THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 19 2014
S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2014-002492

Prakash & Urmila Solanki.....Respondents,

v.

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Regina Hollins Lewis, SC ID #68539
Mary D. LaFave, SC ID #75366
GAFFNEY LEWIS & EDWARDS, LLC
3710 Landmark Drive, Suite 109
Columbia, South Carolina 29204
(803) 790-8838 (office)
(803) 790-8841 (fax)
Attorneys for Petitioner

Other Counsel of Record:
John D. Hawkins, SC ID #5891
Charles Logan Rollins, II, #78395
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, South Carolina 29304
Attorneys for Respondent

INDEX

Introduction..... 1

Arguments.....1

I. TO THE EXTENT RESPONDENTS CLAIM THE TRIAL COURT IS NOT REQUIRED TO MAKE A DETERMINATION REGARDING A DEFENDANT'S CULPABILITY TO SUPPORT A PUNITIVE DAMAGES AWARD PRIOR TO SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY, THE RESPONDENTS' ARGUMENT IS PATENTLY ERRONEOUS.....1

A. THE APPLICABLE CASE LAW SUPPORTS THE CONCLUSIONS OF BOTH WAL-MART AND JUDGE BRUCE WILLIAMS THAT PUNITIVE DAMAGES SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.....3

1. THE DECISION OF THE COURT OF APPEALS IN *LONGSHORE* IS APPLICABLE TO THE FACTS OF THIS CASE AND SUPPORTS THE CONCLUSION THAT THE PUNITIVE DAMAGES AWARD SHOULD BE REVERSED.....3

2. RESPONDENTS' RELIANCE ON *MISHOE* IS MISPLACED AS THE CREATION OF A DANGEROUS CONDICTION ANALYSIS SET FORTH IN *MISHOE* IS INAPPLICABLE TO THE FACTS HERE.....6

3. THE COURT OF APPEALS' DECISION IN *GATHERS V. HARRIS TEETER* IS DISTINGUISHABLE AND RESPONDENTS' RELIANCE ON THE DECISION MISAPPREHENDS THE LAW.....8

Conclusion.....9

INTRODUCTION

Petitioner Wal-Mart respectfully submits this Reply Brief in response to the issues raised by Prakash and Urmila Solanki (the "Respondents") in their Return to Petition for Writ of Certiorari of December 10, 2014. Respondents have set forth no evidence to rebut Petitioner's arguments and the Petition for Writ of Certiorari should be granted.

ARGUMENT

I. To the Extent Respondents Claim the Trial Court is Not Required to Make a Determination Regarding a Defendant's Culpability to Support a Punitive Damages Award Prior to Submitting the Issue of Punitive Damages to the Jury, the Respondents' Argument is Patently Erroneous.

In their Return to the Petition for Certiorari, Respondents attempt to convince this Court that Wal-Mart seeks to have the Court infringe upon the province of the jury by requesting that this Court to make a factual finding regarding punitive damages. Respondents' assertion is erroneous. Specifically, Respondents first assert that South Carolina law does not require a judge to make a factual finding of clear and convincing evidence of willful, wanton, or reckless conduct before submitting the issue of punitive damages to the jury. *See* Resp'ts Return Br. at 6. In fact, Wal-Mart does not and has not argued that the trial court must itself make a factual determination that punitive damages are warranted – rather, Wal-Mart correctly asserts that prior to submitting the issue of punitive damages to the jury, the trial court must determine *whether there is such evidence in the record from which a jury can conclude that clear and convincing evidence of willful, wanton, or reckless conduct exists*. *See Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E. 2d 5, 11 (Ct. App. 2005) ("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. 149, 152, 478 S.E.2d 57, 58 (1996))). Thus, the trial court committed reversible error in failing to make the requisite finding of evidence of reckless, willful, or wanton conduct on behalf of Wal-Mart before allowing the issue of punitive damages to be charged to the jury.

Moreover, to the extent this Court determines the trial court conducted the proper analysis prior to submitting the issue of punitive damages to the jury, the record was devoid of any evidence of reckless, wanton, or willful conduct; thus, it was reversible error to allow the issue of punitive damages to be presented to the jury under any circumstances. Despite the Respondents' assertions to the contrary, Wal-Mart presents to this Court for consideration the novel issue of whether punitive damages may be imposed upon a retailer based upon an alleged error in the handling of a transaction or based upon a retailer's provision of requested documents to law enforcement.

