

2005

Lynn A. Jenkins, I. v. National Product Sales, Inc. d.b.a. NPS, and John Does I-X : Brief of Appellant

Utah Court of Appeals

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Lynn A. Jenkins; pro se.

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UTAH COURT OF APPEALS

LYNN A. JENKINS, I.

Plaintiff-Appellant

vs.

NATIONAL PRODUCT SALES,
INC. d.b.a. NPS, and JOHN DOES
I-X

Defendant-Appellee

Appellate Case No. 20050795 CA
[Civil No. 010911737]

APPELLANT' S OPENING BRIEF

THIS APPEAL IS FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE
HON. JOHN PAUL KENNEDY, DISTRICT COURT JUDGE PRESIDING

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Issue: I

THE COURT ERRED WHEN IT GAVE INSTRUCTIONS TO THE JURY TO
DETERMINE THE LAW OF A CITIZEN'S ARREST.

Issue: II

THE COURT'S JURY INSTRUCTIONS TO DETERMINE THE FACTS OF A
CITIZEN'S ARREST WERE IN ERROR.

Issue: III

THE COURT ERRED WHEN IT ORDERED APPELLANT TO PAY THE
APPELLEE'S COURT COSTS.

Issue: IV

THE COURT ERRED WHEN IT DENIED THE APPELLANT DAMAGES
AWARDED TO HIM BY THE JURY.

*(All issues on Appeal were preserved at trial. Note: Trial Transcript, also., ADDENDUM
Page 1., thru Page 6., Plaintiff's EXPEDITED MOTION TO STAY JURY TRIAL which
motion was denied by Judge Kennedy before the commencement of the trial)*

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JURISDICTION OF THE APPELLATE COURT

This appeal is from the final judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Hon. John Paul Kennedy, District Court Judge presiding. The Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j), since the appeal was transfer by the Utah Supreme Court as allowed by Utah Code Ann. § 78-2-2(4).

The relevant dates of the appeal are:

- (a.) the final judgment appealed from was entered August 12, 2005;
- (b.) the notice of appeal was filed September 11, 2005; and
- (c.) there were no motions filed pursuant to Rules 50(b), 52(b), or 59, Utah Rules of Civil Procedure.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue I: THE COURT ERRED WHEN IT GAVE INSTRUCTIONS TO THE JURY TO DETERMINE THE LAW OF A CITIZEN'S ARREST.

Standard of review: *State v. Trane*, 2002 Utah LEXIS 138,*; 2002 UT 97; 57 P.3d 1052,

[*12] "The actual issue in this case is whether the [NPS] officers had authority and probable cause to arrest [plaintiff]."

II. Issue: THE COURT'S JURY INSTRUCTIONS TO DETERMINE THE FACTS OF A CITIZEN'S ARREST WERE IN ERROR.

The jury was given the following questions for its determination:

3. Defendant, or its employees or agents, had the lawful right to detain the Plaintiff because:

- a. The Defendant, and or its employee or agent, had reason to believe that merchandise had been wrongfully taken by the Plaintiff, and the merchandise can (sic) be recovered by detaining the Plaintiff

in a reasonable manner for a reasonable length of time, for the purpose of attempting to effect the recovery of the merchandise or for the purpose of informing a peace officer of the circumstances of the detention.

Yes X [jury answer]

No

b. The Defendant, and or its employee or agent, had probable cause to believe that Plaintiff had committed a retail theft or had taken the goods with an intent to steal them, if the detention is for a reasonable length of time for all or any of the following purposes: to recover the goods, or to make reasonable inquiry as to whether Plaintiff has in his possession unpurchased merchandise; to request and/or verify identification.

Yes X [jury answer]

No

c. to inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer.

Yes

No X [jury answer]

Standard of review: *Eddy v. Albertson's, Inc.*, 2001 Utah LEXIS 172,*; 2001 UT 88; 34

P.3d 781, “. . . [*5] A. Sufficiency of the Evidence. A judgment should be vacated only if, after viewing the evidence and all reasonable inferences in the light most favorable to the prevailing party, the appellate court concludes that the evidence is insufficient to sustain the verdict. *Franklin v. Stevenson*, 1999 UT 61, 987 P.2d 22.”

III. Issue: THE COURT ERRED WHEN IT ORDERED APPELLANT TO PAY THE APPELLEE’S COURT COSTS.

It is ORDERED AND ADJUDGED that Plaintiff take nothing, that the action be dismissed on the merits, and that Defendant recover court costs from Plaintiff in the amount of \$687.00.

Standard of review: *Eddy v. Albertson's, Inc.*, 2001 Utah LEXIS 172,*; 2001 UT 88; 34 P.3d 781, “[*9] The jury was justified in concluding that the [NPS] employees detained [appellant] on suspicion of shoplifting and that they failed to satisfy the citizen's arrest statutory requirements. While there was other evidence supportive of [appellee's] version of events, the jury was entitled to make its own judgments on controverted testimony regarding the facts.”

IV. Issue: THE COURT ERRED WHEN IT DENIED THE APPELLANT DAMAGES AWARDED TO HIM BY THE JURY.

The jury was instructed:

If you find that Plaintiff was detained, please state the dollar amount of damage, if any, Plaintiff proved by a preponderance of the evidence that he suffered as a direct and proximate consequence of the detention. \$5,000.00 [jury answer]

Standard of review: *Eddy v. Albertson's, Inc.*, 2001 Utah LEXIS 172,*; 2001 UT 88; 34 P.3d 781,: “[*5] Sufficiency of the Evidence court concludes that the evidence is insufficient to sustain the verdict. *Franklin v. Stevenson*, 1999 UT 61, 987 P.2d 22.”

STATEMENT OF THE CASE

This case involves a citizen’s arrest by the defendant-appellee, National Products Sales d.b.a., (“NPS”), when they placed the plaintiff-appellant Lynn A. Jenkins I., under an arrest by handcuffing him and physically placing him into a small confinement room at its sales location on Armstrong Drive in Salt Lake City Utah. The appellee’s claimed immunity under Utah Code Ann. §§ 76-6-602, 76-6-603, 76-6-604, 77-7-3, 77-7-12, 77-

7-14 and 78-11-18.

SUMMARY OF ARGUMENTS

The United States Supreme Court in its recent slip opinion, *DOLAN v. UNITED STATES POSTAL SERVICE ET AL.*, Certiorari to the United States Court of Appeals for the Third Circuit, No. 04–848. Argued November 7, 2005, Decided February 22, 2006 raised to the issue of the congressional grant of governmental employee immunity and clearly ruled that federal employees were not immune from tort claims since congress mandated a reasonable delivery of the US mail and *DOLAN* was denied that reasonable mail delivery which caused her harm. 544 U. S. ____ (2005) page 4., Section II:

We assume that under the applicable state law a person injured by tripping over a package or bundle of papers negligently left on the porch of a residence by a private party would have a cause of action for damages. See 28 U. S. C. §§1346(b)(1), 2674. The question is whether, when mail left by the Postal Service causes the slip and fall, the §2680(b) exception for “loss, miscarriage, or negligent transmission of letters or postal matter” preserves sovereign immunity despite the FTCA’s more general statements of waiver. . . . page 5 . . . ‘transmission’ in §2680(b) follow two other terms, ‘loss’ and ‘miscarriage.’ Those terms, we think, limit the reach of ‘transmission.’ ‘[A] word is known by the company it keeps’— a rule that ‘is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.’ *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307 (1961); see also *Dole v. Steelworkers*, 494 U. S. 26, 36 (1990) (‘[W]ords grouped in a list should be given related meaning’ (internal quotation marks omitted)).

