity -- these numbers are in
10 millions. Let's see. Total assets, and then liabilities,
11 so the net looks to me it's 195 billion. These are in
12 millions.

13 MR. ROZELSKY: Your Honor, this is exactly the point
14 I'm making is it's unfair to publish absent some expert
15 who's going to say this is the net worth.

16 MR. HAWKINS: Let me---

17 MR. ROZELSKY: We, we -- Your Honor, we have roughly 20
18 request to admit. A request to admit could of been served
19 that said admit that your net worth is greater than a
20 billion, five billion, ten, whatever. But he didn't do
21 that, Your Honor. And, so, it's improper for him to get up
22 here and present evidence that's not in the record, and it's
23 improper for the Court to now allow him, when he's not
24 identified a witness, to interpret this document. He's had
25 an opportunity, Your Honor.

1 THE COURT: I'm allowing it because I'm being forced,
2 Mr. Rozelsky, to limit him, quite correctly based upon your
3 earlier motion, to not mention that Wal-Mart's a big company
4 when we all know that it's a big company, and the whole
5 world knows that it's an extremely profitable company, and I
6 feel silly, somewhat silly at having to limit that. So, out
7 of fairness to the plaintiff, the only fair thing I can do
8 is let them reopen the case and present the evidence of net
9 worth.

10 Now, if you've got no problem with him simply arguing
11 Jury, you can base your, base this award on your experience,
12 on your understanding of the size and profitability of
13 Wal-Mart without getting into real numbers, then maybe I
14 won't let him reopen his case.

15 MR. ROZELSKY: I have no problem with that, Your Honor.
16 What, what I have a problem with is him saying they've
17 got lots of stores, and they've got -- I think what Your
18 Honor said, and the caution that you have already given was,
19 if you're going to say, based on your common experience and
20 your knowledge of Wal-Mart, you can testify. But when we
21 start using big, powerful, large, and those sorts of
22 adjectives, I think it goes beyond the evidence, and
23 there's, there's not a witness for him to put up about
24 reading that document, and I apologize for what seems like a
25 silly argument, Your Honor. But to Ford in Hampton County

1 it was not such a silly argument.

2 THE COURT: But we're in Spartanburg.

3 MR. ROZELSKY: Understood. But he's gonna argue this
4 is Wal-Mart, this is Wal-Mart. That's what he -- he's gonna
5 argue hey, everybody knows they're huge. So, I want to make
6 sure, Your Honor, that the record is very clear as to what
7 evidence is in the record.

8 MR. HAWKINS: Your Honor, I -- can I hand up an email
9 from Mr. Rozelsky please, and he says in there I hope this
10 ends the financial inquiry. He submitted this data as being
11 answer to our discovery request for the net worth. In other
12 words, he wouldn't tell us the net worth. He refers us to
13 this and he says I hope this ends the inquiry.

14 So, what else are we to do?

15 We're relying on him to provide us with the net worth
16 as attorney for Wal-Mart. He's done that. We have it.

17 MR. ROZELSKY: Your Honor, they filed motions to compel
18 on other issues. In fact, they filed motions to compel
19 we've argued before you or at least briefed to you last
20 Friday. This issue wasn't in it. I provided them a
21 document. What they do with that document is their own
22 decision. What they put before the jury is their own
23 decision.

24 Your Honor, I have no objection to Mr. Hawkins saying
25 to the jury that they can use their common sense with regard

1 to how to punish Wal-Mart.

2 THE COURT: All right. Mr. Hawkins?

3 MR. HAWKINS: Yes, Your Honor.

4 THE COURT: Let me hear comments, assuming that we get
5 a verdict in your favor, and assuming that it's a good
6 verdict, I'm trying to minimize the appellate error that
7 exists in this case. So, when it comes to punitive damages,
8 do your best to exercise some restraint.

9 MR. HAWKINS: Your Honor, may I ask that you consider
10 too, as a way to sort of resolve this, is to take judicial
11 notice of Wal-Mart's self-published 2011 financial review
12 and it's on the -- it's coming up on the Internet now and it
13 is---

14 THE COURT: Do you have authority that says that I am
15 permitted to take judicial notice of the net worth of a
16 company?

17 That makes me nervous.

18 MR. HAWKINS: I understand.

19 Well, then, Your Honor, I would, I would like -- I
20 would -- and I appreciate and I know, I know what you're
21 saying and where you're coming from. I'm fine with your
22 ruling, but I'd like to ask that, that I be allowed to
23 publish the form 10-Q to the jury, which has their net worth
24 that was provided to me by Mr. Rozelsky as evidence of their
25 net worth, and I, I have been in trials before where I have

1 had -- I don't know what Mr. Rozelsky's experience with this
2 is, but I've been in trials before where I've had evidence
3 of the net worth. The issue doesn't come up until the Court
4 decides whether there's gonna be punitives or not punitives.

5 We just want to reopen our case for the limited purpose
6 of getting this document into evidence. It is been admitted
7 too as the terms of its authenticity by Mr. Rozelsky and---

8 MR. ROZELSKY: Your Honor, no request to admit
9 authenticity. I'm not gonna deny the document.

10 Okay. But there's not a witness to interpret the
11 document. And, so, Rule 403 clearly comes into play to say
12 how highly prejudicial it is for the jury to get a 10-Q
13 without some accountant to explain what it means.

14 MR. HAWKINS: It's self-evidence.

15 THE COURT: It's not self-authenticating though under
16 Rule---

17 MR. ROZELSKY: It's in---

18 THE COURT: ---901?

19 MR. ROZELSKY: What's that?

20 Well, I'm not sure. But it's also not self-evident
21 since you asked what the net worth was and he still hasn't
22 given you an answer. So, it's clearly not self-evident --
23 if, if an attorney can't figure it out, why are we gonna put
24 it in front of a jury when the case is been closed?

25 MR. HAWKINS: I can figure it out. I can figure it

1 out. 195 billion. I just have trouble with the zeros, but
2 it's 195 billion.

3 THE COURT: We're not gonna do that. Thanks.

4 MR. HAWKINS: Thank you, Your Honor.

5 May I make this a Court's Exhibit?

6 THE COURT: Please by all means, and add the email if
7 you wish to the---

8 MR. HAWKINS: Yes, sir.

9 THE COURT: Thank you.

10 MR. HAWKINS: Thank you so much.

11 THE COURT: Yes, sir.

12 (WHEREUPON, the 10-Q was marked as Court's Exhibit No.
13 3 for identification purposes only at this time.)

14 MR. SMITH: Your Honor, one other point, the video that
15 we been all looking at for the last couple days---

16 THE COURT: Yes, sir.

17 MR. SMITH: ---we want to make sure that that's in
18 evidence.

19 THE COURT: Very good.

20 MR. HAWKINS: No objection.

21 MR. ROZELSKY: No objection, Your Honor.

22 (WHEREUPON, the videotape was marked as Joint Exhibit
23 No. 1 and received into evidence at this time.)

24 THE COURT: Do -- does the jury have a video screen in
25 the back?

1 Are they capable of playing that in the back or they
2 would need to come out here and do it?

3 MR. SMITH: Well, Your Honor, they've got that
4 television right there that works.

5 THE COURT: They can take the TV if they wanted to.
6 Okay.

7 MR. ROZELSKY: And it can only be played off of this,
8 off of this laptop.

9 THE COURT: Off of that laptop?

10 MR. ROZELSKY: Because it has some proprietary
11 information on it.

12 THE COURT: I'm gonna tell them, if they want, since I
13 assume we don't have a clean laptop and I don't want to send
14 anything back into the jury room that doesn't, that
15 shouldn't be going back, so, I'm gonna tell them if they
16 want to see the video again to let us know. We'll bring
17 them out. We'll play it.

18 MR. SMITH: One point is---

19 THE COURT: Yes, sir.

20 MR. SMITH: ---I have, I have this set up to where I
21 can log off and log back in as a guest in which the jury can
22 not access anything else other than what's, other than the
23 video. So, this is capable of going back to the jury if
24 it's needed, but---

25 THE COURT: Do you have any problem with his laptop?

1 MR. HAWKINS: I, I do have a problem with Mr. Smith
2 controlling the -- and I trust him completely with my life.
3 But I have a problem with him controlling with his computer
4 what the jury sees in the back room.

5 MR. SMITH: I won't control it. I'll let them have it.

6 MR. HAWKINS: I don't know what's on the computer. I
7 think that's a better---

8 THE COURT: Let me -- the way I've always done it is
9 brought them out. I appreciate the fact that you're willing
10 to not have to do that, and I really like to be able to send
11 it back to them, and let them look at it and do what they
12 want. But if the only way to do that is off your machine,
13 we can't send your machine back.

14 MR. SMITH: Yes, sir.

15 THE COURT: We'll do it the old fashioned way.

16 All right. We're gonna be at ease for a few minutes.

17 How long do you intend to take on your closing at this
18 point?

19 MR. HAWKINS: Forty-five minutes---

20 THE COURT: Forty-five minutes---

21 MR. HAWKINS: ---to an hour.

22 THE COURT: ---to an hour.

23 Okay.

24 MR. ROZELSKY: If they're still awake at that point, 15
25 minutes, 20 max.

1 THE COURT: About the same for you, Mr. Smith,
2 probably?

3 MR. SMITH: Yes, sir, twenty minutes.

4 MR. HAWKINS: Your Honor?

5 THE COURT: Yes, sir.

6 MR. HAWKINS: Have we gone over -- have you decided
7 when we're gonna go over the request to charge?

8 I was gonna suggest, because I had sort of assumed the
9 trial was gonna go until late, and I have a Power Point that
10 I need to, just to finalize.

11 Is it possible to break for lunch and then do charge
12 after that?

13 THE COURT: I'll be more than happy. I do need to
14 discuss that with you. I could ask the jury to be back at
15 1:15 and just tell them that, instead of keeping them
16 waiting back there, I have not finished the -- I have not
17 finished even including in the instructions to the jury the
18 different causes of action and I know I need to insert some
19 stuff that y'all have provided me.

20 why don't we just go ahead and do that and I'll just
21 ask them to be back around 1:15 and we'll go straight into
22 closings and the charge if that's okay?

23 MR. SMITH: And I am working on a, on a verdict form.
24 I know this is sort of gonna be difficult because we've
25 asked for apportion of liability and plus there's

1 comparative negligence involving the sheriff. So, we're
2 working on it. We'll have it to you within the hour, but I
3 didn't know if Your Honor's already started working on one
4 or not.

5 THE COURT: I have not, but I do have some thoughts on
6 a way to do that.

7 MR. SMITH: And another thing is, Your Honor, we
8 submitted real short jury charges on the Tort Claims Act,
9 and I know the Court has this -- most Court's have their
10 favorite jury instructions on the Tort Claims Act section
11 that I've mentioned. If you want to use those or the
12 Court's preferred, that's fine with us.

13 THE COURT: All right. Let's go ahead and have the
14 jury in here. I'm gonna release them till 1:15.

15 (WHEREUPON, the following takes place within the
16 presence of the jury.)

17 THE COURT: All right. Let the record reflect that the
18 jury is back.

19 Ladies and gentlemen of the jury, I've been talking to
20 the attorneys and we've been moving along and discussing the
21 law that's applicable in this case, and, in all candor,
22 these conversation are taking a little bit longer than I had
23 anticipated. Instead of keeping you stuck back there, then
24 bringing you out, what I'm gonna do is go ahead and release
25 you for lunch. We're gonna stay here. We're gonna keep

1 working. We're gonna get this squared away.

2 I'm gonna ask that you be back in the jury room at
3 1:15. At that point in time we'll start promptly with the
4 closing arguments of counsel, you'll receive my charge that
5 applies on the law, and we will take it from there.

6 So, you're excused until 1:15. Again, don't discuss
7 the case. I'll see you back in the jury room at 1:15.

8 Thank you for your patience.

9 (WHEREUPON, the following takes place outside the
10 presence of the jury.)

11 THE COURT: All right. We'll be at ease for five
12 minutes.

13 (WHEREUPON, a short recess was taken at this time.)

14 THE COURT: Y'all just bear with me for a few moments
15 here please.

16 (Pause.)

17 THE COURT: Okay. Mr. Smith, on the probable cause
18 question and the evidentiary value it should be given, what
19 is the request that you're gonna make in the way of a
20 charge?

21 MR. SMITH: Well, first of all, I request jury charge
22 two.

23 Do you have my jury charges?

24 Do you have my jury charges?

25 THE COURT: I do not.

1 MR. SMITH: Here they are. One through -- right here.
2 I've got an extra copy.

3 THE COURT: I haven't seen them.

4 MR. SMITH: I, I emailed them to you.

5 THE COURT: Oh, you e-mailed them to me?

6 MR. SMITH: Yes, sir.

7 THE COURT: Okay.

8 MR. SMITH: But I---

9 THE COURT: I'm sorry.

10 MR. SMITH: And I, I did hand some up yesterday for the
11 record.

12 Of course, the most important ones would be jury charge
13 one. That's probable cause.

14 And then two, another probable cause defense, and
15 particularly about where it says existence of such facts and
16 circumstances that would leave in the mind actual knowledge
17 of the prosecuting party and the person, person was guilty
18 of the crime. Probable cause must regard the viewpoint of
19 the prosecuting party, the sheriff. Actually not what the
20 actual facts were, but what the prosecuting party or sheriff
21 honestly believed to be.

22 And then the true bill, the jury charge on the true
23 bill, that's a direct quote from the Supreme Court's opinion
24 of what a, what a true bill is. South Carolina law says the
25 rule as a true bill of indictment is prima facia evidence

1 that probable cause in an action of malicious prosecution,
2 and the Jackson case, which is also cited in the Wright case
3 talks about false imprisonment, which is the same question.
4 If there's probable cause on the true bill, then, for the
5 crime to be charged, then prima facia evidence that there
6 was probable cause for the charges.

7 You'll see the case notes down at the bottom where it's
8 further discussing what a true bill is, and, in particular,
9 Frye versus School District Of Greenville County, it talks
10 about Grand Jury's true bill of indictment where a teacher
11 for contributing to the delinquency of a minor is prima
12 facia evidence of probable cause.

13 So, we think this is a very important jury charge, and
14 then, of course, jury charge number four on malicious
15 prosecution and five is a jury charge on false imprisonment.
16 I think all of our charges are the same.

17 As to the sheriff, there's no need for a negligence
18 jury charge because Your's Honor's dismissed that or
19 comparative negligence for the sheriff and perhaps for
20 Wal-Mart. They may have a comparative negligence need for
21 that charge.

22 Jury charge eight, that doesn't apply to the sheriff.
23 Then we have the jury charges nine through twelve, which are
24 dealing with the Tort Claims Act defenses, judicial action,
25 immunity, enforcement of the laws, discretionary act, and

1 institution for prosecution for judicial review, and we
2 understand the Court has its preferred charges on that,
3 which are fine with us, and then I think I said we're still
4 working on the jury form in my office. I don't have access
5 to the Internet. So, I'd like to run back to my office and
6 finish that.

7 THE COURT: What if I were to charge the jury that a
8 true bill of indictment is evidence that probable cause
9 existed, and you may, you may consider this evidence in
10 light of the other competent evidence presented?

11 Is that acceptable?

12 MR. SMITH: Well, Your Honor, that's -- the point is
13 the case law says it's prima facia.

14 THE COURT: I understand. I---

15 MR. SMITH: And, so, we think that would be error to---

16 THE COURT: Then I need to define prima facia.

17 MR. SMITH: Yes, sir, I guess. I'll be glad to---

18 THE COURT: which would mean that---

19 MR. SMITH: On its face.

20 THE COURT: Right.

21 MR. SMITH: But I think it needs to be told to the
22 jury. It's a very powerful doctrine that Your Honor took
23 judicial notice of.

24 THE COURT: I understand. I don't intend to use the
25 word powerful. You can use that in arguing---

1 MR. SMITH: Yes, sir.

2 THE COURT: ---in your closing. But that would be a
3 comment on the evidence or the weight of the evidence as
4 opposed to the existence or non existence.

5 MR. SMITH: That will be the only thing. I think the
6 word prima facia evidence is a key word and all the case law
7 that I have read says about true bills.

8 MR. ROZELSKY: Your Honor, we put in a charge, if you
9 want to use an example or an exemplar, from the McHenton
10 versus, Henton versus Mobile Home Industry Association.
11 It's titled on the Wal-Mart charge list as malicious
12 prosecution - indictment, prima facia evidence of probable
13 cause, and it gives the definition. I can hand up the cases
14 if Your Honor would like. But it gives the -- I can hand up
15 the charge if you'd like.

16 THE COURT: I have your charges here.

17 MR. ROZELSKY: Okay. It's -- I, I can't -- we didn't
18 number them. I apologize.

19 THE COURT: That's okay. Let me find it.

20 (Pause.)

21 THE COURT: I'm trying to deal with how to deal with
22 the indictment because, based upon my reading of the law and
23 my earlier rulings, it's still a matter for this jury to
24 consider or it's properly a matter for this jury to consider
25 whether there was probable cause. I'm, I'm trying to deal

1 with the evidentiary weight that a true bill is properly
2 entitled to and obviously it's not definitive.

3 I need help in that regard, gentlemen.

4 Do you have a suggestion?

5 MR. ROLLINS: I have some thoughts. It is admittedly
6 prima facia evidence, evidence. It's a prerequisite to a
7 warrant for arrest being issued. But it's not conclusive on
8 the existence of probable cause as to the jury's fact
9 finding role in this case. The language to that effect, I
10 don't think we want prima facia defined in the, in the jury
11 instruction. That opens another can of worms. But --.

12 THE COURT: I, I think I got it. Hold on.

13 MR. ROZELSKY: Your Honor, I've got the Henton law
14 cases if those help if you want to hand that up cause they
15 deal with that issue. It's the one that says indictment of
16 prima facia evidence of probable cause. It's here in the
17 file.

18 THE COURT: Here's what I'm gonna instruct them. A
19 true billed indictment is evidence on its face that probable
20 cause existed and you may consider this evidence in light of
21 the other competent evidence presented in deciding whether
22 probable cause existed or probable cause to arrest existed.

23 MR. ROZELSKY: Your Honor, I think the Henton -- well,
24 never mind I'm not -- I don't have a dog in this fight.
25 Sorry.

1 MR. SMITH: Well, we think it would be important to use
2 the term prima facia. It's a legal term.

3 THE COURT: Right. I just substituted on its face for
4 prima facia, prima facia.

5 MR. SMITH: Your Honor, I'd prefer to stick with the
6 language of the case law, Your Honor.

7 THE COURT: Okay. I will do that then.

8 MR. HAWKINS: Well---

9 THE COURT: Instead of defining Latin, you'd rather me
10 use the Latin?

11 MR. SMITH: Yes, sir.

12 THE COURT: No objection from the plaintiff I assume?

13 MR. HAWKINS: No objection.

14 MR. SMITH: And then, of course, Wal-Mart has this very
15 nice jury charge of what prima facia evidence means, which
16 we think is right on point too if the Court would consider
17 that.

18 THE COURT: Which one is it?

19 MR. SMITH: This would be this one right here.

20 THE COURT: Has the plaintiff had a chance to read that
21 definition of prima facia?

22 MR. ROLLINS: If I can have just one second---

23 THE COURT: Certainly.

24 MR. ROLLINS: ---to review it.

25 (Pause.)

1 MR. ROLLINS: I would like clarification on that.
2 This -- if the evidence that's standing alone and
3 unexplained would maintain the proposition, just some
4 statement to the effect but if this evidence is rebutted
5 with, rebutted by the plaintiff with evidence of his own,
6 that proposition is not maintained or something just to
7 clarify rebuttable negates the prima facia assumption of
8 the, of jury, rebuts the, the prima facia part.

9 THE COURT: All right.

10 MR. ROZELSKY: And, Your Honor, that charge I handed
11 up, I have to be honest, I borrowed it from Justice or from
12 Judge Ralph King Anderson's. So, that's why there might be
13 a long string cite.

14 THE COURT: Well, according to the stock charges that
15 I've used, under false imprisonment, it reads as follows.
16 It talks about how you got to have -- false arrest is an
17 arrest made without probable cause. For example, if
18 probable cause existed to believe that the theft had
19 occurred that it could not be a false arrest. Probable
20 cause is a good faith belief that the plaintiff is guilty of
21 the crime where the belief rests on grounds that would make
22 an ordinarily prudent and cautious person, under the
23 circumstances, believe that a crime had been committed.

24 Probable cause is something more than mere suspicion of
25 guilt of the plaintiff. Therefore, an arrest made on a

1 mere, on a hunch or a mere belief or guess unsupported by
2 the facts, circumstances, or credible information pointing
3 to guilt of the plaintiff could not be justified as having
4 been made on probable cause.

5 Probable cause may be found somewhere between suspicion
6 and sufficient evidence to convict. In determining whether
7 or not there was probable cause for an arrest, the
8 probability can not be technical, but must be based upon
9 factual and practical considerations of every day life on
10 which reasonable, prudent, and cautious people act.
11 Probable cause may exist even though there may be some room
12 for doubt.

13 A true billed indictment is prima facia evidence that
14 probable cause existed, and you may consider this evidence
15 in light of the other competent evidence presented in
16 deciding whether probable cause to arrest existed. In
17 addition, the fact that the plaintiff may have been found
18 not guilty of the crime for which the arrest was made does
19 not mean that there was no probable cause for the arrest.

20 I think that covers it. I'm comfortable with that.

21 On the question of the Tort Claims Act, is that not --
22 what's, what's the plaintiff's position with regard to the
23 defendant's assertion under the Tort Claims Act or the
24 request to charge under the Tort Claims Act?

25 MR. ROLLINS: Which specific time?

1 Is that the one that you gave us today?

2 MR. SMITH: Yes.

3 THE COURT: Well, the way you have your charges read,
4 read, written, Mr. Smith, no offense, but it sounds like I
5 should charge the jury that the Sheriff's Department is not
6 liable for anything.

7 MR. SMITH: Well, that's right, Your Honor.

8 THE COURT: I imagine that the plaintiff may have
9 issues with that too.

10 MR. ROLLINS: Well, it appears that any exception to
11 governmental immunity is ignored in this. So --.

12 THE COURT: Right.

13 And how would this -- how would the plaintiff propose I
14 deal with that?

15 MR. ROLLINS: I, frankly, Your Honor, I didn't see this
16 until this morning. So, I -- it would take me a few minutes
17 to look at the statute.

18 THE COURT: My hesitation in charging that, Mr. Smith,
19 comes from the possible confusion to the jury. Obviously
20 it's possible for a Sheriff's Department, under a certain
21 set of facts and circumstances, to be held liable for
22 instituting criminal proceedings against an individual, and
23 by simply throwing out there that the government entity is
24 not liable for instituting criminal proceedings negates the
25 possibility that they could be liable, and, under the law, I

1 think you would agree with me that there is the possibility
2 of facts existing, and I've already ruled that there is the
3 possibility of facts existing which would make your client
4 liable.

5 MR. SMITH: Well, the Supreme Court, I think, in the
6 Foster case, whatever, did add a caveat that spoke of unless
7 the plaintiff shows gross, willful negligence. Sort of
8 written that into the, in the law, and that's been called
9 the standard jury charges that I've seen---

10 THE COURT: Right.

11 MR. SMITH: ---no exceptions saying---

12 THE COURT: I would agree with you that they need to
13 show gross negligence.

14 MR. SMITH: Right.

15 THE COURT: You would agree with that as well I assume?

16 MR. ROLLINS: Yes, Your Honor.

17 THE COURT: Okay. All right. What I wrote was with
18 respect to plaintiff's causes of action against the
19 Spartanburg Sheriff's Department for false imprisonment and
20 malicious prosecution. The plaintiff must prove, by the
21 preponderance of the evidence, that the Sheriff's Department
22 was grossly negligent in order to recover under either legal
23 theory, and I'll define gross negligence with the standard
24 definition if that's acceptable.

25 MR. ROLLINS: Yes, sir, the one issue with that, Your

1 Honor, would be the Gist opinion, which states that none of
2 the exceptions from liability impose a standard of gross
3 negligence. Only towards false arrest and imprisonment.
4 So, under this case---

5 THE COURT: May I see that?

6 That's the one I was referring to earlier.

7 MR. ROLLINS: The false imprisonment requires that
8 intentional element, which it can't be negligent.

9 THE COURT: Would you agree that, under a malicious
10 prosecution, that gross negligence -- that sounds like an
11 intentional tort just like false imprisonment.

12 MR. ROLLINS: It does. I think, by its definition,
13 institution or continuation of proceedings at the instance
14 of the defendant termination in plaintiff's favor, malice
15 which is inferred from probable cause, lack of probable
16 cause, and damage, I don't think any of those are related.

17 THE COURT: All right. I'm just gonna, I'm gonna go
18 with what I have already prepared and I'm gonna show this to
19 y'all before we go forward with this.

20 All right. What else?

21 I have a comparative negligence charge that I've
22 already put in here. I assume somebody's gonna want that.

23 MR. ROZELSKY: Yes, Your Honor.

24 MR. SMITH: What was your question, Your Honor?

25 THE COURT: Yes, sir, Mr. Hawkins.

1 MR. HAWKINS: I don't know, know that there's a single
2 shred of comparative negligence.

3 MR. ROZELSKY: Your Honor?

4 MR. HAWKINS: The only thing I think of is that, that
5 they're saying he should of turned himself if for a crime he
6 didn't commit.

7 THE COURT: There, there is competent circumstantial
8 evidence of comparative negligence in this case.

9 MR. HAWKINS: Thank you, Your Honor.

10 THE COURT: Is that all right -- so, if y'all can --
11 all right. We got comparative negligence on the Sheriff's
12 Department or you had mentioned the possibility of---

13 MR. SMITH: Your Honor, I guess that's, I guess that's
14 the big question here. It's sort of if, if we, you know, if
15 the jury's not gonna hear a claim of negligence at all
16 against the Sheriff's Office, then---

17 THE COURT: Then there can't be any---

18 MR. SMITH: ---there can't be---

19 THE COURT: I mean it's an intentional tort with you
20 guys.

21 MR. SMITH: There can't be an intentional tort.

22 THE COURT: I don't know that you would have -- you
23 would not apportion liability between the two defendants
24 because you have an intentional tort with the Sheriff's
25 Department and negligence with respect to Wal-Mart, right?

1 MR. SMITH: Well, I still think it -- well, I still
2 think there, it needs to be apportionment. I mean the
3 special verdict, the statute on, on special verdicts makes
4 it clear. It says whenever they're a governmental and a
5 non-governmental entity involved in the same suit, there
6 must be an apportion of, of liability with respect to
7 damages.

8 MR. ROZELSKY: Your Honor, are you anticipating a jury
9 verdict form that says something like do you find that the
10 plaintiff was negligent, yes or no.

11 Okay. Actually -- sorry. Do you find the defendant
12 was negligent. If you don't find the defendant was
13 negligent, then you don't get to the plaintiff.

14 You find that the defendant, Wal-Mart, was negligent,
15 yes or no. If yes, you go to do you find that the plaintiff
16 was comparatively negligent, yes or no. If yes, compare the
17 two. If no, find actual damages.

18 Did you find that the defendant, Wal-Mart, is grossly
19 negligent, reckless, willful, wanton, whatever the standard
20 for punitives. If yes, amount of punitive damages. Then
21 the sheriff's issues.

22 Is that what you were anticipating?

23 THE COURT: I was actually contemplating something a
24 little bit different. As I mentioned yesterday, I think
25 that the entire question of the defendant's collective

1 liability rises or falls on this very issue of probable
2 cause, and I mentioned that yesterday.

3 I was toying with the idea of the very first question
4 to ask the jury is whether or not probable cause existed for
5 the arrest of Mr. Solanki because if the answer to that
6 question is no, then certainly they should proceed on now.
7 If the answer is yes, then the case is over with respect to
8 both defendants I think.

9 MR. HAWKINS: Your Honor, I would have a problem with
10 that because I think it's a little too factually specific.
11 What the plaintiff would request would be to have, have a
12 more general verdict form that I find, we find for the
13 plaintiffs against the county or we find for the county or
14 we find for the plaintiff against Wal-Mart and then actual,
15 punitive damages.

16 But to say, start getting into the, to the -- your
17 charge, I think, will be sufficient to let them know about
18 the whole probable cause issue. But I really think that's
19 so, that's prejudicial to the plaintiffs to have that be the
20 first question I think would --.

21 THE COURT: And I assumed you would take that position.
22 But that's just thinking it through in my head.

23 MR. HAWKINS: Right.

24 THE COURT: That's what -- that's the lynchpin to this
25 entire case.

1 MR. HAWKINS: Right.

2 THE COURT: If they determine that there's no probable
3 cause, then yeah---

4 MR. HAWKINS: Right.

5 THE COURT: ---you, you guys are gonna get something
6 if -- probably, assuming the other elements are there. If,
7 if there was probable cause, then it's over, and that's
8 probably what a lot of this argument is gonna be about at
9 closing I would think.

10 MR. HAWKINS: Your charge I think could---

11 THE COURT: Yeah.

12 MR. HAWKINS: ---will explain that.

13 THE COURT: Very good. I'll take a look at what
14 Mr. Smith prepares since I'm without a clerk.

15 MR. HAWKINS: And then negligence, Your Honor, is still
16 as to Wal-Mart --

17 THE COURT: Correct.

18 MR. HAWKINS: -- regardless of the probable cause
19 issue?

20 THE COURT: Correct. And the gross negligence, I'm
21 just gonna handle that in the punitives. I'm not gonna
22 define that separately because that's the only way, the only
23 place it relates.

24 MR. SMITH: Your Honor?

25 THE COURT: I'm not doing loss of consortium.

1 MR. HAWKINS: I understand.

2 MR. ROZELSKY: I'm -- I want to make sure I understand.

3 If there is a probable cause finding by the jury, how
4 can there be damages -- if all of the damages that the
5 plaintiff is complaining of arise out of the arrest, how can
6 there be damages arising out of any negligence on the part
7 of Wal-Mart if there's probable cause?

8 THE COURT: Because I think that there's evidence from
9 which the jury could conclude that, that defendant,
10 Wal-Mart, was negligent and that that negligence and the way
11 that the transaction was handled combined with the
12 negligence, or sorry, combined with the dereliction on the
13 part of the Sheriff's Department, alleged dereliction, to
14 result in damages. If there is no probable cause, however,
15 or if there was probable cause, however, then, like I say
16 yesterday, Wal-Mart can not be held responsible either.

17 MR. ROZELSKY: Right.

18 So, if the jury checks the box there's probable cause,
19 it's over?

20 THE COURT: Correct, but I don't know that I'm
21 necessarily gonna do it like that. I think that's rather
22 suggestive. Sorry.

23 Anything else that we can think of, gentlemen?

24 MR. HAWKINS: I have something, Your Honor.

25 THE COURT: Yes, sir, please.

1 MR. HAWKINS: I'm sorry to keep beating this horse, but
2 I have a concern about this punitive damages question that,
3 that I just would like you to consider, Your Honor. The,
4 the case law, as I understand it, is that the jury or
5 yourself, in a gamble here, must determine whether or not
6 the defendant has the ability to pay.

7 The question that I don't -- and, of course, they do.
8 It's, it's an absurd debate. But nevertheless, the issue's
9 been raised. And, so, there's this case -- what's the case?

10 Brown v. Ford case, which is suggestive that, in the
11 research that we've been able to do, that I'm worried about
12 if the jury does come back with a punitive damages award and
13 they did not have the defendant's net worth, they're going
14 to argue it's reversible error or that it should be reversed
15 on that grounds.

16 I think, Your Honor, you can comfortably take judicial
17 notice, under Rule 201 of the Rules of Evidence, that states
18 a judicially noticed fact must be one not subject to
19 reasonable dispute in that it is either one, generally known
20 within the territorial jurisdiction of the Trial Court, or
21 two, capable of accurate and ready determination by resort,
22 resources whose accuracy can not reasonably be questioned.

23 The 10-Q filing of the Wal-Mart is, fits in both of
24 those categories, and given -- is probably more error free
25 than the indictment that or the, or the other things that

1 you've taken judicial notice of in this case in that they're
2 not questioning its authenticity.

3 So, we're asking you to simply take judicial notice of
4 it so that it can be with the jury, and if they decide to
5 consider it, they can in terms of that. But I'm worried if
6 we don't --.

7 THE COURT: Mr. Hawkins, may I suggest that I find the
8 likelihood that the South Carolina Court of Appeals or the
9 South Carolina Supreme Court would decide that that's a
10 fatal error and I don't know that---

11 MR. HAWKINS: Well---

12 THE COURT: I feel really silly and we should all feel
13 really silly that we're really spending this much time on
14 that particular question. The, the fact remains there
15 hadn't been any evidence presented. I still believe that
16 Wal-Mart's success and its profitability and its size is a
17 matter of common experience. I imagine that if we get to
18 the punitive damages stage, the jury will entirely agree
19 that they are a big company and they'll discuss that in the
20 privacy of the jury room and we'll never -- I think we don't
21 need to explain that to them. I don't know that I can take
22 judicial notice at this point in time.

23 So, I'm gonna decline to do so, and if the Court of
24 Appeals wants to say that I was in error and that the
25 punitive damages verdict is reversed because Wal-Mart's a

1 mom, mom and pop operation, then I suppose that the Court of
2 Appeals is free to make that logical jump. But we are where
3 we are.

4 MR. HAWKINS: I understand your ruling. Thank you for
5 hearing me. I appreciate it.

6 THE COURT: Thank you, sir.

7 Anything else we can think of, gentlemen?

8 MR. SMITH: Your Honor, could I take a two minute
9 break?

10 THE COURT: By all means, yes, sir. I'm not done with
11 this anyway, and I'm gonna email this to y'all when I finish
12 it over lunch, and there's gonna be some stuff that you're
13 gonna notice in the way of errors that, that you're gonna
14 want to bring to my attention at some point anyway.

15 So, if y'all want to go ahead and break, we can do that
16 and you needed something else to---

17 MR. SMITH: Well, I need to run back and if I'm gonna
18 get my verdict form, I'm working on it and rush back---

19 THE COURT: Right.

20 MR. SMITH: ---and try to work on it.

21 THE COURT: Right, and get a sandwich.

22 MR. ROZELSKY: Your Honor, is it possible that the
23 Clerk's Office can print that email from me?

24 I'm not gonna run back to Greenville and I don't have
25 printers.

1 THE COURT: Well, I'll take that back.

2 MR. ROZELSKY: Okay. Thank you.

3 THE COURT: I will get it to you.

4 MR. ROZELSKY: I appreciate that.

5 THE COURT: Yeah, I'll email it to you as soon as I can
6 get it done.

7 All right. We're gonna be at ease. If y'all can be
8 back a few minutes before 1:15 that'd be nice. If not, then
9 we can---

10 MR. ROZELSKY: Yes, Your Honor. That's not a problem.
11 Thank you.

12 MR. HAWKINS: Thank you, Your Honor.

13 THE COURT: Thank you.

14 (WHEREUPON, Court was in recess for the lunch break.)

15 THE COURT: All right. If we could, let's go back on
16 the record.

17 I've been provided with the verdict form that Mr. Smith
18 prepared.

19 Does the plaintiff have any problem with that verdict
20 form?

21 MR. HAWKINS: Yes. Well, I know Mr. Rozelsky does.
22 So, maybe his can go first and mine---

23 THE COURT: Mr. Rozelsky, I'll hear from you first.

24 MR. ROZELSKY: Well, Your Honor, they're a couple
25 things. One, I -- it includes causes that are not going to

1 the jury.

2 THE COURT: Right. I'll fix that.

3 MR. ROZELSKY: But I think, first off, that the, if
4 it's going to say as to plaintiff, it should say Plaintiff
5 Prakash somewhat -- well, at this point, does Mrs. Solanki
6 need to remain on the caption?

7 THE COURT: I think she's out of it.

8 MR. ROZELSKY: Okay. So, as to plaintiff's cause of
9 action for negligence, I think that the language typically
10 is that you, we find the defendant, Wal-Mart, was negligent
11 and the first part I don't really have a problem with. Let
12 me make sure I get this correct.

13 THE COURT: Sure.

14 MR. ROZELSKY: I just got handed this a second ago.

15 THE COURT: Right, I understand. I did as well. I
16 appreciate Mr. Smith having prepared this.

17 (Pause.)

18 MR. ROZELSKY: Typically, Your Honor, I would think
19 that it would say something -- rather than saying we find in
20 favor of the plaintiff or the defendant at that, it would
21 say -- and I said it earlier. If I could of frozen what the
22 court reporter wrote down when I said it before. I think it
23 should say something to the effect of we find, by
24 preponderance of the evidence, that Wal-Mart was negligent,
25 yes or no. Because otherwise that's comparing the plaintiff

1 and Wal-Mart at that point.

2 THE COURT: You really have any problem with changing
3 that correctly to reflect that?

4 MR. HAWKINS: Which one are you talking about?

5 THE COURT: Well, I think what he's talking is more of
6 a stylus of change. We find the plaintiff's cause of action
7 against Wal-Mart for negligence. We find for plaintiff or
8 defendant, and circle one, or, you know, plaintiff or
9 defendant, Wal-Mart, circle one.

10 Is that kind of what you're thinking?

11 MR. ROZELSKY: Yeah, and the difficulty is, Your Honor,
12 because you're going to give a comparative charge, and if
13 they find that Mr. Solanki was, in fact, comparative, then
14 this entitled -- they're gonna have to give their
15 percentages. So, I think should be, number one, we find
16 that the defendant, Wal-Mart, was negligent, yes or no. If
17 no, drop down to wherever you get to the, to the county. If
18 yes, go to the next question.

19 We find the plaintiff, Prakash Solanki, was
20 comparatively negligent, yes or no. If you answered yes to
21 one and two, go to three or go to four, whatever number that
22 is, and compare the two. If not, you go to the line that
23 says we find the plaintiff is entitled to actual damages
24 against Wal-Mart in the amount of X, and that would only be
25 Mr. Solanki's name on there. Not Mrs. Solanki as well.

1 Then I would ask that the next line say we find that
2 the plaintiffs or do you, do you find that wal-Mart was
3 grossly negligence, and reckless, willful, or wanton, yes or
4 no. If no, drop to the stuff about the county. If yes, we
5 find against wal-Mart in punitive damages in the X amount.
6 Then you drop into the county's charges.

7 But, Your Honor, I think the, the one difficulty that
8 you pointed out is if we go through that form in that
9 fashion, the plaintiffs will necessarily have decided
10 negligence and or gross negligence against wal-Mart before
11 reaching a, any issue of probable cause.

12 MR. HAWKINS: The plaintiff?

13 MR. ROZELSKY: Okay. I'm sorry. A jury. I said
14 plaintiff. Jury would necessarily, if, in fact, they
15 checked the box yes, wal-Mart is negligent, yes, wal-Mart is
16 grossly negligent, and then they come down to the Sheriff's
17 Department and they conclude that there is no probable
18 cause, there can be no damages proximately flowing from
19 wal-Mart's negligence if there was a lawful arrest.

20 MR. HAWKINS: That's a very clever argument. But the
21 fact is they can find against the sheriff -- they could find
22 for the sheriff on other grounds than just the probable
23 cause one.

24 MR. ROZELSKY: Which Your Honor---

25 THE COURT: There's no way to separate that out. He's

1 suggesting that, if they find for the sheriff, they must
2 have, it follows ---

3 THE COURT: Find that there's probable cause.

4 MR. HAWKINS: Sir?

5 THE COURT: Rule that they find for the sheriff, he's
6 asserting that they, they must find---

7 MR. HAWKINS: They've already decided that there was
8 probable cause when, in fact, they could find for the
9 sheriff for any other reason.

10 THE COURT: If they determined that there's probable
11 cause, but that the, there was, there was malice or there
12 was what?

13 MR. HAWKINS: Anything. But they're not specifically
14 finding probable cause. I mean I think what they're trying
15 to do is to get everything hinging on the probable cause
16 argument, and I think your charge is sufficient to guide the
17 jury in how to handle the question. The verdict form needs
18 to be as simple as possible, and---

19 MR. ROZELSKY: I don't disagree with that, Your Honor.
20 I'm just struggling with the fact that they're going to
21 consider negligence and necessarily consider damages as a
22 part of that analysis.

23 MR. HAWKINS: Well, let's what you---

24 MR. ROZELSKY: Hold on---

25 MR. HAWKINS: I'm sorry.

1 MR. ROZELSKY: ---please.

2 MR. HAWKINS: I'm sorry.

3 MR. ROZELSKY: Through those first questions. And if
4 there is not a false imprisonment, and that is if there is
5 proper imprisonment and proper prosecution, then there can
6 be no damages that are tied to Wal-Mart. Yet they've
7 already decided that in the verdict form, which would result
8 in a, in an internally inconsistent document.

