

**FORM 13
BRIEF OF APPELLANT**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Judge

C.A. No.: 2016-CP-42-1280
Appellate Case No.: 2017-001009

Caitlyn Langham,
v.

Appellant,

Officer Russell Porter,
City of Spartanburg,
Spartanburg Police Department, and WALMART, Inc.,

Respondents.

APPELLANT'S INITIAL BRIEF

Anderson, South Carolina
August 15, 2017

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STATEMENT OF ISSUES ON APPEAL

- I. **WHETHER THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WALMART WAS PROPER.**
- II. **WHETHER THE GRANT OF SUMMARY JUDGMENT FOR THE MALICIOUS PROSECUTION CHARGE AGAINST RESPONDENTS WAS PROPER.**
- III. **WHETHER RESPONDENT WALMART WAS LIABLE FOR VIOLATION OF 42 U.S.C. §1983.**
- IV. **WHETHER THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS PORTER, CITY OF SPARTANBURG AND SPARTANBURG POLICE DEPARTMENT WAS PROPER.**
- V. **WHETHER RESPONDENT PORTER WAS LIABLE FOR THE ASSAULT AND BATTERY AGAINST APPELLANT.**

STATEMENT OF THE CASE

On December 24, 2013, Appellant was shopping for some groceries at Dorman Center WALMART in Spartanburg, when she decided to get some personal items. She set all the merchandise in her cart, and went to the checkout line. Realizing that she did not bring enough money for all the items she picked, she placed the personal items on the rack beside the cashier where the lip gloss and chips were situated.

It was when Appellant was queueing at the cashier, that Respondent Officer Porter approached her from behind by tapping her shoulder and grabbing her left arm. Since she had a birth control implant, she told Respondent Porter that he was hurting her. Respondent Porter, taking her action as a form of resistance, suddenly threw her on the ground, handcuffed her and took her into the office. While in the office, Appellant was subjected to a physical search. It was only then that Respondent Officer Porter explained to her that she was being accused of shoplifting, and presented to her the personal items (mascara, powder) which she allegedly stole.

The police, whom Respondents called to respond to the incident, arrived and took Appellant in Spartanburg County, where she was booked and arraigned. She was eventually released. The shoplifting charges went to trial, where Appellant was found not guilty.

Appellant was accused, assaulted, forcefully arrested and detained against her will and without warrant, by Respondent Officer Russel Porter. As a result of these wrongful acts, Appellant sustained physical injuries and mental anguish when she was assaulted by Respondent Officer Porter. By reason of Respondent's grossly negligent conduct, Appellant was deprived of her liberty when she was unlawfully arrested and detained. Despite having no probable cause, Respondents pursued a criminal case against Appellant, which resulted in her acquittal by the Spartanburg Municipal Court on September 17, 2014.

Appellant filed this action for violations of her constitutional rights under the due process clause of the Fourteenth Amendment, for violation of his constitutional rights under the reasonableness clause of the Fourth Amendment, unlawful arrest, assault and battery, and malicious prosecution.

On April 8, 2016, Appellant filed a Complaint against Respondents Officer Russel Porter, the City of Spartanburg, the Spartanburg Police Department and WALMART Stores Inc. alleging defamation, false arrest, false imprisonment, assault and battery and violation of 42 U.S.C. §1983.

On May 16, 2016, Respondent WALMART filed its Answer and moved to dismiss alleging that the Complaint is barred by statute of limitations and lack of cause of action.

On November 15, 2016, the trial court granted Respondent's Partial Motion to Dismiss on the causes of action for defamation, false imprisonment, and violation of § 1983, leaving the cause of action for assault and battery pending at the trial court.

On November 21, 2016, Appellant moved to reconsider the Order, dated November 15, 2016, which the court denied in its Order, dated March 22, 2017.

On December 8, 2016, Respondents Porter, City of Spartanburg and Spartanburg Police Department moved for summary judgment, which the court granted in its Order, dated March 23, 2017.

On April 18, 2017, Appellant appealed the Orders, dated March 22, 2017 and March 23, 2017.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002); *David v. McLeod Regional Medical Center*, 367 S.C. 242, 247, 626 S.E.2d 1 2 (2006). Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Rule 56 (c), SCRCP. The appellate court must view the facts in the light most favorable to the non-moving party below. *Id.* If the slightest doubt exists as to whether there are genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law, the summary judgment must be reversed.

