

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

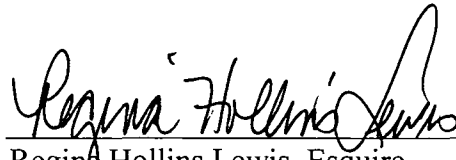
Case No. 2012-213247

Wal-Mart Store #2806Appellant,

v.

Prakash & Urmila SolankiRespondents.

INITIAL BRIEF OF APPELLANT



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SC COURT OF APPEALS

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See *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. at 564, 619 S.E. 2d at 11 (“Trial judges in this state have long been required, as a threshold matter, to assess the culpability of a defendant’s conduct to determine whether punitive damages are available in a given case (i.e., whether the issue should be submitted to the jury).” (quoting *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet Inc.*, 324 S.C. at 152, 478 S.E.2d at 58)) 16

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STATEMENT OF ISSUES ON APPEAL

- I) Did the trial court err in submitting the issue of punitive damages to the jury where Appellant Wal-Mart merely cooperated with a request by law enforcement and there was no evidence to support a finding of reckless, willful, or wanton misconduct by Appellant Wal-Mart?

- II) Did the trial court err in denying Wal-Mart's post-trial motions for JNOV and for reversal or reduction of punitive damages award where the evidence was insufficient to sustain an award of punitive damages?

STATEMENT OF THE CASE

This case arises out of the arrest of Respondent Prakash Solanki ("Mr. Solanki") by the Respondent Spartanburg County Sheriff's Department ("the Sheriff's Department") several months after a transaction occurred at a Wal-Mart retail store during which it was alleged by the Sheriff's Department that Mr. Solanki committed identity theft and credit card fraud. Mr. Solanki filed a complaint on November 18, 2010 in the Spartanburg County Court of Common Pleas in which he alleged causes of action against Appellant Wal-Mart ("Wal-Mart") and the Sheriff's Department for: (1) negligence; (2) gross negligence and recklessness; (3) false imprisonment; (4) intentional infliction of emotional distress; (5) defamation/defamation *per se*; (6) assault; (7) battery; (8) malicious prosecution; and (9) loss of consortium.

The case was tried before a jury from March 6 – 9, 2012. At the close of all of the evidence the trial court granted directed a verdict in favor of Wal-Mart on all causes of action except negligence, gross negligence and loss of consortium. (Transcript Vol. II, p. 41). The court indicated that it would take the directed verdict motion under advisement with regard to the gross negligence and loss of consortium claims. (Transcript Vol. II, p. 41). Thereafter, the court granted the motion on the loss of consortium claim and, over the objection of Wal-Mart, determined that it would submit the issues of gross negligence and punitive damages to the jury. (Transcript Vol. II, p. 66). The court also granted a directed verdict on all claims against the Sheriff's Department except for the claims of false imprisonment and malicious prosecution. (Transcript Vol. II, pp. 40-41).

The jury returned a verdict in favor of the Sheriff's Department on both claims against it and returned a verdict against Wal-Mart on the claim of negligence. The jury

awarded Mr. Solanki \$50,000 in actual damages and \$225,000 in punitive damages against Wal-Mart. The jury also found that Mr. Solanki was comparatively negligent in the amount of 25 percent. (Transcript Vol. II, p. 262).

Wal-Mart timely filed post-trial motions including a Motion for Judgment Notwithstanding the Verdict, Motion for New Trial Absolute, for New Trial *Nisi Remittitur*, for Reversal or Reduction of Punitive Damages, or for New Trial pursuant to the Thirteenth Juror Doctrine. By order filed on October 12, 2012, the trial court denied Wal-Mart's post-trial motions. (Order Denying Wal-Mart's Post-Trial Motions, Filed October 2, 2012). This appeal followed.

STATEMENT OF FACTS

Mr. Solanki testified that he went shopping at Wal-Mart with his wife on November 27, 2009, "Black Friday," the day after Thanksgiving. The two selected several items and Mr. Solanki went to the self-checkout area to pay for the items. (Transcript Vol. I, pp. 29, 31, 33-35). Mr. Solanki scanned the items and attempted to proceed to pay for them; however, there was a problem with the register. A Wal-Mart associate, Ryan Smalls, who was working in the self-checkout area attempted to assist Mr. Solanki at the register and when the attempt was unsuccessful, Mr. Smalls suspended the transaction and took Mr. Solanki to a cashier-assisted register to complete the transaction. (Transcript Vol. I, 36-47). It is unclear exactly what transpired during the transaction; nevertheless, Mr. Solanki testified that he used his credit card during the transaction and provided his identification and his credit card at the request of Mr. Smalls. (Transcript Vol. I, pp. 53 – 58). At some point, apparently because of a malfunction with the register, a credit card in Mr. Solanki's name was manually stenciled and thereafter, credit card information from the credit card of a woman named Robin Martin was manually entered into the register by Mr. Smalls. A receipt with Ms. Martin's credit card information was then signed by Mr. Solanki for the items he purchased, totaling \$144.70, and the amount was charged to Ms. Martin's credit card. Mr. Solanki and his wife left the store without incident. (Transcript Vol. I, pp. 53 – 58).

