1983

Elwood E. McFarland v. Skaggs Companies, Inc. : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

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

BRIEF OF DEFENDANT/APPELLANT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES CITED

Other Authorities Cited Continued

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NATURE OF THE CASE

This case involves an action for false arrest where the Plaintiff, Elwood K. McFarland, was initially approached by a Skaggs employee in connection with an investigation of alleged shoplifting but based upon an alleged altercation between Plaintiff and the Skaggs employee, Plaintiff was subsequently arrested for an assault.

DISPOSITION IN THE LOWER COURT

The trial was heard on January 11 and 12, 1982, in the District Court of the Second Judicial District in and for Weber County, State of Utah before a jury with the Honorable Ronald O. Hyde, Judge presiding. Based on the Court's instructions, the jury determined that the arrest by the Skaggs employee was not lawful and awarded the Plaintiff $10,000.00 in general damages and $25,000.00 in punitive damages.

RELIEF SOUGHT ON APPEAL

Defendant/Appellant Skaggs contends that the Court's instructions (1) requiring that in order for Skaggs to satisfy its burden of proof on its affirmative defense of justification for detention by reason of an arrest for assault it had to prove beyond a reasonable doubt (a criminal standard in a civil trial) that McFarland would be found guilty of the crime of assault in a criminal court, and (2) advising the jury that in Utah there is no statutory privilege protecting against an unlawful arrest for assault based on one having probable cause to believe that an assault had been committed, were improper and constituted reversable, prejudicial error making it impossible for Skaggs to get a fair trial and based thereon, Skaggs seeks to have the lower Court's judgment reversed and the cause remanded back to the lower Court for a new trial with proper instructions.

STATEMENT OF FACTS

On the 9th day of January, 1980, Elwood McFarland, a dentist and a resident of Ogden, Utah, entered the Ogden Skaggs Drug Center located at 24th Street and Monroe Blvd. to purchase a t.v. antenna plug. (Record pg. 6) The Plaintiff, after entering the store, proceeded to the display stand where the desired electrical antenna plugs were located. McFarland fingered through the display of the electrical plugs. Apparently being unable to find the particular plug, be began to search in nearby areas in which an electrical plug might have been misplaced under an affiliated heading. (Record pg. 11) After finishing a check of possible locations of the wanted article, Plaintiff became satisfied that the particular antenna

plug he wanted was not in stock. Plaintiff then proceeded to leave the store.

What the Plaintiff did not know was that during the time he had been perusing through the merchandise at the display stands, he had been watched by Anita Avondet, a Skaggs Security Officer. (Record p. 93) Avondet testified that she saw the Plaintiff take an electrical part off the shelf, and put it in his right hand trenchcoat pocket. (Record p. 93) Avondet had been standing on a catwalk, behind a one way mirror observing the customer traffic on the electrical aisle. (Record p. 110)

Immediately after passing through the door leaving Skaggs, the Plaintiff was approached by Anita Avondet. According to McFarland, Avondet stopped McFarland with the words: "Sir, I'd like to talk to you". (Record p. 14, 42) or "Sir, I want to talk to you." (Record p. 16) According to Avondet, she stopped McFarland with the words: "Sir, I'm with Skaggs Security. I need to have you come back into the store with me." (Record pg. 95, 98) According to McFarland, he thought she was selling something (Record p. 14, 42) and so he said "I'm not interested" (Record p. 14) or "I don't want to" (Record p. 16) and "I was moving her away so I could go to my car." (Record p. 14) or "I moved her away in an attempt to walk around her to my automobile." (Record p. 16) On cross examination, McFarland was asked: "Your reaction then to her statement "Sir, I'd like to talk to you" was simply to take your left arm and push her out of the way as you proceeded past her." McFarland responded: "Yes, I extended my arm and was trying to walk around her. . . . Q. Was that in the area of the chest?

A. Yes." (Record p. 43) According to Avondet, McFarland struck her across the chest, pushing her, causing her to lose her balance, and she fell down against a rail. Avondet promptly got back up on her feet only to be struck again by McFarland. At this point, Avondet reached for her handcuffs and McFarland reportedly declared "O.K., O.K., I'll go back in." (Record p. 95) Avondet testified that during this experience she was always in fear of immediate bodily harm and that she had been struck by McFarland once by his left hand and once by his right hand. (Record p. 96)

In light of the altercation, Avondet escorted McFarland into the manager's office for further questioning. (Record p. 96) When they reached the manager's office she requested that McFarland hand over his trenchcoat so that it could be examined so as to ascertain whether it contained the electrical part she had observed him put in his right hand trenchcoat pocket. McFarland repled to Avondet that he was not about to hand over anything until he was placed under arrest. At this point Avondet said "O.K., I'm placing you under citizen's arrest for assault". (Record p. 98) Avondet testified that at that time McFarland removed his trenchcoat and handed it to her. She examined this right hand pocket, the pocket into which she had seen McFarland place the part. Examination revealed the electrical part was not to be found in that pocket. She did not examine the left pocket because her observation was that he put in in the right pocket. (Record p. 98) At this juncture, Avondet called the police.

