FINAL BRIEF OF APPELLANT

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

Mario Escalante, Appellant,

v.

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

FINAL BRIEF OF APPELLANT

June 25, 2018

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STATEMENT OF THE CASE

This suit is brought pursuant to the arrest of Mario Escalante for allegedly shoplifting a case of beer from Respondents' retail establishment on Sunday, May 5, 2013.

Appellant came to Anderson County from El Paso, Texas to work a concession stand at the annual Anderson County Fair. Appellant had spent the morning breaking down the concession stand he had been working at and during a break, went to purchase a case of beer to celebrate his friend's birthday, later that evening. Since Appellant is not a resident of this county, he was unaware of the prohibition of the sale of alcohol on a Sunday. Appellant selected Respondents' retail establishment to make his purchase based on the close proximity of the store to the fair grounds.

After entering the store and making his way to the back of the building where the beer is located, Appellant picked up one case and proceeded to the register to make his purchase. When the transaction was complete, the clerk gave Appellant a receipt for his beer purchase and he exited the store. Upon getting into his truck, Appellant thought one case would not suffice based on the number of people he expected to partake in the festivities. Appellant then entered the store for a second time and made his way back to the "beer cave" for a second case.

When Appellant approached the clerk this time, she realized the mistake she had made by selling alcohol on a Sunday; and, informed Appellant she would not be able to sell him the second case. Appellant returned the case to where he had found it, left the store and returned to the fair grounds to finish tearing down the stand.

Respondent David Rodgers claimed that at this time, one of the clerks in his store called him on his cell phone, informed him that Appellant stole a case of beer, ran out of the store and drove off. He stated that upon arriving at the store, he reviewed the video camera footage of the incident, concluded that based on the Appellant's wet appearance and the direction the surveillance video showed him exiting the property, he must have been working the fairgrounds.

However, his testimony was contradicted by his 911 call following the alleged incident. In actuality, Respondent Rodgers was at the store when Appellant left the store, because he followed him back to the fairgrounds. This claim was supported by the exchange between Rodgers and the 911 operator which was memorialized by the State. (R.p. 250-251). Respondent Rodgers informed the 911 operator that he was behind Appellant's truck. He kept Appellant in his sight from the time that he left his store until he had been cuffed and placed on the back of the police car.

The case of beer that was confiscated by police was Busch beer. Appellant's receipt and associated purchase evidence on his bank statement (his bank in San Antonio, Texas), for the month of May 2013, was a $14.30 case of Busch as well. (R.p. 252). Rodgers has claimed that Mario bought the first case; and, he stole the second case. He has never presented anything tangible to support the claim. The woman who sold him the case said that she never saw a *second* case leave the store. (R.p. 254). Only one case of beer was found in Appellant's truck when he was arrested at the fairgrounds. A charge was brought against Appellant for taking the beer, but it was later dismissed when Respondent Rodgers failed to appear at court and, in doing so, failed to prosecute.

On July 22, 2013, the Appellant initiated this action against the Respondents David Rodgers and Janice W. Rodgers, d/b/a Whitehall Express Mart. Appellant asserted the following

causes of action: false imprisonment, invasion of privacy, defamation, negligence, false arrest, outrage, malicious prosecution, conspiracy, conversion and fraud.

On or about December 14, 2014, Respondents brought a Notice of Motion and Motion for Summary Judgment. The matter was heard by the Honorable Robin B. Stilwell on February 9, 2015. On or about March 18, 2015, Judge Stilwell's Order based on the hearing granted Respondents' motion as to the conspiracy and fraud causes of action. However, he denied the motion with regard to false imprisonment, invasion of privacy, defamation, negligence, false arrest, outrage, malicious prosecution and conversion. (R.p. 57).

Trial was set in this matter for a date certain on February 16, 2016. On February 11, 2016, defense counsel, Phillip Reeves, Esquire, moved for a continuance because his "daughter was having a birthday". (R.p. 197-199). Mr. Reeves had nothing to do with this matter. The trial was set in the summer of 2015. Since the child's birthday is likely the same day annually, the request for a continuance, when he knew he was not participating in the trial anyway, was done simply to deprive Appellant from having his day in court.

