THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 19-CP-10-00949
Appellate Case No. 2022-00141

Jacob Murdaugh, ...Appellant,

v.

Walmart Stores East, LP, Jan Lunsford, and John Doe, Defendants,

Of Whom Walmart Stores East, LP and Jan Lunsford are the, ... Respondents,

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Can a retailer wrongfully accuse someone of shoplifting at a retail store, provide no explanation as to why a wrong name was given, and then be shielded from liability after that person is arrested and charged with a crime for over one year?

STATEMENT OF THE CASE

Appellant filed a Summons and Complaint on December 4, 2019 and timely served Respondents. [Complaint]. The Complaint alleges causes of action for false imprisonment, malicious prosecution, defamation/slander/libel, defamation/slander/libel *per se*, assault and battery, negligence, and vicarious liability. Respondents timely filed their Answer on February 10, 2020. [Answer] Respondents filed a motion for Summary Judgment on July 8, 2021 and a Memorandum in Support of this motion on September 14, 2021. [Motion for Summary Judgment and Memorandum in Support] On October 14, 2021, counsel for the parties took the deposition of the key witness, Sgt. Keith Belanger. [Deposition of Belanger] On November 3, 2021, the trial judge heard Respondents' Motion for Summary Judgment, and on December 3, 2021, issued an Order granting Respondents' Motion for Summary Judgment on all causes of action. [Order, dated December 3, 2021] On December 14, 2021, Appellant filed a Motion to Reconsider. [Appellant's Motion to Reconsider] With permission of the court, Appellant filed a Memorandum in Support of Motion to Reconsider on January 7, 2022. [Memorandum in Support of Motion to Reconsider] On January 11, 2022, without hearing, the trial judge denied the Motion to Reconsider. [Order Denying Plaintiff's Motion to Reconsider] This appeal followed.

FACTS

On July 24, 2018, Appellant entered the store owned by Walmart Stores East, LP in Walterboro, South Carolina (hereinafter referred to as the "Walmart") with some companions. [Deposition of Appellant, P. 42]. He attempted to make a purchase, but his card was declined. [Deposition of Appellant, P. 43] He never shoplifted and left the store without incident. [Deposition of Appellant, P. 47-49]

Later, Sgt. Keith Bellanger responded to a call from Walmart reporting a shoplifting incident. [Deposition of Bellanger, P. 8] He initially spoke with Jan Lunsford, who was the nighttime manager. [Deposition of Bellanger, P. 8]. Respondent Lunsford had been at least an assistant manager for Walmart since 2014. [Deposition of Lunsford, P. 9 – 10] She had spoken with Sgt. Belanger numerous times in the past regarding safety and crimes. [Deposition of Lunsford, P. 18, lines 3 – 8] She advised him the night of this incident that she was informed by contract workers that "a couple of individuals tried to push a shopping cart out through the garden area, that they had words back and forth." [Deposition of Bellanger, P. 8] The individuals then left the property. [Deposition of Bellanger, P. 8-9]

Sgt. Bellanger and Ms. Lunsford accessed the video system for viewing, and Ms. Lunsford provided Sgt. Bellanger with still photos. [Deposition of Bellanger, P. 9] Ms. Lunsford produced the name "Jacob Murdaugh" to Sgt. Bellanger as the identity of the shoplifter who was pushing the shopping cart.[1] [Deposition of Bellanger, P. 9, line 24 – P. 10, line 1; P. 27, lines 5 – 7] She informed Sgt. Bellanger that she had personal knowledge of Appellant. [Deposition of Bellanger, P. 10, ll. 5 – 9] Sgt. Bellanger then obtained a shoplifting warrant for Appellant "based upon the information provided to [him] by Ms. Lunsford." [Deposition of Bellanger, P. 10, ll. 11-21; P. 27; P. 73, l. 12 – P. 74, l. 7] The arrest would not have happened if Ms. Lunsford did not tell Sgt. Bellanger that Appellant pushed the shopping cart out of the store. [Deposition of Bellanger, P. 26, ll. 14-19] Walmart prosecutes their own shoplifting cases through court appearance and testimony. [Deposition of Bellanger, P. 28]

[1] The actual shoplifter was never identified.