A citizen’s arrest is criminal in nature which clearly denies the arrested party any due process, or the rights afforded the criminal at large, in other words, qualified immunity means a person placed under a citizen’s arrest is guilty of shoplifting. without a

trial, nor protection by a magistrate nor right to face his accuser. The United States Supreme Court determined that a federal agent's “. . . [q]ualified immunity is not the law to simply save trouble” *WILL ET AL. v. HALLOCK ET AL.*, Certiorari to the United States Court of Appeals for the Second Circuit, No. 04–1332. Argued November 28, 2005, Decided January 18, 2006, slip page 7., 546 U.S. ____ (2006):

. . . . Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was. **The nub of qualified immunity is the need to induce officials to show reasonable initiative when the relevant [shoplifting] law is not “clearly established,”** *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982); see also *Saucier v. Katz*, 533 U. S. 194, 202 (2001); a quick resolution of a qualified immunity claim is essential. (Emphases added)

page 8., the moment an official is served with a complaint, the judgment bar can be raised only after a case under the [federal] Tort Claims Act has been resolved in the Government's favor. If a *Bivens* action alone is brought, there will be no possibility of a judgment bar, nor will there be so long as a *Bivens* action against officials and a [federal] Tort Claims Act against the Government are pending simultaneously

ARGUMENT

As to Issue: I., the court clearly erred when it gave instructions to the jury to determine the law of a citizen's arrest. Determinative law: The Supreme Court has stated an arrest is an issue of law. See: *State v. Trane*, 2002 Utah LEXIS 138,*; 2002 UT 97; 57 P.3d 1052, “Further, the questions of whether an arrest . . . is constitutional are questions of law *State v. Harmon*, 910 P.2d 1196, 1199; *State v. Brown*, 853 P.2d 851, 855 (Utah 1992).”

As to Issue: II., the court's jury instructions to determine the facts of the citizen's arrest were in error. Determinative law: *Eddy v. Albertson's, Inc.*, 2001 UT 88; 34 P.3d 781: "[*6] The 'citizen's arrest' statute provides, in pertinent part, that '[a] private person may arrest another: (1) For a public offense committed by another in his presence' Utah Code Ann. § 77-7-3(1) [*7] (1995) (emphasis omitted). However, for such an arrest to be lawful, section 77-7-6(1) of the Utah Code requires that 'the person making the arrest shall inform the person being arrested of his intention, cause and authority to arrest him.' [*8] In *McFarland v. Skaggs*, 678 P.2d 298 (Utah 1984), we explained that the notice of 'intention, cause and authority' of section 77-7-6 of the Utah Code must be given 'at the time the prisoner is detained or the arrest is effected, rather than sometime later during the time of detention,' otherwise, the arrest falls 'short of the statutory mandate' and the defendant 'fails to perfect whatever privilege it might have . . . to arrest plaintiff' for the offense. *Id.* at 302."

As to Issue: III., the court erred when it ordered appellant to pay the appellee's court costs. Determinative law: *Eddy v. Albertson's, Inc.*, 2001 Utah LEXIS 172,*; 2001 UT 88; 34 P.3d 781, "[*4] The jury found that [NPS had] falsely imprisoned [*5] [appellant], but did not find intentional infliction of emotional distress. Accordingly, the jury awarded \$ 5616 in damages and costs."

As to Issue: IV., the court erred when it denied the appellant damages awarded to him by the jury. Determinative law: *Eddy v. Albertson's, Inc.*, 2001 UT 88; 34 P.3d 781.

“[*6] Based on th[e] evidence, it was reasonable for the jury to conclude that the two [appellee's] employees were acting on suspicion of shoplifting, and that under the circumstances the suspicion was unfounded and could not give rise to a right to arrest and detain.”

The jury’s verdict on August 12, 2005 found:

1. Plaintiff was detained by Defendant or its employees or agents who acted intentionally and without Plaintiff’s consent.

Yes X [jury answer]

No ____

2. Plaintiff was aware of the detention or was damaged by the detention.

Yes X [jury answer]

No ____

The appellee’s immunity, granted by the jury, failed to meet the immunity standard established by the Utah Supreme Court in *Laney v. Fairview City*, 2002 UT 79; 57 P.3d 1007; 453 Utah Adv. Rep. 40, citing *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985):

The Origins of the Open Courts Clause of State Constitutions, 74 *Or. L. Rev.* 1279 (1995); *Industrial Comm’n v. Evans*, 52 Utah 394, 174 P. 825, 831 (1918) (‘The question of ultimate legal liability cannot be withdrawn from the courts.’). Second, open courts or remedies clauses were intended to grant individuals rights to a judicial remedy for the protection of their person, property, or reputation from abrogation and unreasonable limitation by economic interests that could control state legislatures. See *Schuman*, 65 *Temp. L. Rev.* at 1208; *Berry*, 717 P.2d at 675.¹

¹ *Also note*: RUSSON, Justice, concurring: . . . The *Berry* test applies to legislative acts that would restrict or eliminate the right of the people to seek a remedy under the open courts provision of the Utah Constitution against a person, business, or

together with, the equal protection requirements stated in *Gallivan v. Walker*, 2002 Utah

LEXIS 117,*; 2002 UT 89; 54 P.3d 1069; 455 Utah Adv. Rep. 3:

¶31 Article I, section 24 of the Utah Constitution states: ‘All laws of a general nature shall have uniform operation.’ Utah Const. art. I, § 24. The Fourteenth Amendment to the United States Constitution prohibits a state from enacting laws that deny ‘any person within its jurisdiction the equal protection of the laws.’ U.S. Const. amend. XIV, § 1. Despite their dissimilar language, these two constitutional provisions ‘embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same.’ *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984); see also *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 355-56 (Utah 1997) (observing that Utah's uniform operation of laws provision and federal Equal Protection Clause ‘embody the same general principles’); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 888 (Utah 1988) (same); *Liedtke v. Schettler*, 649 P.2d 80, 81 n.1 (Utah 1982) (stating that article I, section 24 is ‘generally considered the equivalent of the Equal Protection Clause of the 14th Amendment, U.S. Constitution’).

CONCLUSION

The appellee-defendant NPS has acted in bad faith concerning the citizen’s arrest and should be required to pay appellant’s prayer for relief, as stated in the complaint matter.

WHEREFORE, Plaintiff prays that this Court enter its judgment as follows:

1. For an Order that Defendant, and its employees are jointly and severally liable to Plaintiff in the amount of not less than \$250,000.00, or such other and further amounts as may be proven at trial.

government entity participating in a private or proprietary action that allegedly harmed them.

2. For an Order that Defendant, and its officers and directors are jointly and severally liable to Plaintiff in the amount of not less than \$250,000.00, or such other and further amounts as may be proven at trial.

3. For an Order that Defendant, and the owners of the premises used and occupied by Defendant be jointly and severally liable to Plaintiff in the amount of not less than \$250,000.00, or such other and further amounts as may be proven at trial.

4. For costs and attorneys fees, as may be just and reasonable.

5. For such other and further relief as the Court may deem just and proper.

DATED this 19th day of April, 2006.



LYNN A. JENKINS I.,
Plaintiff-Appellant, pro se.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellant's Opening Brief was ☐ hand delivered ☐ mailed by first class mail this April 20th, 2006 to the following:

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Plaintiff, *pro se*,

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY STATE OF UTAH

LYNN A. JENKINS, I.)	
)	
Plaintiff,)	EXPEDITED MOTION TO STAY
)	JURY TRIAL
vs.)	
)	Civil No.010911737
)	
NATIONAL PRODUCT SALES,)	Judge John Paul Kennedy
INC. d.b.a. NPS, and JOHN DOES)	
I-X)	
Defendants.)	

COMES NOW the Plaintiff Lynn A. Jenkins, *pro se.*, and petitions the Court for a stay of the jury trial scheduled on Friday, August 12, 2005 at 8:30 a.m., in the above entitled matter so that he can petition the Court to rule on the claim of immunity as raised by defendant's National Product Sales, Inc., d.b.a., NPS, in its "PROPOSED JURY VERDICT FORM" and "PROPOSED JURY INSTRUCTIONS" for the jury trial.