When the police arrived, McFarland was questioned about the alleged assualt on Avondet, and according to officer Lucas of the Ogden City Police Department, McFarland told him that "he had pushed her". (Record p. 70) Officer Lucas stated that Avondet told him that "she saw him pick up the t.v. plug and put in in his right coat pocket. He then walked past the check out stand and out the store without paying for it. . . . She left the catwalk and went out side the store and approached Mr. McFarland and asked to talk to him, at which time he turned around and hit her. He took his right arm and struck her just below the neck, pushing her away." (Record p. 57) Officer Lucas testified Avondet told him "she feared for her safety" . . . "like anybody that gets hit, she was scared, she got hit." (Record p. 83) Avondet also testified she was "in fear of bodily harm." (Record p. 97) Officer Lucas also testified that "from my investigation, myself personally, I felt an assault had been committed." (Record p. 69) McFarland told Officer Lucas that he thought Avondet was "a prostitute". (Record p. 50) According to Avondet, McFarland also told Lucas that "The only reason I struck her was because I thought she was a 'hooker'." and "If I'd really wanted the merchandise there would have been nothing she could have done to have stopped me." (Record (Record p. 100)

After discussing the matter with both McFarland and Avondet, Officer Lucas asked Avondet to accompany him outside the manager's office to the hall. There, Officer Lucas and Avondet had the following conversation:

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 its up to you. We have a good assault case. It's up to you."

(Record p. 59, 100)

Because she wasn't hurt, Avondet decided not to have McFarland formally arrested for assault and because the merchandise Avondet had been McFarland place in his pocket was missing, it was decided that McFarland should simply be released. McFarland was informed promptly of his decision and he was told he was free to go. (Record p. 100) McFarland advised his wife of the incident and no other persons were aware of said incident until such time as McFarland filed his Complaint against Skaggs in late November, 1980, alleging false arrest and slander on the part of Skaggs and suing for $5,000.00 in general damages and $50,000.00 in punitive damages, after which an article appeared in the OGDEN STANDARD EXAMINER reporting that McFarland had filed his civil suit and gave a brief description of the substance of the law suit.

THE COURTS INSTRUCTIONS

At trial, Skaggs argued that Avondet was justified in detaining and searching McFarland for two reasons; to-wit, (1) the privilege granted storeowners to detain and search suspected shoplifters and (2) the privilege granted to private persons to arrest and detain persons who have committed an assault of their person. The period of detention for each of the foregoing two reasons overlapped each

other and thus if Skaggs lawfully detained McFarland for either of the two reasons, the detention was justified and Skaggs is not liable to McFarland for false arrest.

With regard to the first reason, (the merchant privilege arrest), Utah law provides as follows:

> "78-17-7 Shoplifting - Authority to Search. Any merchant may request an 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 make 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 of action unless such taking into custody and detention are unreasonable under all the circumstances."

Skaggs requested that the Court instruct the jury on the above law in its Requested Instructions No. 5 and No. 6, but the Court refused to do so. Instead the Court only gave Skaggs Requested Instruction No. 11 (the Court's Instruction No. 7) which was a summary

of Utah law as set forth in 76-6-603 and 604, which the Court felt also covered the law as set forth in 78-11-17 and 18. However, a reading of these statutes clearly show that the requirements are different. For example 78-11-17 does not require a reasonable belief of the merchant to search a suspected shoplifter whereas 78-11-18 and 76-6-603 and 604 all require that the merchant have probable cause to detain a suspected shoplifter.

With regard to the second reason (private citizen's privilege to arrest), Utah law provides as follows:

> "77-13-4. By private persons - A private person may arrest another
> (1) For a public offense committed or attempted in his presence."

Since an assault constitutes a "public offense" a private person has a privilege to arrest another person based on probable cause when said other person has committed an assault on the private person. Nevertheless, the Court in its Instruction No. 11 instructed the jury as follows:

> "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."

In addition to the above, the Court in its Instruction No. 12 instructed the jury as follows:

> "A charge that Plaintiff Elwood McFarland, M.D. committed the crime of assault requires you to consider this issue under the rules applicable to the criminal action. A Defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of reasonable doubt whether his guilt is satisfactorily shown he is

> entitled to a verdict of 'not guilty'. This presumption places upon the person alleging the commission of a crime the burden of proving the Defendant guilty beyond a reasonable doubt." (This is the first paragraph. The second paragraph defines reasonable doubt).

LAW AND ANALYSIS

POINT I

THE COURT'S INSTRUCTION NO. 12 CONSTITUTED REVERSABLE PREJUDICIAL ERROR IN THAT IT INSTRUCTED AVONDET (SKAGGS) ARREST OF McFARLAND FOR AN ASSAULT WAS UNLAWFUL. SKAGGS HAD TO PROVE BEYOND A REASONABLE DOUBT (A CRIMINAL STANDARD IN A CIVIL TRIAL) THAT McFARLAND WOULD BE FOUND GUILTY OF THE CRIME OF ASSAULT IN A CRIMINAL COURT.

The Court's Instruction No. 12 requiring the jury to "consider this issue under the rules applicable to a criminal action" would undeniably give any reasonable person acting as a juror a sense that he or she were passing judgment upon the Plaintiff for the crime of assault - guilty or not guilty. The logical outgrowth of this instruction in the trial was that if the Defendant, Skaggs, did not carry its burden of proof "beyond a reasonable doubt" of the Plaintiff's criminal guilt, then the Defendant was liable for false arrest.

The Court's Instruction No. 11 clearly outlined the consequences to Skaggs if it failed to carry this misapplied burden.

