FINAL 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

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SC Court of Appeals

Appellate Case No.: 2017-001009

Caitlyn Langham, Appellant,

vs.

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

AMENDED FINAL BRIEF OF APPELLANT

Anderson, South Carolina
May 23, 2018

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Standard of Review 3

Arguments 4

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS 4

II. APPELLANT'S CAUSES OF ACTION ARE NOT BARRED BY STATUTE OF LIMITATIONS 10

III. RESPONDENT CITY OF SPARTANBURG POLICE DEPARTMENT IS NOT ENTITLED TO QUALIFIED IMMUNITY 13

IV. RESPONDENTS ARE LIABLE FOR ASSAULT AND BATTERY, MALICIOUS PROSECUTION AND VIOLATION OF 42 U.S.C. §1983 14

Conclusion 21

Certificate of Counsel for Amended Final Brief 22

TABLE OF AUTHORITIES

STATUTES

§15-3-530 (5) SC Code Ann. 11

§15-3-535 SC Code Ann. 11

§16-13-140 SC Code Ann. 4

§17-13-30 SC Code Ann. 7

§ 23-24-10 SC Code Ann 20

§23-24-20 (Supp. 1978) SC Code Ann. 20

§23-24-50 SC Code Ann 20

42 U.S.C. §1983 11

42 U.S.C. §1988 11

CASES

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) 8

Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) 4

Cruz v. Donnelly, 727 F.2d (3d Cir. 1984) 18

David v. McLeod Regional Medical Center, 367 S.C. 242. 247. 626 S.E.2d 1 2 (2006)..... 3

Dennis v. Sparks, 449 U.S. 24, 27-28, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) 17

Drayton v. County of Charleston, Civil Action No. 2:14-cv-3488-RMG-MGB (D.S.C. Jul. 10, 2015) citing City of Canton v. Harris, 489 U.S. 378, 390 (1989) 20

Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d.662, 663 (1990) 4

King Grant-Davis v Shane Fortune, et al., 2:15-cv-4211-MD-MGB, citing 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) 17

Lanham v. Blue Cross and Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) 3

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) 8

Law v. S.C. Department of Corrections, 629 S.E.2d 651(2006) citing Eaves v. Broad River Electric Co-op., Inc., 277 S.C. 475, 477, 289 S.E.2d 414, 415 (1982) 16

Lynch v. Toys 'R Us-Delaware, 375 S.C. 604 (2007) citing Law v. S.C. Department of Corrections, 368 S.C. at 441, 629 S.E.2d at 651(2006) 8

Mains v. Kmart Coro., 375 SE2d 311 (SC: Court of Appeals) 10

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) 97

Monell v. Department of Social Services, 426 U.S. 658 (1978) 19

Murray v. WALMART, Inc., 874 F.2d 555 citing El Fundi, 625 F.2d 195 17

Ownes v Okure, 448U.S. 245 (1989) 11

Parrot v. Plowden Motor Co., 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965) 16

Rojas v. Alexander's Department Store, Inc., 924 F.2d 406 (1990) citing Iskander, at 128-29; Powell, supra at 506; Smith v. Brookshire Bros., 519 F.2d 93. 94 (5th Cir. 1975) 17

Snider v. Seung Lee, 584 F.3d 193; 199 (4th Cir, 2009) 11

Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990) 8

State v. Clark, 287 S.E.2d 143 (1981) 7

State v. Martin, 268 S.E.2d 105 (1980) 7

Strother v. Lexington County Recreation Commission, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998) 8

Wilson v. Garcia, 471 U.S. 261 (1985) 11

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

II. WHETHER THE APPELLANT'S CAUSES OF ACTION WERE PRECLUDED BY STATUTE OF LIMITATIONS.

III. WHETHER RESPONDENT CITY OF SPARTANBURG POLICE DEPARTMENT IS ENTITLED TO QUALIFIED IMMUNITY.

IV. WHETHER RESPONDENTS ARE LIABLE FOR ASSAULT AND BATTERY, MALICIOUS PROSECUTION, AND VIOLATION OF 42 U.S.C. §1983.

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.

As Appellant was reaching the cashier, Respondent Officer Russel Porter (hereinafter Porter) approached her from behind and grabbed 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, 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 he explained to her that she was being accused of shoplifting, and presented to her the personal items (mascara, powder) which she had placed on the rack only moments before. The police, whom Respondent WAL-MART Stores, Inc. (hereinafter WAL-MART) called to respond to the incident, arrived and immediately took Appellant in Spartanburg County Jail, 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 Porter. As a result of these wrongful acts, Appellant sustained physical injuries and mental. By reason of Respondent Porter's grossly negligent conduct, Appellant was deprived of her. 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.