In the Order drafted by defense counsel, and endorsed by the Honorable Cordell Maddox, it is stated that the matter would be continued. More importantly, he ordered that "(T)he parties shall be permitted to select a second date certain for the trial of this matter after the United States District Court for the District of South Carolina has ruled on pending motions for summary judgment." The second date certain would be set following the ruling in the federal court. He also stated that, "Respondents shall be responsible for any reasonable change fees incurred by the Appellant, Mario Escalante, in altering his flight plans."

Respondents were denied summary judgment on seven of nine causes of action relating to the reckless act of accusing an individual, who was 1200 miles from home of stealing a case

of beer, after buying one with his bank card. Appellant requested and received a date certain trial to get justice in the state court. Respondents thwarted said opportunity with the "birthday continuance". These contentions are underscored by the fact that the defense move for yet another summary judgment after they were previously denied, as well as stopping Appellant from a trial on the merits because of a child's birthday. Having the audacity to request summary judgment based on these facts is free of integrity. Granting summary judgment with these facts sets a perilous precedent.

Judge Maddox did not change any aspect of the Order for Continuance that was prepared for him. He states affirmatively that the date certain trial will be reset upon the Federal Court's ruling on summary judgment. He also states that Respondents shall pay for the difference of altering his flight plans for the next date certain trial. There is no language whatsoever that indicates summary judgment in the Federal Court would allow Respondents to escape the trial that they continued for a birthday.

On January 13, 2015, Appellant filed a federal suit against the Anderson's County Sheriff's Department, Sheriff John Skipper, Sergeant Andrew Hyslop, Deputy Brandon Surratt, the City of Anderson Police department, James Stewart and the Respondents 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 undisputed. 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 Respondents 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 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 Respondents' Rodgers. The State action dealt with the relationship between Respondents' Rodgers and his employees.

The basis for the granting of summary judgment came from the Report and Recommendation of the federal magistrate. The magistrate based all of her arguments on the fact that probable cause existed at the time of the arrest. In fact, the following was stated, "the Court declines to address...any of the Rodgers Respondents' arguments regarding personal involvement in the specific state law claims." (R.p. 342).

The District Court adopted the Report and Recommendation of the Magistrate. This ruling was ultimately affirmed by the 4th Circuit Court of Appeals on November 3, 2017.

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

Thus, Appellant brings this motion to reconsider a finding that overruled the Order previously issued by Judge Stilwell. This action does not have the same parties as the federal action. The employees of the Rodgers' Respondents were not identified. In addition, there are no law enforcement parties in this action.

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, the issue of res judicata 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

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTSS.

I. The claims presented in this case are not barred by res judicata.

Respondents contend that summary judgment is warranted because the Federal court has previously ruled on a case involving the same parties. Appellant believes that he is not precluded from raising the cause of action for negligence against Respondents.

The principle behind the doctrine of *res judicata* is that it is in the public interest that there should be an end to litigation and that no one should be twice sued for the same cause of action. *First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945) as cited in Nelson v. Coker, No. 3626, SC: Court of Appeals, April 14, 2003.* This

doctrine bars claims that have been litigated or that could have litigated from being litigated again.

In addressing whether there is res judicata, the court usually looks at three (3) factors: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Riedman Corp. v. Greenville Steel Structures, Inc,* 308 S.C. 467, 419 S.E.2d 217 (1992)). Appellant maintains that res judicata does not apply in this case.

There was no identity of parties between the two cases. In the Federal case, the primary party involved was the law enforcement officers responsible for Appellant's unlawful arrest and detention. Respondents Rodgers was included to establish his participation in the conspiracy against Appellant. In the state case, the parties involved were Respondents Rodgers and/or his establishment.

There was no identity of subject matter. The cause of action for the Federal case is the conspiracy perpetrated by Respondents Rodgers and certain elements of the Anderson County Sheriff Office, to deprive Appellant of his right to liberty. The subject matter in that case is the deprivation of the constitutional rights of the Appellant. In the instant case, Appellant Rodgers was sued for his gross negligence, negligent hiring, training and supervision, and damages. Appellant submits that the actions arose from different transactions and occurrences.

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.

