

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
R. Keith Kelly, Judge

OCT 09 2017
SC Court of Appeals

Case No. 2017-001009

Caitlyn Langham.....Appellant,

v.

Officer Russell Porter, City of Spartanburg,
And Wal-Mart, Inc.....Respondents,

**RESPONDENT WAL-MART, INC.'s MOTION TO
STRIKE MATTERS FROM PLAINTIFF'S DESIGNATION OF MATTER**

Respondent Wal-Mart, Inc. (hereinafter, "Walmart"), by and through its counsel, hereby moves for an Order striking certain matters from Appellant's Designation of Matter to be Included in the Record on Appeal (hereinafter "Designation") based upon the failure to comply with Rules 209 and 210(c) of the South Carolina Appellate Court Rules. Appellant includes matters in her Designation that were not presented to the trial court; thus, this Court must strike those matters from Appellant's Designation.

The following documents were neither presented to the trial nor admitted into evidence in the underlying action and, therefore, are improperly included in Appellant's Designation:

- a. Appellant's matter number 16, Transcript of Ronnee Miller Deposition, dated January 18, 2017, pp. 16, 21, 23, and 38-39;

b. Appellant's matter number 17, Transcript of Caitlyn Langham Deposition, dated January 18, 2107, pp. 19-22;

c. Appellant's matter number 18, Transcript of Officer Porter Trial Testimony, dated September 17, 2104, pp. 14, 15, 16, 19-20; and

d. Appellant's matter number 19, Incident Report, dated December 24, 2013.

As the aforementioned matters were not presented to the trial court nor admitted into evidence in the underlying action, this Court must strike these matters pursuant to Rules 209 and 210(c), SCACR. *See* Exhibits A-H.

Based upon the foregoing, Walmart hereby moves this Honorable Court for an Order striking all improper matters as set forth above from Appellant's Designation.

Respectfully submitted,



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October 9, 2017

Attorneys for Respondent Wal-Mart, Inc.

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Caitlyn Langham,

Plaintiff,

vs.

Officer Russell Porter, City of Spartanburg,
Police Department and Wal-Mart Stores, Inc.,

Defendants.

COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-42-1280

**DEFENDANT WAL-MART'S
MOTION TO DISMISS
PURSUANT TO
RULE 12(b)(6), SCRPC**

PLEASE TAKE NOTICE that Defendant Wal-Mart Stores, Inc. (hereinafter, "Wal-Mart") hereby moves this Court for an Order dismissing Plaintiff's causes of action for false imprisonment, defamation, and violations of 42 U.S.C. § 1983 against Wal-Mart pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Plaintiff's causes of action for false imprisonment and defamation, as set forth in her Complaint filed April 8, 2016, were not filed within the applicable statutes of limitations and are thereby barred as untimely. Additionally, 42 U.S.C. §1983 does not create a cause of action against private entities and is indeed inapplicable to a private corporation's actions; thus, to the extent Plaintiff asserts violations of 42 U.S.C. §1983 against Wal-Mart, this Honorable Court should dismiss those causes of action.

Plaintiff's Complaint alleges that on December 24, 2013, she was accused of and arrested for shoplifting at the Wal-Mart store located at 141 Dorman Centre Drive, Spartanburg, South Carolina. Pl.'s Compl., attached hereto as Exhibit A, ¶ 8. As a result of the alleged incident, Plaintiff sets forth in her Complaint a cause of action against Wal-Mart for malicious prosecution. See Ex. A, Pl.'s Compl., ¶¶ 63-67. Additionally, Plaintiff asserts that Wal-Mart is vicariously liable under the doctrine of *respondeat superior* for the alleged acts and omissions of

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Defendant Porter, against whom Plaintiff alleges causes of action for violations of 42 U.S.C. § 1983, false imprisonment, defamation, and assault and battery.

Plaintiff's claims for false imprisonment and defamation are governed by section § 15-3-550 of the South Carolina Code, which required Plaintiff to file those causes of action within two (2) years of the date of the alleged incident. Plaintiff's Complaint alleges the incident occurred on December 24, 2013. See Ex. A, Pl.'s Compl., at ¶ 8. Thus, Plaintiff filed her Complaint well past the applicable two-year statute of limitations, which would have expired on December 24, 2015. As Plaintiff did not file her Complaint until April 8, 2016, approximately three and one-half (3.5) months after the controlling deadline passed, her causes of action for false imprisonment and defamation do not state facts sufficient to constitute a cause of action, are untimely, and should be dismissed with prejudice pursuant to Rule 12(b)(6), SCRCF.

Additionally, to the extent Plaintiff asserts claims against Walmart arising under 42 U.S.C. § 1983, those claims also fail as a matter of law. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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The Supreme Court of the United States previously held that local governing bodies, such as a city municipality, are liable under § 1983 for constitutional violations arising from the government's implementation of policy or custom. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The plaintiff must show that such policy or custom amounted to a "deliberate indifference" to the plaintiff's constitutional rights. *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); *Todd v. Smith*,

305 S.C. 227, 407 S.E.2d 644 (1991).

Wal-Mart is a private corporate entity; therefore, any of its alleged actions on the date of the alleged incident cannot be characterized as governmental action or pursuant to governmental policy. Plaintiff does not present any allegations that Wal-Mart acted under the color of state or federal law. Indeed, to the extent Plaintiff asserts violations of 42 U.S.C. § 1983 against Wal-Mart, which are inapplicable as explained above, she does so through the theory of *respondeat superior*; however, municipal liability under 42 U.S.C. § 1983 cannot be based on the traditional theory of *respondeat superior*. *Bd. of the County Comm'Rs v. Brown*, 520 U.S. 397, 416 (U.S. 1997) (citing *Monell*, 436 U.S. at 691).

Based upon the foregoing, Plaintiff's claims for false imprisonment, defamation, and violations of 42 U.S.C. § 1983 fail as a matter of law. Therefore, this Honorable Court should dismiss her claims for false imprisonment and defamation as untimely and barred by the applicable statutes of limitation, as well as dismiss any claims against Wal-Mart purportedly arising under 42 U.S.C. § 1983 as said statute does not provide for a cause of action against a private entity.

WHEREFORE, Wal-Mart respectfully requests that this Honorable Court grant the following relief:

- a) issue an Order dismissing with prejudice Plaintiff's causes of action against Wal-Mart for false imprisonment, defamation, and violations of 42 U.S.C. § 1983;
- b) schedule a hearing on this matter should the Court deem a hearing necessary; and,
- c) such other and further relief as the Court deems appropriate.

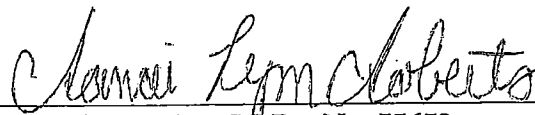
This Motion is based on the applicable statutory and case law, the South Carolina Rules of Civil Procedure, any memorandum in support of this Motion that Defendant Wal-Mart may

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submit, as well as the pleadings and arguments of counsel to be offered at any hearing scheduled on this matter.

Given the nature of this Motion, Rule 11 of the South Carolina Rules of Civil Procedure does not require consultation with opposing counsel prior to the filing hereof.

Respectfully submitted,



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May 13, 2016

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EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-42-1280

Caitlyn Langham,

Plaintiff,

v.

Officer Russell Porter, City of Spartanburg,
Police Department and Wal-Mart Stores, Inc.

Defendants.

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS MOTION TO
DISMISS**

Plaintiff respectfully submits this Memorandum in Opposition to Defendant WARMART'S Motion to Dismiss. In support of which, Plaintiff presents the following:

MEMORANDUM

Plaintiff filed this action for violation 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, false arrest, defamation, false imprisonment, and malicious prosecution.

The facts as alleged in the Complaint must be taken as true and incorporated herein. In essence however, Plaintiff was accused, arrested and detained, against her will and without warrant, by Defendant WARMART's employees and agent. As a result of this wrongful act, Plaintiff sustained physical injuries and was deprived of her liberty when she was unlawfully and falsely imprisoned. And, despite having no probable cause, Defendant WARMART pursued a case against Plaintiff. Plaintiff was acquitted by the Spartanburg Municipal Court on September 14, 2013.

Discovery has not been exchanged between parties.

On May 13, 2016, Defendant WALMART moved to dismiss Plaintiff's Complaint based on two grounds: First, Defendant WALMART claims that Plaintiff is barred from filing the instant action by statute of limitations. And secondly, Defendant WALMART alleges that 42 U.S.C. §1983 does not apply to private entities such as Defendant WALMART, and thus, Plaintiff's Complaint should be dismissed for failure to state a cause of action.

Standard of Review on a Motion to Dismiss under Rule 12(b)(6)

A motion to dismiss can only be granted if there is no set of facts that would entitle plaintiffs to a verdict on the claims in issue. Applicable standards state that the facts alleged in the complaint are accepted as true. *Scheuer v. Rhoades*, 416 U.S. 232, 236 (1974); *Franks v. Ross*, 313 F.3d 184,192 (4th Cir. 2002). In addition, all reasonable inferences must be made in favor of plaintiffs. *Johnson v. Mueller*, 415 F.2d 354 (4th Cir. 1969); *MacKethan v. Peat. Marwick. Mitchell & Co.*, 439 F. Supp. 1090 (E.D. Va. 1977).

Under *Ashcroft v. Iqbal*, to overcome a motion to dismiss, plaintiffs must have alleged facts in a complaint which also “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Plaintiffs' Complaint easily meets these standards and Defendants raise no legally valid arguments to warrant a dismissal.

ARGUMENTS

I. The Relevant Statutes of Limitations Bar No Claims in this Action

Defendant asserts that “Plaintiff's claims for false imprisonment and defamation are governed by §15-3-550 of the South Carolina Code, which required Plaintiff to file those causes of action within two (2) years of the date of the alleged incident.” And that since the Complaint

alleged that the incident happened on December 24, 2013, Plaintiff only had until December 24, 2015 to file her case. Defendant further alleges that Plaintiff, in filing her Complaint on April 8, 2016 is already barred by the two-year statute of limitations.

The law is well-settled on this question of statutes of limitation for actions brought under § 1983. While a statute of limitations is not contained within the text of § 1983, the Supreme Court has decided that the state's general statute of limitations for personal injury claims applies, even if the state has different statutes of limitation for intentional torts. *Owens v. Okure*, 488 U.S. 253, 249-50 (1989). To determine the timely filing of a § 1983 claim, courts borrow the statute of limitations from the most analogous state-law cause of action. 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 actions (*Wilson c. Garcia*, 471 U.S. 261 (1985), *Owens v. Okure*, 448 U.S. 235 (1989)).