It is alleged, the Defendant's claim of immunity appears to be unlawful and/or unconstitutional as to Utah Code Ann. § 76-6-206 (2004)("Criminal

Trespass”); Utah Code Ann. § 76-6-602 (2004)(“Retail Theft Statute”); Utah Code Ann. § 76-6-603 (2004)(“Retail Theft Statute”); Utah Code Ann. § 76-6-604 (2004)(“Retail Theft Statute”); Utah Code Ann. § 77-7-3 (2004)(“Citizen’s Arrest”); Utah Code Ann. § 77-7-12 (2004)(“Detention Statute”); Utah Code Ann. § 77-7-14 (2004)(“Detention Statute”); and Utah Code Ann. § 78-11-18 (2004)(“Shoplifting Statute”) in relationship to the following Utah’s constitutional mandates:

Article I, Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Article I, Section 5. [Habeas corpus.]

The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Article I, Section 8. [Offenses bailable.]

(1) All persons charged with a crime shall be bailable except:

(a) persons charged with a capital offense when there is substantial evidence to support the charge; or

(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or

(c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is

likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.

Article I, Section 13. [Prosecution by information or indictment -- Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

Article I, Section 14. [Unreasonable searches forbidden -- Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Article I, Section 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

Article I, Section 26. [Provisions mandatory and prohibitory.]

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Article I, Section 27. [Fundamental rights.]

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

The defendant's immunity fails to meet the private immunity standard

established by the Utah Supreme Court in Laney v. Fairview City, 2002 UT 79; 57 P.3d 1007; 453 Utah Adv. Rep. 40, citing Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985):

The Origins of the Open Courts Clause of State Constitutions, 74 Or. L. Rev. 1279 (1995); Industrial Comm'n v. Evans, 52 Utah 394, 174 P. 825, 831 (1918) ("The question of ultimate legal liability cannot be withdrawn from the courts."). Second, open courts or remedies clauses were intended to grant individuals rights to a judicial remedy for the protection of their person, property, or reputation from abrogation and unreasonable limitation by economic interests that could control state legislatures. See Schuman, 65 Temp. L. Rev. at 1208; Berry, 717 P.2d at 675. [Note: RUSSON, Justice, concurring: . . . The Berry test applies to legislative acts that would restrict or eliminate the right of the people to seek a remedy under the open courts provision of the Utah Constitution against a person, business, or government entity participating in a private or proprietary action that allegedly harmed them.]


together with, the equal protection requirement stated in 2002 UT 89; 54 P.3d 1069; 455 Utah Adv. Rep. 3; 2002 Utah LEXIS 117,*; Gallivan v. Walker,:

¶31 Article I, section 24 of the Utah Constitution states: "All laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. The Fourteenth Amendment to the United States Constitution prohibits a state from enacting laws that deny "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Despite their dissimilar language, these two constitutional provisions "embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984); see also Carrier v. Pro-Tech Restoration, 944 P.2d 346, 355-56 (Utah 1997) (observing that

Utah's uniform operation of laws provision and federal Equal Protection Clause "embody the same general principles"); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 888 (Utah 1988) (same); *Liedtke v. Schettler*, 649 P.2d 80, 81 n.1 (Utah 1982) (stating that article I, section 24 is "generally considered the equivalent of the Equal Protection Clause of the 14th Amendment, U.S. Constitution").

WHEREFORE the plaintiff alleges there is a need for a stay of the scheduled jury trial so that the parties herein might file their memorandums as to the claimed immunity of the defendant in the above entitled action, also, the constitutionality of the above Utah Code citations and for such other and further relief the Court deems proper in the premises on file herein.

DATED this 10th day of August, 2005.


LYNN A. JENKINS I.,
Plaintiff, pro se.

CERTIFICATE OF SERVICE

I hereby certify that on 10th day of August 2005, a true and correct copy of the above EXPEDITED MOTION FOR STAY OF JURY TRIAL was placed in the U.S. Mail, postage first class prepaid, x hand delivered, facsimile, to the following:

Terry M. Plant Esq.,
Andrew M. Wadsworth Esq.,
PLANT, WALLACE, CHRISTENSEN & KANELL
130 East South Temple, Suite 1700
Salt Lake City, Utah 84111


LYNN A. JENKINS I.,

**THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

AUG 15 2005

SALT LAKE COUNTY

By

Deputy Clerk

LYNN A. JENKINS, I.,

Plaintiff,

JURY INSTRUCTIONS

vs.

Case No. 010911737

NATIONAL PRODUCT SALES,
INC.,

Judge John Paul Kennedy

Defendant.

Members of the Jury: Attached are instructions numbered 1 through 33.

Taken together, these instructions govern your conduct and deliberations during the trial of this case and must be carefully considered and followed.

DATED this 12th day of August, 2005.


JOHN PAUL KENNEDY
DISTRICT JUDGE



JURY INSTRUCTIONS

1. GENERAL INSTRUCTION

There are certain laws and rules which apply to this case. I'll explain them to you from time to time during these proceedings in order to give you the information that you need to fulfill your role as jurors at each stage of the trial. I will give you the first set of instructions at this point. You will receive further instructions before evidence is presented and the final set of instructions after the close of evidence. Please pay careful attention. Each of you has been given a copy of these instructions. This copy is yours to keep. As I read these instructions to you, you may follow along on your copy, or not, as you wish. Keep in mind the following points:

Obey Instructions. Some of these instructions give you information about how the trial will proceed, the rules that govern this process, and the roles of the participants, including your role as jurors. Other instructions tell you what the law is that you are to apply in reaching your verdict in this case. If any attorney makes statements of the law that differ from the instructions on the law that I give to you, you should disregard such statements and rely entirely on these instructions.

Many Instructions. There will be many instructions. All are important. Don't pick out one and ignore the rest. Think about each instruction in the context of all the others.

Gender – Singular/Plural. In these instructions, any references to “she” or “her” also include “he” or “him,” or *vice versa*, as appropriate to this case; and the singular, such as “Defendant” includes the plural “Defendants,” when

appropriate.

Note Taking. The Bailiff has provided you with notepads and pens. You may take notes during the trial, but don't over do it, and don't let it distract you from following the evidence. The lawyers will review the evidence in their closing arguments and help you focus on what is most relevant to your decision. I also caution that notes are not evidence. Use them only to aid personal memory or concentration. Keep in mind that you must each arrive at a verdict independently, and one juror's memory of the evidence or opinion should not be given excessive consideration solely because that juror has taken notes.

Keep an Open Mind. Don't form or express an opinion about the ultimate issues in this case until you have listened to all the evidence and the lawyers' summaries, along with the final instructions on the law. Keep an open mind until your deliberations are completed.

2. WHAT RULES APPLY TO RECESSES

From time to time I will call for a recess. It may be for a few minutes, a lunch break, overnight or longer. During recesses, do not talk about this case with anyone; not family, friends or even with each other. The bailiff may ask you to wear a badge identifying yourself as a juror so that people will not try to discuss the case with you. Don't mingle with the lawyers, the parties, the witnesses or anyone else connected with the case. You may say "hello" or exchange similar brief civilities with these persons, in passing, but don't engage in any conversation. Don't accept from or give to any of these persons any favors, however slight, such as rides or food.

The lawyers and parties are naturally concerned to avoid any hint of improper contact with you, so don't think that they are being purposely rude if they avoid any interaction with you during the course of this trial. If anyone tries to talk to you about the case, let the bailiff know immediately. You may communicate with the bailiff or among yourselves about topics other than a subject of the trial. Don't read about this case in the newspaper or listen to any reports on television or radio, if there are any. Finally, don't form or express an opinion regarding any subject of the trial until you are sent out for deliberation at the end of the trial. These restraints are necessary for a fair trial.

3. THE ROLE OF THE JUDGE, THE JURY AND THE LAWYERS and PARTIES ACTING PRO SE

The judge, the jury and the lawyers are all officers of the Court and play important roles in the trial.