9 Maybe the way to fix it, and I'm just thinking out
10 loud, Your Honor, is to put the causes of action as to the
11 Sheriff's Department first, and -- but I still think, Your
12 Honor, that -- well, if, if there's no cause of action
13 against the Sheriff's Department for loss of consortium,
14 excuse me, for false imprisonment and malicious prosecution,
15 I, I don't believe that they can get a verdict against
16 Wal-Mart.

17 Am I missing something there, Your Honor?

18 I'm not sure where the damages would flow from because,
19 at that point, that's a lawful arrest.

20 THE COURT: Agreed.

21 MR. HAWKINS: Yet---

22 MR. ROZELSKY: So, we can't presume damages. All the
23 testimony's been that his damages stemmed from being
24 arrested.

25 MR. HAWKINS: Judge?

1 MR. ROZELSKY: I mean his testimony was, when he left
2 the Wal-Mart store, he felt free to leave. In fact, he came
3 back the next day. I mean there aren't damages flowing from
4 that.

5 So, I'm not sure, Your Honor, how there can be -- once
6 they reach -- if they reach the conclusion that the
7 Sheriff's Department is not liable for false imprisonment or
8 malicious prosecution, I think that should end the, the
9 verdict form as to all parties.

10 MR. HAWKINS: I just think that's a, a clever argument.
11 But it doesn't float because if -- because there are a
12 number of reasons they could find for the sheriff that have
13 nothing to do with probable cause. It's not -- that's not
14 the sole question before the jury. You -- we're agreeing
15 that that's not gonna be the sole question for the jury.
16 It's going to be who, who you, who do you find for versus
17 this narrow probable cause argument.

18 MR. ROZELSKY: Your Honor, I don't think we have---

19 MR. HAWKINS: May I, may I---

20 THE COURT: One at a time.

21 MR. ROZELSKY: That's fine. That's fine. I'm sorry.

22 THE COURT: One at a time.

23 MR. HAWKINS: Plus, it's an accurate -- it's a cause of
24 action for negligence against Wal-Mart that does not hinge
25 on probable cause, whether there was probable cause or not.

1 But, again, I think what he's trying to do is sort of
2 control the information going to the jury when you're
3 charge, when it's up to you for that and your charge does
4 that sufficiently.

5 THE COURT: I'm worried about -- his point that I'm
6 worried, that I should be concerned about, an inconsistent
7 verdict though, is well taken. I, I don't want to be put in
8 a position---

9 MR. ROZELSKY: Your Honor, I don't know that---

10 THE COURT: ---where I---

11 MR. ROZELSKY: I don't know that probable cause has to
12 even be said on the document. I think though that -- and
13 I'm not sure -- I, I appreciate his, his telling me it's a
14 clever argument, but I think it's a legal argument, Your
15 Honor, in that if there is a, that there's -- I don't
16 believe there's any testimony, Your Honor, that Mr. Solanki
17 suffered any damages other than those damages that began
18 when he was pulled over in Georgia. And, and if I'm
19 incorrect on that, if, if there is, then I will sit down.

20 But I think that all of the damages that he's testified
21 to flow out of the improper arrest. And, so, if a jury
22 concludes that the arrest was proper, then there can
23 necessarily be no damages against Wal-Mart.

24 MR. ROLLINS: I think the issue is being over
25 complicated, Your Honor. Negligence, the duty for Wal-Mart

1 when it provided this document was to ensure -- well, they
2 had several possible causes for negligence. But they should
3 of been certain that the document they provided was
4 consistent or that they had some explanation or clarified
5 exactly what that document signified per their internal
6 mechanism for producing it. Once they failed to do that and
7 turned it over to the Sheriff's Department, they then set
8 into, set him into effect the chain of events that led to
9 imprisonment. Now, whether that's probable cause or not is
10 a completely legally distinct from a pure simple negligence
11 analysis.

12 The jury could very well find that there's probable
13 cause, but still that Wal-Mart's providing that document
14 that led to Mr. Solanki's arrest, even if, from the
15 prospective of the Sheriff's Department, it was a legitimate
16 arrest does not absolve Wal-Mart of its independent duty to
17 make, to -- first of all, to create a document that's
18 consistent, to check an ID, and be sure that the card being
19 charged, Robin Martin's card and the card provided by Mr.
20 Solanki, his own card, were the same. But then -- and to be
21 sure if they -- even if they don't know how that happened,
22 to explain or if they don't know how those two documents are
23 there, they offer that -- they have some duty to explain or,
24 in some way, act when they know that the consequences of
25 their failure to do so will be.

1 THE COURT: I don't disagree. But on the cause of
2 action for negligence, one of the elements that must be
3 proven is damages, and if the only damages that we're
4 talking about flowed from the wrongful arrest of Mr.
5 Solanki, six days that he sent, spent in jail, then the
6 point that counsel for Wal-Mart is making is that, by
7 definition, if a probable cause determination was made or if
8 there's a verdict in favor of the Sheriff's Department, then
9 you have, by definition, failed to prove damages on the
10 negligence cause of action, which takes us back full circle
11 to what I had initially suggested and I don't want to do
12 that because that's, that, what I had initially suggested
13 was ask him, up or down, was there probable cause. Yes,
14 you're done. No, keep going.

15 But---

16 MR. ROZELSKY: Your Honor, I think in, in -- I want to
17 take one second and reply. I think that now suggesting that
18 there are damages that Wal-Mart caused for a unlawful
19 arrest. That's, that's what I'm saying. To take that to
20 the farthest conclusion, that is that they're saying that
21 there can be a consistent verdict where the jury finds that
22 there was a lawful arrest, but that Wal-Mart's somehow
23 caused damages.

24 Now, I think, Your Honor, the way to cure this on the
25 jury verdict form is to begin by saying do you find that the

1 defendant, Spartanburg County Sheriff's, falsely imprisoned
2 Mr. Solanki, yes or no. That encompasses all of the
3 elements. Not just probable cause.

4 MR. ROLLINS: Our argument is not lawfulness versus
5 unlawfulness. It is the Sheriff's Department can be found
6 not to be liable in tort for their actions with regard to
7 Mr. Solanki, but Wal-Mart still is because, as a natural and
8 probable consequence of their providing this admittedly
9 absurd document, it set into effect, it set into -- it set a
10 chain of events into action that led to Mr. Solanki's
11 arrest, and that arrest, although not tortuously liable from
12 Spartanburg, according to Spartanburg, still was wrongful as
13 to Wal-Mart's cause, pure negligence analysis duty, breach,
14 causation, damages.

15 We don't have to look at lawfulness of the arrest. We
16 don't have to look at probable cause. It's a complete
17 issue---

18 MR. ROZELSKY: Your Honor, how can there be damages
19 from a lawful arrest?

20 THE COURT: You're all right and you've convinced me.
21 I'm gonna do my own verdict form, but if I could use your
22 template because a lot of this is really good.

23 Can you email me that?

24 MR. SMITH: It is. It has been emailed.

25 THE COURT: Thank you. Thank you so much. I haven't

1 checked.

2 MR. SMITH: Yes, sir.

3 THE COURT: I appreciate that.

4 Have y'all had a chance to review the verdict, the
5 requested charge or the instructions---

6 MR. SMITH: Yes, Your Honor. I just noticed that
7 there's no -- the affirmative defenses under the Tort Claims
8 Act are not in here.

9 THE COURT: I'm still struggling with how to deal with
10 that.

11 You're, you're wanting me to charge that -- how do I
12 charge that you could be liable and then the Tort Claims Act
13 says you're not liable?

14 MR. SMITH: Well, I guess the jury -- in other words,
15 the plaintiff would have to be, the Court would say would be
16 the affirmative defenses, the plaintiff has to show malice
17 and, or, or gross negligence, which there had been none, and
18 Your Honor's not gonna fix it. It's a, it's a real
19 difficult situation.

20 If there's no negligence, the negligence can't be
21 sought against the sheriff. It wasn't -- it doesn't -- it
22 seems to me that the Tort Claims Act, affirmative defense
23 are absolute.

24 MR. ROLLINS: That clearly contradicts the Gist
25 opinion, your Honor.

1 MR. SMITH: I, I -- the jury ought to be told that
2 there can be no negligence or no finding of liability for
3 judicial proceedings, legislative proceedings, quasi
4 administrative proceedings, discretionary acts or unless,
5 unless there's malice. They need to be told that.

6 MR. ROLLINS: I believe the rule is discretionary acts
7 unless it's, unless they performed grossly negligent.

8 MR. SMITH: Right.

9 MR. ROLLINS: And that would be the false imprisonment
10 and the malicious prosecution.

11 MR. SMITH: Well, I just -- we're entitled to these
12 affirmative defenses, and, and I hate to -- I wouldn't want
13 to waive them at this, at this stage by not having them in
14 the jury instruction.

15 MR. ROLLINS: I guess our position would be, Your
16 Honor, how does a jury -- how would a jury invoke one of
17 these affirmative defenses if Mr. Smith can indicate some
18 possible scenario and it's clear or under the case law that
19 these causes of action are pertinent to the Sheriff's
20 Department?

21 MR. SMITH: Well, this is a instance in which it's not
22 your typical false arrest with the police officer
23 controlling the scene of the crime committed in its
24 presence, and then acting to arrest that person, and then
25 the issue of probable cause is in effect. But this is a

1 case where there has been a warrant issued by a magistrate
2 upon sworn testimony, and it's our opinion that, at that
3 point, it qualifies, under the Tort Claims Act, immunity.
4 It becomes a quasi judicial, judicial, quasi judicial
5 proceeding at that point.

6 THE COURT: All right. Here's how -- when you say
7 immunity, that's what's used in the act, governmental entity
8 is not liable for a loss resulting from. It says exceptions
9 to waiver of immunity in the act, and I'm looking at
10 15-78-60, and the word immunity is used -- that's -- it's
11 used in the title, but that's still part of the law.

12 The recent case that came down about the Castle
13 Doctrine, the codification of the Castle Doctrine deals with
14 the exact same word, immunity. A person who defends his
15 home from someone who comes in is immune from prosecution,
16 and the Supreme Court adopted a procedure whereby, as a
17 matter of law, a defendant can seek a bifurcated proceeding
18 where the Court rules does the immunity apply. Because if
19 they're immune, then they aren't tried period. It's not
20 like an affirmative defense.

21 Would that not seem to indicate that the question of
22 immunity, Mr. Smith, is a matter for the Court as opposed to
23 the jury?

24 MR. SMITH: Well, yes, sir, we've been arguing that all
25 along. I mean if -- we -- I believe that's been our point

1 all along. We should of not been in the case.

2 THE COURT: But if that's the case, then how does, how
3 do you reconcile that with Gist, G-I-S-T?

4 MR. SMITH: Well, Your Honor, the Tort Claims Act is a
5 difficult statute to interpret granted. It has to be
6 reconciled.

7 The way I reconcile in, in Gist is -- in Gist, they
8 were distinguishing probable cause for an officer on the
9 beat, on the patrol versus probable cause in a Magistrate
10 Court proceeding, and I think that the Gist case clearly
11 says well, as the Law case that came along, that once that
12 occurs, if there's sworn testimony, an affidavit based on
13 sworn testimony, it's no longer a jury issue. It's absolute
14 immunity and I know we've argued this before.

15 So, I still think we need to have the affirmative
16 defenses still apply, and I under -- I don't know how we can
17 not say they don't apply because they're there for the very
18 purpose they're stated, for judicial administrative
19 proceedings. I don't know how we can reconcile all of that.
20 But -- because I think Gist says it's a matter of law at
21 this point that the sheriff should be dismissed.

22 MR. ROLLINS: I think it's a matter of law that
23 Spartanburg has made its prima facia showing, the true bill
24 of indictment, but then whether that's rebutted by the --
25 and I think -- and that's really what all of his affirmative

1 defenses rest on is this prima facia showing made by the
2 true billed indictment, which is obviously accurate. But
3 then the plaintiff -- but the jury has to be, determine
4 whether the plaintiff rebutted that by a factual showing of
5 his own.

6 So, I think all, all of the other affirmative defenses
7 are incorporated by that true bill indictment, by the
8 concession of the true bill indictment is a prima facia
9 showing resulted from that administrative proceeding.

10 THE COURT: If I were to read, Mr. Smith, the way that
11 you say that 23 applies, under Section 60, institution or
12 prosecution of any judicial or administrative proceedings,
13 and I agree that that's in there. You have to agree with me
14 too, though, that if they had decided to take Mr. Solanki to
15 trial, if they convicted him, he couldn't sue you. If
16 they -- if they had come back with a not guilty verdict by a
17 jury, we're in a different trial, he would still have the
18 available option of suing you.

19 Correct?

20 MR. SMITH: Well, I don't know.

21 THE COURT: I mean we didn't get that far in this case.
22 I mean that's, that's pretty black letter law.

23 MR. SMITH: Right.

24 THE COURT: There's a case pending in Greenwood where
25 the sheriff is alleged to have maliciously prosecuted a

1 magistrate, and they took that to trial and the magistrate
2 was found not guilty of stealing the money, and right now
3 there's a nice big old civil case waiting for me at home
4 with the sheriff as a party defendant.

5 Reading this section, this section the way that you are
6 reading it, you could never, again, you could never sue
7 anyone for false arrest or malicious prosecution.

8 MR. SMITH: I think I know what case you're talking
9 about, and, and if that case, if I'm not mistaken, there was
10 evidence that they were maintaining the -- it was an abuse
11 of process case?

12 Was that not an abuse of process case?

13 THE COURT: I don't know.

14 MR. SMITH: I think it was, Your Honor. I think, I
15 think I read that case last night. That was an abuse of
16 process case and not malicious prosecution in which case
17 they were challenging the, the defendant's motive for
18 maintaining and pursuing that lawsuit. I did read that
19 case, and I think, I think I might have it here with me and
20 I'll look for it.

21 THE COURT: What if I were to charge the jury that, as
22 a matter of law, the Sheriff's Department can not be held
23 liable under either of these theories if the jury, if you
24 find that there's probable cause to a verdict or if there
25 was probable cause to have arrested the guy?

1 MR. SMITH: Yes, sir.

2 THE COURT: I'll slip it in there somewhere.

3 MR. SMITH: Yes, sir, that would work.

4 MR. ROZELSKY: Your Honor, I have one quick question.

5 THE COURT: Yes.

6 MR. ROZELSKY: Cause I understand that you directed a
7 verdict in favor of Wal-Mart on the false imprisonment
8 claim, correct?

9 THE COURT: Right.

10 MR. ROZELSKY: And if the only damages that are flowing
11 from any alleged negligence are the imprisonment, are those
12 damages not already decided as a matter of law in favor of
13 Wal-Mart?

14 THE COURT: No.

15 MR. ROZELSKY: I mean are, are -- why not?

16 I mean I'm not entitled -- the damages -- your damage
17 order says or the -- I mean I think that there's a
18 likelihood of confusion of the jury if you're charging on
19 damages for false imprisonment. You've directed a verdict
20 yet in favor of Wal-Mart on false imprisonment and the
21 plaintiff's only testimony is I'm damaged because I was
22 arrested.

23 THE COURT: The way -- Mr. Hawkins assist, help me.

24 MR. ROLLINS: Mr. Rollins.

25 THE COURT: Mr. Rollins. So sorry, sir.

1 what Mr. Rollins said a moment ago I have to agree
2 with. It's possible that the jury might decide to find for
3 the sheriff on grounds other than probable cause and that
4 does not necessarily negate Wal-Mart's negligence.

5 MR. ROZELSKY: Your Honor, I'm not saying it negates
6 the negligence. Okay. There can be a finding of
7 negligence, but there has to be a finding of damages, and if
8 the only damages are that he was falsely imprisoned, okay,
9 it doesn't matter about probable cause.

10 If there's a lawful imprisonment, how can there be
11 damages from a lawful imprisonment?

12 They're no damages that flow from that, Your Honor.
13 If, if Mr. Solanki's in jail---

14 THE COURT: You're just---

15 MR. ROZELSKY: ---lawfully, that is that the jury has
16 determined that this was a proper arrest, then how could
17 there ever be damages for Wal-Mart's negligence?

18 THE COURT: You're basically asserting that there's an
19 intervening act here which would take care of any damages
20 that, that Wal-Mart may have suffered?

21 MR. ROZELSKY: Right.

22 THE COURT: Their argument is that the damages from the
23 negligence of Wal-Mart, namely the six days in jail,
24 naturally and probably flowed from the negligence of
25 Wal-Mart even if the jury decides to find that the false

1 imprisonment and the malicious prosecution claims shouldn't
2 stand.

3 MR. ROZELSKY: But, Your Honor, you've already directed
4 a verdict in favor of me where you say Wal-Mart did not
5 falsely imprison him, correct?

6 THE COURT: Uh-huh, I have.

7 MR. ROZELSKY: Therefore, I really think, at this
8 point, Wal-Mart ought to be able to walk because there's not
9 even damages that they can prove. We focus so much on the
10 evidence of negligence.

11 But at this point, if you've directed a verdict in
12 favor of Wal-Mart saying that there's no false imprisonment,
13 and all of their damages flow at, admittedly from the
14 arrest, how can there ever be -- even if there's a finding
15 that Wal-Mart breached, had a duty and breached that duty,
16 they're no damages because Wal-Mart didn't falsely imprison
17 him.

18 THE COURT: I appreciate your position. That's an
19 excellent question for appeal and I'm sure it will make a
20 fine law school bar exam three years from now.

21 MR. ROZELSKY: Okay.

22 THE COURT: Let's have the jury in please.

23 MR. HAWKINS: Your Honor, are we gonna start the --
24 sir, hold on.

25 Are we gonna start the closings?

1 Can I have just a few seconds to go to the men's room?

2 THE COURT: Oh, by all means, yes. We'll be at ease
3 for five minutes. I apologize.

4 MR. HAWKINS: I'm sorry.

5 THE COURT: All right.

6 (WHEREUPON, a short recess was taken at this time.)

7 MR. ROZELSKY: Your Honor, just before you went off the
8 bench we were discussing the fact that you had directed a
9 verdict in favor of Wal-Mart on the false imprisonment
10 claim, and I presume that it is clearly within bounds for me
11 to say to the jury that, in fact, the Court has decided, as
12 a matter of law, that Wal-Mart did not falsely imprison Mr.
13 Solanki.

14 THE COURT: No, probably not. You need to say
15 something along the lines of the only, the only question
16 that you'll have to decide, with regard to Wal-Mart, is
17 whether or not we're negligent or grossly negligent.

18 MR. ROZELSKY: Well, Your Honor---

19 THE COURT: Cause I don't want to be drawn in. Again,
20 that's, that's, that's bringing the Court into a factual
21 determination. That's asking -- that's given the premature
22 of the Court's ruling on the facts of the case, and I am
23 trying to stay out of this one.

24 MR. ROZELSKY: Your Honor, I -- let me just make sure I
25 understand you.

1 You directed, as a matter of law at this moment, there
2 were not facts sufficient to go to the jury on the false
3 imprisonment claim against Wal-Mart.

4 THE COURT: Correct.

5 MR. ROZELSKY: Okay. Therefore, how is it that I can't
6 tell the jury that as they have to -- because they have to
7 consider negligence, which includes damages, which includes
8 the only damages that have been presented are of false
9 imprisonment.

10 THE COURT: Dance around it, but don't bring the Court
11 into it.

12 MR. ROZELSKY: So, can I say the law has determined
13 that there's not a claim for false imprisonment?

14 I'm not sure how to dance around it. Your Honor, it's
15 not a factual determination by you. It's a legal
16 determination that there were insufficient facts.

17 THE COURT: I understand and why argue to the jury
18 something that they're not gonna have an opportunity to even
19 talk about or argue other than to encourage the jury or to
20 suggest to the jury that perhaps the Court feels like the
21 case that the plaintiff has brought against the defendant,
22 Wal-Mart, is lacking in some way. That's the only reason I
23 would think that you would get---

24 MR. ROZELSKY: No, Your Honor. Your Honor---

25 THE COURT: ---get that in.

1 MR. ROZELSKY: ---the plaintiff has one cause of action
2 against Wal-Mart, and in order to prove it they have to
3 prove a duty, a breach, cause, and harm.

4 Okay. And if, if, as a matter of law, they can't prove
5 that harm, as a matter of law Wal-Mart didn't falsely
6 imprison, I'm entitled to tell that to the jury so that they
7 can determine that, in fact, there was no damage, and I
8 think I'm entitled to a directed verdict on that, but I
9 understand Your Honor's position. But I also think that I'm
10 allowed to argue to the jury that, as a matter of law,
11 Wal-Mart is not falsely imprisoned this man.

12 THE COURT: You may say that the false imprisonment
13 charge, the only allegation of false imprisonment that the
14 jury will have to consider is as to the Sheriff's
15 Department. It's for the same reasons that I'm not gonna
16 allow you to say that the judge is directed a verdict on
17 assault and battery, intentional infliction of emotional
18 distress, defamation, that the judge is also gotten rid of
19 the cause of action for loss of consortium because there was
20 no evidence of that, for the assault because there was no
21 evidence of touching, battery because there was no evidence
22 of apprehension, false imprisonment because there was no
23 allegation that Wal-Mart employees put their hands on him.

24 In short, ladies and gentlemen of the jury, plaintiff's
25 case is so weak that the judge has gone about directing a

1 verdict on all these causes of action which plaintiff
2 brought against my poor defenseless client, we're not going
3 there.

4 MR. ROZELSKY: Your Honor?

5 THE COURT: I don't allow it for the same reason I
6 don't allow the, the, the plaintiff in situations, where
7 there's an admission of negligence, I typically don't allow
8 the plaintiff to say, you know, here they've walked into
9 Court at the eleventh hour and all of a sudden admitted
10 negligence when all along they were saying that we weren't
11 negligent in any way, shape, or form. The same reason I
12 don't let the plaintiff do it.

13 MR. ROZELSKY: Your Honor, it's an essential element of
14 their claim against me and you've directed a verdict as to
15 that, those damages.

16 THE COURT: I, I definitely have.

17 MR. ROZELSKY: Thank you, Your Honor.

18 THE COURT: So, talk to them about negligence, and
19 you -- feel free to tell them that the cause of action
20 concerning the false imprisonment and the malicious
21 prosecution does not stand against Wal-Mart. It only stands
22 against the Sheriff's Department. You might say that.

23 MR. ROZELSKY: Thank you, Your Honor.

24 THE COURT: That's fair game.

25 MR. ROZELSKY: Thank you, Your Honor.

1 THE COURT: Let's have the jury please.

2 (WHEREUPON, the following takes place within the
3 presence of the jury.)

4 THE COURT: All right. Let the record reflect that the
5 jury is back.

6 Ladies and gentlemen of the jury, thank you for your
7 continued patience. We are now at the stage of the trial
8 where you'll have an opportunity to hear the closing
9 summation of counsel for the plaintiff as well as counsel
10 for the defendants. I'll remind you that what the attorneys
11 tell you during their summation is not evidence in this
12 case. It is only their contentions as to what has been
13 proven or what has not been proven in this particular case.

14 Additionally, ladies and gentlemen, it's quite
15 customary for counsel to make reference to the facts in
16 their summation, the facts that have been proven, the facts
17 that have not been proven, things of that nature.

18 I will tell you, as I told you on Monday, that because
19 you are the sole judges of facts of this case, if, at
20 anytime, any of the attorneys say anything about the facts
21 and it differs from what your recollection of the facts is,
22 you should go with what you recall the facts to be. So, if
23 you remember a witness, if you remember a witness saying
24 that the sky was blue that day and that's a relevant fact,
25 but counsel argues that the sky was raining, that it was

1 raining and cloudy that day, you should go with your
2 recollection of what those facts are as opposed to what the
3 lawyers tell you those facts are because ultimately you are
4 the judges of the facts in this case.

5 And with that, Mr. Hawkins, you're recognized for your
6 closing arguments, sir.

7 MR. HAWKINS: Thank you, Your Honor.

8 Mr. Bailiff, I'm gonna ask that you dim the lights.

9 would you dim the lights please?

10 (Bailiff complies.)

11 MR. HAWKINS: Thank you. That's good.

12 Members of the jury, I thank you so much for hearing
13 this case. I think you can tell it's a very important case
14 for Prakash and Urmila Solanki.

15 what I'm going to do now is make what's called my
16 closing argument, and that's where I give you what I believe
17 to be our case when it comes to what's happened here today.

18 You've heard a lot of testimony. You've heard --
19 you've seen a lot of ducking and dodging. I think we've
20 seen some things that we probably wish we had never seen,
21 and learned some things that we probably wish we'd never
22 learned.

23 We certainly have a hope and a faith in our criminal
24 justice system that it won't let us down, that it protects
25 people, and 99 percent of the time it does. But there's

1 that one percent, or whatever the number is, where the
2 criminal justice system let's us down. And when it does, it
3 let's us down in a big way because, as I said when I got up,
4 one of the most important things about our country is the
5 right to be free.

6 what happened in this case was a travesty of justice
7 that resulted in this 72-year old man being incarcerated in
8 jail for six days in a very uncomfortable situation,
9 humiliated, anguished, missing his wife, and for the rest of
10 his life, what should be his golden years, he is actually
11 going to be looking over his shoulder because that sense of
12 security that he once had has been forever taken away from
13 him.

14 So, this case is about him losing his liberty and why
15 he lost his liberty and -- next slide.

16 Of course, you-all know that Prakash, Prakash was
17 72-years old at the time this happened. He's married for 16
18 years to Urmila, lives in Boiling Springs, and in Georgia
19 and travels back and forth, a native of Uganda, of Indian
20 decent, a United States citizen, an American citizen, a tax
21 payer. He escaped from Idi Amin in 1972, came to this
22 country, lived the American dream, worked for 35 years at
23 Spartanburg Steel. Of course, if you believe the, if you
24 believe the defendants, you know, he's, he's spending his
25 time preparing for a life of crime.

1 But what he actually did was he had a good job. He
2 worked hard. He did what people were suppose to do. He
3 paid his taxes and he retired. Not your typical criminal.

4 When we get into this transaction, I want you to
5 remember one thing, and this is probably the most important
6 thing, and, you know, most of the time in your life the last
7 thing that happens is usually the most important thing.

8 In this case, this is the last thing that happened.
9 This was the receipt that he signed at Wal-Mart with his,
10 the imprint of his own personal credit card, which he
11 voluntarily gave when they asked for, and then this is his
12 signature here up from where he's suppose to sign.

13 This, this document is the most important document in
14 the case because around this document revolves everything
15 else. Despite what Mrs. Cashion said, this document here is
16 what drove the case, and what we're going to show you is why
17 we think that this document was ignored, and, and what is
18 obvious on its face to the 12 of you or 13 of you, was
19 simply ignored by the police because they made up their mind
20 immediately about what happened.

21 Black Friday. It sends a chill down my spine and makes
22 me cringe. We all have been there. It's usually a
23 miserable experience. But we submit ourselves to it because
24 there's lots of good bargains on that particular day. And,
25 so, everybody piles out and goes shopping on Black Friday.

1 Bargain hunting.

2 well, Mr. Solanki went out with his wife and started
3 that morning and basically shopped all day on Black Friday
4 with a little break for lunch.

5 So, to put all this in context -- because the
6 defendant's want to constantly show that video and show how
7 he looked suspicious allegedly on the video. I'd love to
8 have the video of what it looked like right now when I was
9 shopping or when you were shopping or when they were
10 shopping and how somebody could go and take every little
11 hand movement out of context and suggest that they're doing
12 something suspicious.

13 But that's what they did with Mr. Solanki. It's
14 reprehensible, and I'll talk about it more in just a minute.

15 But you put it in context. He's a 72-year old man,
16 been shopping all day long. Wal-Mart is packed with people,
17 and it's seven o'clock at night and he's getting tired and
18 ready to go.

19 Prakash testified that he only had, that he had his,
20 only had his own Bank of America card. Now, that's his
21 word. I believe it's true. He testified that it's true.
22 But as I'm gonna show you, and as I think you've already
23 picked up on, there's a whole bunch of reasons why, of
24 course, he only had his card, that he didn't have Robin
25 Martin's card, and why that we could show that it's simply

1 absurd to suggest that he had Robin Martin's card and was
2 trying to use it on that day.

3 As you-all know, he went to the self-checkout, 44.
4 This master criminal scanned all his items, and then, at the
5 self-checkout, he decided -- he made a decision, if you want
6 to believe what they say, that he was simply going to,
7 instead of scanning a card, which they say he had Robin
8 Martin's card, instead of scanning his card or her card
9 there, which he could have done and signed his own -- a, a
10 name, Mickey Mouse or whoever, and probably most likely
11 gotten away with it, according to Mrs. Cashion, instead of
12 doing that, this, this person said I'm going to involve
13 another employee. I'm going to involve Mr. Smalls or this
14 fellow standing over here because I need to pull this fellow
15 in order to, to commit this crime and to get away with this.
16 This is what they would have you believe. It's absurd.

17 So, we know he scanned his items and he scanned all his
18 items. He didn't try to slip one by them and put them in
19 the, put it in the bag. He was trying to scan his items,
20 and he had some trouble with the machine. We're not sure
21 what happened. But he said a prompt came up, and it didn't
22 allow him or ask him to swipe this card. And, so, then he
23 was helped by Mr. Ryan Smalls, a nice man who came over and
24 tried to help him.

25 We know that Ryan worked at the self-pay station. He

1 was working there while he was in school. But that he
2 helped the Solankis, and then one of the things he did was
3 to go and help customers who were struggling with the
4 self-checkout.

5 So, I'm sure we've all had some problem with the
6 self-checkout before you know. And, so, he had seen it
7 before and he actually said some of those machines
8 repeatedly had problems.

9 So, it is completely believable that Mr. Solanki had
10 some kind of problem at Register 44 that required him to
11 come over. But that's not their theory. That's, that's not
12 what they say, and I'm gonna ask you to hold him to it.

13 They, they, under their theory, the people at this
14 table, Mr. Solanki, really didn't have any problem with the
15 machine. He wanted to involve Wal-Mart employee in this, in
16 this thing. So, he didn't even attempt to swipe his card.
17 He just made the whole thing up that the machine was having
18 a problem because he needed an employee to get away with
19 this.

20 We know that Ryan brings him over, he suspends the
21 transaction, and brings him from Register 44, which is the
22 self-pay, over to the, to Register 52, and then there, as
23 you remember, he has Prakash swipe the card, swipe his card,
24 and the card doesn't work.

25 Now, again, they're saying -- he's trying to swipe

1 Robin Martin's card and, again, attempting to get away with
2 this crime, fowls up the card for some reason or the
3 transaction. But we know that he asked for Prakash's ID.
4 They won't admit that. They won't admit that he asked for
5 Prakash's ID. But you saw the tape, and I'm gonna show you
6 again a close-up of how it's an ID, not a credit card, that
7 any person can see, and then we know that they made an
8 imprint of Prakash's card, and then Prakash leaves the
9 store, and that's the last thing the tape shows.

10 We know that this is the, the procedures when
11 somebody's card doesn't work. Now, Mr. Solanki testified
12 that his card, he was having trouble with his card that day.
13 We don't know why. We don't have a way to get inside
14 Wal-Mart's machinery or computers and know what happened on
15 that particular day.

16 We all do know, using our common sense, that computers
17 frequently malfunction, whether it's our smart phone or our
18 desk top computer. Everything ought to be working
19 perfectly, and, for whatever reason, there's a glitch or
20 something doesn't work right and we want to just shoot the
21 thing. We want to throw it out the window. We get so
22 frustrated and angry. We have to reboot. We have to wait.
23 It's a disruption in our lives. But machines and computers
24 break down every day. That's a known fact.

25 These things here have, have given us trouble during

1 the trial. Everything that we own, sooner or later, is
2 gonna give us trouble.

3 So, these are the procedures to be used if the card
4 won't swipe for whatever reason. And, so, we know then that
5 the associate has to key in the number twice, that he has to
6 press enter, that he has to put in the expiration date and
7 press enter, that he has the CSM, the customer service
8 manager to perform an override, and then, when prompted,
9 enter the CVV number located on the back of the card.

10 There's all kind of reasons why, we believe, there's
11 serious, serious issues with how the police and Wal-Mart
12 went about this thing.

13 We know Robin Martin comes in here. She's an innocent
14 victim of all, of something. We know that Prakash is an
15 innocent victim as well. We know that Robin Martin
16 testified, and this is very significant, to two purchases,
17 to Murphy's east side and Wal-Mart Boiling Springs, that
18 these two, when she looked at her statement, were
19 unauthorized. She didn't do them. So, she knew there was a
20 problem. Then she checked her wallet, and she saw her card
21 wasn't, her card wasn't in her possession.

22 She told the police that it was last in her possession
23 at 16:30, which, in military time, is 4:30 on
24 November 27th, 2009. Then she testified, this is just a
25 copy of her deposition, but she said the same thing on the

1 stand, that the \$144.70 and the \$10.00 were the only two
2 times---

3 MR. ROZELSKY: Your Honor, I'm gonna object to using
4 deposition testimony. It was not used for impeachment
5 purposes. It's not in the record. It's improper use of, of
6 evidence that's not in the record.

7 MR. HAWKINS: I -- skip. Let's go on to the next
8 slide.

9 THE COURT: Go to the next slide.

10 MR. HAWKINS: He's objecting.

11 But anyway, we all know -- you heard her on the stand,
12 Mrs. Martin, say that those are the only two. So, I wasn't
13 trying -- all I was trying to do was just show it to you in
14 writing. But if they've got a problem with it, that's fine.

15 Here's the whole -- here's the, here's the interesting
16 thing. Okay. The interesting thing, and why there are tons
17 and tons of questions about, about this case, about whether
18 Prakash Solanki ever did this, and this stuff looks readily
19 available to, to Gina Cashion before she ever sought the
20 warrant. Some of the stuff was, some of it wasn't. But
21 this clearly was had the right questions been asked and a
22 proper investigation been done.

23 Here's the Hardee's charge, which nobody, I mean nobody
24 is suggesting that Mrs. Cashion didn't, has, has denied that
25 this charge is hers. But low and behold, this was on the

1 29th, which is two days after Black Friday. Whereas the
2 Wal-Mart charge and the Murphy's charge were on Black
3 Friday, the 27th.

4 So, why, ladies and gentlemen, is this Hardee's charge
5 here on the 29th at \$6.69 and, next slide, a credit for
6 \$6.69 on 11/29 as well?

7 Now, Mrs. Martin was a little bit confused on this.
8 She said like -- she said she does one of two things.
9 Sometimes she returns things back to stores, and sometimes
10 she simply pays it off with a, a debit from her bank account
11 at Bank of America because she can keep up with her
12 transactions that way.

13 Well, you don't return, you don't get things back from
14 Hardee's. We all know that and we know that, nevertheless,
15 there's a credit here on the 29th.

16 So, here is -- and I, I don't pretend to know what this
17 means or how it, you know, how it came about, but I do know
18 that it's a huge question mark in my mind, if I'm an
19 investigator, into a crime that hey, there, there might be
20 something more to this especially if I'm a financial crimes
21 investigator and this is what I do on a daily basis.

22 You know, I'm expected to maybe have a little more
23 expertise and inquire a little further, and, as a police
24 officer, I'm sworn to uphold the law. Not to just pin a
25 crime on somebody, but to uphold the law, and if there's

1 evidence that I have or questions that I have that raise,
2 raise a doubt in my mind, I need to answer those before I go
3 off and seek a warrant.

4 Okay. That is something I should do in trying to find
5 this probable cause.

6 We know -- we heard, we heard a deposition of Gia
7 Lynch, who was the Bank of America representative. That was
8 a -- I know it's a dry thing to hear a deposition read, but
9 it's the only way we could do it, and we questioned her
10 about credit card procedures.

11 Now, her testimony is not definitive. I'm not
12 suggesting that it is. But what I'm saying is her testimony
13 raises serious doubts about the way that this matter was
14 handled. In fact, she testified and I asked you before or I
15 showed you before about the CVV number, she testified that
16 when we come across, over to the column right under the CVV
17 we have the letter T.

18 And what does that indicate with respect to the
19 security code?

20 She says I have never been -- I've not -- I've never
21 seen T before. So, I'm not familiar with what T represents.
22 However, because I know the card was not swiped at the time
23 of this particular transaction -- and let me stop you there,
24 ladies and gentlemen. She said however, because I know the
25 card was not swiped at the time of this particular

1 transaction. That point is important for a later document
2 I'm gonna show you.

3 She says it could have also been a possibility that the
4 CVV code was not able to be clearly replicated, replicated
5 in the system and you see here there's a T as opposed to a Y
6 for this, for the transaction at issue.

7 Next slide.

8 She goes on to say something very interesting. It does
9 not necessarily mean that the transaction might still not go
10 through because, in this particular instance, it did receive
11 an authorization code. So, the charge still is authorized.
12 But I know that the card was not present during the time of
13 this transaction.

14 Again, another serious question about the way that
15 Wal-Mart and the sheriff handled this matter in this case
16 coming from Mrs. Lynch.

17 Now, I want to get into probably who was the most
18 important witness in the case, and that's Deputy Gina
19 Cashion, and I don't have any doubt that she's a very nice
20 person and tries to do the best that she can do. I think
21 that, and I'm not -- and I, and certainly don't mean to
22 attack her. But I have to -- in, in the fairness to my
23 client, we have -- the question is was there probable cause
24 for this arrest.

25 So, I have to carefully look at what Mrs. Cashion did

1 and how she did it and, and you have to as well, and, in
2 this process, what I would submit to you, ladies and
3 gentlemen, is that sometimes good people, when they make a
4 mistake, and they are -- and that mistake is brought to
5 their attention, they can do one of two things. They can
6 admit their mistake or they can double down and dig in their
7 heels and say I never made any mistake, and, despite what
8 truths you put at them, they will duck and dodge and deny
9 the obvious, what's right in front of their faces, and you
10 saw that with Mrs. Cashion as she was deposed, as she was,
11 gave her testimony.

12 You saw that, despite the truth being put right in her
13 face, she would deny it.

14 why?

15 Because she is protecting herself, she is protecting
16 her organization, and she figures that the only way that she
17 is going to get through this is to, is to dig in and say I
18 didn't do anything wrong. I'm a hundred percent sure of
19 everything.

20 Well, I'm not a hundred percent sure of anything. But
21 she's a hundred percent sure of everything she did, and of
22 the truths that I put to her, you can see, things that you
23 know of your own mind and your own experience, that she
24 denied and she denied them strongly.

25 The most important thing though about her testimony is

1 she came down here and she sat in or she stood up and she
2 watched the video and she watched it play.

3 well, the, the first thing that struck me is that she
4 wasn't more familiar with the video than apparently she was.
5 You would of thought that she would of watched the video
6 numerous times, you certainly have, and you would of thought
7 that she would of watched it in preparation for this trial
8 and known it.

9 Now, her attorney, Mr. Smith, he, I have to hand it to
10 him, he has virtually memorized that video, and he is
11 extremely familiar with it. You would think that she would
12 of been. But she wasn't.

13 She came down here and she watched the video and she
14 looked up at the video as it played, and when I finally
15 asked her the most important question, the \$60,000 question,
16 whatever you want to call it, she said I don't know how this
17 thing happened. I don't know how this crime was committed.

18 Folks, you can't have probable cause for a crime if you
19 can't look at the video where the crime took place and at
20 least have a theory as to how the individual committed the
21 crime. At least a theory. She couldn't even theorize. All
22 she kept saying was I can't read his mind. There's no audio
23 on the tape. I don't know what was said. I can't read his
24 mind.

25 well, give me a theory, detective. I mean if you go up

1 on a dead body, and there's a hole in the person where
2 somebody shot them, you've got a theory that maybe somebody
3 used a gun and shot the individual. And if the person is
4 holding a knife in their hand, in their dead hand, you got a
5 pretty good theory that hey, maybe the person shot in
6 self-defense cause he had the knife in his hand.

7 Police officers develop theories all the times in
8 cases, and this is a lady that's, that investigates
9 financial crimes, and she had zero theory as she watched the
10 tape.

11 Next.

12 We know that she saw this receipt of Register 44, which
13 is the self-pay. We know all these items ended up being
14 scanned by Mr. Solanki and we know the time here was
15 19:42 or 7:42:22.

16 Okay. Next.

17 And here's a, here's a freeze frame of Register 44 at
18 7:42:22, and there's Mr. Smalls, and there's all the goods
19 that were scanned. We know she had that receipt. We know
20 she watched the tape.

21 Next.

22 Cashion says that Mr. Solanki was never asked for nor
23 showed his ID. I don't believe that's true, and, and I
24 don't think that the tape shows that. She says what he
25 handed Ryan was actually Robin Martin's card, not an ID.

1 She said that then Ryan would of had to key in Robin's
2 number at that time. The time on the last receipt shows
3 7:45, but the final receipt is a period apparently until,
4 until 7:50, 7:50:11PM, and frankly she actually handed
5 Robin's card at 7:45 it would of been keyed at that time.

