

REPLY BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Judge

Appellate Case No.: 2017-001009

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SC Court of Appeals

Caitlyn Langham

Appellant,


vs.

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

Respondents.

**APPELLANT'S REPLY BRIEF TO RESPONDENTS
OFFICER PORTER AND CITY OF SPARTANBURG
POLICE DEPARTMENT'S INITIAL BRIEF**

Anderson, South Carolina
February 1, 2018


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STATEMENT OF THE ISSUES ON APPEAL

- I. **WHETHER THE APPELLANT'S CAUSES OF ACTION FOR MALICIOUS PROSECUTION, FALSE IMPRISONMENT, ASSAULT AND BATTERY AND VIOLATION OF THE FOURTH AMENDMENT FAILED BECAUSE THERE WAS PROBABLE CAUSE FOR APPELLANT'S ARREST.**
- II. **WHETHER APPELLANT'S CAUSE OF ACTION FOR ASSAULT AND BATTERY IS PRECLUDED BY THE STATUTE OF LIMITATIONS.**
- III. **WHETHER THE CITY RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY.**
- IV. **WHETHER THE CITY OF SPARTANBURG AND SPARTANBURG POLICE DEPARTMENT ARE PROPER RESPONDENTS UNDER § 1983.**
- V. **WHETHER RESPONDENT PORTER IS LIABLE FOR ASSAULT AND BATTERY.**

ARGUMENTS

- I. **THERE WAS NO PROBABLE CAUSE FOR APPELLANT'S ARREST, WHICH ENTITLES APPELLANT TO HER CAUSES OF ACTION.**

Appellant reiterates that the standard/basis of probable cause for shoplifting cases in South Carolina is embodied in S.C. Code Ann. §16-13-140, which provides that:

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

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

Respondent WALMART has an existing policy in addressing shoplifting incidents. Ronnee Miller, an Assistant Manager at Respondent WALMART on duty at 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 Appellant 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.*).

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

Respondent Porter testified in a prior criminal case that he accosted Appellant while she was in a queue towards the cashier. (Russell Porter Trial Tr., lines 1-14, September 17, 2014). He himself admitted that he did not see her take anything (Porter, Trial Testimony. 14: 1-9, 15: 17-20). In fact, he was busy with another shoplifting incident when he was "notified by WALMART employees that a certain young lady was putting stuff into her bag". (Porter, Trial Testimony, 7: 4-8; 19: 23-25). It was only then that he approached Appellant who was queueing through the cashier, inside Respondent WALMART's premises. Respondent Porter did not personally witness Appellant intentionally attempt to leave the building, as in fact he stopped her while she was in a line towards the cashier.

What is apparent in Respondent Porter's testimony is that in his overzealousness to perform his job, he failed to follow Respondent WALMART's shoplifting policy. By his own admission, he assumed that Appellant was not going to pay. (Porter, Trial Testimony, 15:24-25; 16:11-4). Respondent Porter should not be allowed to arrest Appellant for what he assumed would happen. Respondent Porter does not have reasonable cause to believe that Appellant did not intend to pay. He approached Appellant while she was in the line towards the cashier. She never made it to the cashier as Respondent Porter stopped and arrested her. In short, there was no taking without paying. Thus, based on the facts and circumstances known to Respondent Porter, there was no crime or offense committed or being committed.

Appellant insists that there was no probable cause to arrest her, considering that based on Respondent WALMART's policy, Respondent Porter did not personally see nor observe Appellant select, conceal, possess and take any item without paying for it by passing all registers.

Appellant also contends that there is nothing reasonable in the manner by which Respondent Porter forcefully seized Appellant, slammed her on the floor and illegally searched her purse. The issue of the reasonableness of force employed by Respondent Porter should have been heard and decided by the jury.

II. APPELLANT'S CAUSE OF ACTION FOR ASSAULT AND BATTERY IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Appellant's cause of action for assault and battery against Respondent Porter (Sixth Cause of Action) was based on his individual capacity. Firstly, Respondent Porter was performing an act outside the scope of his duty as a police officer. To be specific, he was performing his job as an employee of Respondent WALMART, as he was hired in his off duty.

Secondly, at all relevant times, Respondent WALMART had control and supervision over Respondent Porter's actions during the incident. Respondent Porter approached, stopped, arrested and detained Appellant upon the instruction and/or instigation of Respondent WALMART's employees. (Porter, Trial Testimony, 7: 4-8; 19: 23-25).

Respondent Porter was sued for his tortious conduct in his individual capacity. This being so, the applicable statute for this cause of action is SC Code Ann. § 15-3-530(5), which allows three (3) years for the Appellant to bring a personal injury action.

III. THE CITY RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

City Respondents averred that Appellant failed to establish that they violated her rights. Qualified immunity is a doctrine that says that in order to sue an officer for a violation of a Constitutional rights, one must show that not only that officer committed violation, but that at the time the violation occurred, it has been "clearly established" that the officer's actions were unconstitutional.