On October 8, 2018, Appellant was driving his truck and was stopped by police for having a trailer without functioning brake lights and was arrested for the Walmart shoplifting warrant. [Deposition of Appellant, P. 55; Deposition of Bellanger, P. 24, ll. 13-21]

Over a year later, on November 6, 2019, Appellant attended his criminal hearing, and the charge was dismissed after the judge reviewed the photographs of the actual shoplifter. [Deposition of Appellant, P. 66-69]. Walmart participated in the trial of the case. [Deposition of Bellanger, P. 13-14] The photographs from Walmart's security system showed that Appellant was not the same individual who pushed the shopping cart out of the store. [Deposition of Appellant, 80-86; photographs; Deposition of Bellanger, P. 18, ll. 1-3] Ms. Lundsford denied knowing Appellant and even denied having any knowledge of the events that occurred on July 24, 2018. [Deposition of Lunsford]

ARGUMENTS

STANDARD OF REVIEW

In reviewing a motion for summary judgment , the appellate court applies the same standard of review as the [circuit] court under Rule 56(c), SCRCP." *Companion Prop. & Cas.Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006). "Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. "[The] standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Id*. at 390-91, 631 S.E.2d at 916 (quoting *Estes v. Roper Temp. Servs., Inc*., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991)).

The nonmoving party "is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 271, 826 S.E.2d 609, 614 (2019) (quoting *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

LAW

A retailer should not be allowed wrongfully accuse someone of shoplifting at a retail store, provide no explanation as to why a wrong name was given, and then be shielded from liability after that person is arrested and charged with a crime for over one year.

I. Malicious Prosecution.

To sustain an action for malicious prosecution, "a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Law v. S.C. Dep't of Corrections*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). Regarding this cause of action, all of these elements are easily met.

Regarding (1) the institution of criminal proceedings against Appellant (2) by or at the instance of Respondents, Walmart prosecutes their own cases. [Deposition of Bellanger, P. 28] Store Manager Lunsford provided the information to the police that led to the warrant being sworn. [Deposition of Bellanger, P. 9, line 24 – P. 10, line 1] Sgt. Bellanger then obtained a shoplifting arrestwarrant for Appellant "based upon the information provided to [him] by Ms. Lunsford." [Deposition of Bellanger, P. 10, ll. 11-21; P. 73, l. 12 – P. 74, l. 7] The arrest would not have happened if Ms. Lunsford did not tell Sgt. Bellanger that Appellant pushed the cart out

of the store. [Deposition of Bellanger, P. 26, ll. 14-19] Ms. Lunsford agreed that Sgt. Bellanger should issue an arrest warrant. [Deposition of Bellanger, P. 27]

The third element is termination of the proceedings in Appellant's favor. While this fact is not believed to be in dispute, it is contained in the record where the charge was dismissed by the municipal judge. [Deposition of Appellant, P. 69, line 21 – P. 70, line 8]

Regarding the fourth element, "malice," "[i]t is well established that in an action for damages for malicious prosecution, malice may be inferred for want of probable cause." *Elletson v. Dixie Home Stores*, 231 S.C. 565, 574 (S.C. 1957). "The determination of probable cause is ordinarily a jury matter." *Melton v. Williams*, 281 S.C. 182, 185 (S.C. Ct. App. 1984). "Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice. Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person." *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 437 (S.C. 2006). Here, there being no evidence of criminal activity by Appellant, no explanation by Respondents as to why he was arrested, and Sgt. Belanger's testimony that he acted based on statements made by Respondents, malice can be inferred. In the case at hand, there is no evidence that Respondent exercised any caution when providing the wrong name of the shoplifter to law enforcement.