6 Next slide.

7 The idea is very important, this whole idea about the
8 ID. It's important for several reasons.

9 First of all, the tape shows, I believe, Mr. Solanki
10 handing his ID to the individual, to, to Ryan Smalls. It's
11 completely sensible that Mr. Smalls would of asked for his
12 ID at this point in time nor problems with the card swiping.

13 why wouldn't Mr. Smalls have asked for his ID?

14 But, no, no. Mrs. Cashion says, number one, that
15 what's on the tape, what's on the slide that you'll see in a
16 minute, that wasn't his ID. That was a credit card.

17 I said well, why would he hand a credit card to him?

18 Because that, that -- he was using that as an illusion
19 she said. Well, that's just -- that doesn't make any sense
20 at all along with a lot of other things she said.

21 So, if you agree that what he handed was his ID at this
22 point in time in the slide, you must also believe that,
23 after that point, he wanted to get caught because all the
24 evidence shows that, after him handing her his ID, that's
25 when apparently Robin Martin's card was keyed in. So, he

1 would of had to hand his own ID and then hand Mrs. Martin's
2 card after the fact. So, he basically gave himself away.

3 Next slide.

4 Now, this is 7:45:57. As you can see here, this is
5 when Mr. Smalls hands back the ID. Now, you can't tell
6 exactly on the slide what it is. But it looks to -- it
7 looks like a face there. It looks like an ID. It does not
8 look like a credit card as she said.

9 Next slide.

10 And then here's a blowup of it as well.

11 Now, usually credit cards aren't white. They're blue
12 or gray or red or some other kind of color, but they're not
13 white. This is for the receipt, which she also had, from
14 Register Number 52 at 7:50:11 is when it's there.

15 Next.

16 Now, this slide is very very important, and stick with
17 me for just a minute.

18 Okay?

19 Mr. Solanki testified, you'll remember, and he was
20 attacked for this by the defendants. He testified that he
21 signed a blank piece of paper, and they were like ha, ha,
22 you didn't sign a blank piece of paper. They think that's
23 ludicrous. They think that's ridiculous.

24 Well, ladies and gentlemen -- go back one slide.

25 This receipt printed at 7:50:11. Okay.

1 Forward.

2 7:50:11. Already Mr., Mr. Smalls has this in his
3 left-hand to give to Mr. Solanki to do the imprint. Mr.
4 Solanki's pulling out his card, and already he's got the
5 receipt in his left-hand.

6 If this receipt had already been printed, how could
7 that happen if the, if, if -- if the receipt was printed at
8 7:50:11, how could he already have that in his hand right
9 there if it was printed at that particular moment in time?

10 And if Mr. Solanki signed a blank piece of paper, what
11 kind of mistakes is he opening himself up to on the part of
12 Wal-Mart if they're having people sign blank pieces of
13 paper?

14 Next slide.

15 Remember earlier where the indication from Mrs. Lynch
16 was that it was a swipe, that it was not swiped, that it was
17 hand keyed?

18 Well, this document from Bank of America said it was
19 swiped. It makes absolutely no sense.

20 Next slide.

21 Here's Mrs. Cashion's statement. It's full of errors.
22 It's full of, it's full of errors. It's full of things that
23 are wrong with it, and I went over those with you as well.
24 But the bottom line is she said this person's card still did
25 not work. The cashier took Solanki's ID, these are her

1 words, not mine, and covered it up with paper so he could
2 get an imprint with pencil of this person's ID.

3 Now, this was done I think on the 2nd. This sentence
4 was written on the 1st, and this sentence was written on the
5 2nd. This document is very important because it shows what
6 was actually, what Mrs. Cashion was thinking at the time
7 before she sought the warrant.

8 Again, a very important issue in this case is probable
9 cause, and you're gonna hear these defendants stand up and
10 tell you all the reasons why there was probable cause to
11 arrest Mr. Solanki.

12 But I will tell you that there was zero probable cause
13 to arrest Mr. Solanki because of the slipshod work done by,
14 with all respect, done by Mrs. Cashion. It was a sloppy,
15 sloppy investigation period, and this statement is a good
16 reason -- when you go to the jury room you'll have this.
17 Please read it. Read it carefully. Look at all of the
18 mistakes. Look at all of the things that she got wrong.

19 Now, if you get back there and you find this statement
20 to be correct, and, of course, I'm not talking about
21 typographical error. I'm talking about serious things. But
22 if you get back there and find it to be correct, it's a
23 different issue. But if you get it back there and you lay
24 it on the table and you look at it really closely, you're
25 gonna see that she got some things seriously wrong.

1 She contradicts her own testimony here. She said
2 that, when she was under oath, she said that Mr. Solanki
3 never handed his ID. Well, here she suggested that he did.
4 Now, she tries to massage her testimony by saying well, it
5 wasn't his ID he was handing. It was his credit card.

6 Now, in your experience in your life, how many times do
7 you recall going anywhere and them saying I like your ID?

8 You hand your ID -- no, no, no, no, no, I don't want
9 your, I don't want your ID. I want your credit card as your
10 ID.

11 That's absurd. It's, it's laughable, and it really is
12 an insult to your intelligence, and to the intelligence of
13 everyone in this courtroom to suggest that what she meant by
14 this was that she was, that Mr. Solanki was asked to hand
15 his credit card as opposed to his ID, and the reason that
16 she made this, she attempted to say this to you is to
17 explain away the fact that just a few minutes earlier she
18 had said that what he handed was not his ID. She's got to
19 try to make two things that are exact opposite come together
20 as one, and she can't do it without, of course, without not
21 telling the truth.

22 And, and it's -- it is ashamed. It's ashamed that, you
23 know, we dig in our heels and we say we didn't do anything
24 wrong instead of admitting person, taking personal
25 responsibility when making a mistake. Everybody makes

1 mistakes. Nobody's perfect.

2 But the question is do you take personal responsibility
3 or, if you're a company or a Sheriff's Department, do you
4 take responsibility?

5 But not these people over here. They don't take an
6 ounce of responsibility for anything that happens to this
7 man. Instead, they dig in their heels and say that this man
8 is a criminal. It's exactly what they've done.

9 Now, let's talk about probable cause cause you're gonna
10 hear a lot about it. The judge is gonna tell you about
11 probable cause and what it means, and I can tell you it's
12 your decision. It's your decision whether there's probable
13 cause.

14 You're gonna hear about the fact that there was a
15 warrant signed by a judge and there was, and I went through
16 with the judge just how, you know, how you get a warrant.
17 And basically the police comes and they give some evidence
18 to the judge. The judge doesn't scour it with a fine tooth
19 comb. He just looks to make sure there's something, and
20 then he signs off on it, and obviously he would want to
21 believe there was probable cause. He would want to trust
22 the officer.

23 In this case, the judge made the best decision he could
24 based on the information that was provided to him. But the
25 fact is that not all the information was provided to him.

1 And the judge said, as you'll recall, that he wanted all the
2 evidence that was pertinent and relevant.

3 So, if, if the officer had evidence that a person might
4 not be guilty, the judge said he'd want to see that too.

5 why?

6 He's just doing his job.

7 Right?

8 So, you're gonna hear about probable cause. You're
9 gonna hear that the, the warrant is, that you got to take
10 the warrant and that's got to be the end of your discussion
11 because there was a warrant signed or there was a, an
12 indictment by the Grand Jury.

13 You do get that -- the fact is, ladies and gentlemen,
14 at the end of the day, that if those, if that were the case,
15 and those things were the end of the debate, it wouldn't
16 even be in your hands.

17 It's in your hand. You're gonna be deciding the issue
18 of whether there was probable cause or not, and I'm gonna
19 tell you, you, you have more information than anybody else
20 has had. This case is been talked about more in this
21 courtroom for four days than I guarantee it ever has been
22 before.

23 So, you are gonna be in the best position to determine
24 whether Mrs. Cashion had probable cause than anybody else.
25 You're gonna be in a better position than the Grand Jury.

1 You're gonna be in a better position than the magistrate,
2 anybody, cause you've seen all the evidence and you know
3 what Mrs. Cashion had at the time that she went and sought
4 the warrant.

5 So, let's talk about, what, what, what did she not
6 have?

7 I said she did not have probable cause. Excuse me.

8 This is what she had basically to go on. She had
9 videotape. She had the receipts. She had the Solanki
10 receipt, and she had -- and she needed to have proof that
11 Solanki used Robin Martin's credit card and she did not have
12 this proof, and the reason you know she did not have this
13 proof is because she could not watch the tape and tell you
14 how the transaction took place. She could not tell you how
15 Mr. Solanki went about doing this alleged crime. Mrs.
16 Cashion knew full well that Mr. Solanki offered his own
17 credit card at the transaction.

18 Now, let's say for a minute that you are a police
19 officer, that you are Mrs. Cashion. In some sense you're
20 trying to put yourself in her shoes as you decide this.

21 what would you do or a normal person would do?

22 Do you think, if you were investigating a crime like
23 this, and you had evidence that the person gave his own
24 credit card and signed his own name, and that's how he got
25 caught, that you might not stop for just a second and go hu,

1 that's a bit odd?

2 And when I asked her that, I said do you find it odd?

3 She said no, I don't find it odd.

4 So, put yourself in that position. She knew Solanki
5 had offered his own card. She knew he had put himself in
6 the position of basically being caught cause she didn't ask
7 any questions.

8 At that point, with the Solanki receipt, with the card
9 imprint, she did not have probable cause. She then should
10 have had an obligation to go and to ask some more questions
11 and to get some more evidence.

12 Next slide.

13 Instead, she rushed to judgment. She had a receipt
14 showing \$144.70, which was charged to Mrs. Martin's card.
15 She had a receipt with Prakash Solanki's name on it in that
16 same amount. The fact that Mr. Solanki didn't call her
17 back, for whatever reason, made her suspicious and there was
18 a video which she saw showing a 72-year old man fidgeting
19 with his hands and wallet, and what's interesting is that
20 they keep raising questions about -- and you remember Mrs.
21 Smith at the beginning.

22 He kind of, he kind of got away from it a little bit
23 over the trial. But at first they were making a whole bunch
24 of noise about the fact that Mr. Solanki is there and
25 he's -- the camera's down on him, and he pulls this card out

1 and that card out, and he does this and he does that, and
2 they're trying to make all that look suspicious.

3 That's not evidence of a crime, ladies and gentlemen.
4 That is zero evidence. They -- if it were, they would of
5 had a reason to show us or tell us or at least had a theory
6 about what all this shell game was with the cards. But they
7 never could do it. Because that is, that is not evidence of
8 a crime. All that is is mere suspicion that he looks
9 suspicious.

10 And guess what?

11 They, they already made up their minds. There wasn't
12 gonna be any changing despite what the evidence was.

13 Here's what Mrs. Cashion didn't do.

14 Now, ask yourself again, if this is your job, would you
15 not do this?

16 You've got two fraudulent charges. We know about the
17 Wal-Mart one. We know there's a Murphy's one as well for
18 \$10.00. Call Murphy's. It takes five minutes. Or go by
19 there.

20 I'm not asking her to track down every lead in the
21 world. I'm just saying all she could of had to do was to
22 call Murphy's and at least find out which store it was, is
23 it the east side or the Boiling Springs, which, which one is
24 it.

25 How hard is that to do?

1 But Mr. -- do you hear what Mrs. Cashion said?

2 She said I didn't do that because Mrs. Martin didn't
3 tell me. Mrs. Martin didn't give me that information.

4 That's not good police work, ladies and gentlemen.
5 That is sloppy, sloppy police work, and it is not probable
6 cause. You can not simply ignore things that are right in
7 front of your face that you can reach out and touch,
8 important facts. You can just ignore those because -- and
9 now she's gonna blame poor Mrs. Martin?

10 what?

11 She's blaming Mrs. Martin for the fact that she, for
12 whatever reason, didn't find out which Murphy's it was?

13 And then she says oh, well, Murphy's videos are grainy.
14 Well, it would of been nice to know, at least try, you know.
15 I believe she could of tried pretty easily and the Murphy's
16 people I'm sure would of cooperated with her. They would of
17 pulled the video from the 27th at 6:17 when the card was
18 used and perhaps, just perhaps, it would of shown one of two
19 things. Either Mr. Solanki, as they think, or it would of
20 shown some other person, which then that would of let Mr.
21 Solanki out of suspicion.

22 A very simple thing. It would of taken her -- I bet
23 you the whole exercise, the whole process probably would of
24 taken her an hour, hour and a half if she pursued it. But
25 she didn't do it.

1 But why?

2 Because she had rushed to judgment.

3 She already had made up her mind, and the heck with the
4 facts, and the heck with any further investigation
5 whatsoever.

6 So, then when I questioned her about that, she comes up
7 with another, another wild thing to say. She says well,
8 maybe two people used the card. Maybe two people had it.
9 Maybe it was found at, at -- it was found after 4:30 by
10 somebody, and then used at Murphy's at 6:17, and then lost
11 again and found by Mr. Solanki at 7:47 or whatever it was
12 And that's absurd.

13 I mean we're gonna, we're gonna be into the realm of
14 space aliens next if we're gonna leave some of the things
15 that Mrs. Cashion tried to say.

16 She had not done her work. She had not done her job.
17 She could have also looked at the Murphy's tape. She could
18 of gone over to wal-Mart and look at the tape with Ryan.

19 These transactions are complicated. This isn't like
20 watching somebody steal money. You kind of got to know how
21 the cash register works if you're gonna say somebody
22 committed fraud, and it would of been a very simple matter
23 for Mrs. Cashion to simply call up wal-Mart. wal-Mart was
24 cooperating with them on the investigation.

25 Call up wal-Mart and say, you know what, can you pull

1 the tape for Register 44 and let me talk with Ryan Smalls
2 cause I need to kind of understand why he went up and got
3 involved in the transaction.

4 They can say all that he want that he would of
5 forgotten and whatever. He remembered some of it today, and
6 he certainly would of remembered it then. It was just a few
7 days later. But Mrs. Cashion didn't take the simple
8 expedience. She didn't do the simple thing of looking at
9 the tape of somebody who might of known what was going on.

10 She said she didn't even look at the self-checkout.
11 She didn't even inspect the machine to see if they required
12 a zip code or a signature or what, and she said she'd never
13 been through a self-checkout at Wal-Mart.

14 Well, fine investigating the crime. I would want to go
15 to the self-checkout and I would want to look at it, and I
16 would want to see okay, here's the screen. Here is the, the
17 machine where you swipe the card and hey, what's this little
18 thing hanging down here?

19 Oh, that's a, a pin attached by a rope which any,
20 anybody knows is used to sign for a credit card.

21 Well, Mrs. Cashion said well, I don't know that that's
22 a pen when I showed her a picture of it.

23 Well, of course, it's a pen, and then she said well, it
24 didn't require a signature. It required a zip code.

25 Well, that's clearly not the case.

1 So, Mrs. Cashion is saying thing after thing after
2 thing that makes no sense. She didn't ask why Mr. Solanki
3 wouldn't have simply gotten away with it by going to the
4 self-checkout, taking his own credit card, swiping it,
5 signing Mickey Mouse, being gone. She never even asked that
6 question. That is a huge question along with why he gave
7 his own credit card.

8 No effort was made. She rushed to judgment. She
9 already knew she didn't have probable cause, and the
10 probable cause is got to mean something or otherwise you,
11 anybody, you know, the police can arrest somebody for
12 anything at all, and come back later and make up whatever
13 reason they want to. Probable cause has to mean something,
14 and you've got to make it mean something, ladies and
15 gentlemen of the jury.

16 I've talked about that she thinks two people might have
17 had the card in the same few hour period. She won't admit
18 the card swipe machine allows a signature even though
19 there's a PIN there.

20 She says he presented his credit card for ID purposes.
21 She said he wanted to involve a -- this is the, this is the
22 craziest one of all, that he wanted to involve a store
23 employee to accomplish this, this crime. That's absurd and
24 she had no doubt of his guilt. No doubt Wal-Mart didn't
25 make a mistake.

1 That's what struck me about her testimony was no doubt
2 whatsoever, I'm a hundred percent sure.

3 Well, nobody in this courtroom but her at this point
4 probably that is a hundred percent sure that he did it.
5 Give me a 99 percent, Mrs. Cashion. Give me -- just give me
6 99 percent sure. But no, it's a hundred percent, and that's
7 just not the way the world works, and the basis of her so
8 called probable cause is a 72-year old man struggling with a
9 receive pay machine.

10 Next.

11 Swiping a card here, and, again, here's another thing
12 that I don't understand Mrs. Cashion's theory and -- well,
13 she doesn't understand either. But he swipes a card here.
14 They talked about him waving a card over the machine or
15 whatever. He swipes a card.

16 Now, if he's swiping Mrs. Martin's card, why does he
17 cancel the transaction as she says?

18 And, remember, she says oh, well, he clicked on the
19 left side of the, of the screen hitting decline.

20 Well, she offered no proof that she'd ever seen that
21 machine and how it worked, and he hit the middle of the
22 screen, whatever it was. So -- but, again, their theory,
23 he's, he's messing up this transaction because he ultimately
24 wants this thing to be hand keyed in.

25 Next.

1 And here he is again going, going to imprint his own
2 card into this.

3 Go back one please.

4 And I asked the question, ladies and gentlemen, I said,
5 why, if he's been handing Mrs. Martin's card all day long,
6 why, at this point, this crucial, critical point at the end,
7 does he hand his own card?

8 Now, if, if that question could be answered, maybe I
9 don't have a case. If that question could be answered.

10 But, why, ladies and gentlemen, if, if, as they say, he
11 had Mrs. Martin's card and he's swiping it and he's been
12 handing it and it's been hand keyed, why not hand her card
13 at this juncture to be, to be imprinted unless he's just
14 crazy or wants to get caught?

15 And I don't see a 35 -- I don't see a man working
16 35-years for Spartanburg Steel, and is 72-years old
17 undertaking these kind of insane risks. People just
18 don't -- I mean people like that don't do that.

19 But they can't answer that. I challenge them now, when
20 they get up behind me, tell me why.

21 MR. SMITH: Your Honor, this is improper law that he
22 has up on the screen. We ask that he move on to the next
23 slide. It's not the law of the case.

24 MR. HAWKINS: I just got that people are presumed
25 innocent, Your Honor. I thought that was the law in

1 America.

2 MR. SMITH: The law is probable cause.

3 THE COURT: All right. I understand where you're going
4 and where you're arguing this. I'm gonna allow him some
5 latitude. I'll charge the jury on the applicable standard
6 in this particular case.

7 Obviously, ladies and gentlemen, presumption of
8 innocence applies to a criminal case. This is a civil case.
9 I'll advise you as to the standards that apply in a civil
10 case, but I'm not inclined to interrupt Mr. Hawkins
11 argument.

12 You may proceed, sir.

13 MR. HAWKINS: Thank you, Your Honor.

14 I'm -- what I'm trying to get to here, before we broke
15 for lunch yesterday, Mrs. Cashion said an amazing thing. I
16 asked her, I said, so, Mr. Solanki had a duty to call you
17 and come to you and prove himself innocent, and she said
18 yes, and we broke for lunch. And I'm sure you remember
19 that. It was a very telling thing because, in her mind, a
20 person is guilty and they need to come to her and prove
21 their, prove themselves innocent.

22 Well, I'm sorry, Mrs. Cashion, but you're gonna have to
23 do your own job. Nobody's gonna do your work for you, and
24 you're not gonna -- you know, you may have a lot of people
25 that you call and they come tripping over themselves to show

1 why they didn't do X, Y, and Z.

2 But Mr. Solanki -- now, of course, he -- I -- he would
3 of come and responded if he had gotten the message from
4 them. There was obviously some kind of miscommunication.
5 But he would of come and tried to clear it up.

6 No, no, he wants to be arrested in Georgia. So, he's
7 gonna ignore the Spartanburg County Sheriff's Department.

8 First of all, it was a miscommunication.

9 Second of all, even if he'd gotten the message, he had
10 no duty to come tripping, to bend the knee of the
11 Spartanburg County Sheriff's Department to prove himself
12 innocent. That is not how it works in America, and for her
13 to base her probable cause on the fact that he didn't come
14 tripping to prove himself innocent to her, that is another
15 reason why there's no probable cause in this case, and then
16 that's gonna be the system we live in, you know, that's the,
17 that's a police state. That's not America. That's not the
18 way it works in America.

19 It's her job to get the evidence. Not just the
20 evidence that looks bad, but all the evidence.

21 He's a citizen of Spartanburg County. He pays his
22 taxes. He pays her salary. He's entitled to a little bit
23 of decency, and if she's got evidence that he didn't do it,
24 she's got to, at least, recognize that fact and show all
25 that to the magistrate and explain to the magistrate.

1 You know what, Magistrate Pasley, here's the deal.
2 Okay. They're -- this case is really really weird.
3 Okay. He went through the self-checkout. He had the
4 other lady's credit card, but, for whatever reason, he
5 didn't swipe it there and sign his name even though he could
6 of got away with it. No, no. He wanted to involve an
7 employee.

8 And I think that's weird, don't you, Magistrate Pasley?
9 By the way, he presented his own ID to him and then,
10 after that, they hand keyed in a card, and the last thing
11 that happened was he gave his own card and signed it and
12 went out the door.

13 I think all that's odd, don't you, Magistrate Pasley?

14 But hey, no, she didn't do that. She had her man. She
15 had her man, and she wasn't gonna turn lose.

16 Forget Murphy's. Forget the machines. It's lunchtime.
17 Go back one.

18 She never even considered that he might be innocent.
19 That was her words. Not mine.

20 Now, I don't know about you, but I want Spartanburg
21 Sheriff's Department to at least consider the possibility
22 that some of the people that they investigate just might be
23 innocent. She didn't consider Wal-Mart made a mistake.

24 well, that too is really really weird because any
25 corporation that that's size is gonna make some mistakes

1 sooner or later. People do.

2 why, why wouldn't they?

3 She, she really got in a very narrow mind set I
4 believe, and she was looking for anybody who had \$144.70
5 transaction, and once she found the receipts match up, Mr.
6 Solanki, Mrs. Martin, that was the end for her. That was
7 the end and everything else she built on top of that for
8 probable cause has simply come after the fact to explain
9 away the sloppy way that she did the investigation. That's
10 all it is.

11 But the problem is she found a \$144.70 transaction, but
12 it indicated that the man was innocent, that he offered his
13 own card, he signed his own name, and he gave his own ID,
14 and she ignored that completely because she had found what
15 she was looking for.

16 Next slide.

17 Other than the video, which simply shows Mr. Solanki
18 being in the store -- by the way, that's all the video
19 shows. The video doesn't show Mr. Solanki doing a single
20 thing wrong. Nothing. When you look at that video, and I
21 know you have, the video does not show any criminal act of
22 Mr. Solanki or even any suspicious act.

23 Now, Mrs. Cashion couldn't even say that the video was.
24 So, when you look at probable cause, the video is really not
25 even relevant. All it shows is his likeness was in the

1 store. That's it. But you can toss the video because we
2 have this. These are his fingerprints, so to speak, that
3 were left on this crime was this receipt.

4 So, this is it. This is -- other than the video,
5 ladies and gentlemen, this is her probable cause if it is
6 probable cause, and it is not probable cause because it
7 indicates that Mr. Solanki attempted to pay for the goods
8 himself.

9 If he attempted to pay for the goods himself, but, for
10 whatever reason, Wal-Mart didn't process, process it that
11 way or something happened, then he is absolutely innocent.
12 He offered his own card. He signed his own name that --
13 their ID and theory about it's all part of some scam is
14 ludicrous. It makes no sense. Nobody would ever attempt
15 such a scam that would result in them ultimately being
16 caught.

17 So, when you hear about probable cause, they can talk
18 about warrants. They can talk about Grand Jury indictments.
19 But you have to look at what Mrs. Cashion had in front of
20 her at the time.

21 The video didn't show any criminal act or any
22 suspicious act. The receipts merely showed purchase. This
23 was it. This was the only document constituting probable
24 cause in this case, and this document shows that Mr. Solanki
25 didn't do it, and she ignored it and there's no probable

1 cause.

2 Next slide.

3 She could of gone on. She could of gone to Murphy's.

4 Next slide.

5 And there was no hurry. I mean here's the thing. This
6 happened on the 27th. She started investigating it around
7 the 1st of December. She got a warrant on the 3rd. She's
8 in quite a hurry to get a warrant even though all these
9 questions are being raised. You know, she could of taken
10 more time. She could of been more thorough. She could of
11 done the things that I have suggested before, which are all
12 reasonable things.

13 But no, go straight to the warrant office or go
14 straight to the magistrate, get the warrant, and then that's
15 it, sets in the process, everything else that's happened
16 here.

17 Next slide.

18 The judge is gonna charge you on the law of the case,
19 and I want to be -- I want to explain here kind of how this
20 works cause it can be a little confusing.

21 Our case against wal-Mart is based on the fact that
22 wal-Mart was negligent, and wal-Mart messed up this whole
23 transaction that resulted in our client being in jail for
24 six days. The judge will charge you on these individual
25 things about negligence, and I'm not gonna go over them

1 here, and he, you know, and he'll charge you about
2 circumstantial evidence as well.

3 In other words, just cause you see it doesn't mean you
4 can't consider what happened by putting together the pieces
5 of what happened. In this case we know that Mr. Solanki, or
6 we contend, it's up to you ultimately, we know Mr. Solanki
7 did not have Mrs. Martin's card. We know he didn't use it
8 on this day.

9 We know that the Wal-Mart employees, according to the
10 evidence, there's evidence that the card wasn't even there
11 at all, that it was just the number that was there because
12 there was no CVV number inputted into the system. We know
13 that Wal-Mart had a duty to protect its customers.

14 Now, it had a duty to protect Mrs. Martin, and it had a
15 duty to protect Mr. Solanki. You go to a store. You kind
16 of -- you go to a store and you patronize the store and you
17 buy goods. You kind of hope that the store won't screw
18 things up so you end up in jail months later for something
19 you didn't do. That's a reasonable expectation to have when
20 we shop and you go to places.

21 Wal-Mart let Mr. Solanki down in a big way, in a big
22 way, and it's sort of like a perfect storm. Neither one
23 could of really happened without the other. Had Mrs.
24 Cashion not done such a poor job in this case investigating
25 it, and not having any probable cause, he wouldn't of ended

1 up in jail and this never would of happened.

2 Had wal-Mart not screwed up the transaction, and then
3 failed, after the fact, to protect Mr. Solanki by going to
4 the police and saying listen, there are huge issues about
5 this case, I mean we, we got a card from a gentleman who
6 you're accusing of the crime. Had wal-Mart done those
7 things, and had the sheriff done the things they were
8 suppose to do, then we wouldn't even be here today. But
9 instead, these two elements come together, the sheriff's
10 actions and wal-Mart's actions and resulted in Mr. Solanki
11 being arrested.

12 We have claims against the Sheriff's Department for
13 false imprisonment and malicious prosecution, and the judge
14 will tell you about those as well.

15 Next slide.

16 Let's talk about the impact to Prakash Solanki.

17 Now, everybody here knows somebody probably that's
18 70-years old or older. That's -- it's, it's a tender, it's
19 a tender age. It's like, you know, things are different
20 when you're older, and when you're older sometimes you get a
21 little more anxious. You're a little more, want things to
22 be settled. You want to walk on even floors if you can.
23 You want to be warm. You don't want to be too cold. You
24 don't want to be around a bunch of people hustling and
25 bustling. You want a little quiet and peace. That's what

1 comes with being elderly.

2 But he, Mr. Solanki, didn't, didn't have that luxury
3 for six days of his life. He's in jail for six days in
4 Georgia with a, people that most of who aren't criminals,
5 some of whom are hardened criminals, and he's with them
6 cursing, they're using profanity, some of them are arguing,
7 and he's just trying to keep his head down and lay low and
8 figure out what's going and get the heck out of there.

9 So, of course, he's anxious. He's unsure. He's
10 afraid. He's alone. He talks to his wife. I mean he talks
11 to his wife through, through thick glass with one of these
12 telephones and just imagine the conversation that they're
13 probably having with one another trying to understand what's
14 happening to them and not understanding.

15 Now, if you commit a crime and you get caught a few
16 months later, even if you don't fess up to the crime, you
17 know in your own mind why you're there, because you did it,
18 and your answer for it. But if you're innocent and you get
19 arrested months later, and you don't know what the heck is
20 going on, you don't remember anything about it -- by the
21 way, he used his own card the day after the 27th, and he
22 still -- he used his own card on the 28th at, at the same
23 Wal-Mart to make a purchase.

24 So, in his mind, he'd shopped at Wal-Mart before and
25 why is he being arrested and he is alone and he's scared.

1 He's humiliated. He's embarrassed. He's never spent a day
2 in jail in his life, and it is a huge shock to his system,
3 and I will tell you that it will probably be a bigger shock
4 to an elderly person than it would be to somebody else.

5 Next slide.

6 One of the things that you will do, as you go back into
7 the jury room, is you will, if you find for the plaintiff in
8 this case, the next step is to determine damages.

9 Now, this isn't a case where somebody breaks the arm
10 and we know what the medical bills are. This is a case
11 where somebody's freedom has been taken away from them, and
12 only you, using your common sense, can know what kind of
13 dollar figure to put on that. He can never get back those
14 six days and six days of a -- defense might say well, what's
15 six days?

16 Six days locked up in jail is a long, long time when
17 you're 72 or if you're 25. Six days in jail is a long time.

18 Ladies and gentlemen, they're people that, that are,
19 that get DUI's and they don't spend six days in jail.
20 There's people that, that steal things. They're people that
21 commit a battery against their spouse, they beat their
22 spouse, they don't spend six days in jail.

23 But Prakash Solanki spent six days in jail for
24 something he didn't even do with a bunch, with a bunch of
25 criminals.

1 What price do you put on that?

2 And I mean I'm just gonna throw some numbers up there.
3 You got to do whatever you think is right, whatever numbers
4 you think is right because what I would suggest to you, and
5 you do it anyway you want to, and we don't want anything
6 other than what's fair in your minds, but you've got to
7 consider how much is a day of freedom worth, how much is a
8 hour of freedom worth, a minute.

9 It's priceless. And, so, to enjoy your golden years,
10 to be taken out of your car and handcuffed and put in jail
11 for something you never did, that's a pretty rough thing.

12 Next slide.

13 Six days of loss of freedom, what is it worth per day?

14 You come up with a number if you decide that. You have
15 to decide the issue.

16 But I'll tell you this, no amount of money can make up
17 for what he went through, but it's the only way to set
18 things right now.

19 Next slide.

20 We do believe that the verdict in this case should be a
21 substantial verdict. I told you that at the beginning.
22 It's got to mean something to be deprived of your freedom
23 for six days.

24 Wal-Mart is a large company with lots of computer
25 systems. They failed to protect Prakash Solanki. The

1 Sheriff's Office failed to protect Prakash Solanki. They
2 assumed he was guilty and never varied from that.

3 Next slide.

4 I want you to remember this as you, as you go back to
5 the jury room, and hold them accountable.

6 Okay. Both of these defendants still think, in their
7 minds, that Prakash Solanki is guilty. Cashion is a hundred
8 percent sure that he's guilty. The sheriff's lawyer tries
9 to make him look guilty by showing pictures of the top of
10 his head in a video, and Wal-Mart is playing very clever by
11 not really saying. I don't think I've ever heard my good
12 friend, the Wal-Mart counsel, say one time that Mr. Solanki
13 is guilty or innocent.

14 Well, he should. When he gets up, he should and you
15 should ask yourself is he gonna say that.

16 Is he gonna say hey, I'm going to state, I'm going to
17 take the position and say right now Mr. Solanki's guilty of
18 this crime or is he gonna say he's innocent of the crime?

19 I think Mr. Solanki deserves that from the Wal-Mart
20 people. I think, I think Wal-Mart owes Mr. Solanki the
21 common decency to say here in open Court before all you
22 people and before everybody, Mr., that Wal-Mart owes him an
23 obligation to say we think you're guilty or we think you're
24 innocent and we're sorry for what happened to you.

25 But I don't expect the Wal-Mart attorney's gonna get up

1 here and do it. He's gonna try and play it both ways. But
2 don't let him get away with it.

3 Next.

4 This is what they wrote, folks. I didn't make this up.
5 This is what wal-Mart has said in this case. They are on
6 the record as saying that the Seventh Circuit Solicitor's
7 Office should of dismissed the charge. They disagree. They
8 deny that.

9 They say -- I say admit Prakash Solanki's not guilty.
10 They say denied.

11 I say admit he's not guilty of this warrant. They say
12 denied.

13 This is what's in writing. Despite any kind of
14 rhetoric from wal-Mart now, this is what they really
15 believe. This is what the wal-Mart corporate defendant
16 really believes about Prakash Solanki, and now they're gonna
17 play nice like oh, we just didn't have anything to do with
18 it. We, we're just wal-Mart, and hey, we just -- we
19 provided information. But we didn't lock him up.

20 You gonna let them get away with that?

21 Next slide.

22 wal-Mart must take responsibility for calling Prakash
23 Solanki a liar and a criminal. We have proven to you that
24 Robin, that Robin Martin's card was not used by Prakash
25 Solanki. It would of been absurd for him to do it.

1 Next slide.

2 Next slide.

3 Members of the jury, you can assess actual damages and
4 you can assess punitive damages. Actual damages are meant
5 to compensate Mr. Solanki for the, for the six days that he
6 spent in jail and all the other things that have come since
7 then in terms of his, his fear of being unsettled and never
8 knowing and always looking over his shoulder. That's actual
9 damages and I have suggested to you a way that you can
10 calculate those, those if you deem appropriate. Whatever
11 you think.

12 But also remember that this man survived the regime of
13 Idi Amin without ever being in jail, he nearly got killed,
14 but he never was in jail, only to come to America, worked
15 35-years, and to be jailed after something he didn't do at
16 Wal-Mart because of Wal-Mart, Wal-Mart's actions.

17 Next slide.

18 The judge is gonna charge you on punitive damages.

19 What are punitive damages?

20 Punitive damages are not designed to compensate the
21 victim of something. They are designed to punish the
22 defendant, to keep it from ever happening again, to deter
23 the conduct of the defendant, and you will have the power,
24 when you go to the jury room, to assess punitive damages and
25 we would ask that you consider to do so.

1 Use your common sense. Think about it.

2 If this is not going to happen again, if wal-Mart is
3 going to get the message that it has to protect its
4 customers, how are you gonna send that message?

5 Not with a note and a card.

6 The only thing that you can do is to send a very large
7 verdict for punitive damages against wal-Mart. That's what
8 it's going to take to get wal-Mart's attention, to get at
9 the bosses at wal-Mart.

10 We all know -- we can all use our common sense and know
11 how big wal-Mart is. We know that. And you can use your
12 common sense to assess punitive damages that will keep
13 wal-Mart from doing this to somebody other than the
14 Solankis.

15 Next slide.

16 Next slide.

17 With that I conclude my remarks. I appreciate, on
18 behalf of Prakash and Urmila Solanki, you've been such a
19 respectful and attentive jury, and I really appreciate it
20 and I ask that you come back with a verdict for the
21 plaintiffs.

22 Thank you.

23 THE COURT: Thank you, Mr. Hawkins.

24 Ladies and gentlemen of the jury, you've been sitting
25 there for about an hour and ten minutes.

1 Anyone need a bathroom break or can we keep going?

2 If you need a break, raise your right-hand.

3 (No response.)

4 THE COURT: Nobody needs five minutes.

5 All right. Very good.

6 All right. Mr. Rozelsky, your closing, sir.

7 MR. ROZELSKY: May it please the Court?

8 THE COURT: Yes, sir.

9 MR. ROZELSKY: I think what I heard my friend here just
10 say is you should punish Wal-Mart for never helping and
11 prevent them from ever helping the police department again,
12 prevent them from cooperating with the police department
13 again. He said you got to stop them from doing what they
14 did. You need to stop them from doing what they did.

15 Remember, on Monday afternoon, I told you you're gonna
16 learn three things about Wal-Mart in this case?

17 One, a lot of video cameras. We've seen them, saw all
18 kinds of pictures. We've seen lots of video.

19 Two, customer service. You saw Ryan Smalls, 15 seconds
20 in, helping to scan. We saw, when Mr. Solanki put both
21 things not on the weight scale, but on the floor, coming to
22 help and reset the machine. We saw him suspend the
23 transaction.

24 And three, we saw Wal-Mart cooperate with the police.

25 That's what he saw. I told you that on Monday. That's

1 exactly what you saw today.

2 Now, as we get here this afternoon, my friend wants to
3 say that Wal-Mart is the bad actor in this. I counted I
4 think 39 slides about what they believe Mrs. Cashion did
5 wrong, and then, in the shell game that we've seen all week,
6 he just says them, them. Everybody at that table is them.
7 They did this. They did this.

8 Let's think about what the evidence is against
9 Wal-Mart. The judge is gonna charge you that there's only
10 one claim remaining against Wal-Mart. That's negligence.

11 Okay. He's gonna say there's one claim against
12 negligence. Not false imprisonment. Not malicious
13 prosecution. But negligence and you saw Mr. Hawkins put
14 that up there.

15 Now, you may say well, gosh, the plaintiff put up first
16 Mr. Solanki, Ryan Smalls, then Gina Cashion, then Gia Lynch
17 by deposition, or maybe I've got those two confused, and
18 Wal-Mart got up and said Your Honor, we're gonna rest on
19 what's in evidence. That may of struck you as odd as, odd.
20 You may of been thankful that we didn't put up four
21 witnesses.

22 I keep thinking to myself did I presume that you-all
23 are going to thank me for never showing the video and curse
24 me for Wal-Mart having the video.

25 Okay. But the reason Wal-Mart didn't put up a case --

1 the reason we didn't put witnesses on there is because the
2 plaintiff has the burden of proof.

3 Okay. Wal-Mart doesn't have to come up here and prove
4 to you that Mr. Solanki was guilty beyond a reasonable
5 doubt. In fact, Wal-Mart doesn't care about that. I mean
6 yes, we care obviously. We care that Mrs. Cashion upholds
7 the oath that she's taken. We care that, when she goes to
8 the magistrate, she has all the evidence she needs to take
9 to the magistrate.

10 So, when she comes to Wal-Mart, she says I call
11 Wal-Mart and I ask for the video.

12 I ask them how many transactions, on November the
13 27th, in \$144.27?

14 Put it on the computer. Bing. One. One transaction.

15 How many transactions with the last four digits 494?

16 Bing one. Same transaction.

17 Okay. So, Wal-Mart gives her the video.

18 Now, for some reason, there's an argument that Wal-Mart
19 apparently, according to the Solanki's and their attorneys,
20 has a duty to check to make sure the police do a good enough
21 investigation. That's, that's what I heard him say. That
22 is, if Mrs. Gina Cashion doesn't know how to do these things
23 right, they have a duty to go and teach the police how to do
24 them.

25 And what was the testimony of Mrs. Gina Cashion?

1 She sat right here and she said after I got the
2 documents from Wal-Mart I never went back. I didn't ask
3 Ryan Smalls. I didn't ask Sharon Abbott, the other woman in
4 the video. I, I didn't ask some of the others in computer
5 programming how this works. I didn't do any of that.

6 The plaintiff didn't call them. The plaintiff called
7 Ryan Smalls in this case. He didn't have to call Wal-Mart
8 witnesses if he wanted to call Wal-Mart people.

9 So, what have the plaintiffs told you?

10 The plaintiffs said Wal-Mart was negligent because they
11 failed to follow their own policies and procedures, and they
12 showed you Exhibit No. 7. In Exhibit No. 7 that you're
13 gonna get to take back, in all of its pages, it's 16-pages
14 long and it's called FG304, credit card transactions.
15 That's -- it's part of the front end guide that cashiers use
16 and Ryan, who worked there for nine months, said yeah, I
17 remember all that stuff back then and he was shown a page.
18 I want to show that page again of this.

19 Bailiff, if you pull the lights a little bit please?

20 (Bailiff complies.)

21 MR. ROZELSKY: And what they've showed you is, going
22 down to the section that says if the credit card does not
23 swipe or customer presents a paper voucher, which didn't
24 happen here, key in the account number twice.

25 That's what they said, right?

1 Ryan said to you I keyed in the account number twice,
2 and then it says, when prompted, enter the expiration date.
3 And he says I keyed in the expiration date, and it says ask
4 a CFM to perform an override for the key card. And he
5 testified how Mrs. Sharon Abbott came over and had to key it
6 to complete the transaction, and it says, when prompted,
7 entered CVV number located on the back of the card. And
8 they oh, that's where it is. That's where you were
9 negligent.

10 You were negligent because you didn't enter the CVV
11 right number. Ryan -- you heard Ryan's testimony. Sat
12 right here. Said if it prompted me to enter the CVV number
13 I entered it.

14 How do you know that?

15 Well, I was holding the card.

16 And they point to Gia Lynch at Bank of America who
17 says, you know, that block that I showed says the CVV may or
18 may not have been entered.