Judge. It is my role as judge to decide all legal issues, supervise the trial and instruct the jury on the LAW that it must apply.

Jury. It is your role as the jury to follow that law and decide the factual issues. Factual issues generally relate to WHO, WHAT, WHEN, WHERE, HOW or similar things concerning which evidence will be presented.

Lawyers and parties acting pro se. It is the role of the lawyers and parties acting on their own behalf without the help of a lawyer to present evidence, generally by calling and questioning witnesses and presenting exhibits. It is the responsibility of each side to be an advocate, and each has a duty to try to persuade you to accept their version of the facts and to decide the case in favor of their position.

The ethical rules and the standards of professionalism adopted in this state are very important to this proceeding. Those rules and standards require that lawyers demonstrate courtesy, candor, and cooperation. Consistent with their duties, each side must diligently advance their legitimate interests. They should do so with energy and courage. At the same time, each side should not engage in conduct that is uncivil, abrasive, abusive, hostile, or obstructive. Instead, each side should treat others in a courteous and dignified manner. We all have the right to expect civil and professional conduct from all participants involved in this case.

Keep in mind that neither the lawyers, the parties, nor I actually decide the facts of this case, because that is your role. Don't be influenced by what you think our personal opinions are; rather, you decide the case based upon the law explained in these instructions and the evidence presented in court.

4. OUTLINE OF THE TRIAL

The trial will generally proceed as follows:

Opening Statements. Each side will outline what the case is all about, and they will indicate what they think the evidence will show.

Presentation of Evidence. The Plaintiff will offer its evidence first, followed by the Defendant. Each side may also offer rebuttal evidence after hearing the witnesses and seeing the exhibits offered by the other side. If an exhibit is given to you to examine, you should examine it carefully, individually, and without any comment.

Recesses and Breaks. During the trial there will be periods of time when the court recesses. During those times you must not discuss the case with anyone, including fellow jurors; you should not allow anyone to discuss the case with you. If any attempt is made to do so, you should report that to the bailiff immediately. You should not read, hear, or see media coverage of this trial.

Additional instructions on the Law. After each side has presented its evidence, I will give you additional instructions on the law that applies to this case.

Closing Arguments. Each side will then summarize and argue the case. They will share with you their respective views of the evidence, how it relates to the law and how they think you should decide the case.

Jury Deliberation. The final step is for you to retire to the jury room and deliberate until you reach a verdict, and you will be given additional instructions about how you are to do that later. During your deliberations, we will not be able to provide you with transcripts of the trial testimony; you will have to rely on your memory. Thus it is important, whether you take notes or not, that you observe the witnesses carefully and listen carefully to the testimony.

5. THE CLAIMS OF THE PARTIES.

The Plaintiff asserts that he was wrongfully detained at Defendant's store and as a result of the wrongful actions of Defendant or Defendant's employees or agents, he suffered damages in the amount of \$250,000. The Defendant denies any wrongful actions on its behalf or behalf of any of its employees or

agents.

6. WHAT IS THE JURY'S ROLE IN THIS CASE?

You must decide whether the Plaintiff's claim has been established under the standard set for the Plaintiff's burden of proof or not. Your decision is called a VERDICT. Your verdict must be based only on the evidence produced here in court. It must be based on facts, not on speculation. Don't guess about any fact. However, you may draw reasonable inferences or arrive at reasonable conclusions from the evidence presented. You should perform your duty to be a jury uninfluenced by passion or prejudice against the Defendant. You must not allow yourselves to be biased against the Defendant simply because the Plaintiff has brought this case in court.

You are to be governed in your deliberations solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the Plaintiff and the Defendant have a right to demand and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, that you will reach a just verdict regardless of what the consequences of such verdict may be. The verdict must represent the individual opinion of each juror. Three-fourths of the members of the jury must agree upon the verdict.

7. WHAT IS EVIDENCE?

Evidence is anything that tends to prove or disprove the existence of a disputed fact. Evidence includes testimony, documents, objects, photographs, recordings, stipulations, certain qualified opinions, and/or any combination of these things.

Sometimes the lawyers may agree that certain facts exist; this is called a stipulation. You should accept any stipulated facts as having been proved. In limited instances, I may take “judicial notice” of a well-known fact. If that happens, I will explain how you should treat it.

8. OPINION TESTIMONY

Under certain circumstances, witnesses are allowed to express an opinion. A person who by education, study or experience has become an expert in any art, science or profession, may give an opinion and the reason for it. A layperson (a non-expert) is also allowed to express an opinion if it is based on personal observations and it is helpful to understanding such person’s testimony or other aspects of the case. You are not bound to believe anyone’s opinion. Consider it as you would any other evidence, and give it the weight you think it deserves.

9. WHAT IS NOT TO BE CONSIDERED OR USED AS EVIDENCE?

I’ve explained to you what evidence is. Now I’ll tell you about some things which do not qualify as evidence or which, for some other good reason, you should not consider in reaching your verdict.

Complaint. The fact that a formal complaint has been filed asserting a claim against the Defendant is not evidence of liability. The Defendant has filed an Answer, denying any liability. As I will discuss in more detail later in these instructions, it is the Plaintiff’s burden to prove to you that the Defendant is liable by a preponderance of the evidence.

Lawyer Statements. What the lawyers say is not evidence. Their purpose is to give you a preview of expected evidence and to help you understand the evidence from their viewpoint. If a lawyer makes a statement about the evidence which is different from your own recollection of the evidence, you should rely on your own memory. The same is true for statements made by a party acting as his own lawyer. Only his testimony while in the witness box may be considered as evidence.

Personal Investigation. Evidence is not what you can find out on your own. You should not make any investigation about the facts in this case. Do not make personal inspections, observations or experiments. Do not view premises, things or articles not produced in court. Don't let anyone else do anything like this for you. Don't look for information in law books, dictionaries or public or private records which are not produced in court.

Out of Court Information. Do not consider anything you may have heard or read about this case in the media or by word of mouth or other out-of-court communication. You must rely solely on the evidence that is produced and received in court.

10. THE JUDGE DECIDES WHAT EVIDENCE IS ADMISSIBLE

Sometimes a question will be raised about whether certain evidence is proper for the jury to consider. This type of question is called an OBJECTION. I rule on objections. If an objection is SUSTAINED the evidence is kept out and you should not consider it, nor should you guess as to what the evidence might have been or what was the reason for the objection. If an objection is

OVERRULED the evidence comes in and you may consider it. If evidence which you have heard or seen is STRICKEN you must ignore it.

My decisions regarding the admission of evidence involve issues of law, and I am not giving any opinion as to which witnesses are or are not worthy of belief or as to which party should prevail in the case. Don't be concerned about the reasons for my rulings, and don't try to infer anything about the case from those rulings.

Further, if I do or say anything during the course of this trial that suggests to you that I favor the position of either party, whether in my rulings or otherwise, it is entirely unintentional; and you must not be influenced by that in any way.

11. WHO IS RESPONSIBLE TO CONVINCE THE JURY?

The Plaintiff has the burden of proof. The Plaintiff is the one making the initial claim in this case. The Plaintiff must establish Plaintiff's claim by a preponderance of the evidence or the greater weight of evidence.

The Defendant bears the burden of proof for any defense offered.

12. WHAT IS MEANT BY "PREPONDERANCE OF THE EVIDENCE?"

To be successful, Plaintiff must prove certain facts to you by a preponderance of the evidence. "Preponderance of the evidence" means the greater weight of the evidence; or, that evidence which is more convincing as to its truth. As is sometimes stated, "preponderance of the evidence" means such degree of proof that the greater probability of

truth lies therein.

The preponderance of the evidence is not necessarily determined by the number of witnesses, or the number of documents, or the amount of testimony, but rather by the convincing character of the evidence, weighed impartially, fairly, and honestly by you. If the evidence is evenly balanced as to its convincing force on any allegation, you must find that such allegation has not been proved.