Subsequently, on or about December 1, 2009, Ms. Martin reported to the Spartanburg County Sheriff's Department that her credit card had been stolen and that two unauthorized charges had been made using her credit card. (Transcript Vol. I, pp. 178 – 181, 264 – 266). One of the two charges was the charge in the amount of \$144.70

that had been charged during Mr. Solanki's transaction at Wal-Mart on November 27, 2009. (Transcript Vol. I, pp. 265, 271). Ms. Martin reported that the card was last in her possession at approximately 4:30 p.m. on November 27, 2009. (Transcript Vol. I, p. 183).

Deputy Gina Cashion was assigned to investigate the unauthorized charge made at Wal-Mart on December 1, 2009.¹ (Transcript Vol. I, p. 264). On that day, she contacted Wal-Mart and asked if they would pull video surveillance and receipts for the date and time of the transaction involving Ms. Martin's card. Specifically, Deputy Cashion requested receipts for any transaction involving a credit card with the last four digits of Ms. Martin's card, 4094. She also requested that Wal-Mart check for purchases made on November 27, 2009 in the amount of \$144.70. Wal-Mart complied with the deputy's requests and located one transaction in the amount of \$144.70. (Transcript Vol. I, pp. 266- 269). Wal-Mart provided Deputy Cashion with video surveillance showing the transaction and three documents: 1) a copy of the stenciled impression of Mr. Solanki's credit card; 2) a receipt showing an itemized list of the items purchased by Mr. Solanki in an amount totaling \$144.70; and 3) the store's copy of a receipt showing Ms. Martin's credit card number with Mr. Solanki's signature for a purchase in the total amount of \$144.70. (Transcript Vol. I, pp. 266 – 269, 373 – 381). After obtaining the documents and video from Wal-Mart, Deputy Cashion had no further contact with Wal-Mart about the transaction. After providing the requested information to Deputy Cashion, Wal-Mart took no further action with regard to the transaction or the investigation by law enforcement. (Transcript Vol. I, p. 398).

¹ The second unauthorized charge was a \$10.00 charge made at a Murphy's gas station on the same day. (Transcript Vol. I, pp. 269). Deputy Cashion testified that she was assigned to investigate only the unauthorized charge made at Wal-Mart in the amount of \$144.70 (Transcript Vol. I, pp. 277 – 278).

Based on the time of the transaction and the time shown in the video, Deputy Cashion determined that Mr. Solanki was involved in the transaction. She attempted to contact Mr. Solanki by calling him and leaving a business card with a note at his South Carolina address but was unsuccessful in her attempts.² (Transcript Vol. I, pp. 385 – 388). Deputy Cashion testified that thereafter, based upon the video and documents received from Wal-Mart as well as bank statements obtained from Ms. Martin, she sought and received an arrest warrant for Mr. Solanki. (Transcript Vol. I, pp. 388 – 389). Thereafter, in April 2010, Mr. Solanki was arrested in Georgia. He testified that he spent six nights in jail until he was transported to South Carolina where he was released on bond. (Transcript Vol. I, pp. 63 – 67, 70, 72 – 73). The matter was reviewed by the Grand Jury and on June 11, 2010, indictments were issued charging Mr. Solanki with financial transaction card theft and financial transaction card fraud. On August 24, 2010 the indictments were dismissed by the solicitor. (Transcript Vol. I, p. 394). Subsequently, on November 18, 2010, Mr. Solanki instituted the subject action.

² Mr. Solanki testified that he and his wife owned a home in South Carolina and rented an apartment in Georgia, where his wife worked and that they traveled back and forth between the two residences.

ARGUMENT

- I. **THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY WHERE THE COURT CONCLUDED ONLY THAT THERE WAS A JURY QUESTION WITH REGARD TO GROSS NEGLIGENCE, AND WHERE THERE WAS NO FINDING BY THE COURT OR ANY EVIDENCE TO SUPPORT A FINDING THAT WAL-MART ACTED IN A MANNER THAT WAS WANTON, OR WILLFUL, OR RECKLESS.**

At the close of the Plaintiff's case, the trial court initially indicated that it saw the claim against Wal-Mart as one of simple negligence. (Transcript, Vol. II, p. 21). Thereafter, the court determined that the issue of punitive damages would be submitted to the jury. As there was no evidence of any willful, wanton, or reckless act by Wal-Mart to sustain a punitive damages award, the trial court erred in submitting the issue to the jury and the punitive damages award should be reversed.

It is well-established that "[p]unitive damages are quasi-criminal in nature and are imposed to punish a wrongdoer and to deter like conduct." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 560, 619 S.E.2d 5, 11 (Ct. App. 2005) (citing *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 154, 164, 604 S.E.2d 385, 389 (2004)). "Although appellate review of an award of punitive damages is limited to the correction of errors of law, an award of punitive damages must be proven under a significant burden of proof: clear and convincing evidence. *See id.* (citing *Austin Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310, 594 S.E.2d 867, 873 (Ct. App. 2004)).