South Carolina law allows three years for a plaintiff to bring a personal injury action. S.C. Code Ann. § 15-3-530 (5). Therefore, the statute of limitations for § 1983 claims arising in South Carolina is three years, regardless of the underlying allegations of the § 1983 claim.

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 years, but the date of accrual is not until the criminal proceedings end in the plaintiff's.

Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, 1 C. Corman, *Limitation of Actions* 7.4.1, p.

532 (1991); *Carnes v. Atkins Bros. Co.*, 123 La. 26, 31, 48 So. 572, 574 (1909), so also a §1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated. *Heck v. Humphrey*, 512 U.S. 477 (1994). The Heck doctrine teaches that if the unlawful arrest claim would necessarily imply the invalidity of a conviction, then the Section 1983 claim does not accrue until the conviction has been set aside and there is no longer any possibility of a judgment in the pending criminal prosecution.

Plaintiff has been acquitted of shoplifting by a jury on September 17, 2014. Following the doctrines abovementioned, Plaintiff has until September 17, 2016 to file her suit against Defendant WALMART. Plaintiff's Complaint based on Fourth and Fourteenth Amendment - malicious prosecution is not time barred.

II. Plaintiff's claims against WALMART is sufficiently stated.

Defendants moved to dismiss Plaintiff's Complaint for Failure to State a Cause of Action. In support of its Motion, Defendant WALMART argued that as a private corporation, 42 U.S.C. §1983 is inapplicable to Defendant WALMART.

Contrary to Defendant WALMART's allegations, a private entity and/or citizen may be held liable for violation of Section 1983. In order to recover under section 1983, a plaintiff must prove that the defendant deprived him of a constitutional right under color of state law (*Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970)). In a section 1983 action against a private party, a plaintiff will be entitled to relief if he can prove that the private party was "a willful participant in joint activity with the State or its agents" which activity deprived the plaintiff of a constitutional right (*Id.* at 152, 90 S.Ct. at 1605-06). For example, a store and its employees may be considered to be acting jointly with police when the police will

detain accused shoplifters without making an independent investigation, *Smith v. Brookshire Bros., Inc.*, 519 F.2d 93, 94 (5th Cir.1975) (per curiam), cert. denied, 424 U.S. 915, 96 S.Ct. 1115, 47 L.Ed.2d 320 (1976), or pursuant to a customary plan between the store and the police department, (*Duriso v. K-Mart No. 4195, Division of S.S. Kresge Co.*, 559 F.2d 1274, 1277 (5th Cir.1977) (per curiam) ..

State action is present when private security guards and police officers act in concert to deprive a plaintiff of his civil rights, particularly when a state statute authorizes a shopkeeper to detain suspected shoplifters. *El Fundi*, 625 F.2d at 196. In the case at bar, numerous facts point to the conclusion that Wal-Mart was acting in concert with the local police. First, Defendant WALMART hired Defendant Officer Porter, a police officer, as a security guard on his off days. Defendant Officer Porter admitted during his cross examination in the prior criminal case filed against Plaintiff that he was hired by Defendant WALMART for the twelfth time on the day the incident happened. Second, it is the practice of Wal-Mart to work with the police department in prosecuting shoplifters. Defendant Officer Porter Elliot and/or WALMART employees had telephoned the police after the unlawful search of Plaintiff's purse and her wrongful arrest, and requested the assistance of an officer for all the detained shoplifters. The police responded, taking Plaintiff into custody

Finally, under SC Code §16-13-140 (2012), a merchant or his employee may detain a suspected shoplifter to effect proper investigation and recovery of unpurchased goods "in a reasonable manner for a reasonable length of time". This state statute, combined with the concerted actions of Defendants Wal-Mart, its employees and the local police department, afford ample evidence of willful, joint activity which supports a claim against Wal-Mart under section 1983.

As for Defendant WALMART's claim that Plaintiff did not present any allegations that Defendant WALMART acted under the color of state or federal law, the Court has ruled in *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir.1980) (per curiam), a Complaint need not be articulately drafted in order to adequately allege that private persons are acting under color of state law. It is sufficient that plaintiff's complaint set out a detailed accounting of the events that led to Plaintiff's complaint set out detailed accounting of what transpired when she was detained for shoplifting. She alleged that she sustained numerous injuries and damages "[a]s a direct and proximate result of willful, wanton, and reckless acts of the Defendants, which constitute violation of Plaintiff's Constitutional rights." Murray's complaint also specifically invoked jurisdiction pursuant to section 1983. These statements more than adequately allege facts sufficient to state a claim against Wal-Mart under section 1983.

Assuming arguendo that Defendant WALMART is not liable under 42 U.S.C. 1983, this does not absolve Defendant WALMART from its liability under the doctrine of respondeat superior. This principle makes an employer or principal legally responsible for the wrongful acts done by an employee or agent, if such acts occur within the scope of the employment or agency.

Under this doctrine, an employer is liable for the negligent acts or omissions of his/her employee which are committed within the scope of his/her employment. To impose liability, there should be some evidence that a master-servant relationship existed between the parties. The test to determine if respondeat superior applies is whether the person sought to be charged as a master had the right or power to control and direct the physical conduct of the other in the performance of the act. If there is no right to control, there is no liability. [*Wilson v. United States*, 989 F.2d 953, 958 (8th Cir. Mo. 1993)].

In this particular case, Defendant WALMART hired Defendant Officer Porter, as a security guard on several instances. The common law control test is the basic test, using the common law rules, for determining whether a relationship exists between the worker and the person or firm that they work for. Under the common-law test, the employer has the right to tell the employee what to do, how, when, and where to do the job.

The relationship between Defendant WALMART and Defendant Officer Porter satisfies all of these factors: Defendant WALMART, in the times that Defendant Officer Porter was in its employ, assigned Defendant Officer Porter to man a specific area. Defendant WALMART's employees instructed Defendant Officer Porter to approach Plaintiff, whom they suspected of shoplifting. Defendant WALMART allowed Defendant Porter to manhandle Plaintiff since none of its employees prevented Defendant Porter from exercising excessive force against Plaintiff. Finally, Defendant WALMART hired and continued to hire Defendant Porter during the latter's off days. Thus, Defendant WALMART, at the time of the incident, is by law, an employer of Defendant Officer Porter.

CONCLUSION

For the above and foregoing reasons, Plaintiffs submit that Defendant's motion to dismiss should be denied.

Respectfully submitted,

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August 24, 2016

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-42-1280

Caitlyn Langham,

Plaintiff,

v.

Officer Russell Porter, City of Spartanburg,
Police Department and Wal-Mart Stores, Inc.

Defendants.

**PLAINTIFF'S MOTION FOR
RECONSIDERATION**

Pursuant to the Rule 59(e) of the South Carolina Rules on Civil Procedure, Plaintiff Langham file this Motion to Reconsider the Order of this Court, dated November 15, 2016. In support of which, Plaintiff presents the following:

INTRODUCTION

Plaintiff filed this action for violation 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, false arrest, defamation, false imprisonment, and malicious prosecution.

Plaintiff was accused, arrested and detained, against her will and without warrant, by Defendant Wal-Mart's employees and agent. Plaintiff sustained physical injuries and was deprived of her liberty when she was unlawfully and falsely imprisoned. And, despite having no probable cause, Defendant Wal-Mart pursued a case against Plaintiff. Plaintiff was acquitted by the Spartanburg Municipal Court on September 14, 2013.

On April 8, 2016, Plaintiff filed a Complaint against Defendants Porter, City of Spartanburg Police Department and Wal-Mart Stores, Inc., alleging among other causes of

action, defamation, assault and battery, malicious prosecution, false arrest, false imprisonment, and violation of 42 U.S.C. §1983.

On May 13, 2016, Defendant Wal-Mart moved to dismiss alleging that the Complaint is barred by statute of limitations and lacked cause of action. Plaintiff filed its Opposition to Defendant's Motion to Dismiss on August 24, 2016.

On November 15, 2016, this Honorable Court issued its Order, granting Defendant's Partial Motion to Dismiss.

STANDARD OF REVIEW

A motion under Rule 59(e) has long been viewed as a "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) as cited in *Elam v. South Carolina Department of Transportation*, 361 S.C. 9 (2004), 602 S.E.2d 772 (SC: South Carolina). A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, to preserve it for appellate review. *Id.*

Plaintiff reiterates that its cause of action against Wal-Mart for violation of 42 U.S.C §1983 is sufficiently stated.

ARGUMENT

To establish a Section 1983 claim, a plaintiff must be able to demonstrate a violation or 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-PMD-MGB.

Contrary to Defendant Wal-Mart's 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*, 625 F.2d at 195, state action is present when private security guards and police officers act in concert to deprive a plaintiff of his civil rights, particularly when a state statute authorizes a shopkeeper to detain suspected shoplifters.

In the case at bar, numerous facts point to the conclusion that Wal-Mart was acting in concert with the local police. First, Defendant Wal-Mart hired Defendant Officer Porter, a law enforcement officer, on his off days. Defendant Officer Porter admitted that he was hired by Defendant Wal-Mart for the twelfth time on the day the incident happened. Second, it is the practice of Wal-Mart to work with the police department in prosecuting shoplifters. Defendant Officer Porter and/or Wal-Mart's employee had telephoned the police after the unlawful search of Plaintiff's purse and her wrongful arrest, and requested the assistance of an officer for all the detained shoplifters. The police responded by taking Plaintiff into 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 a detention for shoplifting. *Cruz v. Donnelly*, 727 F.2d 79 (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 following provisions of S.C. Code Ann., namely, § 23-24-10, §23-24-50 and §23-24-20 (Supp. 1978), shows that a law enforcement officer may perform 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 gives a hint of an arrangement between private, commercial establishments like Defendant Wal-Mart employing off-duty officers, who exercise their official functions, and by the law enforcement agency. It must be noted here that Defendant Porter continues to be in the employ of the law enforcement agency.

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

The aforementioned state statutes, combined with the concerted actions of Defendants Wal-Mart, its employees and the local police department, afford ample evidence of willful, joint activity which supports a claim against Wal-Mart under section 1983.

