FINAL 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

Caitlyn Langham, Appellant,

vs.

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

APPELLANT'S FINAL REPLY BRIEF TO RESPONDENT WAL-MART STORES INC'S FINAL BRIEF

May 4, 2018

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STATEMENT OF THE CASE

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

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

Spartanburg County, where she was booked and arraigned. She was eventually released. The shoplifting charges went to trial, where Appellant was found not guilty.

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

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

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

On May 16, 2016, Respondent WAL-MART filed its Answer and moved to dismiss alleging that the Complaint is barred by statute of limitations and lack of cause of action. Appellant filed its Opposition to Respondent's Motion to Dismiss on August 24, 2016.

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

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

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

On April 18, 2017, Appellant appealed the Orders, dated March 22, 2017 and March 23, 2017. These Orders were the subject of Appellate Case No. 2017-001009.

On May 15, 2017, Respondent WAL-MART moved for summary judgment on the causes of action for assault and battery. The court granted summary judgment in favor of Respondent WAL-MART on July 14, 2017.

Appellant moved to reconsider the July 14, 2017 Order, which the Court denied in its Order, dated October 3, 2017. Appellant appealed the aforementioned Orders, which were the subject matter of Appellate Case No. 2017-002160.

Appellant moved to consolidate the two Appellate Cases in its motion, dated October 24, 2017. In the meantime, Respondent WAL-MART filed its Initial Brief of Respondent on March 23, 2018, to which herein Appellant replies as follows:

STANDARD OF REVIEW

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

non-moving party below. *Id.* If the slightest doubt exists as to whether there are genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law, the summary judgment must be reversed.

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

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE CAUSE OF ACTION FOR FALSE IMPRISONMENT AGAINST RESPONDENT WAL-MART.

Appellant is not appealing the trial court's decision on false imprisonment and defamation as these causes of action are barred by the statute of limitations.

II. THE TRIAL COURT ERRED IN DISMISSING THE CLAIMS FOR VIOLATION OF 42 U.S.C. §1983 AGAINST RESPONDENT WAL-MART.

Appellant reiterates that her cause of action against Respondent WAL-MART for violation of §1983 is separate and distinct from her cause of action for assault and battery, and unlawful arrest and detention based on *respondeat* superior.

In order to establish a §1983 claim, Appellant 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-MD-MGB.

Respondent WAL-MART anchors its arguments of non-applicability of 42 U.S.C. §1983 in the fact that Respondent WAL-MART is a private corporation, and as such, may not perform acts under color of state law. Although *Monell* (*Monell vs. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978) dealt with municipal employers, its rationale has been extended to private businesses. *Iskander, supra,* at 128-29; *Powell, supra,* at 506; *Smith v. Brookshire Bros.,* 519 F.2d 93, 94 (5th Cir.1975) (per curiam) as cited in Rojas v. Alexander's Dept. Store, Inc., 924 F.2d 406 (1990).

In a number of cases, the Court has ruled that if a private person is "jointly engaged" with a state official in an alleged violation, that person acts under the color of state law. Dennis v. Sparks, 449 U.S. 24, 27-28, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). In *El Fundi v. Derochei*, 625 F.2d 195 as cited in Murray v. WAL-MART, 874 F.2d 555, state action is present when private security guards and police officers act in concert to deprive Appellant of his civil rights, particularly when a state statute authorizes a shopkeeper to detain suspected shoplifters. In the *Murray* case, the court has allowed a litigant to recover against WAL-MART under §1983. The court held that WAL-MART had acted under color of state law. In the case at bar, numerous facts point to the conclusion that Respondent WAL-MART acted in concert with the local police.

First, Respondent WAL-MART hired Respondent Officer Porter, a law enforcement officer, on his off days. Respondent Porter admitted that he was hired by Respondent WAL-MART for the twelfth time on the day the incident happened. (Porter Depo., 11: 15-18). Second, in the case of *Cruz v. Donnelly*, the Third Circuit Court of Appeals addressed the specific question of when state action is present in detention for shoplifting. Cruz v. Donnelly, 727 F.2d (3d Cir. 1984). Cruz held that "commercial establishments and their employees will only be held liable under §1983 when: (1) the police have a pre-arranged plan with the store, and

(2) under the plan, the police will arrest anyone identified as a shoplifter by the store without independently evaluating the presence of probable cause." *Id.*

In this case, it is the practice of Respondent WAL-MART to work with the police department in prosecuting shoplifters. Respondent Porter and/or WAL-MART employees had telephoned the police after the unlawful search of the Appellant's purse and her wrongful arrest and requested the assistance of other officers for all the detained shoplifters. The police responded by taking Appellant in custody, without an independent investigation as to what transpired.

Third, in *Rojas v. Alexander's Dept. Store, Inc.,* the court held that a corporation, acting under color of state law, will be held liable under § 1983 for its own unconstitutional policies. *Rojas, Id.* It further provides that the proper test is whether there is a policy, custom or action by those who represent official policy that inflicts injury actionable under § 1983. Appellant believes that Respondent WAL-MART's policy on shoplifting and its arrangement with Respondent Police Department on the arrest, seizure and detention of suspected shoplifters, without an independent investigation by the local police, is a custom or tradition that violates the Constitutional rights of the Appellant. For this reason, Respondent WAL-MART is liable under §1983. Respondent WAL-MART's liability under the doctrine of *respondeat* superior is discussed in the succeeding section.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WAL-MART.