To establish a claim for punitive damages, "the plaintiff must prove the defendant's misconduct was willful, wanton, or in reckless disregard of his rights." *Id.* As our Supreme Court has observed, "[t]rial judges in this state have long been required, as a threshold matter, to assess the culpability of a defendant's conduct to determine

whether punitive damages are available in a given case (i.e., whether the issue should be submitted to a jury.)” *S.C. Farm Bur. Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 152, 478 S.E.2d 57, (1996).

Here, Wal-Mart had no involvement in instituting charges against Mr. Solanki or in pursuing the warrant for Mr. Solanki’s arrest. Rather, Wal-Mart’s involvement with Mr. Solanki was limited to two actions: (1) the handling of the transaction in which Robin Martin’s lost credit card was used to purchase items for Mr. Solanki; and (2) Wal-Mart’s compliance with the request of the Spartanburg County Sheriff’s Department to provide documents and video relevant to the transaction. The evidence is woefully inadequate to support a finding that Wal-Mart acted in a manner that was willful, wanton, or reckless with regard to either of Wal-Mart’s actions with regard to Mr. Solanki and thus, the trial court erred in submitting the issue of punitive damages to the jury.

A. The Testimony and Other Evidence Presented at Trial Did Not Support a Finding of Wanton, Willful, or Reckless Misconduct by Wal-Mart.

Mr. Solanki testified that he initially attempted to make a purchase at a self-checkout register. The register malfunctioned and cashier Ryan Smalls suspended the transaction and moved Mr. Solanki’s items to a cashier-assisted register to complete the transaction. (Transcript Vol. I, pp. 35 – 47). While there is no audio on video surveillance of the transaction, the video was shown to Mr. Solanki who testified regarding what occurred during the transaction. (Transcript Vol. I, pp. 35 – 47, 53 – 58).

According to Mr. Solanki he was never in possession of a credit card belonging Robin Martin, to the woman whose card was used to purchase Mr. Solanki’s items. (Transcript Vol. I, p. 36). Mr. Solanki testified that he provided his own credit card

although the receipt produced by Wal-Mart from the transaction shows that Mr. Solanki in fact signed a receipt bearing credit card information that belonged to Robin Martin, which had been hand-keyed into the system by cashier Ryan Smalls. Thereafter, Mr. Solanki took the items totaling \$144.70 and left the store without incident. (Transcript Vol. I, pp. 5 – 8).

Cashier Ryan Smalls testified that he was working as a cashier during the time of the incident and that he worked the second shift in the afternoon from 5:30 until 11:00 pm. Mr. Smalls recalled that he was working at the self-checkout on Black Friday, November 27, 2009. (Transcript Vol. I, pp. 138 – 139). He testified, however, that he had no independent recollection of the transaction because he dealt with hundreds of transactions while employed at Wal-Mart. (Transcript Vol. I, pp. 142, 160 – 161). He was shown the video footage and testified that the video appeared to show him assisting Mr. Solanki at the self-checkout. (Transcript Vol. I, p. 155). Thereafter, Mr. Solanki sought the assistance of Mr. Smalls when the register apparently malfunctioned, and Mr. Smalls ultimately suspended the transaction and moved Mr. Solanki's items to another register to complete the transaction. (Transcript Vol. I, pp. 156 – 160). Mr. Smalls further testified that he had no independent recollection, but based on the video it appeared that a Wal-Mart customer service manager thereafter came to the register where he had moved Mr. Solanki to assist with the transaction. Mr. Smalls then took an impression of a credit card and subsequently hand-keyed credit card information into the register. (Transcript Vol. I, pp. 160 – 166, 168 – 172). The items were charged to the credit card, the transaction ended and Mr. Solanki left the store without incident.

(Transcript Vol. I, p. 58). Mr. Smalls testified that he followed all of the procedures that he was required to follow. (Transcript Vol. I, pp. 165 – 166).

Wal-Mart's only involvement with Mr. Solanki's transaction thereafter was to comply with a request by the Spartanburg County Sheriff's Department. Deputy Gina Cashion of the Sheriff's Department testified that on December 1, 2009, she was assigned to handle the report by Robin Martin that a fraudulent charge had been made on her credit card at Wal-Mart. (Transcript Vol. 1, p. 264). Deputy Cashion testified that she contacted Wal-Mart and asked for any documents and video involving the fraudulent transaction. (Transcript Vol. I, pp. 266 – 269). As discussed, Wal-Mart provided the deputy with video surveillance showing the transaction and three documents: (1) a copy of the stenciled impression of Mr. Solanki's credit card; (2) a receipt showing an itemized list of the items purchased by Mr. Solanki in an amount totaling \$144.70; and (3) the store's copy of a receipt showing Ms. Martin's credit card number and signed by Mr. Solanki for a purchase in the total amount of \$144.70. (Transcript Vol. 1, pp. 266 – 269, 373 – 381). It is undisputed that after obtaining the documents and video from Wal-Mart, Deputy Cashion did not inquire further of Wal-Mart regarding the transaction and that all actions taken with regard to Mr. Solanki's arrest were instituted by the Sheriff's Department. (Transcript Vol. I, pp. 388- 389, 398).