Furthermore, determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

ARGUMENTS

I.

THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF WALMART WAS IMPROPER AS IT WAS PRECLUDED BY THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACTS

A. No Probable Cause Exists For The Warrantless Arrest And The Illegal Search And Seizure of Appellant

Respondent WALMART raised as its defense the Merchant's Defense Statute or SC Code Ann. §16-13-140, which provides that:

“In any action brought by reason of having been delayed by a merchant or merchant's employee or agent on or near the premises of a mercantile establishment for the purpose of investigation concerning the ownership of any merchandise, it shall be a defense to such if: (1) the person was delayed in a reasonable manner for a reasonable time to permit such investigation, and (2) reasonable cause existed to believe that the person delayed had committed the crime of shoplifting. “

Reasonable cause in §16-13-140 is akin or in fact the same as probable cause.

Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime had been committed by the person being arrested. *Jones v. City of Columbia*, 301 S.C. 62, 65, 389 S.E.2d.662, 663 (1990). In determining probable cause, only those facts and circumstances that were or should have been known to the Respondent at the time the Appellant was stopped should be considered. The determination of whether probable cause exists is ordinarily a jury question; however, it may be decided as a matter of law, when the evidence yields but one conclusion. *Law v. S.C. Department of Corrections*, 368 S.C. at 441, 629 S.E.2d at 651(2006), as cited in *Lynch v. Toys 'R Us-Delaware*, 375 S.C. 604 (2007). In this case, the evidence yields further investigation, especially considering Respondent Officer Russell's false statement in the Incident

Report, claiming to have personally seen Appellant placed hid some items in her bag. This was belied by his own words in his trial testimony.

Probable cause involves the existence of such facts or circumstances as would excite the belief of a reasonable mind—acting on facts known to him—that the person arrested had committed the crime of shoplifting. To establish probable cause, we must look at Respondent WALMART's existing policy in addressing shoplifting incidents.

Ronnee Miller, an Assistant Manager at Respondent WALMART on the day of the alleged incident, discussed the company policy on shoplifting. In her deposition, Ronnee explained the procedure. In her deposition, Ronnee explained the procedure which WALMART employees must observe in shoplifting incidents, namely: (1) selection, (2) concealment, (3) continued possession, and (4) last point of entry.

- “ Q: Can you tell me what the procedure for WALMART is when you have an alleged shoplifting?*
- A: As an AP associate, you have to have the--the four elements. Once you get all four elements and they pass the last point of sale, which is them going out the door, you then approach and take them into the office. From there you collect the items, obtain the receipt. And then from there, if police need to be contacted, we you get them involved. If not, we take our information, key it in the system and go from there.*
- Q: All right. Well, I'm not going to lie to you bit. I didn't get a single thing of that, so if we could go slowly for me.*
- A: Okay.*
- Q: The four elements, what are the four elements?*
- A: You have to get selection.*
- Q: Selection meaning?*
- A: Them picking up the items.*
- Q: Yes, ma'am.*
- A: Concealing it.*
- Q: And that means that they've concealed it is some way?*
- A: Uh-huh.*
- Q: And what does "concealed" mean to you?*
- A: To me would be placing it in your pocket, placing it in your purse, putting the item on. If it's a hat, taking the tag off and placing the item on head, on your head. That would be concealing it.*
- Q: And the third?*

A: *Continued possession.*
Q: *And that would mean what specifically?*
A: *As you're watching them, they -- like if they're shopping now, after they already got the item, do they still have it on them; that you're just verifying that they didn't take it out of their purse or put the item down.*
Q: *So it's maintaining it in the area that it's been concealed in?*
A: *Uh-huh.*
Q: *Is that "yes"?*
A: *Yes, sir.*
Q: *Thank you. And the fourth element?*
A: *Last point of sale*
Q: *All right. And that means what?*

A: *Walking out the front door, passing all registers.*
Q: *So once that occurs --*
A: *Uh-huh.*
Q: *-- is that when you approach the individual?*
A: *Yes, sir.*
Q: *And passing all registers, meaning, the last opportunity to pay for it?*
A: *Yes, sir.*
Q: *Do you let them get out of the building, or is it just past the register?*
A: *Past the register.*
Q: *Take me from that, that point, please.*
A: *From that point, we then do the approach, identify ourselves. I'll ask them to come into the -- the substation."*

(Ronnee Miller Dep., 11-13, January 18, 2017).