> "You are instructed that if the Plaintiff committed an assault on Anita Avondet and she had the right to arrest the Plaintiff and to detain him for the purposes of surrendering him to the custody of a peace officer.
>
> However, if an assault had not been committed, then she had no right to arrest Plaintiff. 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's Instruction Nos. 11 and 12 gave Plaintiff's counsel the green light to argue to the jury as follows:

> "Now just two things to make sure we really understand what we're doing, and as far as burden of proof is concerned, again going back to these instructions. It's the burden, the absolute and total and complete burden of the Defendant, that is Skaggs, to prove to you people beyond a reasonable doubt, a criminal standard, that an assault as defined in the Utah State Statute, was committed . . . It is the burden of Skaggs to prove criminally that Dr. McFarland assaulted Ms. Avondet. I would suggest to you that they have not carried that burden. Failing to do it, the jury would have to conclude that you have a false arrest for assault. It's as simple as that. They, failing their burden, they lose. Damages must be assessed." (Record p. 258, 259)

The Court allowed the Plaintiff to prove his case by a preponderance whereas the Court required the Defendant Skaggs to prove its case "beyond a reasonable doubt". The Court was clearly in error and prevented Skaggs from having a fair trial.

In 30 Am Jur 2d on Evidence, Section 1169, it states in pertinent part as follows:

> "It is well settled in substantially all the jurisdictions in the United States, or at least in all those in which the question has been directly raised, that facts constituting a crime need not be proved beyond a reasonable doubt if they are at issue in a civil action, but that it is sufficient to prove the existence of the criminal act by preponderance of the evidence. Thus, although facts may be alleged that, if true, constitute guilt in the party charged, for which he might be indicted and punished, it does not follow that the proof, in order to maintain the cause of action or defense, must be such as would convict the party charged of the crime, if upon trial under an indictment. Thus, in a civil action where there is an allegation of fraud or forgery, or a criminal misappropriation of property, or false representations, or a trespass which might subject the trespassers to criminal prosecution, proof be-

yond a reasonable doubt is not required, and it is generally held that a preponderance of the evidence is sufficient. In a civil action for assault and battery, the fact that the act forming the basis of the action is also a crime does not require the Plaintiff to sustain the allegations of his Complaint by proof beyond a reasonable doubt. (the same would apply to an affirmative defense) Although some cases, in defining the degree of proof essential to establish in a civil action facts which constitute a crime, have used expressions which seem to require more than a mere preponderance of the evidence, they are apparently not intended to require proof beyond a reasonable doubt.

While, in a civil case, a presumption exists that the party to whom a criminal act is imputed is innocent, such presumption may be overcome by a preponderance of the evidence. However, it has been said that this presumption should yield only to satisfactory evidence, which would unavoidably require clearer proof than would be necessary in a case involving no criminality. For example, according to some authorities, to create a preponderance of evidence in favor of a defense of alteration of an instrument, the presumption of innocence must be overcome, and therefore, the proof should be clear and convincing.

In some of the earlier cases it was held that a criminal act which is directly in issue in a civil case must be established beyond a reasonable doubt. But these cases are for the most part no longer authoritative, and in some instances have been expressly overruled." 30 Am. Jr. 2d Evidence Section 1169. (Emphasis added and language in brackets added)

In light of the lack of legal basis for using a criminal burden in a civil trial, one might point out that it would obviously be reversable, prejudicial error if in a criminal case the prosecution were allowed to prove the guilt of the accused by a preponderance of the evidence. The law is consistent in its burden in criminal actions;

that consistency is not less important in civil actions. In particular, when the case involves a question of assault, as in the case at bar, the degree of proof required in 6 Am. Jr. 2d Assault and Battery Section 207, is as follows:

> "The basic doctrine which authorizes issues of fact to be determined in accordance with the preponderance or weight of the evidence applies to civil actions to recover damages for assault and battery and to affirmative defenses therein. The fact that the act forming the basis of the action is also a criminal act does not require the Plaintiff to sustain the allegations of his complaint by proof beyond a reasonable doubt." (Emphasis added)

Prejudicial error was made when the Court imposed upon the Defendant the burden of criminal proof for the elements of the crime of assault in this case. The elements of the crime of assault were only tangentially at issue. If it had been a case where Anita Avondet was trying to recover money damages from McFarland for assault, then the elements of the crime of assault would have been directly in issue, but as we have seen, even then Avondet would not have had to prove them "beyond a reasonable doubt."

Proof "beyond a reasonable doubt" as a standard in civil cases is not one which appears to have any foundation in modern jurisprudence. The history of criminal standards in civil trials is well laid out in 124 ALR 1378 in an annotation entitled "Reasonable Doubt Rule As Applicable To Evidence In Civil Cases Of Facts Amounting To A Felony Or Misdemeanor.", where the annotator summarizes the rule in the United States by stating:

> "It seems to be well settled in substantially all the jurisdictions in this country or at least in all those in which the question has been directly raised, that facts constituting a crime need not be proven beyond a reasonable doubt if they are issued in a civil action." 124 ALR 1380.

In support of the above proposition, the annotator cites court authority in 34 different states, as well as the Federal Courts, for this wide and well founded law. The article also cites case law which provides an interesting analogy to the instant case. For instance a case around the turn of the century stated that in order to make

> "Good a defense of justification on the ground of truth in an action for slander in charging a crime, the Defendant [was] required to prove the Plaintiff guilty of the crime imported to him [by the Defendant] by testimony sufficient to convict the Plaintiff of those charges on a criminal trial."

However, regarding this proposition the annotation states the general rule as follows:

> "But this view, so far as it was adopted, has since been overruled expressly or by implication. (cites omitted) An instruction in an action for libel that if a crime is charged against the Plaintiff by the publication in question, then the Defendant, in order to show the truth of the charge, must prove beyond a reasonable doubt that the Plaintiff committed the crime, was declared to be unsound, as a preponderance of evidence is sufficient." 124 ALR 1385.