On April 8, 2016, Appellant filed a Complaint against Respondents Porter, the City of Spartanburg (hereinafter City), the Spartanburg Police Department (hereinafter Police) and WAL-MART, alleging defamation, false arrest, false imprisonment, assault and battery, malicious prosecution and violation of 42 U.S.C. §1983. (R. 1).

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. (R., p. 19 and 37). Appellant opposed Respondent WAL-MART's motion on August 24, 2016. (R., p. 60).

Respondents Porter, City and Police also filed their Answer on May 16, 2016. (R.,p 43).

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 and Police moved for summary judgment (R. 81, 84), which Appellant opposed on February 28, 2017. (R, p. 108). The trial court granted summary judgment to Respondents, in its Order, dated March 23, 2017. (R., p. 129).

On April 18, 2017, Appellant appealed the Orders, dated March 22, 2017 and March 23, 2017. (R., p. 174).

On May 15, 2017, Respondent WAL-MART moved for Summary Judgment on the causes of action for assault and battery. (R., p. 138). The court granted summary judgment in favor of Respondent WAL-MART on July 14, 2017. (R., p. 152).

Appellant moved to reconsider the July 14, 2017 Order, (R. 159), which the Court denied in its Order, dated October 3, 2017. (R., p. 170). Appellant appealed the aforementioned Orders, which were the subject matter of Appellate Case No. 2017-002160.

Appellant moved to consolidate the two Appellate Cases on October 24, 2017, which this Honorable Court granted in its Order, dated November 27, 2017. (R., p. 181).

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 ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

A. No Probable or Reasonable Cause Exists for the Warrantless Arrest and the Illegal Search and Seizure of Appellant

Respondents claimed that Appellant's causes of action are barred by the existence of probable cause.

South Carolina passed the Merchant's Defense Statute or S.C. Code Ann. §16-13-140, which became the standard of probable cause in shoplifting cases. In fact, Respondent WAL-MART relied on the same provision as its defense. The provision states:

> *"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. "*

Reasonable cause in §16-13-140 is akin or in fact the same as 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 Respondent at the time the Appellant was stopped should be considered.

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 WAL-MART's 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 that Respondent WAL-MART has an existing procedure to abide by in cases of shoplifting incident 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 a 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 in 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., p. 196-198).

Miller testified she cannot recall having seen the Appellant select or pick out an item, conceal, nor carry it out of the store nor pass the check-out counter or cashier. (R. p. 113). It should be noted that Miller had the wealth of camera angles, and the related video recordings, at her disposal. Miller testified that there were fifty (50) cameras within the store.

Respondent Porter did not personally observe Appellant approach any merchandise, select nor conceal the same. In fact, he testified in a prior criminal case that he accosted Appellant upon the prodding of a WAL-MART employee, who allegedly saw her carrying

personal items suspiciously. (R. 113). Respondent Porter did not personally witness Appellant intentionally attempt to leave the building without paying for the items, as in fact he arrested her while she was in line to pay for the items she had chosen. (R. p. 113).

The unlawful arrest and subsequent detention by Appellant was based on a suspicion of an alleged eyewitness, a Kelyn Eber, who was conveniently missing or was no longer in its employ. Respondent WAL-MART had a chance to substantiate its shoplifting charges by submitting the surveillance video on the day of the incident, but it has consistently denied its existence nor provide a reasonable explanation for its non-production. (R. p. 167). Ms. Langham allegedly took the items out of her purse in the checkout line. The thought that there was no surveillance near the register is patently absurd.

Respondent WAL-MART had an obligation to preserve the video since they had arrested the Appellant. It did not present a single video because it would have negated the claim of shoplifting. More importantly, the video of the register would have shown Respondent Porter's violent manhandling of Appellant.

Respondent Porter, as a member of Respondent Police, was covered by S.C. Code Ann. § 17-13-30. This provision empowers an officer to arrest a person without a warrant for any crime committed in his view, which the courts have extended to include crimes freshly committed. *State v. Martin, 268 S.E.2d 105 (1980), State v. Clark, 287 S.E.2d 143 (1981).* In this case, Respondent Porter admittedly did not personally witness Appellant select, conceal, continuously possess or pass the last point of entry. As such, Porter illegally arrested 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).