Miller, who was among the WALMART employees who were present at the store at the time of the incident, asserted that she cannot recall having seen the Appellant select or pick out an item. Neither did she see the Appellant conceal any merchandise, nor carry it out of the store nor pass the cashier. (Miller Dep., 38: 22-25; 39: 1-6, *Id.*).

Respondent Porter testified in a prior criminal case that he accosted Appellant upon the prodding of a WALMART employee, who allegedly saw the Appellant carrying personal items suspiciously. (Russell Porter Trial Tr., 19:11-25; 20:1-8). Respondent Porter did not personally observe Appellant approach any merchandise, select nor conceal the same. Respondent Porter did not personally witness Appellant intentionally attempt to leave the building, as in fact he

arrested her while she was in a line towards or in front of the cashier. The following testimonies by Respondent Porter are revealing:

Q: Well, where did you—where did you see her take something?

*A: **I didn't see her take anything. The things were in her bag. I don't have to see her take anything?***

Q: You—you go grab people and start going through their purse with –

A: No. As soon as I walked up to her I looked into her bag, and the items were in her bag.

Q: And you knew that was stolen because why?

A: Because she immediately tried to—tried to leave. She tried to turn and walk away from me.” (Emphasis supplied)

(Porter, Trial Testimony. 14: 1-9, September 17, 2014)

Q: The bottom line is you did not see her put anything in that purse, did you?

*A: **I don't have to see her put it in. That's not—that's not a part of the statute I have to see her put it in. She needs (ph) possession of it. I don't have to see her put it in.***

*Q: **She hadn't gotten through the line, had she?***

*A: **No, she had not.***

*Q: **Okay. So, you're essentially assuming that she wasn't going to pay for something?***

*A: **By her actions she did not intend to pay, and she didn't have the money. She didn't have the \$74.16 in her purse when we checked her.***

*Q: **And that's why she took—she took stuff from her cart and put it to the side—“ (Emphasis supplied)***

(Porter Trial Testimony. 15: 17-25; 16:1-6).

*Q: **So we don't—we don't have any video?***

*A: **No.***

*Q: **We don't have the alleged witnesses?***

*A: **No witnesses.***

*Q: **Well, people—***

*A: **(Inaudible) witness?***

*Q: **--that actually saw what happened. Right? That's how you learned of it. Right?***

*A: **Saw?***

*Q: **I mean you don't just go up to people and attack them and say, You stole this. Right?***

*A: **No, huh-uh.***

*Q: **Okay. Well, there were people that gave you that hint. Right?***

*A: **Right.***

*Q: **Where are they?***

*A: **I don't know.***

- Q: Do you have anybody here from WALMART to say that you can't – the video was not good, you couldn't see it, or you just didn't get it? Right?
- A: There was no video, sir. I went in the LP office, asked the LP guy. Is this area covered? No this area is not covered. There's nothing— (Emphasis supplied).

(Porter Trial Testimony, 19:11-25; 20: 1-8)

The unlawful arrest and subsequent detention by Appellant was based on an suspicion of an alleged eyewitness, a WALMART employee, who was conveniently missing or is no longer employed in WALMART Stores, Inc.. Respondent WALMART Stores, Inc. had a chance to substantiate its allegation of the shoplifting incident by submitting the surveillance videos on the day of the incident, but it has consistently denied the existence of the video. This despite WALMART's own employee, Ronnie, testifying that there were fifty (50) cameras inside the store. (Ronnee Miller Depo., 16: 7-12)

As a member of Respondent Spartanburg Police Department, Respondent Porter is covered by S.C. Code Ann. § 17-13-30, which provides that an officer may arrest a person without a warrant for any crime committed in his view, which the courts have extended to include crimes freshly committed. *State v. Martin*, 268 S.E.2d 105 (1980), *State v. Clark*, 287 S.E.2d 143 (1981). In this case, Respondent Porter did not personally witness Appellant shoplifting any merchandise, and as such he may not arrest Appellant without a warrant.

“The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990)). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C.

356, 361-62, 563 S.E.2d 331, 333 (2002) (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)); *Strother v. Lexington County Recreation Commission*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

Jurisprudence has long established that even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing and Regulation, et al.*, 337 S.C. 476, 523 S.E.2d 795 (1999). Had this case reached the jury, a different conclusion may have been reached as to the existence of probable cause for Appellant's unlawful arrest, assault and battery and subsequent illegal detention.