These vintage cases, declaring the burden to be only a preponderance of the evidence even though the elements of a crime are at issue in a civil case, are still good law across the United States. In Lazarus vs. Pascuzzi, 333 N.E. 2d 1079 (Ill. 1979), which involved the sale of a boat without the consent of the owner,

the trial court applied a reasonable doubt standard of proof for a criminal act in a civil action. The reviewing court granted a new trial stating as follows:

> "The Court clearly stated that proof of criminal activity requires proof beyond a reasonable doubt. This is not true in a civil case when a violation of law is relied on. In a civil action, the violation like every other fact at issue need only be proved by a preponderance of the evidence. (cites omitted) Because it affirmatively appears on the record that the trial court may have applied the wrong standard of proof to the agents at issue and did in fact apply the incorrect standard to the proof of the criminal act, we must reverse and remand for a new trial. Since the existence of agency in the possible criminal acts are issues of fact, the resolution of which depends largely upon the weight of the evidence and the credibility of the witnesses, only a new trial applying the correct preponderance of the evidence standard to the evidence can correct the possible error at trial. Accordingly, the judgment of the trial court. . . is reversed and the cause is remanded for a new trial." 333 N.E. 2d 1080

Sively vs. American National Insurance, 454 S.W. 2d 799, 454 S.W. 2d at 802 (Tex. 1970), the court held as follows:

> "Plaintiff further urges that the Defendant must prove the decreased was intoxicated beyond a reasonable doubt as in any criminal case. We find no Texas case directly in point, but in 124 ALR 1380, we find this statement: 'It seems to be well settled in substantially all the jurisdictions in this country, or at least in all those in which the question has been directly raised, that facts constituting a crime need not be proven beyond a reasonable doubt if they are at issue in a civil case.' Therefore, we will follow the majority and hold that the facts constituting intoxication need be proven by a preponderance of the evidence as in all civil suits." 454 S.W. 2d at 802.

Furthermore, in Orient Insurance Company vs. Cox, 238 S.W.2d 757 (Ark, 1951), an insurance case concerning a fire in which the crime of arson was at issue, the court stated as follows:

> "Appellants made numerous specific objections to the giving of Instruction No. 7. It is argued that the instruction is abstract, misleading and prejudicial in that it employed language which is only applicable in criminal cases and invaded the province of the jury by commenting on the weight of the evidence. The well settled rule in this country in civil cases is that facts constituting a crime need not be proven beyond a reasonable doubt and only a preponderance of evidence is required to sustain a charge of arson made in defense of a suit on a fire insurance policy. While Instruction No. 7 declared that only a preponderance of the evidence was required, there are other cases where circumstantial evidence and the presumption of innocence are involved and proof beyond a reasonable doubt is required. This language was misleading in that it in fact had the effect of requiring more than a preponderance of the evidence to establish incendiarism." (Emphasis added) 238 S.W. 2d at 763.

The court concluded its opinion by the following sentence:

> "On account of errors indicated in the giving of instructions 7 and 9 requested by Appellee, the Judgment is reversed and the cause remanded for a new trial." Id. at 764.

Based on the above law, it is absolutely clear that proof beyond a reasonable doubt is not the standard or burden in a civil trial and the trial court committed reversable and prejudicial error in so instructing the jury which made it impossible for Skaggs to get a fair trial, such that Skaggs is entitled to a new trial with proper instructions.

POINT II

THE COURT'S INSTRUCTION NO. 11 CONSTITUTED REVERSABLE, PREJUDICIAL ERROR IN THAT IT INSTRUCTED THE JURY THAT AVONDET, AS A PRIVATE CITIZEN, HAD NO PRIVILEGE TO ARREST McFARLAND FOR ASSAULT ON HER PERSON BASED ON PROBABLE CAUSE.

The court's Instruction No. 11 stated as follows:

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

(This paragraph was requested by the Defendant Skaggs).

> "However, if an assault had not been committed then she had no right to arrest plaintiff. 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 above instruction gave plaintiff's counsel the green light to argue to the jury as follows:

> "You and I go out and arrest one of our neighbors for what we consider to be improper activity. After you make the arrest you better make the arrest stick or you've got problems. You better be right or you've got a problem. And that's why the judge has told you here that she doesn't have any privilege, and unless Miss Avondet can prove beyond a reasonable doubt that Dr. McFarland assaulted her, then she committed false arrest, and Skaggs Drug Store or outlet is responsible in damages. (Emphasis added)

Notwithstanding the court's Instruction No. 11, however, the Utah law allows a private person to arrest another for a public offense committed or attempted in his presence, based on probable cause. Section 77-13-4, Utah Code Annotated, 1953, as amended, states as follows:

> "A private person may arrest another for a public offense committed or attempted in his presence."

A fair reading of the above statute, would lead any private citizen to believe that he had a right to arrest another for what he reasonably believed to be an assault committed in his presence and on his person and that probable cause would be valid defense to a charge of false arrest. To conclude otherwise, would mean that a private citizen would have to read something into the statute that is not there, to wit: that if the person arrested is not guilty beyond a reasonable doubt of the offense for which he was arrested, then the private citizen is liable for a false arrest. That simply is not the law in Utah nor can one conclude that from reading the statute.

