

1982

# Elwood E. McFarland v. Skaggs Companies, Inc. : Brief of Respondent

Utah Supreme Court

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Stephen G. Morgan; Attorney for Defendant-Appellant;

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IN THE SUPREME COURT

STATE OF UTAH

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ELWOOD K. McFARLAND, )  
Plaintiff/Respondent, ) Case No. 18352  
vs. )  
SKAGGS, INC., )  
Defendant/Appellant. )  
)

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BRIEF OF RESPONDENT

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APPEAL FROM THE SECOND JUDICIAL DISTRICT  
COURT OF WEBER COUNTY, HONORABLE RONALD O.  
HYDE, DISTRICT JUDGE

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FILED

SEP 28 1982

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Clerk, Supreme Court, Utah

FILED

NOV 14 1983

IN THE SUPREME COURT

STATE OF UTAH

Clark, Supreme Court, Utah

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ELWOOD K. McFARLAND,	)	
Plaintiff/Respondent,	)	APPELLANT SKAGGS ADDITIONAL
vs.	)	AUTHORITIES AND CORRECTIONS
SKAGGS, INC.,	)	
Defendant/Appellant.	)	Case No. 18352
	)	

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COMES NOW Appellant Skaggs pursuant to Rule 75(p)(3) of the Utah Rules of Civil Procedure, and submits its Additional Authorities and Corrections as follows:

1. It is the position of Skaggs, and always has been, that its privilege or justification to detain McFarland was two fold:

(a) the shoplifting statutes which allow a storeowner the right to detain a customer for a reasonable time and in a reasonable manner when the storeowner has reason to believe (probable cause) that the customer has unlawfully taken merchandise from the store without paying for it. (This was the basis on which McFarland was initially approached).

(b) the criminal statute (77-13-4) which allows any private person the right to detain (arrest) another person "for a public offense committed or attempted in his presence" when the private person has reason to believe (probable cause) that the other person has committed a public offense, which includes an assault, in his presence, i.e. specifically, in this case, on her person.

(This was an additional basis on which McFarland was detained).

2. As soon as possible after McFarland was detained, Skaggs called the police in order "to inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer." (76-6-603(5) When the peace officer arrived, he investigated both (a) the shoplifting charge and (b) the assault charge.

Thereafter, he advised Skaggs' security officer Avondet as follows:

Lucas; "Are you really hurt?"

Avondet; "Oh, not that bad. Just you know. I've been hit and I'm not bleeding or cut or anything."

Lucas; "Well it's up to you. We have a good assault case. It's up to you."  
(Record p. 59, 100)

Because Avondet was not hurt, she decided not to have McFarland formally arrested for assault (and thus taken before a magistrate) and because the merchandise she had seen McFarland put in his pocket could not be found, she decided not to have McFarland formally arrested for shoplifting either, and thus it was decided that McFarland should simply be released.

3. The period of time that McFarland was detained was for both the shoplifting charge and the assault charge. They overlapped each other. Thus, if Skaggs was justified or privileged by law to detain McFarland on either the shoplifting charge or the assault charge, the detention was not unlawful. To say it another way, if Skaggs was not justified or privileged to detain McFarland on the shoplifting charge, but Skaggs was justified or privileged to detain McFarland on the assault charge, then the detention was still lawful because the detention period for the assault charge overlapped and was the same as the detention period for the shoplifting charge.

4. Skaggs was not given a fair trial and the trial court committed reversible and prejudicial error by instructing the jury (Court's Instruction No. 12 and McFarland's Supplemental Request No. 2) that in order for Skaggs' detention of McFarland on the assault charge to be justified or privileged, Skaggs had to prove beyond a reasonable doubt that McFarland would have been found guilty of the crime of assault in a criminal court. In addition, the Court committed reversible and prejudicial error by instructing the jury (Court's Instruction No. 11 and McFarland's Supplemental Request No. 1) that in Utah "there is no statutory privilege protecting against an unlawful arrest for assault based on one having probable cause to believe an assault had been committed."

5. Skaggs objected to the Court's Instructions Nos 12 and 11; among others, and requested Instructions that properly set forth the burden of proof in this case, that being, proof by a preponderance of the evidence and not proof beyond a reasonable doubt. Skaggs' Requested Instruction No. 1, attached hereto, stated that the burden of proof was a preponderance of the evidence. The Court did not give this instruction as requested. Skaggs' Requested Instruction No. 2, attached hereto, defined the term "preponderance of the evidence" and "probable cause" and "reasonable belief". The Court did not give these Instructions as requested, but did in substance (Court's Instructions Nos. 2 and 8). Skaggs' Requested Instruction Nos. 5, 6, 7, 10 and 11, attached hereto, stated the law concerning shoplifting. The Court chose only to give Skaggs Requested Instruction No. 11 (Court's Instruction No. 7). Skaggs' Requested Instruction Nos. 12 and 13 stated the law concerning assault. The Court gave