B. The Reasonableness Of Manner By Which Appellant Was Delayed By Respondent Porter And Respondent Walmart, Inc. Is An Issue Of Material Fact.

Respondent WALMART Stores, Inc. alleged that it has "acted reasonably and in good faith in in the exercise of their legal rights and at no time breached any duty. In essence, Respondent WALMART Stores, Inc. raised the doctrine of Merchant's Defense under S.C. Code Ann. § 16-13-140.

Under the Merchant's Defense, while Respondent WALMART Stores Inc. had the right to stop and delay their customers, such should be done in a reasonable manner and within a reasonable time. Reasonable manner and within reasonable time should be determined by company policies on shoplifting.

It is Appellant's contention that there is nothing reasonable in the manner by which Respondent Officer Porter, delayed and subsequently arrested Appellant, forcefully slammed her on the floor, and illegally searched her purse.

Respondent Porter violated Respondent WALMART's policies on shoplifting. Without observing or witnessing Appellant select an item, conceal or continuously carry the same without

paying for it, and walk past the cashier or exit the store, Porter approached her from behind, while the latter was queueing at the cashier, and arrested her. Respondent Porter had no reason to believe that Appellant had intent to conceal and carry the alleged stolen items since he did not personally see her hide or place any item in her purse. Neither did he have any reason to believe that Appellant had no intention of paying for the merchandise since Appellant was still within the WALMART premises, and was in the line to pay, and has in fact paid, for the items she had on her cart. (Porter, Trial Testimony, 8:2-25; Langham Deposition, 19-20; 21:2-25).

The manner by which Respondent Porter arrested, detained and subsequently searched Appellant was unlawful and illegal. Respondent Porter applied excessive force by slamming Appellant on the floor, which resulted in bruises and injuries on her person. Appellant was never informed of her alleged violation until she was inside the office, and was being searched for other items. Nothing was found on her person, but Respondent Porter presented her with lipstick, powder and other personal items, that she allegedly shoplifted.

Furthermore, there is a genuine issue of material fact as to the appropriateness of Respondent Porter's action in arresting, detaining, and manhandling Appellant. In her deposition, Ronnee Miller stated that police officers are hired by Respondent WALMART to provide security.

“Q: What procedures are law enforcement agents to follow when they're looking for you?”

Ms. Bagley: Object to the form.

A: They—I mean, they—they normally do their job as a police officer and whatever that entails. And then they're —like I said, they're just there for security purposes and just crowd control when hired in.

Q: All right. And so correct me if I'm wrong, that the purpose of the law enforcement agent is not to catch shoplifters; it is to maintain calm within the store?”

A: Yes, sir.

Q: So to keep people from stabbing each other for an Xbox?”

A: Yes sir.”

(Ronnee Miller Dep., 21:23-25; 23:1-15)

The issue of the appropriateness of action and reasonableness of force employed by Respondent Porter goes into the interpretation of the law, specifically S.C. Code Ann. § 16-13-140. Whether Appellant was delayed in a reasonable manner and for a reasonable time to permit investigation, under the circumstances of this case, was an issue for the jury; so also was the question of whether there was reasonable cause to believe that Appellant committed the crime of shoplifting. (*Mains v. K Mart Corp.*, 375 SE2d 311, (SC: Court of Appeals, 1988)

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing and Regulation, et al.*, 337 S.C. 476, 523 S.E.2d 795

Appellant asserts that the existence of probable cause and reasonable delay should have been submitted to the jury.

II.

THE GRANT OF SUMMARY JUDGMENT ON THE MALICIOUS PROSECUTION CHARGES AGAINST RESPONDENTS WAS IMPROPER.

In order to recover in an action for malicious prosecution, Appellant must show (1) the institution or continuation of original judicial proceeding, either civil or criminal; (2) by, or at the instance of, the Respondent; (3) termination of such proceeding in the Appellant's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *Parrot v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965); *Eaves v. Broad River Elec. Co-op., Inc.*, 277 S.C. 475, 477, 289 S.E.2d 414, 415 (1982) as cited in *Law v. S.C. Department of Corrections*, 629 S.E.2d 651(2006),

Applying these criteria into this case, Respondents WALMART Stores, Inc. and the City of Spartanburg instituted a criminal case against Appellant in 2014. Appellant was acquitted by the Spartanburg Municipal Court on September 17, 2014. As discussed in the previous paragraphs, there can be no probable cause for the arrest, detention, imprisonment, assault and battery and subsequent prosecution of Appellant. Malice may be inferred from a lack of probable cause to institute the criminal case. Malice can also be inferred when, despite proceeding with the criminal case, Respondent WALMART Stores, Inc. did not provide nor submit a copy of any surveillance video in the store on the date of the alleged incident, despite the testimony of the possibility of the same by its own employee, Ronnee Miller. By reason of this malicious prosecution, Appellant suffered damages.