19 Did you listen to her testimony?

20 She says it's bank or card issuer specific. Okay.
21 Card issuer specific.

22 She didn't say I can tell you, beyond a shadow of a
23 doubt, that this CVV was not entered. But you don't even
24 need to go to her testimony or even Ryan's testimony cause
25 right down in the little box, let's look at what it says in

1 the little box.

2 If the CVV number entered is not correct, the register
3 prompts to enter again, allows two temps, attempts. If
4 failed two attempts, customer is prompted to enter another
5 form of tender.

6 Okay. So, if Ryan didn't enter -- if Ryan was prompted
7 and didn't enter it, it's not gonna authorize the
8 transaction.

9 So, what do you conclude?

10 Maybe it didn't ask for it.

11 Now, what did Ryan testify?

12 Ryan told you that he saw Mr. Solanki come up, and that
13 there was absolutely nothing about Mr. Solanki's
14 transactions that caused him any suspicion. That's why he
15 couldn't remember the specific transaction. Said this was
16 just a normal transaction. I went out there, I helped him.
17 He tried to use the card. I helped him. Nothing suspicious
18 about that.

19 Now, you saw a video a few minutes ago that had a time
20 stamp and the time stamp looks here at 19:50, and it's not
21 printed.

22 Ladies and gentlemen, they're three different times
23 that you'll see on these receipts that you get to take back
24 and right here you see a receipt of 19:49:07. That's when
25 this gets printed out. That's when this information gets

1 printed out.

2 If you're unsure about that, watch the video. Watch
3 the video after 19:50:11. Watch for Ryan to put it in the
4 machine and run it again before he slips it in the drawer.
5 It doesn't happen.

6 So, the suggestion that I just signed a blank card
7 isn't there. It's the suggestion is somehow Wal-Mart was
8 negligent by having him sign a blank certificate, it's not
9 there. He signed this receipt.

10 But what you need to remember, with regard to Wal-Mart,
11 is that this is a negligence claim. Okay. Wal-Mart doesn't
12 have the burden of proof.

13 Mr. Bailiff, can you turn that up again, lights up?

14 (Bailiff complies.)

15 MR. ROZELSKY: Wal-Mart does not have the burden of
16 proof in this case. Just as Mr. Hawkins did on Monday
17 afternoon when he wanted to shift the burden of proof and
18 said make them show you these things, the judge is gonna
19 charge you that the person who has the legal duty to show
20 you things are the plaintiffs, and they don't need to show
21 you, beyond a reasonable doubt. We all hear that.

22 They need to show you by what's called a preponderance
23 of the evidence, and the judge is gonna tell you about
24 tipping the scales. But if the scales remain even, if it's
25 just as likely one or the other, then they haven't met their

1 burden.

2 Now, in order to prove negligence against Wal-Mart,
3 they have to prove a duty, a breach, cause, and a harm.

4 All right. Wal-Mart doesn't have to prove what Mr.
5 Solanki did, what Mr. Solanki was thinking, and why Mr.
6 Solanki did it. Wal-Mart doesn't even have to give you a
7 theory. You didn't hear any Wal-Mart witnesses stand up
8 here and give you a theory.

9 You heard me ask Mrs. Cashion, hey, Mrs. Cashion, is it
10 possible that somebody whose thought this through doesn't
11 want to be caught on video sliding his card?

12 You heard me ask that.

13 They're lots of explanations. They're lots of
14 explanations as to why. There's -- some are criminal. Some
15 are not.

16 It's not Wal-Mart's duty to prove to you -- those
17 admissions, those request to admit, why does Wal-Mart deny
18 those things?

19 It's not Wal-Mart's burden to prove those things.
20 There's no element of damages, of negligence that the judge
21 will charge you that says prove that the solicitor's office
22 wrongfully dismissed these or prove that there was probable
23 cause or prove that he was guilty of a crime.

24 It's Mr. Solanki's card.

25 Okay. If you've got a Bank of America card, your card

1 might look just like that. We didn't see Robin Martin's
2 card because she didn't have it anymore. It might of looked
3 just like that.

4 I'm not telling you this is what happened, but I can
5 tell you one thing that could of happened. Mr. Solanki
6 could of been shopping in the same store that our friend,
7 Mrs. Martin, had stopped in, and Mrs. Martin could of left
8 her charge card there and the clerk could of handed it back
9 to Mr. Solanki, and all of a sudden Mr. Solanki has two Bank
10 of America cards.

11 I don't know. It's not my burden to prove it. But I
12 don't know. But if you want to know why Wal-Mart says we
13 don't know, cause we don't.

14 Wal-Mart has a duty to protect its customers from harm
15 in the store.

16 Okay. That's why you see the little cones out keeping
17 people from falling. That's why you see security guards
18 walking around to make sure that people aren't getting hurt.

19 What the plaintiffs want you to have is to add some
20 duty to Wal-Mart that after somebody leaves the store,
21 Wal-Mart doesn't say anything about the transaction, doesn't
22 have any, no suspicion whatsoever that Wal-Mart, once they
23 look at this receipt, they should say this receipt is
24 internally inconsistent because right here it says Master
25 Card and right here it has a different number. And, so,

1 Wal-Mart should give that to the police, but doesn't get the
2 same protections that Mr. Solanki gets.

3 Wal-Mart doesn't get to presume that the police are
4 gonna do their job correctly. Wal-Mart has to go behind the
5 police. Wal-Mart has to be the police.

6 Ladies and gentlemen, if, if Wal-Mart is negligent for
7 not going behind the police, how much cooperation are you,
8 are you gonna see from the Wal-Marts or Targets or JC
9 Pennies or even any retailer?

10 But more importantly than that, the plaintiffs have to
11 prove damages.

12 Okay. These are damages other than his incarceration
13 because the false imprisonment claim, the six days, it's not
14 against Wal-Mart. The six days -- you saw the -- I think it
15 was Number 42. It showed the law of the case. Wal-Mart,
16 negligence, punitive damages, and then it dropped down and
17 it says Sheriff's Department, false imprisonment, malicious
18 prosecution.

19 You're not to decide if Wal-Mart falsely imprisoned Mr.
20 Solanki. You're to decide if Wal-Mart's negligence, if you
21 find that there's negligence, that Wal-Mart's negligence
22 caused him damages, but none of those damages cause those
23 are the false imprisonment damages.

24 Now, he talked about punitive damages to you, and he
25 told you that you should punish Wal-Mart.

1 Now, punitive damages -- excuse me. My voice is
2 cracking after a week in here. Punitive damages are damages
3 that are above and beyond actual damages and that's a higher
4 standard. There's the preponderance, there's reasonable
5 doubt, and somewhere in-between is clear and convincing
6 evidence is what the judge is gonna say to you. Clear and
7 convincing evidence that Wal-Mart was not negligent. No.
8 Clear and convincing that Wal-Mart was grossly negligent.
9 That is they used no care at all. No, no care. Lack of
10 slight care.

11 That means that Wal-Mart acted on their own or that
12 they were willful. That Ryan Smalls, 21-year old student at
13 USC-Upstate, somehow had it out for Mr. Solanki, and that he
14 was willful and wanton and reckless. What they want you to
15 believe is that Ryan Smalls either had another card sitting
16 there that he picked up and used or that somehow he was able
17 to rattle off 16-digits, 5576 2122 0015 6549.

18 Can you punch that in again?

19 Can you guess the expiration date?

20 More importantly, can you guess a 16-digit number twice
21 with an expiration date maybe, with a CVV, for somebody who
22 lives in Chesnee?

23 How does that happen?

24 Have they showed you, by preponderance of the evidence,
25 that Wal-Mart did something wrong in keying in that card?

1 Have they shown you that?

2 Cause if they haven't, they haven't met their burden of
3 proof.

4 Last summer I came home from work one day at lunchtime,
5 and my wife was not real happy with me.

6 Now, I know you probably think that might not be
7 unusual, but this day she was particularly unhappy with me,
8 and it's only when she handed me a credit card receipt for
9 Kays Jewelers where Kurt Rozelsky had charged \$8,500 to buy
10 some jewelry in Jersey City, New Jersey, and she looked at
11 me like Desi Arnez and said Lucy, you got some explaining to
12 do.

13 Well, what I found out was I did have some explaining
14 to do, but I had to figure out first who did it, and,
15 unfortunately, it wasn't just the \$8,500. It was about
16 \$22,000, and what shocked me the most was that the
17 prosecuting office, the people who prosecuted it, didn't
18 have any interest.

19 So, which is it that we want?

20 Do we want the prosecutor to go out, do an
21 investigation, see if there's probable cause, take it to the
22 Master or to the magistrate, take it to the Grand Jury, or
23 do we want them to just say, you know what, let's move on to
24 the next one?

25 But the question really is what is it, what is it that

1 Wal-Mart did wrong?

2 Because the explanation is that Wal-Mart had a card, a
3 driver's license, and a bank card, and that Wal-Mart also
4 had Robin Martin's card, and that Wal-Mart should have
5 stopped Mr. Solanki when they didn't match up.

6 what do you think they would of done if they stopped
7 Mr. Solanki when the two cards didn't match up?

8 would there have been an arrest right then?

9 But that's not what Wal-Mart did. Wal-Mart, their
10 witness, sat right here.

11 what did he say?

12 He said, you know, I'm not sure if I saw that it said
13 Prakash Solanki on the ID and I saw Robin Martin on the card
14 that I would of had a problem because not everybody has the
15 same last name. It could of been his wife's card. She was
16 standing right there with him, and I bet you, if they
17 harassed him about it, they'd be standing before you saying
18 they targeted him because they said he didn't look like a
19 Martin.

20 You see, they're gonna get Wal-Mart one way or another.
21 It's what they want.

22 Mr. Solanki was so damaged by Wal-Mart he went back the
23 next day. Mr. Solanki is so damaged by Wal-Mart he said he
24 went back there last week. He continues to go. His
25 testimony was, as he sat right here, was these people are so

1 nice to me.

2 But the damages that the plaintiff is asking you is for
3 the six days in jail. That's for these folks over here.
4 False imprisonment, wrongfully put him in jail, that's the
5 claim.

6 what's the negligence?

7 what's the negligence that wal-Mart committed?

8 And if -- even if you find that wal-Mart somehow, that,
9 that somehow Ryan Smalls got that card to go through without
10 the CVV, what's the damage to Mr. Solanki?

11 Not the imprisonment cause that's the false
12 imprisonment.

13 The damages that came from that, what are they?

14 If the Sheriff's Department had done the perfect job,
15 CSI, come flying in with that cool black Hummer, the guy
16 with the red hair, just comes up and says I can do all this,
17 and they do the best investigation, and they have probable
18 cause and they don't get a conviction, would we be here?

19 would we be saying wal-Mart did something?

20 Hu-huh. (Negative).

21 wal-Mart has the same right that you have, and that you
22 have, and that you have, and that's the right to cooperate
23 with the police without the fear that if something happens
24 in the police's investigation and they don't have all the
25 evidence right, that you're gonna get sued for cooperating.

1 That's what it is. This is a suit for cooperation.

2 Ladies and gentlemen, I appreciate your time. I
3 appreciate your patience. This has drug on for a long time.
4 But I told you on the first day that, under our system, this
5 is a very important time for all the parties. Mr. Solanki
6 has the right to have his day in Court. Wal-Mart has their
7 right to have their day in Court as does Mrs. Cashion and
8 the Sheriff's Department.

9 The most important thing that you-all can do when you
10 go back there is not forget your common sense. The most
11 important thing you can do is to ask yourself did the
12 plaintiff prove to you that Wal-Mart, A, was negligent, and,
13 B, that that negligence somehow caused damages.

14 I thank you for your patience.

15 THE COURT: Thank you very much.

16 Mr. Smith.

17 MR. SMITH: May it please the Court?

18 THE COURT: Yes, sir.

19 MR. SMITH: Opposing counsel.

20 Ladies and gentlemen of the jury, I thank you for your
21 patience the last couple of days. The Spartanburg County
22 sheriff thanks you and Detective Gina Cashion thanks you.

23 I know this is been a difficult trial because of the
24 tales that you've had to look at, and the video that you've
25 been presented with.

1 One of the things I want to remind you is this is not
2 about prosecuting, a criminal prosecution. That is not a
3 criminal trial. It never has been and I know you know that.
4 But Mr. Hawkins has wanted it to be that. But it has not
5 and it never will be.

6 What this case is about, for the sheriff, is about
7 probable cause.

8 Was there probable cause?

9 They're only two, two claims against the sheriff. That
10 is false imprisonment and malicious prosecution, and one of
11 the common elements in both of these charges are a finding
12 of probable cause.

13 The sheriff put up two of its witnesses that would know
14 the most about what constitutes probable cause. Detective
15 Cashion has been on the sheriff's force for over 18-years.
16 She is an experienced police officer who has been charged
17 with investigating violent crimes, financial crimes, and
18 property crimes, and she has worked with the Magistrate's
19 Court on a daily basis over this 18-year period, and she
20 knows the procedures of that Court. She knows how to go and
21 consult with the judges down there. Judge Pasley being on
22 the bench for 39-years now. A very distinguished magistrate
23 judge who is there to consult with police officers so that
24 they can make the right decision.

25 He is there for the very purpose of making sure that

1 the police officers have done their job and the leg work
2 necessary in order for a criminal procedure to follow, to
3 proceed. He does not convict. He does not seek to prove
4 guilt beyond a reasonable doubt. At that stage, it is
5 probable cause, and even Judge Pasley told you that it is
6 the less, it is a much lesser standard for probable cause
7 than it is to prosecute, and I know you know that, but I
8 have to point it out.

9 In this particular case, I believe the judge will
10 instruct you what probable cause is, and one of the things
11 is -- and I believe the judge will, will instruct you, and
12 I'll check with him, about that it is probable cause that is
13 looked upon or viewed in the point of view of the
14 prosecuting party, the sheriff. The question is not what
15 the actual facts were, but what the prosecuting party or the
16 sheriff honestly believed them to be.

17 Now, I know Detective Cashion was on the stand
18 yesterday, yesterday for a long time. It is not very often
19 you see a witness on the stand as long as she was on there.
20 She was on the stand yesterday, and I will tell you that any
21 competent trial lawyer, will fly through that door back
22 there like a buzzard, and pick the bones dry off the witness
23 by questioning them about the things they didn't do. It's
24 easy to do.

25 I can pick your bones apart about what you didn't do

1 this morning when you got up from bed. So, it's not
2 relevant. It's easy to do. It's fun to do. But it's not
3 fair.

4 So, yesterday he asked the Detective Cashion all kinds
5 of hypothetical questions about what's in his mind, what
6 about this, what if that, what if that. I mean that's fun
7 to do, but it's not relevant.

8 But when it came time to ask her about what she did do,
9 it came out quickly, it came out concisely, and to the
10 point.

11 She went to Wal-Mart when she got the complaint. The
12 first report she wrote up had some errors in it and it was
13 the first report. She had not completed her investigation
14 and she was quoting the LPO officer or the loss prevention
15 officer at Wal-Mart about what had happened, and, you know,
16 if you think about it, if you sit down and try to write out
17 and describe in handwritten form what a fraudulent credit
18 card transaction looks like, it is hard to do. But you can
19 see it if you look for it, and that's what she did.

20 She had the only evidence that really matters was the
21 videotape, and she went to Wal-Mart and she got what she
22 had. She had done it many times before. Every store in
23 town or like most stores that have them have video
24 surveillance. They have cash registers and point of sales
25 and they print-off receipts and a time and date, all that on

1 there. She did exactly what her training told her do.

2 But she did an investigation because her training
3 taught her or told her that this is how you look, gather
4 evidence for purposes of proving probable cause that I need
5 to do as an officer that would motivate one of seven or
6 eight magistrates, who are lawyers, some of them, most of
7 them are lawyers, who know the law, and Judge Pasley has
8 been studying the law for 39-years, and I have no doubt that
9 he is fully aware of what the law requires.

10 But she did what she needed to do in the investigation
11 as she would in any credit card fraud, fraud investigation,
12 and got what was needed to do and she took it to Judge
13 Pasley.

14 Now, one of the things I think the judge will tell you,
15 two things, one of them is that, I believe he will tell you
16 this, is that all proceedings before magistrate in criminal
17 cases shall be commenced upon information under oath plainly
18 and substantially setting forth the offenses charged upon
19 which and only which shall the warrant of arrest be issued.

20 A warrant affidavit, that's the piece of paper that's
21 up there, that is insufficient, that little blurb there, it
22 is insufficient in itself to establish probable cause may be
23 supplemented before the magistrate by sworn oral testimony.
24 She testified it was under oath when she saw Judge Pasley.
25 Judge Pasley came in here and said it was under oath, it's

1 always under oath, and I will talk with these officers, and
2 when they haven't got enough, I will send them on their way
3 and it does happen.

4 So, it's not a cake walk. Officers do their job, and
5 if they've done a job, they get the warrant that's needed to
6 do what they do.

7 The second thing about probable -- I know I mentioned
8 this, but I do, I want to emphasize it, is you evaluate it
9 based on the facts that were known at the time. We're not
10 trying to -- we never have been trying to prosecute it in
11 this case here. But at the time she had gathered the
12 information, that is what you look at.

13 Now, the lawyers in this case have spent a lot of time
14 taking those depositions in Arizona, finding out how these
15 credit card transactions work, and the equipment and all
16 that, and it's pretty complicated, and I, I grant you that.
17 But that was not something that was available or even known
18 to Detective Cashion at the time. But it helps explain
19 things that could of happened, and Mr. Hawkins was putting
20 up a exhibit up there that was gotten and you'll hear about
21 later, and it had on there swiped. It was a diagram.

22 That was a report that was compiled from the CIC
23 report, and y'all heard that, and the reason why we went to,
24 we got the deposition in Arizona is because it had the CIC
25 log it and it's a very cryptic spread sheet, but you got to

1 look at it cause that's the raw data, that's the most
2 accurate data, and what it tells us. It tells us the exact
3 time that the transaction took place. 18:46 is when they
4 received the electronic message in Arizona that an
5 authorization had been made.

6 So, you take that, that record or that report and you
7 look at it, and we know what's keyed and what's not keyed,
8 and that's where you learn for a fact whether things were
9 keyed or whether or not they were hand swiped.

10 Now, you heard about the, that every credit card can be
11 different, and that may be true in this case. But the
12 thinking -- the thing is it corroborates the fact that, to
13 the second that Robin Martin's card number was charged at
14 the very, very moment that Mr. Solanki was standing there at
15 the very moment that Ryan Smalls was standing there, at the
16 very moment Mrs. Abbott, who over to help, was standing
17 there.

18 A crime was committed at that moment in time, at that
19 instance, with those three people standing there. Wal-Mart,
20 Mr. Smalls says he didn't have her card. He didn't have it
21 in his mind or memory. He didn't have it in his possession.
22 Mrs. Abbott, who comes over to turn the key, she didn't have
23 it in there.

24 So, there's only one person left, for purposes of
25 probable cause, is that of Mr. Solanki. Now, I don't begin

1 to understand Wal-Mart's system. It is complicated, and,
2 you know, I have to rely -- we have to rely on what they,
3 what they say it does and doesn't do.

4 But that's where the evidence came from. That's what
5 Detective Cashion had at that time back in December of 2008,
6 and when you look at it in terms of what is required, in
7 terms of showing probable cause, she did what she was
8 suppose to do, and, unfortunately, that meant she had a duty
9 to go and, and obtain a warrant from one of the finest
10 magistrates that we have in this county. That's Judge
11 Pasley.

12 Now -- and I won't go on much longer, I promise you.
13 You know, we could go over the video here, and I think that
14 you'll be able to take it back or at least to come out here
15 and watch it, stop it, and start it, and everything.

16 And one of the things I tried to make clear, at the
17 beginning of this case, that when the complaints were filed,
18 Mr. Hawkins presumably met with his client, spent time
19 writing the complaint, he says that he attempted to make
20 payments at the self-checkout counter, that it wouldn't
21 work.

22 But when you looked at the video, there was never an
23 attempt to swipe or pay his card there. But that's what
24 they said. They said it took the payment there. It's a
25 small point, but that's why that cash, that machine comes

1 into play because they said that's where the first attempt
2 was made. But it wasn't.

3 well, one of the things about that video is that you
4 never see Mr. Solanki pull a credit card out of his wallet.
5 It's a zipped-up wallet, and it's in his left pocket back
6 here. And, and, so, he doesn't have the credit card in his
7 hand, that he saw.

8 So, the next time you see him you see him over at the
9 grocery pay, and when he walks around the corner, and I know
10 you'll be able to find it on the, on the videotape, he
11 already has a credit card in his hand, and he swipes that
12 credit card with his right-hand. He switches it to his
13 left-hand, puts in his pocket. He does it twice and you
14 know that's something read on there because you can see the
15 little thing blink.

16 But when it comes to handing the credit card to other,
17 to the other side, when he hands that white card or whatever
18 reflected card it was, it comes out of his left pocket, and
19 then when they ask for his credit card, his wallet comes out
20 and that's where we see a credit card. And my point about
21 that is, if he had the credit card to begin with, he could
22 of put it in his wallet and zipped it up with one hand, and
23 that's the point that makes it -- that point -- not my, not
24 that single point, but when you add that up to all the other
25 items of evidence that Detective Cashion had, it all adds up

1 to probable cause that she felt comfortable after 18-years
2 of experience of going before a Judge Pasley and asking him
3 for an arrest warrant.

4 And it's, it's a dialogue. It's a meeting. She had
5 her file in front of her. She had the, the videotape, all
6 of the evidence she had gathered, the DVD records and all
7 that, and she sat down and she had this conversation under
8 oath, and he said you've got probable cause, and he said on
9 the stand that if my name is on it there's probable cause.

10 But that's not the end of it. This matter went before
11 the Grand Jury, and it's a body of 18 people, and
12 unfortunately they serve for a year. And they come in once
13 a month or ever so often, and they meet in the courthouse,
14 the courtroom across the way, and they sit here and they do
15 a good job, and a police officer came in with the same file,
16 went over the same information there, and that jury returned
17 what is called an indictment true bill, and I believe the
18 judge will instruct you that, that a true bill is prima
19 facia evidence of probable cause.

20 That's not one finding of probable cause. That's two
21 in this case.

22 So, we think it knocks it in the head. Detective
23 Cashion has done nothing that violates any of her procedures
24 at the sheriff's office, that violates any procedures or
25 requirements of her of the law or the Magistrate's Court,

1 and there's been no, not one regulation, not one policy, and
2 the Sheriff Office has a lot of policy manuals, that have
3 been put here and goes in as an exhibit that says she
4 violated anything. Not one. Not one iota.

5 So, we are very competent. You know, I'm sorry that
6 this is happened to Mr. Solanki, but we're not liable for
7 it. And when you top it all off, I mean the stated position
8 of Wal-Mart that, that he did it, that they don't believe
9 that the charges should of been dismissed as the, as the
10 prosecution did. But when you have that, what an officer
11 has a duty to prosecute.

12 Robin Martin wanted it prosecuted. She had all the
13 evidence available that indicated he was the one most likely
14 to do it, and Judge Pasley agreed.

15 So, we ask you to return a verdict for the Sheriff's
16 Office in this case, and we don't think there's any
17 liability. The probable cause is documented for both
18 charges of false imprisonment and malicious prosecution are
19 supported by Judge Pasley and by the Spartanburg County, the
20 State Grand Jury that meets here. And on top of all that, I
21 don't believe Detective Cashion -- I think the judge will
22 instruct you on malicious prosecution. There's an element
23 of malice, badness on her part.

24 There's been no evidence that she is a bad person. No
25 evidence that she had any intent other than doing her job

1 that she does on a daily basis.

2 So, two elements of, of malicious prosecution do not
3 exist for the plaintiff's case, and one solid evidence,
4 piece of evidence, lack of probable -- solid proof of
5 probable cause exists on both of them.

6 So, we ask you to please return a verdict in favor of
7 the Sheriff's Office.

8 I thank you for your attention and appreciate your
9 time.

10 Thank you.

11 MR. HAWKINS: Your Honor?

12 THE COURT: Yes, sir.

13 You need a break?

14 MR. HAWKINS: Yes, sir.

15 THE COURT: I realize the jury may not need a break.
16 However I do. And that's one of few benefits of being a
17 judge. Otherwise there's really not many perks to it.

18 So, we're gonna take a break, people, cause I need one.
19 About five minutes I'll have you back. Don't discuss the
20 case yet. I'll tell you when you can.

21 Thanks.

22 (WHEREUPON, the following takes place outside the
23 presence of the jury.)

24 THE COURT: All right. We're at ease for a few
25 minutes.

1 (WHEREUPON, a short recess was taken at this time.)

2 THE COURT: Mr. Hawkins, were you gonna have anything?

3 MR. HAWKINS: We will, Your Honor.

4 THE COURT: Just briefly in reply.

5 MR. HAWKINS: Yes, brief reply.

6 THE COURT: Very good.

7 MR. SMITH: Your Honor?

8 THE COURT: Yes, sir.

9 MR. SMITH: I was looking over the jury charges.

10 THE COURT: Yes, sir.

11 MR. SMITH: And I, I had two of them that I didn't see
12 in the jury charges, and I was wondering if you would, would
13 include. That the one and two.

14 On number two, in particular, the jury charge from the
15 Law case, Law versus Department of Corrections where
16 probable cause facts with regard from point of view of the
17 prosecuting party question that -- I was wondering if you
18 could charge that, those. The Law case being a 2006 case.

19 THE COURT: I don't know that we have those notes of
20 those.

21 MR. SMITH: The Law case? Yeah, you have.

22 THE COURT: We have those.

23 MR. SMITH: You have those charges, yes, sir, and this
24 is the Law case.

25 THE COURT: I have the Law case, but I don't have the

1 other---

2 MR. SMITH: Law case.

3 MR. ROZELSKY: Your Honor, while they're looking at
4 that, do you have a copy, a hard copy of the verdict form?

5 I'm having a tough time reading it on the, the---

6 THE COURT: Yes, I do. I'll just give that---

7 MR. ROZELSKY: I just wanted to take a look at it,
8 sir. Thank you.

9 THE COURT: Thank you.

10 MR. HAWKINS: Your Honor, two, it looks like there's a
11 verdict form is, has Parkas and missing an H on there.

12 THE COURT: My clerk, my clerk was fixing that. The
13 clerk caught that for me.

14 (Pause.)

15 THE COURT: Mr. Smith, what I'm, what I'm -- I have no
16 problem with either of the propositions of law that you're
17 putting up here. What I'm trying to figure out is,
18 obviously, probable cause is discussed under both the false
19 imprisonment and the malicious prosecution causes of action
20 that I've explained to the jury. They're slight variations
21 in how that's explained to them.

22 For example, under the malicious prosecution, it says,
23 in determining whether probable cause exists, you should
24 focus on whether the defendant had reasonable cause to
25 believe that the plaintiff committed the acts about which

1 the complaint was made and not whether the plaintiff was
2 actually guilty or innocent.

3 Probable cause is determined by the facts and
4 circumstances present in the mind of the defendant at the
5 moment of the institution or continuation of the proceedings
6 and not by any later events, which is basically similar to
7 charge number two.

8 where would you like these inserted?

9 MR. SMITH: well, I just really have that one sentence
10 on the second one. The other one is important in, with
11 respect to the arrest warrant up there about that an
12 affidavit, a warrant affidavit is not sufficient and can be
13 supplemented by oral testimony.

14 THE COURT: Right. I, I agree I should put that in
15 there.

16 MR. SMITH: And the other one is really just one
17 sentence. In determining the existence of probable cause,
18 the facts regarding the viewpoint of the party prosecuting.
19 The question is not what the actual facts were, but what he
20 honestly believed them to be, and that is in the Law case
21 citing the Eaves case, which we think is applicable to this
22 case right there. I think it at least emphasizes to the
23 jury it's not what we all know today. It's, it's what was,
24 what was relevant at that time.

25 THE COURT: All right. But you're really just looking

1 for one---

2 MR. SMITH: One sentence.

3 THE COURT: For jury charge number two, but---

4 MR. SMITH: Yeah.

5 THE COURT: ---jury charge number one, I agree with you
6 that that should be charged and I'm happy to add that.

7 But that's all you're wanting from that?

8 MR. SMITH: Actually---

9 THE COURT: Okay.

10 MR. SMITH: Yes, sir.

11 THE COURT: And then the one sentence under number two?

12 MR. SMITH: Yes.

13 THE COURT: I'll do that for you. That's not a
14 problem.

15 I'll be doing that while he's giving his reply and I'll
16 email to you if that's okay. You can print me out a new
17 form sheet. I'll tell you which pages I'll need you to
18 print and that's all there.

19 All right. Let's bring the jury in please.

20 Mr. Hawkins, I need you to talk for at least ten
21 minutes.

22 MR. HAWKINS: Yes, Your Honor.

23 MR. ROZELSKY: But no longer.

24 (WHEREUPON, the following takes place within the
25 presence of the jury.)

1 THE COURT: Let the record reflect that the jury is
2 back and seated.

3 Mr. Hawkins, your reply, sir.

4 MR. HAWKINS: Thank you, Your Honor.

5 Because I, because we have the burden of proof, I get
6 the last chance to talk with you. It won't be as, as long
7 or involved as last time. But I just wanted to say -- I'll
8 start first by talking about Mr. Smith's comments and then
9 I'll go to Mr. Rozelsky's comments.

10 Mr. Smith, I'm, I'm glad he's sorry this happened to
11 Mr. Solanki. I almost shed a tear. Right after he told you
12 how guilty Mr. Solanki was, he said that he's sorry that it
13 happened to Mr. Solanki. And, of course, Mrs. Cashion said
14 she thought he ought to be in jail, and had no problem with
15 anything that happened.

16 So, you have to take what they say, you know, and
17 challenge it a little bit.

18 Are they really sorry what happened to them or are they
19 sorry that they've been dragged into all this?

20 I think it's sorry that they got drug into all this.

21 But I'm, but I'm glad he's sorry. I really am. I
22 hope, I hope he really is.

23 You heard a lot from Mr. Smith about Judge Pasley and
24 about the Grand Jury. I think you can figure out if they,
25 if, from a legal standpoint, they control this question of

1 probable cause, you wouldn't even have it. You would not
2 even have it. You wouldn't even get to decide it. It
3 wouldn't even come to you.

4 You are not bound by one iota by what the Grand Jury
5 did or what the magistrate judge did. That is considered
6 what they call, in Latin, prima facia evidence, and that's a
7 fancy word for meaning on its face. So, you look at
8 something, and on its face it's a certain way, but then you
9 pick it up, you turn it over, oh, it's some other way or you
10 examine it from the side. That's all that means, prima
11 facia.

12 Mr. Smith would love for you to have the warrant and
13 the Grand Jury indictment and that to be the end of the
14 question as far as his client goes. But the law doesn't
15 work like that, ladies and gentlemen.

16 what you're gonna hear is you're gonna hear about the
17 warrant, and you're gonna hear about the indictment from the
18 judge, and the prima facia, and just please understand you
19 are not bound by it one bit.

20 what you are bound by is your oath as jurors to
21 determine whether or not Mrs. Cashion had probable cause at
22 the time she sought the warrant in this case on the 3rd when
23 she rushed to judgment and she ignored all the things that
24 I've already been through with you.

25 Mr. Smith talks about that I picked on her for what she

1 did and didn't do. Well, that's pretty important, what she
2 didn't do. It's a fair question to ask.

3 I mean we can look at what she did do. She did look at
4 the video. She did look at the receipts. She did look at
5 her receipts signed by Prakash Solanki which indicated that
6 he was an innocent man, and she went ahead and proceeded to
7 get a warrant based on that.

8 But it is very very relevant what she didn't do as an
9 investigating officer, and I do question what she didn't do.
10 I do wish that she had taken some extra steps that, I think,
11 any citizen would like her to afford, and all we're asking
12 you, when we put documents up there that are a year later or
13 whatever, that's just to show you, I'm sorry, that's just to
14 show you how messed up this whole transaction was.

15 But the only thing you need to look at, when it comes
16 to determining probable cause, is what Mrs. Cashion had
17 before her. She had plenty of things before her that should
18 of told her she didn't have probable cause in this case.

19 If, if what Mr. Smith is saying is correct, if that, if
20 the, what she had and the way she conducted this
21 investigation was probable cause, do you mind telling me who
22 can't be arrested?

23 Anybody could.

24 Probable cause essentially is meaningless then. If
25 what he's saying is because she thought that my client was

1 guilty, that's, that's probable cause, just the fact that
2 she thought.

3 He also said that the only, and I want to make sure
4 that I read it because I want to quote him, the only
5 evidence that really mattered was the video. That's what he
6 said. And we know Mr. Smith loves that video. We know that
7 Mr. Smith has a theory of that video of Mr. Solanki pulling
8 off some kind of elaborate crime.

9 We know that Mr. Smith may be the only one in the world
10 that understands his theory. I've been dealing with this
11 case for a long time. I still don't understand what his
12 theory is as to how Mr. Solanki pulled the crime off. If,
13 if he pulled this out of his pocket and put his hands in
14 here, and he got out his wallet and he unzipped it, when I
15 look at the tape, I see an older gentleman fiddling around
16 with his, with his belongings at the self-checkout line on
17 Black Friday.

18 I do not see some kind of master mind, slight of hand,
19 shell game like he would have you believe. And what's
20 really interesting is they've sat right next to each other
21 the whole time, Mr. Smith and Mrs. Cashion. You would think
22 if Mr. Smith had a theory about how this whole thing was
23 pulled off, which I don't think any of us understand, he
24 would of shared it with Mrs. Cashion or Mrs. Cashion would
25 of shared it with him, and she would of been able to tell

1 you. But when she watches the video, she, all she just says
2 is I really don't know what is going on. I don't know how
3 the crime happened.

4 when she made that testimony that I don't know how the
5 crime happened from what she sees on the video, that is an
6 admission from her that the video did not matter, that it
7 was not relevant because she can't draw any evidence from
8 the video if she doesn't know or have even a theory as to
9 how this supposedly happened.

10 Mrs. Cashion, again, I'm, I'm certain is a very nice
11 person, and I don't have anything bad to say about her. I
12 just am disappointed that, as a public officer holding an
13 office of public trust, that she would of conducted such a,
14 such a poor investigation and then I'm disappointed that
15 when she's on the stand she won't admit certain things that
16 you and I all know are absolutely true like that, that two
17 people could most likely not have used the card in the short
18 period of time or that there was a PIN on the swipe machine
19 at check-out Register Number 44, which you could see and I
20 can see. When we zoomed in on it she said I don't know what
21 that is.

22 So defensive, dug her heels in, and said I'm a hundred
23 percent sure this man is guilty. Nothing could ever shake
24 me from my belief. I never considered that he was innocent.
25 She's dug in. Mr. Smith is dug in. The county's dug in,

1 and we got probable cause, and the magistrate signed the
2 warrant, and the Grand Jury gave the indictment, and we, we
3 didn't do anything wrong.

4 Well, come on. I mean nobody's above being looked at
5 and examined, in retrospect, especially public officials
6 who, you know, who take the -- you know, public officials
7 who are paid with tax payers dollars. It's okay to look
8 back at what they did and examine it, and that's all we been
9 doing in this trial.

10 So, I don't think there's any question that there was
11 no probable cause here when you examine all these, these
12 things in the light of day with the mind to what Mr. Cashion
13 was looking at at the time. She worked there for 18-years.
14 She's, she's -- he says she's a good investigator. Fine,
15 I'll accept all that. But she should of done a better job.
16 She should of done a better job. If she was such a good
17 investigator, she should of done better.

18 The one thing, the one thing that blows them out of the
19 water on probable cause is two fraudulent charges, one at
20 Wal-Mart, one at Murphy's, and she didn't even check out the
21 one at Murphy's. She didn't even check it out, and it would
22 of taken her a short time to do. It wouldn't have been any
23 big deal for her to do it and she didn't do it.

24 Blows probable cause out of the water, that one thing.
25 We talked about the people at the register. Ryan

1 Smalls and the CSM, Sharon Abbott, and Mr. Solanki. What's
2 interesting is that they ruled out Ryan Smalls without even
3 questioning him, and they had him able to question.

4 So, she could of talked to Ryan Smalls. They had
5 Sharon Abbott there. They could of talked to Sharon Abbott,
6 but they didn't even do that. They saw this gentleman here
7 on a tape and they saw his signature and he's the one that
8 they singled out.

9 So, if it were three people there when the transaction
10 were keyed in, why pick him?

11 Now, I want you to use your common sense.

12 Why pick him?

13 Why jump to a conclusion so quickly that this man that
14 they saw on the tape was guilty of a crime?

15 Ask yourself why they picked him, why they didn't
16 question Ryan, why they didn't question Sharon.

17 Why jump to him?

18 Let me talk now about Wal-Mart. Mr. Rozelsky told you
19 a story about him being the victim of credit card fraud, and
20 that his -- and I am sorry for him that he was. But he said
21 the prosecutor didn't want to prosecute the crime, and he
22 said -- I guess he was trying to make the point of what do
23 people want.

24 Do they want nothing to be prosecuted?

25 That's what these people were trying to do is just

1 prosecute a crime.

2 Mr. Rozelsky, what people want is the police to do
3 their job, to have a happy -- let's have a happy middle
4 ground.

5 Okay. Let's just prosecute people that we have the
6 evidence on.

7 Can we agree on that?

8 If we agree on that we're getting somewhere. We don't
9 need to go to extremes and say we're not gonna prosecute
10 anybody or we're gonna prosecute everybody on the smallest
11 amount of evidence just cause it happened to be near the
12 transaction at the time it went down. We don't need to do
13 that.

14 He said something interesting and then he kind of
15 caught himself. But it was the first thing out of his
16 mouth. He said I don't care what Gina Cashion did. Well,
17 then he kind of corrected himself.

18 But the point is, you don't get the sense that Wal-Mart
19 really cares about what happened to Mr. Solanki because,
20 number one, they've accused him of being a criminal when I
21 asked them about that. The request to admit that I put up
22 there, I didn't make those up. That's Wal-Mart's own words.
23 He says now well we just wrote denied because he didn't
24 know.

25 well, believe me, if Wal-Mart had wanted to say we

1 don't know, they could of used the words that said denied on
2 lack of information or belief. There's ways they could of
3 said we don't know. They didn't say that. They said denied
4 because they truly, truly, truly have treated him as if he
5 were a criminal all the way through this in the sense that
6 they have constantly, constantly, constantly -- that's been
7 their defense. He did it. That's their defense.

8 So, again, I challenged my friend, Mr. Rozelsky, I said
9 please come up here and tell the jury and do this man the
10 dignity of saying you were guilty or you're innocent. If
11 you believe he's innocent, tell him. If you believe he's
12 guilty, tell him. But Wal-Mart won't take the position.

13 But what Wal-Mart wants you to take the position on is
14 that Wal-Mart is a simple bystander. We had nothing to do
15 with this, Wal-Mart says, even though the transaction
16 happened in our store, at our register, handled by our
17 employees, using our equipment and our computer systems, all
18 we did was cooperate with the police. We didn't mean any
19 harm against Mr. Solanki.

20 Well, ladies and gentlemen, if you believe that Mr.
21 Solanki did not have Robin Martin's credit card, that
22 everything that followed from, from what happened in that
23 transaction register, everything, circumstantial evidence
24 that I'm talking about here is the result of Wal-Mart's
25 gross negligence, a major, major screw up.

1 I don't know that anybody in here can tell me the last
2 time in the last ten years where you've seen this kind of
3 thing. It just does not happen in merchant, with merchants
4 where people are swiping credit cards over pieces of paper
5 and then put in the drawer, and then Mr. Solanki says it was
6 in blank. I think I showed you where we think it was in
7 blank based on the timing of everything.

8 That just doesn't happen. So I mean you don't have
9 employees getting ID's and doing imprints. It was a grossly
10 negligently handled transaction on the part of Wal-Mart, and
11 then when the police came calling, Wal-Mart, like Pontius
12 Pilate, washed their hands of the whole thing.

13 Here's the video. Here's the receipts. We're out of
14 it even though everything happened in their store, even
15 though Mr. Solanki is a good customer, and Mr. Rozelsky says
16 well, he's not really damaged. He still loves Wal-Mart.
17 He's a good man, and he wants to shop.

18 Mr. Rozelsky says he went in the day after this
19 happened. Well, he hadn't been locked up then. He got
20 locked up later, and he didn't go to Wal-Mart while he was
21 in jail for six days. And yes, he's gone back since then.
22 But don't get me wrong, I can speak on behalf of Mr.
23 Solanki, he wants you, and he's asking you to render a
24 verdict and to do justice in this case, and to bring about
25 justice for him and what happened to him at the hands of

1 Wal-Mart and the Sheriff's Department.

2 You're gonna get a form, a verdict form, from the judge
3 to take back with you, and there's some boxes on there or
4 some questions, and they'll ask you things like you find for
5 the plaintiff on their cause of action against the sheriff.
6 Do you find for the plaintiff on cause of action against
7 Wal-Mart. It has a part in there that says negligence as
8 far as was Mr. Solanki partially negligent for what happened
9 to him.

