

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

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

MAY 24 2018

SC Court of Appeals

Case No. 2017-001009

Caitlyn Langham.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT WAL-MART STORES, INC.

Lee Ellen Bagley, Esquire
Randi Lynn Roberts, Esquire
3700 Forest Dr., Suite 400
Columbia SC 29204
(803) 790-8838

Attorneys for Respondent
Wal-Mart Stores, Inc.

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

Caitlyn Langham.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT WAL-MART STORES, INC.

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of the Facts.....	5
Standard of Review.....	6
Argument.....	8
I. THE TRIAL COURT PROPERLY DISMISSED LANGHAM’S CAUSE OF ACTION FOR FALSE IMPRISONMENT PURSUANT TO RULE 12(b)(6) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE	8
II. THE TRIAL COURT PROPERLY DISMISSED LANGHAM’S CAUSES OF ACTION FOR ASSAULT AND BATTERY, MALICIOUS PROSECUTION, AND VIOLATION OF 42 U.S.C. § 1983 AS ALLEGED AGAINST WALMART	10
a. The trial court properly granted summary judgment in favor of Walmart as to Langham’s causes of action for assault and battery and malicious prosecution as Langham failed to present any genuine issue of material fact.....	10
b. The trial court properly dismissed any claims against Walmart under 42 U.S.C. § 1983.....	15
Conclusion.....	17

TABLE OF AUTHORITIES

CASES

<i>Austin v. Paramount Parks, Inc.</i> , 195 F.3d 715 (4th Cir. 1999).....	16
<i>Board of the County Comm'rs v. Brown</i> , 520 U.S. 397 (1997).....	16, 17
<i>Caldwell v. K-Mart Corp.</i> , 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991).....	8
<i>Carter v. Morris</i> , 164 F.3d 215 (4th Cir. 1999).....	16
<i>Doe v. Marion</i> , 373 S.C. 390, 645 S.E.2d 245 (2007).....	6
<i>First Sav. Bank v. McLean</i> , 314 S.C. 361, 444 S.E.2d 513 (1994).....	10, 11
<i>First Union Nat'l Bank of S.C. v. Soden</i> , 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998)....	8, 9, 10
<i>Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC</i> , 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015).....	6, 7
<i>Huffman v. Sunshine Recycling, LLC</i> , 417 S.C. 514, 790 S.E.2d 401 (Ct. App. 2016).....	14, 15
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	14
<i>Law v. S.C. Dep't of Corr.</i> , 368 S.C. 424, 629 S.E.2d 642 (2006).....	12, 13
<i>Monell v. Dep't of Soc. Servs. of City of New York</i> , 436 U.S. 658 (1978).....	16, 17
<i>R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.</i> , 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000).....	10, 11
<i>Roberts v. City of Forest Acres</i> , 902 F. Supp. 662, 671 (D.S.C. 1995).....	11
<i>Rossignol v. Voorhaar</i> , 316 F.3d 516 (4th Cir. 2003).....	16
<i>Toussaint v. Ham</i> , 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).....	6, 16
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	9
<i>Wright v. Collins</i> , 766 F.2d 841 (4th Cir.1985).....	17

STATUTES AND COURT RULES

42 U.S.C. § 1983.....	15
-----------------------	----

Rule 220(c), SCACR.....14

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court properly dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure Appellant's cause of action for false imprisonment and defamation as alleged against Walmart where Appellant failed to file such causes of action within the applicable statute of limitations?

- II. Did the trial court properly grant summary judgment to Walmart as to Appellant's causes of action for assault and battery, through the theory of *respondeat superior*, and malicious prosecution where no genuine issue of material fact existed and there was no evidence from which a reasonable jury could find in favor of Appellant?

- III. Did the trial court properly grant dismissal of Appellant's causes of action for violations of 42 U.S.C. § 1983 as alleged against Walmart where Walmart is a private business entity and Appellant alleged such causes of action only through the theory of *respondeat superior*?