Thus, there is no sound basis to deny a cause of action for malicious prosecution, where the necessary elements are present.

III.

RESPONDENT WALMART WAS LIABLE FOR VIOLATION OF 42 U.S.C. §1983.

In order to establish a §1983 claim, Appellant must be able to demonstrate a violation of a right secured by the Constitution and the laws of the United States, and that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988) and *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 707 (1999) as cited in *King Grant-Davis v Shane Fortune, et al.*, 2:15-cv-4211-MD-MGB.

Contrary to Respondent WALMART Stores, Inc' assertions, it is not necessary for an individual to be a state officer to act under color of state law for purposes of §1983 actions. If a private person is "jointly engaged" with a state official in the alleged violation, that person acts under the color of state law. *Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S.Ct. 183, 66 L.Ed.2d

185 (1980). In *El Fundi v. Derochei*, 625 F.2d 195 as cited in *Murray v. WALMART*, 874 F.2d 555, state action is present when private security guards and police officers act in concert to deprive Appellant of his civil rights, particularly when a state statute authorizes a shopkeeper to detain suspected shoplifters. In fact, a court has allowed a litigant to recover against WALMART under §1983. In the case of *Murray*, the court held that Wal-Mart had acted under color of state law. In the case at bar, numerous facts point to the conclusion that Respondent WALMART acted in concert with the local police.

First, Respondent WALMART Stores Inc. hired Respondent Officer Porter, a law enforcement officer, on his off days. Respondent Porter admitted that he was hired by Respondent WALMART Stores, Inc for the twelfth time on the day the incident happened. (Porter Depo., 11: 15-18). Second, it is the practice of Respondent WALMART Stores, Inc to work with the police department in prosecuting shoplifters. Respondent Porter and/or WALMART Stores, Inc. employees had telephoned the police after the unlawful search of the Appellant's purse and her wrongful arrest, and requested the assistance of other officers for all the detained shoplifters. The police responded by taking Appellant in custody.

Thirdly, in the case of *Cruz v. Donnelly*, the Third Circuit Court of Appeals addressed the specific question of when state action is present in detention for shoplifting. *Cruz v. Donnelly*, 727 F.2d (3d Cir. 1984). Cruz held that "commercial establishments and their employees will only be held liable under §1983 when: (1) the police have a pre-arranged plan with the store, and (2) under the plan, the police will arrest anyone identified as a shoplifter by the store without independently evaluating the presence of probable cause." *Id.*

A reading of the S. C. Code Ann. provisions namely, § 23-24-10, §23-24-50 and §23-24-20 (Supp. 1978), shows that a law enforcement officer may perform an off-duty, private work,

provided that “the work to be performed is within the officer’s jurisdiction and that the officer obtains permission for such work from the agency and governing body by which he is employed.” Op. S.C. Atty. Gen., 2014 (March 17, 2014). It further states that the officers “moonlighting” shall retain full law enforcement authority. *Ibid.* This only proves that there is an arrangement, whether written or otherwise, between private, commercial establishments like Respondent WALMART Stores, Inc. employing off-duty officers, who exercise their official functions, and by the law enforcement agency. It must be noted here that Respondent Porter continues to be in the employ of the law enforcement agency.

During the times that Respondent Officer Porter was in its employ, Respondent WALMART Stores, Inc. had control over him. Respondent WALMART Stores, Inc. assigned him to man a specific area and gave instructions whom to approach and apprehend for shoplifting. Respondent WALMART Stores, Inc. allowed and/or tolerated Respondent Porter to manhandle Appellant since none of its employees prevented Respondent Porter from exercising excessive force against Appellant. And finally, Respondent WALMART Stores, Inc. hired and continued to hire Respondent Porter during the latter’s off days.

The afore-mentioned state statutes combined with the concerted actions of Respondents WALMART Stores, Inc., its employees, and the local police department, afford ample evidence of willful, joint activity which supports a claim against Respondent WALMART Stores, Inc. under §1983.