II. The issues in the present case are not barred by collateral estoppel.

Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the re-litigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." *Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986) as cited in Nelson v. Coker, Ibid.*

There is no identity of issues between the two cases. The issue in the Federal case is the State's violation of Appellant's rights: his 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 original suit.

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, 309 S.C. 203, 420 S.E.2d 856, 859 (Ct. App. 1992),* 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." As cited in *Nelson v. Coker, Ibid.* 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

III. Respondents' Answer should have been stricken for non-compliance with discovery rules.

On December 29, 2017, Appellant moved to strike Respondents' Answer. While this is a drastic measure, Appellant's motion was warranted in this case under Rule 37(b)(2) of the South

Carolina Rules of Civil Procedure. [1] The rule provides that, where a party to the action fails to obey an order to provide or permit discovery, the court may issue an order "refusing to allow the disobedient party to support or oppose designated claims or defenses", prohibit "him from introducing designated matters in evidence", or striking the parties' pleadings. The court may also award attorney fees and costs to the moving party.

"The duty to preserve material evidence arises not only during litigation but also extends to that period before a litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." Silvestri v. General Motors Corp. 271 F.3d 583, 590 (4th Cir. 2001).

Respondents knew that the store's video surveillance was necessary for the prosecution of the shoplifter. (Exhibit 4, Incident Report, Motion to Stricken Answer). Appellant approached Rodgers a short time after his release from jail to show his receipt proving that he did not steal anything. Appellant pleaded for Rodgers to correct the mistaken accusation against him. Instead of calling the police to explain the situation, Rodgers refused to clear Appellant's

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[1] *Rule 37* ***(b) Failure to Comply With Order.***
(2) Sanctions by Court in Which Action Is Pending. *If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:*
(A) *An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;*
(B) *An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;*
(C) *An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;*
(D) *In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;*
(E) *Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply show that he is unable to produce such person for examination.*
In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

name. In his deposition, Respondent Rodgers further accused Appellant of threatening him. (R.p. 345-346).

Respondent Rodgers allegedly showed the police still shots of Appellant. (R.p. 347-351). He admitted taking Appellant's picture from the video surveillance. Rodgers knew he brought a charge for shoplifting. He knew that there would be no excuse when the video failed to show a second case of beer being taken from the establishment. He would have been charged with giving a false police report. The only logical conclusion in his failure to present the video surveillance was that it was deliberately destroyed.

Respondents acted with bad faith and gross indifference of Appellant's rights by failing to preserve the video surveillance despite their knowledge and anticipation of litigation on the alleged incident. Like *Silvestri*, Respondents used evidence to its advantage; and, then failed to allow Appellant the same opportunity. Striking Respondents' Rodgers' answer is harsh, but the willful indifference on saving the discovery caused irreparable prejudice. It has made the prosecution of this case impossible for Appellant.

This Court's ruling on striking the answer was a mere afterthought. Respondents' Answer should have been stricken, just as the evidence had been stricken. Without the defective pleading, Respondents would not be able to move for summary judgment

IV. Respondent's act of spoliation prevented Appellant from litigating his claims.

In the case of *Basnight*, 346 S. Ct 248-249, 551 S.E.2d 278 cited at *South Carolina Public Interest Foundation v. Greenville County, et al.*, No. 5016 (S.C: Court of Appeals, 2012), the Court held that a judgment must be valid in order to preclude a second action concerning the same transaction.

Respondent Rodgers failure to present a video surveillance/recording of what he claimed transpired, and which became his basis for reporting the alleged shoplifting, is an act of spoliation. Spoliation is the destruction of evidence which is expected to be relevant in a case.