STATEMENT OF THE CASE

This case arises from the City of Spartanburg's arrest of Appellant Caitlyn Langham (hereinafter "Langham") for shoplifting on December 24, 2013, at the Walmart store located at 141 Dorman Centre Drive, Spartanburg, South Carolina. Langham filed her Complaint instituting the present action on April 8, 2016, in which she named Wal-Mart Stores, Inc.,¹ Officer Russell Porter, and City of Spartanburg, Police Department as Defendants (collectively "Defendants" or "Respondents") and alleged a cause of action for malicious prosecution against all Defendants. (R. pp. 5-17). Additionally, Langham asserted that Wal-Mart Stores, Inc. (hereinafter, "Walmart") and City of Spartanburg, Police Department (hereinafter "City") were vicariously liable under the doctrine of *respondeat superior* for the alleged acts and omissions of Officer Russell Porter (hereinafter "Porter"), against whom Langham alleged causes of action for violations of 42 U.S.C. § 1983, false imprisonment, defamation, and assault and battery.² (R. pp. 5-17).

On November 15, 2016, upon motion of Walmart and following a hearing with the parties, the Court dismissed Langham's claims of false imprisonment and defamation as to Walmart, ruling that Langham failed to file the aforementioned claims within the applicable statute of limitation. (R. pp. 70-74). Additionally, the Court ruled that because Walmart is a private corporate entity, Langham's claims under 42 U.S.C. § 1983 must be dismissed to the

¹ This Brief is submitted on behalf of the named Defendant Wal-Mart Stores, Inc.; however, as asserted before the trial court, Wal-Mart Stores Inc. is not a proper party to this action; Wal-Mart Stores East, L.P. is the proper corporate entity.

² Langham's Complaint, in its entirety, alleges the following causes of action against each party: violations of civil rights under 42 U.S.C. § 1983, false imprisonment, defamation, assault and battery, and malicious prosecution against Porter individually; violations of civil rights under 42 U.S.C. § 1983, false imprisonment, defamation, and assault and battery, all through the doctrine of *respondeat superior*, as well as malicious prosecution directly against Walmart; and malicious prosecution and violations of 42 U.S.C. § 1983 against the City. (R. pp. 5-17). In this Brief, submitted only on behalf of Walmart, Walmart addresses only the causes of action against it.

extent Langham asserted those against Walmart. (R. pp. 70-74). Thereafter, the Court denied Langham's Motion for Reconsideration of its ruling as to Walmart, and Langham proceeded upon the only remaining claims of assault and battery, through the theory of *respondeat superior*, and malicious prosecution. (R. pp. 171-72).

On March 23, 2017, upon motion of Porter and the City and following a hearing with the parties, the Court granted summary judgment in favor of Porter and the City as to all of Langham's causes of action, ruling that her claims of false imprisonment, defamation, and assault and battery were barred by the applicable statutes of limitation and that her causes of action for unreasonable search and seizure under the Fourth Amendment, false imprisonment, and malicious prosecution were barred by the existence of probable cause as a matter of law. (R. pp. 130-37). Accordingly, Porter and the City were dismissed from the action. (R. pp. 130-137).

Thereafter, on July 14, 2017, upon motion of Walmart and following a hearing with the remaining parties, the Court granted summary judgment in Walmart's favor as to Langham's remaining causes of action, ruling that claims for assault and battery³ and malicious prosecution cannot be sustained when the arrest upon which the claims are based was lawful. (R. pp. 153-58).

Langham filed the present appeal on April 21, 2017. (R. p. 175). Additionally, on July 20, 2017, Langham filed a Motion for Reconsideration as to the Court's July 14, 2017 Order granting summary judgment in favor of Walmart, which the trial court denied. (R. pp. 160-68; 171-73). Langham filed a second Notice of Appeal in this matter on October 16, 2017, formally appealing from the trial court's Order dated July 14, 2017, and October 3, 2017. Upon

³ Langham alleged "assault and battery" as one cause of action, rather than two separate claims. (R. pp. 5-17).

Langham's motion, this Court consolidated Langham's two appeals on November 29, 2017. (R. p. 182). Walmart accordingly addressed the consolidated appeals in its Final Brief.

STATEMENT OF FACTS

According to Langham's Complaint, on December 24, 2013, she entered the Walmart store located at 141 Dorman Centre Drive, Spartanburg, South Carolina, intending to buy dog food, cookies, and soda. (R. p. 7). After selecting those initial items, Langham decided to shop for cosmetic products. (R. p. 7). Langham selected several cosmetic items, including mascara and eyeliner, and placed those cosmetic items in her purse that was located in the shopping cart. (R. p. 7). Langham alleges that Walmart associates informed Officer Russell Porter with the City of Spartanburg Police Department that they observed Langham placing items in her purse. (R. p. 7).