10 Now, that, to me, that is a question that is outside of
11 the realm of any understanding of how Mr. Solanki is
12 negligent. If he committed this crime, well then obviously
13 he's beyond negligent. But if he didn't commit this, he's
14 done nothing wrong.

15 The only thing they can point to that he's somehow
16 negligent in this whole process is he didn't rush to the
17 police to, to give his side of the story. Now, that flies
18 in the face of America right there if that's the kind of
19 standard we're gonna set people up.

20 So, I just wanted you to understand the part about the
21 percentages of negligence versus Mr. Solanki versus, versus
22 Wal-Mart.

23 And, again, we're asking you to do justice for this
24 man. We believe we've shown you, beyond any question, that
25 he didn't use Mrs. Martin's credit card on this day, that he

1 is the victim of gross negligence by wal-Mart, he's the
2 victim of false imprisonment by the Sheriff's Department,
3 and it's a serious thing when sometimes people don't do
4 their jobs and things follow from that there are very very
5 tragic.

6 And, again, I would remind you one last time, wal-Mart
7 is a very large company. You have to decide, using your
8 common sense, 12 of you actually have the power, when you go
9 back there, to send wal-Mart a message, if you choose to do
10 so, and you will not, members of the jury, send them any
11 kind of message that they'll remember unless you speak very
12 loudly with the verdict form that you send back to the
13 judge.

14 Thank you.

15 THE COURT: All right. Thank you, Mr. Hawkins.

16 All right. Ladies and gentlemen of the jury, it now
17 becomes my responsibility to charge you on the law that
18 applies in this particular case, and the way that this was
19 done 20-years ago and even, even today, traditionally the
20 way it's done is that the judge would sit up here and read
21 you about 15, 16, 20-pages of, of the law that applies, and
22 you're suppose to be able to be like a sponge and absorb all
23 of that and instantly apply it to the facts in this
24 particular case.

25 I've always found it unreasonable that, and I've always

1 found it a little bit unreasonable to expect a jury to
2 absorb, in 15-minutes, what it took me three years to learn
3 and I'm still learning after 20-years of practicing.

4 what I'll telling you, ladies and gentlemen, is I'm
5 gonna send a copy of these instructions back with you to the
6 jury room. You can consult, you can consult them if you
7 need to.

8 I'll tell you to take the instructions as a whole.
9 Don't obviously pay attention to one part and ignore the
10 other part of these instructions, and certainly, if you have
11 any questions during the course of your deliberations,
12 simply write that question on a sheet of paper, send it to
13 the bailiff, and I will make -- I will endeavor to answer
14 that question or to assist you in anyway I possibly can.

15 Now, ladies and gentlemen, you will also have the
16 exhibits back in the jury room once you retire for your
17 deliberations. The one exhibit that you won't have will be
18 the, the video. If you have a need to see that video again,
19 just send out a note and let us know and we'll boot it up on
20 the projector again and let you see.

21 The only reason we don't send that back with you is we
22 don't have the capability back there to play it for you.
23 So, there's no point in giving you a DVD that you can't
24 actually play.

25 Now, Mr. Foreman, ladies and gentlemen of the jury, I

1 remind you that, during this trial, you and I have certain
2 duties to perform. As the trial judge, it's my
3 responsibility to preside over the trial of this case, and I
4 also have the duty to rule on the admissibility of the
5 evidence offered during this trial.

6 If there was any testimony ordered stricken from the
7 record during this trial, you must disregard that testimony.
8 You're to consider only the testimony which is been
9 presented from the witness stand, any exhibits which have
10 been made a part of this record in the case, any
11 stipulations of counsel, and any matter which the Court has
12 taken judicial notice of.

13 I have the additional duty to charge you the law
14 applicable to this case. It's your duty, as jurors, to
15 accept and apply the law as I now state it to you. If you
16 think you have any idea as to what the law is or what the
17 law ought to be and it does not, it does not agree with what
18 I tell you the law is, you must forget that idea because
19 you're sworn to accept and apply the law exactly as I state
20 it to you now.

21 In every case tried in this Court before a jury, the
22 jury becomes the sole and exclusive judge of the facts in a
23 case.

24 Excuse me.

25 A trial judge can not comment on or make any statement

1 about the facts in a case. Since you are the sole judges of
2 the facts, please do not think, by anything I've said during
3 this trial, that I have any opinion concerning the facts in
4 this case.

5 Ladies and gentlemen, the law simply does not permit me
6 to have any opinion about the facts.

7 Now, ladies and gentlemen, the burden of proof in this
8 case is by a preponderance of the evidence. A preponderance
9 of the evidence simply means the greater weight of the
10 evidence. It's evidence which, as a whole, shows you that
11 the facts sought to be proven is more likely true than not
12 true.

13 This can best be illustrated by imagining a set of
14 scales. When the case begins, the scales are even. After
15 all the evidence has been presented, if the scales remain
16 even, or if they tip ever so slightly in favor of the
17 defendant or one of defendants, then the plaintiff has
18 failed to meet the burden of proof and would not be entitled
19 to recover in this case. If, on the other hand, the scales
20 tip ever so slightly in favor of the plaintiff, the
21 plaintiff will have met his burden of proof, and you should
22 return a verdict for the plaintiff.

23 The preponderance of the evidence, ladies and
24 gentlemen, is not determined by the number of witness
25 called, witnesses called to testify. Instead it must be

1 determined by the greater weight of all the evidence.

2 Now, ladies and gentlemen, there are two types of
3 evidence generally presented during a trial, direct evidence
4 and circumstantial evidence.

5 Direct evidence is the testimony of a person who claims
6 to have actual knowledge of a fact such as an eye witness.
7 It's evidence which immediately establishes the main fact to
8 be proved.

9 Circumstantial evidence is proof of a chain of facts
10 and circumstances indicating the existence of a fact. It is
11 evidence which immediately establishes collateral facts from
12 which the main fact may be inferred. Circumstantial
13 evidence is based on inference and not on personal knowledge
14 or observation. It is proof that does not actually
15 establish the fact in question, but that asserts or
16 describes something else from which you may either
17 reasonably infer the truth of the fact or at least
18 reasonably infer an increase in the probability that the
19 fact is true.

20 For circumstantial evidence to be sufficient to warrant
21 the finding of a fact, the circumstances must lead to the
22 fact with reasonable certainty. The facts and circumstances
23 should be considered in light of ordinary experience and
24 common sense, ladies and gentlemen. The existence of a fact
25 can not be based on speculation, surmise, or conjecture.

1 Now, the law makes absolutely no distinction between
2 the weight or the value to be given to either direct or
3 circumstantial evidence nor is a greater degree of certainty
4 required of circumstantial evidence than of direct evidence.

5 Ladies and gentlemen, necessarily you must determine
6 the credibility of witnesses who have testified in this
7 case. Credibility simply means believability. It becomes
8 your duty, as jurors, to evaluate the evidence and determine
9 which evidence convinces you it is true.

10 In determining the believability of witnesses who have
11 testified in the case, you may believe one witness over
12 several witnesses or several witnesses over one witness.
13 You may believe a part of the testimony of a witness and
14 reject the remaining part of the testimony of that same
15 witness. You may believe the testimony of the witness in
16 its entirety or reject the testimony of a witness in its
17 entirety.

18 You may consider whether the witness has an interest in
19 the result of the trial, whether the witness is prejudiced
20 towards either the plaintiff or the defendants, the
21 opportunity for the witness to have seen the matters and
22 things about which the witness may testify, and the way the
23 witness acts on the witness stand.

24 Now, ladies and gentlemen, in this case the plaintiff
25 has alleged a cause of action of false imprisonment with

1 regard to the Sheriff's Department. I'll now explain that
2 cause of action to you.

3 The plaintiff claims that the Spartanburg Sheriff's
4 Department falsely imprisoned the plaintiff. False
5 imprisonment is the deprivation of a person's liberty
6 without lawful justification.

7 In order to recover for false imprisonment, the
8 plaintiff must prove, by preponderance or a greater weight
9 of the evidence, that the defendant restrained the
10 plaintiff, that the restraint was intentional, and that the
11 restraint was unlawful.

12 False imprisonment may be committed by words and/or
13 acts which the plaintiff was afraid to disregard. It's not
14 necessary that the plaintiff be confined within a prison or
15 within the walls or that he be assaulted or even touched nor
16 is it necessary that force be used nor is it necessary that
17 any injury be done to the plaintiff's body, character, or
18 reputation, nor is it necessary that the wrongful act be
19 committed with malice or ill will or even with the slightest
20 wrongful intention.

21 False imprisonment may result from a false arrest or
22 from a lawful arrest in which there was a detention or delay
23 beyond a reasonable time in which to make an investigation.
24 False arrest is an arrest made without probable cause. For
25 example, if probable cause existed to believe that a theft

1 had occurred, then it could not be a false arrest.

2 Probable cause, ladies and gentlemen, is a good faith
3 belief that the plaintiff is guilty of a crime where the
4 belief rests on grounds that would make an ordinarily
5 prudent and cautious person, under the circumstances,
6 believe that a crime had been committed. Probable cause is
7 something more than mere suspicion of guilt of the
8 plaintiff. Therefore, an arrest made on a hunch or a mere
9 belief or a guess unsupported by facts, circumstances, or
10 credible information pointing to the guilt of the plaintiff
11 can not be justified as having been made on probable cause.
12 Probable cause may be found somewhere between suspicion and
13 sufficient evidence to convict.

14 In determining whether or not there was probable cause
15 for an arrest, the probability can not be technical, but
16 must be based on, upon factual and practical considerations
17 of every day life on which reasonably, sorry, on which
18 reasonable, prudent, and cautious people act.

19 Probable cause may exist even though there may be some
20 room for doubt. A true bill indictment is prima facie
21 evidence that probable cause existed, and you may consider
22 this evidence in light of the other competent evidence
23 presented in deciding whether probable cause to arrest
24 existed in this case. In addition, the fact that the
25 plaintiff may of been found not guilty of the crime for

1 which the arrest was made does not mean that there was no
2 probable cause for the arrest.

3 Ladies and gentlemen, furthermore, all proceedings
4 before magistrates in criminal cases, the law states it
5 shall be commenced on information under oath plainly and
6 substantially setting forth the offense charged upon which
7 and only which shall a warrant of arrest issue. A warrant
8 affidavit that is insufficient in itself to establish
9 probable cause may be supplemented before a magistrate by
10 sworn oral testimony. In establishing probable cause, the
11 facts must be regarded from the point of view of the
12 prosecuting party. The question is not what the actual
13 facts were, but what the prosecuting party honestly believed
14 them to be.

15 If the Spartanburg Sheriff's Department was legally
16 justified in restraining the plaintiff, ladies and
17 gentlemen, that is if you find that there was probable cause
18 for the arrest, there is no false imprisonment and you
19 should return a verdict for the Sheriff's Department on the
20 false imprisonment cause of action.

21 Now, ladies and gentlemen, the plaintiff also alleges a
22 cause of action for malicious prosecution against the
23 Sheriff's Department that I'll explain to you just now. The
24 plaintiff claims that the defendant is guilty of malicious
25 prosecution. An action for malicious prosecution protects

1 an individual's interest in being free from unjustified
2 litigation and the resulting injury to reputation, financial
3 expense, and interference with property.

4 In order to recover, in order to recover in an action
5 for malicious prosecution, the plaintiff must prove, by a
6 preponderance or a greater weight of the evidence, the
7 following elements:

8 First, the plaintiff must prove that civil or criminal
9 judicial proceedings against the plaintiff were begun or
10 continued. The plaintiff must also prove that the
11 proceedings were begun or continued by the defendant or at
12 the defendant, Sheriff's Department's request.

13 Next, the plaintiff must prove that the prosecution has
14 ended in the plaintiff's favor and can not be reinstated or
15 further maintained without beginning a new proceeding.

16 The plaintiff must further prove that the defendant
17 acted with malice in instituting or continuing the
18 proceedings. Malice may be either -- malice may either be
19 expressed or implied. Malice, in a case of this kind, is a
20 deliberate purpose to injure another without any just cause
21 or excuse.

22 However, malice does not require that the act be
23 motivated by personal ill will. Malice is a willful
24 intention to do a, to do a -- let me repeat that. Malice is
25 a willful intention to wrong another unjustly. It may be

1 inferred from the circumstances of the case or it may be
2 inferred from a prosecution that is commenced without
3 probable cause.

4 Next the plaintiff must prove that the defendant lacked
5 probable cause in instituting or continuing the action. In
6 determining whether probable cause existed, you should focus
7 on whether the defendant had reasonable cause to believe
8 that the plaintiff committed the act about which the
9 complaint was made and not whether the plaintiff was
10 actually guilty or innocent. Probable cause is determined
11 by the facts and circumstances present in the mind of the
12 defendant, Sheriff's Department, at the time of the
13 institution or continuation of the proceedings. Not by any
14 later events.

15 A true billed indictment again, ladies and gentlemen,
16 is prima facie evidence that probable cause existed and you
17 may consider this evidence in light of the other competent
18 evidence presented in deciding whether the probable cause
19 existed to arrest.

20 If the facts and circumstances would lead a person of
21 ordinary intelligence, caution, and prudence, acting
22 conscientiously, fairly and without prejudice, to believe
23 that the plaintiff was guilty, that would be probable cause.
24 Probable cause is something more than suspicion.

25 Finally, the plaintiff must prove that the injury or

1 damage resulted from the proceedings instituted against the
2 plaintiff. The plaintiff may recover those damages which
3 are direct, natural, and proximate result of the prosecution
4 by the defendant.

5 Damages which may be awarded include a loss of time
6 from work, deprivation of liberty, and any circumstances of
7 aggravation such as injury to reputation, character, health,
8 mental, and/or physical pain and suffering, general
9 impairment of social and mercantile standing, fright,
10 nervous, nervousness, and dignity, humiliation,
11 embarrassment, hardship, discomfort, bodily pain, and mental
12 anguish. Damages may also include expenses such as the
13 amount of attorneys fees paid in defending the prosecution.

14 You're not required to award the amount of damages
15 requested by the parties. Instead, you should award those
16 damages which you find the evidence has shown that the
17 plaintiff has suffered or will suffer as a proximate result
18 of the defendant, Sheriff's Department, conduct.

19 Now, ladies and gentlemen, as to the defendant in this
20 case, Defendant Wal-Mart, the plaintiff alleges causes of
21 action, a cause of action for negligence, and I'll explain
22 that to you.

23 Ladies and gentlemen, first of all, in our courts, I'll
24 charge you that no distinction is made between corporations
25 and individuals. In the eyes of the law, a corporation is

1 entitled to the same fair and impartial consideration and to
2 justice by the same, same legal standards as is an
3 individual.

4 The plaintiff claims that the defendant was negligent
5 and should compensate the plaintiff for the injuries the
6 plaintiff suffered as a result of the defendant's
7 negligence. In order to prove that the defendant was
8 negligent, the plaintiff must prove, by a preponderance or
9 greater weight of the evidence, the following things:

10 First of all, the plaintiff must prove, by
11 preponderance of the evidence, that the defendant owed the
12 plaintiff a duty of care. Now, ladies and gentlemen, this
13 is a question of law and I've concluded that Wal-Mart does,
14 in fact, owe the plaintiff a duty. Accordingly, you must
15 then decide the remaining questions.

16 The first of these questions is whether the plaintiff
17 has proven, by preponderance of the evidence, that the
18 defendant breached the duty of care by a negligent act or
19 omission.

20 Negligence, ladies and gentlemen, simply means that a
21 person has done something that a reasonable person would not
22 have done or has failed to do something that a reasonable
23 person would have done in the same situation. The plaintiff
24 must also prove, by a preponderance of the evidence, that he
25 suffered damages as a result of the defendant's breach of

1 duty.

2 Finally, the plaintiff must prove, by a preponderance
3 or greater weight of the evidence, that the damages suffered
4 were proximately caused by the defendant's breach of duty.
5 Proximate cause is something that produces a natural chain
6 of events which, in the end, brings about the injury. It's
7 the direct cause of the injury.

8 To prove that the defendant's negligence proximately
9 caused the plaintiff's injury, the plaintiff must first
10 prove causation in fact. This is proven by showing that the
11 injury would not have occurred but for the defendant
12 Wal-Mart's negligence.

13 The plaintiff must also prove legal cause. Legal cause
14 is proven by showing that the injury was foreseeable. This
15 means that the injury occurred as a natural and probable
16 consequence of the defendant's negligence. The plaintiff
17 must prove some injury from the defendant's negligence was
18 foreseeable, but that, but does not have to prove that the
19 particular injury that occurred was foreseeable. However,
20 the defendant can not be held responsible for things which
21 could not be expected to happen.

22 Proximate cause does not mean the only cause. The
23 defendant's act can be a proximate cause of the plaintiff's
24 injury if it was at least one of the direct concurring
25 causes of the injury.

1 Now, ladies and gentlemen, with respect to damages, I
2 charge you that if you decide that the plaintiff is entitled
3 to a verdict with regard to the causes of action, your next
4 step would be to decide how much money the defendants should
5 be required to pay. I charge you that actual damages are to
6 compensate the plaintiff for the plaintiff's injuries or
7 loss and to put the plaintiff as near as possible in the
8 same position that the plaintiff was in before the incident
9 occurred.

10 In other words, actual damages would be the actual
11 losses suffered and expenses which the plaintiff has
12 suffered because of the defendant's negligence. Pain and
13 suffering, ladies and gentlemen, compensates the plaintiff
14 for physical discomfort and emotional response to the
15 sensation of pain caused by the injury itself.

16 Now, there's no definite standard by which to
17 compensate the plaintiff for pain and suffering. You have
18 the authority to determine the amount, if any, to be allowed
19 for pain and suffering using calm and reasonable judgment to
20 ensure that the damages are just and reasonable in light of
21 the testimony and evidence presented in this case.

22 Additionally, ladies and gentlemen, I charge you that
23 an element of damages could be loss of enjoyment of life.
24 Loss of enjoyment of life compensates the plaintiff for
25 limitations on the plaintiff's ability to participate in and

1 to derive pleasure from the normal activities of daily life.

2 Additionally, mental suffering may be an element of his
3 damages or may be part of the plaintiff's damages. Mental
4 suffering, apprehension, shock, fright, emotional upset,
5 humiliation, and anxiety, either present or expected in the
6 future, can be properly considered as an element of damages.
7 The exact amount of damages for mental suffering can not be
8 exactly measured.

9 Now, ladies and gentlemen, in this case the defendant,
10 wal-Mart, claims that the plaintiff's own negligence
11 proximately caused the plaintiff's injuries. If you find
12 the defendant was negligent, you must then decide whether
13 the plaintiff was negligent. Sorry. If you -- if you find
14 that the defendant was negligent, you must then decide
15 whether the plaintiff was negligent.

16 The defendant must prove, by a preponderance or a
17 greater weight of the evidence, that the plaintiff breached
18 a duty of care which proximately caused the plaintiff's
19 injuries. The same laws which I have told you to use in
20 deciding whether the defendant, wal-Mart, was negligent
21 should be used in deciding whether the plaintiff in this
22 case was negligent.

23 If you find that the negligence of both the plaintiff
24 and the defendant proximately caused the plaintiff's
25 injuries, you must then decide how much the negligence of

1 the plaintiff contributed to the plaintiff's injuries and
2 how much the defendant's negligence contributed to the
3 plaintiff's injuries.

4 In deciding the percentage of negligence of the
5 plaintiff and the defendant, you may consider, among other
6 things, the following factors, some of which may apply, all
7 of which may not apply:

8 First of all, whether each party's conduct was only
9 inadvertent or whether it was engaged in with an awareness
10 of the danger involved.

11 Secondly, the magnitude of the risk created by each
12 party's conduct including the numbers of persons endangered
13 and the possible severity of the injury.

14 Third, the significance of the goal that each party was
15 trying to reach and the need to achieve the goal in that
16 matter, in that manner.

17 Fourth, each party's capabilities and abilities to
18 realize and eliminate the risk involved.

19 Fifth, the, the particular circumstances confronting
20 each party at the time the conduct occurred such as the
21 existence of an emergency requiring a quick decision.

22 Sixth, the relative closeness of the causal, of the
23 causal relationship of the negligent conduct of the
24 defendant and the harm to the plaintiff.

25 Seven, and seven, whether the conduct of either party

1 involved a violation of a safety, statute, or regulation.

2 If you find that the negligence of both the plaintiff
3 and the defendant proximately caused the plaintiff's injury,
4 you must then decide how much the negligence of the
5 plaintiff contributed to the plaintiff's injuries and how
6 much the defendant's negligence contributed to the
7 plaintiff's injuries. In deciding the percentages of
8 negligence of the plaintiff and the defendant, you may
9 consider, among other things, the following factors:

10 wait a second.

11 I'm repeating myself, aren't I?

12 I got two 13's. Excellent.

13 How did that happen?

14 All right. Very good.

15 I had to print this off twice and I had some
16 corrections to make.

17 All right. We're on Page 14 now. We're almost done.

18 All right. Now, ladies and gentlemen, I'll give you
19 written questions on a special verdict form for you to use
20 in reaching your deliberations.

21 Does counsel for the plaintiff happen to have that
22 verdict form by any chance or did you give that back to me?

23 I might need that.

24 Thank you, Mr. Rollins. Thank you, sir.

25 Now, this form will have spaces for you to write your

1 decisions about the percentage of negligence, if any, of
2 both parties which proximately caused the plaintiff's
3 injuries, and question four on the verdict form asked you to
4 decide whether defendant, Wal-Mart, was negligent, and, if
5 so, whether the defendant's negligence was the proximate
6 cause of the plaintiff's injury.

7 Question five asked the same question about any
8 negligence by the plaintiff.

9 Question six then asked you to decide the percentage of
10 each party's negligence which proximately caused the
11 plaintiff's injuries. The percentages have to add up to a
12 hundred percent.

13 Now, ladies and gentlemen, if the plaintiff's
14 negligence was greater than that of the defendant, Wal-Mart,
15 the plaintiff would not be entitled to any damages and your
16 verdict would be for the defendant, Wal-Mart. If, however,
17 you find that the plaintiff's negligence was equal to or
18 less than the defendant's negligence, you would answer
19 question seven which asks you to determine the total amount
20 of damages suffered by the plaintiff.

21 Now, ladies and gentlemen, on question seven, don't
22 reduce the plaintiff's total damages based upon the
23 percentages of negligence of any party. After you have
24 answered the questions, I'll compute the amount of damages
25 for which the defendant is responsible based on the

1 percentage of the defendant's negligence which you have
2 decided proximately caused the plaintiff's injuries. You're
3 to determine only the total amount of the plaintiff's
4 damages and enter that figure on the verdict form.

5 Additionally, ladies and gentlemen, the plaintiff, in
6 this case, alleges that they are entitled to punitive,
7 punitive damages to Wal-Mart. If you award actual damages
8 against Wal-Mart, you may also consider an award of punitive
9 damages.

10 Punitive damages are intended to punish the defendant
11 for extraordinary and outrageous misconduct and to prevent
12 the defendant and others from committing similar acts in the
13 future. Punitive damages can only be awarded when the
14 conduct of the defendant has been some, something more than
15 merely negligent. The evidence must establish the
16 defendant's act were reckless, willful, and wanton meaning
17 there was a conscious failure to exercise due care or a
18 conscious indifference to the rights and safety of others or
19 a conscious, conscious disregard, or sorry, or a reckless
20 disregard thereof.

21 If you find that the defendant's conduct was willful,
22 wanton, or reckless, you may award the plaintiff punitive
23 damages. To support an award of punitive damages, the
24 plaintiff must prove, by clear and convincing evidence, that
25 the conduct complained of included a consciousness of

1 wrongdoing at the time of the conduct.

2 Now, ladies and gentlemen, clear and convincing
3 evidence is more than just a preponderance or a greater
4 weight of the evidence which requires only proof which
5 persuades you that a party's claim is more likely true than
6 not true. On the other hand, clear and convincing proof is
7 not as high a standard as the burden of proof in criminal
8 cases, which is proof beyond a reasonable doubt.

9 Clear and convincing proof leaves no substantial doubt
10 in your mind. It means that the evidence is not ambiguous,
11 doubtful, equivocal, or contradictory.

12 Convincing means persuading by proof or argument
13 causing one to believe in the truth of what is asserted.

14 Clear and convincing proof establishes in your mind not
15 only that the fact is probable, but that it is highly
16 probable.

17 Before awarding punitive damages you must consider and
18 weigh four elements which may be pertinent to the facts of
19 this case. You must first consider the relationship between
20 any punitive damages award and the harm caused. Any penalty
21 imposed should take into account the reprehensibility of the
22 conduct, the harm caused, the defendant's awareness of the
23 conduct's wrongfulness, the duration of the conduct, and any
24 concealment.

25 Thus, any penalty imposed should bear a relationship to

1 the nature, nature and extent of the conduct and the harm
2 caused including the compensatory damage award made by you.

3 Secondly, any penalty imposed should take into account,
4 as a mitigating factor, any other penalty that may have been
5 imposed or which may be imposed for the conduct involved
6 including any criminal or civil penalty or any other
7 punitive damages award arising out of the same conduct.

8 Next, you should consider whether the award of, whether
9 the award of and the amount of any punitive damages award
10 made deprive the defendant of any profits derived from the
11 improper conduct, and whether the ill gotten profits should
12 be properly awarded to the plaintiff. Finally, any award of
13 punitive damages must be limited to punishment and thus may
14 not may, may not effect economic bankruptcy.

15 To this end, the defendant's ability to pay any
16 punitive damages award should be considered. However, the
17 economic bankruptcy factor is not an absolute bar to an
18 award of punitive damages.

19 Now, again, ladies and gentlemen, I've prepared this
20 verdict form to help guide your deliberations.

21 If you have any questions about this, Mr. Foreman,
22 please let me know. But it should be fairly
23 self-explanatory.

24 The first question, and I'll go through the first three
25 questions because I've already explained in the general

1 charge to you about the causes of action concerning
2 Wal-Mart, but the first three questions concern the causes
3 of action against the Sheriff's Department. The first
4 question is a simple statement. We, the jury, on the cause
5 of action against the Spartanburg Sheriff's Department for
6 false imprisonment find, and then it has a colon, and it
7 instructs the foreperson to initial one of these answers.
8 You find either for the plaintiff on the false imprisonment
9 or the defendant. If you find for the -- regardless of what
10 your answer is on that, you should proceed to question two.

11 Question two asks or states we, the jury, on the cause
12 of action against the Spartanburg Sheriff's Department for
13 malicious prosecution find for, and it has where you can
14 find for the plaintiff or the defendant. If you find for
15 either the -- if you find for the plaintiff on either or
16 both questions one or two, and/or two, you should then
17 proceed to question three, which asks what sum should be
18 awarded to the plaintiff to compensate him for the damage
19 caused by the Spartanburg Sheriff's Department, and then
20 there's a little blank with a dollar sign next to it.

21 If you conclude that the plaintiff has met its burden
22 of proof that he is entitled to a remedy on one of those
23 causes of action, and all 12 of you agree, then you would
24 write out the, the verdict that or the amount that you've
25 decided upon right here just as if you're writing out a

1 check. Write it out in long form.

2 Like, if it's, just to give you an example, if it's a
3 thousand dollars, you would write out \$1,000, and that's
4 just as example. The amount of damages is, of course,
5 entirely up to y'all. But write it out like O-N-E
6 T-H-O-U-S-A-N-D. You got it.

7 All right. Now, the remaining questions on the verdict
8 form I've already explained to you. Question eight is the
9 one that concerns punitive damages. If you have found that
10 the plaintiff has proven his entitlement to clear and, to
11 punitive damages based upon clear and convincing evidence,
12 and you have also awarded actual damages against Wal-Mart,
13 then you may consider a punitive damages award against
14 Wal-Mart. You would similarly write out the amount of
15 punitive damages award on that blank just like you would on
16 number seven and on number three.

17 Okay. Write it out in long hand just like you're
18 writing out a check.

19 Now, ladies and gentlemen of the jury, I will remind
20 you that you have no enemies to punish in this case. You
21 have no friends to reward. Your verdict must be based upon
22 the evidence and the law as I have given it to you, and the,
23 the facts as you find them to be.

24 Now, in just a moment I'm gonna ask that you retire to
25 the jury room. It is not time to begin your deliberations

1 yet though. Your cue to begin your deliberations will be
2 receipt of this jury instructions, this verdict form, and
3 the exhibits which were introduced into evidence in this
4 case.

5 I'll also -- your cue to begin deliberations will be my
6 asking the alternate to step out and, and come in here.
7 Once I send all that information in to you and I ask her to
8 step out, that's when you can commence your deliberations.

9 Now, the bailiff told me that you need some more
10 snacks, some Coke-Cola, and some other stuff like that.
11 That's not a problem. The problem is the canteen closed at
12 4:00.

13 So, myself or somebody's gonna have to run down to the
14 local One Stop or whatever you got close to the courthouse
15 and get you what you need. So, I don't know if they kept
16 the list from the other day. Jot down a quick list of what
17 you need and how much of it, okay, and give that to the
18 bailiff. While we're getting everything together there to
19 send in to you, and I'll try to make sure that y'all have
20 something to quench your thirst and deal with any hunger
21 pains.

22 How long you choose to deliberate is entirely up to
23 you. If it starts dragging on into the evening and you want
24 to break for the night, that's perfectly fine. I have to be
25 back here tomorrow anyway. But that's up to you how long

1 you choose to deliberate. There is no set length. There is
2 no set guidelines along those lines.

3 So, with that, I invite you to go back to the jury
4 room. You'll have this case in the next few minutes.

5 (WHEREUPON, the following takes place outside the
6 presence of the jury.)

7 THE COURT: All right. The jury is out.

8 Exceptions, additions from the plaintiff?

9 MR. HAWKINS: No exceptions from the plaintiff. We do
10 have some exhibits that we did an inventory of and want to
11 make sure they're in evidence. I think I pulled the ones --
12 look over them again just to make sure.

13 MR. SMITH: Can I get a copy of the jury, special
14 verdict form?

15 THE COURT: Yes, sir.

16 MR. SMITH: Does it say unanimous, unanimous?

17 MR. SMITH: I think I told them that.

18 MR. ROZELSKY: I don't think so, Your Honor. My
19 exception is gonna be two fold.

20 One is unanimity. I don't think they were told that
21 they need to be unanimous.

22 Secondly, Your Honor, I think that there was an
23 improper charge on the facts. I don't believe Your Honor
24 ever directed a verdict as to a duty to Wal-Mart. Plaintiff
25 never made any motions. You, you said, with regard to

1 negligence, you need to prove duty. I directed a verdict or
2 I've decided, as a matter of law, that there is, in fact, a
3 duty, and I think that's an improper charge, Your Honor.

4 THE COURT: I think, as a matter of law, it is a matter
5 of law for the Court, correct --

6 MR. HAWKINS: Correct.

7 THE COURT: -- the existence of a duty?

8 MR. HAWKINS: Yes, sir.

9 THE COURT: I find that there's a duty.

10 All right. Let's have the jury back out. I'm gonna
11 explain to them the unanimity requirement.

12 MR. HAWKINS: Your Honor, I move into evidence, with
13 consent of the other parties, I think No. 5, 6, 11, 12, and
14 14 please.

15 THE COURT: All right. Without objection.

16 MR. ROZELSKY: No objection.

17 THE COURT: All those are in evidence.

18 (WHEREUPON, Plaintiff's Exhibit Nos. 5, 6, 11, 12, and
19 14 were received into evidence at this time.)

20 (WHEREUPON, the following takes place within the
21 presence of the jury.)

22 THE COURT: All right. Let the record reflect that the
23 jury is back.

24 Ladies and gentlemen, one of the pleasures of working
25 with fine attorneys, such as the ones who are appearing here

1 today, is that they are quick to remind me of something that
2 I forgot to mention to you, and I thought I had mentioned
3 it, but I do believe that, I do believe that maybe they're
4 correct, and even if they're incorrect, it bears repeating.

5 Understand, in South Carolina, we don't have majority
6 verdicts, we never have and I hope we never will, meaning
7 that all 12 of you must agree on the verdict in all aspects
8 of the verdict.

9 Okay. So, that's what I mean by unanimity. You must
10 all agree on the verdict and the propriety of the verdict
11 for a verdict to be record. Eleven to one isn't good
12 enough. Seven to five, certainly not good enough. All 12
13 of you must agree.

14 So, with that, any additions except for that,
15 gentlemen?

16 MR. SMITH: May we approach the bench please?

17 THE COURT: Please.

18 (WHEREUPON, a bench conference was held out of the
19 hearing of the jury at this time.)

20 THE COURT: All right. Alternate, you stay with me.
21 The 12 -- the rest of y'all go in there. You're gonna have
22 the case in the next few minutes. Work on your list of
23 snacks, please.

24 (WHEREUPON, the following takes place outside the
25 presence of the jury.)

1 (WHEREUPON, the alternate juror was dismissed at this
2 time.)

3 THE COURT: We're at ease.

4 Y'all check the exhibits and everything. Make sure
5 we're good to go. Here's the charge, the verdict form, and
6 as soon as y'all are satisfied that everything's together,
7 you can send it on back to the jury.

8 (WHEREUPON, the jury began deliberations at 5:06 and
9 returned with a request at 6:45.)

10 THE COURT: All right. We're back on the record.

11 The bailiff told me that the jury is ready to leave for
12 the evening. That's per the, the indications that we got
13 earlier.

14 They requested -- they tell me that they've already
15 done some work on the verdict form, and they were wanting to
16 secure that for the evening. So, I've given them an
17 envelope, just a blank envelope that I had out of my bag,
18 instructed the foreperson to seal the verdict form in that,
19 and we'll allow that to go with the court reporter tonight
20 and stay with her so that we don't know what they're doing.
21 So, that's where we are.

22 We'll resume tomorrow morning at 11:30, and if -- as
23 y'all are aware, I've got another trial that I'm gonna start
24 tomorrow morning at, at 9:30.

25 So, if you want to -- I know you're in Greenville.

1 where's your primary office?

2 MR. HAWKINS: It's in---

3 THE COURT: About---

4 MR. HAWKINS: ---Spartanburg, Moore.

5 THE COURT: Spartanburg, but it's -- yeah, it's how far
6 from here?

7 MR. HAWKINS: It's not far. It's ten minutes.

8 THE COURT: Ten minutes.

9 MR. ROZELSKY: I don't mind being here at 9:30.
10 what time is the jury coming in?

11 THE COURT: 9:30.

12 MR. ROZELSKY: Then I'll be here.

13 THE COURT: What I was gonna do, I was gonna -- I was
14 simply gonna instruct them that, as soon as all 12 are here,
15 let the bailiff know, we'll send the stuff in, and they can
16 start deliberating again.

17 I've got that case going on, and even if they were to
18 reach a verdict sometime tomorrow morning, if I'm in the
19 middle of a witness, it's gonna be kind of hard for me to
20 break. I'm gonna have to tell them just to cool their
21 heels, and if you can leave -- if y'all can leave contact
22 information and be here within 20 minutes or so.

23 MR. ROZELSKY: Well, we're just gonna come over here,
24 Your Honor.

25 THE COURT: Well, that's -- whatever you want to do.

1 That's perfectly fine.

2 MR. ROZELSKY: I---

3 THE COURT: But I don't, I don't want to burn your
4 mornings. I don't want to burn your mornings and y'all have
5 been in trial all week. I imagine your desk is looking like
6 mine is probably looking.

7 So, all right. If you'll give the exhibits to the
8 court reporter, and she'll safeguard those tonight, and
9 bring the jury on in.

10 (WHEREUPON, the following takes place within the
11 presence of the jury.)

12 THE COURT: All right. Let the record reflect that the
13 jury is back.

14 Don't get too comfortable. I'm told that you're ready
15 to leave for the evening, Mr. Foreman. I've provided you
16 with an envelope that you apparently had sealed the verdict
17 form in since y'all have done some work on that.

18 Is that correct?

19 FOREMAN: Correct.

20 THE COURT: All right. What I'm gonna ask you to do is
21 just come back tomorrow morning and go directly to the jury
22 room where you were deliberating just now or whenever these
23 gentlemen direct you to. As soon as all 12 of you are
24 there, the bailiffs will automatically bring in the evidence
25 and the exhibits and that verdict form. Unseal the verdict

1 form at that point, and just resume with your deliberations.

2 Now, I will be -- I think I mentioned to y'all that
3 I've got another case tomorrow. It's nonjury. But it
4 probably is gonna run all day.

5 So, I will be here trying that case in this courtroom.
6 I'm still available to you. So, if you need anything from
7 me, you just let me know. I'm telling you that, that I'm
8 gonna be trying a case though because sometimes it's hard to
9 break in the middle of a witness. So, if there's a ten or
10 fifteen minute lull between the time that you send a message
11 out and I'm not instantly responding to you, it's because
12 we're taking testimony that we need to get in, and I'm
13 trying to get to a breaking point.

14 You understand?

15 (Jurors nod affirmatively.)

16 THE COURT: So, I apologize if there is any delay. We
17 do have chicken biscuits on the way however. So, that is a
18 benefit. I'll see y'all tomorrow morning. Y'all just go
19 straight to the jury room. As soon as all 12 -- oh, sorry.
20 9:30, 9:30. Go straight to the jury room. As soon as all
21 12 are here, let the bailiff know, we'll send the exhibits
22 in, and resume.

23 You have a great night. Don't talk about the case with
24 anyone. See you in the morning.

25 (WHEREUPON, the following takes place outside the

1 presence of the jury.)

2 THE COURT: All right. The jury is out.

3 We'll be at ease until tomorrow morning.

4 MR. HAWKINS: Thank you, Your Honor.

5 THE COURT: Thank y'all very much.

6 MR. ROZELSKY: Thank you, Your Honor.

7 THE COURT: And just, if you're, if you're -- yeah, if
8 y'all aren't gonna come in tomorrow morning, just make sure
9 you've got a number or cell phone or some way to reach you,
10 that the clerk's got some way to reach you.

11 (WHEREUPON, the note from the jury was marked as
12 Court's Exhibit No. 4 for identification purposes only at
13 this time.)

14

15 (WHEREUPON, Court was in recess for the evening.)

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1 Friday, March 9th, 2012

2
3 (WHEREUPON, the jury resumed deliberations at 9:30 in
4 the morning.)

5 THE COURT: All right. We're back on the record on
6 Case 10-CP-42-5929.

7 The jury has sent an inquiry out concerning I assume
8 that aspect of the punitive damages charge. So, apparently
9 they're on question eight or the final question of the jury
10 form.

11 MR. HAWKINS: What was the jury form -- well, they've
12 got it. Do we have a---

13 THE COURT: I can give you a copy.

14 MR. HAWKINS: Apparently it's got -- reads different.
15 Oh, one reads and and one reads or.

16 THE COURT: And what I've done, I've checked the bench
17 book instructions, and during -- just so that everything's
18 clear, on Page 242, and I, I use the electronic version of
19 the bench book in drafting these instructions, but it
20 discusses, it discusses the nature of the punitive damages
21 award, and it says when conduct, first paragraph, when
22 conduct of the defendant has been something more than mere
23 negligence, the evidence must establish the defendant's acts
24 were reckless, willful, and wanton, dot dot dot.

25 The next paragraph says if you find that defendant's

1 conduct was willful, wanton, or reckless, dot, dot, dot.

2 The -- I've reviewed the law, and I, I am quite
3 confident that the operative conjunction to use would be or.
4 The first paragraph of the bench book is incorrect.

5 So, a finding of willfulness, wantonness, or
6 recklessness would support a punitive damages award in my
7 reading of the law.

8 Does the plaintiff -- does counsel for the plaintiff or
9 the defendants have any authority that they could cite to me
10 which is contrary to that?

11 MR. ROZELSKY: No, Your Honor, but I'm not sure I
12 understand how -- if the charges went back with the jury,
13 and there were no objections to that charge, I'm not sure
14 how we now go back and I'm gonna -- essentially it's a
15 recharge or correcting of a charge to which there was no
16 objection. It's not on the verdict form. This is purely
17 off of the charge.

18 THE COURT: Correct. Correct.

19 MR. ROZELSKY: I mean the verdict form on that, if they
20 are, in fact, on number eight, says we, the jury, find the
21 plaintiff is entitled to an award of punitive damages
22 against Wal-Mart in the sum of blank. So, I, I'm not sure
23 how to correct it, Your Honor.

24 When, when judge's don't send the jury charges back,
25 I've seen the jury brought back in and the judge merely

1 repeats it. Without an objection to the charge, I'm not
2 sure how to cure it because they have the charges back there
3 with them.

4 THE COURT: The, the last thing I want, however, or the
5 biggest concern I have is the jury misapplying the law, and
6 because what was provided in the bench book is
7 contradictory, that appears to be what they're getting hung,
8 hung up on, and I intend to give them or it's my intention
9 to give them the correct instruction on what I believe the
10 law is.