South Carolina courts have long recognized the court's power to sanction parties for mishandling evidence. In *Welch v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) where plaintiff sued bottling company for poison on in the soft drink, but refused to have the bottled tested by the defendant bottling company, the court held that the jury should be able to consider the missing evidence. *Welch*, as cited in *Stokes v. Spartanburg Regional Medical Center*, No. 4078 (S.C: Ct. App, 2006). In *Wisconsin Motor Corp. v. Green,* 224 S.C. 460, 79 S.E.2d 718 (1954), Respondent contested the amount billed by Appellant, alleging having paid in cash and checks showing payment, but failed to submit bookkeeping records, cancelled checks nor presented bookkeepers for testimony), the court held that if a "a party fails to produce testimony of an available witness or witnesses or a material issue in the cause, or produce available records, it may be inferred that the testimony or contents of the records, if presented would be adverse to the party who fails to call the witness or present the records. *Id.*

In *Kershaw County Bd. of Educ. vs. U.S. Gypsum Co.,* 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990), *Gathers v. South Carolina Electric and Gas Co.*, 427 S.E.2d 687 (1993), *Vodusek v. Bayliner Marine Corp.* , 71 F.3d 148, 156 (4th Cir., 1995), and *Stokes v Spartanburg Regional Medical Center*, *Ibid.*, South Carolina courts have permitted an adverse inference that withheld or destroyed evidence would be adverse to the party failing to produce said evidence. This inference applies whether the reason for the loss or destruction of evidence is intentional (*Wisconsin Motors Corp., Ibid.*) or accidental (*Gathers, Ibid.).* Furthermore, even if there was

a valid explanation for the evidence missing, the court should have allowed the jury to hear adverse instruction and give the latter the opportunity to apply it if justified. *Stokes, Ibid.*

In the case of *Pringle v. SLR, Inc. of Summerton,* the court advised that the party advocating for the adverse inference must be able to show that the missing evidence might reasonably support whatever presumption is being requested. *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 405-06, 675 S.E.2d 783, 787-88 (Ct. App. 2009), citing Kevin Eberle, *Spoliation in South Carolina,* South Carolina Lawyer, Sept. 2007, 26, 32.

Here, Appellant has presented a receipt and a bank statement showing payment of a case of Busch beer. He believed that the missing video would have collaborated his assertions, and would show that only one case of beer was purchased and taken out of Respondent's store. Based on the fact that the clerk who sold the beer to Appellant watched him take it to his truck, and testified that she only saw him leave the store with one case, there can be no other deduction. (R.p. 315).

In *Vodusek,* the court required a showing that the delinquent party knew that the evidence was relevant to some issue at trial, and that his willful conduct resulted in its loss or destruction. In the case at bar, Respondent caused the arrest of the Appellant, using the latter's photo, allegedly taken from the video. Respondent Rodgers knew or should have known that a suit was filed against Appellant. He was put on notice that he would need the video to prosecute the theft of the case of beer.

As previously established, sometime after his arrest, Appellant returned to Respondents' store to present his receipt showing the purchase of case of Busch beer. When Respondent refused to clear Appellant's name, he knew or should have known, that his accusation of shoplifting would be contested by the Appellant who took pains to return and show proof of

purchase. From that moment, Respondent Rodgers had a duty to obtain and preserve a copy of any relevant information recorded by his surveillance video. This is especially true since there was written, as well as verbal request for him to do so.

As discussed in the previous section, Respondents themselves, brought the case for shoplifting against Appellant. Thus, the duty to preserve the video surveillance cannot be any clearer. These events, taken together, are enough to support the inference that Respondent Rodgers' consciously or recklessly destroyed the requested video surveillance, because it would prove the fabrication of the alleged shoplifting.

The case at bar has similarities with the case of *Silvestri v. General Motors Corp*, 271 F.3d 583 (4th Cir., 2001), where despite the anticipation of litigation against General Motors, the plaintiff's counsel and plaintiff did not take any steps to preserve the vehicle. Silvestri laid down the standards for the dismissal based on spoliation:

> *"To justify the harsh sanction of dismissal, the District Court must consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the Defendant the ability to defend the claim."*

Respondent Rodgers knew and, in fact, initiated a suit against Appellant for the alleged shoplifting. Despite this knowledge, anticipation of litigation, and written and verbal reminders, Respondent Rodgers did not preserve the video surveillance. It is quite telling that Respondent Rodgers did not attend the trial for the shoplifting case, which was dismissed for failure to prosecute. No other inference can be deduced from the non-presentation of the video than that Respondent Rodgers knew that it would prove that Appellant did not commit the alleged offense of shoplifting.