CONCLUSION

For the above and foregoing reasons, Plaintiff moves for this Court to reconsider its Order, dated November 15, 2016 granting the Motion to Dismiss of Plaintiff’s cause of action for

violations of 42 U.S.C. §1983, and requests that this issue be litigated.

Respectfully submitted,

s/ Donald L. Smith
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Anderson, South Carolina
Date: November 21, 2016

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-42-1280

Caitlyn Langham,

Plaintiff,

v.

Officer Russell Porter, City of Spartanburg,
Police Department and Wal-Mart Stores, Inc.

Defendants.

CERTIFICATE OF SERVICE

THE UNDERSIGNED person deposes and says that he served Plaintiff's Motion for a Continuance upon Defendants, by and through counsel of record, James Jolley, Esquire, Lee Ellen Bagley, Esquire, Randi Lynn Roberts, Esquire and Kelli Spinks, Esquire, by means of electronic mail in this action addressed to the parties at the email addresses shown below:

November 21, 2016

s/Donald L. Smith
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EXHIBIT D

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-42-1280

Caitlyn Langham,)
)
 Plaintiff,)
)
 v.)
)
 Officer Russell Porter, City of)
 Spartanburg, Police Department,)
 and Wal-Mart Stores, Inc.,)
)
 Defendants,)
)
 _____)

MOTION TO DISMISS AND/OR
MOTION FOR SUMMARY JUDGMENT
BY DEFENDANTS PORTER,
CITY OF SPARTANBURG, AND
SPARTANBURG POLICE DEPARTMENT

YOU WILL PLEASE TAKE NOTICE that the Defendants Officer Russell Porter, City of Spartanburg, and Spartanburg Police Department, by and through their undersigned counsel, hereby moves this Court, pursuant to Rules 12(b)(6) and 56 of the South Carolina Rules of Civil Procedure, for an order dismissing and/or granting Summary Judgment in favor of these Defendants. This motion is based upon the grounds that the pleadings, depositions, Answers to Interrogatories and admissions on file, together with affidavits, if any, show that the Plaintiff's claims are barred by the applicable statute of limitation and/or there is no genuine issue as to any material fact as to the Plaintiff's claims. Therefore, these Defendants are entitled to dismissal and/or judgment as a matter of law. This Motion is further based upon such authority as will be set forth in the Memorandum that will be filed in support of the Motion.

[Signature block on next page.]

LOGAN, JOLLY & SMITH, LLP

s/James D. Jolly, Jr.
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Attorney for Defendants Officer Russell Porter,
City of Spartanburg, and Police Department

Anderson, South Carolina

Dated:

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-42-1280

Caitlyn Langham,)
)
 Plaintiff,)
)
 v.)
)
 Officer Russell Porter, City of)
 Spartanburg, Police Department,)
 and Wal-Mart Stores, Inc.,)
)
 Defendants,)
)
 _____)

MEMORANDUM IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT BY
DEFENDANTS PORTER, CITY OF
SPARTANBURG, AND SPARTANBURG
POLICE DEPARTMENT

COMES NOW the Defendants Officer Russell Porter, City of Spartanburg, and Spartanburg Police Department, by and through their undersigned legal counsel, and file this Memorandum of Law in support of their Motion for Summary Judgment.

STATEMENT OF THE CASE

Plaintiff filed this action with the Clerk of Court for the County of Spartanburg, State of South Carolina, on April 8, 2016, alleging both federal and state causes of action in connection with her arrest for shoplifting on or about December 24, 2013. The Defendants filed an Answer that included, among other defenses, any applicable statutes of limitations. The Defendants filed the Motion for Summary Judgment on December 8, 2016, and now submit this Memorandum in support of the Motion.

STATEMENT OF THE FACTS¹

According to the Plaintiff's Complaint, she was shopping at the Wal-Mart store in Spartanburg on Christmas Eve of 2013 when she "decided to pick up a few personal

¹ The facts are based on the pleadings on file with the Court, the depositions cited herein, and/or the documents submitted herewith as Exhibits.

cosmetic items.” She put “cosmetic items such as mascara and eyeliner in her shopping car[t],” along with other items. However, she claims that when she got to the register she realized she did not have enough money for all of the items in her cart and that she put the cosmetic items on a shelf near the checkout line. The Plaintiff’s Complaint admits that Wal-Mart employees told Officer Porter that they witnessed her placing items in her purse. (Complaint ¶¶ 9-13.) The Plaintiff admits that she had a drug problem and was “probably” on pain medicine on the date of her arrest. (See Depo. of Caitlyn Langham, p. 12, l. 23 – p. 13, l. 22; p. 14, l. 3-6, attached hereto as Exhibit 1)

Officer Porter approached the Plaintiff and personally observed numerous Wal-Mart items in her open shoulder bag/purse. As Officer Porter attempted to place the Plaintiff into custody, she physically resisted and Officer Porter was forced to use a reasonable amount of force to effectuate the arrest. The unopened, and unpurchased, Wal-Mart items found in Plaintiff’s purse included hygiene items, snacks, and candies worth \$74.62. .” (See Trial Transcript excerpts attached hereto as Exhibit 2, p. 8, l. 1 – p. 9, l. 13).

LEGAL STANDARDS

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” S.C.R.C.P. 56 (c). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 541 S.E.2d 831 (2001). The purpose of summary judgment is to

expedite the disposition of cases that do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Guinan v. Tenet Healthsystems of Hilton Head*, 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009).

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Moates v. Bobb*, 322 S.C. 172, 470 S.E.2d 402 (Ct.App.1996) (citing 54 C.J.S. Limitations of Actions § 2, at 16-17 (1989)). "Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* (citing 51 Am.Jur.2d, Limitation of Actions § 18, at 603 (1970)).

LEGAL ARGUMENT

I. THE PLAINTIFF'S STATE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiff's causes of action for false imprisonment, defamation, and assault and battery are barred by the applicable statutes of limitation. "The S.C. Tort Claims Act, S.C. Code Ann. §15-78-10, *et. seq.*, governs all tort claims against governmental

entities and is the exclusive civil remedy available in an action against a governmental entity or its employees.” *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003). The Tort Claims Act contains a general two (2) year statute of limitations. S.C. Code Ann. §15-78-110 (1976, as amended). This action was not filed until April 8, 2016, which was more than two (2) years after the Plaintiff’s arrest on December 24, 2013.² Based thereon, those causes of action should be dismissed.³ Moreover, with respect to the accrual of a cause of action under the Tort Claims Act, “the statute of limitations begins to run when the Plaintiff should know that she might have a potential claim against another, not when she develops a full blown theory of recovery.” *Joubert v. S.C. Department of Social Services*, 341 S.C. 176, 190, 534 S.E. 2d 1,8 (SC App. 2000). S.C. Code Ann. §15-78-110(a). The date on which discovery should have been made is an objective, not subjective question. *Kruetner v. David*, 320 S.C. 283, 465 S.C. 2d 88 (1995). “A cause of action accrues when the Plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action.” *Brooks v. City of Winston Salem, N.C.*, 85 F 3d 178 (4th Cir. 1996) (quoting *Nasim v. Warden, Md. House of Correction*, 64 F 3d 951 (4th Cir. 1995) (en banc), cert. denied 516 US 1177 (1996)). Since Plaintiff knew of her arrest on December 24, 2013, the statute of limitations began to run on such date. Therefore, the Plaintiff’s two year time period for filing suit expired on December 24, 2015. As Plaintiff did not file her initial suit in this matter until April 8, 2016, the Defendants are entitled to

² At a hearing held on August 25, 2016 on the Defendant Wal-Mart’s Motion to Dismiss, the Plaintiff conceded that the state claims, including false imprisonment and defamation are barred by the two-year statute of limitations found in §15-3-550.

³ Judge R. Keith Kelly previously found that the two-year statute of limitations found in §15-3-550 barred the Plaintiff’s causes of action against Wal-Mart for false imprisonment and defamation. (See Order of November 15, 2016, attached hereto as Exhibit 3.)

summary judgment based upon the statute of limitations as to all causes of action pled by the Plaintiff with the exception of malicious prosecution. Defendants concede for purposes of this motion that since one of the elements Plaintiff must prove to establish malicious prosecution is termination in the Plaintiff's favor, the statute arguably did not start to run until September 17, 2014, when the Plaintiff was acquitted. However, malicious prosecution, along with all of the other causes of action, is barred by the conclusive existence of probable cause.

II. THE PLAINTIFF'S FOURTH AMENDMENT CLAIMS AND HER CLAIMS FOR FALSE ARREST AND MALICIOUS PROSECUTION ARE PRECLUDED BY PROBABLE CAUSE.

Plaintiff's causes of action for unreasonable search and seizure under the Fourth Amendment, as well as for false imprisonment and malicious prosecution under state law, are barred by the existence of probable cause. "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 542 U.S. 146 (2004). Similarly, state law claims for malicious prosecution and false arrest require the lack of probable cause as one of their elements. See *McBride v. School District of Greenville County*, 389 SC 546, 698 SE 2d 845 (SC App. 2010); *Jordan v. Deese*, 317 SC 260, 452 SE 2d 838 (1995); *Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 SC 171, 456 SE 2d 429 (SC App. 1995); *Wortman v. Spartanburg*, 310 SC 1, 425 SE 2d 18 (1992).

The foundational case for the probable cause standard is *Illinois v. Gates*, 462 U.S. 213 (1983), which states that judicial officers should evaluate the evidence presented in the complaint and affidavits in a "nontechnical, common-sense" manner, "applying a standard less demanding than those used in more formal legal proceedings"

and that the ultimate decision on whether probable cause exists must be based on the totality of the circumstances. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. *Devenpeck, supra* (citing *Maryland v. Pringle*, 540 U.S. 366 (2003)).

“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.” *Maryland v. Pringle, supra*. Probable cause exists when facts and circumstances known to the officer(s) would warrant belief of prudent person that arrestee had committed or was committing offense, and must be supported by more than mere suspicion, although evidence sufficient to convict is not required. See *Taylor v. Waters*, 81 F.3d 429 (4th Cir.1996). “Stripped to its essence, the question to be answered is whether an objectively reasonable police officer, placed in the circumstances, had a ‘reasonable ground for belief of guilt’ that was ‘particularized with respect to the person to be searched or seized.’ ” *U.S. v. Humphries*, 372 F.3d 653 (4th Cir.2004) (citing *Maryland v. Pringle, supra*).