While the language of the statute itself does not use the words "probable cause to believe", other states with similar statutes have read such words into the statute in order for it to make sense. For example, California's statute Penal Code 837, is almost identical and in the 1980 California case of Gomez v. Garcia, 169 Cal. Rptr. 350 (1980), the Court of Appeals held as follows:

> "Penal Code Section 837 authorizes a private person to arrest another for a public offense committed in his presence. (Similar to the Utah statute 77-13-4, Utah Code Annotated, 1953, as amended) While the statute does not speak of 'probable cause to believe' an offense has been committed in the present of the person making the arrest, (same as Utah) the state of mind of such person of necessity comes into play in a hind sight analysis of whether the arrest was or was not lawful.

> The phrase 'in the presence' is concerned with the conduct of the arrestee which forms the basis for the arrest. In other words, bad conduct must have been in the presence of the person making the arrest. Where the validity of the arrest turns on whether that conduct constitutes a public offense, the test to be applied must be one of whether the person making the arrest had a reasonable, good faith belief that it did. . . . 169 Cal. Reptr. at 352, (Emphasis added)

The facts of this California case are interesting as they pertain to the defense of ones own self or ones own property. The case involved a disgruntled exemployee (Gomez) who returned to his old place of employment. He was asked to leave, he refused. He was arrested by his employer for breach of the peace and the police were called. Gomez was acquitted of the misdemeanor charge of breach of the peace. Gomez then promptly brought suit for false arrest and false imprisonment. The court found that his employer was acting on probable cause that he had committed the crime. It must be noted that the employer was protecting his own property as it was his own place of business, and on that basis, even though Gomez was acquitted of the charge for which he was arrested, recovery was denied. Probable cause was present. It is quite certain the result would have been the same if the employer had done the arresting in protection of his own person but it is likely quite certain the result would not have been the same had the employer done the arresting in protection of another's property or person.

In another 1980 case, Chavis vs. Henderson, 488, F.Supp. 325 (NY 1980), the Court stated "to support an arrest by a police

officer or civilian there must be reasonably trustworthy information known to the arresting individual sufficient to warrant a prudent man in believing that the petitioner committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, Thirteen Lawyers Edition 2nd, 142, 1964.

In a 1971 Utah Law Review Article, the author in a footnote likens an Illinois statute concerning the arrest power of a private citizen to a Utah statute. The notes states:

> "The arrest power of a private citizen in Illinois is similar to that in most other jurisdictions. The Illinois statute authorizes a citizen arrest where there is a reasonable ground to believe that an offense other than an ordinance violation is being committed. Illinois Annotated Statutes, C.G. 38 Sections 107-3. (Emphasis added)(Vol. 4 U.L.R., 486, 487, fn.9)

In Utah, the statute is even more liberal in that a citizen may arrest where inter alia, "any public offense is commited in his presence." Utah Code Annotated 77-13-4. The all important point, however, is that said arrest need be based only on probable cause.

It is submitted that the Court mistakenly based its inclusion of the second paragraph of Instruction No. 11 on the Restatement of Torts, 2d, Section 119, which was provided to the Court and argued by the Plaintiff's counsel, which states as follows:

> "A private person is privileged to arrest another without a warrant for a criminal offense. . . (c) if the other, in the presence of the actor, is committing a breach of the peace. . . ."

Under the comment on clause (c) and (d) the Restatement states as follows, in covering situations where the breach of the peace in-

volves the property or person of someone other than the person making the arrest, which is an all important distinction in understanding the law in this area:

> "o. Reasonable suspicion. To create the privilege to arrest another, it is not enough that the actor-whether a private person or a peace officer-reasonably suspects that the other is committing a breach of the peace, except as stated in Clause (e), and in Section 121(c), where the actor is a peace officer and he arrests a participant in an affray. If in fact no breach of the peace has been committed, a mistaken belief on the part of the actor, whether induced by a mistake of law or of fact and however reasonable, that a breach of the peace has been committed by the other does not confer a privilege to arrest under Clause (c).
>
> Illustration:
>
> 4. A, a private person, sees B and C fighting. Reasonably believing it to be a mutual combat, A arrests both B and C. In fact B was acting in self-defense. A's arrest of B is not privileged under the rule states in Section 121(c)."

This Restatement section is inapplicable in the case at bar because the case at bar involves a breach of the peace on the person making the arrest, not a third person as set forth in the Restatement Illustration.

The landmark California case of Collyer vs. S.H. Kress & Company, 54 P.2d 20 (1936) makes the distinction between Section 119 of the Restatement (which involves the person or property of one other than the person making the arrest) and the case at bar (which involves only the person making the arrest). In 137 ALR 501, the annotator approves the distinction recognized in the Collyer case

and then quotes directly from the Collyer case as follows:

> "We, therefore, approve the distinctions made in Collyer v. Kress & Company, . . . That broad statement occasionally appears to the effect that probable cause is no defense in actions for false imprisonment. . . . In all cases involving solely the legality of the process, it is obvious that probable cause is not pertinent to any issue in the case. Because of like irrelevancy, the statement may properly be made in cases of illegal arrests upon suspicion by a private person where, by statutory authority or otherwise, he is permitted to make such an arrest only when the offense is being committed in his presence. However, those authorities which hold where a person has reasonable grounds to believe that another is stealing his property, as distinguished from those where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner [citing cases], must necessarily proceed upon the theory that probable cause is a defense. And this is the law because the right to protect one's property from injury has intervened. In an effort to harmonize the individual right to liberty with a reasonable protection to the person or property of the Defendant, it should be said in such a charge of false imprisonment, where a defendant had probable cause to believe that the plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, that probable cause is a defense, provided, of course, that the detention was reasonable. As already indicated, the rule should be different if the offense believed to be in the process of commission relates to the person or property of another." (Emphasis added)

The opinion is clear that "if the offense believed to be in process of commission relates to the person or property of another" probable cause is not enough to confer the privilege to arrest. This statement is consistent with the aforementioned Restatement Illustration where the arrestor (A) arrested (B) and

(C) for an offense "believed to be in the process of commission which relate[d] to the person or property of another." On the other hand, the opinion is also clear that "probable cause is a defense" if it exists in a circumstance where a defendant had probable cause to believe that the plaintiff was about to injure the defendant in his person or property." Id. at 502 (emphasis added).