Wal-Mart's request for review is not an extraordinary request as Respondents suggest. As in directed verdict issues on appeal, appellate courts have long examined whether there was evidence in the record to support the presentation of certain issues to the jury. *See Hennes v. Shaw*, 397 S.C. 391, 398, 725 S.E.2d 501, 505 (Ct. App. 2011) (holding the appellate court can reverse the trial court's grant or denial of a motion for a directed verdict or JNOV when there is no evidence to support the ruling or when the ruling is governed by an error of law). As Respondents set forth no facts to negate the novel issue presented to this Court, the Petition for Writ of Certiorari should be granted and the award of punitive damages should be reversed.

A. The applicable case law supports the conclusions of both Wal-Mart and Judge Bruce Williams that punitive damages should not have been submitted to the jury.

1. The decision of the Court of Appeals in *Longshore* is applicable to the facts of this case and supports the conclusion that the punitive damages award should be reversed.

In their Return, Respondents first attempt to distinguish *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E. 2d 5, 11 (Ct. App. 2005), and argue that the "Court of Appeals' choice of phraseology is unfortunate" and that the *Longshore* opinion is "the crux of the confusion surrounding the question presented in this case." *See* Resp'ts Return Br. at 7. Respondents further argue that *Longshore*, in which the Court of Appeals concluded there was no clear and convincing evidence to support an award of punitive damages, is distinguishable because the decision was based on a finding of lack of proximate cause between the security company's breach of its standard of care and the damages sustained by the plaintiff in that case. *See* Resp'ts Return Br. at 9-10. However, *Longshore* is directly comparable to the facts here and squarely supports the conclusion that punitive damages should not have been submitted to the jury in this case.

In *Longshore*, the plaintiff was shot by a security guard, who was employed by the defendant security company, after a party where the defendant was providing security and during which a fight broke out. 365 S.C. at 557, 619 S.E.2d at 7. The plaintiff sued for negligence, negligent hiring, training and supervision and assault and battery. *Id.* at 559, 619 S.E.2d at 8. The jury awarded damages only on the negligent hiring, training, and supervision claim and awarded both actual and punitive damages on the claim. *Id.* The defendant security company appealed and argued, *inter alia*, that the punitive damages award should be reversed. *Id.* at 560, 619 S.E.2d at 9. The Court of Appeals

observed the long-standing law of South Carolina that "an award of punitive damages must be proven under a significant burden of proof: clear and convincing evidence." *Id.* at 564, 619 S.E.2d at 11. As discussed herein *supra*, the Court of Appeals further observed that as a threshold matter, the trial court is obligated to assess the defendant's conduct and determine whether or not the issue of punitive damages should be submitted to the jury. *Id.* The Court ruled that "[u]pon review, we find no clear and convincing evidence that [the defendant's] conduct in negligently hiring, training, or supervising [their employee] was willful, wanton, or in reckless disregard of the rights of others." *Id.* The Court concluded that the evidence, "at most establishes that [the defendant] was negligent." *Id.* The case correctly sets forth the law of punitive damages and is instructive here. As in *Longshore*, the cashier's alleged error in handling Mr. Solanki's transaction was negligent at best and cannot support an award of punitive damages.

Similarly, Wal-Mart's conduct in complying with law enforcement's request for documentation and video pertaining to the transaction simply cannot support an award of punitive damages as there is no evidence that Wal-Mart did anything wrong in providing the information. Respondents argue that *Longshore* is inapplicable here because it "is an opinion about proximate cause." *See* Resp'ts Return Br. at 9. Assuming Respondents are correct in its analysis of *Longshore*, the case is even more compelling in supporting a reversal of the punitive damages award here because there is no evidence that Wal-Mart's alleged failure to explain the documents provided to police was the proximate cause of Mr. Solanki's arrest. Indeed, glaringly absent from Respondents' Return is any evidence that Wal-Mart had knowledge or information regarding the documents, which could have explained the discrepancy or exonerated Mr. Solanki. That is because no such evidence

exists. The simple facts are that the officer requested information regarding the transaction from Wal-Mart. Wal-Mart provided the requested information. The information contained a discrepancy in credit card numbers *for which Wal-Mart had no additional information to offer police.* Based on the discrepancy the police officer (and judge) determined that there was probable cause to arrest Mr. Solanki. As in *Longshore*, there was no clear and convincing evidence to support the trial court's submission of punitive damages to the jury. Further, as the Court found in *Longshore*, it is within the province of the appellate court to correct errors of law and to reverse an award of punitive damages where, as here, the award is not supported by clear and convincing evidence. *Longshore* supports the reversal of the punitive damages award here; a writ of certiorari should be issued and the punitive damages award should be reversed. [1]