13. Circumstantial Evidence.

A fact may be proved by circumstantial evidence. Circumstantial evidence consists of facts or circumstances that give rise to a reasonable inference of the truth of the facts sought to be proved.

14. All Parties Are Equal Before the Law.

The fact that the plaintiff is an individual and that the Defendant is a corporation should make no difference whatever to you. It is your duty to hear and determine this case the same as if it were between two individuals.

15. HOW TO MAKE DECISIONS ABOUT THE EVIDENCE

It will be your duty to determine your verdict relying solely on the evidence presented during the trial. For that purpose you should consider all of the evidence together, fairly, impartially and conscientiously, putting aside any bias, prejudice, or preconceptions.

Once evidence is admitted, you must decide three things about it: Whether it should be believed, how important it is, and what you can reasonably infer or conclude from it. An inference is a conclusion that logic, reason, or common sense leads you to draw from a fact or group of facts that the evidence has established.

Use your common sense as a reasonable person in making these decisions. Review all the evidence. Don't imagine things which have no evidence to back them up. Consider the evidence fairly without any bias or sympathy toward either side.

Where there is conflicting evidence, you should try to reconcile the conflict so far as you reasonably can. Where the conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are.

16. DECIDING WHETHER TO BELIEVE A WITNESS

You are the sole judges of the importance of the evidence, the believability of the witnesses and the facts. There is no firm rule that I can give you for determining whether a witness is truthful. As each witness testifies, you must decide how accurate that testimony is and what weight to give it, using your own good judgment and experience in life. In evaluating testimony, it may help you to ask yourself questions such as these, giving the weight you feel is reasonable for each issue:

Personal Interest. Does the witness have a personal interest in how the trial comes out?

Other Bias. Does the witness have some other bias or motive to testify a certain way?

Demeanor. What impression is made by the witness's appearance and conduct while answering questions?

Consistency. Did the witness make conflicting statements or contradict other evidence?

Knowledge and Memory. Did the witness have a good opportunity to know the facts and the ability to remember them?

Reasonableness. Is the testimony reasonable in light of human experience?

You may also apply any other common sense yardstick to the testimony you hear and the other evidence you receive. You are not required to believe any witness or all that a witness says. You are entitled to believe one witness as against many or many as against one, in accordance with your honest convictions.

The mere fact that a witness is a police officer, in itself, does not make that person's testimony more or less credible, but such testimony must be weighed in the same way as you would any other witness.

17. WHAT IF A WITNESS PURPOSELY GIVES FALSE TESTIMONY?

If you believe a witness has purposely given false testimony about anything relevant to the case, you may disregard not only the false testimony but any of the remaining testimony from that witness, or you may give the remaining testimony whatever weight you think it deserves.

18. WHAT TO TAKE WITH YOU INTO THE JURY ROOM

You may take the following things with you when you go into the jury room to discuss this case:

- a. All exhibits admitted in evidence;
- b. Your notes (if any);
- c. Your copy of these instructions; and
- d. The verdict form or forms that will be given to you.

19. WHAT TO DO IN THE JURY ROOM

The first thing you should do in the jury room is choose a person to be in charge. This person is called the FOREPERSON. The Foreperson's duties are:

- a. To keep order and allow everyone a chance to speak;
 - b. To represent the jury in any communications you make;
- and

- c. To sign your verdict and bring it back to court.

In deciding what the verdict should be, all jurors are equal. The Foreperson has no more power than any other juror.

20. YOUR VERDICT MUST BE YOUR OWN DECISION ARRIVED AT AFTER OPEN AND HONEST DELIBERATION.

Consider each other's opinions, then reach your own decision based upon honest deliberation. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of opinion or to announce a determination to stand for a certain verdict. When that is done at the outset, a person's sense of pride may block appropriate consideration of the case. Use your common memory, your common understanding and your common sense. Talk about the case with each other as you ponder and deliberate.

In the end, your verdict must be your own. Don't make a decision just to agree with everyone else. You should, however, respect and consider the opinions of the other jurors. If you are persuaded that a decision you initially made was wrong, don't hesitate to change your mind. Help each other arrive at the truth. Your decision need not be unanimous. Only six of you need to agree upon the verdict. In an attempt to reach a decision, you may not resort to chance or any form of decision-making other than honest deliberation.

21. WHAT TO DO IF YOU HAVE QUESTIONS DURING DELIBERATION

If you think you need more information or a clarification, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question whenever appropriate. However, these instructions should contain all the information you need to reach a verdict based upon the evidence that has been presented to you. You should understand that no further evidence can be provided to you.

22. FOCUS ON THIS CASE ALONE

Your duty is to decide this case and this case alone. You should not use this case as a forum for correcting perceived wrongs in other cases or in the broader society, or as a means of expressing views about anything other than the ~~guilt or innocence of this~~ *issue in the* ~~Defendant.~~ *Case* Your verdict should reflect the law given to you in these instructions applied to the facts that you find to be supported by the evidence. Your decision should not be distorted by any outside factors or objectives. *JP K*

The final test of the quality of your service will be the verdict you return. You will make an important contribution to justice and your community if you focus exclusively on this case and return a just and proper verdict.

23. REACHING A VERDICT

In determining any fact in this case you should not consider nor be influenced by any statement made or act done by the Court which you may interpret as indicating its views thereon. You are the sole and final judges of all questions of fact submitted to you, and you must determine such questions for yourselves from the evidence, without regard to what you believe the Court thinks thereon. The Court has not intended to express, or intimate, or be understood as giving any opinion on what the proof shows or does not show, or what are or what are not the facts in the case. Indeed, it is immaterial what the Court thinks about it. You must follow your own views and not be influenced by the views of the Court.

As I have said, this being a civil case, your verdict must represent the view of three-fourths, or six members of the jury. When six of you are in agreement, then you have reached a verdict and your work is finished. At least six of you must agree on each issue presented to you. If there is more than one issue, the six in agreement need not be the same six on each issue.

24. HOW TO REPORT YOUR VERDICT

When you retire to deliberate, you will be provided with a Verdict Form, which is self-explanatory. After your deliberations have been completed and you have reached a verdict, the Foreperson should fill out and sign the Verdict form in accordance with the decision of the jury.

Once the Verdict form is completed and signed, notify the bailiff that you are ready to return to court. The Foreperson should

ADDENDUM

present the Verdict Form to the bailiff, at the direction of the judge, when you return to the courtroom to deliver your verdict.

25. WHAT HAPPENS AFTER THE VERDICT HAS BEEN REPORTED

After you have given your verdict to the judge, the clerk will read the jury's verdict. After that, the judge or the clerk may ask each of you about the verdict to make sure you agree with it. Then you will be released from your jury service and you may leave at any time.

After you are excused, you may talk about the case with anyone. Likewise, you are not required to talk about it, if you don't want to. If anyone attempts to talk to you about the case when you don't want to do that, please tell the Bailiff or the Court Clerk. Finally, if you do decide to discuss the case with anyone, keep in mind that your fellow jurors freely stated their opinions in the jury room with the understanding that they were speaking in confidence. Please respect the privacy of the views of your fellow jurors.

26. The Instructions are to be considered as a whole.

These instructions, though numbered separately, are to be considered and construed by you as one connected whole: Each instruction should be read and understood in reference to and as a part of the entire charge, and not as though any one sentence or instruction separately were intended to state the whole law of the case upon any particular point. Moreover, the order in which the instructions are given has no significance as to their relative importance.

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

29. What Is False Imprisonment?

The Plaintiff has the burden of proving each of the following elements by a preponderance of the evidence to establish a claim of false imprisonment:

- a. The Defendant, or its employees or agents, acted intending to confine or restrain the Plaintiff; and
- b. The actions of Defendant, or its employees or agents, resulted in the confinement or restraint of the Plaintiff; and
- c. The Plaintiff was aware of the confinement or restraint, or was harmed by it.