Langham proceeded to the area where the cash registers were located, where Officer Porter approached her to identify himself and personally observed several Walmart items in Langham's purse. (R. pp. 7; 184-86). Officer Porter then attempted to place Langham in custody and she physically resisted, causing Officer Porter to use reasonable force to effectuate his arrest of Langham. (R. pp. 184-86). Langham admits that she likely was under the influence of pain medicine on the date of the alleged incident as she had a drug problem during that time period. (R. pp. 192-93). Ultimately, it was determined that the unopened Walmart merchandise found in Langham's purse totaled \$74.62. (R. p. 186).

STANDARD OF REVIEW

The trial court dismissed pursuant to Rule 12(b)(6), SCRPC, Langham's causes of action for false imprisonment, defamation, and violations of 42 U.S.C. § 1983 as alleged against Walmart, based upon Langham's failure to state facts sufficient to constitute a cause of action. When reviewing the dismissal of claims pursuant to Rule 12(b)(6), SCRPC, an appellate court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). A ruling on a Rule 12(b)(6) motion must be based solely on the allegations set forth on the face of the complaint. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

As to Langham's remaining causes of action against Walmart—assault and battery, through the theory of *respondeat superior*, and malicious prosecution—the trial court granted summary judgment in favor of Walmart pursuant to Rule 56(c), SCRPC. “An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRPC.” *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 651, 780 S.E.2d 263, 272 (Ct. App. 2015) (quoting *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009)). “Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment 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.” *Id.* (quoting *Bovain*, 383 S.C. at 105, 678 S.E.2d at 424). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to

the nonmoving party.’” *Id.* at 650-51 (quoting *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009)).

ARGUMENT⁴

I. THE TRIAL COURT PROPERLY DISMISSED LANGHAM'S CAUSE OF ACTION FOR FALSE IMPRISONMENT PURSUANT TO RULE 12(b)(6) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Langham avers that the trial court erred in granting summary judgment to Walmart because she presented genuine issues of material fact as to the affirmative defense to false imprisonment set forth in section 16-13-140 of the South Carolina Code of Laws,⁵ also known as the Merchant's Defense.⁶ App. Br. pp. 4-12. However, the trial court dismissed Langham's cause of action for false imprisonment pursuant to Rule 12(b)(6), SCRPC, based upon her failure to file the claim within the applicable statute of limitations. Therefore, Langham's argument is erroneous, and the trial court properly dismissed this cause of action as alleged against Walmart. Accordingly, this Honorable Court should affirm the trial court.

⁴ On March 8, 2018, this Court granted Walmart's Motion to Strike Certain Materials from Langham's Designation of Matter pursuant to Rules 209 and 210(c), SCACR, based upon Langham's failure to present certain designated materials to the trial court and consequently ruled that those certain materials shall not be included in the record on appeal. Thus, Walmart objects to Plaintiff's citations to those stricken materials to the extent Plaintiff fails to amend her Brief to remove same.

⁵ "Section 16-13-140 provides a defense to [false imprisonment] if the merchant has probable cause to believe a person is taking his property and acts reasonably in his efforts to investigate the matter." *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 30, 410 S.E.2d 21, 23 (Ct. App. 1991).

⁶ Langham does not cite a specific trial court Order in her arguments set forth in Section I of her Brief from which she appeals; however, as the Merchant's Defense is an affirmative defense to false imprisonment, Walmart addresses the argument as one appealing the trial court's Order dated November 15, 2016, in which it dismissed Langham's cause of action for false imprisonment and defamation as alleged against Walmart. To that end, Walmart notes that the trial court dismissed Langham's cause of action for false imprisonment and defamation based upon Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and not, as Langham argues, based upon Rule 56 of the South Carolina Rules of Civil Procedure. (R. pp. 70-74). Further, Langham does not appeal the trial court's dismissal of her cause of action of defamation against Walmart; thus, the trial court's dismissal of that cause of action as alleged against Walmart is the law of the case. *See First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

As a threshold matter, Langham did not raise the issue of the Merchant's Defense to the trial court in response to Walmart's Motion to Dismiss her claims of false imprisonment and defamation.⁷ (R. pp. 61-68; 70-74). Thus, Langham failed to preserve this argument for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

The trial court dismissed Langham's cause of action for false imprisonment against Walmart based upon Langham's failure to file the same within two (2) years from the date of the alleged incident as required by the statute of limitations set forth in section 15-3-550 of the South Carolina Code. Specifically, the trial court ruled:

Plaintiff's claim[] for false imprisonment . . . [is] governed by section § 15-3-550 of the South Carolina Code, which required Plaintiff to file [that cause] of action within two (2) years of the date of the alleged incident. Plaintiff's Complaint alleges the incident occurred on December 24, 2013. 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 [cause] of action for false imprisonment . . . do[es] not state facts sufficient to constitute a cause of action, [is] untimely, and [is] hereby dismissed with prejudice pursuant to Rule 12(b)(6), SCRCF.