The foregoing was the extent of the evidence regarding Wal-Mart's involvement with Mr. Solanki and was insufficient as a matter of law to sustain a claim of gross negligence or punitive damages.³ At best, the evidence was such that a jury could infer

³ As set forth in detail below, the parties argued and the trial court considered primarily the issue of gross negligence and the applicable standard of absence of the use of even slight care. Counsel for Wal-Mart also argued the absence of wanton, reckless, or willful misconduct by Wal-Mart. After lengthy arguments on the issue the trial court ruled that the issues of gross negligence and punitive damages would be charged

simple negligence based on the fact that Mr. Solanki's credit card that was stenciled did not match the numbers on Ms. Martin's credit card that was hand-keyed and signed by Mr. Solanki, or that Mr. Solanki's presented identification did not match the name on Ms. Martin's credit card.

- 1. The trial court acknowledged that the evidence supported the submission of simple negligence only to the jury and erred in thereafter ruling that punitive damages would be submitted to the jury.**

Counsel for Respondent apparently recognized that the handling of the transaction at Wal-Mart did not give rise to a claim for punitive damages; consequently, counsel focused its argument on the information provided by Wal-Mart to the Sheriff's Department upon the Department's request, and counsel for Respondent contended that punitive damages were warranted because Wal-Mart owed a duty of protection to Mr. Solanki to prevent his arrest:

He was a customer of the store. He had an obligation—he had a right to expect that Wal-Mart would protect him against an unreasonable accusation of fraud by some third party or some sheriff or some Sheriff's Department that, with all due respect, did a botched and ineffective investigation.

Mr. Solanki was due a certain amount of protection and standard of care by Wal-Mart such that when [the deputy sheriff] came calling for the information, they should have provided—they should have explained to her, looked at the tape themselves, and said wait a minute, there are some serious questions about this transaction.

to the jury. (Transcript Vol. II, p. 66). Thereafter the trial court indicated that it would not charge gross negligence separately and was "just gonna handle that in the punitives. I'm not gonna define that separately because that's the only way, the only place it relates." (Transcript Vol. II, p. 104). Consequently, the trial court did not charge gross negligence but only charged the jury on punitive damages and the willful, wanton, or reckless standard. While Appellant discusses both gross negligence and punitive damages herein because both issues were argued by the parties and assessed by the Court, there is no evidence to support a finding of lack of slight care or willful, wanton, or reckless misconduct and thus, the court's ruling as to both gross negligence and punitive damages was erroneous and should be reversed.

There's so many questions about why Mr. Solanki didn't do it that were never investigated by Wal-Mart.

So, I do think there's evidence to go to the jury on the ground of negligence as against Wal-Mart and gross negligence and recklessness in that when, that Wal-Mart had a duty, once they knew that there was a criminal investigation being conducted on one of their own customers—and here's the problem, Your Honor.

They never considered the man might be innocent. Wal-Mart simply takes this sort of hands-off approach that Mr. Solanki, that they didn't do anything, they just provide information. The question is, you know, what information did they provide. They provided a videotape. They provided some receipts. But did they provide any explanation or clarification?

But Wal-Mart offered zero technical assistance to [the deputy sheriff] in terms of explaining what's going on in this point-of-sale machine such to suggest that I think the jury could draw very clear inferences that Wal-Mart simply failed, in an egregious way, to protect its own customer, Mr. Solanki.

(Transcript, Vol. II, pp. 11 – 13). The court then inquired of Mr. Solanki's counsel as to what manner Wal-Mart failed to exercise even the slightest care regarding Mr. Solanki:

Recklessness—gross negligence is the failure to exercise even slight care, and obviously we're dealing, based on my comments yesterday, my initial reaction was to, to look at Wal-Mart as only or to send it to the jury with regard to Wal-Mart only on the negligence cause of action. Where's the failure to exercise any, even, even the slightest care with regard to the Plaintiff?

(Transcript Vol. II, p. 15). Counsel for Mr. Solanki responded, "It's in the failure to conduct any kind of internal investigation to protect Mr. Solanki from an accusation of, of criminality." (Transcript Vol. II, p. 15). The court then inquired as to whether or not Wal-Mart had an affirmative duty to conduct such an investigation, to which counsel for

Mr. Solanki responded that he thought Wal-Mart did have a duty to conduct an internal investigation before providing the requested information to law enforcement. (Transcript Vol. II, pp. 15 – 16). Counsel's response in this regard is patently erroneous and is not supported by South Carolina law.

Still not convinced by Mr. Solanki's argument, the trial court correctly observed that Wal-Mart merely cooperated with the Sheriff's Department by providing information that the Department requested pertaining to Mr. Solanki's transaction at Wal-Mart after having received a report of a lost or stolen credit card from Ms. Martin. The court stated:

But if we're talking about the failure to exercise even the slightest care concerning Mr. Solanki, how is cooperating with law enforcement, once they arrive and they say we want a listing of all transactions for \$144.70, there was one transaction on that day, they pull that transaction, they hand it to the deputy, they pulled the tapes, they provide those to the deputy, and Wal-Mart leaves it to the professionals to do what it is that they are supposedly trained to do, and I realize that that's disputed here.