A person is restrained when that person is not free, or reasonably believes he is not free to leave a place to which he has been confined, and such person does not consent to such restraint.

30. Merchant's Right to Detain

Utah has several laws which grant to a merchant the right to detain a person for a reasonable time and in a reasonable manner under certain circumstances. These laws are set forth in the Utah Code.

The Defendant bears the burden of proving by a preponderance of the evidence that such a right to detain the Plaintiff in this case exists, by showing:

- a. that the Defendant, and or its employee or agent, had reason to believe that merchandise had been wrongfully taken by Plaintiff, and the merchandise can be recovered by detaining Plaintiff in a reasonable manner for a reasonable length of time, for the purpose of attempting to effect the recovery of the merchandise or for the purpose of informing a peace officer of the circumstances of the detention; or
- b. that the Defendant, and or its employee or agent, had probable cause to believe that the Plaintiff had committed a retail theft or had taken the goods with an intent to steal them, if the detention is for a reasonable length of time for all or any of the following purposes: to recover the goods, or to make reasonable inquiry as to whether the Plaintiff has in his possession unpurchased merchandise; to request and/or verify identification; or
- c. to inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer.

It is a lawful defense to alleged wrongful detention if Defendant shows by a preponderance of the evidence that the person causing the detention of the Plaintiff had probable cause to believe that Plaintiff had committed retail theft and that the Defendant and its employees and agents acted reasonably in detaining Plaintiff under all circumstances of this case.

“Retail theft” is when a person knowingly takes possession of, conceals, carries away, transfers, or causes to be transferred, any merchandise displayed, held, or offered for sale in a retail store with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise.

To show “probable cause” means that the Defendant must show by a preponderance of the evidence that the Defendant or its employees or agents believed in good faith that his or her actions were lawful and that such belief was reasonable.

Whether such belief was “reasonable” must be determined under all the applicable circumstances.

If you find that the Defendant or its employees made a “citizens’ arrest” of the Plaintiff, then for Defendant to establish that its conduct was not wrongful, Defendant must also show by a preponderance of the evidence that the person who detained Plaintiff informed the Plaintiff at the time of the detention of his intention to detain Plaintiff, the cause of the detention, and the person’s authority to make the detention. Such notice shall not be required, however, when there is reason to believe that the notice will endanger the life or safety of the person making the citizens’ arrest, or will likely enable the Plaintiff to escape; or at the time of the detention the Plaintiff was actually engaged in the commission

of, or attempted commission of, a crime; or, the Plaintiff is being detained as a part of his pursuit immediately after the commission of a crime.

31. The Verdict Form.

Upon the jury's reaching a verdict, the foreperson shall complete and sign the verdict form. That form states:

At least six of the eight members of the jury find as follows on each point:

1. Plaintiff was detained by Defendant or its employees or agents who acted intentionally and without Plaintiff's consent.

Yes X

No

2. Plaintiff was aware of the detention or was damaged by the detention.

Yes X

No

3. Defendant, or its employees or agents, had the lawful right to detain the Plaintiff because:

- a. The Defendant, and or its employee or agent, had reason to believe that merchandise had been

ADDENDUM

wrongfully taken by the Plaintiff, and the merchandise can be recovered by detaining the Plaintiff in a reasonable manner for a reasonable length of time, for the purpose of attempting to effect the recovery of the merchandise or for the purpose of informing a peace officer of the circumstances of the detention.

Yes X

No

- b. The Defendant, and or its employee or agent, had probable cause to believe that Plaintiff had committed a retail theft or had taken the goods with an intent to steal them, if the detention is for a reasonable length of time for all or any of the following purposes: to recover the goods, or to make reasonable inquiry as to whether Plaintiff has in his possession unpurchased merchandise; to request and/or verify identification.

Yes

No X

- c. to inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer.

Yes

No X

3. Did Defendant show by a preponderance of the evidence that the person causing the detention of the Plaintiff had probable cause to believe that Plaintiff had committed retail theft and that the Defendant and its employees and agents acted reasonably in detaining Plaintiff under all circumstances of this case.

Yes _____

No X

4. If you find that the Defendant or its employees performed a “citizens’ arrest”, then do you also find that the Defendant or its employees and/or agents provided notice to the Plaintiff at the time of the detention of his intention to detain Plaintiff, the cause of the detention, and the person’s authority to make the detention.

Yes X

No _____

5. If you find that the Defendant or its employees performed a “citizens’ arrest”, and if your answer to No. 4 is “no”, was there reason to believe that the notice will endanger the life or safety of the person making the arrest, or will likely enable the Plaintiff to escape; or at the time of the detention the Plaintiff was actually engaged in the commission of, or attempted commission of, a crime; or, the Plaintiff is being detained as a part of his pursuit immediately after the commission of a crime?

Yes _____

No _____

6. If you find that Plaintiff was detained, please state the dollar amount of damage, if any, Plaintiff proved by a preponderance of the evidence that he suffered as a direct and proximate consequence of the detention.

\$ 5,000

Instruction No. 32

In determining questions of fact, you are not at liberty to indulge in speculation or conjecture, nor are you at liberty to follow your own ideas of what the law is or should be. On the contrary, you are required to look solely to the evidence for the facts and to the instructions given you by the court for the law, and to return a verdict which in all respects, including without limitation the amount of damages (if any), is in accordance with the foregoing.

Instruction No. 33

If a party has access to evidence but fails to present such evidence at trial, the jury may draw such adverse inferences against such party as it deems appropriate based upon that party's failure to present such evidence.

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

LYNN A. JENKINS, I.,

AUG 12 2005

Plaintiff,

VERDICT

SALT LAKE COUNTY

vs.

By *[Signature]*
Deputy Clerk

NATIONAL PRODUCT SALES,
INC.,

Case No. 010911737
Judge John Paul Kennedy

Defendant.

We, at least six of the Jurors in the above case, find as follows:

1. Plaintiff was detained by Defendant or its employees or agents who acted intentionally and without Plaintiff's consent.

Yes X

No

2. Plaintiff was aware of the detention or was damaged by the detention.

Yes X

No

3. Defendant, or its employees or agents, had the lawful right to detain the Plaintiff because:

- a. The Defendant, and or its employee or agent, had reason to believe that merchandise had been wrongfully taken by the Plaintiff, and the merchandise can be recovered by detaining the Plaintiff in a reasonable

ADDENDUM
Page 32

manner for a reasonable length of time, for the purpose of attempting to effect the recovery of the merchandise or for the purpose of informing a peace officer of the circumstances of the detention.

Yes X
No

- b. The Defendant, and or its employee or agent, had probable cause to believe that Plaintiff had committed a retail theft or had taken the goods with an intent to steal them, if the detention is for a reasonable length of time for all or any of the following purposes: to recover the goods, or to make reasonable inquiry as to whether Plaintiff has in his possession unpurchased merchandise; to request and/or verify identification.

Yes
No X

- c. to inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer.

Yes
No X

3. Did Defendant show by a preponderance of the evidence that the person causing the detention of the Plaintiff had probable cause to believe that Plaintiff had committed retail theft and that the Defendant and its employees and agents acted reasonably in detaining Plaintiff under all circumstances of this case.

Yes _____

No X

4. If you find that the Defendant or its employees performed a “citizens’ arrest”, then do you also find that the Defendant or its employees and/or agents provided notice to the Plaintiff at the time of the detention of his intention to detain Plaintiff, the cause of the detention, and the person’s authority to make the detention.

Yes X

No _____

5. If you find that the Defendant or its employees performed a “citizens’ arrest”, and if your answer to No. 4 is “no”, was there reason to believe that the notice will endanger the life or safety of the person making the arrest, or will likely enable the Plaintiff to escape; or at the time of the detention the Plaintiff was actually engaged in the commission of, or attempted commission of, a crime; or, the Plaintiff is being detained as a part of his pursuit immediately after the commission of a crime?