(R. p. 71). Because Langham does not appeal the trial court's ruling as to her failure to file the cause of action of false imprisonment within the applicable statute of limitations, the ruling is the law of the case. *See First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"). Accordingly, this Court must affirm the trial court's Order dismissing

⁷ Indeed, Ronnee Miller's deposition, of which Langham uses an excerpt in support of her argument, was not taken until January 18, 2017, approximately two (2) months after the trial court dismissed Langham's cause of action for false imprisonment.

Langham's cause of action for false imprisonment as alleged against Walmart.⁸ Further, to the extent that Langham appealed the trial court's dismissal based upon the statute of limitations as set forth in its Nov. 15, 2016 Order, which she did not, this Honorable Court must nevertheless affirm the trial court's dismissal as Langham indisputably failed to file her claim for false imprisonment within the applicable two (2) year statute of limitation.

II. THE TRIAL COURT PROPERLY DISMISSED LANGHAM'S CAUSES OF ACTION FOR ASSAULT AND BATTERY, MALICIOUS PROSECUTION, AND VIOLATION OF 42 U.S.C. § 1983 AS ALLEGED AGAINST WALMART.⁹

- a. The trial court properly granted summary judgment in favor of Walmart as to Langham's causes of action for assault and battery and malicious prosecution as Langham failed to present any genuine issue of material fact.**

⁸ Langham briefly references assault and battery and malicious prosecution in Section I, although the trial court did not rule upon those causes of action in its Order dated November 15, 2016, but, rather, ruled on those causes of action in a subsequent hearing and Order. Walmart addresses malicious prosecution in a following section (Section IV). Notwithstanding, to the extent Langham attempts to assert arguments regarding either assault and battery or malicious prosecution in Section I, she does so in conclusory fashion and without any supporting authority. Thus, she abandons these issues. See *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (stating Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory).

⁹ In Section II of her Brief, Langham argues the trial court erred in finding her causes of action for violation of § 1983, assault and battery, and malicious prosecution were barred by the statute of limitations. However, Walmart did not move for summary judgment on the aforementioned causes of action based upon the statute of limitations. Thus, to the extent that Langham fails to properly address the dismissal of these causes of action as against Walmart in another section of her Brief, the trial court's dismissal of those causes of action as alleged against Walmart is the law of the case. See *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"). Additionally, Langham references the applicability of the South Carolina Tort Claims Act. Walmart did not raise the South Carolina Tort Claims Act as a defense; thus, this argument is erroneous to the extent it is asserted against Walmart.

Langham argues the trial court erred in granting summary judgment to Walmart as to her causes of action for assault and battery and malicious prosecution. *See* App. Br. pp. 15-18.¹⁰ However, Langham fails to present any evidence that Walmart lacked probable cause and, further, fails to present any evidence of malice on behalf of Walmart. Thus, this Honorable Court must affirm the trial court's ruling as set forth more fully below.

Initially, to the extent Langham references assault and battery in Section IV of her Brief, she fails to provide any supporting authority for her position and makes only conclusory statements as the cause of action for assault and battery. Thus, Langham abandoned the issue and this Honorable Court need not address it.¹¹ *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory).

As to malicious prosecution, in order to maintain such a claim, "a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage."

¹⁰ In Section III of her Brief, Langham argues the City of Spartanburg Police Department is not entitled to qualified immunity. *See* App. Br. pp. 14-15. As the arguments in Section III do not pertain to Walmart, Walmart does not address the arguments' merit or lack thereof.

¹¹ To the extent that this Court finds Langham did not abandon the issue of assault and battery, the trial court did not err in finding that Langham could not maintain a claim of assault and battery, through the theory of *respondeat superior*, as probable cause existed as a matter of law for Defendant Porter to detain, arrest, and try Langham. A lawful arrest based upon probable cause cannot serve as the basis for a civil claim of assault and battery; thus, Langham presents no genuine issue of material fact as to said claim. *See Roberts v. City of Forest Acres*, 902 F. Supp. 662, 671 (D.S.C. 1995) (finding that a person who uses reasonable force in effectuating a lawful arrest is not liable for assault or battery). Accordingly, this Court must affirm the trial court's ruling.