Respondents' assertion that this Court's decision in *South Carolina Farm Bureau* does not address the standard for the trial court in determining whether or not to submit the issue of punitive damages to the jury is also erroneous. In fact, in *South Carolina Farm Bureau,* this Court provided clear guidance to trial courts regarding punitive damages. 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996). The Court observed that a trial court's review of punitive damages has three stages. *Id.* "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

---

[1] Notably, Respondents' assertion that Wal-Mart presented only one case "in over two centuries of South Carolina jurisprudence" to support its position does nothing to negate Wal-Mart's argument. *Longshore* is well-established jurisprudence in South Carolina, is good law, and directly quotes one of this Court's decisions, which in turn cites to two more cases that support Wal-Mart's position. *See Longshore*, 365 S.C. at 564, 619 S.E.2d at 11; *see also S.C. Farm Bureau Mutual Ins. Co.*, 324 S.C. at 152, 478 S.E.2d at 58; *Crossley v. State Farm Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992); *Scoggins v. McClellion*, 321 S.C. 264, 468 S.E.2d 12 (Ct. App. 1996).

so, the jury should be adequately instructed to assess an appropriate amount of damages." *Id.* The second step involves the post-trial *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) review, and the third step involves an inquiry of whether the award is excessive or inadequate. *S.C. Farm Bureau*, 324 S.C. at 154, 478 S.E.2d at 59. While Petitioner's challenge here is to the submission of punitive damages to the jury and not to the amount or excessiveness of the award, *South Carolina Farm Bureau* expressly addresses the role of the trial court in determining whether to submit the issue of punitive damages to the jury, and the trial court in this instance failed to properly assess Wal-Mart's culpability for purposes of punitive damages as required before sending the issue to the jury. In failing to do so, the trial court committed reversible error. *See Solanki v. Wal-Mart Store #2806*, Op. No. 5264 (S.C. Ct. App. filed August 20, 2014) (Shearouse Adv. Sh. No. 123 at 132) (Williams, J., dissenting).

While Respondents contend that a preliminary decision by the trial court would invade the province of the jury, Wal-Mart is not requesting the trial court or this Court invade the jury's province; it is arguing that the trial court failed to conduct the proper analysis and improperly submitted the issue of punitive damages to the jury. Wal-Mart requests this Court find in favor of longstanding jurisprudence and grant its Petition for Writ of Certiorari based upon the trial court's failure to make the required finding of whether there was evidence of reckless, willful, or wanton conduct on the part of Wal-Mart.

2. Respondents' reliance on *Mishoe* is misplaced as the creation of a dangerous condition analysis set forth in *Mishoe* is inapplicable to the facts here.

Wal-Mart contends Respondents presented no evidence of reckless, willful, or wanton conduct such that the jury could deliberate the issue of punitive damages. As Wal-Mart argued in its Petition for Writ of Certiorari, the Court of Appeals erred in finding there were two factual circumstances that supported an award of punitive damages—(1) the manual inputting of credit card information by the cashier, Mr. Smalls, and (2) the supplying of potential evidence to law enforcement. (App.p. 798); *Solanki v. Wal-Mart Store #2806*, Op. No. 5264 (S.C. Ct. App. filed August 20, 2014) (Shearouse Adv. Sh. No. 123 at 128). Neither of these circumstances presents any clear and convincing evidence that Wal-Mart acted in a reckless, willful, or wanton manner, and Wal-Mart's Petition for Writ of Certiorari should be granted so that the award of punitive damages can be reversed.

Respondents continue to rely on *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 Wal-Mart was aware of a dangerous condition and did not take action to minimize or avoid the danger, such that sufficient evidence existed to create a jury issue as to whether there is clear and convincing evidence of reckless, wanton, or willful behavior. The facts of *Mishoe* are readily distinguishable as the defendant in *Mishoe* was actually notified and aware of an inherently dangerous physical condition on the premises—a hole that had been reported a year prior to the plaintiff's accident—yet did nothing to prevent the accident. *Id.* at 201-02, 621 S.E.2d at 366. Here, in the first instance, Wal-Mart merely hand-keyed a transaction using precise steps that are intended to prevent identity fraud. There is no inherent danger in this situation; Wal-Mart took precautions to prevent a future, possible incident. As to the second factual scenario—providing law enforcement requested

evidence, there is absolutely no evidence in the record that Wal-Mart created a dangerous condition by providing the requested information. As set forth, there is no information that Wal-Mart had knowledge of any information that it could have provided to law enforcement to exonerate Mr. Solanki or prevent his arrest. Respondents' reliance on *Mishoe* is misplaced.