Appellant asserted that City Respondents failed to address the many complaints for excessive use of force against Respondent Porter. City Respondents also failed in its duty to train, supervise and discipline Respondent Porter and Respondent Police Department. City Respondents also failed to monitor the arrangement between Respondents Porter, Spartanburg Police Department, and WALMART, that resulted in gross violation of Appellant's Constitutional rights. This policy of indifference by City Respondents allowed Respondent Porter to act in a manner that, as in Appellant' case, violates the individual's Constitutional rights.

City Respondents knew or should have known of Respondent Porter's aggressive behavior, but has done nothing to investigate, remedy, or discipline Respondent Porter. Instead, they continued to hire and retain him despite posing a danger to the public.

City Respondents knew or should have known that the arrangement between the other Respondents, is on its face, violative of the right to due process and liberty of the Appellant, in particular, and the public in general.

IV. THE CITY OF SPARTANBURG AND SPARTANBURG POLICE DEPARTMENT ARE PROPER RESPONDENTS UNDER §1983.

In her eighth cause of action, Appellant alleged that she through information and belief, came to know that Respondent Porter had history of complaints, including excessive use of force. (Appellant Complaint. 12-13, April 8, 2016). Appellant, through her counsel, requested information and details of said previous complaints. Respondents City of Spartanburg and Spartanburg Police failed to act on said complaints, as Respondent Porter continued to work to the day of this shoplifting incident.

Appellant also asserted in the same cause of action that Respondents failed to train supervise, and discipline Respondent Porter. (Complaint, 13:75-76). Their failure to provide remedial actions to the many complaints against Respondent Porter is tantamount to a policy of indifference. This indifference resulted in the deprivation of the rights and liberty of the Appellant.

Furthermore, Appellant believed that Respondent Spartanburg Police had an arrangement with Respondent WALMART, wherein Respondent Police will arrest anyone identified as a shoplifter by Respondent Walmart. without evaluating the presence of probable cause, as what happened in this case. Appellant insists that this set up between Respondents police department and Walmart has become a custom that violates the Constitutional rights of the Appellant.

For the above-mentioned reasons, Respondent City and Police Department are liable under §1983.

V. RESPONDENT PORTER IS LIABLE FOR ASSAULT AND BATTERY.

Appellant asserts that there was no probable cause supporting the arrest and detention of herein Appellant, and as such, Respondent Porter was liable for assault and battery.

Appellant submits that Respondent Porter, undeniably committed assault and battery upon the person of Appellant. Appellant was cooperating with Respondent when the latter approached her and interrogated her. It was only when he, suddenly and without reason, grabbed at Appellant's arm with such force that she had to raise her arm in pain. Respondent Porter took this as a sign of resistance, and forcibly slammed her on the floor. Appellant did not exhibit any violent nor scandalous behavior prior or subsequent to Respondent Porter's manhandling him.

As previously discussed, the probable cause for shoplifting is defined in SC Code Ann. §16-13-140, and must show that person was delayed in a reasonable manner or a reasonable time to permit investigation, and that reasonable cause existed to believe that the person delayed had committed the crime of shoplifting.

Respondent absolutely had no reasonable cause to delay Appellant as he did not see nor observe Appellant select, conceal, possess and take any item without paying for it. Appellant was within Respondent WALMART's vicinity, and was in fact queueing towards the cashier. Respondents did not present any video surveillance nor witness to substantiate its claim of shoplifting.

Neither was Appellant delayed in a reasonable manner. When Respondent Porter took hold of her arm, he already had her in custody. Respondent Porter had no need to slam Appellant to the floor. There is nothing reasonable in the manner by which Respondent Officer Porter

forcefully seized Appellant, who was smaller and lighter than him, slammed her on the floor and unlawfully and illegally searched her purse. Respondent Officer Porter used such force that it resulted in bruises and physical injuries on the Appellant. (Exhibits 2-3).

Respondent, in effectuating an arrest without probable cause, was liable for committing assault and battery upon the person of Appellant.

CONCLUSION

For these reasons, as well as those addressed in her Initial Brief to this Court, Appellant respectfully requests that lower court's judgment or orders be reversed, and the case be remanded for trial.

Respectfully submitted,



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CERTIFICATE OF COUNSEL FOR REPLY BRIEF

I HEREBY CERTIFY that Appellant's Reply Brief in the above-captioned case complies with Rule 211 (b) SCACR.

February 1, 2018



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PROOF OF SERVICE

I certify that I have served a copy of Appellant's Return to Respondent WALMART's Motion to Strike Matters from Appellant's Designation of Matters, Appellant's Reply Brief to Respondent Porter and City of Spartanburg Police Department's Initial Brief and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, Lee Ellen Bagley, Esquire, and Randi Lynn Roberts, Esquire at 3700 Forest Drive, Suite 400, Columbia, SC 29204, and James D. Jolly Jr., Esquire and Stacy Todd Coffee, Esquire at 1805 North Blvd., Anderson, SC 29622 by depositing a copy of it in the United States Mail, postage prepaid, on February 1, 2018.

February 1, 2018



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