

1994

John Priddy v. Shopko Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

JOHN PRIDDY,	:	
	:	
PLAINTIFF/APPELLANT,	:	CASE NO. 940605-CA
	:	
VS.	:	
	:	
	:	CATEGORY 15
SHOPKO CORPORATION,	:	
	:	
DEFENDANT/APPELLE.	:	

BRIEF OF APPELLANT

APPEAL FROM THE SUMMARY JUDGMENT OF THE THIRD DISTRICT COURT
SALT LAKE COUNTY—STATE OF UTAH
THE HONORABLE DAVID S. YOUNG

UTAH COURT OF APPEALS
BRIEF

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ATTORNEYS FOR APPELLEE

FILED

JAN 10 1995

COURT OF APPEALS

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Plaintiff:	John Priddy
Defendant:	Shopko Corporation
Appellant:	Jonh Priddy
Appellee:	Shopko Corporation

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JURISDICTION

Jurisdiction for this appeal is vested in the Utah Court of Appeals pursuant to Utah Code Annotated § 78-2a-3(2)(k)(1994 as amended).

NATURE OF PROCEEDINGS

This is an appeal from a final Order of summary judgment entered on August 5, 1994, dismissing the Plaintiff's action for defamation of character (slander per se) and negligent infliction of emotional distress in the Third Judicial District Court for Salt Lake County, State of Utah, The Honorable David S. Young presiding.

In particular, Plaintiff appeals the trial Court's failure to assess the materiality of disputed issues of fact; the trial court's complete failure to review a material piece of evidence which was provided to the court in the form of a video tape recording the defendant made while the Plaintiff was shopping at the Defendant's store. The content of the video recording went to the principal facts of whether the Defendant acted reasonably or had probable cause. The trial court selected just one of the disputed facts, only to draw all reasonable inferences from the "selected" fact in favor of the moving party.

This appeal also argues the trial court applied the wrong legal standards or produced a deficient legal analysis to the disputed facts of the case. The appeal further contests the constitutionality of Utah Code Annotated, Section 78-11-18 which

appears to encroach the Open Court provisions of Article 1, Section 11 of the Utah State Constitution.

STATEMENT OF ISSUES ON APPEAL

When entertaining a motion for summary judgment, the trial court is required to draw all inferences fairly arising from the facts presented in a light most favorable to the non-moving party. The trial Court failed to assess the materiality of the facts of this case and the disputes arising from the facts.¹ Although the Defendant failed to meet its duty to show it had probable cause or that it acted reasonably,² the trial court selected just one of the disputed material facts and drew all reasonable inferences therefrom in a light most favorable to the Defendant, the moving party. Thus, the trial court erroneously applied the wrong legal standards, or produced a deficient legal analysis.

Utah Code Annotated, Section 78-11-18(1975 as amended) denies people wrongly accused of shoplifting their constitutional right to seek redress in Utah courts in violation of Article I, Section 11 of the Utah State Constitution.

¹. The Plaintiff provided a video tape recording to the trial court in support of his answer opposing the motion for summary judgment [Addendum I]. The video tape had the effect of defeating the Defendant's claims of privilege in showing the Appellee did not have probable cause or reason to accuse the Appellant of retail theft. The trial court failed to review the recording on the video tape and, therefore, could not assess its disputed elements and their materiality.

². See Terry v. Zions, 605 P.2d 314, on rehearing, 617 P.2d 700 (Utah 1979)(shopkeepers must have probable cause before arresting a person).

DETERMINATIVE AUTHORITY

Utah R. Civ. P. 56 (c).

...[T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

Utah Code Annotated 78-11-18 (1975 as amended). [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 type of claim or action unless the custody and detention are unreasonable under all circumstances.

Utah State Constitution Article I, Section 11. Courts Open — Redress of injuries.

All courts shall be open, and every person, for any 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.

STATEMENT OF THE CASE

On October 3, 1993, Plaintiff John Priddy [hereinafter "the Appellant"] filed a complaint for defamation of character [slander per se] and negligent infliction of emotional distress against Shopko Corporation, [hereinafter "the Appellee"]. The Appellant alleged that the Appellee's security operatives falsely and maliciously accused him of retail theft. The Appellee filed a motion for summary judgment claiming it deserved summary judgment as a matter of law because there were not any disputed issues of material fact and that it was privileged or had probable cause in accusing the Appellant of retail theft. The Appellee also argued that the Appellant did not suffer emotional distress.