But Wal-Mart then leaves it to law enforcement to do their thing with the reasonable assumption that if there's nothing to it, they're not gonna bring charges. If there is something to it, they will bring charges and I don't think that's an unreasonable position for any merchant to take.

You would—anytime that Wal-Mart is the victim of a bad check or a fraudulent credit card transaction like this, and I imagine it happens probably a thousand or five thousand times a day with these automated machines, you would place an affirmative duty on Wal-Mart to conduct an internal investigation with the Wal-Mart police, the Wal-Mart mall cops, to have a parallel investigation internally anytime this happens.

Is that what you're saying they have an obligation to do?

Counsel for Mr. Solanki then responded, “Well, they can, they can afford it.” (Transcript Vol. II, pp. 18 – 19). Counsel for Mr. Solanki then argued that Wal-Mart has a “heightened” duty to a customer where the customer is the target of a criminal investigation based on a situation allegedly created by Wal-Mart:

And I would, I would submit that, if the they, themselves, have created the situation which allows one of their own customers to become the target of a criminal investigation, then their duty then becomes heightened toward that customer if the customer, if there are strong suggestions that the customer’s innocent, and, in this instance where you have a customer who proffers his own card and signs his own name to a transaction, and they knew that he was gonna be subject to the criminal investigation, they would have an affirmative duty to participate with the police and explain to the police the problems and to look at their own machinery and try to find out what was done and how this happened.

(Transcript Vol. II, pp. 19 - 20).

Thereafter, following the close of all of the evidence, the court again inquired about the issue of gross negligence, asking counsel, “[h]elp me out, again. How is their [sic] evidence that can go to the jury on the issue of gross negligence?” (Transcript Vol. II, p. 64). Counsel for Mr. Solanki replied that Wal-Mart failed to “explain” the documents provided to law enforcement:

[By Mr. Rollins, Counsel for Plaintiff]: Well, the standard is that there is not even a slight exercise of care, and under these circumstances, when Wal-Mart presents a self-contradictory document and knowing that it will be acted upon by the appropriate authority to arrest Prakash Solanki, it has to take some action to explain that document or, in some way, to prevent his being arrested. When they, when they create the mechanism that will irrevocably lead to his arrest, they have some duty to notify the Sheriff’s Department upon what ground Mr. Solanki will be arrested on.

(Transcript Vol. II, p. 64).

As the trial court correctly observed when initially considering the issue, the actions of the cashier, if negligent, amounted to simple negligence:

A credit card is obviously presented. Under one – under the most reasonable interpretation of the facts, Mrs. Martin’s credit card was presented, either innocently or with culpability, to Wal-Mart. Wal-Mart then keys in that credit card manually. Not the machine. But a manual key in of that credit card.

After it’s all over and done, perhaps ID is checked, perhaps ID isn’t checked, it probably was checked, but there wasn’t a comparison of the ID against the credit card provided, and more importantly, the impression that was given on Plaintiff’s 1 for the credit card that definitely belongs to Mr. Solanki in no way matches up with the credit card transaction that was actually keyed in, the credit card number that was actually keyed in by the clerk.

I see that as simple negligence. I don’t know that’s failure to use the slightest care especially in light of the fact that it certainly appears to me, that, that efforts were made to verify the identification of Mr. Solanki. That seems more like negligence on my, from, in my mind than anything else, and we’re dealing with two credit cards.

(Transcript Vol. II, pp. 20 – 21) (emphasis supplied). Thus, the trial court acknowledged that the alleged transaction in Wal-Mart would give rise only to a claim for simple negligence. The trial court ruled, however, that both gross negligence and punitive damages would be submitted to the jury:

All right [sic]. As a general rule, issues of gross negligence are properly for the jury to determine. There’s evidence, based upon the weirdness of this transaction, for lack of a better word, in the record, there’s evidence from which the jury could conclude that, in some way, plaintiff was grossly negligent in the way they or, sorry, that the defendant Wal-Mart, was grossly negligent in the way they handled this transaction. There is evidence from which they could

reasonably conclude that. I'll charge gross negligence and punitives.

(Transcript Vol. II, p. 66). Thus, the trial court reasoned that because the transaction was "weird" and gross negligence is generally an issue of fact, that gross negligence and punitive damages would be charged. Thereafter, as discussed, the trial court indicated that it would not charge gross negligence and would charge punitive damages. (Transcript Vol. II, p. 104). The trial court erred in determining that either issue should be submitted to the jury as there was no evidence to support a finding of either gross negligence or punitive damages.

B. The Trial Court Erred in Applying a Gross Negligence Standard without Making a Finding of Reckless, Wanton, or Willful Misconduct by Wal-Mart Required for Submission of Punitive Damages to the Jury.