11 I realize that there was no objection to the charge as
12 going back, but this is -- what kills me is that I had
13 corrected this on the electronic version of the bench book a
14 year ago when the lawyer pointed this out to me in another
15 case I was doing, and they recently sent out, again, a
16 second version of the or they updated the bench book in
17 August or September of last year. Everybody downloaded it.

18 So, I replaced my old version with the new version that
19 contains the old mistake. So, I'm going to give them the
20 correct version of the law subject to wal-Mart's objection
21 obviously.

22 MR. ROZELSKY: Thank you, Your Honor.

23 MR. HAWKINS: Thank you, Your Honor.

24 THE COURT: Very good. That's your copy of the -- she
25 printed out a few more copies.

1 MR. ROZELSKY: Oh, did you print out multiple?

2 THE COURT: You can have one if you want it.

3 MR. ROZELSKY: Thank you, Your Honor.

4 MR. HAWKINS: She gave this one too.

5 MR. ROZELSKY: Oh, that's fine if you have an extra
6 one.

7 THE COURT: You can take that extra one.

8 MR. ROZELSKY: Thank you, Your Honor.

9 THE COURT: All right. Is your client here yet, Mr.
10 Hawkins, or you want to check and see if -- y'all just let
11 me know when your client gets here, if you would, Mr.
12 Rollins.

13 MR. ROLLINS: We will.

14 THE COURT: And I'll bring the jury in at that
15 particular point in time. The jury's aware that we had some
16 other matters this morning. So, it's not gonna look like we
17 were waiting on anyone to come in.

18 MR. ROLLINS: Okay.

19 (WHEREUPON, a short recess was taken at this time.)

20 THE COURT: All right. We do have everybody present.
21 If we may, let's go ahead and have the jury back in
22 here, please.

23 (WHEREUPON, the following takes place within the
24 presence of the jury.)

25 THE COURT: All right. Let the record reflect that the

1 jury is back and seated.

2 Good afternoon, ladies and gentlemen. I apologize for
3 the delay in bringing you out here. But, as you know, I had
4 that other case and we were real close to getting it done.
5 We've gotten that one done now, and we have all parties
6 present on the case that we are trying.

7 I received the note that the foreman sent out, and it
8 basically states please define punitive damages. The first
9 paragraph says reckless, willful, and wanton. The second
10 paragraph says reckless, willful, or wanton, and the
11 question is do all three need to be present or any one
12 condition, and I assume that what the jury is referring to
13 is Page 15 of the instructions that I sent back.

14 Is that correct?

15 So, it's the conjunction and or or that's messing y'all
16 up, is that correct?

17 FOREMAN: Yes, sir.

18 THE COURT: All right. That basically, ladies and
19 gentlemen, is, is -- the -- to answer your question it's or.
20 Any one of those could suffice. willful or wanton or
21 reckless. willful or wanton or reckless. The and should
22 not have been in there. That was a typo. So, willful or
23 wanton or reckless. Any one of those would suffice.

24 Now, again, ladies and gentlemen, you must take my
25 instructions to you as a whole. with regard to the punitive

1 damages charge, you must take that as a whole. But the
2 correct statement of the law is willful or wanton or
3 reckless, and I'm seeing a whole bunch of people nodding.

4 So, I'm assuming that answers your question, and since
5 it does, please retire, continue to deliberate, and let us
6 know when you've reached a verdict, please.

7 (WHEREUPON, the following takes place outside the
8 presence of the jury.)

9 THE COURT: All right. And, Mr. Rozelsky, you object
10 to my having recharged them on that?

11 MR. ROZELSKY: To the change in the charge, yes, Your
12 Honor.

13 THE COURT: All right. Very good. Your objection is
14 noted for the record. Thank you very much.

15 MR. ROZELSKY: Thank you.

16 THE COURT: All right. We'll be at ease. Hopefully
17 they won't be too much longer.

18 (WHEREUPON, the note from the jury was marked as
19 Court's Exhibit No. 5 for identification purposes only at
20 this time.)

21 (WHEREUPON, the jury began deliberations again at 12:21
22 and returned with a verdict at 12:44.)

23 THE COURT: All right. Ladies and gentlemen, I'm
24 informed that the jury has reached a verdict.

25 Is there anything before we bring the jury in from the

1 plaintiff?

2 MR. HAWKINS: Nothing from the plaintiff.

3 THE COURT: From the defense?

4 MR. ROZELSKY: Nothing, Your Honor.

5 MR. SMITH: Nothing, Your Honor.

6 THE COURT: All right. Very good.

7 I want to compliment all concerned on a very hard
8 fought and well tried case. There are certainly some
9 interesting and unique issues in this one and y'all did an
10 excellent job of not only your presentations, but also
11 helping me out these last couple days. So, I want to thank
12 you-all very much for your courtesies throughout this week.

13 Let me go ahead and have the jury back in if I may,
14 please.

15 (WHEREUPON, the following takes place within the
16 presence of the jury.)

17 THE COURT: All right. Let the record reflect that the
18 jury is back and they are seated.

19 Mr. Foreman, I'm informed by the bailiff that the jury
20 has reached a verdict.

21 Is that correct?

22 FOREMAN: That is correct.

23 THE COURT: And all 12 of you agree on all aspects of
24 that verdict.

25 Is that correct?

1 FOREMAN: Yes, we do, Your Honor.

2 THE COURT: If you would, hand the verdict form to the
3 bailiff for me, please.

4 (Foreman complies.)

5 THE COURT: All right. Madam Clerk, if you'll publish
6 the verdict please.

7 CLERK: Case Number 2010-CP-42-5929, Prakash Solanki
8 versus Wal-Mart and Spartanburg Sheriff's Department.

9 We, the jury, on the cause of action against the
10 Spartanburg Sheriff's Department for false imprisonment,
11 find for the defendant, Spartanburg County Sheriff's office.

12 We, the jury, on the cause of action against
13 Spartanburg Sheriff's Department for malicious prosecution
14 find for Spartanburg, Defendant Spartanburg Sheriff's
15 Department.

16 If jury finds for plaintiff on either both questions
17 one and two in this case, what sum should be awarded to the
18 plaintiff to compensate for, for damages caused by the
19 Spartanburg Sheriff's Department?

20 None.

21 We, the jury, on the cause of action against Wal-Mart
22 for negligence find for plaintiff, Prakash Solanki.

23 If the answer to question four is that you find for the
24 plaintiff, did any negligence of the plaintiff proximately
25 caused her, cause any of plaintiff's damages?

1 Yes.

2 Plaintiff's damages were caused by the negligence of
3 the plaintiff and the defendant in the following
4 percentages:

5 Cost by the plaintiff, 25 percent.

6 Cost by defendant, Wal-Mart, 75 percent.

7 What sum shall be awarded to plaintiff to compensate
8 plaintiff for damages caused by Wal-Mart?

9 \$50,000.

10 We, the jury, find for the plaintiff is entitled to an
11 award of punitive damages, damages against Wal-Mart in the
12 sum of \$225,000.

13 Signed by the foreperson in March the 9th of 2012.

14 Excuse me.

15 Ladies and gentlemen of the jury, is this your verdict
16 and still jury verdict, if so, please raise your right-hand.

17 (WHEREUPON, all jurors raise their hands at this time.)

18 CLERK: So say you-all.

19 THE COURT: All right. Let the, let the record reflect
20 that all 12 jurors did indicate by raising their right-hand
21 that this is their verdict.

22 Anything further from the plaintiff before discharge of
23 the jury?

24 MR. HAWKINS: Nothing, Your Honor.

25 THE COURT: From the defendant, Wal-Mart?

1 MR. ROZELSKY: Your Honor, I would ask that each
2 individual juror be polled.

3 THE COURT: Madam Clerk, if you'll poll each individual
4 juror.

5 CLERK: Yes, sir.

6 THE COURT: Ladies and gentlemen, the clerk is now
7 gonna call your names individually. She'll ask you two
8 questions -- two questions, right?

9 CLERK: Just one.

10 THE COURT: You do it just one.

11 Okay. They do it differently everywhere. But she'll
12 ask still if this is still your verdict, if this is your
13 verdict and still your verdict, and just answer
14 appropriately.

15 Okay. Madam Clerk, please poll the jury.

16 (WHEREUPON, the jury was polled and all jurors answered
17 in the affirmative that this is and was still their
18 verdict.)

19 CLERK: Your Honor, the jury has been polled.

20 THE COURT: All right. Let the record reflect that all
21 12 jurors did indicate orally that this is the verdict and
22 is still their verdict.

23 All right. Anything further from defendant, Sheriff's
24 Department, with respect to the jury, Mr. Smith?

25 MR. SMITH: No, Your Honor.

1 THE COURT: All right. Very good.

2 (WHEREUPON, the jury was dismissed at this time.)

3 THE COURT: All right. I anticipate that they're gonna
4 be some post-trial motions here and, of course, under the
5 Fortis Insurance Case and the Gamble case and the Gore case,
6 I have to conduct a post-trial review of punitive damages.
7 I could do that now. We could wait until some other later
8 point in time because I do anticipate being -- am I correct
9 that they're gonna be post-trial positions?

10 MR. ROZELSKY: Yes, Your Honor, and I would ask that we
11 have ten days to file any post-trial motions. And, so, I
12 suspect that we could address the Gamble factors in that or
13 do you want to have that hearing now in which case we can
14 address those issues as well.

15 THE COURT: In light of the fact that Mr. Hawkins and
16 my blood sugar is probably crashing, if there's no
17 objection, I assume you're gonna want a hearing at some
18 later point in trial on post-trial motions, is that right?

19 MR. ROZELSKY: Yes, Your Honor.

20 THE COURT: I'll be back here in about two months for
21 another, might not even be that long, about maybe six weeks
22 for another Common Pleas term. We could either do it then
23 or we could try to set up some time in the interim.

24 I know that I've already set, during the upcoming
25 chambers week in about three weeks, I set one matter for a

1 hearing for a nonjury case where I just want to get it done
2 and over. And, so, we're gonna have that, that thing. We
3 could do it then. It's gonna be on Thursday.

4 MR. ROZELSKY: Is that the week of the 26th?

5 THE COURT: Yeah, the last week of this month I think.

6 MR. ROZELSKY: I'm in trial in South Georgia that week.
7 I'm sorry, Your Honor.

8 THE COURT: It's not a problem. We'll figure out a
9 convenient time to do it. I'll conduct the post-trial
10 review of the punitive damages verdict at that particular
11 point in time. But the clerk can go ahead and enroll this
12 and allow ten days for post-trial motions.

13 MR. ROZELSKY: Thank you, Your Honor.

14 THE COURT: Anything further on this case before we
15 adjourn?

16 MR. HAWKINS: None from the plaintiff, and we would ask
17 for ten days as well.

18 THE COURT: Very good. Yes, sir.

19 Feel free to brief the punitive damages aspects too on
20 behalf of the plaintiff under the Fortis Insurance
21 requirement.

22 Everyone -- the record is closed. Thank you very much.
23 Pleasure working with y'all this week.

24 MR. HAWKINS: Thank you, Your Honor.

25 MR. ROZELSKY: Thank you.

1 (WHEREUPON, a copy of the jury charge was marked as
2 Court's Exhibit No. 6 for identification purposes only at
3 this time.)
4

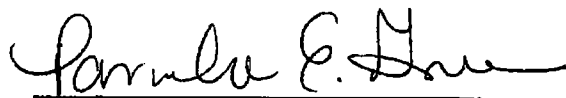
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C E R T I F I C A T E

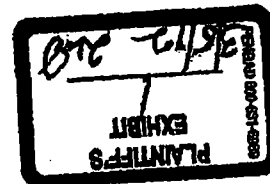
I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 8th and 9th day of March, 2012, as reported by Pamela Faucette and transcribed by myself.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 4th, 2013



PAMELA E. GREEN, Court Reporter



4978

WAL-MART STORE # 2806
BOILING SPRINGS, SC

ST# 2806 OP# 00000317 TE# 52 TR# 08575
MERCHANT# 439900590002806
W/STERC/RDP

GENERAL MDSE TOTAL 114.70
RECOUNT# 1094
APPROVAL # 015758
Name

TRANS ID -
VALIDATION -
PAYMENT SERVICE -
HOND KEYED... 11/27/09 19:19:07

P. 2806

866615 5139398

Cardholder acknowledges receipt of goods and/or services in the amount of the total shown herein and agrees to perform the obligations set forth in the Cardholder's agreement with the issuer.

X
CARDHOLDER SIGNATURE
MERCHANT COPY
SALES SLIP
RETAIN FOR YOUR RECORDS

519 2806 WFE 00000317 1LE 52 1N3 08575

** REINSTATE INHABITATION 48527447272 *
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 00K CIV LICK 00716447117315 7.44 AD
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 BRU! SPLASH 0027755070125 3.12 AD
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 LM DULL 00277084706655 14.24 AD
 ** RECEIVED FILES COMPLETE *

SUBTOTAL 136.51
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EXPIRATION DATE 12/10

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CHARGE CARD STATUS IS APPROVED

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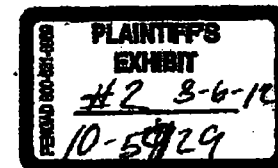
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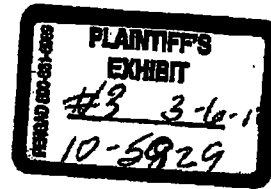
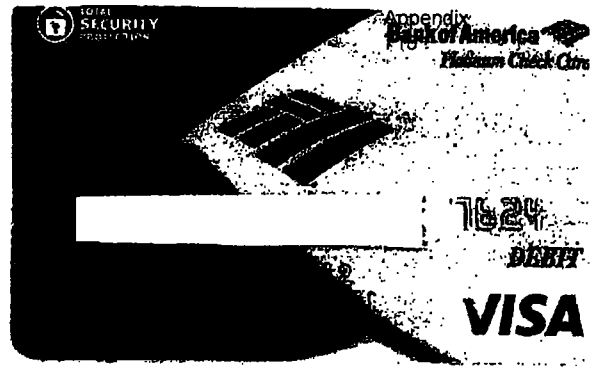
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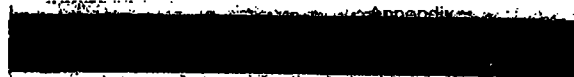
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Before tax

transaction not completed.





Service: 1.800.332.1500 Paid Support: 1.800.332.1500



1.800.332.1500

TTY: 1.800.332.4400

From Outside the US call collect at 810.724.4022



Appendix
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Bank of America, N.A.
P.O. Box 25118
Tampa, FL 33622-5118

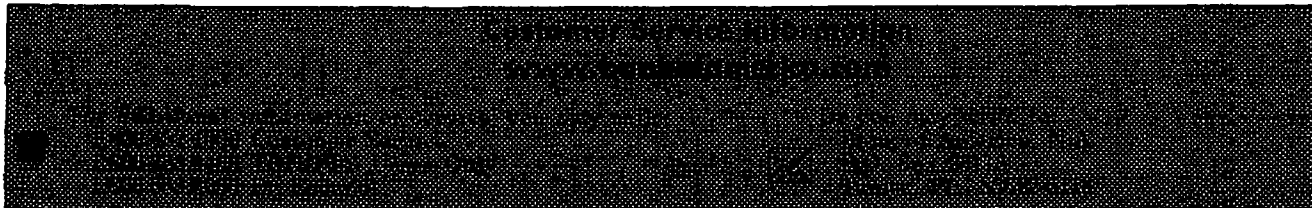
Combined Statement
Page 1 of 4 000780505537
Statement Period
11-10-09 through 12-11-09
B 07 0 H P PH 7 0087
Number of checks enclosed: 0



14005 001 SCH999 I 2 4 0

PRAKASH D SOLANKI
URMILA P SOLANKI
PO BOX 830064
STONE MOUNTAIN GA 30083-0002

Our free Online Banking service allows you to check balances, track account activity, pay bills and more.
With Online Banking you can also view up to 18 months of this statement
online and even turn off delivery of your paper statement.
Enroll at www.bankofamerica.com.



Your Statement Summary

Account Name	Account Number	Statement Date	Balance (\$)
Bank Deposit Accounts **			
Regular Checking	0007 8050 5537	12-11	14,729.62
Regular Savings	0007 8115 5737	12-11	1,152.86

Total Deposit Account Balance \$15,882.48

** Banking products such as checking and savings accounts and credit accounts are offered by Bank of America, N.A., member FDIC. Credit card accounts are offered by Bank of America, N.A. (USA).

PRAKASH D SOLANKI
URMILA P SOLANKICombined Statement
Page 2 of 4 000780805537
Statement Period
11-10-09 through 12-11-09
B 07 0 H P PH 7
Number of checks enclosed: 0

Regular Checking

PRAKASH D SOLANKI URMILA P SOLANKI

Your Account at a Glance

Account Number	0007 8050 5537
Beginning Balance on 11-10-09	\$ 16,889.61
Deposits and Other Additions	+ 1,645.00
ATM and Debit Card Subtractions	- 1,586.29
Other Subtractions	- 2,018.70
Ending Balance on 12-11-09	\$ 14,729.62

Regular Checking Additions and Subtractions

Date Posted	Amount(\$)	Resulting Balances(\$)	Transactions
11-13	12.99	16,876.62	Privacy Assist Des:8006169561 ID:xxxxx0088Oc Indn:Solanki Prakash D Co ID:3521523496 Ppd
11-16	135.00	16,541.62	Publix Super M 11/15 #000651457 Purchase Publix Super Mar Stone Mountai GA
11-16	6.79	16,534.83	Cherian's 11/15 #000403054 Purchase Cherian's Decatur GA
11-16	0.21	16,534.62	Keep The Change Transfer To Acct 5737 For 11/16/09
11-17	500.00	16,034.62	BkofAmerica ATM 11/17 #000008495 Withdrwl DeKalb College B Decatur GA
11-23	2,000.00	14,034.62	GA Tlr cash withdrawal from Chk 5537 Banking Ctr East Atlanta Banking Cen #0102810 GA Confirmation# 0581922670
11-23	32.09	14,002.53	Tj Tj Maxx 11/21 #000233381 Purchase Tj Tj Maxx Decatur GA
11-23	32.07	13,970.46	Garden Ridge - 11/21 #000324269 Purchase Garden Ridge - 02 Stockbridge GA
11-23	13.90	13,956.56	Cns Toys R US 11/21 #000377285 Purchase Cns Toys R US Morrow GA
11-23	1.94	13,954.62	Keep The Change Transfer To Acct 5737 For 11/23/09
11-25	1,645.00 +	15,599.62	US Treasury 303 Des:Soc Sec ID:xxxxx4605A SSA Indn:Prakash D Solanki Co ID:3031036030 Ppd
11-30	500.00	15,099.62	BkofAmerica ATM 11/30 #000002103 Withdrwl DeKalb College B Decatur GA
11-30	87.48	15,012.14	CheckCard 1129 Brandmart USA Dor Doraville GA 24326889334471003704007
11-30	55.21	14,956.93	Wal-Mart #1373 11/29 #000670949 Purchase Wal-Mart #1373 Duluth GA
11-30	40.76	14,916.17	Wal-Mart #2806 11/28 #000894993 Purchase Wal-Mart #2806 Boiling Spri SC
11-30	39.88	14,876.29	Wal-Mart #1340 11/30 #000351212 Purchase Wal-Mart #1340 Lithonia GA
11-30	37.09	14,839.20	Cns Toys R US 11/28 #000796976 Purchase Cns Toys R US Spartanburg SC
11-30	31.78	14,807.42	Cns Toys R US 11/28 #000796366 Purchase Cns Toys R US Spartanburg SC

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

PRAKASH SOLANKI,

Plaintiffs,

vs.

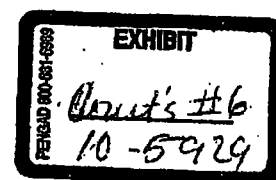
WAL-MART AND SPARTANBURG
COUNTY SHERIFF'S DEPARTMENT

Defendants.

IN THE COURT OF COMMON
PLEAS

C.A. No.: 2010-CP-42-5929

INSTRUCTIONS TO THE JURY



MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY:

DUTIES OF JURY AND JUDGE

I REMIND YOU THAT, DURING THIS TRIAL, YOU AND I HAVE CERTAIN DUTIES TO PERFORM. AS THE TRIAL JUDGE, IT IS MY RESPONSIBILITY TO PRESIDE OVER THE TRIAL OF THIS CASE, AND I ALSO HAVE THE DUTY TO RULE ON THE ADMISSIBILITY OF THE EVIDENCE OFFERED DURING THIS TRIAL. YOU ARE TO CONSIDER ONLY THE EVIDENCE BEFORE YOU. IF THERE WAS ANY TESTIMONY ORDERED STRICKEN FROM THE RECORD DURING THIS TRIAL, YOU MUST DISREGARD THAT TESTIMONY. YOU ARE TO CONSIDER ONLY THE TESTIMONY WHICH HAS BEEN PRESENTED FROM THIS WITNESS STAND, ANY EXHIBITS WHICH HAVE BEEN MADE A PART OF THE RECORD IN THIS CASE, AND ANY STIPULATIONS OF COUNSEL.

I HAVE THE ADDITIONAL DUTY TO CHARGE YOU THE LAW APPLICABLE TO THIS CASE. IT IS YOUR DUTY AS JURORS TO ACCEPT AND APPLY THE LAW AS I NOW STATE IT TO YOU. IF YOU THINK YOU HAVE ANY IDEA AS TO WHAT THE LAW IS OR

WHAT THE LAW OUGHT TO BE AND IT DOES NOT AGREE WITH WHAT I TELL YOU THE LAW IS, YOU MUST FORGET THAT IDEA BECAUSE YOU ARE SWORN TO ACCEPT THE LAW AND APPLY THE LAW EXACTLY AS I STATE IT TO YOU.

IN EVERY CASE TRIED IN THIS COURT BEFORE A JURY, THE JURY BECOMES THE SOLE AND EXCLUSIVE JUDGE OF THE FACTS. A TRIAL JUDGE CANNOT COMMENT ON OR MAKE ANY STATEMENT ABOUT THE FACTS IN A CASE. SINCE YOU ARE THE SOLE JUDGES OF THE FACTS, DO NOT THINK BY ANYTHING I HAVE SAID DURING THE TRIAL THAT I HAVE ANY OPINION ABOUT THE FACTS IN THIS CASE. THE LAW DOES NOT ALLOW ME TO HAVE AN OPINION ABOUT THE FACTS.

COPY OF CHARGE IN THE JURY ROOM

I WILL GIVE YOU A COPY OF THESE INSTRUCTIONS IN WRITTEN FORM. DURING YOUR DELIBERATIONS, YOU MAY REFER TO THE INSTRUCTIONS TO GUIDE YOUR DECISION-MAKING. YOU MUST CONSIDER THE INSTRUCTIONS AS A WHOLE AND NOT FOLLOW SOME AND IGNORE OTHERS. PLEASE RETURN THE INSTRUCTIONS TO THE COURT AT THE TIME YOUR VERDICT IS RENDERED.

PREPONDERANCE OF THE EVIDENCE

THE BURDEN OF PROOF IN THIS CASE IS BY A PREPONDERANCE OF THE EVIDENCE. A PREPONDERANCE OF THE EVIDENCE SIMPLY MEANS THE GREATER WEIGHT OF THE EVIDENCE. IT IS EVIDENCE WHICH, AS A WHOLE, SHOWS THAT THE FACT SOUGHT TO BE PROVED IS MORE LIKELY TRUE THAN NOT TRUE.

THIS CAN BE ILLUSTRATED BY IMAGINING A SET OF SCALES. WHEN THE CASE BEGINS, THE SCALES ARE EVEN. AFTER ALL OF THE EVIDENCE HAS BEEN PRESENTED, IF THE SCALES REMAIN

EVEN OR IF THEY TIP EVEN SLIGHTLY IN FAVOR OF THE DEFENDANT, THEN THE PLAINTIFF HAS FAILED TO MEET THE BURDEN OF PROOF AND WOULD NOT BE ENTITLED TO RECOVER IN THIS CASE. IF, ON THE OTHER HAND, THE SCALES TIP EVEN SLIGHTLY IN FAVOR OF THE PLAINTIFF, THE PLAINTIFF WILL HAVE MET THE BURDEN OF PROOF AND YOU SHOULD RETURN A VERDICT FOR THE PLAINTIFF.

THE PREPONDERANCE OF THE EVIDENCE IS NOT DETERMINED BY THE NUMBER OF WITNESSES. INSTEAD, IT MUST BE DETERMINED BY THE GREATER WEIGHT OF ALL OF THE EVIDENCE.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

THERE ARE TWO TYPES OF EVIDENCE GENERALLY PRESENTED DURING A TRIAL - DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS AN EYEWITNESS. IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES THE MAIN FACT TO BE PROVED.

CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT. IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES COLLATERAL FACTS FROM WHICH THE MAIN FACT MAY BE INFERRED. CIRCUMSTANTIAL EVIDENCE IS BASED ON INFERENCE AND NOT ON PERSONAL KNOWLEDGE OR OBSERVATION. IT IS PROOF THAT DOES NOT ACTUALLY ESTABLISH THE FACT IN QUESTION, BUT THAT ASSERTS OR DESCRIBES SOMETHING ELSE FROM WHICH YOU MAY EITHER REASONABLY INFER THE TRUTH OF THE FACT OR AT LEAST REASONABLY INFER AN INCREASE IN THE PROBABILITY THAT THE FACT IS TRUE. FOR CIRCUMSTANTIAL EVIDENCE TO BE SUFFICIENT TO WARRANT THE FINDING OF A FACT, THE

CIRCUMSTANCES MUST LEAD TO THAT FACT WITH REASONABLE CERTAINTY. THE FACTS AND CIRCUMSTANCES SHOULD BE CONSIDERED IN LIGHT OF ORDINARY EXPERIENCE AND COMMON SENSE. THE EXISTENCE OF A FACT CANNOT BE BASED ON SPECULATION, SURMISE, OR CONJECTURE.

THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE WEIGHT OR VALUE TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN OF DIRECT EVIDENCE.

CREDIBILITY OF WITNESSES

NECESSARILY, YOU MUST DETERMINE THE CREDIBILITY OF WITNESSES WHO HAVE TESTIFIED IN THIS CASE. CREDIBILITY SIMPLY MEANS BELIEVABILITY. IT BECOMES YOUR DUTY AS JURORS TO EVALUATE THE EVIDENCE AND DETERMINE WHICH EVIDENCE CONVINCES YOU IT IS TRUE.

IN DETERMINING THE BELIEVABILITY OF WITNESSES WHO HAVE TESTIFIED IN THIS CASE, YOU MAY BELIEVE ONE WITNESS OVER SEVERAL WITNESSES OR SEVERAL WITNESSES OVER ONE WITNESS. YOU MAY BELIEVE A PART OF THE TESTIMONY OF A WITNESS AND REJECT THE REMAINING PART OF THE TESTIMONY OF THAT SAME WITNESS. YOU MAY BELIEVE THE TESTIMONY OF A WITNESS IN ITS ENTIRETY OR REJECT THE TESTIMONY OF A WITNESS IN ITS ENTIRETY. YOU MAY CONSIDER WHETHER THE WITNESS HAS AN INTEREST IN THE RESULT OF THE TRIAL, WHETHER THE WITNESS IS PREJUDICED TOWARD EITHER THE PLAINTIFF OR THE DEFENDANT, THE OPPORTUNITY FOR THE WITNESS TO HAVE SEEN THE MATTERS AND THINGS ABOUT WHICH THE WITNESS MAY TESTIFY, AND THE WAY THE WITNESS ACTS ON THE WITNESS STAND.

FALSE IMPRISONMENT – AS TO SHERIFF'S DEPARTMENT

THE PLAINTIFF CLAIMS THAT THE SPARTANBURG SHERIFF'S DEPARTMENT FALSELY IMPRISONED THE PLAINTIFF. FALSE IMPRISONMENT IS THE DEPRIVATION OF A PERSON'S LIBERTY WITHOUT LAWFUL JUSTIFICATION. IN ORDER TO RECOVER FOR FALSE IMPRISONMENT, THE PLAINTIFF MUST PROVE BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE THAT THE DEFENDANT RESTRAINED THE PLAINTIFF, THAT THE RESTRAINT WAS INTENTIONAL, AND THAT THE RESTRAINT WAS UNLAWFUL.

FALSE IMPRISONMENT MAY BE COMMITTED BY WORDS AND/OR ACTS WHICH THE PLAINTIFF WAS AFRAID TO DISREGARD. IT IS NOT NECESSARY THAT THE PLAINTIFF BE CONFINED WITHIN A PRISON OR WITHIN WALLS OR THAT HE ~~WAS~~ BE ASSAULTED OR EVEN TOUCHED; NOR IS IT NECESSARY THAT FORCE BE USED; NOR IS IT NECESSARY THAT ANY INJURY BE DONE TO THE PLAINTIFF'S BODY, CHARACTER, OR REPUTATION; NOR IS IT NECESSARY THAT THE WRONGFUL ACT BE COMMITTED WITH MALICE OR ILL WILL OR EVEN WITH THE SLIGHTEST WRONGFUL INTENTION.

FALSE IMPRISONMENT MAY RESULT FROM A FALSE ARREST OR FROM A LAWFUL ARREST IN WHICH THERE WAS A DETENTION OR A DELAY BEYOND A REASONABLE TIME IN WHICH TO MAKE AN INVESTIGATION.

A FALSE ARREST IS AN ARREST MADE WITHOUT PROBABLE CAUSE. FOR EXAMPLE, IF PROBABLE CAUSE EXISTED TO BELIEVE THAT A THEFT HAD OCCURRED, THEN IT COULD NOT BE A FALSE ARREST.

PROBABLE CAUSE IS A GOOD FAITH BELIEF THAT THE PLAINTIFF IS GUILTY OF A CRIME WHERE THE BELIEF RESTS ON GROUNDS THAT WOULD MAKE AN ORDINARILY PRUDENT AND CAUTIOUS PERSON, UNDER THE CIRCUMSTANCES, BELIEVE THAT A CRIME

HAD BEEN COMMITTED. PROBABLE CAUSE IS SOMETHING MORE THAN MERE SUSPICION OF GUILT OF THE PLAINTIFF. THEREFORE, AN ARREST MADE ON A HUNCH OR A MERE BELIEF OR GUESS UNSUPPORTED BY FACTS, CIRCUMSTANCES, OR CREDIBLE INFORMATION POINTING TO THE GUILT OF THE PLAINTIFF CANNOT BE JUSTIFIED AS HAVING BEEN MADE ON PROBABLE CAUSE. PROBABLE CAUSE MAY BE FOUND SOMEWHERE BETWEEN SUSPICION AND SUFFICIENT EVIDENCE TO CONVICT. IN DETERMINING WHETHER OR NOT THERE WAS PROBABLE CAUSE FOR AN ARREST, THE PROBABILITY CANNOT BE TECHNICAL, BUT MUST BE BASED UPON FACTUAL AND PRACTICAL CONSIDERATIONS OF EVERYDAY LIFE ON WHICH REASONABLE, PRUDENT, AND CAUTIOUS PEOPLE ACT. PROBABLE CAUSE MAY EXIST EVEN THOUGH THERE MAY BE SOME ROOM FOR DOUBT. A TRUE BILLED INDICTMENT IS PRIMA FACIE EVIDENCE THAT PROBABLE CAUSE EXISTED AND YOU MAY CONSIDER THIS EVIDENCE IN LIGHT OF THE OTHER COMPETENT EVIDENCE PRESENTED IN DECIDING WHETHER PROBABLE CAUSE TO ARREST EXISTED. IN ADDITION, THE FACT THAT THE PLAINTIFF MAY HAVE BEEN FOUND NOT GUILTY OF THE CRIME FOR WHICH THE ARREST WAS MADE DOES NOT MEAN THAT THERE WAS NO PROBABLE CAUSE FOR THE ARREST.

FURTHERMORE, ALL PROCEEDINGS BEFORE MAGISTRATES IN CRIMINAL CASES SHALL BE COMMENCED ON INFORMATION, UNDER OATH, PLAINLY AND SUBSTANTIALLY SETTING FORTH THE OFFENSE CHARGED, UPON WHICH, AND ONLY WHICH, SHALL A WARRANT OF ARREST ISSUE. A WARRANT AFFIDAVIT THAT IS INSUFFICIENT IN ITSELF TO ESTABLISH PROBABLE CAUSE MAY BE SUPPLEMENTED BEFORE A MAGISTRATE BY SWORN ORAL TESTIMONY. IN ESTABLISHING PROBABLE CAUSE, THE FACTS MUST BE REGARDED FROM THE POINT OF VIEW OF THE PROSECUTING PARTY. THE QUESTION IS NOT WHAT THE ACTUAL FACTS WERE, BUT WHAT THE PROSECUTING PARTY HONESTLY BELIEVED THEM TO BE.

IF THE SPARTANBURG SHERIFF'S DEPARTMENT WAS LEGALLY JUSTIFIED IN RESTRAINING THE PLAINTIFF, THAT IS, IF YOU FIND THAT THERE WAS PROBABLE CAUSE FOR THE ARREST, THERE IS NO FALSE IMPRISONMENT AND YOU SHOULD RETURN A VERDICT FOR THE SHERIFF'S DEPARTMENT ON THE FALSE IMPRISONMENT CAUSE OF ACTION.

MALICIOUS PROSECUTION – AS TO SHERIFF'S DEPARTMENT

THE PLAINTIFF CLAIMS THAT THE DEFENDANT IS GUILTY OF MALICIOUS PROSECUTION. AN ACTION FOR MALICIOUS PROSECUTION PROTECTS AN INDIVIDUAL'S INTEREST IN BEING FREE FROM UNJUSTIFIED LITIGATION AND THE RESULTING INJURY TO REPUTATION, FINANCIAL EXPENSE, AND INTERFERENCE WITH PROPERTY.

IN ORDER TO RECOVER IN AN ACTION FOR MALICIOUS PROSECUTION, THE PLAINTIFF MUST PROVE BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE THE FOLLOWING ELEMENTS:

FIRST, THE PLAINTIFF MUST PROVE THAT CIVIL OR CRIMINAL JUDICIAL PROCEEDINGS AGAINST THE PLAINTIFF WERE BEGUN OR CONTINUED.

THE PLAINTIFF MUST ALSO PROVE THAT THE PROCEEDINGS WERE BEGUN OR CONTINUED BY THE DEFENDANT OR AT THE DEFENDANT'S REQUEST.

NEXT, THE PLAINTIFF MUST PROVE THAT THE PROSECUTION HAS ENDED IN THE PLAINTIFF'S FAVOR AND CANNOT BE REINSTATED OR FURTHER MAINTAINED WITHOUT BEGINNING A NEW PROCEEDING.

THE PLAINTIFF MUST FURTHER PROVE THAT THE DEFENDANT ACTED WITH MALICE IN INSTITUTING OR CONTINUING THE

PROCEEDINGS. MALICE MAY EITHER BE EXPRESS OR IMPLIED. MALICE IN A CASE OF THIS KIND IS A DELIBERATE PURPOSE TO INJURE ANOTHER WITHOUT ANY JUST CAUSE OR EXCUSE. HOWEVER, MALICE DOES NOT REQUIRE THAT THE ACT BE MOTIVATED BY PERSONAL ILL WILL. MALICE IS A WILLFUL INTENTION TO WRONG ANOTHER UNJUSTLY. IT MAY BE INFERRED FROM THE CIRCUMSTANCES OF THE CASE OR IT MAY BE INFERRED FROM A PROSECUTION THAT IS COMMENCED WITHOUT PROBABLE CAUSE.

NEXT, THE PLAINTIFF MUST PROVE THAT THE DEFENDANT LACKED PROBABLE CAUSE IN INSTITUTING OR CONTINUING THE ACTION. IN DETERMINING WHETHER PROBABLE CAUSE EXISTED, YOU SHOULD FOCUS ON WHETHER THE DEFENDANT HAD REASONABLE CAUSE TO BELIEVE THAT THE PLAINTIFF COMMITTED THE ACT ABOUT WHICH THE COMPLAINT WAS MADE, AND NOT WHETHER THE PLAINTIFF WAS ACTUALLY GUILTY OR INNOCENT. PROBABLE CAUSE IS DETERMINED BY THE FACTS AND CIRCUMSTANCES PRESENT IN THE MIND OF THE DEFENDANT AT THE TIME OF THE INSTITUTION OR CONTINUATION OF THE PROCEEDINGS, NOT BY ANY LATER EVENTS. A TRUE BILLED INDICTMENT IS PRIMA FACIE EVIDENCE THAT PROBABLE CAUSE EXISTED AND YOU MAY CONSIDER THIS EVIDENCE IN LIGHT OF THE OTHER COMPETENT EVIDENCE PRESENTED IN DECIDING WHETHER PROBABLE CAUSE TO ARREST EXISTED. IF THE FACTS AND CIRCUMSTANCES WOULD LEAD A PERSON OF ORDINARY INTELLIGENCE, CAUTION, AND PRUDENCE ACTING CONSCIENTIOUSLY, FAIRLY, AND WITHOUT PREJUDICE TO BELIEVE THAT THE PLAINTIFF WAS GUILTY, THAT WOULD BE PROBABLE CAUSE. PROBABLE CAUSE IS SOMETHING MORE THAN SUSPICION.

FINALLY, THE PLAINTIFF MUST PROVE THAT INJURY OR DAMAGE RESULTED FROM THE PROCEEDINGS.

THE PLAINTIFF MAY RECOVER THOSE DAMAGES WHICH ARE THE DIRECT, NATURAL, AND PROXIMATE RESULT OF THE PROSECUTION BY THE DEFENDANT. DAMAGES WHICH MAY BE AWARDED INCLUDE A LOSS OF TIME FROM WORK, DEPRIVATION OF LIBERTY, AND ANY CIRCUMSTANCES OF AGGRAVATION SUCH AS INJURY TO REPUTATION, CHARACTER, HEALTH, MENTAL AND/OR PHYSICAL PAIN AND SUFFERING, GENERAL IMPAIRMENT OF SOCIAL AND MERCANTILE STANDING, FRIGHT, NERVOUSNESS, INDIGNITY, HUMILIATION, EMBARRASSMENT, HARDSHIP, DISCOMFORT, BODILY PAIN, AND MENTAL ANGUISH. DAMAGES MAY ALSO INCLUDE EXPENSES SUCH AS THE AMOUNT OF ATTORNEY'S FEES PAID IN DEFENDING THE PROSECUTION.

YOU ARE NOT REQUIRED TO AWARD THE AMOUNT OF DAMAGES REQUESTED BY THE PARTIES. INSTEAD YOU SHOULD AWARD THOSE DAMAGES WHICH YOU FIND THE EVIDENCE HAS SHOWN THAT THE PLAINTIFF HAS SUFFERED OR WILL SUFFER AS A PROXIMATE RESULT OF THE DEFENDANT'S CONDUCT.

NEGLIGENCE CAUSE OF ACTION AS TO WAL-MART

IN OUR COURTS, NO DISTINCTION IS MADE BETWEEN CORPORATIONS AND INDIVIDUALS. IN THE EYES OF THE LAW A CORPORATION IS ENTITLED TO THE SAME FAIR AND IMPARTIAL CONSIDERATION AND TO JUSTICE BY THE SAME LEGAL STANDARDS AS ANY INDIVIDUAL.

THE PLAINTIFF CLAIMS THAT THE DEFENDANT WAS NEGLIGENT AND SHOULD COMPENSATE THE PLAINTIFF FOR THE INJURIES THE PLAINTIFF SUFFERED AS A RESULT OF THE DEFENDANT'S NEGLIGENCE. IN ORDER TO PROVE THAT THE DEFENDANT WAS NEGLIGENT, THE PLAINTIFF MUST PROVE BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE THE FOLLOWING THINGS.

FIRST, THE PLAINTIFF MUST PROVE BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE THAT THE DEFENDANT OWED THE PLAINTIFF A DUTY OF CARE. THIS IS A QUESTION OF LAW AND I HAVE CONCLUDED THAT WAL-MART DID OWE PLAINTIFF A DUTY.

ACCORDINGLY, YOU MUST THEN DECIDE THE REMAINING QUESTIONS. THE FIRST OF THESE IS WHETHER THE PLAINTIFF HAS PROVEN BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE THAT THE DEFENDANT BREACHED THE DUTY OF CARE BY A NEGLIGENT ACT OR OMISSION.

NEGLIGENCE MEANS THAT A PERSON HAS DONE SOMETHING THAT A REASONABLE PERSON WOULD NOT HAVE DONE OR HAS FAILED TO DO SOMETHING THAT A REASONABLE PERSON WOULD HAVE DONE IN THE SAME SITUATION.

THE PLAINTIFF MUST ALSO PROVE BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE THAT HE SUFFERED DAMAGES AS A RESULT OF THE DEFENDANT'S BREACH OF DUTY.