Skaggs' Instruction No. 12 (Court's Instruction No. 9) but added the objectional second paragraph to its Instruction No. 11, to which Skaggs objected, that "if an assault had not been committed, then she had no right to arrest plaintiff" and that "there is no statutory privilege protecting against an unlawful arrest for assault based on one having probable cause to believe an assault had been committed." The Court then instructed the jury in its Instruction No. 12 (McFarland's Supplemental Request No. 2), over Skaggs' objection, that Skaggs had to prove the crime of assault by proof beyond a reasonable doubt or the arrest or detention for assault was unlawful. Thus, Skaggs did request the proper instructions concerning preponderance of the evidence, and what constitutes a lawful detention for shoplifting and assault, both of which are based on probable cause or reasonable belief.

6. The following corrections should be made to Appellant Skaggs Brief on Appeal:

(a) p. 7, cite is 78-11-7, not 78-17-7;

(b) p. 13, cite in Lazarus v. Pascuzzi should be 393 N.E. 2d 1079 (Ill. 1979), not 333;

(c) p. 14, cite should be 393 NE2d 1079, 1080, not 333 P.2d P.2d 1080;

(d) p. 19, cite should be 4 U.L.R. 476, 477 not 486, 487;

(e) p. 22, cite should be 404 A.2d 147, 153 footnote 16 (District of Columbia 1979), not excluding footnote.

Appellant Skaggs respectfully submits that this Court should grant a new trial to Skaggs because the trial court committed reversible and prejudicial error by imposing upon Skaggs in a civil trial the obligation of proving its defense of justification or privilege to

detain plaintiff by evidence beyond a reasonable doubt (i.e. a criminal standard in a civil trial), instead of by a preponderance of the evidence, and by advising the jury that Skaggs had no privilege to detain plaintiff based on probable cause or a reasonable belief that an assault had been committed, and thus the trial court made it impossible for Skaggs to receive a fair trial. In addition, it is respectfully submitted that an award of punitive damages should be based on the facts and circumstances of each case, malice in fact, and not implied by law, malice in law, as where there is an unlawful detention or arrest based on a good faith, honest mistake.

DATED this 14th day of November, 1983.

RESPECTFULLY SUBMITTED,  
MORGAN, SCALLEY & READING

  
STEPHEN G. MORGAN

MAILING CERTIFICATE

I hereby certify that I mailed a true and exact copy of the foregoing Appellant Skaggs' Additional Authorities and Corrections, postage prepaid, to :

Findley P. Gridley  
Bruce R. Baird  
Attorneys for Plaintiff/Respondent  
427 - 27th Street  
Ogden, Utah 84401

on the 14th day of November, 1983.

  
Stephen G. Morgan

INSTRUCTION NO.   /  

Whenever in these instructions it is stated that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of that allegation is proved by a preponderance of the evidence, you shall find that the same is not true. If the evidence is evenly balanced, as to its convincing force on any allegation, you must find that such allegation has not been proved.

INSTRUCTION NO. 2

The term "preponderance of the evidence" means the greater weight of the evidence, that is, such evidence as, when weighed with that opposed to it, is more convincing as to its truth.

The existence of "probable cause," justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved.

Probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances that would be sufficient to induce a reasonable belief in the truth of the accusation. It depends on the facts known, at the time of the arrest, to the person by whom the arrest is made, from which it follows that an arrest cannot be justified by what a subsequent search discloses. On the other hand, if probable cause existed at the time of the arrest, the fact that investigation proves the person arrested to be innocent does not make the arrest unjustifiable.

The term "reasonable belief" is used interchangeably with the term "probable cause".

INSTRUCTION NO. 5

You are instructed that the law in the State of Utah is as follows:

"78-11-17. Shoplifting-Authority to search.-Any merchant may request any individual on his premises to place or keep in full view any merchandise such individual may have removed, or which the merchant has reason to believe he may have removed, from its place of display or elsewhere, whether for examination, purchase or for any other reasonable purpose. No merchant shall be criminally or civilly liable on account of having made such a request."

"78-11-18. Shoplifting-Authority to detain.- Any merchant who has reason to believe that merchandise has been wrongfully taken by an individual and that he can recover such merchandise by taking such individual into custody and detaining him may, for the purpose of attempting to effect such recovery or for the purpose of informing a peace officer of the circumstances of such detention, take the individual into custody and detain him, on the premises, in a reasonable manner and for a reasonable length of time. Such taking into custody and detention by a merchant or his employee shall not render such merchant or his employee criminally or civilly liable for false arrest, false imprisonment, slander or unlawful detention or for any other type of claim or action unless such taking into custody and detention are unreasonable under all the circumstances."