Thus, defense of ones own self, or defense of ones own property involves a completely different area of the law than the defense of another or defense of another's property. This distinction of protecting one's own person and property by private citizen arrest on the basis of probable cause is noted in the recent 1979 District of Columbia case of Fanier vs. Chesapeake and Potamac Telephone Co. of Maryland, 404 A.2d 147, 153 (District of Columbia, 1979) where the court held as follows:

> "In this jurisdiction probable cause becomes material where defendant arrests or detains plaintiff without a warrant or where he claims to be acting in a protection of his person or property. Liability will not be imposed in those circumstances if there are reasonable grounds to justify the detention, and the detention is accomplished in a reasonable manner." (Emphasis added)

The Restatement of Torts 2nd also recognized this all important distinction in Sections 63-68. In Section 67, the following is stated:

> "Section 67. Assault or Imprisonment in Self-Defense. The actor is privileged in-

> tentionally to confine another or to put him in apprehension of a harmful or offensive contact for the purpose of preventing him from inflicting a harmful or offensive contact or other bodily harm upon the actor, under the same conditions which create a privilege to inflict a harmful or offense contact or other bodily harm upon the other for the same purpose." (Emphasis added)

Under the Comment, it is stated as follows:

> "The actor is privileged to impose such a confinement or put the other in such an apprehension of a bodily contact if, but only if, the conditions stated in Section 65 or 66 are satisfied."

The conditions of Sections 65 and 66 are that if the actor has a reasonable belief a harmful or offensive contact is about to be perpetrated upon him, he is extended the privilege under the terms of 67.

The Restatement of Torts, Section 141, entitled Afray or a Similar Breach of the Peace, also states:

> "Either a peace officer or a private person is privileged to use force against another or to impose confinement upon him for the purpose of terminating or preventing the renewal of an afray or an equally serious breach of the peace which is being or has been committed in the actors presence. Or, in preventing such other from participating therein if (a) the other is or the actor reasonably believes him to be participating or about to participate in the afray. and (b) the confinement or force is not intended or likely to cause death or serious bodily harm and (c) the actor reasonably believes that the force or confinement is necessary to prevent the other from participating in the afray or other equally serious breach of the peace." Restatement of Torts, Second 141.

Under the Comment, the Restatement states as follows:

> "Affect of actors mistake. In order that the privilege may be available under the rules stated in this section, it is necessary that an afray or other breach of the peace be about to be committed or have been committed immediately before the actor's presence. If this is the case, the actor is privileged if he believes that the other is participating or about to participate in the afray or breach of the peace and his privilege is not destroyed by the fact that his believe is mistaken provided the mistake is not unreasonable."

Thus, the guilt or innocence of an arrestee is not the pivotal element when one is protecting his own property or person. The element to be proved in all cases involving ones own person or property is the reasonableness for the arrest by that person, or his agent, i.e.; probable cause.

In further support of the above law is Cervantez vs. J.C. Penneys, 595 F.2d 975 (1979) where in the California Supreme Court explained Collyer vs. S.H. Kress & Company, supra, as follows:

> "At the time of the arrest in this case, merchants were protected from civil liability to false arrest or false imprisonment by a common law privilege that permitted the merchant to detain for a reasonable time and in a reasonable manner for investigation any person whom the merchant had probable cause to believe had unlawfully taken or attempted to take merchandise from the premises. The privilege to detain upon probable cause was established in an effort to harmonize the individual right to liberty with the inherent right of an owner of property to protect his interest in that property." (Emphasis added)

The above underlined language is the balance struck in Collyer. The inherent right of an owner to arrest or detain on probable cause of theft of his property is justified because he might be able to protect his interest. The same is true as it pertains to the person of the arrestor who with probable cause believes that he must arrest in defense of his own person. To again quote Collyer:

> "And this is the law because the right to protect one's property from injury has intervened. In an effort to harmonize the individual right to liberty with a reasonable protection to the person or property of the defendant, it should be said in such a charge of false imprisonment, where a defendant had probable cause to believe that the plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, that probable cause is a defense, provided, of course, that the detention was reasonable." Collyer vs. Kress Co., 54 P.2d 20, 23 Cal. (1936). (Emphasis added)

Based on this common law privilege, Avondet had the right to arrest, in protection of her person, on probable cause of assault. The jury should have been so instructed and the court's failure to do so constituted reversable, prejudicial error.

In Bettolo vs. Safeway Stores, 54 P.2d 24 (1954), the California court held as follows:

> "The trial court instructed the jury that it should disregard any evidence tending to prove probable cause and that such defense was not applicable in actions for false imprisonment where exemplary damages were not asked.

> The instruction was error and palpably prejudicial. Any person may make an arrest for a misdemeanor committed in his presence. Section 837 Pen. Code." (Emphasis added)

The Court's Instruction No. 11 in the case at bar was also "error and palpably prejudicial." The court instructed the jury that "there is no statutory privilege protecting against an unlawful arrest for assault based on one having probable cause to believe an arrest had been committed." Section 77-13-4, Utah Code Annotated, 1953, as amended, specifically says "a private person may arrest another for a public offense (assault) committed or attempted in his presence" and both the authors of the Utah Law Review and the courts of other states with similar statutes have all concluded that an arrest can be lawfully made based on "probable cause" or "where there are reasonable grounds to believe" that such an offense (assault) has been committed.