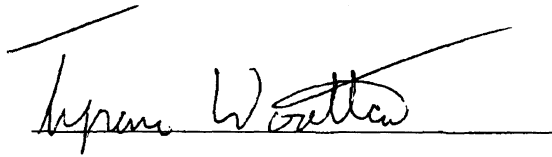
Yes _____

No _____

6. If you find that Plaintiff was detained, please state the dollar amount of damage, if any, Plaintiff proved by a preponderance of the evidence that he suffered as a direct and proximate consequence of the detention.

\$ 5,000

DATED this 12th day of August, 2005.



Foreperson

FILED DISTRICT COURT
Third Judicial District

SEP 26 2005

SALT LAKE COUNTY

By

Deputy Clerk

TERRY M. PLANT, #2610
ANDREW M. WADSWORTH, #9517
PLANT, CHRISTENSEN & KANELL
Attorneys for Defendant National Product Sales
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Telephone: (801) 363-7611

ENTERED IN REGISTRY,
OF JUDGMENTS

DATE

09/27/05

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LYNN A. JENKINS, I,

Plaintiff,

v.

NATIONAL PRODUCT SALES, INC., dba
NPS,

Defendant

JUDGMENT

Civil No. 010911737

Judge: John Paul Kennedy

This action came on for trial on August 12, 2005, before the court and a jury, the
Honorable Judge John Paul Kennedy, District Judge, presiding, and the issues having been duly
tried and the jury having duly rendered its verdict,

It is ORDERED AND ADJUDGED that Plaintiff take nothing, that the action be dismissed
on the merits, and that Defendant recover court costs from Plaintiff in the amount of

\$ 687.00

Judgment @J



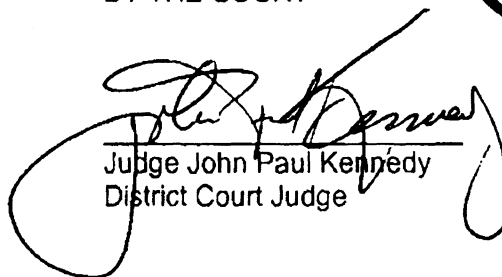
JD17473206
010911737 JENKINS, LYNN A

ADDENDUM

DATED this 26 day of Sept, 2005.

BY THE COURT




Judge John Paul Kennedy
District Court Judge

010911737

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Judgment was mailed, postage prepaid, this
17th day of August, 2005 to the following:

Lynn A. Jenkins
3 East 2750 South
Bountiful, Utah 84010
Plaintiff

Melanie Williams

FILED DISTRICT COURT
Third Judicial District

DEC 27 2001

SALT LAKE COUNTY

Deputy Clerk

Philip R. Hughes (4224)
6843 South 3420 West
West Jordan, Utah 84084
Telephone: (801) 637-3900
Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY STATE OF UTAH

120
LYNN A. JENKINS, I.)
Plaintiff,)
vs.)
NATIONAL PRODUCT SALES, INC.)
dba NPS, and JOHN DOES I-X)
Defendant.)
VERIFIED COMPLAINT
Civil No. 010911737
JUDGE Bohling

Plaintiff, LYNN A. JENKINS, I., alleges as follows:

1. That he is the Plaintiff in the above-entitled action.
2. That the acts and events which are the subject of this cause of action occurred in Salt Lake County, State of Utah.
3. Defendant corporation has its principal place of business and offices in Salt Lake County, state of Utah.
4. The damages caused by defendant, exceed \$1,000.00, as alleged herein.

First Cause of Action
Wrongful Arrest by Private Person

5. Defendant NPS is in the business of retail sales, however it differs from normal retail sales establishments in several aspects:

- a. A large majority of the defendants goods are damaged in packaging or otherwise, and are price marked

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arbitrarily;

b. The goods sold by defendant are sold without warranty, except as may be provided by statute, and goods sold are without manufacturer warranty except as may be provided by statute;

c. The goods sold by defendant are not returnable after purchase, under any circumstances;

d. Certain managers of NPS have authority to negotiate prices different than as marked and frequently discount marked prices;

e. The store has a policy of allowing customers to remove items from the store in order to allow them to check for fit, as once purchased, the item cannot be returned.

6. For several years prior to the incident which gives rise to this cause of action, Plaintiff had been a valued customer of Defendant, having spent thousands of dollars in the years 1999 and 2000, and frequently purchased items at Defendant's weekly auction, as well as at other times.

7. The Plaintiff, was well known to several of the employees of Defendant, due to the frequency of his visits to the store, and viewed as a valued and trusted customer of Defendant's employees.

8. On or about February 9, 2001, Plaintiff entered the business of Defendant, to find a bumper for a vehicle. He found a bumper which he thought might fit his vehicle, and informed a

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clerk at the exit that he needed to check to see if it would fit his vehicle.

9. As is customary, the clerk asked the Plaintiff to leave a form of picture identification prior to leaving the business.

10. The Plaintiff had such a Utah identification card with him, and gave it to the clerk, who accepted the identification as reasonable security for removing the bumper from the business premises.

11. The Plaintiff returned shortly thereafter to the sales area, and asked to speak with a manager, to negotiate the price of the bumper.

12. Plaintiff was informed that the person who could negotiate a price other than as marked was not there at that time, but would return within an hour or so.

13. The Plaintiff informed the clerk, who had maintained the possession of his identification, that he had to go to Bountiful, and would return.

14. The clerk took no action to instruct the Plaintiff to return the bumper to the building, nor did the clerk inform Plaintiff that he was not allowed to remove the bumper from the parking lot.

15. Approximately one hour later, Plaintiff returned. He carried the bumper into the store, returned it to the shelf where he had originally found it.

16. At the time the bumper was returned, Plaintiff notified

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the clerk that he was returning the bumper. Plaintiff also requested the return of his identification at that time.

17. When the bumper was returned, an agent of Defendant, who was acting as store security saw the Plaintiff return the bumper, and followed Plaintiff to watch him return the bumper to its original aisle and appropriate location.

18. The security guard also inspected the bumper, then followed the Plaintiff.

19. As Plaintiff was proceeding to the clerk to get his identification card, he was stopped by the security guard, who told him to go into the interrogation office.

20. Plaintiff informed the security guard that he was going to get his identification card and leave the store.

21. At this point, the security guard began pushing the Plaintiff, 8 times, in his chest with an open palm, saying, "No, you're coming with me."

22. He then took the Plaintiff to the interrogation room, then took Plaintiff's left arm, then his right arm, and hand cuffed the Plaintiff.

23. The security guard refused to allow Plaintiff to leave the interrogation room.

24. The security guard, acting within the scope of his employ, initiated a "taping" of the interrogation by using a video recorder.

25. The security guard also called the police.

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26. The police arrived shortly thereafter, and after hearing both parties, informed the security officer that this was a civil matter, not a criminal matter, because there was no clear policy against removal of items from the premises.

27. Pursuant to §77-7-1, et.seq., a private individual is entitled to make an arrest only if a crime has occurred.

28. In this instance, Mr. Jenkins had permission to remove the bumper from the premises, had left an identification as requested, and returned the bumper to it's original location.

29. Defendant's agent, acting on behalf of Defendant, arrested the Plaintiff.

30. Plaintiff has been damaged thereby in an amount of not less than \$250,000.00, or such other and further amounts as may be proven at trial.

31. Plaintiff has been forced to retain the services of an attorney, and is entitled to compensation for such costs.

Second Cause of Action
Joint and Several Liability

32. At the time of the wrongful arrest, the Defendant was not an authorized corporation by the state of Utah, therefore, officers and directors of the fraudulent corporation may be individually liable.

33. John Does I-V are unidentified officers and directors and or agents of Defendant NPS.

34. John Does VI-X are unidentified employees of Defendant NPS who may have culpability because of the wrongful arrest of

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Plaintiff.

