

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

C.A. No.: 2013-CP-04-1700  
Appellate Case No. 2018-000289

**RECEIVED**

MAY 23 2018

SC Court of Appeals

Mario Escalante,

Appellant,

v.

David L. Rodgers and Janice W. Rodgers,  
d/b/a Whitehall Express Mart,

Respondents.

REPLY BRIEF OF APPELLANT

May 21, 2018



Donald L. Smith, Esquire  
122 N. Main Street  
Anderson SC 29621  
Telephone: (864) 642-9284  
Facsimile: (864) 642-9285  
[attorneydonaldsmith@gmail.com](mailto:attorneydonaldsmith@gmail.com)  
*Attorney for Appellant*

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## STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. This suit is brought pursuant to the arrest of Mario Escalante for allegedly shoplifting a case of beer from Defendants' retail establishment on Sunday, May 5, 2013.

Appellant was wrongfully accused with shoplifting a case of Busch beer. Respondent, using an image of Appellant allegedly taken from a video surveillance in his store, caused the arrest and detention of Appellant despite lack of probable cause. When Appellant presented proof of purchase of the allegedly stolen item and requested Respondent to clear his name, the later refused to accede. A charge was filed against Appellant, which was later dismissed for non-prosecution.

On July 22, 2013, Appellant initiated this action against Respondent Rodgers, asserting among others negligence and negligent (including negligent training and supervision), in Anderson County Court of Common Pleas (state case).

On January 13, 2015, Appellant filed a Federal suit against Anderson County Sheriff Office, Sheriff John Skipper, Sergeant Andrew Hyslop, Deputy Brandon Surratt, the City of Anderson Police department, James Stewart and the defendants found herein, alleging that their conduct created the following causes of action: Section 1983, False Imprisonment, Assault and Battery, Intentional Infliction of Emotional Distress, Invasion of Privacy, Defamation and Slander, Civil Conspiracy, Abuse of Process and Conversion.

The action was brought because Defendant Rodgers was not arrested for selling beer on Sunday, which violated the law, and was undisputable. The action was brought because the

Hispanic U. S. citizen from El Paso was arrested for purchasing a case of beer. The action was brought because not one of the defendants listed in the federal action showed up to Court to prosecute the non-case. Mr. Escalante was forced to take a day off from fair work in Tennessee, and forfeit the \$50.00 associated with that day's work, to come to Anderson to have his face rubbed in the fact that he went to jail for nothing.

The Federal Court found that probable cause existed, despite Rodgers implicit knowledge that he sold the case of Busch beer that was located and, therefore, granted Summary Judgment on all of the actions brought in Federal Court. The Federal Court action dealt with the relationships between the State and Defendants' Rodgers. The State action dealt with the relationship between Defendants' Rodgers and his employees.

Thereafter, herein Defendants' Rodgers moved for summary judgment again, which was granted by this Court in its Order, dated January 16, 2018.

Respondent avers that res judicata and/or collateral estoppel bar the adjudication of this case, since the Federal court ruled against the Appellant in that case. Respondent avers that the state claims and federal suit involve the same parties and same issues. It further states the cause of action of negligence should have been raised in the former suit, and since Appellant did not raise the issue then it is barred from relitigating such.

Appellant argues that the two cases do not involve the same parties, issues nor cause of action, and as such, the state claim for negligence is not barred by res judicata and/or collateral estoppel. He further asserts that he has presented sufficient proof that there exists a genuine issue of material fact that will preclude summary judgment.

## ARGUMENTS

### I. THE ISSUE OF SPOILIATION WAS PROPERLY BEFORE THE COURT.

The act of spoliation goes into the heart of summary judgment. As established, summary judgment is appropriate when it is clear that there is no genuine issue of material fact. Gadson v. Hembree, 364 S.C. 316, 320 (Ct. App. 2005).

In arguing that spoliation should not be considered by this Court, Respondents relied on the ruling in Allen v. Pinnacle Healthcare Sys., LLC, 295 S.C. 268, 715 S.E.2d 362 (2011). In Allen, the court declined to address the issue of attorney's fees in a case of wage dispute, for failure to set forth the same in the statement of issues on appeal. Appellant contends that, the Allen ruling does not apply in this case, as the attorney's fees is a stand-a-lone issue in Allen. Appellant asserts that the issue of spoliation in this case forms a part of the argument why the summary judgment should have been denied. It is well-established that 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. In this case, Appellant presented a testimony by Respondent himself that a video existed. Respondent alleged that he took a snippet or an image of the Appellant from the video and submitted the same to the police to identify him. When Appellant requested the video during the discovery proceedings, the same was conveniently unavailable. The possibility that the Appellant was entitled to the adverse inference instruction is sufficient to grant a reversal of the summary judgment.

### II. APPELLANT'S CLAIMS ARE NOT BARRED BY RES JUDICATA AND/OR COLLATERAL ESTOPPEL

Under the facts and circumstances of this case, neither the doctrine of res judicata and collateral estoppel bar adjudication of this present action. As was argued in the initial appeal

brief, this action for (gross) negligence claims is not barred by the doctrine of res judicate because the requisite elements are not satisfied in the present action. There is no identity of parties, nor identity of subject matter. *Appellant's Initial Brief*, p. 7-8, (April 4, 2018).

The Federal action arose from the unconstitutional conduct and behavior of the law officers, and concerns itself with the conduct of the parties after Appellant left the store. The State case arose from the sale of the case of beer, and concerns itself with the actions of the parties inside the store. The two actions involve claims that are substantially unrelated.