3. The Court of Appeals' decision in *Gathers v. Harris Teeter* is distinguishable and Respondents' reliance on the decision misapprehends the law.

Finally, Respondents cite *Gathers v. Harris Teeter*, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984) in support of their argument that a "mere cooperation" defense is without merit. *Gathers* is distinguishable as the store employee initiated the criminal investigation that led to the Plaintiff's arrest in *Gathers*. *Gathers* involved a law enforcement officer who was also employed when he was off-duty as a security office with Harris Teeter at one of its stores that was not the subject of the action. *Id.* at 225, 317 S.E.2d at 752. The officer was on-duty as a police officer but went to a Harris Teeter for a coffee break. *Id.* He observed the plaintiff through the glass wall of the Assistant Manager's office and determined that the plaintiff was attempting to shoplift cigarettes. *Id.* The officer told the Assistant Manager his suspicions and, with the Assistant Manager's full knowledge, then asked a cashier if the plaintiff had purchased any cigarettes. *Id.* The cashier replied negatively, and the officer then detained the plaintiff outside the store and asked her to come back to the Assistant Manager's office. *Id.* In full view of other customers, the officer: (1) interrogated the plaintiff, (2) did not give plaintiff the *Miranda*[2] warning, (2) refused to let plaintiff call an attorney or her husband,

[2] *Miranda v. Arizona*, 384 S.C. 436 (1966).

(3) declined to look at the cigarette display rack, (4) required the plaintiff to submit to a pat-down body search by the cashier, and (5) searched her grocery bag and pocketbook. *Id.* at 225-26, 317 S.E.2d at 752. The court found there was evidence of an agency relationship between the arresting officer and the grocery store such that the grocery store could be held liable for the arresting officer's actions. Importantly, the court stated, "[i]t is clear that both [the assistant manager] and [the cashier] were acting in furtherance of Harris Teeter's business when they took part in the detention and search of [the plaintiff]." The court then found there was abundant testimony from which a jury might have inferred that the employees of the grocery store participated in the proceedings. Unlike in *Gathers*, the investigating officer in the present case was not an employee of Wal-Mart, nor was she working on Wal-Mart's behalf when she investigated and arrested Mr. Solanki. Thus, Wal-Mart was **not an active participant** in the investigation nor was the investigation being done on its behalf. Rather, in this case, the investigation was pursued by a third-party law enforcement department, which had no relationship to Wal-Mart. Wal-Mart did not actively participate in the investigation; it simply provided specific documents and video at law enforcement's request. Respondents have set forth no evidence to support the award of punitive damages nor do they set forth any compelling reason why the novel issues presented in the Petition for Writ of Certiorari, that will have a far-reaching negative impact on retailers in South Carolina, should not be heard by this Court.

CONCLUSION

The trial court's errors and the Court of Appeals affirmation of those errors has effectively created and imposed an improper heightened duty for all retailers involved in

police investigations initiated by a third-party. In so doing, the decision of the Court of Appeals to affirm this award of punitive damages will cause a significant, unwarranted negative impact on retailers who do business in South Carolina. For the foregoing reasons, this Court should grant Wal-Mart's Petition for Writ of Certiorari and reverse the award of punitive damages.

Respectfully submitted,

December 19th, 2014

Regina Hollins Lewis, SC ID #68539
Mary D. LaFave, SC ID #75366
GAFFNEY LEWIS & EDWARDS, LLC
3710 Landmark Drive, Suite 109
Columbia, South Carolina 29204
(803) 790-8838 (office)
(803) 790-8841 (fax)
Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2014-002492

Prakash & Urmila Solanki.....Respondents,

v.

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

PROOF OF SERVICE

I do hereby certify, on this 19th day of December, 2014, that a copy of the foregoing Petitioner's Reply in Support of Petition for A Writ of Certiorari and Proof of Service were served via electronic mail and by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to: John D. Hawkins, Esquire (john@jdhawkinspa.com) and Charles Logan Rollins, II, Esquire (logan@jdhawkinspa.com), The Hawkins Law Firm, P.O. Box 5048, Spartanburg, South Carolina 29304.

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

Attorneys for Petitioner
Wal-Mart Store #2806