Thus, there is in fact a statutory privilege for a private person to arrest for assault and if the assault is committed or attempted on the person making the arrest, such arrest is privileged if the arresting person had probable cause or reasonable belief that the offense of assault was being committed or attempted on his person. The jury should have been so instructed and the court's failure to so instruct constituted an error at law and was palpably prejudicial which made it impossible for Skaggs to get a fair trial such that Skaggs is entitled to a new trial with proper instructions

POINT III

THE COURT SHOULD RECONSIDER THE STANDARD OF MALICE IN LAW LAID DOWN IN THE TERRY DECISION AND ADOPT MALICE IN FACT INSTEAD OF MALICE IN LAW.

As a result of the Supreme Court holding in Terry vs. Z.C.M.I., 605 P.2d 314 Utah (1979), the court in its Instruction No. 14 instructed the jury as follows:

> "Before punitive damages may be awarded you must find the issues in favor of the plaintiff and against the defendant. In cases of false arrest where the defendant has not met its burden of establishing that the arrest was based upon probable cause the law implies such malice as necessary to justify the award of punitive damages." (Emphasis added)

The Supreme Court decision in Terry, supra, adopting malice in law instead of malice in fact, was commented on by Ronald Boyce in an article entitled "A Thumbnail Sketch of the Utah Supreme Court Decisions, 1979-1980" published in the December 1981 issue of the Utah Bar Journal as follows:

> "The Court indicated that a private party could be held liable for false arrest if, after applying traditional standards of probable cause, it was shown that there was an abstance of an honest, subjective, probable cause."

Boyce concluded as follows:

> "In authorizing punitive damages on the bases of malice in law rather than malice in fact, the Court has taken the position supported by only a small minority of jurisdictions." (Emphasis added)

In 1980, the Utah Law Review Volume 3, in an Article entitled "Developments in Utah Law", on page 698, that part of the Terry decision adopting malice in law instead of malice in fact, is criticized as follows:

"The questionable step in the court's reasoning lay not in equating the absence of probable cause with malice in law, but in declaring malice in law sufficient to uphold a punitive damage award. While there is some support for the proposition that a finding of malice in law will warrant punitive damages, other courts have held that punitive damages are only possible when there has been a showing of malice in fact. Malice in fact, or actual malice, is defined in a variety of ways, most involving known falsity or reckless disregard for the truth or falsity of a charge. However, courts that require actual malice to sustain a punitive damage award agreed that actual malice involves an element of active wrongdoing, not the mere absence of probable cause.

The actual malice rule creates three tiers of liability. If the merchant has probable cause to detain a patron, no liability arises. If the merchant acts without probable cause, but in good faith, liability arises only for compensatory damages. Liability for punitive damages, however, would arise only when the merchant's act is intentionally or reckless malicious.

The actual malice rule is preferrable for several reasons. First, by limiting punitive damages to egregious false imprisonments, the rule better comports with the notion that punitive damages are appropriate only for aggravated torts. Second, the actual malice rule allows for a fairer allocation of the burden of proof. The Utah court was correct in holding that the defendant must prove probable cause; the plaintiff would otherwise face the difficult task of proving a negative-the absence of probably cause. However, it is both practical and logical to place the burden of proving actual malice on the plaintiff, and basic fairness demands that a party seeking to punish another should bear the burden of proof. Moreover, the actual malice rule is consistent with the apparent intent of the Utah Legislature to give the merchant greater protection against the shoplifter.

Finally, the malice-in-law instruction implicitly approved by the court may be difficult for jurors to understand since they probably conceive of malice

in the dictionary sense the malice in fact. If the jury is told that lack of probable cause establishes legal malice, conversely, jurors may infer that probable cause is established merely by showing the absence of actual malice. That inference would be clearly erroneous. Moreover, an instruction that punitive damages are allowed on a showing of mere legal malce, an instruction apparently countenanced by the court, may lead the jury to believe that punitive damages are required whenever legal malice is established. That would also be clearly erroneous. As has been suggested, a jury properly following the law as enunciated in Terry would be very likely to reach a Draconian result when the merchant has made a good-faith mistake. On the other hand, some juries may be inclined to find no cause of action in a good-faith mistake situation if they misunderstand the instructions and do not believe the merchant's conduct warrants the imposition of a punishment. The actual malice rule, then, may benefit some plaintiffs by making it clear to the jury that it may find a middle ground and award compensatory damages only.

The very real problem of shoplifting pits two important considerations against each other- the right of the merchant to protect his inventory and the right of the citizen to be free from unwarranted detention and accusation. The common law rule of strict tort liability protected the patron, but at the expense of the merchant's property interest. On the other hand, absolute immunity for the merchant would go too far in allowing one private citizen the right to detain, search and question another.

The plaintiff in Terry suffered damage, for which she deserved compensation. However, by sanctioning unrestricted punitive damages for a good-faith mistake, the Terry court tipped the balance too far in favor of the patron and against the merchant. To remedy this imbalance, the court or the legislature should adopt the actual malice rule. It protects the interests of both merchant and patron without opening the door to unwarranted punitive damage recoveries." Developments in Utah Law, 1980 Law Review at 698.