As set forth, the trial court applied the gross negligence standard and ruled that a jury question existed as to whether or not Wal-Mart exercised even slight care. In so doing, the trial court erred by failing to make a finding that there was sufficient evidence of reckless, wanton, or willful misconduct to support an award of punitive damages. Rather, the trial court merely concluded that the issue of gross negligence, *i.e.*, whether or not Wal-Mart failed to exercise even the slightest care, was an issue of fact for the jury based on the "weirdness" of the transaction without making a finding as to whether there was evidence of reckless, wanton or willful misconduct. As the South Carolina courts have long observed, "[w]hile punitive damages are recoverable for negligence so gross or reckless of consequences as to imply or to assume the nature of wantonness, willfulness, or recklessness, yet they are not awarded in this State for mere gross negligence." See *Sample v. Gulf Ref. Co.*, 183 S.C. 399, 411, 191 E.E. 209, 214 (1937). In focusing on

gross negligence and the standard of absence of even slight care, the trial court failed to make a determination in the first instance that there existed sufficient evidence from which a jury could conclude by clear and convincing evidence that the alleged misconduct by Wal-Mart was willful, wanton or reckless. *See Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. at 564, 619 S.E. 2d at 11 (“Trial judges in this state have long been required, as a threshold matter, to assess the culpability of a defendant’s conduct to determine whether punitive damages are available in a given case (i.e., whether the issue should be submitted to the jury).” (quoting *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet Inc.*, 324 S.C. at 152, 478 S.E.2d at 58)).

Even if the trial court could be deemed to have concluded that the alleged gross negligence of Wal-Mart rose to the level of recklessness sufficient to submit the issue of punitive damages to the jury, there is simply no evidence in the record to support a finding of reckless, wanton, or willful misconduct by Wal-Mart and accordingly, the award of punitive damages must be reversed.

C. Respondent Has Failed to Identify Any Authority to Support the Argument that Wal-Mart Owes a Heightened Duty to Protect Its Customers from Criminal Prosecution and Thus, the Alleged Heightened Duty Cannot Support an Award of Punitive Damages.

Mr. Solanki’s claim for punitive damages rested on his argument that Wal-Mart had a “heightened” duty to protect Mr. Solanki from criminal prosecution and did not undertake some unidentified act when it complied with the request of Deputy Cashion to provide her with documents and video related to Mr. Solanki’s transaction. (Transcript Vol. II, pp. 19 – 20). This argument fails as a matter of law and is insufficient to support an award of punitive damages.

First, Mr. Solanki cited no authority for the claim that Wal-Mart owed a heightened duty to Mr. Solanki once the police requested evidence from Wal-Mart. It is well-established that negligence is the breach of a duty of care owed to the plaintiff by the defendant. *See, e.g., Bell v. Atl. Coast Line R.R.*, 202 S.C. 160, 181, 24 S.E.2d 177, 186 (1943). To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) resulting in damages to the plaintiff; and (4) the damages proximately resulted from the breach of duty. *See, e.g., Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 368-69, 635 S.E.2d 97, 101 (2006). In determining whether a particular act or omission is negligent, the test used is what would a person of ordinary reason and prudence do under the circumstances at that time and place. *See, e.g., Spahn v. Town of Port Royal*, 326 S.C. 632, 637, 486 S.E.2d 507, 510 (Ct. App. 1997). The issue is what, if any, duty a merchant owes a customer in the regular course of its business. *See Regions Bank v. Schmauch*, 354 S.C. 648, 668-69, 582 S.E.2d 432, 443 (Ct. App. 2003).

Under South Carolina law, the standard of care in a negligence case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. *See e.g., Madison ex. rel. Bryant v. Babcock Center, Inc.*, 307 S.C. 42, 53, 634 S.E.2d 275, 278 (2006). South Carolina courts have long recognized that merchants owe customers a general duty of care: "a merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care...." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). Thus, a merchant must take reasonable care to avoid acts or omissions

which he can reasonably foresee would be likely to injure another person who may be so directly affected by his acts or omissions.

Appellant could locate no South Carolina authority for the proposition that a merchant owes a “heightened” duty to a customer suspected of criminal activity in a transaction that would have required Wal-Mart to do anything other than what it did and the record contains no citation of such authority by Mr. Solanki. Simply put, there was no “heightened” duty owed with regard to Mr. Solanki and there was no evidence from which a jury could conclude that Wal-Mart acted unreasonably in complying with the request from law enforcement. Moreover, even assuming that the provision of information to law enforcement by Wal-Mart was somehow unreasonable, there is absolutely no evidence that Wal-Mart acted in a willful, wanton or reckless manner in providing the requested receipts and video to Deputy Cashion and thus, the trial court erred in submitting the issue of punitive damages to the jury.

Second, Mr. Solanki presented no evidence to show that Wal-Mart deviated from any industry standard by providing the requested evidence to law enforcement without conducting its own independent investigation to “explain” the evidence to the deputy and thus, the conduct could not give rise to a finding of wanton, willful or reckless conduct. Pursuant to South Carolina law, “unless the subject is a matter of common knowledge, expert witness testimony is required to establish both the standard of care and defendant’s failure to conform to the standard....” *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 203 (Ct. App. 2002). Mr. Solanki has presented no evidence, expert or otherwise, to establish an industry

standard requiring Wal-Mart to conduct its own independent investigation or otherwise assist law enforcement with interpretation of evidence.