Appellant submits that there was expressly no adjudication of the negligence of Rodgers, a/k/a "personal involvement in the specific state law claims". Since the federal magistrate refused to address the negligent conduct of Rodgers, and Judge Stilwell specifically stated that there was a genuine issue of material fact as it relates to negligence, Appellant is entitled to have this matter adjudicated.

Neither does collateral estoppel set in as there is no identity of issues between the federal case and the state case.

The issue in the Federal case is the State actors' violation of Appellant's rights against deprivation of liberty and equal protection clause. The focus in the Federal suit was the State's refusal to treat Rodgers the same way that Escalante was treated. The State allowed Rodgers to get away with what is a clear violation of the law: selling beer on Sunday, yet arrested Escalante based on a non-eye witness account. The State did not show up to a court date that it created to "prosecute" Escalante. It was irrelevant what happened to Mario Escalante because he was an Hispanic fair worker. However, the State failed to arrest the white business owner for selling beer on Sunday, despite the receipt and bank statement proving same.

The state claim was brought because of the negligent act of Defendant Rodgers in accusing herein Appellant of shoplifting. His negligent training, negligent supervision, negligent maintenance of the video, etc., formed the core of the State claim.

Negligence was not raised in the Federal court, because Appellant believes that Defendant Rodgers' negligence, and that of their employees, is independent from and does not arise from the allegations of unconstitutional behavior by Rodgers and law enforcement. Since negligence was not raised in the Federal court, it was never adjudicated with finality. Thus, since all the requisite elements for res judicata and collateral estoppel are not met in the present case, then res judicata and collateral estoppel do not apply.

Furthermore, the court held in the case of *Johns v. Johns*, that even when a party meets all the required elements, res judicata will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies." *Johns v. Johns*, 309 S.C. 203, 420 S.E.2d 856, 859 (Cl. App. 1992) as cited in *Nelson v. Coker*, No. 3626, SC: Court of Appeals, April 14, 2003. In balancing the public policies (public policy of finality of judgment against the basic human rights to liberty, privacy, due process and equal protection of law, the court should give deference to the overriding right granted by the US Constitution.

Another exception to the preclusion by reason of res judicata is when the party sought to be precluded, as a result of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Ibid.* Appellant maintains that due to Respondents' failure to provide the video surveillance and the trial court's unwillingness to rule on spoliation, he was deprived of a full adjudication of his case. Thus, even assuming that the court found the elements of res judicata and collateral

estoppel are met, this will not prevent Appellant from pursuing the State action under these exceptions.

**CONCLUSION**

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

Anderson, South Carolina  
May 21, 2018

Respectfully submitted by:



Donald L. Smith (SC Bar#6699)

122 N. Main Street

Anderson, SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

[attorneydonaldsmith@gmail.com](mailto:attorneydonaldsmith@gmail.com)

*Attorney for Appellant*

**FORM 7  
PROOF OF SERVICE  
REPLY BRIEF OF THE APPELLANT**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY  
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The Honorable R. Lawton McIntosh, Circuit Court Judge

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Mario Escalante,

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v.

David L. Rodgers and Janice W. Rodgers,  
d/b/a Whitehall Express Mart,

Respondents.

**PROOF OF SERVICE**

I certify that I have served a copy of the Reply Brief of the Appellant, 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, Respondents, by and through their counsels of record, Phillip Reeves, Esquire and Nicholas A. Farr, Esquire, at Gallivan White and Boyd, P.A., Post Office Box 10589, Greenville, SC 29603, by depositing a copy of it in the United States Mail, postage prepaid, on May 21, 2018.

May 21, 2018



Donald L. Smith, Esquire  
122 N. Main Street  
Anderson SC 29621  
Telephone: (864) 642-9284  
Facsimile: (864) 642-9285  
[attorneydonaldsmith@gmail.com](mailto:attorneydonaldsmith@gmail.com)  
*Attorney for Appellant*

**FORM 8**  
**LETTER TO THE APPEALS COURT CLERK**  
**FILING OF INITIAL BRIEF OF APPELLANT AND FORM 11**

May 21, 2018

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

**RE: Mario Escalante v. David L. Rodgers and Janice W. Rodgers,  
d/b/a Whitehall Express Mart  
Appellate Case No. 2018-000289  
C.A. No.: 2013-CP-04-1700**

Dear Honorable Kitchings:

Please find enclosed the following materials for filing:

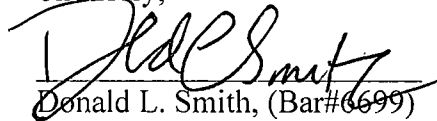
- (1) Reply Brief of Appellant; and,
- (2) Proof of Service for same.

**RECEIVED**

MAY 23 2018

SC Court of Appeals

Sincerely,



Donald L. Smith, (Bar#6699)  
122 N. Main Street  
Anderson SC 29621  
Telephone: (864) 642-9284  
Facsimile: (864) 642-9285  
[attorneydonaldsmith@gmail.com](mailto:attorneydonaldsmith@gmail.com)  
*Attorney for Appellant*

cc: Phillip Reeves, Esquire  
Nicholas A. Farr, Esquire

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


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MAY 23 2018

**SC Court of Appeals**

The HONorable Jenny Abbott Kitchings  
Clerk of COurt South Carolina COurt of Appeals  
Post Office Box 11629  
Columbia, SC 29211



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