IV.

**THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS
OFFICER PORTER, CITY OF SPARTANBURG AND SPARTANBURG POLICE
DEPARTMENT WAS IMPROPER AS IT WAS PRECLUDED BY THE EXISTENCE OF
GENUINE ISSUES OF MATERIAL FACTS**

A. The Causes Of Action For Violation Of §1983, Assault And Battery And Malicious Prosecution Are Not Barred By Statute Of Limitations

Although §1983 provides a cause of action for violations of constitutional and federal statutory rights, it does not describe the applicable statutes of limitations, nor does it detail the accrual and tolling rules. When §1983 does not address important litigation issues, the Supreme Court has often looked to 42 U.S.C. §1988, which specifies that if federal law is “deficient”, state law will apply as long as it is “not inconsistent with the Constitution and the laws of the United States.”

Under §1988, a state’s statute of limitations relating to personal injury is applicable to §1983 litigation. In various cases, the Supreme Court has held that §1983 is best characterized as a tort action for the recovery of damages, and therefore held that the appropriate statute of limitations to be adopted is the state statute applicable to personal injury. *Wilson v. Garcia*, 471 U.S. 261 (1985), *Ownes v Okure*, 448U.S. 245 (1989). (Emphasis supplied).

Under §15-3-535 in relation to §15-3-530 (5), any action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law must be initiated within the three (3) years after the person knew or by exercises of reasonable diligence should have known that he had a cause of action.

Since the incident happened on December 24, 2013, Appellant had until December 24, 2016 to file her case. Appellant filed her Complaint on April 8, 2016 for violation of §1983 and assault and battery against Respondents Porter and WALMART Stores, Inc. Appellant filed her case well within the time. The causes of action for assault and battery and violation of §1983 must prevail.

In *Snider v. Seung Lee*, 584 F.3d 193, 199 (4th Cir, 2009), the Court ruled that “A claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution” which requires at least “a wrongful seizure and termination in her favor of the proceedings following her seizure.” The statute of limitations for such a claim is three (3) years, but the date of accrual is not until the criminal proceedings end in the Appellant’s favor.

Appellant was acquitted from the previous criminal case by Spartanburg Municipal Court on September 17, 2014. This cause of action must survive.

B. There is lack of probable cause for the arrest, search and seizure, and malicious prosecution of Appellant.

As previously discussed, to establish probable cause, Respondent Porter should have followed Respondent WALMART Stores, Inc policies with regards to shoplifting. Respondent Porter never saw Appellant pick any of the items she allegedly shoplifted nor did he see her conceal the same. He did not witness if Appellant had continued possession of her item. From his own testimony, Respondent Porter stopped and detained Appellant just before she can pay. (Porter Trial Testimony. 15:23-25; 16:1-6). He assumed that Appellant did not intend to pay by just looking at her. This despite her being in the line for the cashier. And more importantly, she has not carried out any item past the cashier nor the store building. Appellant was still inside the store.

A reading of Respondent Porter’s testimony would show that he acted, not based on his personal knowledge nor personal observation, but upon a suspicion of an employee who, conveniently, is no longer connected to Respondent WALMART Stores, Inc. Despite the

existence of fifty (50) cameras in the store, no video surveillance could be found in the area where the incident happened.

It is worth mentioning that Respondent Porter provided a false statement in the Incident Report, dated December 24, 2013, where he claimed to have seen Appellant placed several cosmetic items in a large purse, which directly contradicts his testimony in court.

“ ON 12-24-2013 AT 1953 HRS, I OFC. HANCOCK WAS DISPATCHED TO 141 DORMAN CENTER DR. (WALMART) IN THE CITY OF SPARTANBURG FOR A REPORTED SHOPLIFTER IN CUSTODY.

ON ARRIVAL I SPOKE WITH INV. PORTER (SPSD). HE INFORMED ME THAT WHILE HE WAS RESPONDING TO A SHOPLIFTER IN CUSTODY (12-0618.13) HE OBSERVED A WHILE FEMALE IDENTIFIED AS CAITLYN GAIL LANGHAM (W/F, 09-08-1992, 107 TANGLEWYLDE DR., BROWN HAIR) IN THE COSMETIC AREA. HE THEN SAW MS. LANGHAM PLACE SEVERAL COSMETIC ITEMS (LIPSTICK, NAIL POLISH, EYE SHADOW) IN A LARGE PINK PURSE. MS. LANGHAM HAD CONCEALED THE ITEMS IN HER PURSE AND WAS PROCEEDING TO THE FRONT DOORS WHEN SHE WAS APPREHENDED BY INV. PORTER.”