35. John Does X-XV are unidentified property owners of Defendant's premises, who may have culpability because of the wrongful arrest of Plaintiff.

WHEREFORE, Plaintiff prays that this Court enter its judgment as follows:

1. For an Order that Defendant, and its employees are jointly and severally liable to Plaintiff in the amount of not less than \$250,000.00, or such other and further amounts as may be proven at trial.


2. For an Order that Defendant, and its officers and directors are jointly and severally liable to Plaintiff in the amount of not less than \$250,000.00, or such other and further amounts as may be proven at trial.

3. For an Order that Defendant, and the owners of the premises used and occupied by Defendant be jointly and severally liable to Plaintiff in the amount of not less than \$250,000.00, or such other and further amounts as may be proven at trial.

4. For costs and attorneys fees, as may be just and reasonable.

5. For such other and further relief as the Court may deem just and proper.

DATED this 27th day of December, 2001.


PHILIP R. HUGHES
Attorney for Plaintiff

ADDENDUM

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VERIFICATION

STATE OF UTAH)
 : ss.
County of Davis)

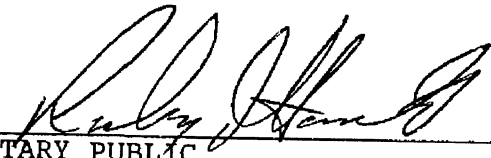
LYNN A. JENKINS, I., being first duly sworn upon his oath, deposes and states that he is the Plaintiff in the above-entitled action, that he has read the foregoing Verified Petition, and understands the contents thereof, and the same is true to the best of his own knowledge.

DATED this 27th day of December, 2001.



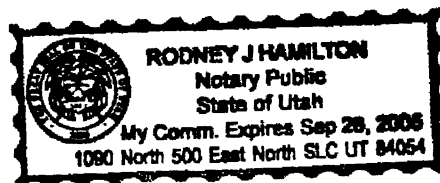
LYNN A. JENKINS, I.

SUBSCRIBED AND SWORN to before me this 27th day of December, 2001.



NOTARY PUBLIC
State of Utah

My Commission Expires:



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ADDENDUM

The Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH CONSTITUTIONAL PROVISIONS

Article I, Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 8. [Offenses bailable.]

(1) All persons charged with a crime shall be bailable except:

(a) persons charged with a capital offense when there is substantial evidence to support the charge; or

(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or

(c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.

Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from

prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the person is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the appellee if appropriate discovery is allowed as defined by statute or rule.

Article I, Section 13. [Prosecution by information or indictment -- Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

Article I, Section 14. [Unreasonable searches forbidden -- Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Article I, Section 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

Article I, Section 26. [Provisions mandatory and prohibitory.]

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Article I, Section 27. [Fundamental rights.]

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

STATUTES

28 U.S.C. § 1346(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 Liability of United States The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled. With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 2680 Exceptions The provisions of this chapter and section 1346(b) of this title shall not apply to-- (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (b) Any claim arising out of the loss, miscarriage, or negligent transmission of

letters or postal matter.

Utah Code Ann. § 76-6-602, Retail theft, acts constituting.

A person commits the offense of retail theft when he knowingly:

- (1) Takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise; or
- (2) Alters, transfers, or removes any label, price tag, marking, indicia of value or any other markings which aid in determining value of any merchandise displayed, held, stored or offered for sale, in a retail mercantile establishment and attempts to purchase such merchandise personally or in consort with another at less than the retail value with the intention of depriving the merchant of the retail value of such merchandise; or
- (3) Transfers any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment from the container in or on which such merchandise is displayed to any other container with the intention of depriving the merchant of the retail value of such merchandise; or
- (4) Under-rings with the intention of depriving the merchant of the retail value of the merchandise; or
- (5) Removes a shopping cart from the premises of a retail mercantile establishment with the intent of depriving the merchant of the possession, use or benefit of such cart.

Utah Code Ann. § 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;
- (6) In the case of a minor, to inform a peace officer, the parents, guardian or other private person interested in the welfare of that minor immediately, if possible, of this detention and to surrender custody of such minor to such person.

A merchant may make a detention as permitted herein off the premises of a retail mercantile establishment only if such detention is pursuant to an immediate pursuit of such person.

Utah Code Ann. § 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.

Utah Code Ann. § 77-7-3. By private persons.

A private person may arrest another:

- (1) For a public offense committed or attempted in his presence; or
- (2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it.

Utah Code Ann. § 77-7-6. Manner of making arrest.

- (1) The person making the arrest shall inform the person being arrested of his intention, cause, and authority to arrest him. Such notice shall not be required when:
 - (a) there is reason to believe the notice will endanger the life or safety of the officer or another person or will likely enable the party being arrested to escape;
 - (b) the person being arrested is actually engaged in the commission of, or an attempt to commit, an offense; or
 - (c) the person being arrested is pursued immediately after the commission of an offense or an escape.
- (2)(a) If a hearing-impaired person, as defined in Subsection 78-24a-1(2), is arrested for an alleged violation of a criminal law, including a local ordinance, the arresting officer shall assess the communicative abilities of the hearing-impaired person and conduct this notification, and any further notifications of rights, warnings, interrogations, or taking of statements, in a manner that accurately and effectively communicates with the hearing-impaired person including qualified interpreters, lip reading, pen and paper, typewriters, computers with print-out capability, and telecommunications devices for the deaf.
- (b) Compliance with this subsection is a factor to be considered by any court when evaluating whether statements of a hearing-impaired person were made knowingly, voluntarily, and intelligently.

Utah Code Ann. § 77-7-12. Detaining persons suspected of shoplifting or library theft -- Persons authorized

- (1) A peace officer, merchant, or merchant's employee, servant, or agent who has reasonable grounds to believe that goods held or displayed for sale by the merchant have been taken by a person with intent to steal may, for the purpose of investigating the

unlawful act and attempting to effect a recovery of the goods, detain the person in a reasonable manner for a reasonable length of time.

(2) A peace officer or employee of a library may detain a person for the purposes and under the limits of Subsection (1) if there are reasonable grounds to believe the person violated Title 76, Chapter 6, Part 8, Library Theft.

Utah Code Ann. § 77-7-14. Person causing detention or arrest of person suspected of shoplifting or library theft -- Civil and criminal immunity.

(1) A peace officer, merchant, or merchant's employee, servant, or agent who causes the detention of a person as provided in Section 77-7-12, or who causes the arrest of a person for theft of goods held or displayed for sale, is not criminally or civilly liable where he has reasonable and probable cause to believe the person detained or arrested committed a theft of goods held or displayed for sale.

(2) A peace officer or employee of a library who causes a detention or arrest of a person under Title 76, Chapter 6, Part 8, Library Theft, is not criminally or civilly liable where he has reasonable and probable cause to believe that the person committed a theft of library materials.

Utah Code Ann. § 78-2-2. Supreme Court jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
- (b) election and voting contests;
- (c) reapportionment of election districts;
- (d) retention or removal of public officers;
- (e) matters involving legislative subpoenas; and
- (f) those matters described in Subsections (3)(a) through (d).

Utah Code Ann. § 78-2a-3. Court of Appeals jurisdiction. . . .

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over: . . .

- (j) cases transferred to the Court of Appeals from the Supreme Court.

Utah Code Ann. § 78-11-18. Merchant's authority to detain.

Any merchant who has reason to believe that merchandise has been wrongfully taken by an individual contrary to Section 78-11-15 or 78-11-16 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 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 the custody and detention are unreasonable under all the circumstances.

RULES

Utah Rules of Civil Procedure Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict. . . . (b) Motion for judgment notwithstanding the verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Utah Rules of Civil Procedure Rule 52. Findings by the court. . . . (b) Amendment.

Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

Utah Rules of Civil Procedure Rule 59. New trials; amendments of judgment. (a)

Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.
- (2) Misconduct of the jury; and whenever any one or more of the jurors have been

induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.