Third, there was no evidence that Wal-Mart knew or had reason to know of any information regarding the transaction that would have exonerated Mr. Solanki. Even if Wal-Mart associates had reviewed the three receipts and video provided to Deputy Cashion they would have been able to provide nothing more than the information the deputy already had, *i.e.*, that the credit card number on the hand-keyed credit card receipt did not match the credit card number on the stenciled receipt from the credit/debit card in Mr. Solanki's name. There is simply no evidence to show that a review of the documents by Wal-Mart would have gleaned information that would have precluded Mr. Solanki's arrest.

To assert that somehow Mr. Solanki would not have been arrested if Wal-Mart had provided some additional unspecified information to the deputy is mere speculation and conjecture and does not at all support a finding that Wal-Mart acted in a reckless, wanton or willful manner. The trial court's conclusion that the transaction was "weird" and thus gave rise to a cause of action for gross negligence is simply insufficient to sustain the punitive damages award as a matter of law. In short, there is no evidence that Wal-Mart had knowledge that Mr. Solanki would be arrested and in any event, there is no evidence to show that Wal-Mart was aware of any information that would have precluded Mr. Solanki's arrest or that such evidence even existed. As such, Wal-Mart was under no legal obligation to undertake an independent investigation to ascertain such information, which did not exist here in any event. Because there was no evidence from which a jury

could conclude by clear and convincing evidence that Wal-Mart acted in a manner that was willful, wanton, or reckless, the award of punitive damages should be reversed.

II. THE TRIAL COURT ERRED IN DENYING WAL-MART'S POST-TRIAL MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR REVERSAL OR REDUCTION OF PUNITIVE DAMAGES.

Wal-Mart timely filed post-trial motions including a motion for judgment notwithstanding the verdict, motion for new trial absolute, motion for new trial nisi remittitur and motion for reversal or reduction of punitive damages. Because there was insufficient evidence to sustain the punitive damages award, the trial court erred in denying the motions for judgment notwithstanding the verdict and the motion for reversal or reduction of punitive damages.

When reviewing the denial of a motion for judgment notwithstanding the verdict, the appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmoving party. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999) (citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992)). The appellate court should reverse the lower court where there is no evidence to support the ruling below. *Elam v. S.C. DOT*, 361 S.C. 9, 13, 602 S.E.2d 772, 782 (2004) (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994)).

In denying Wal-Mart's motions for judgment notwithstanding the verdict and to reverse or reduce punitive damages the trial court concluded for the first time that there was sufficient evidence of willful, wanton, or reckless conduct to support an award of punitive damages. *See Order Denying Wal-Mart's Post-Trial Motions at 12.* The trial

court cited *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) for the proposition that “[w]hen evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness.” See Order Denying Wal-Mart’s Post-Trial Motions at 13. The court reasoned:

In the present case, evidence existed from which a reasonable jury could infer that Wal-Mart was not only aware of the dangerous condition but that it also created it. Namely, Wal-Mart knew its employee hand keyed the transaction. Therefore, the Court properly submitted the issue of punitive damages to the jury. Furthermore, the jury did not have to speculate about what happened to the Plaintiff. Plaintiff presented testimony that he did not use Martin’s card, and the jury viewed a video of the transaction. The jury also heard testimony regarding Plaintiff’s arrest and incarceration. As previously mentioned, credibility and evidentiary determinations are best left to the finders of fact.

See id. at 14, 621 S.E.2d 363. Thus, the trial court concluded that Wal-Mart’s knowledge that its employee hand keyed Mr. Solanki’s transaction, along with Mr. Solanki’s testimony that he used his own card, the video and testimony regarding Mr. Solanki’s arrest and incarceration were sufficient to establish clear and convincing evidence of wanton, willful or reckless conduct. The court’s conclusion in this regard is erroneous as a matter of law.

The trial court further concluded that the factors set forth in *Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991), favored affirmation of the jury’s

punitive award.⁴ In so doing the trial court reasoned, *inter alia*, that: (1) “Wal-Mart...was the party responsible for creating and disseminating the ‘evidence’ used in the criminal proceedings;” and (2) “Wal-Mart did not offer an explanation as to the peculiar nature of this transaction or the clear discrepancies between the credit cards numbers [sic]. Had Wal-Mart acted sooner or at least noticed the discrepancies, Plaintiff may have been cleared of the criminal allegations sooner.”

The evidence relied upon by the trial court in making the post-trial determination that a punitive damages award could be sustained by clear and convincing evidence is wholly insufficient to sustain the punitive damages award. First, the fact that a Wal-Mart associate hand-keyed the transaction along with Mr. Solanki’s testimony that he used his own card cannot form the basis of a punitive damages award. As the trial court itself alluded to several times prior to its ruling submitting the issue of punitive damages to the jury, the manner in which the transaction was conducted could only give rise to a finding of simple negligence. Second, even assuming Wal-Mart’s response to law enforcement’s request for information was negligent, that conduct as well can only give rise to a finding of simple negligence.⁵ The trial court cited no factual basis to support its conclusion that Wal-Mart knowingly created or was aware of a “dangerous condition” with regard to Mr. Solanki and failed to take action to minimize or avoid the danger. There simply is no

⁴ *Gamble* sets forth the factors that the trial court should assess when conducting a post-trial review of an award of punitive damages. Wal-Mart does not challenge the amount of the award as there was insufficient evidence to submit the issue of punitive damages to the jury in the first instance and thus, the award should be reversed on this basis. Wal-Mart cites the trial court’s post-trial reliance assessment of the *Gamble* factors to illustrate the woefully inadequate facts relied upon by the court to erroneously affirm the punitive damages award.