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. 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 v. S.C. Department of Corrections_, 368 S.C. at 441, 629 S.E.2d at 651(2006), as cited in _Lynch v. Toys 'R Us-Delaware_, 375 S.C. 604 (2007). In this case, the evidence yields further investigation, especially considering Respondent Officer Russell's false statement in the Incident Report, claiming to have personally seen Appellant hide some items in her bag. This was belied by his own words in his trial testimony. In fact, a directed verdict would have been apropos given the fact that Respondent Porter did not meet one element out of the four enumerated by Respondent WAL-MART.

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 Department 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 Appellant's unlawful arrest, assault and battery and subsequent illegal detention.

B. The Reasonableness of Manner by Which Appellant Was Delayed by Respondent Porter and Respondent WAL-MART Is An Issue Of Material Fact.

Respondent WAL-MART alleged that it has "acted reasonably and in good faith in in the exercise of their legal rights, and at no time breached any duty. In essence, Respondent WAL-MART raised the doctrine of Merchant's Defense under S.C. Code Ann. § 16-13-140.

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.

It was Appellant's contention that there was nothing reasonable in the manner by which Respondent Officer Porter, delayed and subsequently arrested Appellant, forcefully slammed her on the floor, and illegally searched her purse.

Respondent Porter violated Respondent WAL-MART's policy on shoplifting. Without observing or witnessing Appellant select an item, conceal or continuously carry the same without paying for it, and walk past the cashier or exit the store, Porter approached her from behind, while she was queueing at the cashier, and arrested her. Respondent Porter had no reason to believe that Appellant had intent to conceal and carry the alleged stolen items since he did not personally see her hide or place any item in her purse. Neither did he have any reason to believe that Appellant had no intention of paying for the merchandise since Appellant was still within Respondent WAL-MART's premises, when he approached her at the register. (R. 185, p. lines 6-7) In short, Respondent Porter stopped the Appellant before she had a chance to pass the check-out counter or the cashier that would show intent to take the items without paying for them.

The manner by which Respondent Porter arrested, detained and subsequently searched Appellant was unlawful and illegal. Respondent Porter applied excessive force by slamming Appellant on the floor, which resulted in bruises and injuries on her person. Appellant was never informed of her alleged violation until she was inside the office and was searched for other items. Nothing was found on her person, but Respondent Porter presented her with lipstick, powder and other personal items, that she allegedly shoplifted.

Furthermore, there was a genuine issue of material fact as to the appropriateness of Respondent Porter's action in arresting, detaining, and manhandling Appellant.

The issue of the appropriateness of action and reasonableness of force employed by Respondent Porter goes into the interpretation of the law, specifically S.C. Code Ann. § 16-13-140. Whether Appellant was delayed in a reasonable manner and for a reasonable time to permit investigation, under the circumstances of this case, was an issue for the jury; so was the question of whether there was reasonable cause to believe that Appellant committed the crime of shoplifting. *Mains v. K Mart Corp.,* 375 SE2d 311, (SC: Court of Appeals, 1988.

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.

Appellant asserts that the existence of probable cause and reasonable delay should have been submitted to the jury.

II.
APPELLANT'S CAUSES OF ACTION ARE NOT BARRED BY STATUTE OF LIMITATIONS.

A. The Causes of Action For Violation Of §1983, Assault And Battery And Malicious Prosecution Are Not Barred By Statute Of Limitations

On Violation of §1983

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 the 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 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. *Wilson v. Garcia*, 471 U.S. 261 (1985), *Ownes v Okure*, 448U.S. 245 (1989). (Emphasis supplied).

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 exercises of reasonable diligence, should have known that he had a cause of action.

Since the incident happened on December 24, 2013, Appellant had until December 24, 2016 to file her case. Appellant filed her Complaint on April 8, 2016 for violation of §1983 and assault and battery against Respondents WAL-MART, Officer Porter, and Police. Appellant filed her case well within the time. The causes of action for violation of §1983 must prevail.

On Malicious Prosecution

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 (3) years, but the date of accrual is not until the criminal proceedings end in the Appellant's favor.

Appellant was acquitted from the previous criminal case by Spartanburg Municipal Court on September 17, 2014. This cause of action must survive.

On Assault and Battery

Appellant's cause of action for assault and battery against Respondent Porter (R., p. 12-13) 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 WAL-MART as he was hired during his off duty.

Secondly, at all relevant times, Respondent WAL-MART 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 WAL-MART's employees. (R. p. 113).

Respondent Porter was sued for his tortious conduct in his individual capacity. Respondent WAL-MART was being sued for tortious conduct, based on *respondeat* superior. 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.

On the Applicability of the South Carolina Tort Claims Act

Appellant's cause of action against Respondent Porter was based on his individual capacity. Respondent Porter was acting outside the scope of his official duty, performing his

duties as Respondent WAL-MART's employee. This took it out of the scope of the Torts Claims Act.