In this instant action, Appellant was prevented from proving his claims when Respondent Rodgers intentionally or recklessly failed to produce the video surveillance, despite a duty to preserve the same. Appellant moved to have Respondents' Answer stricken due to spoliation, which the trial court summarily dismissed, stating "I'm going to deny that motion, but I'll take the other one into consideration." (R.p. 285). Appellant asserts that, by failing to rule on the issue of spoliation, or to issue an adverse inference instruction, the trial court allowed Respondents to destroy the evidence which would have clearly illustrated that the shoplifting charge was a hoax; thereby, making him guilty of filing false report or giving false statement. These acts, by the trial court and Respondents, deprived Appellant of his right to due process.

V. There is a genuine dispute of material fact that will prevent summary judgment,

Appellant asserts that the Court erred in granting the summary judgment as there exists a genuine dispute as to a material fact. Appellant submitted a copy of the receipt proving his purchase of the case of beer, conflicted with Respondent Rodgers' claim of shoplifting.

In a summary judgment, a moving party must produce evidence in support of each and every essential element of the claim. In this case, Respondent Rodgers did not submit any evidence that would prove that Plaintiff committed the shoplifting. Despite repeated demands, he did not present the video surveillance, nor did he show the same to any of the police authorities who responded to his call/report of a shoplifting incident. By his own admission, this was not the first time a shoplifting incident occurred in his store, and in previous cases, he submitted a video surveillance." (R.p. 255-256). In this particular case, however, he did not show the video to the police.

To defeat a summary judgment motion, the non-moving party only has to show a scintilla of evidence that a dispute of material fact exist. In the case at bar, the existence of a receipt and

bank statement showing proof of purchase of a case of Bush beer, at the time, date and place of the alleged offense, negates and run in contrast with the self-serving, unsupported testimony of Respondent Rodgers.

The inconsistent and ever-changing testimonies of Respondent Rodgers as to the details surrounding the commission of the alleged shoplifting undermines his credibility. In an attempt to secure a conviction of Appellant for shoplifting, Respondent Rodgers claimed that Appellant took two cases of beer out of his store, the second one being the subject matter of the offense. Only one case of beer was found in Appellant's truck when he was arrested at the fairgrounds. Since the 911 call details Rodgers' continuous surveillance of Appellant from the time he left his property, he would have had the opportunity to see the latter dispense with the beer. Of course, since Appellant was getting the beer for the party at the end of the day, the beer would have been kept in the truck.

The pertinent provision of the crime of shoplifting, for which Plaintiff was accused of, is defined in § 16-13-110 of the South Carolina Code, which states:

> *"A person is guilty of shoplifting if he:*
>
> *(1) takes possession of, carries away, transfers from one person to another or from one area of a store or other retail mercantile establishment to another area, or causes to be carried away or transferred any merchandise displayed, held, stored, or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use, or benefit of the merchandise without paying the full retail value."*

Other than the uncorroborated video surveillance, Respondent Rodgers did not personally witness the alleged taking. His allegation of a second case of beer being shoplifted was not supported by either testimonial or physical evidence. The only evidence presented was the

receipt and bank statement showing that a case of beer was purchased and paid for by Appellant at the date and time of the alleged shoplifting incident. The evidence clearly and unequivocally shows that there was no unauthorized taking of any merchandise.

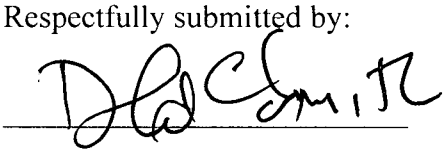
Appellant believes that the credibility of Respondent Rodgers and the application of adverse inference on the missing video, are matters for the jury to determine.

This case is more than a person being in a wrong place at a wrong time. Appellant suffered manifest injustice. Appellant, a foreign traveler, was deprived of his liberty against his will, due to a reckless, grossly negligent and baseless accusations by a callous businessman, who had no qualms at circumventing the law to secure his business. It is time for the Court to recognize the intentional destruction of evidence that cost a visiting litigant any shot he may have had at due process.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the trial court's Orders, granting Respondents' Motion for Summary Judgment be reversed, and this cause be remanded for a jury trial on the merits.

Respectfully submitted by:



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CERTIFICATE OF COUNSEL FOR FINAL BRIEF

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

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