⁵ Wal-Mart does not agree that there was sufficient evidence of negligence arising out of Wal-Mart’s compliance with the request for information by Deputy Cashion. However, Wal-Mart acknowledges that the discrepancy between the credit card numbers during the transaction could give rise to a finding of simple negligence. As the jury verdict does not specify the basis for the finding of negligence Wal-Mart does not challenge the jury’s verdict on the simple negligence cause of action.

evidence in the record to support such a finding. As discussed, even if Wal-Mart had reviewed the receipts and video prior to turning them over to Deputy Cashion, the record is absolutely devoid of any evidence that Wal-Mart had any information that would have exonerated Mr. Solanki or precluded his arrest and prosecution. Thus, the issue of punitive damages should not have been submitted to the jury and further, once the award was made, the trial court erred in denying Wal-Mart's post-trial motions to reverse the award of punitive damages.

III. THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE PUBLIC POLICY IMPLICATIONS OF IMPOSING A HEIGHTENED DUTY ON RETAILERS TO CONDUCT AN INTERNAL INVESTIGATION, THUS CHILLING SUCH RETAILERS' COOPERATION WITH LAW ENFORCEMENT.

The heightened duty imposed by the trial court does not follow South Carolina precedent and creates a chilling effect on retailers' ability to cooperate with law enforcement. In the case at bar, Appellant Wal-Mart complied with a request from the Spartanburg County Sheriff's Department to provide documents and video relevant to the transaction at issue. The heightened duty of care imposed by the trial court would force retailers to conduct their own independent internal investigation prior to complying with such a request from local police authorities.

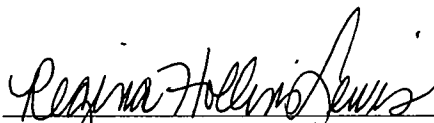
This duty has a multitude of consequences that grate against public policy. First, the investigation conducted by police authorities would be delayed as retailers conducted their own investigation as to the potential innocence of their patrons. This delay could cripple police efforts to apprehend guilty criminals before another such crime is committed. Second, the internal investigation conducted by retailers would force retailers to hire additional personnel to work as detectives monitoring customers and

evaluating potentially fraudulent transactions. This increase in personnel and proper training would result in higher costs passed on to consumers who patronize such retail stores. Third, the imposition of this heightened duty would likely bankrupt smaller retailers that do not have the resources to conduct such an internal investigation. Despite the fact that Appellant Wal-Mart is a large multi-national retailer, the heightened duty imposed by the trial court would be uniformly applied to retailers of all sizes where potentially fraudulent transactions occur. Fourth, this type of duty would put additional strain on the court systems in this state to monitor the investigation procedures of retailers so as to prevent unfair practices. This type of investigation into potentially fraudulent transactions is best left to properly trained police authorities. This Court should reverse the trial court's decision to impose a heightened duty on retailers in order to avoid a chilling effect on the retailers' willingness to cooperate with law enforcement efforts.

CONCLUSION

For the reasons set forth herein Appellant Wal-Mart Stores East LP respectfully requests that this Court find that the trial court erred in submitting the issue of punitive damages to the jury and reverse the award of punitive damages.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-213247

Wal-Mart Store #2806Appellant,

v.

Prakash & Urmila SolankiRespondents.

**APPELLANT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

1. Excerpts from Transcript of Record (Trial), Volume I, March 6 – 7, 2012:

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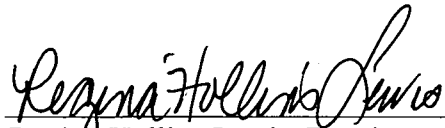
373 – 381
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2. Excerpts from Transcript of Record (Trial), Volume II, March 8 – 9, 2012:

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3. Motions for Judgment Notwithstanding the Verdict, for New Trial Absolute, for New Trial Nisi Remittitur, for Reversal or Reduction of Punitive Damages or for New Trial Pursuant to Thirteenth Juror Doctrine by Wal-Mart Stores East, LP (Filed March 22, 2012)
4. Order Denying Wal-Mart's Post-Trial Motions (Filed October 2, 2012)

The undersigned certify that this designation contains no matter which is irrelevant to this appeal.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2012-213247

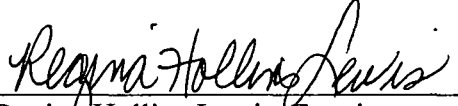
Wal-Mart Store #2806.....Appellant,

v.

Prakash & Urmila Solanki.....Respondents.

PROOF OF SERVICE

I do hereby certify, on this 15th day of March, 2013, that a copy of the foregoing Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal and Proof of Service were served by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to: John D. Hawkins, Esquire and Charles Logan Rollins, II, Esquire, The Hawkins Law Firm, P.O. Box 5048, Spartanburg, South Carolina 29304.


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