Law v. S.C. Dep't of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (quoting *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965)). “An action for malicious prosecution fails if the plaintiff cannot prove *each* of the required elements by a preponderance of the evidence, including malice and lack of probable cause.” *Id.* (citing *Parrott*, 246 S.C. at 322, 143 S.E.2d at 609) (emphasis added).

“[A]n essential element of malicious prosecution is the institution of judicial proceedings without probable cause against the plaintiff.” *Id.* at 436, 629 S.E.2d at 649 (citing *Kinton v. Mobile Home Indus., Inc.*, 274 S.C. 179, 262 S.E.2d 727 (1980)). “The burden is on the plaintiff to show that the prosecuting person or entity lacked probable cause to pursue a criminal or civil action against him.” *Id.* (citing *Parrott*, 246 S.C. at 322, 143 S.E.2d at 609). “Probable cause means ‘the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered.’” *Id.* (quoting *Parrott*, 246 S.C. at 322, 143 S.E.2d at 609). “In determining the existence of probable cause, the facts must be ‘regarded from the point of view of the party prosecuting; *the question is not what the actual facts were, but what he honestly believed them to be.*’” *Id.* (quoting *Eaves v. Broad River Elec. Co-op, Inc.*, 277 S.C. 475, 478, 289 S.E.2d 414, 415-16 (1982)) (emphasis added). “Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion.” *Id.* (citing *Parrott*, 246 S.C. at 323, 143 S.E.2d at 609).

“Malice is defined as ‘the deliberate intentional doing of an act without just cause or excuse.’” *Id.* at 437, 629 S.E.2d at 649 (quoting *Eaves*, 277 S.C. at 479, 289 S.E.2d at 416).

“Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice.” *Id.* “Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person.” *Id.* “Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person.” *Id.* “In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution.” *Id.* (citing *Margolis v. Telech*, 239 S.C. 232, 238, 122 S.E.2d 417, 420 (1961)).

In the present action, the trial court ruled that probable cause existed as a matter of law for the City, via Officer Porter, to arrest, detain, and prosecute Langham. (R. pp. 129-37). It did so based on the following factors: (1) witnesses provided verbal notice to Officer Porter that Langham had suspiciously placed items in her purse; (2) Langham attempted to evade Officer Porter when she saw him; and (3) unopened Walmart merchandise was in Langham’s purse in the plain view of Officer Porter. (R. pp. 129-37; 184-188). To the extent that Langham relies upon an excerpt of Walmart Asset Protection Associate Ronnee Miller’s deposition transcript as evidence that Walmart lacked probable cause,¹² Miller simply testified as to certain internal procedures of Walmart that pertained to shoplifting. (R. pp. 195-98). However, Officer Porter, as a law enforcement officer with arrest authority, is not bound by Walmart’s internal procedures. Furthermore, Walmart’s internal procedures do not alter the legal definition of probable cause and, therefore, are irrelevant to the issue of whether probable cause existed as a matter of law. Officer Porter articulated a sufficient basis for probable cause under South

¹² Appellant asserts her arguments in Section I, in which she used Walmart Asset Protection Associate Ronnee Miller’s deposition transcript, among other materials, as support for the proposition that Walmart lacked probable cause. Thus, Walmart addresses those arguments and materials here.

Carolina law, on which he effectuated Langham's lawful arrest. Moreover, Langham cannot provide any other objective evidence to establish malice on behalf of Walmart. Based on the foregoing, Langham fails to present any genuine issue of material fact as to the requisite elements of lack of probable cause and malice. As both are essential elements of a claim of malicious prosecution, the trial court properly found that Langham's claim fails as a matter of law, and this Honorable Court should affirm the trial court's grant of summary judgment in favor of Walmart as to Langham's cause of action for malicious prosecution.