Assuming arguendo that he was performing acts within the scope of his official duty as a police officer, his excessive use of force against the Appellant took his conduct outside of the scope of the Act.

III.
RESPONDENT CITY OF SPARTANBURG POLICE DEPARTMENT IS NOT ENTITLED TO QUALIFIED IMMUNITY

Respondent Police averred that Appellant failed to establish that it 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 did that officer committed a violation but that at that time the violation occurred, it has been "clearly established" that the officer's actions were unconstitutional.

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

Respondent Police knew or should have known of Respondent Porter's aggressive behavior through the numerous complaints against him, but it has done nothing to investigate, remedy or discipline him. Instead, it continued to hire and retain him despite posing a danger to the public.

Respondent Police 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.

RESPONDENTS ARE LIABLE FOR ASSAULT AND BATTERY, MALICIOUS PROSECUTION AND VIOLATION OF 42. U.S.C. §1983

Assault and Battery

As to Respondent Porter

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 her person. Appellant was cooperating with Respondent Porter when the latter approached and interrogated her. Without reason, he grabbed Appellant's arm, where she had an injectable contraceptive, with such force that she raised her arm in pain. Respondent Porter took this as a sign of resistance, and forcibly slammed her to the floor. Appellant did not exhibit any violent, nor scandalous behavior prior to, or subsequent to, Respondent Porter manhandling her.

Respondent had no reasonable cause to delay Appellant as he did not see nor observe her select, conceal, possess or take any item beyond the cashier and her register, without paying for it. Appellant was within Respondent WAL-MART's vicinity, and was in fact approaching the cashier, as she made her way to the front of the line. Respondents did not present any video surveillance, nor witness, to substantiate its claim of shoplifting.

Appellant was delayed in an unreasonable manner. When Respondent Porter took hold of her arm, he already had her in custody. He had no need to slam Appellant to the floor. There is nothing reasonable in the manner which Respondent Officer Porter forcefully seized

Appellant, who was significantly smaller and lighter than him, slammed her to the floor, and illegally searched her purse. Respondent Officer Porter used such force that, resulted in bruises and physical injuries to the Appellant. (R., p. 117-118).

Respondent Porter's arrest sans probable cause, subject him to liability for committing assault and battery upon the person of Appellant.

As to Respondent WAL-MART

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 Porter was considered an employee of Respondent WAL-MART; he performed and was performing acts in furtherance of Respondent WAL-MART's interest; and WAL-MART benefitted from his actions. 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 of whom to approach and apprehend for shoplifting. Respondent WAL-MART allowed, and/or tolerated Respondent Porter's acts of manhandling and assaulting Appellant. It should be highlighted at this point that none of Respondent WAL-MART's employees prevented Respondent Porter from exercising excessive force against Appellant. And finally, Respondent WAL-MART hired and continued to hire Respondent Porter during his off days. Thus, Respondent WAL-MART is vicariously liable for the tortious acts committed by Respondent Officer Porter against herein Appellant.

Malicious Prosecution

In order to recover in an action for malicious prosecution, Appellant must show (1) the institution or continuation of original judicial proceeding, either civil or criminal; (2) by, or at the

instance of, the Respondent; (3) termination of such proceeding in the Appellant's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. Parrot v. Plowden Motor Co., 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965); *Eaves v. Broad River Elec. Co-op., Inc.*, 277 S.C. 475, 477, 289 S.E.2d 414, 415 (1982) as cited in *Law v. S.C. Department of Corrections*, 629 S.E.2d 651(2006),

Appellant submits that the elements of malicious prosecution are present. Respondents WAL-MART and Police instituted the prior criminal action without any cause to believe that a shoplifting had been committed. Its allegations against Appellant were unfounded and frivolous and without probable cause to believe that the action filed will succeed. There was no probable cause for shoplifting because Respondents WAL-MART and Porter failed to prove the elements of selection, concealment, continued possession and last point of entry. That the criminal action was even more unfounded because Respondents completely failed to address or present evidence regarding their claim of action. Respondent WAL-MART did not submit any surveillance video of the alleged incident, nor did it present its employees who allegedly witnessed the shoplifting.

Appellant believes that the prosecution of the previous criminal case was brought for an ulterior motive, for the purpose of attempting to legally harass Appellant and discredit her should she bring action for the tortious conduct perpetrated by Respondents WAL-MART and Porter. As a result of this malicious prosecution, Appellant was obliged to defend herself and expend money and time in her defense.

Finally, Appellant was acquitted by the Spartanburg Municipal Court on September 17, 2004.