Professor Prosser would agree that malice in fact is much better law than malice in law:

> ". . . Where any such element of bad intent or wanton misconduct is lacking, an imprisonment is the result of a mere mistake either as to the identity of the party or as to the propriaty of the arrest or of the imprisonment, punitive damages are denied." W. Prosser, Law of Torts, p. 44 (4th Edition, 1971).

Likewise, malice in law instead of malice in fact is contary to the very purpose of the Utah Shoplifting statutes granting a privilege to the shopowner which "leaves room for an honest mistake" without the imposition of punitive damages. This conclusion is supported by the author of an Annotation entitled "Construction and Effect, in False Imprisonment Action, of Statute Providing for The Detention of Shoplifters," where at 47 ALR 3d 1005-1006, the author concludes that:

> ". . . the fact that under the statute the merchant can act upon reasonable grounds (as the Utah statute does) leaves room for honest mistake." (Emphasis added and language in brackets added)

In light of the Court's Instructions in the case at bar, Plaintiff's counsel argued to the jury that an honest belief on the part of Avondet was not sufficient (R. 254) and that

> "If you find that they (Skaggs) failed in that burden (proving beyond a reasonable doubt that McFarland was guilty of the crime of assault was circumstances where a private citizen has no privilege to arrest for assault based on probable cause) then the law implies malice and its' malice that gives rise to the award of punitive damages." (R. 233)

and further that

> "You people ought to have the courage to award a judgment that is significant enough that those people (Skaggs) get a message, so the next time around it isn't you or me as it was Dr. McFarland on this particular occasion." (R. 235-236).

The reference to "you", the jury, is a plea that the jury put themselves in the shoes of McFarland, which is an obviously violation of the "golden rule" that precludes such argument.

It is respectfully submitted that if one factual circumstances exists which would not warrant punitive damages because of a good faith honest mistake in making a false arrest that the Utah law as it now stands implying malice in law whenever there is a false arrest, notwithstanding the circumstances, that the Terry case, adopting malice in law instead of malice in fact, is bad law and should be over ruled. The Terry case was a 3-2 decision written by Justice Maughn, now deceased, in which Justice Wilkins, who is no longer on the bench concurred, in which Justice Stewart concurred in result and in which Justice Hall dissented with respect to the punitive damages and in which Justice Crockett, who is no longer on the bench, concurred in the dissenting opinion of Justice Hall.

CONCLUSION

Under the Court's Instructions in the case at bar, it was impossible for Skaggs to get a fair trial.

The Court improperly instructed the jury that Skaggs would be guilty of falsely arresting Plaintiff for an assault even

though Skaggs employee had probable cause to believe that Plaintiff had committed an assault on her unless Defendant Skaggs could prove beyond a reasonable doubt that Plaintiff had in fact committed the crime of assault and that in order for Plaintiff to have been guilty of the crime of assault, Defendant Skaggs had to prove beyond a reasonable doubt that Plaintiff's acts which gave rise to the assault, were done intentionally by which term is meant that Plaintiff had a conscious objective or desire to engage in the conduct or cause the result, and that Plaintiff would have to have been found guilty of the crime of assault in a criminal court. Defendant Skaggs objected to the giving of such an instruction in that it imposed a criminal burden on Defendant with regard to an affirmative defense in a civil trial.

The Court also improperly instructed the jury 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 Defendant again objected to the court giving this instruction since Utah does have a statutory privilege, to-wit: Section 77-13-4, Utah Code Annotated, 1953, as amended, as do many other states which interpret similar statutes as allowing such arrest based on probable cause when the person making the arrest is protecting his own person or property.

The Court instructed the jury that if they determined Defendant's employee had falsely arrested Plaintiff that malice would be implied, thus allowing for Plaintiff being awarded punitive damages against Defendant Skaggs Companies, Inc. Defendant again objected to the giving of this instruction on the basis that

whether or not there was malice in connection with a false arrest, thus allowing for punitive damages should not be implied in all cases but determined on the basis of the facts and circumstances of each case.

Because of the Terry case, where Utah adopted malice in law instead of malice in fact, what the Utah Law Review predicted would occur did occur in the case at bar, to wit, "a jury properly following the law as enunciated in Terry would be very likely to reach a Draconian result when the merchant has made a good-faith mistake." However, if the jury had been properly instructed with respect to Skaggs' burden of proof with regard to its affirmative defenses, the jury never would have considered punitive damages. Nevertheless, because the jury was improperly instructed with respect to Skaggs' burden of proof on its affirmative defenses, and after having heard the arguments of counsel in which counsel for Plaintiff violated the golden rule on many occasions in asking the jury in effect to put themselves in the shoes of the Plaintiff and to award a sufficient amount of punitive damages to make it hurt Skaggs so that what Anita Avondet did to Plaintiff would not happen to any of the jurors, returned a general verdict in favor of Plaintiff and against Defendant Skaggs and awarding $10,000.00 in general damages and $25,000.00 in punitive damages.

It is respectively submitted that the Judgment entered in favor of McFarland and against Skaggs pursuant to the jury verdict

should be reversed and the case remanded to the district court for a new trial in accordance with proper instructions as to Skaggs burden of proof with respect to its affirmative defenses.

DATED this 12th day of July, 1982.

MORGAN, SCALLEY & DAVIS

Stephen G. Morgan

Stephen G. Morgan

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Defendant/Appellant's Brief, postage prepaid, to Mr. Findley P. Gridley, Attorney for Plaintiff/Respondent, 427-27th Street, Ogden, Utah 84401, on this 12th day of July, 1982.

Stephen G. Morgan

Stephen G. Morgan