"78-11-14. Shoplifting-Definitions.-As used in this act:

(3) 'Merchant' means an owner or operator of premises in which merchandise is displayed, held or offered for sale and includes his employees, servants and agents.

(2) 'Merchandise' means any personal property displayed, held or offered for sale by a merchant.

(5) 'Wrongful taking of merchandise' means the taking of merchandise that has not been purchased from a merchant's premises without the permission of the merchant or one of his employees, servants or agents."

INSTRUCTION NO. 6

You are instructed that Ainta Avondet had a right to request Plaintiff to place in full view any merchandise that he may have removed, or which Anita Avondet had reason to believe he may have removed, from its place of display or elsewhere, whether for examination, purchase or for any other reasonable purpose and you are further instructed that Defendant Skaggs cannot be found civilly liable to Plaintiff on account of Anita Avondet having made such request.

INSTRUCTION NO. 7

You are instructed that if Anita Avondet had reason to believe that plaintiff had wrongfully taken merchandise then she had a right to recover such merchandise by taking plaintiff into custody and detaining him for the purpose of attempting to effect such recovery or for the purpose of informing a police officer of the circumstances of such detention as long as she did so in a reasonable manner and for a reasonable length of time and you are further instructed that defendant Skaggs cannot be found civilly liable to plaintiff for false arrest, false imprisonment, slander or unlawful detention on account of such taking into custody and detention unless such taking into custody and detention was unreasonable under all the circumstances.

INSTRUCTION NO. 10

You are instructed that the law in the State of Utah is as follows:

"76-6-603. Detention of suspected violator by merchant-Purposes.- Any merchant who has probable cause to believe that a person has committed retail theft may detain such person, on or off the premises of a retail mercantile establishment, in a reasonable manner and for a reasonable length of time for all or any of the following purposes:

(1) To make reasonable inquiry as to whether such person has in his possession unpurchased merchandise and to make reasonable investigation of the ownership of such merchandise;

(2) To request identification;

(3) To verify such identification;

(4) To make a reasonable request of such person to place or keep in full view any merchandise such individual may have removed, or which the merchant has reason to believe he may have removed, from its place of display or elsewhere, whether for examination, purchase or for any other reasonable purpose;

(5) To inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer;"

"76-6-604. Defense to action by person detained.-In any action for false arrest, false imprisonment, unlawful detention, defamation of character, assault, trespass, or invasion of civil rights brought by any person detained by the merchant, it shall be a defense to such action that the merchant detaining such person had probable cause to believe that the person had committed retail theft and that the merchant acted reasonably under all circumstances."

"76-6-604(4). 'Merchant' means an owner or operator of any retail mercantile establishment where merchandise is displayed, held or offered for sale and includes the merchant's employees, servants or agents;

(3) 'Merchandise' means any personal property displayed, held or offered for sale by a merchant;"

INSTRUCTION NO. 11

You are instructed that if Anita Avondet had probable cause to believe that Plaintiff had taken possession of, concealed, or carried away merchandise displayed for sale with the intention of retaining such merchandise without paying for it, then she had a right to detain Plaintiff on or off Skaggs premises in a reasonable manner and for a reasonable length of time (1) to make reasonable inquiry as to whether Plaintiff had in his possession unpurchased merchandise and to make reasonable investigation of the ownership of such merchandise, (2) to request identification, (3) to verify identification, (4) to make a reasonable request of Plaintiff to place in full view such merchandise, and (5) to inform a peace officer of the detention of Plaintiff and surrender Plaintiff to the custody of a peace officer and you are further instructed that under such circumstances Defendant Skaggs cannot be found civilly liable to Plaintiff in an action for false arrest, false imprisonment, unlawful detention, defamation of character, assault, trespass, or invasion of civil rights as long as Anita Avondet acted reasonably under all circumstances.

INSTRUCTION NO. 12

You are instructed that the law in the State of Utah is as follows:

"76-5-102. Assault.- (1) Assault is:

(a) An attempt, with unlawful force or violence, to do bodily injury to another; or

(b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another."

"77-13-1. 'Arrest.' defined-By whom made.- An arrest is the taking of a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

"77-13-2. How made-Restraint allowed.- An arrest is made by an actual restraint of the person of the defendant..."

"77-13-4. By private persons.- A private person may arrest another:

(1) For a public offense committed or attempted in his presence."

An "assault" constitutes a "public offense."

INSTRUCTION NO. 13

You are instructed that if Plaintiff committed an assault on Anita Avondet then she had a right to arrest Plaintiff and to detain him for purposes of surrendering him to the custody of a peace officer.

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