The evidence establishes probable cause: witnesses told Officer Porter that they had seen the Plaintiff place items into her purse; the Plaintiff (suspiciously and abruptly) attempted to leave the store as the officer approached; and the officer personally observed Wal-Mart merchandise in her open purse. In addition, at the conclusion of the State’s case in the criminal trial, the defense made a motion for a dismissal based on lack of probable cause. The Court denied the motion and stated, “there is sufficient evidence to move forward to allow the matter to be taken in front of the jury.” (See Trial Transcript excerpts attached hereto as Exhibit 4, p. 22, l. 8 – p. 23, l. 12). Based thereon, probable cause existed, as a matter of law, for the Plaintiff’s arrest in this case.

Therefore, Plaintiff's state causes of action for false imprisonment and malicious prosecution and her Fourth Amendment claim are barred and the Defendants are entitled to summary judgment thereon as a matter of law.

III. THE DEFENDANTS CITY OF SPARTANBURG AND SPARTANBURG POLICE DEPARTMENT ARE NOT PROPER PARTIES HERETO AND ARE ENTITLED TO DISMISSAL OR SUMMARY JUDGMENT.

There are two (2) causes of action brought against the City/Police Department: (1) the seventh cause of action, for malicious prosecution; and (2) the eighth cause of action, brought pursuant to §1983. As argued above, the Defendants are entitled to dismissal and/or summary judgment as to the malicious prosecution claim based on probable cause. In addition, the Defendants City of Spartanburg and Spartanburg Police Department are not proper defendants as to the Plaintiff's §1983 claims.

It is "well settled that a municipality is only liable under §1983 if it causes such a deprivation through an official policy or custom." *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). No municipality can "be held liable under §1983 on a *respondeat superior* theory" and "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* Although Plaintiff alleges that there was a history of complaints against Officer Porter, and that the City was deliberately indifferent thereto, there is no evidence to support such an allegation or to otherwise support the Plaintiff's §1983 claim against the City or the Police Department. Therefore, these Defendants are entitled to summary judgment as to the Plaintiff's §1983 cause of action against them.

IV. THE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

In addition to the above, the Defendants are also entitled to qualified immunity herein. Qualified immunity is "an entitlement not to stand trial or face the other burdens

of litigation." *Mitchell v. Forsyth*, 472 U.S. 511 (1985). It protects government officials performing discretionary functions from civil damage suits insofar as the officials' conduct does not violate clearly established rights of which a reasonable person would have known, but officials lose the protection of the immunity if they violate a constitutional or statutory right of the plaintiff and the right was clearly established at the time of the alleged violation such that an objectively reasonable official in the defendants' position would have known of it. *Porterfield v. Lott*, 156 F.3d 563 (4th Cir.1998). In considering a claim of qualified immunity, the court initially must decide whether a constitutional right would have been violated on the facts alleged, and next, assuming that the violation of the right is established, must consider whether the right was clearly established at the time, such that it would be clear to an objectively reasonable person that his conduct violated that right. *Brown v. Gilmore*, 278 F.3d 362 (4th Cir.2001). As stated above, Plaintiff has failed to establish that Defendants violated her rights, much less that they knowingly did so, thus entitling the Defendants to qualified immunity for all claims.

CONCLUSION

Based on the above, the Defendants Porter, City of Spartanburg, and City of Spartanburg Police Department are entitled to dismissal or summary judgment as to the Plaintiff's claims.

LOGAN, JOLLY & SMITH, LLP

s/James D. Jolly, Jr.
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Attorney for Defendants, Officer Russell Porter,
City of Spartanburg and Spartanburg
Police Department

Anderson, South Carolina

Dated: February 24, 2017



Caitlyn Langham 1/18/2017

12

1 -- and tell me what that involves.

2 A. There's four phases. The first phase, it's
3 intense outpatient treatment. You have group three
4 times a week; you have throughout the whole program
5 random drug testing. You call in every day at five
6 o'clock. Then in phase two, you have two groups a week
7 still. You still have a ten o'clock curfew; you still
8 have the random drug test. You have to go to any
9 meetings, six for two weeks. Phase three you have one
10 group, still have a curfew, same, everything is still
11 the same. And then phase four you have like little
12 check-in groups and no curfew, but the drub test and the
13 meetings and obtaining, you know, health insurance,
14 clean drug tests. So it's kind of a lot. It's a lot.

15 Q. And so you're currently going through that
16 program right now?

17 A. Yes, ma'am.

18 Q. Which phase are you in?

19 A. In two weeks I'll be in phase four.

20 Q. And if you successfully complete that program,
21 what happens to the charges?

22 A. My record will be clean.

23 Q. Okay. And did you have a substance-abuse
24 problem?

25 A. Yes, ma'am.

1 Q. Okay. What -- tell me about that.

2 A. It was something that I struggled with for a
3 while. And I -- I tried fixing it and I tried rehab,
4 but eventually, you know, spiraled out of control; and I
5 ended up getting those charges and was, you know, either
6 prison or drug court. So in the beginning, I did it to
7 stay out of prison, but it's been the best thing to
8 happen to me.

9 Q. I'm glad you did that.

10 A. Thank you.

11 Q. What was the -- what was the substance that
12 you used or substances?

13 A. In the beginning, it was pain medicine, and
14 then it -- at the very end it turned to meth and heroin
15 and whatever.

16 Q. And how long were you using?

17 A. I started using when I was fifteen, and then
18 pled in drug court when I was twenty-two and now I'm
19 twenty-four.

20 Q. On the day of the incident at Wal-Mart, were
21 you on any substances at that time?

22 A. Probably.

23 Q. Okay. Do you remember what happened? Do you
24 remember the incident at Wal-Mart?

25 A. Yes, ma'am.

1 Q. Okay. How well would you say you remember it?

2 A. Pretty well.

3 Q. Okay. And you said you probably were on
4 something. Do you have any idea what that -- what it
5 might have been?

6 A. No, ma'am. If anything, pain medicine.

7 Q. Okay. Other than the incident at Wal-Mart,
8 have you ever been arrested for shoplifting at any other
9 time?

10 A. No, ma'am.

11 Q. You referenced two assault and battery
12 charges.

13 A. Yes, ma'am.

14 Q. Were those -- did those happen at the same
15 time? I mean, did those arise out of the same incident?

16 A. Yes.

17 Q. Okay. And who else did -- was involved in
18 that?

19 A. My mother and my grandmother.

20 Q. Okay. Can you kind of tell me what happened
21 with those?

22 A. I was under the influence; and they were
23 trying to detain me, and I kind of put up a fight.
24 There was no punching or anything like that; but, you
25 know, in the situation, it was kind of like, okay, well,



Caitlyn Langham

Copy

State of South Carolina

vs.

Caitlyn Langham

DATE TAKEN: September 17, 2014

LOCATION: Spartanburg Municipal Court

145 West Broad Street

Spartanburg, South Carolina 29306

B E F O R E: Honorable Judge Erika McJimpsey

1 Q. -- were you alerted to the defendant?
2 A. I actually saw her coming toward the front of the
3 store while I was already dealing with another
4 shoplifting incident, and she was actually trying to
5 make her way to the exit, and that also caught my
6 attention, also. I then approached her there at the
7 little register near the side door. I don't know if
8 you're familiar with the Walmart on the Westside or
9 not, but near the entrance where the McDonald's is,
10 on that side. I approached her over there. She was
11 trying to get into the line of people that were
12 already at the register, and she was actually trying
13 to break in front of them to try to get in front
14 because she saw me coming towards her. I did
15 approach her, noted she had a big pink purse hanging
16 off her side. As soon as you look down into the
17 purse, the purse was open, I see a bunch of items
18 inside the purse. At that time I began to try to
19 talk to her. She pulled away and I had a little
20 struggle there. I had to actually take her to the
21 floor. Once I took her to the floor, got her purse,
22 started pulling items out of her purse, hygiene
23 items, snacks, candies, all sorts of items from the
24 store that were not purchased. At that time I
25 placed her into custody and charged her with

1 shoplifting.

2 Q. Do you know what the value of the items that were
3 taken were?

4 A. Yes, sir. The property value was \$74.62. I had
5 those items -- the store ring those items up for me
6 to get an actual value of them.

7 Q. Were any of the items damaged?

8 A. They all were resalable.

9 Q. So Walmart is not seeking any restitution?

10 A. That's correct.

11 Q. And all of those items -- you confirmed those were
12 all items that were located and sold by Walmart?

13 A. Yes, that's correct.

14 Q. Did she say anything else to you that day?

15 A. No. She was actually kind of disoriented or either
16 high for lack of -- lack of terms. Kind of
17 incoherent.

18 MR. SMITH:

19 Objection as to finding that she was high or
20 something (inaudible).

21 THE COURT:

22 State's response?

23 THE STATE:

24 Your Honor, he was just stating his impression of
25 what I believe there's case law that officer's as



STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Caitlyn Langham,

Plaintiff,

vs.

Officer Russell Porter, City of Spartanburg
Police Department and Wal-Mart Stores, Inc.,

Defendants.

COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-42-1280

**ORDER GRANTING DEFENDANT
WAL-MART'S PARTIAL
MOTION TO DISMISS**

This matter came before the Court on August 25, 2016, upon Defendant Wal-Mart Stores, Inc.'s (hereinafter, "Wal-Mart") Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure as to Plaintiff's causes of action against Wal-Mart for false imprisonment, defamation, and violations of 42 U.S.C. § 1983. Randi Lynn Roberts appeared on behalf of Walmart and Donald L. Smith appeared on behalf of Plaintiff¹. Having duly considered the written submissions and oral arguments presented by the parties, this Court grants Defendant Wal-Mart's Motion for the reasons set forth in this Order.

NATURE OF THE CASE

Plaintiff filed her Complaint instituting the present action on April 8, 2016, alleging a cause of action against Wal-Mart for malicious prosecution. *See* Pl.'s Compl. at ¶¶ 63-67. Additionally, Plaintiff asserts that Wal-Mart is vicariously liable under the doctrine of *respondeat superior* for the alleged acts and omissions of Defendant Porter, against whom Plaintiff alleges causes of action for violations of 42 U.S.C. § 1983, false imprisonment, defamation, and assault and battery. Wal-Mart did not move to dismiss Plaintiff's causes of action against it for assault and battery, through the theory of *respondeat superior*, and malicious prosecution.

¹ Counsel for Defendants Officer Russell Porter and City of Spartanburg, Police Department was also present.