Violation of 42 U.S.C. §1983

Appellant reiterates that her cause of action 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.

As to Respondent WAL-MART

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 the color of state law. Appellant, however, relies on *Monell* (*Monell vs. Department of Social Services of City of New York,* 436 U.S. 658, 691 (1978)), the rationale of which has been extended to private businesses. *Iskander,* 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 Department 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.

Firstly, Respondent WAL-MART hired Respondent 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. (R. p. 78). Secondly, 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. (R. p. 78).

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 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 Rojas v. Alexander's Department 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' 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.

As to Respondens Police Department

Under the Monell v. Department of Social Services, 426 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. Respondents insist that no municipality can be held liable under §1983 on a *respondeat* superior theory. Appellant submits that the Complaint against Respondent Police is not based on *respondeat* superior but an independent action based on Respondents Police's failure to properly train, supervise, and discipline Respondent Porter.

In her Eight Cause of Action, Appellant alleged that through information and belief, she came to know that Respondent Porter had history of complaints, including excessive use of force. (R., p. 13-14). Appellant, through her counsel, requested information and details of said previous complaints. Respondent Police failed to act on said complaints, as Respondent Porter continued to work for the Respondent Police even after the shoplifting incident.

Appellant also asserted in the same cause of action that Respondents failed to train, supervise, and discipline Respondent Porter. (R., p. 14). 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 Appellant.

In the case of *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) as cited in <u>*Drayton v. County of Charleston*</u>, 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 Appellant in the hands of Porter's lack proper training has yet to be addressed by Respondent Police.

Respondent Police's failure to provide remedial action in response to prior complaints against Respondent Porter is tantamount to condoning Respondent Porter's violation of Appellant's rights against unlawful arrest, unreasonable search and seizure, due process, right to liberty and right against excessive use of force. Appellant asserts that Respondents' inaction is an action, which amounts to a custom or practice of deliberate indifference, and not just mere negligence.

The jury should be given an opportunity to determine whether those off officials who have the power to make official policy, or in the alternative, the custom or practice of inaction perpetuated by Respondents, has caused Appellant's deprivation of rights.

Furthermore, Appellant believed that Respondent Police had an arrangement with Respondent WAL-MART, wherein the former will arrest anyone identified as a shoplifter by latter, without evaluating the presence of probable cause, as what happened in this case. Appellant insist that this set up between Respondents Police and WAL-MART has become a custom that violates the Constitutional rights of the Appellant. It must be noted here that Respondent Porter continues to be in the employ of the law enforcement agency.

A reading of the S. C. Code Ann. provisions namely, § 23-24-10, §23-24-50 and §23-24-20 (Supp. 1978), shows that a law enforcement officer may perform an 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.*

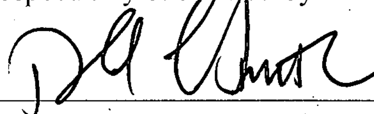
This only proves that there is an arrangement, whether written or otherwise, between private, commercial establishments like Respondent WAL-MART, employing off-duty officers, and the law enforcement agency. This is all the more highlighted by the fact that Respondent Police did not conduct an independent investigation of the alleged shoplifting incident, and just took Appellant in custody.

The afore-mentioned state statutes combined with the concerted actions of Respondents WAL-MART, its employees, and the local police department, afford ample evidence of willful, joint activity which supports a claim against Respondents under §1983.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the trial court's Orders, dated March 22, 2017, March 23, 2017, July 14, 2017 and October 3, 2017, granting Respondents' respective Motion for Summary Judgment should be reversed, and this cause be remanded for a jury trial on the merits.

Respectfully submitted by:



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May 23, 2018

FORM 16
CERTIFICATE OF COUNSEL
FOR FINAL 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

RECEIVED
MAY 29 2018
SC Court of Appeals

Appellate Case No.: 2017-001009

Caitlyn Langham, Appellant,

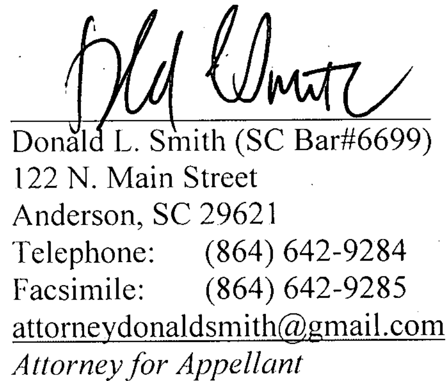
vs.

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

CERTIFICATE OF COUNSEL
FOR AMENDED FINAL BRIEF OF APPELLANT

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

May 23, 2018



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