FINALLY, THE PLAINTIFF MUST PROVE BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE THAT THE DAMAGES WERE PROXIMATELY CAUSED BY THE DEFENDANT'S BREACH OF DUTY.

PROXIMATE CAUSE IS SOMETHING THAT PRODUCES A NATURAL CHAIN OF EVENTS WHICH, IN THE END, BRINGS ABOUT THE INJURY. IT IS THE DIRECT CAUSE OF THE INJURY.

TO PROVE THAT THE DEFENDANT'S NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF'S INJURY, THE PLAINTIFF MUST FIRST PROVE CAUSATION IN FACT. THIS IS PROVEN BY SHOWING THAT THE INJURY WOULD NOT HAVE OCCURRED BUT FOR THE DEFENDANT'S NEGLIGENCE.

THE PLAINTIFF MUST ALSO PROVE LEGAL CAUSE. LEGAL CAUSE IS PROVEN BY SHOWING THAT THE INJURY WAS FORESEEABLE. THIS MEANS THAT THE INJURY OCCURRED AS A NATURAL AND PROBABLE CONSEQUENCE OF THE DEFENDANT'S NEGLIGENCE. THE PLAINTIFF MUST PROVE THAT SOME INJURY FROM THE DEFENDANT'S NEGLIGENCE WAS FORESEEABLE, BUT DOES NOT HAVE TO PROVE THAT THE PARTICULAR INJURY THAT OCCURRED WAS FORESEEABLE. HOWEVER, THE DEFENDANT CANNOT BE HELD RESPONSIBLE FOR THINGS WHICH COULD NOT BE EXPECTED TO HAPPEN.

PROXIMATE CAUSE DOES NOT MEAN THE ONLY CAUSE. THE DEFENDANT'S ACT CAN BE A PROXIMATE CAUSE OF THE PLAINTIFF'S INJURY IF IT WAS AT LEAST ONE OF THE DIRECT, CONCURRING CAUSES OF THE INJURY.

ACTUAL DAMAGES

IF YOU DECIDE THAT THE PLAINTIFF IS ENTITLED TO A VERDICT, YOUR NEXT STEP WOULD BE TO DECIDE HOW MUCH MONEY THE DEFENDANT SHOULD BE REQUIRED TO PAY.

ACTUAL DAMAGES ARE TO COMPENSATE THE PLAINTIFF FOR THE PLAINTIFF'S INJURIES OR LOSS AND TO PUT THE PLAINTIFF, AS NEAR AS POSSIBLE, IN THE SAME POSITION THAT THE PLAINTIFF WAS IN BEFORE THE INCIDENT OCCURRED. IN OTHER WORDS, ACTUAL DAMAGES WOULD BE THE ACTUAL LOSSES AND EXPENSES WHICH THE PLAINTIFF HAS SUFFERED BECAUSE OF THE DEFENDANT'S NEGLIGENCE.

PAIN AND SUFFERING

PAIN AND SUFFERING COMPENSATES THE PLAINTIFF FOR PHYSICAL DISCOMFORT AND EMOTIONAL RESPONSE TO THE SENSATION OF PAIN CAUSED BY THE INJURY ITSELF. THERE IS NO DEFINITE STANDARD BY WHICH TO COMPENSATE THE PLAINTIFF FOR PAIN AND SUFFERING. YOU HAVE THE

AUTHORITY TO DETERMINE THE AMOUNT, IF ANY, TO BE ALLOWED FOR PAIN AND SUFFERING, USING CALM AND REASONABLE JUDGMENT TO ENSURE THAT THE DAMAGES ARE JUST AND REASONABLE IN LIGHT OF THE TESTIMONY AND EVIDENCE PRESENTED IN THE CASE.

LOSS OF ENJOYMENT OF LIFE

LOSS OF ENJOYMENT OF LIFE COMPENSATES THE PLAINTIFF FOR LIMITATIONS ON THE PLAINTIFF'S ABILITY TO PARTICIPATE IN, AND DERIVE PLEASURE FROM, THE NORMAL ACTIVITIES OF DAILY LIFE.

MENTAL SUFFERING

MENTAL SUFFERING, APPREHENSION, SHOCK, FRIGHT, EMOTIONAL UPSET, HUMILIATION, AND ANXIETY, EITHER PRESENT OR EXPECTED IN THE FUTURE, CAN BE PROPERLY CONSIDERED AS AN ELEMENT OF DAMAGES. THE AMOUNT OF DAMAGES FOR MENTAL SUFFERING CANNOT BE EXACTLY MEASURED.

COMPARATIVE NEGLIGENCE

THE DEFENDANT CLAIMS THAT THE PLAINTIFF'S OWN NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES. IF YOU FIND THAT THE DEFENDANT WAS NEGLIGENT, YOU MUST THEN DECIDE WHETHER THE PLAINTIFF WAS NEGLIGENT. THE DEFENDANT MUST PROVE BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE THAT THE PLAINTIFF BREACHED A DUTY OF CARE WHICH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES. THE SAME LAW WHICH I HAVE TOLD YOU TO USE IN DECIDING WHETHER THE DEFENDANT WAS NEGLIGENT SHOULD BE USED IN DECIDING WHETHER THE PLAINTIFF WAS NEGLIGENT.

IF YOU FIND THAT THE NEGLIGENCE OF BOTH THE PLAINTIFF AND THE DEFENDANT PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES, YOU MUST THEN DECIDE HOW MUCH THE NEGLIGENCE OF THE PLAINTIFF CONTRIBUTED TO THE PLAINTIFF'S INJURIES AND HOW MUCH THE DEFENDANT'S NEGLIGENCE CONTRIBUTED TO THE PLAINTIFF'S INJURIES. IN DECIDING THE PERCENTAGES OF NEGLIGENCE OF THE PLAINTIFF AND THE DEFENDANT, YOU MAY CONSIDER, AMONG OTHER THINGS, THE FOLLOWING FACTORS:

- (1) WHETHER EACH PARTY'S CONDUCT WAS ONLY INADVERTENT OR WHETHER IT WAS ENGAGED IN WITH AN AWARENESS OF THE DANGER INVOLVED;
- (2) THE MAGNITUDE OF THE RISK CREATED BY EACH PARTY'S CONDUCT, INCLUDING THE NUMBER OF PERSONS ENDANGERED AND THE POSSIBLE SEVERITY OF THE INJURY;
- (3) THE SIGNIFICANCE OF THE GOAL THAT EACH PARTY WAS TRYING TO REACH AND THE NEED TO ACHIEVE THE GOAL IN THAT MANNER;
- (4) EACH PARTY'S CAPABILITIES AND ABILITIES TO REALIZE AND ELIMINATE THE RISK INVOLVED;
- (5) THE PARTICULAR CIRCUMSTANCES CONFRONTING EACH PARTY AT THE TIME THE CONDUCT OCCURRED, SUCH AS THE EXISTENCE OF AN EMERGENCY REQUIRING A QUICK DECISION;
- (6) THE RELATIVE CLOSENESS OF THE CAUSAL RELATIONSHIP OF THE NEGLIGENT CONDUCT OF THE DEFENDANT AND THE HARM TO THE PLAINTIFF; AND
- (7) WHETHER THE CONDUCT OF EITHER PARTY INVOLVED A VIOLATION OF A SAFETY STATUTE OR REGULATION.

I WILL GIVE YOU WRITTEN QUESTIONS ON A SPECIAL VERDICT FORM FOR YOU TO REACH YOUR VERDICT. THE FORM WILL HAVE SPACES FOR YOU TO WRITE YOUR DECISIONS ABOUT THE PERCENTAGE OF THE NEGLIGENCE, IF ANY, OF BOTH PARTIES WHICH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES.

QUESTION 4 ON THE VERDICT FORM ASKS YOU TO DECIDE WHETHER THE DEFENDANT, WAL-MART, WAS NEGLIGENT AND, IF SO, WHETHER THE DEFENDANT'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES. QUESTIONS 5 ASKS THE SAME QUESTIONS ABOUT ANY NEGLIGENCE BY THE PLAINTIFF.

QUESTION 6 ASKS YOU TO DECIDE THE PERCENTAGE OF EACH PARTY'S NEGLIGENCE WHICH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES. THE PERCENTAGES MUST ADD UP TO ONE HUNDRED PERCENT.

IF THE PLAINTIFF'S NEGLIGENCE WAS GREATER THAN THE DEFENDANT'S NEGLIGENCE, THE PLAINTIFF WOULD NOT BE ENTITLED TO ANY DAMAGES, AND YOUR VERDICT WOULD BE FOR THE DEFENDANT, WAL-MART.

IF, HOWEVER, YOU FIND THAT THE PLAINTIFF'S NEGLIGENCE WAS EQUAL TO OR LESS THAN THE DEFENDANT'S NEGLIGENCE, YOU WOULD ANSWER QUESTION 7 WHICH ASKS YOU TO DETERMINE THE TOTAL AMOUNT OF DAMAGES SUFFERED BY THE PLAINTIFF.

DO NOT REDUCE THE PLAINTIFF'S TOTAL DAMAGES BASED ON THE PERCENTAGE OF NEGLIGENCE OF ANY PARTY. AFTER YOU HAVE ANSWERED THE QUESTIONS, I WILL COMPUTE THE AMOUNT OF DAMAGES FOR WHICH THE DEFENDANT IS RESPONSIBLE BASED ON THE PERCENTAGE OF THE DEFENDANT'S NEGLIGENCE WHICH YOU HAVE DECIDED PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES. YOU ARE TO

DETERMINE ONLY THE TOTAL AMOUNT OF THE PLAINTIFF'S DAMAGES AND ENTER THAT FIGURE ON THE VERDICT FORM.

PUNITIVE DAMAGES AS TO WAL-MART

IF YOU AWARD ACTUAL DAMAGES AGAINST WAL-MART, YOU MAY ALSO CONSIDER AN AWARD OF PUNITIVE DAMAGES. PUNITIVE DAMAGES ARE INTENDED TO PUNISH THE DEFENDANT FOR EXTRAORDINARY AND OUTRAGEOUS MISCONDUCT AND TO PREVENT THE DEFENDANT AND OTHERS FROM COMMITTING SIMILAR ACTS IN THE FUTURE. PUNITIVE DAMAGES CAN ONLY BE AWARDED WHEN CONDUCT OF THE DEFENDANT HAS BEEN SOMETHING MORE THAN MERE NEGLIGENCE. THE EVIDENCE MUST ESTABLISH THE DEFENDANT'S ACTS WERE RECKLESS, WILLFUL AND WANTON, MEANING THERE WAS A CONSCIOUS FAILURE TO EXERCISE DUE CARE OR A CONSCIOUS INDIFFERENCE TO THE RIGHTS AND SAFETY OF OTHERS OR A RECKLESS DISREGARD THEREOF.

IF YOU FIND THAT THE DEFENDANT'S CONDUCT WAS WILLFUL, WANTON, OR RECKLESS, YOU MAY AWARD THE PLAINTIFF PUNITIVE DAMAGES. TO SUPPORT AN AWARD OF PUNITIVE DAMAGES, THE PLAINTIFF MUST PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE CONDUCT COMPLAINED OF INCLUDED A CONSCIOUSNESS OF WRONGDOING AT THE TIME OF THE CONDUCT.

CLEAR AND CONVINCING IS MORE THAN JUST A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE, WHICH REQUIRES ONLY PROOF WHICH PERSUADES YOU THAT A PARTY'S CLAIM IS MORE LIKELY TRUE THAN NOT TRUE. ON THE OTHER HAND, CLEAR AND CONVINCING PROOF IS NOT AS HIGH A STANDARD AS THE BURDEN OF PROOF IN CRIMINAL CASES, WHICH IS PROOF BEYOND A REASONABLE DOUBT. CLEAR AND CONVINCING PROOF LEAVES NO SUBSTANTIAL DOUBT IN YOUR MIND. IT MEANS THAT THE EVIDENCE IS NOT AMBIGUOUS, DOUBTFUL, EQUIVOCAL OR CONTRADICTORY.

CONVINCING MEANS PERSUADING BY PROOF OR ARGUMENT, CAUSING ONE TO BELIEVE IN THE TRUTH OF WHAT IS ASSERTED. CLEAR AND CONVINCING PROOF ESTABLISHES IN YOUR MIND, NOT ONLY THAT THE FACT IS PROBABLE, BUT THAT IT IS HIGHLY PROBABLE.

BEFORE AWARDING PUNITIVE DAMAGES, YOU MUST CONSIDER AND WEIGH FOUR ELEMENTS WHICH MAY BE PERTINENT TO THE FACTS OF THIS CASE:

YOU MUST FIRST CONSIDER THE RELATIONSHIP BETWEEN ANY PUNITIVE DAMAGE AWARD AND THE HARM CAUSED. ANY PENALTY IMPOSED SHOULD TAKE INTO ACCOUNT THE REPREHENSIBILITY OF THE CONDUCT, THE HARM CAUSED, THE DEFENDANT'S AWARENESS OF THE CONDUCT'S WRONGFULNESS, THE DURATION OF THE CONDUCT, AND ANY CONCEALMENT. THUS, ANY PENALTY IMPOSED SHOULD BEAR A RELATIONSHIP TO THE NATURE AND EXTENT OF THE CONDUCT AND THE HARM CAUSED, INCLUDING THE COMPENSATORY DAMAGE AWARD MADE BY YOU.

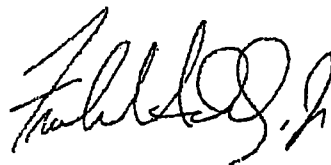
SECONDLY, ANY PENALTY IMPOSED SHOULD TAKE INTO ACCOUNT, AS A MITIGATING FACTOR, ANY OTHER PENALTY THAT MAY HAVE BEEN IMPOSED OR WHICH MAY BE IMPOSED FOR THE CONDUCT INVOLVED, INCLUDING ANY CRIMINAL OR CIVIL PENALTY OR ANY OTHER PUNITIVE DAMAGES AWARD ARISING OUT OF THE SAME CONDUCT.

NEXT, YOU SHOULD CONSIDER WHETHER THE AWARD OF AND THE AMOUNT OF ANY PUNITIVE DAMAGES AWARD MAY DEPRIVE THE DEFENDANT OF ANY PROFITS DERIVED FROM THE IMPROPER CONDUCT AND WHETHER THE ILL-GOTTEN PROFITS SHOULD BE PROPERLY AWARDED TO THE PLAINTIFF.

FINALLY, ANY AWARD OF PUNITIVE DAMAGES MUST BE LIMITED TO PUNISHMENT AND, THUS, MAY NOT EFFECT ECONOMIC BANKRUPTCY. TO THIS END, THE DEFENDANT'S

ABILITY TO PAY ANY PUNITIVE DAMAGE AWARD SHOULD BE
CONSIDERED. HOWEVER, THE ECONOMIC BANKRUPTCY
FACTOR IS NOT AN ABSOLUTE BAR TO AN AWARD OF PUNITIVE
DAMAGES.

[EXPLAIN VERDICT FORM]



March 8, 2012
Spartanburg, SC

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

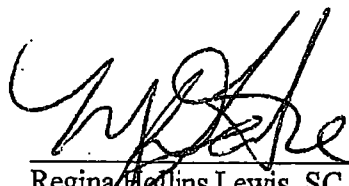
Prakash and Urmila Solanki.....Respondents,

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 2013, that a copy of the foregoing Final Brief of Appellant and Proof of Service 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.



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SEP 04 2013

SC Court of Appeals

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Wal-Mart Store #2806, and Spartanburg
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Whom Wal-Mart Store #2806 is the Appellant.....Appellant.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I) Did the trial court err in submitting the issue of punitive damages to the jury where Appellant Wal-Mart merely cooperated with a request by law enforcement and there was no evidence to support a finding of reckless, willful, or wanton misconduct by Appellant Wal-Mart?
- II) Did the trial court err in denying Appellant Wal-Mart's post-trial motions for JNOV and for reversal or reduction of punitive damages award where the evidence was insufficient to sustain an award of punitive damages?

STATEMENT OF THE CASE

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 filed a complaint on November 18, 2010 in the Spartanburg County Court of Common Pleas in which he alleged causes of action against Appellant Wal-Mart ("Wal-Mart") and the Sheriff's Department for: (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 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 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.

STATEMENT OF FACTS

Mr. Solanki testified that he went shopping at Wal-Mart with his wife on November 27, 2009, "Black Friday," the day after Thanksgiving. The two 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 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

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).

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, on November 18, 2010, Mr. Solanki instituted the subject action.

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.

ARGUMENT

I. THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY WHERE THE COURT CONCLUDED ONLY THAT THERE WAS A JURY QUESTION WITH REGARD TO GROSS NEGLIGENCE, AND WHERE THERE WAS NO FINDING BY THE COURT OR ANY EVIDENCE TO SUPPORT A FINDING THAT WAL-MART ACTED IN A MANNER THAT WAS WANTON, OR WILLFUL, OR RECKLESS.

At the close of the Plaintiff's case, the trial court initially indicated that it saw the claim against Wal-Mart as one of simple negligence. (R. at 461). Thereafter, the court determined that the issue of punitive damages would be submitted to the jury. As there was no evidence of any willful, wanton, or reckless act by Wal-Mart to sustain a punitive damages award, the trial court erred in submitting the issue to the jury and the punitive damages award should be reversed.

It is well-established that "[p]unitive 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. *Longshore*, 365 S.C. at 564, 619 S.E.2d at 11 (citing *Austin Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310, 594 S.E.2d 867, 873 (Ct. App. 2004)).

To establish a claim for punitive damages, "the plaintiff must prove the defendant's misconduct was willful, wanton, or in reckless disregard of his rights." *Longshore*, 365 S.C. at 560, 619 S.E.2d at 11.

As our Supreme Court has observed, “[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 a jury.)” *S.C. Farm Bur. Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 152, 478 S.E.2d 57, (1996).

Here, Wal-Mart had no involvement in instituting charges against Mr. Solanki or in pursuing the warrant for Mr. Solanki’s arrest. Rather, Wal-Mart’s involvement with Mr. Solanki was limited to two actions: (1) the handling of the transaction in which Robin Martin’s lost credit card was used to purchase items for Mr. Solanki; and (2) Wal-Mart’s compliance with the request of the Spartanburg County Sheriff’s Department to provide documents and video relevant to the transaction. The evidence is woefully inadequate to support a finding that Wal-Mart acted in a manner that was willful, wanton, or reckless with regard to either of Wal-Mart’s actions with regard to Mr. Solanki and thus, the trial court erred in submitting the issue of punitive damages to the jury.

A. The Testimony and Other Evidence Presented at Trial Did Not Support a Finding of Wanton, Willful, or Reckless Misconduct by Wal-Mart.

Mr. Solanki testified that he initially attempted to make a purchase at a self-checkout register. The register malfunctioned and cashier Ryan Smalls suspended the transaction and moved Mr. Solanki’s items to a cashier-assisted register to complete the transaction. (R. at 70–82). While there is no audio on video surveillance of the transaction, the video was shown to Mr. Solanki who testified regarding what occurred during the transaction. (R. at 70–82, 88–93).

According to Mr. Solanki he was never in possession of a credit card belonging to Robin Martin, the woman whose credit card was used to purchase Mr. Solanki's items. (R. at 71). Mr. Solanki testified that he provided his own credit card although the receipt produced by Wal-Mart from the transaction shows that Mr. Solanki in fact signed a receipt bearing credit card information that belonged to Robin Martin, which had been hand-keyed into the system by cashier Ryan Smalls. Thereafter, Mr. Solanki took the items totaling \$144.70 and left the store without incident. (R. at 93).

Cashier Ryan Smalls testified that he was working as a cashier during the time of the incident and that he worked the second shift in the afternoon from 5:30 until 11:00 p.m. Mr. Smalls recalled that he was working at the self-checkout on Black Friday, November 27, 2009. (R. at 173-74). He testified, however, that he had no independent recollection of the transaction because he dealt with hundreds of transactions while employed at Wal-Mart. (R. at 177, 195-96). He was shown the video footage and testified that the video appeared to show him assisting Mr. Solanki at the self-checkout. (R. at 190). Thereafter, Mr. Solanki sought the assistance of Mr. Smalls when the register apparently malfunctioned, and Mr. Smalls ultimately suspended the transaction and moved Mr. Solanki's items to another register to complete the transaction. (R. at 191-95). Mr. Smalls further testified that he had no independent recollection, but based on the video it appeared that a Wal-Mart customer service manager thereafter came to the register where he had moved Mr. Solanki to assist with the transaction. Mr. Smalls then took an impression of a credit card and subsequently hand-keyed credit card information into the register. (R. at 195-201, 203-07). The items were charged to the credit card, the transaction ended and Mr. Solanki left the store without incident. (R. at 93). Mr.

Smalls testified that he followed all of the procedures that he was required to follow. (R. at 200-01).

Wal-Mart's only involvement with Mr. Solanki's transaction thereafter was to comply with a request by the Spartanburg County Sheriff's Department. Deputy Gina Cashion of the Sheriff's Department testified that on December 1, 2009, she was assigned to handle the report by Robin Martin that a fraudulent charge had been made on her credit card at Wal-Mart. (R. at 299). Deputy Cashion testified that she contacted Wal-Mart and asked for any documents and video involving the fraudulent transaction. (R. at 301-04). As discussed, Wal-Mart provided the deputy 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 and signed by Mr. Solanki for a purchase in the total amount of \$144.70. (R. at 301-04, 408-16). It is undisputed that after obtaining the documents and video from Wal-Mart, Deputy Cashion did not inquire further of Wal-Mart regarding the transaction and that all actions taken with regard to Mr. Solanki's arrest were instituted by the Sheriff's Department. (R. at 423-24, 433).

The foregoing was the extent of the evidence regarding Wal-Mart's involvement with Mr. Solanki and was insufficient as a matter of law to sustain a claim of gross negligence or punitive damages.³ At best, the evidence was such that a jury could infer

³ As set forth in detail below, the parties argued and the trial court considered primarily the issue of gross negligence and the applicable standard of absence of the use of even slight care. Counsel for Wal-Mart also argued the absence of wanton, reckless, or willful misconduct by Wal-Mart. After lengthy arguments on the issue the trial court ruled that the issues of gross negligence and punitive damages would be charged to the jury. (R. at 506). Thereafter the trial court indicated that it would not charge gross negligence separately and was "just gonna handle that in the punitives. I'm not gonna define that separately because that's the only way, the only place it relates." (R. at 544). Consequently, the trial court did not charge

simple negligence based on the fact that Mr. Solanki's credit card that was stenciled did not match the numbers on Ms. Martin's credit card that was hand-keyed and signed by Mr. Solanki, or that Mr. Solanki's presented identification did not match the name on Ms. Martin's credit card.

1. **The trial court acknowledged that the evidence supported the submission of simple negligence only to the jury and erred in thereafter ruling that punitive damages would be submitted to the jury.**

Counsel for Respondent apparently recognized that the handling of the transaction at Wal-Mart did not give rise to a claim for punitive damages; consequently, counsel focused its argument on the information provided by Wal-Mart to the Sheriff's Department upon the Department's request, and counsel for Respondent contended that punitive damages were warranted because Wal-Mart owed a duty of protection to Mr. Solanki to prevent his arrest:

He was a customer of the store. He had an obligation—he had a right to expect that Wal-Mart would protect him against an unreasonable accusation of fraud by some third party or some sheriff or some Sheriff's Department that, with all due respect, did a botched and ineffective investigation.

Mr. Solanki was due a certain amount of protection and standard of care by Wal-Mart such that when [the deputy sheriff] came calling for the information, they should have provided—they should have explained to her, looked at the tape themselves, and said wait a minute, there are some serious questions about this transaction.

There's so many questions about why Mr. Solanki didn't do it that were never investigated by Wal-Mart.

gross negligence but only charged the jury on punitive damages and the willful, wanton, or reckless standard. While Appellant discusses both gross negligence and punitive damages herein because both issues were argued by the parties and assessed by the Court, there is no evidence to support a finding of lack of slight care or willful, wanton, or reckless misconduct and thus, the court's ruling as to both gross negligence and punitive damages was erroneous and should be reversed.

So, I do think there's evidence to go to the jury on the ground of negligence as against Wal-Mart and gross negligence and recklessness in that when, that Wal-Mart had a duty, once they knew that there was a criminal investigation being conducted on one of their own customers—and here's the problem, Your Honor.

They never considered the man might be innocent. Wal-Mart simply takes this sort of hands-off approach that Mr. Solanki, that they didn't do anything, they just provide information. The question is, you know, what information did they provide. They provided a videotape. They provided some receipts. But did they provide any explanation or clarification?

But Wal-Mart offered zero technical assistance to [the deputy sheriff] in terms of explaining what's going on in this point-of-sale machine such to suggest that I think the jury could draw very clear inferences that Wal-Mart simply failed, in an egregious way, to protect its own customer, Mr. Solanki.

(R. at 451–53). The court then inquired of Mr. Solanki's counsel as to what manner Wal-Mart failed to exercise even the slightest care regarding Mr. Solanki:

Recklessness—gross negligence is the failure to exercise even slight care, and obviously we're dealing, based on my comments yesterday, my initial reaction was to, to look at Wal-Mart as only or to send it to the jury with regard to Wal-Mart only on the negligence cause of action. Where's the failure to exercise any, even, even the slightest care with regard to the Plaintiff?

(R. at 455). Counsel for Mr. Solanki responded, "It's in the failure to conduct any kind of internal investigation to protect Mr. Solanki from an accusation of, of criminality." (R. at 455). The court then inquired as to whether or not Wal-Mart had an affirmative duty to conduct such an investigation, to which counsel for Mr. Solanki responded that he thought Wal-Mart did have a duty to conduct an internal investigation before providing

the requested information to law enforcement. (R. at 455-56). Counsel's response in this regard is patently erroneous and is not supported by South Carolina law.

Still not convinced by Mr. Solanki's argument, the trial court correctly observed that Wal-Mart merely cooperated with the Sheriff's Department by providing information that the Department requested pertaining to Mr. Solanki's transaction at Wal-Mart after having received a report of a lost or stolen credit card from Ms. Martin. The court stated:

But if we're talking about the failure to exercise even the slightest care concerning Mr. Solanki, how is cooperating with law enforcement, once they arrive and they say we want a listing of all transactions for \$144.70, there was one transaction on that day, they pull that transaction, they hand it to the deputy, they pulled the tapes, they provide those to the deputy, and Wal-Mart leaves it to the professionals to do what it is that they are supposedly trained to do, and I realize that that's disputed here.

But Wal-Mart then leaves it to law enforcement to do their thing with the reasonable assumption that if there's nothing to it, they're not gonna bring charges. If there is something to it, they will bring charges and I don't think that's an unreasonable position for any merchant to take.

You would—anytime that Wal-Mart is the victim of a bad check or a fraudulent credit card transaction like this, and I imagine it happens probably a thousand or five thousand times a day with these automated machines, you would place an affirmative duty on Wal-Mart to conduct an internal investigation with the Wal-Mart police, the Wal-Mart mall cops, to have a parallel investigation internally anytime this happens.

Is that what you're saying they have an obligation to do?

Counsel for Mr. Solanki then responded, "Well, they can, they can afford it." (R. at 458-59). Counsel for Mr. Solanki then argued that Wal-Mart has a "heightened" duty to a

customer where the customer is the target of a criminal investigation based on a situation allegedly created by Wal-Mart:

And I would, I would submit that, if the they, themselves, have created the situation which allows one of their own customers to become the target of a criminal investigation, then their duty then becomes heightened toward that customer if the customer, if there are strong suggestions that the customer's innocent, and, in this instance where you have a customer who proffers his own card and signs his own name to a transaction, and they knew that he was gonna be subject to the criminal investigation, they would have an affirmative duty to participate with the police and explain to the police the problems and to look at their own machinery and try to find out what was done and how this happened.

(R. at 459-60).

Thereafter, following the close of all of the evidence, the court again inquired about the issue of gross negligence, asking counsel, "[h]elp me out, again. How is their [sic] evidence that can go to the jury on the issue of gross negligence?" (R. at 504). Counsel for Mr. Solanki replied that Wal-Mart failed to "explain" the documents provided to law enforcement:

[By Mr. Rollins, Counsel for Plaintiff]: Well, the standard is that there is not even a slight exercise of care, and under these circumstances, when Wal-Mart presents a self-contradictory document and knowing that it will be acted upon by the appropriate authority to arrest Prakash Solanki, it has to take some action to explain that document or, in some way, to prevent his being arrested. When they, when they create the mechanism that will irrevocably lead to his arrest, they have some duty to notify the Sheriff's Department upon what ground Mr. Solanki will be arrested on.

(R. at 504).

As the trial court correctly observed when initially considering the issue, the actions of the cashier, if negligent, amounted to simple negligence:

A credit card is obviously presented. Under one – under the most reasonable interpretation of the facts, Mrs. Martin's credit card was presented, either innocently or with culpability, to Wal-Mart. Wal-Mart then keys in that credit card manually. Not the machine. But a manual key in of that credit card.

After it's all over and done, perhaps ID is checked, perhaps ID isn't checked, it probably was checked, but there wasn't a comparison of the ID against the credit card provided, and more importantly, the impression that was given on Plaintiff's 1 for the credit card that definitely belongs to Mr. Solanki in no way matches up with the credit card transaction that was actually keyed in, the credit card number that was actually keyed in by the clerk.

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 supplied). Thus, the trial court acknowledged that the alleged transaction in Wal-Mart would give rise only to a claim for simple negligence. The trial court ruled, however, that both gross negligence and punitive damages would be submitted to the jury:

All right [sic]. 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, 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). Thus, the trial court reasoned that because the transaction was "weird" and gross negligence is generally an issue of fact, that gross negligence and punitive damages would be charged. Thereafter, as discussed, the trial court indicated that it would not charge gross negligence and would charge punitive damages. (R. at 544). The trial court erred in determining that either issue should be submitted to the jury as there was no evidence to support a finding of either gross negligence or punitive damages.

B. The Trial Court Erred in Applying a Gross Negligence Standard without Making a Finding of Reckless, Wanton, or Willful Misconduct by Wal-Mart Required for Submission of Punitive Damages to the Jury.

As set forth, the trial court applied the gross negligence standard and ruled that a jury question existed as to whether or not Wal-Mart exercised even slight care. In so doing, the trial court erred by failing to make a finding that there was sufficient evidence of reckless, wanton, or willful misconduct to support an award of punitive damages. Rather, 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. As the South Carolina courts have long observed, "[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." *See Sample v. Gulf Ref. Co.*, 183 S.C. 399, 411, 191 S.E. 209, 214 (1937). In focusing on gross negligence and the standard of absence of even slight care, the trial court failed to make a determination in the first instance that there existed sufficient evidence from which a jury could conclude by clear and convincing evidence that the alleged

misconduct by Wal-Mart was willful, wanton or reckless. *See Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. at 564, 619 S.E. 2d at 11 (“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).” (*quoting S.C. Farm Bur. Mut. Ins. Co. v. Love Chevrolet Inc.*, 324 S.C. at 152, 478 S.E.2d at 58)).

Even if the trial court could be deemed to have concluded that the alleged gross negligence of Wal-Mart rose to the level of recklessness sufficient to submit the issue of punitive damages to the jury, there is simply no evidence in the record to support a finding of reckless, wanton, or willful misconduct by Wal-Mart and accordingly, the award of punitive damages must be reversed.

C. Respondent Has Failed to Identify Any Authority to Support the Argument that Wal-Mart Owes a Heightened Duty to Protect Its Customers from Criminal Prosecution and Thus, the Alleged Heightened Duty Cannot Support an Award of Punitive Damages.

Mr. Solanki’s claim for punitive damages rested on his argument that Wal-Mart had a “heightened” duty to protect Mr. Solanki from criminal prosecution and did not undertake some unidentified act when it complied with the request of Deputy Cashion to provide her with documents and video related to Mr. Solanki’s transaction. (R. at 459–60). This argument fails as a matter of law and is insufficient to support an award of punitive damages.

First, Mr. Solanki cited no authority for the claim that Wal-Mart owed a heightened duty to Mr. Solanki once the police requested evidence from Wal-Mart. It is well-established that negligence is the breach of a duty of care owed to the plaintiff by the defendant. *See, e.g., Bell v. Atl. Coast Line R.R.*, 202 S.C. 160, 181, 24 S.E.2d 177,

186 (1943). To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) resulting in damages to the plaintiff; and (4) the damages proximately resulted from the breach of duty. *See, e.g., Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 368-69, 635 S.E.2d 97, 101 (2006). In determining whether a particular act or omission is negligent, the test used is what would a person of ordinary reason and prudence do under the circumstances at that time and place. *See, e.g., Spahn v. Town of Port Royal*, 326 S.C. 632, 637, 486 S.E.2d 507, 510 (Ct. App. 1997). The issue is what, if any, duty a merchant owes a customer in the regular course of its business. *See Regions Bank v. Schmauch*, 354 S.C. 648, 668-69, 582 S.E.2d 432, 443 (Ct. App. 2003).

Under South Carolina law, the standard of care in a negligence case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. *See e.g., Madison ex. rel. Bryant v. Babcock Center, Inc.*, 370 S.C. 42, 53, 634 S.E.2d 275, 278 (2006). South Carolina courts have long recognized that merchants owe customers a general duty of care: "a merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care...." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). Thus, a merchant must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure another person who may be so directly affected by his acts or omissions.

Appellant could locate no South Carolina authority for the proposition that a merchant owes a "heightened" duty to a customer suspected of criminal activity in a

transaction that would have required Wal-Mart to do anything other than what it did and the record contains no citation of such authority by Mr. Solanki. Simply put, there was no "heightened" duty owed with regard to Mr. Solanki and there was no evidence from which a jury could conclude that Wal-Mart acted unreasonably in complying with the request from law enforcement. Moreover, even assuming that the provision of information to law enforcement by Wal-Mart was somehow unreasonable, there is absolutely no evidence that Wal-Mart acted in a willful, wanton or reckless manner in providing the requested receipts and video to Deputy Cashion and thus, the trial court erred in submitting the issue of punitive damages to the jury.

Second, Mr. Solanki presented no evidence to show that Wal-Mart deviated from any industry standard by providing the requested evidence to law enforcement without conducting its own independent investigation to "explain" the evidence to the deputy and thus, the conduct could not give rise to a finding of wanton, willful or reckless conduct. Pursuant to South Carolina law, "unless the subject is a matter of common knowledge, expert witness testimony is required to establish both the standard of care and defendant's failure to conform to the standard...." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 203 (Ct. App. 2002). Mr. Solanki has presented no evidence, expert or otherwise, to establish an industry standard requiring Wal-Mart to conduct its own independent investigation or otherwise assist law enforcement with interpretation of evidence.

Third, there was no evidence that Wal-Mart knew or had reason to know of any information regarding the transaction that would have exonerated Mr. Solanki. Even if Wal-Mart associates had reviewed the three receipts and video provided to Deputy

Cashion they 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 mere speculation and conjecture and does not at all support a finding that Wal-Mart acted in a reckless, wanton or willful manner. The trial court's conclusion that the transaction was "weird" and thus gave rise to a cause of action for gross negligence is simply insufficient to sustain the punitive damages award as a matter of law. In short, there is no evidence that Wal-Mart had knowledge that Mr. Solanki would be arrested and in any event, there is no evidence to show that Wal-Mart was aware of any information that would have precluded Mr. Solanki's arrest or that such evidence even existed. As such, Wal-Mart was under no legal obligation to undertake an independent investigation to ascertain such information, which did not exist here in any event. Because there was no evidence from which a jury could conclude by clear and convincing evidence that Wal-Mart acted in a manner that was willful, wanton, or reckless, the award of punitive damages should be reversed.

II. THE TRIAL COURT ERRED IN DENYING WAL-MART'S POST-TRIAL MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR REVERSAL OR REDUCTION OF PUNITIVE DAMAGES.

Wal-Mart timely filed post-trial motions including a motion for judgment notwithstanding the verdict, motion for new trial absolute, motion for new trial nisi

remittitur and motion for reversal or reduction of punitive damages. (R. at 19). Because there was insufficient evidence to sustain the punitive damages award, the trial court erred in denying the motions for judgment notwithstanding the verdict and the motion for reversal or reduction of punitive damages.

When reviewing the denial of a motion for judgment notwithstanding the verdict, the appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmoving party. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999) (citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992)). The appellate court should reverse the lower court where there is no evidence to support the ruling below. *Elam v. S.C. DOT*, 361 S.C. 9, 28, 602 S.E.2d 772, 782 (2004) (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994)).

In denying Wal-Mart's motions for judgment notwithstanding the verdict and to reverse or reduce punitive damages the trial court concluded for the first time that there was sufficient evidence of willful, wanton, or reckless conduct to support an award of punitive damages. (R. at 12-14). The trial court cited *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) for the proposition 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." (R. at 13). The court reasoned:

In the present case, evidence existed from which a reasonable jury could infer that Wal-Mart was not only

aware of the dangerous condition but that it also created it. Namely, Wal-Mart knew its employee hand keyed the transaction. Therefore, the Court properly submitted the issue of punitive damages to the jury. Furthermore, the jury did not have to speculate about what happened to the Plaintiff. Plaintiff presented testimony that he did not use Martin's card, and the jury viewed a video of the transaction. The jury also heard testimony regarding Plaintiff's arrest and incarceration. As previously mentioned, credibility and evidentiary determinations are best left to the finders of fact.

(R. at 14). Thus, the trial court concluded that Wal-Mart's knowledge that its employee hand keyed Mr. Solanki's transaction, along with Mr. Solanki's testimony that he used his own card, the video and testimony regarding Mr. Solanki's arrest and incarceration were sufficient to establish clear and convincing evidence of wanton, willful or reckless conduct. The court's conclusion in this regard is erroneous as a matter of law.

The trial court further concluded that the factors set forth in *Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991), favored affirmation of the jury's punitive award.⁴ In so doing the trial court reasoned, *inter alia*, that: (1) "Wal-Mart...was the party responsible for creating and disseminating the 'evidence' used in the criminal proceedings;" and (2) "Wal-Mart did not offer an explanation as to the peculiar nature of this transaction or the clear discrepancies between the credit cards numbers [sic]. Had Wal-Mart acted sooner or at least noticed the discrepancies, Plaintiff may have been cleared of the criminal allegations sooner." (R. at 16).

⁴ *Gamble* sets forth the factors that the trial court should assess when conducting a post-trial review of an award of punitive damages. Wal-Mart does not challenge the amount of the award as there was insufficient evidence to submit the issue of punitive damages to the jury in the first instance and thus, the award should be reversed on this basis. Wal-Mart cites the trial court's post-trial reliance assessment of the *Gamble* factors to illustrate the woefully inadequate facts relied upon by the court to erroneously affirm the punitive damages award.

The evidence relied upon by the trial court in making the post-trial determination that a punitive damages award could be sustained by clear and convincing evidence is wholly insufficient to sustain the punitive damages award. First, the fact that a Wal-Mart associate hand-keyed the transaction along with Mr. Solanki's testimony that he used his own card cannot form the basis of a punitive damages award. As the trial court itself alluded to several times prior to its ruling submitting the issue of punitive damages to the jury, the manner in which the transaction was conducted could only give rise to a finding of simple negligence. Second, even assuming Wal-Mart's response to law enforcement's request for information was negligent, that conduct as well can only give rise to a finding of simple negligence.⁵ The trial court cited no factual basis to support its conclusion that Wal-Mart knowingly created or was aware of a "dangerous condition" with regard to Mr. Solanki and failed to take action to minimize or avoid the danger. There simply is no evidence in the record to support such a finding. As discussed, even if Wal-Mart had reviewed the receipts and video prior to turning them over to Deputy Cashion, the record is absolutely devoid of any evidence that Wal-Mart had any information that would have exonerated Mr. Solanki or precluded his arrest and prosecution. Thus, the issue of punitive damages should not have been submitted to the jury and further, once the award was made, the trial court erred in denying Wal-Mart's post-trial motions to reverse the award of punitive damages.

⁵ Wal-Mart does not agree that there was sufficient evidence of negligence arising out of Wal-Mart's compliance with the request for information by Deputy Cashion. However, Wal-Mart acknowledges that the discrepancy between the credit card numbers during the transaction could give rise to a finding of simple negligence. As the jury verdict does not specify the basis for the finding of negligence Wal-Mart does not challenge the jury's verdict on the simple negligence cause of action.

III. THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE PUBLIC POLICY IMPLICATIONS OF IMPOSING A HEIGHTENED DUTY ON RETAILERS TO CONDUCT AN INTERNAL INVESTIGATION, THUS CHILLING SUCH RETAILERS' COOPERATION WITH LAW ENFORCEMENT.

The heightened duty imposed by the trial court does not follow South Carolina precedent and creates a chilling effect on retailers' ability to cooperate with law enforcement. In the case at bar, Appellant Wal-Mart complied with a request from the Spartanburg County Sheriff's Department to provide documents and video relevant to the transaction at issue. The heightened duty of care imposed by the trial court would force retailers to conduct their own independent internal investigation prior to complying with such a request from local police authorities.