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STANDARD OF REVIEW

“Under Rule 12(b)(6), SCRCF, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action.” *Doe v. Marion*, 361 S.C. 463, 468, 605 S.E.2d 556, 559 (Ct. App. 2004) (citing *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003)). “A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” *Id.* at 469, 605 S.E.2d at 559 (citing *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001)). Alternatively, a motion to dismiss under Rule 12(b)(6), SCRCF, cannot be sustained “if the facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.” *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Upon thorough review of the facts alleged in Plaintiff’s Complaint and the inferences reasonably deducible therefrom, the Court finds that Wal-Mart meets the requisite standard for the dismissal of several causes of action in this matter.

LAW/ANALYSIS

Plaintiff’s claims for false imprisonment and defamation are governed by section § 15-3-550 of the South Carolina Code, which required Plaintiff to file those causes of action within two (2) years of the date of the alleged incident. Plaintiff’s Complaint alleges the incident occurred on December 24, 2013. *See* Pl.’s Compl. at ¶ 8. Thus, the applicable two-year statute of limitations expired on December 24, 2015. As Plaintiff did not file her Complaint until April 8, 2016, approximately three and one-half (3.5) months after the controlling deadline passed, her causes of action for false imprisonment and defamation do not state facts sufficient to constitute a cause of action, are untimely, and are hereby dismissed with prejudice pursuant to Rule 12(b)(6), SCRCF.

Additionally, to the extent Plaintiff asserts claims against Wal-Mart under 42 U.S.C. §

1983, those claims also fail as a matter of law. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court of the United States previously held that local governing bodies, such as a city municipality, are liable under § 1983 for constitutional violations arising from the government's implementation of policy or custom. *Monell v. Dep't of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978). However, 42 U.S.C. § 1983 “cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.” *Monell*, 436 U.S. 658, 691 (1978); *see also Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 416 (1997). In the instant matter, Wal-Mart is not a municipality or other governing body. Wal-Mart is a private corporate entity and, thus, 42 U.S.C. § 1983 cannot be read to give rise to a cause of action against Wal-Mart, whether through the theory of *respondeat superior* or otherwise.

CONCLUSION

Based upon the foregoing, Plaintiff's claims for false imprisonment, defamation, and violations of 42 U.S.C. § 1983 fail as a matter of law. Therefore, this Honorable Court hereby dismisses her claims for false imprisonment and defamation as untimely and barred by the applicable statute of limitations, as well as dismisses any claims against Wal-Mart purportedly arising under 42 U.S.C. § 1983, as said statute does not provide for a cause of action against a private entity. Therefore, the present action will proceed as it pertains to Wal-Mart only upon Plaintiff's causes of action for assault and battery, through the theory of *respondeat superior*, and

malicious prosecution².

ACCORDINGLY, it is hereby ORDERED, ADJUDGED and DECREED that Defendant Wal-Mart's Motion is GRANTED as to Plaintiff's causes of action for false imprisonment, defamation, and violations of 42 U.S.C. § 1983.

The Honorable R. Keith Kelly

_____, 2016
Gaffney, South Carolina

² Nothing in this Order shall be interpreted as an admission by Wal-Mart or ruling by this Court as to the ultimate viability of Plaintiff's remaining causes of action.



Spartanburg Common Pleas

Case Caption: Caitlyn Langham VS Russell Porter , defendant, et al
Case Number: 2016CP4201280
Type: Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2016-11-15 13:45:09 page 5 of 5

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Copy

Caitlyn Langham

State of South Carolina

vs.

Caitlyn Langham

DATE TAKEN: September 17, 2014

LOCATION: Spartanburg Municipal Court

145 West Broad Street

Spartanburg, South Carolina 29306

B E F O R E: Honorable Judge Erika McJimpsey

ELECTRONICALLY FILED - 2017 Feb 24 11:01 AM - SPARTANBURG - COMMON PLEAS - CASE#2016CP4201280

1 moment to your jury deliberation room. Follow Ms.
2 Miller. (Inaudible). We'll have you back in just a
3 moment. You're more than welcome to (inaudible).
4 Ms. Miller, (inaudible) not to begin deliberating,
5 not to even talk about the case. Mr. Smith,
6 (inaudible)?

7 MR. SMITH:

8 May it please the Court. I would ask that
9 (inaudible) dismissed based on he stated himself he
10 had no personal information. He didn't have any --
11 he didn't know anybody, the witnesses he didn't talk
12 to them. He just went up to a woman and started
13 looking through her purse. I mean there's no --
14 there's nothing there, no probable cause.

15 THE COURT:

16 Mr. (inaudible).

17 THE STATE:

18 Your Honor, with regards to the exact words that
19 were said by Officer Porter, he said that he'd had
20 information (inaudible) concealed merchandise. He
21 approached her. She began to flee from him. Flight
22 in itself can be evidence of a crime (inaudible).
23 He looked in her purse, saw the merchandise, and
24 asked her why. She refused to comply. I think
25 there is probable cause and enough evidence to send

1 this to the jury.

2 THE COURT:

3 Go ahead.

4 MR. SMITH:

5 There is no specificity about who this person was or

6 ~~how big, what she was wearing. There's nothing like~~

7 that. I mean, nothing.

8 THE COURT:

9 I'm going to deny the motion for a direct verdict at

10 this time. I believe there's sufficient evidence to

11 move forward to allow the matter to be taken in

12 front of the jury. So I'm going to deny the motion.

13 Mr. Smith, (inaudible) witnesses?

14 MR. SMITH:

15 I need to (inaudible) client.

16 THE COURT:

17 Sure, sure. We'll go off the record for just about

18 five minutes, Mr. Smith?

19 MR. SMITH:

20 Yes, Your Honor.

21 THE COURT:

22 Okay. Thank you. Thank you ladies and gentlemen

23 for your patience. Mr. Smith, you may call your

24 first witness.

25 MR. SMITH:

EXHIBIT E

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Caitlyn Langham,

Plaintiff,

v.

Officer Russell Porter, City of Spartanburg,
Police Department and Wal-Mart Stores, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-42-1280

**OPPOSITION TO DEFENDANTS
OFFICER RUSSEL PORTER, CITY
OF SPARTANBURG AND
SPARTANBURG POLICE
DEPARTMENT**

Plaintiff respectfully submits this Memorandum in Opposition to Defendants Officer Russel Porter, City of Spartanburg and Spartanburg Police Department’s Motion for Summary Judgment. In support of which, Plaintiff presents the following:

MEMORANDUM

Plaintiff filed this action for violation 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, false arrest, defamation, false imprisonment, and malicious prosecution.

Plaintiff was accused, assaulted, defamed, forcefully arrested and detained, against her will and without warrant, by Defendant Officer Russel Porter. As a result of these wrongful acts, Plaintiff sustained physical injuries and mental anguish when she was assaulted by Defendant Officer Porter. By reason of his gross negligent conduct, Plaintiff was publicly humiliated and deprived of her liberty when she was unlawfully and falsely imprisoned. And, despite having no

Langham v. Officer Porter, City of Spartanburg, Spartanburg Police Department and Walmart Stores, Inc.
C.A. No: 2016-CP-42-1280
Opposition to Defendants Motion for Summary Judgment

probable cause, Defendants pursued a case against Plaintiff. Plaintiff was acquitted by the Spartanburg Municipal Court on September 14, 2013.

On April 8, 2016, Plaintiff filed a Complaint against Defendants Porter, City of Spartanburg Police Department and WALMART Stores, Inc., alleging among other causes of action, defamation, assault and battery, malicious prosecution, false arrest, false imprisonment, and violation of 42 U.S.C. §1983.

On May 13, 2016, Defendant WALMART moved to dismiss alleging that the Complaint is barred by statute of limitations and lacked cause of action. Plaintiff filed its Opposition to Defendant's Motion to Dismiss on August 24, 2016.

On February 24, 2017, Defendants Officer Porter, City of Spartanburg, and Spartanburg Police Department moved for a Summary Judgment of the present case.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRPC. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must go to the jury. *Young, supra*.

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.*, Op. No. 3061 (S.C. Ct. App. filed

October 25, 1999)(Shearouse Adv. Sh. No. 33 at 1). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Vermeer, supra*. 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. *Id*. In general, if the pleadings and the evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Carolina Alliance, supra*.

Plaintiff submits that the Complaint presented genuine issue of material facts, and Defendants raised no legally valid arguments to warrant a dismissal or summary judgment.

I. The Relevant Statutes of Limitations Bar No Claims in this Action

Defendants asserts that “Plaintiff’s claims for false imprisonment and defamation are governed by §15-3-550 of the South Carolina Code, which required Plaintiff to file those causes of action within two (2) years of the date of the alleged incident.” And that since the Complaint alleged that the incident happened on December 24, 2013, Plaintiff only had until December 24, 2015 to file her case. Defendant further alleges that Plaintiff, in filing her Complaint on April 8, 2016 is already barred by the two-year 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 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 the 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 actions (*Wilson c. Garcia*, 471 U.S. 261 (1985), *Ownes v. Okure*, 448 U.S. 235 (1989)).

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 three (3) years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.

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 years, but the date of accrual is not until the criminal proceedings end in the plaintiff’s favor.

II. DEFENDANTS’ ASSAULT AND BATTERY, UNLAWFUL SEARCH AND SEIZURE, FALSE ARREST, AND MALICIOUS PROSECUTION COMMITTED AGAINST HEREIN PLAINTIFF ARE WITHOUT PROBABLE CAUSE

Defendants assert that Plaintiff’s Complaint against them should be dismissed for lack of 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 defendant at the time the plaintiff 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, 368 S.C. at 441, 629 S.E.2d at 651, as cited in *Lynch v. Toys 'R Us-Delaware*, 375 S.C. 604 (2007).

Defendant Officer Porter testified in the prior criminal action as well as in his own deposition that he accosted Plaintiff while she was in line towards the cashier. (Defendants Exhibit 2, lines 1-14) Defendant Porter had not personally observed Plaintiff approach any merchandise, select and conceal the same. Nor did he witness the Plaintiff intentionally walk past the cash register, nor did she show any attempt to leave the premises. Defendant Porter's actions were prompted by the false and inaccurate reporting of Co-Defendant Walmart's employees. Accordingly, the determination of whether Plaintiff was falsely arrested and imprisoned should be submitted to the jury.