There is no probable cause in this case, the fifth element of malicious prosecution. The surveillance photograph of Appellant [Deposition of Bellanger, Exhibit 5] does not look like the surveillance photograph of the actual shoplifter [Deposition of Bellanger, Exhibit 6]. There is no evidence in the record that Appellant committed any criminal act, or that probable cause existed for Respondents to inform Sgt. Bellanger that Appellant committed any criminal act. To further

the fact that no evidence supports probable cause, Respondents offer no explanation to the contrary. Specifically, Store Manager Lunsford testified that:

- She does not remember the incident [Deposition of Lunsford, P. 10, line 9 – P. 11, line 2]
- She does not recall the surveillance photographs [Deposition of Lunsford, P. 12, lines 2 – 17]
- She did not recall a warrant being taken against Appellant [Deposition of Lunsford, P. 12, lines 18 – 21]
- She does not remember providing information to the police about this case [Deposition of Lunsford, P. 13, lines 19 – 25]
- She does not remember the incident at all [Deposition of Lunsford, P. 16, line 13 – 16; P. 18, lines 9 – 12]
- She did not recall Appellant even being at the store. [Deposition of Lunsford, P. 12, lines 9 – 11; P. 13, lines 2 – 6]

Finally, the sixth element is met in that Appellant was clearly damaged by being arrested and prosecuted in a criminal case. [Deposition of Appellant, P. 53, line 25 – P. 54, line 2; P. 65, line 22 – P. 66, line 9; Exhibit B-5, arrest warrant] More specifically, three months after the actual shoplifter committed his crime, Appellant was driving down the road and law enforcement initiated a traffic stop for a minor traffic violation. This stop was the first time Appellant learned there was a warrant for his arrest. [Deposition of Appellant, P. 56, lines 3 – 9] He was handcuffed. [Deposition of Appellant, P. 56, lines 3 – 9] His parents came and picked up his vehicle while he was in custody and saw him in handcuffs. [Deposition of Appellant, P. 57, line 13 – P. 58, line 6]. He was taken to the detention center, booked, strip searched, placed in a

prison jump suit, placed with general population, and held for approximately 24 hours. [Deposition of Appellant, P. 58, line 7 - P. 60, line 24]. The arrest was posted on the internet. [Deposition of Appellant, P. 14, lines 13 – 18]

The Order granting summary judgment states that "Walmart did not even provide the Walterboro Police with [Appellant]'s name" but such is not the case as Sgt. Bellanger clearly stated in his deposition that Ms. Lunsford was his only source for Appellant's name. [Deposition of Lunsford, P. 9, line 12 – P. 10, line 17]

Respondents cite to *Richardson v. Rent-A-Ctr. E., Inc.*, 2012 U.S. Dist. LEXIS 6617, at *12-13 (D.S.C. Jan. 20, 2012) for the proposition that "Generally when an officer has discretion to make a decision as to whether to prosecute, that discretion renders the decision their own and the person who provided the information is not liable." Reliance on *Richardson* is misplaced in that *Richardson* contemplated "truthful" information being provided to the police. Ms. Lunsford, without explanation, informed the police that Appellant was the individual who attempted shoplifting when in fact a different person unknown to Appellant was the shoplifter.

Respondents' arguments are based mostly on *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 826 S.E.2d 609 (S.C. 2019). In *Huffman*, seventy pounds of copper wire were stolen from Defendant Aiken. A police officer and representative of the defendant viewed surveillance video that depicted an unidentified black male removing the wire. The representative of Defendant Aiken checked with local metal recyclers to determine if the thief attempted to sell the wire. His search led him to recycling company Defendant Sunshine where the wire was located. An employee of Sunshine revealed that a white female brought the wire in. Defendant Aiken advised law enforcement of these findings. Law enforcement then investigated further with Sunshine, spoke with employees of the company, reviewed video, and obtained a copy of the

receipt from when the wire was sold to the recycler. Law enforcement discovered witnesses who stated that the white female brought in wire and provided a copy of the plaintiff's driver's license that she submitted at the time she sold her wire. The police thereafter arrested the white female plaintiff.