(Incident Report, December 24, 2013).

In his testimony in the criminal court, Respondent Porter twice denied seeing Appellant placed items in her purse.

“Q: *Well, where did you—where did you see her take something?*

A: **I didn't see her take anything. The things were in her bag. I don't have to see her take anything?**”

(Porter, Trial Testimony. 14: 1-3, September 17, 2014)

“Q: *The bottom line is you did not see her put anything in that purse, did you?*

A: ***I don't have to see her put it in. That's not—that's not a part of the statute I have to see her put it in. She needs (ph) possession of it. I don't have to see her put it in.***”

(Porter, Trial Testimony.15: 17-22, September 17, 2014)

Respondent Porter lacked probable cause in delaying, arresting and detaining Appellant. There being no probable cause for her unlawful arrest, the subsequent search on her person and her purse is illegal and unconstitutional.

Appellant reiterates that the existence of probable cause and reasonable delay should be submitted by the trial court to the jury.

C. Respondents City of Spartanburg and Spartanburg Police Department Are Proper Parties and Are Liable Under §1983.

Under the *Monell v. Department of Social Services*, 426 U.S. 658 (1978), a municipal government can be held liable under Section 1983 if a plaintiff can demonstrate that a deprivation of a federal right occurred as a result of the local government's local officials whose acts may fairly be said to be those of the municipality. Respondents insist that no municipality can be held liable under §1983 on a *respondeat superior* theory. Appellant submits that the Complaint against Respondents City of Spartanburg and Spartanburg Police Department is not based on *respondeat superior* but an independent action based on Respondents City and Police Department's failure to properly train, supervise, and discipline Respondent Porter.

In the case of *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) as cited in *Drayton v. County of Charleston*, Civil Action No. 2:14-cv-3488-RMG-MGB (D.S.C. Jul. 10, 2015), the Court held that the failure to provide proper training may fairly be said to represent a policy for which the city is responsible if it actually causes injury. The physical, emotional and mental injuries sustained by Plaintiff in the hands of Porter's lack proper training has yet to be addressed by Respondents City and Police Department.

Respondents City's and Police Department's failure to provide remedial action in response to prior complaints against Respondent Porter is tantamount to condoning Respondent Porter's violation of Appellant's rights against unlawful arrest, unreasonable search and seizure,

due process, right to liberty and right against excessive use of force. Appellant asserts that Respondents' inaction is an action, which amounts to a custom or practice of deliberate indifference, and not just mere negligence.

The jury then must determine whether those off officials who have the power to make official policy, or in the alternative, the custom or practice of inaction perpetuated by Respondents, has caused Appellant's deprivation of rights.

D. Respondents Porter, City of Spartanburg and Spartanburg Police Department are not entitled to Qualified Immunity

Respondents assert that the instant action be dismissed because they are entitled to qualified immunity. Such qualified immunity however does not protect herein Respondents since their conduct is in clear violation of Appellant's constitutional and statutory rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm. *Johnson v. Glick*, 481 F.2d 1028 as cited in *Graham v. Connor*, 490 U.S. 386 (1989).

Respondent Porter's act of conducting unlawful arrest and unreasonable search and seizure upon the person and property of Plaintiff, without probable cause, unprovoked and done with excessive force, violated Appellant's rights to due process and liberty. As a police officer, Respondent Porter, should have known that using such force against Appellant would result in the latter sustaining physical injuries. The degree of force exerted by Respondent Porter upon Appellant is unreasonable, considering not only the difference in their physicality and strength, but also the circumstances of this case.

Plaintiff further alleges that Defendant Porter deprived her of her constitutional right to due process in failing to inform her of the reason for stopping, arresting and detaining her.

Thus, Plaintiff submits that there are genuine issues to be adjudicated in the present action.

V.

RESPONDENT PORTER WAS LIABLE FOR ASSAULT AND BATTERY.