The Appellant filed an Answer opposing the motion for summary judgment. The Appellant's opposition memorandum included several supporting affidavits³ and a video tape recording which featured the Appellee's security operatives conducting an in-depth camera(s) surveillance of the Appellant from the instant the Appellant entered the Appellee's store.

Prior to the motion for summary judgment, the Appellant filed a Motion to Compel the production of certain discovery the Appellee had refused to provide.⁴ The Appellant planned to amend his Verified Complaint to conform to the evidence received after discovery and to substitute negligent infliction of emotional distress with intentional infliction of emotional distress. The Appellant desired this substitution because the evidence contained

³. See specifically Affidavit of Jolene Priddy. Addendum F.

⁴. The Motion to Compel which predated the Appellee's motion for summary judgment, required certain evidence of material importance which, if produced, would have gone to the important issues of privilege and probable cause.

in the video tape recording showed the Appellee did not have probable cause but acted with malice. Because the trial court found that a favorable judgment on the Appellee's motion would moot the other issues, it did not hear the Appellant's other motions.

Although the trial court did not entertain the Motion to Compel, the Appellant submitted enough evidence to support the materiality of the disputed facts in opposing the motion for summary judgment. The trial court did not review all the evidence the Appellant submitted to show the unequivocal existence of disputed material issues of fact. The Appellant maintains that the video recording of 45 minutes of in-store camera surveillance shows disputed issues of material fact. And, the trial court held that, pursuant to Utah Code Annotated 78-11-18, (1975 as amended),⁵ the Appellee was privileged⁶ in accusing the Plaintiff of retail theft and blamed the Appellant for the occurrences. The trial Court certified its Order as final for purposes of appeal [Addendum A]. The Appellant filed a Notice of Appeal to the Utah Supreme Court [Addendum B]. The Supreme Court assigned the appeal to this Honorable Court [Addendum C].

⁵. The trial court miscited the statute. It cited to U.C.A. § 78-12-17 and 18. Perhaps the trial court meant to cite to 78-11-17 and 18 (1975 as amended).

⁶. The video recording was submitted specifically to demonstrate to the trial court that the Appellee acted with malice and had no privilege in accusing the Appellant of retail theft. Had the trial court observed the content of the recording, it is unequivocal it would have reached a different decision. See Transcript at Page 25, lines 8-17.

STATEMENT OF FACTS

As this case comes to this Court on a summary judgment ruling, the Appellant respectfully offers the following facts based on the facts alleged in his Verified Complaint [**Addendum D**], and in his Answer and Opposition to the Defendant's Motion for Summary Judgment [**Addendum E**].

a. On February 20, 1993, Ms. Jolene Patience--now known as Jolene Priddy--purchased a set of hair curlers (hereinafter "the set") from the Appellee's store located in Sugarhouse, Salt Lake City, Utah.

b. A few days later, Ms. Priddy noticed the set was defective and returned it to the store. The store was out of this particular merchandise. The store's customer service clerk gave Ms. Priddy a rain check document so she could make the exchange at another date. The clerk also told Ms. Priddy to keep the defective rollers until the exchange.

c. On Sunday, February 28, 1993, The Appellant, a black man, and Ms. Priddy, went to the Appellee's store to use the rain check and to shop for other items.

d. At the store, the Appellant shopped around and selected a few household items which were held in plain view and which he intended to buy. The Appellant also helped Ms. Priddy select a replacement set of hair curlers.

e. The Appellant went to the checkout counter after he completed his shopping, to pay for the household items. At the same time, Ms. Priddy, as she was instructed to do, went to the customer service desk located behind the checkout counter to use

the rain check and exchange the defective set for the new set of curlers.

f. While the Appellant was still at the checkout counter paying for the items he selected, Ms. Priddy returned to the checkout counter to show the checkout clerk that the merchandise exchange was done properly.

g. After paying the checkout clerk for the items, the Appellant and Ms. Priddy left the store.

h. Several of Appellee's security operatives surrounded the Appellant and Ms. Priddy in the parking lot. Ms. Jackie Boysen, the Appellee's loss prevention *supervisor*, loudly accused the Appellant of retail theft and demanded to inspect his shopping bags. See *Affidavits of Jolene Priddy*, **Exhibit "A"** of Appellant's answer opposing Appellee's motion for summary judgment and **Addendum F** to Appellant's Brief.

i. All of the employees of the Appellee witnessed the accusation of retail theft.