As an additional sustaining ground,¹³ Walmart did not instigate Langham's arrest to the extent that one unidentified associate provided information to law enforcement regarding Langham's suspicious behavior in the store. "Where a person merely directs the attention of a police officer to what he supposes to be a breach of the peace, or gives to such officer facts indicating such, and the officer, without other direction, arrests the offender on his own responsibility, the person who did nothing more than communicate the facts to the officer is not liable for causing the arrest, even though it is made without a warrant." *Huffman v. Sunshine Recycling, LLC*, 417 S.C. 514, 526, 790 S.E.2d 401, 408 (Ct. App. 2016), cert. granted (Sept. 29, 2017) (quoting *Wingate v. Postal Tel. & Cable Co.*, 204 S.C. 520, 527, 30 S.E.2d 307, 310 (1944)). "Where a person has information or knowledge that the law has been violated, he not only has a right, but frequently it is his duty, to communicate such information or facts to the proper officer so as to give such officer the opportunity, if in his judgment it is proper to do so, to

¹³ See *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000) (holding that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court" and that "[t]he appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment."); see also Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

take whatever steps may be necessary to apprehend the offender.” *Id.* (quoting *Wingate*, 204 S.C. at 527, 30 S.E.2d at 310). Langham fails to present any evidence that Walmart associates requested, directed, or commanded Langham’s arrest, and private persons are permitted to provide information to law enforcement to assist with investigations. Officer Porter testified as to the factors by which he established probable cause to make a lawful arrest of Langham, of which an alleged verbal report of suspicious behavior was simply one factor. Thus, Langham fails to prove any error by the trial court in granting summary judgment to Walmart as to malicious prosecution, and this Honorable Court must affirm the trial court’s rulings.

b. The trial court properly dismissed any claims against Walmart under 42 U.S.C. § 1983.

Langham argues that the trial court erred in dismissing her claims for violations of 42 U.S.C. § 1983 as alleged against Walmart. *See* App. Br. pp. 18-23. However, the trial court appropriately found that Walmart could not be liable for claims under 42 U.S.C. § 1983 as a private entity and, further, could not be liable under the theory of *respondeat superior*. Thus, this Honorable Court must affirm the trial court’s grant of summary judgment in Walmart’s favor as to any causes of action based upon alleged violations of 42 U.S.C. § 1983.

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.

To state a claim for relief under § 1983, a plaintiff must demonstrate that the defendant’s action was perpetrated under color of state law. 42 U.S.C. § 1983 (2002). The color of law

requirement excludes from the reach of § 1983 all “merely private conduct, no matter how discriminatory or wrongful.” *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). Furthermore, no state actor can be held liable under 42 U.S.C. § 1983 on a *respondeat superior* theory. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978); *Bd. of the Cnty Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727 (4th Cir. 1999).

The trial court dismissed pursuant Rule 12(b)(6), SCRCP, Langham’s cause of action against Walmart for violations of 42 U.S.C. § 1983, and based its decision solely on the four corners of Langham’s Complaint. (R. pp. 70-74). However, Langham ignores the proper standard of review of this Court by attempting to establish the trial court’s error using allegations and evidence outside of the allegations set forth in Langham’s Complaint. *See Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) (holding a ruling on a Rule 12(b)(6) motion must be based solely on the allegations set forth on the face of the complaint). Any argument referencing allegations outside of Langham’s Complaint are improper and should not be considered by this Court.

In the present matter, Walmart is a private corporate entity and Langham’s Complaint alleges that Officer Porter was employed by the City of Spartanburg Police Department at the time of the alleged incident. (R. p. 6). Thus, Walmart is a private entity and any private conduct by Walmart cannot be subject to claims under 42 U.S.C. § 1983. To the extent Langham alleges any employment relationship between Walmart and Officer Porter, Langham asserts her causes of action for violations of 42 U.S.C. § 1983 against Walmart solely through the theory of *respondeat superior*. (R. pp. 10-11; 15). As it is well-established that the doctrine of *respondeat superior* has no application under 42 U.S.C. § 1983, the trial court properly dismissed

Langham's causes of action alleging violations of that statute. *Bd. of the Cnty Comm'rs*, 520 U.S. at 416; *Monell*, 436 U.S. at 691; *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985). Accordingly, this Honorable Court must affirm the trial court's ruling.

CONCLUSION

For the reasons set forth herein, Respondent Walmart respectfully requests that this Honorable Court affirm the trial court's dismissal of Langham's claims of false imprisonment and violations of 42 U.S.C. § 1983 pursuant to Rule 12(b)(6), SCRCF, as alleged against Walmart, and the trial court's grant of summary judgment in favor of Walmart on the cause of action of malicious prosecution. (R. pp. 70-74; 153-58).

Respectfully submitted,



Lee Ellen Bagley, SC Bar No. 77672
Randi Lynn Roberts, SC Bar No. 78888
GAFFNEY LEWIS & EDWARDS, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina, 20204
803.790.8838 (telephone)
803.790.8841 (fax)

May 24, 2018

Attorneys for Respondent Wal-Mart Stores, Inc.