Police Officers like Respondent Porter is not immune from assault and battery if they effect an unlawful arrest. In addressing assault and battery claims against police authority, the Supreme Court of South Carolina has stated:

“ An unlawful arrest, or an attempt to make an unlawful arrest, stands upon the same footing as any other non-felonious assault, or as a common assault and battery. The person who is so unlawfully arrested, or against whom such an unlawful attempt is directed, is not bound to yield, and may resist force with force, but he is not authorized to go beyond the line of force proportioned to the character of the assault, or he in turn becomes a wrongdoer.... ”

State v. McGowan, 347 S.C. 618, 623, 557 S.E.2d 657, 660 (2001) (emphasis omitted) (quoting *State v. Francis*, 152 S.C. 17, 34-35, 149 S.E. 348, 355-56 (1929) as cited in the case of *Horton v. City of Columbia*, 757 SE 2d 537 (SC: Court of Appeals, 2014

It is Appellant’s contention that Respondent Porter had no probable cause to stop/delay, arrest and detain Appellant. Appellant’s arrest was therefore unlawful and unconstitutional, and did not cloth Respondent Porter with any immunity for his assault and battery of herein Appellant. Respondent Porter undoubtedly committed assault and battery against Appellant.

A battery is the infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree; it is unnecessary that the contact be a blow, as any forcible contact is sufficient; an assault occurs when a person has been placed in reasonable fear of bodily harm by the conduct of the Respondent. *Herring v. Lawrence Warehouse Co.*, 222 S.C. 226, 72

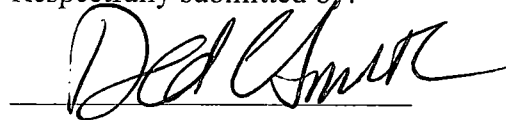
S.E.2d 453 (1953) as cited in Gathers v. Harris Teeter Supermarket, Inc. 317 SE 2d 748 (SC: Court of Appeals, 1984).

When Respondent Porter stopped Plaintiff, he grabbed her arm and slammed her on the floor, applying an unnecessary and excessive force considering the big difference in their sizes. Plaintiff, despite not being informed of the reason for Respondent's actions, did not put up any resistance. Plaintiff informed Respondent that he was hurting her when he gripped her arm, which had her birth control implant. Respondent Porter took that as a form of defiance and threw her on the ground. (Langham Dep., 22: 3-24, January 18, 2017). Plaintiff was placed in reasonable fear of bodily harm by Respondent Porter's conduct. Plaintiff, who was smaller and lighter than Porter, sustained bruises and physical injuries as a result of Respondent Porter's unlawful actions.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the trial court's Orders, dated March 22, 2017 and March 23, 2017 granting Respondent's Motion for Summary Judgment should be reversed, and this cause be remanded for a jury trial on the merits.

Respectfully submitted by:



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Anderson, South Carolina
August 15, 2017

FORM 7
PROOF OF SERVICE
APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Judge

Case No.: 2016-CP-42-1280
Appellate Case No. 2017-001009

Caitlyn Langham

Appellant,

vs.

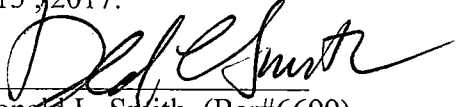
Officer Russell Porter,
City of Spartanburg, Spartanburg Police
Department, and WALMART, Inc.,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, Lee Ellen Bagley, Esquire, at 3700 Forest Drive, Suite 400, Columbia, SC 29204, and James D. Jolly Jr., Esquire at 1805 North Blvd., Anderson, SC 29622, by depositing a copy of it in the United States Mail, postage prepaid, on August 15, 2017.

August 15, 2017
Anderson, South Carolina


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AUG 18 2017
SC Court of Appeals

FORM 8
LETTER TO THE APPEALS COURT CLERK

August 15, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

**RE: Caitlyn Langham v. Officer Russell Porter, City of Spartanburg,
Spartanburg Police Department and WALMART, Inc.
C.A. No.: 2016-CP-42-1280
Appellate Case No.: 2017-001009**

Dear Honorable Kitchings:

Please find enclosed the following materials for filing:

- (1) Appellant's Initial Brief;
- (2) Appellant's Form 14 Designation of Matter; and
- (3) Proof of Service for same.

Sincerely,



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cc:

The Honorable Hope Blackley
Lee Ellen Bagley, Esquire
James D. Jolly, Jr., Esquire

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AUG 18 2017

SC Court of Appeals



Attorney Office of Donald Smith
122 N. Main Street,
Anderson, SC 29621

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AUG 18 2017

SC Court of Appeals
SC Court of Appeals

The Honorable Jenny Abbott Kitching
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Columbia SC 29211