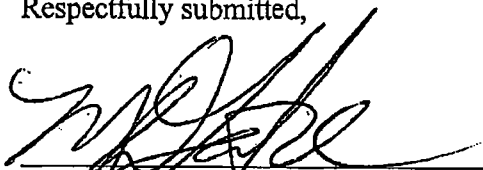
This duty has a multitude of consequences that grate against public policy. First, the investigation conducted by police authorities would be delayed as retailers conducted their own investigation as to the potential innocence of their patrons. This delay could cripple police efforts to apprehend guilty criminals before another such crime is committed. Second, the internal investigation conducted by retailers would force retailers to hire additional personnel to work as detectives monitoring customers and evaluating potentially fraudulent transactions. This increase in personnel and proper training would result in higher costs passed on to consumers who patronize such retail stores. Third, the imposition of this heightened duty would likely bankrupt smaller retailers that do not have the resources to conduct such an internal investigation. Despite the fact that Appellant Wal-Mart is a large multi-national retailer, the heightened duty imposed by the trial court would be uniformly applied to retailers of all sizes where potentially fraudulent transactions occur. Fourth, this type of duty would put additional

strain on the court systems in this state to monitor the investigation procedures of retailers so as to prevent unfair practices. This type of investigation into potentially fraudulent transactions is best left to properly trained police authorities. This Court should reverse the trial court's decision to impose a heightened duty on retailers in order to avoid a chilling effect on the retailers' willingness to cooperate with law enforcement efforts.

CONCLUSION

For the reasons set forth herein Appellant Wal-Mart Stores East LP respectfully requests that this Court find that the trial court erred in submitting the issue of punitive damages to the jury and reverse the award of punitive damages.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Regina Hollins Lewis', written over a horizontal line.

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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

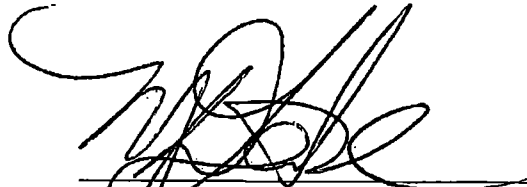
Prakash and Urmila Solanki.....Respondents,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with SCACR Rule 211(b).



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY CIRCUIT COURT

Court of Common Pleas

Frank R. Andy, Jr. Circuit Court Judge

Case No. 2012-213247

Prakash and Urmila Solanki,

Respondents

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

Wal-Mart Store #2806 is the Appellant

Appellant

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY?
2. SHOULD THE APPELLATE COURT REVERSE THE JURY'S AWARD OF PUNITIVE DAMAGES BASED ON "PUBLIC POLICY" CONSIDERATIONS (I.E., OVERTURN THE JURY'S AWARD OF PUNITIVE DAMAGES BASED ON THE APPELLATE COURT'S OWN WEIGHING OF THE SUFFICIENCY OF THE EVIDENCE)?

STATEMENT OF THE CASE

This case is an appeal by Wal-Mart ("Appellant") from a jury verdict in the Spartanburg County Court of Commons Pleas. Prakash Solanki ("Respondent") filed an action on November 18, 2010 against Wal-Mart and the Spartanburg County Sheriff's Office alleging actions for 1) negligence; 2) gross negligence and recklessness; 3) false imprisonment; 4) intentional infliction of emotional distress; 5) defamation and defamation *per se*; 6) assault; 7) battery; 8) malicious prosecution; and 9) loss of consortium. A jury trial was held in Spartanburg from March 5, 2012 to March 9, 2012. The Court directed a verdict for Wal-Mart except for the negligence/gross negligence claims against Wal-Mart. The jury found that Defendant Spartanburg County was not liable to Plaintiff, and the jury returned a verdict against Wal-Mart in favor of Respondent on the issue of negligence/gross negligence by awarding \$50,000 in actual damages and \$225,000 in punitive damages to Respondent Prakash Solanki on March 9, 2012. The jury also found Respondent Prakash Solanki twenty five percent (25%) comparatively at fault.

Thereafter, Appellant filed post-trial motions for Judgment Notwithstanding the Verdict, 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. On September 25, 2012, Appellant's Motions were denied. Appellant thereafter appealed to this Court.

STATEMENT OF THE FACTS

Plaintiff Prakash Solanki went to Wal-Mart Store #2806 in Boiling Springs, South Carolina on November 27, 2009 to purchase items for his upcoming trip to India. He testified that he used his own debit card and possessed no card that did not belong to him (Record on Appeal Vol. I, pp. 92--97). It is undisputed that he provided a Wal-Mart employee with his own debit card, of which an employee made an impression. It is undisputed that a Wal-Mart employee hand keyed a transaction that was charged on the credit card of Robin Martin, who reported the charge as fraudulent. (Record on Appeal Vol. I pp. 92-97). Deputy Gina Cashion of the Spartanburg County Sheriff's Office investigated the transaction and was provided videos of the incident, as well as a Wal-Mart generated receipt of the purchase, by Wal-Mart. The receipt showed an impression of Prakash Solanki's credit card, along with his signature, on one side and the transaction and Robin Martin's credit card number on the other. Deputy Cashion testified that the video and receipt/impression provided by Wal-Mart constituted the bases upon which she arrested Mr. Solanki (Record on Appeal Vol. I, p. 383-384). Deputy Cashion testified that the Sheriff's Office had attempted to contact Mr. Solanki by leaving a note at his South Carolina home and leaving a message on his phone. Plaintiff testified that he was in Georgia at the time. Deputy Cashion testified that Mr. Solanki had an obligation to prove his innocence and should have contacted the Sheriff's Office regarding its request for his cooperation. (Record on Appeal Vol. I p. 350). Prakash Solanki was arrested and spent six

days in prison as a result of this transaction, and, according to Deputy Cashion, his arrest was predicated by the Wal-Mart receipt and videos provided to her by Appellant Wal-Mart (Record on Appeal Vol. I, p. 382-383). The entire credit card transaction was captured on a video that the jury viewed several times.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY.

Although it is partially accurate, as Appellant contends, that punitive damages are awarded to punish wrongdoers and deter like conduct, the rule has long been clear that punitive damages serve a broader purpose in South Carolina. In fact, the relatively broad scope of punitive damage awards in South Carolina has a history that dates to within one year of the United States' gaining its independence from Great Britain, as articulated by our Supreme Court:

The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future. *Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party.* This Court has explained the important role that punitive damages play in the American system of justice generally, and in South Carolina in particular since at least 1784.

Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; *and indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded; but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning*

to others.... Punitive damages have now come, however, to be generally, though not universally, regarded, not only as punishment for wrong, but as vindication of private right. This is the basis upon which they are now placed in this state.

Clark v. Cantrell, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000) (emphasis added) (citations omitted) (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 573, 106 S.E.2d 258, 261 (1958)). Therefore, punitive damages exist not only to deter the wrongdoer, but they also exist to compensate the plaintiff, particularly a plaintiff who has suffered non-economic damages for invasion of his private rights—in the case at bar, of the Plaintiff's right to liberty itself: "Our courts have long recognized that punitive damages serve to compensate a plaintiff and vindicate his rights arising out of a wrong suffered or injury sustained." Smith v. Widener, 397 S.C. 468, 472, 724 S.E. 2d 188, 191 (Ct. App. 2012).

South Carolina's application of punitive damages awards is so broad that, in some cases, the law not only allows a punitive damage award but *requires* it. In Sample v. Gulf Refining Co., 183 S.C. 399, 191 S.E. 209, 215 (1937), Chief Justice Stabler held:

There was also no error in charging plaintiff's third request containing the proposition that it would be the duty of the jury to award punitive damages, if it found that respondent's rights had been consciously, willfully, and recklessly violated. While there is authority in other jurisdictions to the effect that the award of punitive damages rests in the discretion of the jury yet under the settled rule prevailing in this state punitive damages are awarded not only as punishment for a wrong, but also as vindication of private right, and when under proper allegations a plaintiff proves a willful, wanton, reckless, or malicious violation of his

rights, *it is not only the right but the duty of the jury to award punitive damages.*

(Emphasis added).

- A. **The Legal Threshold for Whether the Jury Must Be Given a Punitive Damages Charge is Whether Evidence Exists By Which A Reasonable Inference of Recklessness, Willfulness, or Wantonness May Be Drawn, and, When a Party Creates a Dangerous Condition and Takes No Action To Mitigate the Potential Harm from that Dangerous Condition, it is Chargeable with Consciousness of its Wrongdoing so as to Necessitate a Punitive Jury Charge.**

In the second tier of cases (after those in which a Plaintiff is entitled as of right to an award of punitive damages) are those cases in which the issue of punitive damages is left to the discretion of the jury. In the case at bar, the trial court did not determine that the Plaintiff was entitled to an award of punitive damages as a matter of right; accordingly, the only issue for the trial judge's determination is whether any reasonable inference of recklessness, willfulness, or wantonness could have been drawn. The rule is that "[t]he issue of punitive damages *must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton.*" Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) (emphasis added). If the court determines, as it did in the case at bar, that more than one inference can be drawn regarding the recklessness, willfulness, or wantonness, the court *must* submit the punitive issue to the jury.

Accordingly, the only issue properly before this Court with regard to the issue of the trial court's charging punitive damages is whether it is possible that an inference of

recklessness, willfulness, or wantonness could reasonably have been drawn from the evidence presented in the case:

The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights. It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor [. . .]” In other words, “at the time of his act or omission to act the tort-feasor [must] be conscious, *or chargeable with consciousness*, of his wrongdoing.

Cody P. v. Bank of America, N.A., 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011) (emphasis added) (citations omitted). This standard holds 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.* Mishoe, 366 S.C. at 201, 621 S.E.2d at 366 (emphasis added).

Section I (A)(1) of Appellant’s Brief states, “The trial court acknowledged that the evidence supported the submission of simple negligence only to the jury and erred in thereafter ruling that punitive damages would be submitted to the jury.” In fact, the trial court never “acknowledged” that “submission of simple negligence only” was warranted. The basis of Appellant’s allegation is an offhand remark by the trial judge, which Appellant itself quotes in its brief: “I see that as simple negligence. I don’t know why 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.” (Record on

Appeal Vol. II, pp. 460-462) (Appellant's Brief at 15). Apodictically, in a jury trial, it is the jury, and not the judge, that is the fact finder. By Appellant's logic, since the trial judge had determined, in his own mind, that Wal-Mart was negligent, the same course of line of reasoning that leads Wal-Mart to now allege that gross negligence, wilfulness, wantonness, and reckless were not at issue would also lead to the logical conclusion that liability was not at issue, *i.e.*, since the judge found simple negligence, he should have directed a verdict as to liability and allowed the jury to decide only damages. If the trial court had so found, of course, this appeal would have been taken on different grounds.¹ In fact, the trial court simply followed the law that required it to submit the issue of punitive damages to the jury if any reasonable inference of reckless, willful, or wanton conduct could be drawn from the evidence. That a trial judge forms a personal opinion about what he thinks the evidence shows does not require (or even allow) him to substitute the opinion he forms for that of the jury, which remains the finder of fact in a jury trial.

In making its *legal* decision (which is within the purview of the judge in a jury trial), after giving its *factual* (and, in a jury trial, irrelevant) opinion about whether it believed Wal-Mart should be liable to Plaintiff, the trial court went on to state the correct rule of law:

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

¹ In FN5, p. 23 of its brief, Appellant states that "Wal-Mart does not agree that there was sufficient evidence of negligence [. . .]."

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 punitive.

(Record on Appeal Vol. II, p. 506). In its brief, Appellant makes an argument that the trial court did not clearly demarcate the boundaries between gross negligence and punitive damages (FN 3 of Appellant's Brief at page 11). Appellant thereafter raises the issue that the trial court did not charge gross negligence but did charge punitive damages. Appellant does not dispute that the trial court's punitive jury instruction charged the correct law. Nor does it explain how the trial court's failure to adequately demarcate the difference between the gross negligence and punitive damages standards in the court's statements to counsel while the jury was not present could possibly invalidate the jury's awarding punitive damages based on a punitive jury charge that correctly outlines the law.

In Gathers, which was cited by Plaintiff's counsel as grounds for the Wal-Mart's liability (Record on Appeal Vol. 2, Part 1 at PP. 465 - 467), the arresting officer, Ackerman, had allegedly witnessed the plaintiff steal items from the Harris Teeter store. Gathers v. Harris Teeter, 282 S.C. 220, 225, 317 S.E.2d 748, 752 (Ct. App. 1984). The only role played by Harris Teeter was that it was the site of the alleged theft, and its employees assisted Officer Ackerman—upon his request. Id. In the case at bar, on the other hand, Wal-Mart created the self-contradictory document that the police used to arrest Plaintiff. Even when Defendant Harris Teeter, in Gathers, was found liable only for

agreeing to cooperate with a police investigation, this Court refused to absolve it of liability:

Harris Teeter seeks to relieve itself of liability for its employees' actions by claiming that [Police Officer] Ackerman ordered the two employees to help him, that they were under a legal duty to help Ackerman, and that the law imposes no civil liability upon a private person for doing what the law requires him to do [. . .] The only duty imposed upon a private citizen is to communicate such facts and information to a police officer as are necessary to allow the officer the opportunity to apprehend the offender [. . .] Any further actions taken by a private citizen must be justified under the circumstances.

Id. The distinguishing feature in the case at bar is that, prior to acquiring evidence from Wal-Mart, the police had no evidence that would link Plaintiff to the alleged crime. Wal-Mart did not provide the police with evidence to apprehend a person who was a known criminal offender. Instead, Wal-Mart made the Plaintiff appear to be an offender when he was not by creating and producing the evidence that was used to inculcate and arrest him. In addition, a Wal-Mart employee admittedly hand-keyed the fraudulent transaction. As Plaintiff's counsel argued to the trial court:

We have a request to admit, on the record, that Wal-Mart keyed in this transaction [. . .] and we have Prakash Solanki's card imprinted on the other side. These two [. . .] documents [. . .] on this single exhibit show two [. . .] scenarios [. . .] Now, Wal-Mart provided this contradictory piece of evidence that it generated [. . .] It's only Wal-Mart that has created this document that has two separate credit card transactions on a single document [. . .] it's inherently irrational and [. . .] Wal-Mart's position essentially is that it can relieve itself of liability because [. . .] Wal-Mart was required to cooperate with government entities [. . .] but when it provides evidence that is inherently contradictory, it cannot do so without explanation of how that evidence was generated when it knows, by cooperating with the police [. . .] an arrest will result [. . .] only

Wal-Mart had access to its internal system to explain how this could have happened.

(Record on Appeal Vol. 2, at pp. 465 - 467). By any standard, when a Wal-Mart employee entered the fraudulent transaction, and Wal-Mart created a document with contradictory evidence while exclusively controlling the instrumentality by which it was created, and because of which Respondent was arrested, the jury could infer, as it did, that Wal-Mart was conscious, or chargeable with consciousness, of the wrong it was perpetuating—a wrong that eventually led to Respondent's spending six days in jail. The appropriate legal standard, after all, requires only that the defendant be conscious or chargeable with consciousness of the existence of a "dangerous condition" that it has created and regarding which it has not taken "action to minimize or avoid the danger" before "sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness." Mishoe, 366 S.C. at 201, 621 S.E.2d at 366.

B. No Standard Exists by which an Appellate Court May Reverse a Trial Court's Damages Award Based on the Appellate Court's Engaging in its Own Weighing of the Evidence.

Appellant alleges that this Court should reverse the trial court on the basis that the trial court erred by submitting the issue of punitive damages to the jury without "*sufficient evidence* from which a jury could conclude by clear and convincing evidence that the alleged misconduct by Wal-Mart was willful, wanton or reckless." (Appellant's Brief at 17). South Carolina appellate court review does not extend so far with respect to the issues presented. Instead,

The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Because of this discretion, our review on appeal is limited to the correction of errors of law. Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.

Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310-11, 594 S.E.2d 867, 873

(Ct. App. 2004) (internal citations omitted).

This statement regarding the insufficiency of the evidence, reiterated with variations throughout Appellant's brief, encapsulates the entirety of Appellant's argument that the jury's punitive award should be reversed.² Appellant requests that this Court engage in a *de novo* review of the sufficiency of the evidence upon which the trial court made its determination to provide a jury charge for punitive damages and thereafter find, as a matter of fact, that Wal-Mart's conduct did not rise to the level of recklessness, willfulness, or wantonness. Although South Carolina law, following the United States Supreme Court's guidance, does analyze the *constitutionality* of the *amount* of punitive damages awards *de novo* to determine whether it comports with due process (See, e.g. Mitchell v. Fortis, Ins. Inc., 385 S.C. 570, 686 S.E.2d 176 (2009)), no rule of law has ever allowed an appellate court in South Carolina to gainsay the trial court's "any evidence" and "reasonable inference" determinations that punitive damages, *per se*, were justified. At the appellate level, the standard is not whether *sufficient* evidence existed for the trial court's finding regarding the punitive issue—but whether *any evidence* existed: "This Court must

² Interestingly, at trial, Wal-Mart did not call any witnesses or present any evidence.

affirm the trial court's punitive damages finding [. . .] if *any evidence reasonably supports* the judge's factual findings." Austin, 358 S.C. at 314, 594 S.E.2d at 875 (emphasis added).

Although an appellate court may reduce the amount of a punitive award if it makes a *de novo* determination that the award violates due process, it cannot substitute its view for the jury's regarding whether the conduct of a defendant was reckless, willful, or wanton so as to abrogate, *per se*, an award of punitive damages:

In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings.

Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

Clearly, because Wal-Mart created the instrumentality that led to Mr. Solanki's wrongful arrest, the trial court was not only allowed, but required, to submit the issue of punitive damages to the jury because "[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*." Mishoe, 366 S.C. at 201, 621 S.E.2d at 366 (Emphasis added). The jury was admittedly provided with a correct jury charge (Record on Appeal Vol. 2 at 680-682) regarding the standard required before it could award punitive damages. In fact, as concrete evidence that the jury seriously weighed its duties, the jury requested

clarification regarding the scrivener's error stating the requirement as a conjunctive "willful, wanton, *and* reckless" instead of the correct, disjunctive, standard "willful, wanton, *or* reckless." (Record on Appeal Vol. 2 at 698-699. Accordingly, the trial court properly submitted the issue of punitive damages to the jury.

II. THE COURT DID NOT FIND THAT WAL-MART OWED A HEIGHTENED DUTY OF CARE, AND NO PRECEDENT EXISTS FOR AN APPELLATE COURT SUBSTITUTING ITS FINDINGS OF FACT FOR THOSE OF THE JURY.

As articulated by the South Carolina Supreme Court,

The rule of reasonable care under the circumstances could not limit the conduct of Robinson Crusoe as he was first situated; but as soon as he saw the tracks in the sand, the rule began to have vitality. He then had notice that there might be other persons on the island; *and this knowledge of their presence made it his duty as a reasonable man to use reasonable care to the end that no act of his should injure them* Rogers v. Scyphers, 251 S.C. 128, 134-35, 161 S.E.2d 81, 84 (1968).

Rogers v. Scyphers, 251 S.C. 128, 134-35, 161 S.E.2d 81, 84 (1968) (quoting 38 Am. Jur. at page 655, Negligence, Sec. 14). The only duty owed to Respondent was the duty of reasonable care under the circumstances.

A. The Trial Court Did Not Hold Wal-Mart To A Heightened Duty of Care.

Nothing in the record of this case indicates that the trial court made any decision as a consequence of a "heightened" duty of care. Wal-Mart's argument to that effect rests solely upon a single occurrence in which Plaintiff's counsel (not the court) stated that Wal-Mart owes a "heightened" duty of care when Wal-Mart "created the situation." (Record on Appeal Vol. II, pp. 459). Clearly, this statement articulates an erroneous proposition of

law, but Wal-Mart points to no evidence that the trial court made any decision based upon an alleged "heightened" duty. Apart from evidence somewhere in the record that indicates the judge applied the erroneous standard, there is no ground for reversal. In its order denying Wal-Mart's post-trial motions, the trial court found that the action was one of negligence, and Wal-Mart owed only "the duty of reasonable care under the circumstances." It summarized particularly the duty that it had determined:

In the instant case, Wal-Mart and its employees are charged with the duty of a reasonable merchant in processing financial card transactions. Clearly, Wal-Mart owes an obligation to its customers to properly process credit card transactions. To assert otherwise would allow Wal-Mart to receive the benefit of correctly processed transactions without any of the corresponding responsibility for any ill effects of negligently processed transactions. Just as a store owner in a premises liability case owes the customer a duty to make the store reasonably safe, Wal-Mart owed Plaintiff a duty to reasonably process this transaction. Whether Wal-Mart lived up to this duty is a question solely within the province of the jury, and this Court will defer to the jury's determination in that regard.

Order Denying Wal-Mart's Post-Trial Motions at 6. Accordingly, since the trial court never determined that a heightened duty was owed, a reversal based upon such an allegation is not warranted.

B. The Trial Court Was Correct in Denying Wal-Mart's Post-Trial Motions for Judgment Notwithstanding the Verdict and for Reversal or Reduction of the Punitive Damages Award.

With regard to Wal-Mart's assertion that the trial court erred in failing to grant its post-trial motions:

In reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the circuit court. When

ruling on directed verdict or JNOV motions, the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied.

On appeal from the denial of a motion for directed verdict or JNOV, the appellate court may only reverse if there is no evidence to support the circuit court's ruling. Neither the circuit court nor the appellate court has the authority to decide credibility issues or resolve conflicts in testimony.

Mishoe, 366 S.C. at 200, 621 S.E.2d at 355 (citations omitted). In its Order denying Wal-Mart's motions, the trial court found, "[w]hether Wal-Mart lived up to this duty [to reasonably process credit transactions] is a question solely within the province of the jury, and this Court will defer to the jury's determination in that regard." Order Denying Wal-Mart's Post-Trial Motions at 6. The trial court's deference to the jury's verdict has a sacrosanct status under South Carolina law: "It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967). In addition:

A trial court may amend a verdict in matters of form, but not of substance. A change of substance is a change affecting the jury's underlying decision, but a change in form is one which merely corrects a technical error made by the jury. The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. After the amendment, the verdict must be not what the judge thinks it ought to have been, but what the jury intended it to be.

While a trial judge may have the right in certain instances in a civil case to make, or order made, a correction in the verdict of a jury, after discharge of the jury, for the purpose of giving effect to what the jury unmistakably found, that power is limited strictly to cases where the jury

has expressed their finding in an informal manner but the Judge cannot, under the power of amending the verdict, invade the province of the jury or substitute his verdict for theirs.

The law rather forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury. Obviously, the absolute power to change or modify the findings of a jury upon an issue of fact properly submitted to them would, when exercised, amount to the substitution of the trial judge's findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury.

Camden v. Hilton, 360 S.C. 164, 172-73, 600 S.E.2d 88, 92 (Ct. App. 2004) (citations omitted). Defendant Wal-Mart cannot allege that the charges submitted to the jury were in any manner deficient. No required jury charge relating to the negligence cause of action or the damages in this case was omitted, and every charge articulated the correct legal standard applicable for each element of negligence, comparative negligence, damages, and punitive damages.

The jury was presented with the direct evidence of the video of the transaction for which Mr. Solanki was arrested and with circumstantial evidence pertaining to where the allocation of blame for his arrest lay. Clearly, since the jury found a verdict for Defendant Spartanburg County, it allocated the blame for Plaintiff's arrest to Wal-Mart, which created the evidence that led to the arrest. Viewing the evidence in the light most favorable to Respondent, no evidence warrants a finding that the trial Court erred by not granting Wal-Mart's motions, and this Court is constrained to accept the trial court's findings since no evidence exists that they were governed by any error of law.

CONCLUSION

Under South Carolina law, "An appellate court cannot reduce a verdict and will only strike down a verdict *in toto* in those rare cases where the amount is so shockingly excessive as to indicate it was the result of passion, partiality, prejudice, or corruption." Gathers at 232, 756. In the instant case, Appellant makes no allegation of passion, partiality, prejudice, or corruption. Such an allegation, in a case in which the jury found the Plaintiff 25% comparatively at fault, found one defendant not liable, and requested clarification of the punitive damages standard before making its award, could not be credibly made. For this reason, and for the other reasons articulated above, the judgment of the trial court should be affirmed.



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September 4, 2013

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

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 certify that I have served the Final Brief of Respondent, on Appellant,
Wal-Mart Store #2806, by depositing a copy of the same in the United States Mail, postage
prepaid, on September 4, 2013, to its attorney of record and the following parties:

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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[SIGNATURE PAGE FOLLOWS]

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September 4, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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Prakash and Urmila Solanki,.....Respondents,

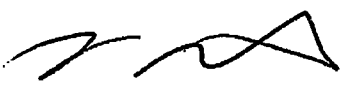
v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

September 4, 2013.


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THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2012-213247

Appeal From Spartanburg County
The Honorable Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5264
Heard March 5, 2014 – Filed August 20, 2014

AFFIRMED

Regina Hollins Lewis and Mary Daniel LaFave, both of
Gaffney Lewis & Edwards, LLC, of Columbia, for
Appellant.

John David Hawkins and Charles Logan Rollins, II, both
of The Hawkins Law Firm, of Spartanburg, for
Respondents.

Solankis) in an action for gross negligence. It also appeals the trial court's denial

of its post-trial motions for Judgment Notwithstanding the Verdict (JNOV) and for the reversal or reduction of punitive damages. We affirm.

FACTS/PROCEDURAL HISTORY

On November 27, 2009, "Black Friday," the Solankis went shopping at the Wal-Mart in Boiling Springs, South Carolina. After they selected their items, Mr. Solanki went to the self-checkout line; however, he experienced a problem with the register. Ryan Smalls, a Wal-Mart employee, attempted to help Mr. Solanki. When Smalls could not get the self-checkout machine to operate correctly, Smalls took Mr. Solanki to a cashier-assisted register. There were also problems with that register. During the transaction, Mr. Solanki handed Smalls his debit card and identification. Smalls manually stenciled Mr. Solanki's debit card, which he used as a credit card because Mr. Solanki could not remember his pin number. However, the credit card information of Robin Martin was hand keyed into the register during this transaction. A receipt with Martin's credit card information was signed by Mr. Solanki and \$144.70 was charged to her account. The Solankis left the store unaware of the mistake.

On December 1, 2009, Martin notified the Spartanburg County Sheriff's Office her credit card had been stolen and two unauthorized charges were on her account, including Mr. Solanki's purchase at Wal-Mart. Deputy Gina Cashion was assigned to the case. She requested Wal-Mart provide her with the video surveillance and receipts for the date and time of the unauthorized charges. Wal-Mart found one transaction for that date in the amount of \$144.70. It provided Deputy Cashion with video surveillance of the transaction, a copy of the stenciled impression of Mr. Solanki's debit card, the itemized receipt, and the store's copy of the receipt showing Martin's credit card information with Mr. Solanki's signature.

Deputy Cashion tried to contact Mr. Solanki but was unsuccessful. Based on the information at her disposal, she obtained an arrest warrant for Mr. Solanki. He was arrested in Georgia in April 2010 and spent six nights in jail before he was transported to South Carolina where he posted bail. He was indicted on financial transaction card theft and financial transaction card fraud, but the indictments were dismissed on August 24, 2010.

Mr. and Mrs. Solanki filed a complaint against Wal-Mart and the Sheriff's Office for (1) negligence, (2) gross negligence and recklessness, (3) false imprisonment, (4) intentional infliction of emotional distress, (5) defamation and defamation per

se, (6) assault, (7) battery, (8) malicious prosecution, and (9) loss of consortium.¹ The trial court directed a verdict for Wal-Mart on all causes of action except negligence and gross negligence. The jury returned a verdict against Wal-Mart for negligence. They awarded Mr. Solanki \$50,000 in actual damages and \$225,000 in punitive damages against Wal-Mart. They also found Mr. Solanki was comparatively negligent in the amount of 25%. Wal-Mart filed post-trial motions for JNOV, new trial *nisi* remittitur, reversal or reduction of punitive damages, or new trial pursuant to the Thirteenth Juror Doctrine. The trial court denied all of Wal-Mart's motions. This appeal followed.

LAW/ANALYSIS

I. Punitive Damages

Wal-Mart asserts the Solankis presented insufficient evidence to submit the issue of punitive damages to the jury. Specifically, Wal-Mart maintains the Solankis presented no evidence at trial its actions were willful, wanton, or reckless. Instead, it argues this is a case of simple negligence, which is not subject to punitive damages. Furthermore, Wal-Mart contends the trial court erred in applying the gross negligence standard without first making a finding of willful, wanton, or reckless misconduct before submission to the jury.

Additionally, Wal-Mart argues the Solankis asserted a heightened duty of care for Wal-Mart beyond the duty a merchant owes to its customers. Wal-Mart maintains it was not under a heightened duty of care, and under the general duty of care a merchant owes to a customer, no facts were presented at trial that demonstrated Wal-Mart breached its duty. Wal-Mart contends the Solankis presented no evidence showing it deviated from industry standards by handing over the evidence in its possession to the Sheriff's Office without conducting its own investigation. We disagree.

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses no evidence that reasonably supports the jury's findings." *Wright v. Craft*, 372 S.C. 1,

except for the claims of false imprisonment and malicious prosecution. The jury

18, 640 S.E.2d 486, 495 (Ct. App. 2006). According to Rule 220(c), SCACR, an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000).

The standard of review as regards the refusal to grant a directed verdict is well established: In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed by this [c]ourt when there is not evidence to support the ruling below.

Creech v. S.C. Wildlife & Marine Res. Dep't, 328 S.C. 24, 28-29, 491 S.E.2d 571, 573 (1997) (internal quotation marks omitted).

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). "Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Id.* at 378-79, 539 S.E.2d at 533.

To 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. *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). "A conscious failure to exercise due care constitutes willfulness." *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984).

In light of *Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991)], there are now three stages in this state to a trial court's review of punitive damages.

First, the court must determine whether the defendant's conduct rises to the level of culpability warranting a punitive damage award. If not, the issue of punitive damages may not be submitted to the jury. If so, the jury should be adequately instructed to assess an appropriate amount of damages. Second, the trial judge must conduct a post-trial *Gamble* review to ensure that the award does not deprive the defendant of due process. If the award is determined to violate the defendant's due process rights, then the trial court must either grant a new trial absolute, or a new trial *nisi* remittitur. If the award is determined not to violate the defendant's due process rights, then the trial court reaches the third inquiry, to wit, whether, in the exercise of its discretion, it finds the award excessive or inadequate.

S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996).

Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care. *Clyburn v. Sumter Cnty. Sch. Dist. # 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). "While 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." *Bell v. Atl. Coast Line R. Co.*, 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning- the conscious failure to exercise due care." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

Gross negligence is ordinarily a mixed question of law and fact. *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887. "When the evidence supports but one reasonable inference, it is solely a question of law for [the] court, otherwise it is an issue best resolved by the jury. . . . In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." *Madison ex rel. Bryant v. [unintelligible]*, [unintelligible] S.C. [unintelligible], [unintelligible] S.E.2d [unintelligible] (1994). "The duty of a landlord is not an absolute of the safety of the customer but rather that of the duty of exercising ordinary care to keep the premises in reasonably safe condition."

The record contains no evidence the trial court imposed a heightened duty of care on Wal-Mart. At trial, the Solankis' attorney discussed his own belief that Wal-Mart should be subject to a heightened duty; however, the record does not indicate the trial court instructed the jury on a heightened duty.

We find the Solankis presented sufficient evidence of Wal-Mart's willful, wanton, or reckless misconduct to send punitive damages to the jury in two factual circumstances—the taking of the credit card information for the sale and the turning over of the credit card information to law enforcement. The trial court followed proper procedure in making this finding. At the close of all evidence, Wal-Mart moved for a directed verdict, asserting the Solankis had not proven gross negligence, and the trial court denied the motion. In its order denying Wal-Mart's post-trial motions, the trial court explicitly found sufficient evidence of willful, wanton, or reckless misconduct by Wal-Mart to send the issue to the jury. Particularly in light of the standard of review for directed verdict motions, we find sufficient evidence existed at the close of evidence to allow the issue of gross negligence to go to the jury. Wal-Mart attempted to run Mr. Solanki's credit card at least three times. When that was unsuccessful, the employee resorted to manually stenciling Mr. Solanki's credit card; however, the information hand-keyed into the cash register belonged to Martin. At the end of the transaction, the receipt presented had Mr. Solanki's signature but showed Martin's credit card information. These facts combined with Mr. Solanki's testimony that he did not use Martin's credit card could allow a reasonable jury to determine Wal-Mart's actions amounted to gross negligence. When reviewing these facts in the light most favorable to the Solankis, we find no error in the trial court's conclusions.

The trial court also found evidence was presented from which a reasonable jury could have concluded Wal-Mart was aware of the dangerous condition it created. It determined Wal-Mart knew the employee hand-keyed the transaction and testimony was presented Mr. Solanki did not present any card but his own to the cashier. Therefore, viewing all facts in the light most favorable to the Solankis, the trial court determined it would be reasonable to conclude Wal-Mart was responsible for the error in processing the credit card. Furthermore, the trial court concluded 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.

II. Post-trial Motions

Wal-Mart asserts the evidence was insufficient to sustain the grant of punitive damages. Therefore, the trial court erred in denying the motion to reverse or reduce the amount of punitive damages.

Regarding the motion for JNOV, Wal-Mart argues the denial of this motion was the first time the trial court made a finding of willful, wanton, or reckless misconduct by Wal-Mart. It maintains this was an error of law. Additionally, it asserts the trial court erred in its evaluation of the *Gamble* factors and the trial court's reasoning is insufficient to sustain an award of punitive damages under a clear and convincing standard. In response to the trial court's evaluation of the first *Gamble* factor (defendant's degree of culpability), Wal-Mart contends the hand keying of Mr. Solanki's credit card only speaks to simple negligence. Additionally, Wal-Mart argues that even if its response to the Sheriff's Office's request for information amounted to negligence, it was only simple negligence, and no evidence was presented Wal-Mart was aware of a dangerous condition it then failed to mitigate. Therefore, it contends the evidence was insufficient to sustain the award of punitive damages.² We disagree.

When reviewing a motion for JNOV, an appellate court must employ the same standard as the trial court. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). On appeal from an order denying a motion for JNOV, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012).

In *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354, the supreme court of South Carolina specified an eight-factor post-verdict review for trial courts to conduct to determine if a punitive damages award comports with due process. The factors are:

- (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7)

² Wal-Mart's brief contains no argument regarding the *Gamble* factors. *Earthlink, Inc. v. Earthlink, Inc.*, 395 S.C. 170, 726 S.E.2d 170 (2012), cert. denied.

defendant's ability to pay; and finally, (8) . . . other factors deemed appropriate.

Id. The trial court is not required to make findings of fact for each factor to uphold a punitive damage award. *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996).

"[W]e need dwell no longer upon the rationale, or upon the merits or demerits, of the doctrine [of punitive damages]. Acquiescence in it for almost two centuries justifies the conclusion that it is now agreeable to, and part of, the public policy of the state." *Rogers v. Florence Printing Co.*, 233 S.C. 567, 574-75, 106 S.E.2d 258, 261-62 (1958).

As previously noted, the Solankis presented sufficient evidence to send the issue of punitive damages to the jury. Accordingly, the trial court did not err in denying Wal-Mart's post-trial motion to reverse or reduce the amount of the punitive damages. We also disagree with Wal-Mart's proposition it was an error of law for the trial court to explicitly state its finding of willful, wanton, or reckless misconduct for the first time in its order denying Wal-Mart's post-trial motions.

We find the trial court's analysis of the *Gamble* factors is sufficient to sustain the punitive damages award. The trial court made the required *Gamble* analysis after the award of punitive damages. Regarding the defendant's degree of culpability, it found Wal-Mart created and disseminated the evidence used to arrest Mr. Solanki. Therefore, Wal-Mart was in the best position to point out the hand-keying of the credit card information to the Sheriff's Office. As to the duration of the conduct, the trial court determined the transaction itself lasted a few minutes. However, Wal-Mart had the opportunity to explain the odd nature of the transaction throughout the criminal process. Concerning the defendant's awareness or concealment, the trial court found Wal-Mart created the documents and had exclusive knowledge and possession of them when it turned the information over to the Sheriff's Office. Furthermore, Wal-Mart was in the best position to ensure the transaction was handled properly. The trial court stated a punitive damages award may encourage greater oversight in Wal-Mart's and similarly situated vendor's credit card processing procedures. Regarding whether the award is reasonably related to the harm likely to result from such conduct, the trial court found the award was reasonably related to the harm suffered by Mr. Solanki and others who may be improperly accused of a crime due its negligence. It further found Wal-Mart was able to pay the punitive damages award. The court considered the fact that the jury was able to view the transaction on video and then

render its verdict as a significant "other factor." We find the evidence supports the trial court's ruling.

CONCLUSION

Based on the foregoing, the trial court's decision is

AFFIRMED.

LOCKEMY, J., concurs.

WILLIAMS, J: I respectfully dissent and believe the trial court improperly sent the issue of punitive damages to the jury.

The 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 disregard of [Mr. Solanki's] rights." *See Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (finding "the plaintiff must prove the defendant's misconduct was willful, wanton, or in reckless disregard of his rights" to support an award of punitive damages). Although 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. *See Rogers v. Florence Printing Co.*, 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958) ("The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights."); *Hicks v. McCandlish*, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952) ("Gross negligence is a relative term, and means the absence of care that is necessary under the circumstances, but the absence of this care alone, whether called 'gross' or 'ordinary' negligence, does not authorize the jury to give exemplary damages."); *Bell v. Atl. Coast Line R. Co.*, 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943) ("While 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

Specifically, testimony from trial negates the Solankis' claim that Wal-Mart acted

Solanki's transaction, testified at trial to Wal-Mart's internal procedures for handling credit card transactions. Smalls testified that Wal-Mart's policy, when a credit card would not swipe at a self-checkout station, was to first try to finalize the transaction at the self check-out station. If this did not work, an employee would suspend the transaction and attempt to process the transaction at the employee's work station. If the credit card still would not work, the employee would hand key the credit card number into the system twice to ensure accuracy, enter the expiration date, and then ask a customer service manager to manually perform an override. After the override was performed, the employee would then enter the three-digit security code on the back of the credit card before finalizing the transaction. According to Smalls, even a manager could not override the transaction if each of these steps were not properly taken. Although Smalls did not independently recollect this transaction with Mr. Solanki, after viewing the video surveillance, he affirmed that each of the foregoing steps was taken during this transaction. Further, although it is regrettable that Mr. Solanki spent six nights in jail as a result of this incident, the Solankis presented no evidence that Wal-Mart's actions of complying with law enforcement's request were unreasonable or that Wal-Mart intentionally and recklessly processed Mr. Solanki's credit card transaction. *See Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 ("In order to 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 with reckless disregard for the plaintiff's rights. A conscious failure to exercise due care constitutes willfulness." (internal citations omitted)).

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))). Rather, the extent of the trial court's observation on the issues of gross negligence and punitive damages was as follows:

As a general rule, the issues of gross negligence are properly for the jury to determine. There's evidence, based upon the weirdness of the transaction, for lack of a better word, . . . from which the jury could conclude that, in some way, . . . the defendant Wal-Mart, was grossly negligent in the way they handled the transaction. . . . I'll charge gross negligence and punitives.

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.

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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Frank R. Addy, Jr., Circuit Court Judge

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SC Court of Appeals

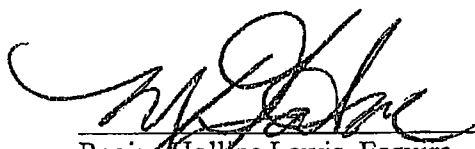
Prakash and Urmila Solanki.....Respondents,

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.


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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

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 Aprhodite 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,



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September 4, 2014
Columbia, South Carolina

The South Carolina Court of Appeals

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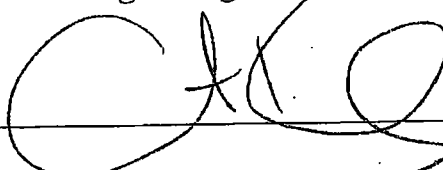
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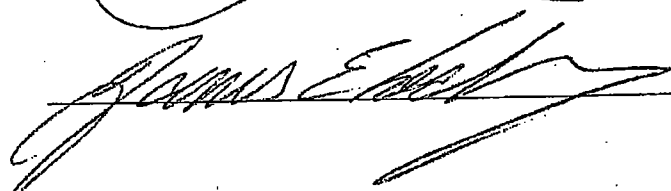
Of whom Wal-Mart Store #2806 is the Appellant.

Appellate Case No. 2012-213247

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

I would grant the petition for rehearing.

 J.

Columbia, South Carolina

cc:

FILED

October 23, 2014
VCH

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Charles Logan Rollins, II, Esquire
Regina Hollins Lewis, Esquire
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