Furthermore, while Walmart's had the right to stop and delay their customers, such should be done in a reasonable manner and within a reasonable time. Ronnie Miller, an employee of co-Defendant WALMART, stated in his deposition Defendant WALMART's policy in relation to shoplifting. (Exhibit 1) Defendant Porter, with gross negligence, did not follow the said policy when, without personally observing her committing any of the four elements of co-Defendant WALMART shoplifting policy (selection, concealment, continued possession and last point of sale). There is nothing reasonable in the manner by which Defendant Officer Porter forcefully seized Plaintiff, who was smaller and lighter than him,

slammed her on the floor and unlawfully and illegally searched her purse. Defendant Officer Porter used such force that it resulted in bruises and physical injuries on the Plaintiff. (Exhibits 2-3).

III. DEFENDANTS CITY OF SPARTANBURG AND SPARTANBURG POLICE DEPARTMENT ARE PROPER PARTIES IN THE MALICIOUS CLAIMS PROSECUTION

Under *Monell v. Department of Social Serv.*, 436 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. Defendants insist that no municipality can be held liable under §1983 on a respondeat superior theory. Plaintiff submits that the Complaint against Defendants City of Spartanburg and Spartanburg Police Department is not based on respondeat superior but an independent action based on Defendants City and Police Department's failure to properly train, supervise, and discipline Defendant Porter. In the case of *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) as cited in *Drayton vs. 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 Defendant Porter's lack of proper training has yet to be addressed by Defendant City and Police Department.

Furthermore, Defendants City and Police Department's failed to provide remedial action in response to prior complaints against Defendant Porter is tantamount to condoning Defendant Officer Porter's violation of Plaintiff's right against unreasonable search and seizure, due process, right to liberty and right against use of excessive force. Plaintiff asserts that the state's

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 officials who have the power to make official policy, or in the alternative, the custom or practice of inaction perpetuated by Defendants, has caused Plaintiff's deprivation of rights.

IV. THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Defendants assert that the instant action be dismissed because they are entitled to qualified immunity. Such qualified immunity however does not protect herein Defendants since their conduct is in clear violation of Plaintiff's constitutional and statutory rights. Defendant Porter's act of conducting unreasonable search and seizure upon the person and property of Plaintiff, without probable cause, and using excessive force by slamming Plaintiff on the floor clearly violates Plaintiff's right to due process and liberty. As a police officer, Defendant Officer Porter, should have known that using such force against Plaintiff would result in the latter sustaining physical injuries. The degree of force exerted by Defendant Porter upon Plaintiff is unreasonable, considering the difference in their physicality and strength.

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

CONCLUSION

For the above and foregoing reasons, Plaintiffs submit that Defendant's motion to dismiss should be denied.

February 28, 2017

Respectfully submitted,

s/Donald L. Smith
Donald L. Smith, #06699
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Attorney for Plaintiff

Miller, Ronnee - Vol. I, (Pages 1:1 to 2:17)

1

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG

CAITLYN LANGHAM,

Plaintiff,

vs. Case No.: 2016-CP-42-1280

OFFICER RUSSELL PORTER,
CITY OF SPARTANBURG
POLICE DEPARTMENT AND
WAL-MART STORES, INC.,
Defendants.

DEPOSITION

WITNESS: RONNEE MILLER

DATE: Wednesday, January 18, 2017

TIME: 1:05 p.m.

LOCATION: Logan, Jolly & Smith
1805 North Boulevard
Anderson, South Carolina

TAKEN BY: Attorneys for the Defendant

REPORTED BY: ANDREA SHORB
Court Reporter

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On behalf of Wal-Mart, Inc.

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On behalf of Officer Russell Porter and
City of Spartanburg
Miller, Ronnee - Vol. I, (Pages 11:1 to 15:17)

11

- 1 address a shoplifting incident?
2 A. Yes.
3 Q. Can you tell me what the procedure for Wal-
4 Mart is when you have an alleged shoplifting?
5 A. As an AP associate, you have to have the --
6 the four elements. Once you get all four
7 elements and they pass the last point of sale,
8 which is them going out the door, you then
9 approach and take them into the office. From
10 there you collect the items, obtain the
11 receipt. And then from there, if police need
12 to be contacted, we you get them involved. If
13 not, we take our information, key it in the
14 system and go from there.
15 Q. All right. Well, I'm not going to lie to you
16 one bit. I didn't get a single thing of that,
17 so if we could go slowly for me.
18 A. Okay.
19 Q. The four elements, what are the four elements?
20 A. You have to get selection.

21 Q. Selection meaning?
22 A. Them picking up the items.
23 Q. Yes, ma'am.
24 A. Concealing it.
25 Q. And that means that they've concealed it in
12
1 some way?
2 A. Uh-huh.
3 Q. And what does "concealed" mean to you?
4 A. To me would be placing it in your pocket,
5 placing it in your purse, putting the item on.
6 If it's a hat, taking the tag off and placing
7 the item on head, on your head. That would be
8 concealing it.
9 Q. And the third?
10 A. Continued possession.
11 Q. And that would mean what specifically?
12 A. As you're watching them, they -- like if
13 they're shopping now, after they already got
14 the item, do they still have it on them; that
15 you're just verifying that they didn't take it
16 out of their purse or put the item down.
17 Q. So it's maintaining it in the area that it's
18 been concealed in?
19 A. Uh-huh.
20 Q. Is that "yes"?
21 A. Yes, sir.
22 Q. Thank you. And the fourth element?
23 A. Last point of sale.
24 Q. All right. And that means what?
25 A. Walking out the front door, passing all
13
1 registers.
2 Q. So once that occurs --
3 A. Uh-huh.
4 Q. -- is that when you approach the individual?
5 A. Yes, sir.
6 Q. And passing all registers, meaning, the last
7 opportunity to pay for it?
8 A. Yes, sir.
9 Q. Do you let them get out of the building, or is
10 it just past the register?
11 A. Past the register.
12 Q. Take me from that, that point, please.
13 A. From that point, we then do the approach,
14 identify ourselves. I'll ask them to come

15 into the -- the substation.
16 Q. So you have them in the substation?
17 A. Uh-huh. Once they're in the substation, then
18 ask for our items back. We would have the
19 witness or someone come to the substation and
20 grab the items.
21 Q. For what purpose?
22 A. That is a return receipt, so that we can get a
23 subtotal.
24 Q. Okay.
25 A. While that's going on, you then ask for ID.

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1 We then look them up in the system, which we
2 call APIS, A-P-I-S.
3 Q. And so that's for the purpose to see if they
4 are already not allowed to come on -- what's
5 the -- what's the term?
6 A. Just to see if they're already in the system.
7 Q. Trespass.
8 A. Yes. To see if they're trespass also.
9 Q. So you look on there, on APIS, to see if they
10 are on trespass. And if they are not, you go
11 about putting them on trespass?
12 A. Depending on the statement, the situation.
13 Not all shoplifters are on trespass.
14 Q. And the next step?
15 A. After we do all that, get return receipt, they
16 have -- verify the ID, check APIS to see if
17 they're in there. We either contact the
18 police or we release the suspect.
19 Q. And the decision to release or call the police
20 is based on what?
21 A. Based on the dollar amount and if they're in
22 the system or not and also age, for example.
23 Q. Can you explain that to me, please?
24 A. Age, if they're sixteen or younger, we
25 normally will call the parents; get them

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1 involved and then release into the custody of
2 their parents. If it's over \$25 and they have
3 no ID, police are contacted to identify the
4 suspect and because they went over their \$25
5 dollar amount.
6 Q. Is there another one?
7 A. No, sir.
8 Q. Would you say that it was a case-by-case

9 basis?
10 A. Yes.
11 Q. At your store now or Spartanburg previous, is
12 there always an agent, like a police officer
13 for -- police officer from some area of law
14 enforcement that works as well?
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Miller, Ronnee - Vol. I, (Pages 1:1 to 2:17)

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG

CAITLYN LANGHAM,

Plaintiff,

vs. Case No.: 2016-CP-42-1280

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POLICE DEPARTMENT AND
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Defendants.

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On behalf of Officer Russell Porter and
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Miller, Ronnee - Vol. I, (Pages 11:1 to 15:17)

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EXHIBIT F

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Caitlyn Langham,

Plaintiff,

vs.

Wal-Mart Stores, Inc.,

Defendant.

COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-42-1280

**DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

PLEASE TAKE NOTICE that Defendant Wal-Mart Stores, Inc. (hereinafter, "Walmart") hereby moves this Court pursuant to Rule 56 of the South Carolina Rules of Civil Procedure for an Order dismissing Plaintiff Caitlyn Langham's causes of action against Walmart for assault and battery, asserted under the theory of *respondeat superior*, and malicious prosecution. Because no genuine issue of material fact exists as to these causes of action, Walmart is entitled to judgment as a matter of law.

In support of its Motion, Defendant shows that Plaintiff has not and cannot establish that Walmart is liable for Plaintiff's alleged damages. There is no evidence that (1) Walmart acted with actual or implied malice in instituting a criminal charge against her and (2) Walmart lacked probable cause. Specifically, the trial court previously ruled that probable cause existed as a matter of law to arrest, detain, and try Plaintiff. *See Exhibit A, Order dated March 22, 2017.* As Plaintiff cannot establish that a genuine issue of material fact exists as to her claims of assault and battery and malicious prosecution, Walmart is entitled to judgment as a matter of law.

This Motion is supported by the applicable law, any Memorandum in Support of this Motion, including exhibits, that may be served, and counsel's arguments at any hearing set on said Motion.

Given the nature of this Motion, consultation with Plaintiff's counsel is not required pursuant to the South Carolina Rules of Civil Procedure.

WHEREFORE, Walmart hereby requests that the Court grant it the following relief:

- 1) Enter an Order granting summary judgment in favor of Walmart on Plaintiff's causes of action for assault and battery, asserted under the theory of *respondeat superior*, and malicious prosecution; and/or
- 2) Set a hearing on Walmart's Motion so that Walmart may set forth more fully its arguments for the Court; and/or
- 3) Such other and further relief as the Court may deem appropriate.

RESPECTFULLY SUBMITTED,

s/ Lee Ellen Bagley

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Randi Lynn Roberts, SC Bar No. 78888
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Attorneys for Wal-Mart Stores, Inc.

May 15, 2017

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Caitlyn Langham,

Plaintiff,

vs.

Officer Russell Porter, City of Spartanburg
Police Department and Wal-Mart Stores, Inc.,

Defendants.

COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-42-1280

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION**

This matter came before the Court on February 28, 2017, upon Plaintiff Caitlyn Langham's (hereinafter, "Plaintiff") Motion for Reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Plaintiff requests the Court reconsider its dismissal of Plaintiff's causes of action for false imprisonment, defamation, and violations of 42 U.S.C. § 1983 against Defendant Wal-Mart Stores, Inc. (hereinafter "Walmart"), as memorialized in the Order dated November 15, 2016. Donald L. Smith appeared on behalf of Plaintiff and Randi Lynn Roberts appeared on behalf of Walmart.¹ For the reasons set forth herein, the Court finds that Plaintiff did not present any facts or issues that the Court failed to consider or rule upon in dismissing the aforementioned causes of action against Walmart. Therefore, the Court denies Plaintiff's Motion for Reconsideration.

NATURE OF THE CASE

Plaintiff filed her Complaint instituting the present action on April 8, 2016, alleging a cause of action against Walmart for malicious prosecution. See Pl.'s Compl. at ¶¶ 63-67. Additionally, Plaintiff asserts that Walmart is vicariously liable under the doctrine of *respondeat superior* for the alleged acts and omissions of Defendant Porter, against whom Plaintiff alleges

¹ Counsel for Defendants Officer Russell Porter and City of Spartanburg, Police Department was also present.

causes of action for violations of 42 U.S.C. § 1983, false imprisonment, defamation, and assault and battery. Walmart filed a Motion to Dismiss pursuant to Rule 12(b)(6), of the South Carolina Rules of Civil Procedures, requesting dismissal of Plaintiff's causes of action for false imprisonment, defamation, and violations of 42 U.S.C. §1983. Walmart did not move to dismiss Plaintiff's causes of action against it for assault and battery, through the theory of *respondeat superior*, and malicious prosecution. After full consideration of all the evidence and arguments presented by the parties on Walmart's Motion to Dismiss, this Court dismissed Plaintiff's causes of action as alleged against Walmart for false imprisonment, defamation, and violations of 42 U.S.C. § 1983 in its Order filed November 15, 2016. Subsequently, Plaintiff filed the subject Motion for Reconsideration.

LAW/ANALYSIS

A Rule 59(e) motion is a vehicle to request the alteration or amendment of judgment as well as a vehicle to seek reconsideration of issues presented at the initial hearing or trial. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004); *see, e.g., Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (finding the "purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"). "A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* at 24, 602 S.E.2d at 780 (emphasis in original). "A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.* (emphasis in original).

The Court hereby incorporates by reference its ruling as set forth in the Order dated November 16, 2016, including all citations therein to the relevant case and statutory law. Based

on the evidence appropriately in the record and the parties' arguments, the Court finds that Plaintiff does not present any evidence, issues, or facts that warrant the Court's altering, amending, or reconsidering its dismissal of Plaintiff's causes of action for false imprisonment, defamation, and violations of 42 U.S.C. § 1983. Thus, this Court denies Plaintiff's Motion for Reconsideration.

CONCLUSION

ACCORDINGLY, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Reconsideration is DENIED.

_____, 2017
Gaffney, South Carolina

The Honorable R. Keith Kelly



Spartanburg Common Pleas

Case Caption: Caitlyn Langham VS Russell Porter , defendant, et al

Case Number: 2016CP4201280

Type: Order/Other

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2017-03-22 13:15:32 page 4 of 4

EXHIBIT G

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-42-1280

Caitlyn Langham,

Plaintiff,

v.

Officer Russell Porter, City of Spartanburg,
Police Department and Wal-Mart Stores, Inc.

Defendants.

**RESPONSE OPPOSITION TO
DEFENDANT WALMART'S
MOTION FOR SUMMARY
JUDGMENT**

Plaintiff respectfully submits this Memorandum in Opposition to Defendant WALMART'S Motion for Summary Judgment. In support of which, Plaintiff presents the following:

MEMORANDUM

Plaintiff filed this action for violation 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, false arrest, defamation, false imprisonment, and malicious prosecution.

Plaintiff was accused, assaulted, defamed, forcefully arrested and detained, against her will and without warrant, by Defendant Officer Russel Porter together with Defendant WALMART's employees, by reason of, and in performance of their duties as agent of Defendant WALMART. As a result of these wrongful acts, Plaintiff sustained physical injuries and mental anguish when she was assaulted by Defendant Officer Porter. By reason of his gross negligent conduct, Plaintiff was publicly humiliated and deprived of her liberty when she was unlawfully

Langham v. Officer Porter, City of Spartanburg, Spartanburg Police
Department and Walmart Stores, Inc.
C.A. No: 2016-CP-42-1280
Opposition to Defendants Motion for Summary Judgment

and falsely imprisoned. And, despite having no probable cause, Defendant WALMART pursued a case against Plaintiff. She was acquitted by the Spartanburg Municipal Court.

On April 8, 2016, Plaintiff filed a Complaint against Defendants Porter, City of Spartanburg Police Department and WALMART Stores, Inc., alleging among other causes of action, defamation, assault and battery, malicious prosecution, false arrest, false imprisonment, and violation of 42 U.S.C. §1983.

On May 13, 2016, Defendant WALMART moved to dismiss alleging that the Complaint is barred by statute of limitations and lacked cause of action. Plaintiff filed its Opposition to Defendant's Motion to Dismiss on August 24, 2016.

On November 15, 2016, the Honorable Court issued its Order, granting Defendant WALMART's Partial Motion to Dismiss.

On May 15, 2017, Defendant WALMART moved for summary judgment on the causes of action for assault and battery. Thus, this Opposition.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRCF. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must go to the jury. *Young, supra*.

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.*, Op. No. 3061 (S.C. Ct. App. filed October 25, 1999) (Shearouse Adv. Sh. No. 33 at 1). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Vermeer, supra*. 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. *Id.* In general, if the pleadings and the evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Carolina Alliance, supra*.

Plaintiff submits that the Complaint presented genuine issue of material facts, and Defendants raised no legally valid arguments to warrant a dismissal or summary judgment.

ARGUMENT

I. **THERE IS A GENUINE ISSUE THAT WOULD PREVENT THE GRANTING OF SUMMARY JUDGMENT AGAINST PLAINTIFF.**

Defendant WALMART asserts that Plaintiff's Complaint against them for assault and battery should be dismissed for lack of genuine issue of material facts.

Plaintiff avers that there is genuine issue of material facts when Defendant WALMART alleged the following in its Answer, dated May 13, 2016, to wit: (1) That Defendant

WALMART at all times “acted reasonably and in good faith in the exercise of their legal rights and at no time breached any duty” , thereby raising the doctrine of Merchant’s Defense.

In her Opposition to the Motion for Summary Judgment, Plaintiff contests that there is nothing “reasonable” in Defendant Porter and Defendant WALMART’s act of preventing, delaying, arresting and detaining Plaintiff.

Defendant Officer Porter testified in the prior criminal action that he accosted Plaintiff while she was in a queue towards the cashier. (Defendants Exhibit 2, lines 1-14) Defendant Porter had not personally observed Plaintiff approach any merchandise, select and conceal the same. Nor did he personally witness the Plaintiff intentionally walk past the cash register, nor attempt to leave the premises.

Under the Merchant’s Defense doctrine, while Defendant Walmart 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 is to be determined by company policies on shoplifting. In her deposition, Ronnie Miller, an employee of Defendant WALMART, discussed Defendant WALMART’s policy in relation to shoplifting. (Exhibit 1). Defendant Porter and Defendant WALMART’s employees, with gross negligence, did not follow the said policy when he accosted and manhandled Plaintiff, without personally observing her committing any of the four elements of co-Defendant WALMART shoplifting policy (selection, concealment, continued possession and last point of sale). There is nothing reasonable in the manner by which Defendant Officer Porter forcefully seized Plaintiff, who was smaller and lighter than him, slammed her on the floor and unlawfully and illegally searched her purse. Defendant Officer Porter used such force that it resulted in bruises and physical injuries on the Plaintiff. (Exhibits 2-3).

II. MOTION FOR SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE DEFENDANT WALMART, INC. DISPOSED OF VIDEO OF WHAT TRANSPIRED ON THAT DAY AND TIME OF THE ALLEGED SHOPLIFTING INCIDENT.

Plaintiff asserts that Defendant WALMART, Inc has the duty to preserve the surveillance videos used on the day of the alleged shoplifting incident, especially since Defendant WALMART knew or should have known that this evidence is relevant to a litigation which it reasonably anticipates. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

Defendant WALMART knew or could have known that it will be prosecuting, as it indeed prosecuted, Plaintiff on shoplifting charges. It therefore has the duty to preserve the surveillance video used on the day of the incident. In fact, it did not even present the video to the police, which would have been a standard operating procedure. That Plaintiff was eventually acquitted, did not take away the obligation of Defendant WALMART to preserve and produce the video.

Plaintiff has on several occasions requested for a copy of the surveillance video from Defendant WALMART, Inc. The latter failed to accede to said request, nor provide a reasonable explanation for its non-production.

Plaintiff avers that the surveillance video will bolster Plaintiff's allegations that she was subjected to an unreasonable arrest and detention by Defendant Porter and Defendant WALMART's employees. The video will also show that Defendants Porter and WALMART employees forcefully grabbed Plaintiff and slammed her on the floor, causing physical injuries on her person.

Plaintiff is therefore entitled to an inference that the video surveillance would have been adverse to the position of Defendant WALMART, Inc.

Accordingly, the determination of whether the arrest, detention and subsequent assault of the Plaintiff was done in good faith and in a reasonable manner, as well as the spoliation of relevant evidence should be submitted to the jury.

CONCLUSION

For the above and foregoing reasons, Plaintiff submits that Defendant WALMART, Inc.'s Motion for Summary Judgment should be denied.

June 19, 2017

Respectfully submitted,

s/Donald L. Smith
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Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Plaintiff

EXHIBIT H

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-42-1280

Caitlyn Langham,

Plaintiff,

v.

Officer Russell Porter, City of Spartanburg,
Police Department and Wal-Mart Stores, Inc.

Defendants.

**PLAINTIFF'S MOTION FOR
RECONSIDERATION**

Pursuant to the Rule 59(e) of the South Carolina Rules on Civil Procedure, Plaintiff Langham file this Motion to Reconsider the Order of this Court, dated July 14, 2017. In support of which, Plaintiff presents the following:

MEMORANDUM

Plaintiff filed this action for violation 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, false arrest, defamation, false imprisonment, and malicious prosecution.