After the arrest, evidence was discovered that exculpated the white female and implicated the black male, and the black male pled guilty to stealing the wire. The white female indicated that she was tearing down her home and this is how she was able to sell copper wire. In the civil case, summary judgment was granted in favor of Sunshine.

The case at hand is distinguishable because in *Huffman*, the police came to Sunshine, and Sunshine simply cooperated and answered questions. The Supreme Court held: "we find the court of appeals erred in reversing the trial court's grant of Sunshine's motion for summary judgment as to Huffman's malicious prosecution claim because Huffman failed to present a scintilla of evidence that Sunshine instituted the proceedings against her or that the proceedings were instituted at the instance of Sunshine. Unlike *Huffman*, in this case, Respondents Walmart and Lunsford initiated the investigation and purported to be a victim in this case. There was no further investigation necessary from the police as they were provided probable cause by Walmart and Lunsford, and they acted on such information.

The *Huffman* Court stated further stated:

> This is not to say any individual who acts in bad faith or knowingly reports incorrect information to law enforcement cannot be held liable for false imprisonment or malicious prosecution. *See Reaves v. Westinghouse Elec. Corp.*, 683 F.Supp. 521, 525 (D. Md. 1988) ("The tort of false arrest is predicated upon knowing misconduct."). There is a distinct difference between an individual who, in good faith, reports mistaken or inaccurate information and an individual who purposely provides law enforcement with knowingly false information. *See Brice* , 220 F.3d at 238 ("[T]he critical question is whether the witness provided the police with his honest or good faith belief of the facts.").

Huffman v. Sunshine Recycling, LLC, 426 S.C. 262, 274 (S.C. 2019) (citations in original). Further, while the South Carolina Supreme Court affirmed the grant of summary judgment in favor of Sunshine, in the same opinion it held that the claims against Aiken proceed to trial.

Here, the six (6) elements of malicious prosecution should be left for a jury to decide as there is far more than a scintilla of evidence that Walmart and Lunsford are liable for this cause of action.

II. Defamation.

To prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *McBride v. School Dist. of Greenville*, 389 S.C. 546, 559-60 (Ct. App. 2010). Here, in the light most favorable to Appellant, Respondent Walmart, through its Store Manager Lunsford, falsely published to law enforcement that Appellant shoplifted in their store, and Appellant was arrested as a result of this statement. [Deposition of Bellanger, P. 10, ll. 11-21; P. 73, l. 12 – P. 74, l. 7] The arrest would not have happened if Ms. Lunsford did not tell Sgt. Bellanger that Appellant pushed the cart out of the store. [Deposition of Bellanger, P. 26, ll. 14-19] Ms. Lunsford agreed that Sgt. Bellanger should obtain an arrest warrant. [Deposition of Bellanger, P. 27]

At the summary judgment hearing, Respondents did not appear to argue that the elements were not met, but it did claim that the statements were privileged. However, Respondents only cite to *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d (S.C. 1946) for the proposition that a privilege applies in the context of this case at hand. This citation is misplaced. First, the

Supreme Court in *Bell* reversed the grant of a directed verdict and held that this issue "will depend upon the establishment of the essential facts at the trial." *Id.* at 494; see also *Id.* at 496 (stating "But this is always a question for the jury."). Second, the Supreme Court found that for a privilege to apply, "the statement must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed." *Id.* at 494. Respondents cite to no case that suggest the facts of the case at hand become a warranted occasion, and because Ms. Lunsford provided no explanation to suggest her statements were made in good faith, this should not be that privileged occasion. Indeed, "the defendant cannot get the benefit of the defense of qualified privilege without setting it up as an affirmative defense." *Id.* at 494.