Appellant reiterates that there is a genuine issue of material facts that will preclude the granting of summary judgment in favor of Respondent WAL-MART.

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 Respondent at the time the Appellant was stopped should be considered.

Respondent WAL-MART has an existing policy in addressing shoplifting incidents. Ronnee Miller, an Assistant Manager at Respondent WAL-MART 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 WAL-MART 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."*

(R. 194-199).

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.*).

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). Respondent Porter did not personally observe Appellant approach any merchandise, select nor conceal the same. Respondent Porter did not personally witness Appellant intentionally attempt to leave the building, as in fact he arrested her while she was in a line towards the cashier.

The one person who allegedly witnessed the incident, Kelyn Eber, was conveniently missing or is no longer employed in Wal-Mart. Respondent WAL-MART had a chance to present an evidence of the shoplifting incident by submitting the video surveillance from the plethora of camera throughout the store. However, they did not provide a single video.

They had an obligation to preserve the video since they had arrested the Appellant. They did not preserve the videos because these would have negated the claim for theft and/or shoplifting. More importantly, the video of the register would have shown Respondent Porter's violent manhandling of Appellant.

"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 arrived at, as to the existence of probable cause for Appellant's unlawful arrest, assault and battery and subsequent illegal detention.

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

Contrary to WAL-MART's assertions, Appellant did not bring the doctrine of Merchant's Defense. In essence, Respondent WAL-MART raised the said doctrine under S.C. Code Ann. § 16-13-140, when it reiterated that it has "acted reasonably and in good faith in in the exercise of their legal rights and at no time breached any duty". (R. 30).

Under the Merchant's Defense, while Respondent WAL-MART 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. Respondent Porter was 6 feet. Appellant was smaller and lighter. Respondent Porter slammed Appellant 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 Appellant.

It is Appellant's contention that there is nothing reasonable in the manner by which Respondent Officer 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 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 should not have been granted in this matter because genuine issues of material facts exist, such as whether the delay and/or stop made against Petitioner was done in a reasonable manner and for reasonable time to permit investigation, and as to what point did Respondent Porter initiated delay. These are relevant issues because they go to the heart of the issue--probable cause. When the resolution of a case depends on determining what actually happened, "the issue is inappropriate for resolution by summary judgment." *Rainey v. Conerly*,

973 F.2d 321, 324 (4th Cir.1992). In other words, 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. Spoliation 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 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 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.

Appellant insists that Respondent WAL-MART 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.*

Appellant asserts that Respondent WAL-MART had the duty to preserve the surveillance videos used on the day of the alleged shoplifting incident, especially since Respondent WAL-MART 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).

Respondent WAL-MART knew or could have known of a potential civil action as an offshoot of it filing shoplifting case against Appellant. During the criminal case involving the parties, Appellant requested the surveillance videos from Respondent Wal-Mart. Respondent consistently refused to accede to said request, nor provide a reasonable explanation for their non-production. In fact, Respondent WAL-MART did not even present the video to the police, which is the standard operating procedure. That Appellant was eventually acquitted, did not take away the obligation of Respondent WAL-MART to preserve and produce the video.

Appellant avers that the surveillance video will bolster Appellant's allegations that she was subjected to an unreasonable arrest and detention by Respondent Porter and Respondent WAL-MART's employees. The video will also show that Respondents Porter forcefully grabbed Appellant and slammed her on the floor, causing physical injuries on her person.

By reason of Respondent WAL-MART'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 Respondent WAL-MART would have been unfavorable to it. Kershaw County Board of Educ, Id.

The unreasonable refusal to produce the surveillance video prejudices Appellant in that she is prevented from forming her theory of the case, and/or proving that Respondent Porter applied unreasonable force in stopping/delaying Appellant. It is anticipated that the surveillance video will show that Appellant did not shoplift; that she was in the line to pay the cashier when Respondent Porter confronted her; that Respondent Porter placed his hands on Appellant's arm which made her winced in pain; that Appellant did not resist, made a scene, nor acted violent; that Porter threw Appellant on the floor and forcefully take him to the office.

Appellant undeniably sustained damages due to the destruction and/or non-production of the surveillance videos. Furthermore, because of the missing videos, Appellant's case was summarily dismissed. Appellant is therefore entitled to an inference that the video surveillance would have been adverse to the position of Respondent Wal-Mart, Inc.

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

IV. THE TRIAL COURT ERRED IN DISMISSING THE CLAIMS BASED ON RESPONDEAT SUPERIOR.

Appellant submits that Respondent WAL-MART is liable for the tortious conduct of its employees under the doctrine of *respondeat* superior.

Appellant asserts that, at all times relevant to the incident, Respondent Officer Porter was an employee of Respondent WAL-MART and was performing acts in furtherance of Respondent Wal-Mart's interest, and which the latter benefitted from. Appellant reiterates that at the time of the incident, it had control over Respondent Officer Porter. Respondent WAL-MART assigned him to man a specific area and gave instructions whom to approach and apprehend for shoplifting. Respondent Wal-Mart. allowed and/or tolerated Respondent Porter's acts of

manhandling and assaulting Appellant as none of its employees prevented him from exercising excessive force against Appellant. And finally, Respondent WAL-MART hired and continued to hire Respondent Porter during the latter's off days. Thus, Respondent WAL-MART is vicariously liable for the tortious acts committed by Respondent Officer Porter against herein Appellant

CONCLUSION

For these reasons, as well as those addressed in her Final 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 Final Reply Brief in the above-captioned case complies with Rule 211 (b) SCACR.

May 4, 2018

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