Plaintiff was accused, assaulted, defamed, forcefully arrested and detained, against her will and without warrant, by Defendant Officer Russel Porter together with Defendant WALMART's employees, by reason of, and in performance of their duties as agent of Defendant WALMART. As a result of these wrongful acts, Plaintiff sustained physical injuries and mental anguish when she was assaulted by Defendant Officer Porter. By reason of his grossly negligent conduct, Plaintiff was publicly humiliated and deprived of her liberty when she was unlawfully and falsely imprisoned. And, despite having no probable cause, Defendant WALMART pursued a case against Plaintiff. She was acquitted by the Spartanburg Municipal Court.

On April 8, 2016, Plaintiff filed a Complaint against Defendants Porter, City of Spartanburg Police Department and WALMART Stores, Inc., alleging among other causes of action, defamation, assault and battery, malicious prosecution, false arrest, false imprisonment, and violation of 42 U.S.C. §1983.

On May 13, 2016, Defendant WALMART moved to dismiss alleging that the Complaint is barred by statute of limitations and lacked cause of action. Plaintiff filed its Opposition to Defendant's Motion to Dismiss on August 24, 2016.

On November 15, 2016, the Honorable Court issued its Order, granting Defendant WALMART's Partial Motion to Dismiss on the causes of action for defamation and false imprisonment.

On May 15, 2017, Defendant WALMART moved for summary judgment on the causes of action for assault and battery. The court granted summary judgment, thus this motion for reconsideration.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56 (c), SCRCP. *David v. McLeod Regional Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56 (c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *David*, 367 S.C.at 247, 626 S.E.2d at 3.

A motion under Rule 59(e) has long been viewed as a “motion for reconsideration” despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) as cited in *Elam v. South Carolina Department of Transportation*, 361 S.C. 9 (2004), 602 S.E.2d 772 (SC: South Carolina). A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, to preserve it for appellate review. *Id.*

ARGUMENT

THERE IS A GENUINE ISSUE OF MATERIAL FACTS THAT WILL PRECLUDE THE GRANTING OF SUMMARY JUDGMENT

A. The issue of probable cause is typically a question of fact for the jury to decide.

In determining probable cause, only those facts and circumstances that were or should have been known to the Defendant at the time the Plaintiff was stopped should be considered.

Defendant WALMART has an existing policy in addressing shoplifting incidents. Ronnee Miller, an Assistant Manager at Defendant WALMART on the day of the alleged incident, discussed the company policy on shoplifting. In her deposition, Ronnee explained the procedure that 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).

Ronnee Miller asserted that she cannot recall having seen the Plaintiff select or pick out an item, conceal the same, nor carry it out of the store nor pass the cashier. (Miller Dep., 38: 22-25; 39: 1-6, *Id.*).

Defendant Porter testified in a prior criminal case that he accosted Plaintiff while she was in a queue towards the cashier. (Russell Porter Trial Tr., lines 1-14). Defendant Porter did not personally observe Plaintiff approach any merchandise, select nor conceal the same. Defendant Porter did not personally witness Plaintiff intentionally attempt to leave the building, as in fact he arrested her while she was in a line towards the cashier.

The one person who allegedly witnessed the incident, Kelyn Eber, was conveniently missing or is no longer employed in WALMART. Defendant WALMART had a chance to present an evidence 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.

“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 Plaintiff's unlawful arrest, assault and battery and subsequent illegal detention.

B. The reasonableness of force employed by Defendant Porter is an issue of material fact.

Defendant WALMART reiterates that it has "acted reasonably and in good faith in the exercise of their legal rights and at no time breached any duty. In essence, Defendant WALMART raised the doctrine of Merchant's Defense under S.C. Code Ann. § 16-13-140. Under the Merchant's Defense, while Defendant WALMART 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. Defendant Porter was 6 feet. Plaintiff was smaller and lighter. Defendant Porter slammed Plaintiff on the floor, unlawfully and illegally searched her purse, and forcibly led her to the substation, all these times, applying such force that resulted in bruises and injuries on Plaintiff.

It is Plaintiff's contention that there is nothing reasonable in the manner by which Defendant Officer Porter, forcefully seized Plaintiff, slammed her on the floor, and illegally searched her purse. The issue of the reasonableness of force employed by Defendant Porter goes into the interpretation of the law, specifically S.C. Code Ann. § 16-13-140. This issue should have been heard and decided by the jury.

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

C. POTENTIAL SPOILIATION OF EVIDENCE IS SUFFICIENT TO DEFEAT SUMMARY JUDGMENT

While South Carolina courts do not recognize an independent cause of action of negligent spoliation, it can be and is allowed to be used as a defense in criminal cases or to defeat a judgment on verdict. (*Stokes v. Spartanburg Regional Medical Center*, 629 S.E.2d 675 (S.C. Ct. App. 2006).

South Carolina apparently recognizes a type of Adverse Inference Rule as it relates to loss or destruction of evidence. In *Wisconsin Motor Corp. v. Green*, 79 S.E.2d 718, 720-21 (S.C. 1954), the court held that it appears as though such inference may be given when a party does not provide an explanation for its failure to produce appropriate documents. *Id.*

In both *Kershaw County Board of Education v. United States Gypsum Co.*, 396 S.E.2d 369, 372 (S.C. 1990) and *Stokes v. Spartanburg Regional Medical Center*, where destruction of evidence or spoliation was alleged, the courts ruled that it was for the jury to decide whether a negative inference is justified.

Plaintiff insists that Defendant WALMART committed spoliation. The elements of spoliation are as follows:

- "(1) a pending or potential civil action;*
- (2) knowledge of the spoliator of the pending or potential civil action;*
- (3) willful destruction of evidence;*
- (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action;*
- (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action;*
- (6) the party's inability to prevail in the civil action; and*
- (7) damages."*

Hannah v. Heeter, 213 W.Va 704, 584 S.E.2d 560 (2003) as cited in *Austin v. Beaufort County Sheriff's Office*, 659 SE 2d 122.

Plaintiff asserts that Defendant WALMART, Inc has the duty to preserve the surveillance videos used on the day of the alleged shoplifting incident, especially since Defendant WALMART knew or should have known that this evidence is relevant to a litigation which it reasonably anticipates. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

Defendant WALMART knew or could have known of a potential civil action as an offshoot of it filing shoplifting case against Plaintiff. Even during the previous criminal case involving the parties, Plaintiff has already requested for the surveillance videos from Defendant WALMART. Defendant consistently refused to accede to said request, nor provide a reasonable explanation for its non-production. In fact, it did not even present the video to the police, which is the standard operating procedure. That Plaintiff was eventually acquitted, did not take away the obligation of Defendant WALMART to preserve and produce the video.

Plaintiff avers that the surveillance video will bolster Plaintiff's allegations that she was subjected to an unreasonable arrest and detention by Defendant Porter and Defendant WALMART's employees. The video will also show that Defendants Porter forcefully grabbed Plaintiff and slammed her on the floor, causing physical injuries on her person.

By reason of Defendant WALMART's continued refusal to submit the surveillance video, an inference may be drawn by the jury that the evidence which was lost or destroyed by Defendant WALMART would have been unfavorable to it. *Kershaw County Board of Educ, Id.*

The unreasonable refusal to produce the surveillance video prejudices Plaintiff in that she is prevented from forming her theory of the case, or proving the unreasonable and unlawful assault and battery against Plaintiff.

Plaintiff undeniably sustained damages due to the destruction of the surveillance videos. Furthermore, because of the missing videos, Plaintiff's case was summarily dismissed.

Plaintiff is therefore entitled to an inference that the video surveillance would have been adverse to the position of Defendant WALMART, Inc.

Accordingly, the determination of whether the arrest, detention and subsequent assault of the Plaintiff was done in good faith and in a reasonable manner, as well as the spoliation of relevant evidence should be submitted to the jury.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully request that this Honorable Court reconsider its Order, reverse its ruling, order trial of the case and enter judgment in favor of Plaintiff on all claims.

Anderson, South Carolina
July 19, 2017

Respectfully submitted,

s/Donald L. Smith
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attorneydonaldsmith@gmail.com
Attorney for Plaintiff

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
R. Keith Kelly, Judge

Case No. 2017-001009

RECEIVED
OCT 09 2017
SC Court of Appeals

Caitlyn Langham.....Plaintiff,

v.

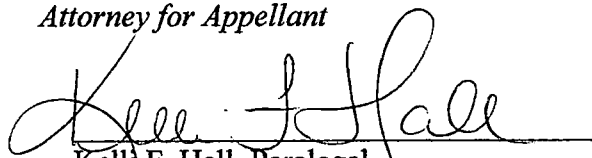
Officer Russell Porter, City of Spartanburg,
And Wal-Mart, Inc.....Respondents,

CERTIFICATE OF SERVICE

I do hereby certify, on this 9th day of October, 2017, that a copy of the foregoing
**Respondent Wal-Mart, Inc.'s Motion to Strike Matters from Plaintiff's Designation of
Matter** was served by depositing a copy of the same in the United States Mail, first-class,
postage prepaid, addressed to counsel of record as follows:

James D. Jolly, Jr., Esquire
Logan Jolly & Smith
1805 North Blvd.
Anderson, South Carolina 29622
Attorney for City of Spartanburg

Donald L. Smith, Esquire
Attorney Office of Donald Smith
122 N. Main Street
Anderson, South Carolina 29621
Attorney for Appellant


Kelly F. Hall, Paralegal

Columbia, South Carolina



3700 Forest Drive, Suite 400, Columbia, SC 29204 | T: 803.790.8838 | F: 803.790.8841

October 9, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
www.glelawfirm.com
OCT 09 2017
SC Court of Appeals

Re: *Caitlyn Langham v. Officer Russell Porter, City of Spartanburg and Wal-Mart, Inc.*
Case No : 2017-001009

Dear Clerk Kitchings:

Enclosed for filing please find the original and seven (7) copies of Respondent's Motion to Strike Matters From Plaintiff's Designation of Matter, along with a check in the amount of \$25.00 for the filing fee in the above-referenced matter. We would appreciate you filing the original with the Court and returning the clocked copy for our records to the courier.

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

Sincerely,

A handwritten signature in black ink that reads 'Kelli'.

Kelli F. Hall
Paralegal

/kfs

Enclosures

cc: Morgan S. Templeton, Esq.
Matthew C. LaFave, Esq.