Finally, Respondents claim that *Bell* protects all communications made in a criminal investigation for the purpose of detecting the suspects. The quote from *Bell* states otherwise:

> When one has an interest in the subject-matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, <u>every communication honestly made</u>, in order to protect such common interest, is privileged by reason of the occasion.

Bell v. Bank of Abbeville, 208 S.C. 490, 493-94 (1946) (emphasis added).

Even if Respondents were correct in claiming some qualified privilege might apply, that privilege can still be defeated by malice, which is a question for the jury. There is no evidence supplied by Respondents, or otherwise in this case, that support a claim of privilege. It is not a blanket immunity.

III. False Imprisonment.

The notion that a private individual may face potential liability for false imprisonment is recognized in South Carolina. *Wingate v. Postal Tel. & Cable Co.*, 204 S.C. 520, 528, 30 S.E.2d 307, 311 (1944) ("The charge of false imprisonment is not confined to the party who unlawfully

seizes or restrains another, but it likewise extends to any person who may cause, instigate or procure an unlawful arrest."). As this Court definitively stated in Wingate, it is "well settled that where a private person induces an officer by request, direction or command to unlawfully arrest another, he is liable for false imprisonment." *Id.*; *see Whitmire v. Publix Theatre Corp.*, 164 S.C. 487, 162 S.E. 753 (1931) (finding evidence justified the jury's conclusion theater representative's actions caused plaintiff's arrest by requesting police return plaintiff to the theater for an investigation); *Falls v. Palmetto Power & Light Co.*, 117 S.C. 327, 109 S.E. 93 (1921) (holding sufficient evidence from which the jury could conclude power company's general manager acted unreasonably and without ordinary prudence in calling for the arrest of plaintiff who sold similar goods as those stolen from power company). Accordingly, Respondents are not shielded from liability simply because the police actually made the arrest.

The lower court's order suggests that Respondents are shielded from liability because the report to police was "in good faith." There is simply no evidence to support this finding, and even if there was, there is enough evidence to the contrary to submit this issue for a jury's consideration.

CONCLUSION

In the light most favorable to Appellant, Respondents informed law enforcement that Appellant was shoplifting. There is no evidence of such. On the contrary, there is surveillance photographs of both the actual shoplifter [Deposition of Bellanger, Exhibit 6] and of Appellant who happened to be in the store *around* the same time [Deposition of Bellanger, Exhibit 6]. The actual shoplifter was stocky, had a beard, was wearing a white tee-shirt, was wearing a backwards dark hat, and had a large tattoo on his left arm. Appellant was much thinner and fit, had no beard, was wearing a colored tee-shirt, was wearing a forwards white hat, had no tattoos,

and was wearing a brace on his right wrist. Even more important is that the actual shoplifter pushed a shopping cart full of merchandise out of the store while Appellant left empty-handed.

Respondent Store Manager Lunsford was working that night and called the police to report an incident of shoplifting. According to the responding officer, Sgt. Belanger, based on information she provided him, including Appellant's first and last name, he obtained an arrest warrant for Appellant. Appellant was later arrested and prosecuted before a judge dismissed the charge. Respondent Store Manager Lunsford did not provide any explanation in her deposition and repeatedly stated she did not recall this incident.

For this appeal, Appellant is abandoning his causes of action for assault and battery and for negligence. There is evidence to meet the elements of malicious prosecution, defamation, and false imprisonment. The alleged defenses and privileges should not apply, or at best, should be heard by a jury. Ms. Lunsford was always acting in the scope of her employment.

The lower court erred in finding there was no genuine issue of material fact regarding Appellant's claims for malicious prosecution, defamation, and false imprisonment. This Court should reverse the trial judge and remand this case for trial.

Respectfully submitted,

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Dated: May 23, 2022