j. Ms. Priddy witnessed and heard the accusation of retail theft. See *Affidavit of Jolene Priddy*, **Addendum F**.

k. Several shoppers either exiting or entering the store gathered around to view the spectacle. They heard the open, vocal and repeated accusations of retail theft or became aware of it as the Appellee's security operatives, namely Jackie Boysen, continued accusing the Appellant of retail theft and demanding to inspect the Appellant's and Ms. Priddy's shopping bags.

l. During discovery, the Appellant purchased from the Appellee a video tape featuring the Appellant shopping in the

Appellee's store. See Shopko Video Tape, **Exhibit "B"** of Appellant's answer and opposition to Appellee's motion to summary judgment in the trial court and **Addendum I** to Appellant's Brief.

m. The video recording shows the Appellant for about 45 minutes of normal shopping in the store. Nothing in the video suggests or even allows the reasonable inference that the Appellant did anything to warrant suspicion of retail theft. See Affidavit of Greg Markham, **Exhibit "E"** of Appellant's answer opposing Appellee's motion for summary Judgment, and **Addendum G** to Appellant's Brief. In the video recording, it is obvious that the Appellant was stopped and accused of retail theft because of his race and ethnic heritage. See Shopko Video Tape, **Addendum I**.

n. Since being accused of retail theft, the Appellant has been unable to sleep well, and often has nightmares.

o. Additionally, Appellant has been unable to feel at ease in any store. The reckless and outrageous occurrences of February 28, 1993 make him feel that, because of his race, he may be a perpetual suspect in retail theft.

SUMMARY OF ARGUMENT

On review of a motion for summary judgment, the appellate court, reviewing the facts in a light most favorable to Appellant's cause of action, is free to reappraise the legal conclusions reached by the trial court. In this case, the trial court failed to assess the materiality or the disputed aspects of the facts the parties offered and to draw all reasonable inferences from those facts in a light most favorable to the

Appellant, the non-moving party. Specifically, the trial court, failed to review a material and critical piece of evidence which goes to the principal issues of probable cause and privilege. Additionally, the trial court selected *just* one of the disputed facts, and drew all reasonable inferences therefrom in favor of the moving party. This presumption in favor of the moving party violates the generally accepted standards for summary judgment.

The trial court applied the wrong legal standards or produced a deficient legal analysis in reaching its conclusions. Finally, the Appellant submits that Utah Code Annotated, Section 78-11-18 bars the plaintiff's constitutional right to seek redress in Utah courts in violation of Article I, Section 11 of the Utah State Constitution.

ARGUMENT

I

ON REVIEW OF A MOTION FOR SUMMARY JUDGMENT, THE APPELLATE COURT, REVIEWING THE FACTS IN A LIGHT MOST FAVORABLE TO APPELLANT'S CAUSE OF ACTION, IS FREE TO REAPPRAISE THE TRIAL COURT'S LEGAL CONCLUSIONS

On review of a summary judgment, the losing party is entitled to have all the facts presented, and all inferences fairly arising from those facts considered in a light most favorable to the losing party's cause of action. Utah R. Civ. P. 56(c); King v. Searle Pharmaceuticals, Inc., 832 P.2d 858 (Utah 1992); Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993); Katzenberger v. State, 735 P.2d 405, 408 (Utah App. 1987).

Since disposition of a case on summary judgment precludes a trial on the merits, the appellate court must review the evidence in the light most favorable to the losing party. This means that the appellate court should affirm only where it appears there are no genuine disputes of fact or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); Seare v. Univ. of Utah Sch. of Medicine; 882 P.2d 673, 674 (Utah App. 1994).

The trial court is to be given no deference and only if the moving party is entitled to judgment as a matter of law (based on the facts as seen by the losing party) is summary judgment to be granted. The matter is reviewed for correctness. Ferree v. State, 784 P.2d 149, 151 (Utah 1989); Seare v. Univ. of Utah Sch. of Medicine, 882 P.2d at 674; Pratt v. Mitchell Hollow Irrigation, Co., 813 P.2d 1169, 1171 (Utah 1991); Mumford v. ITT Commercial Fin. Co., 858 P.2d 1041, 1043 (Utah App. 1993).

a. The Trial Court Faced Several Material Factual Disputes

1. *Material Fact that a Non-Shopko Bag.*

"In determining whether the trial court properly found there were no genuine issues of material fact," the appellate court reviews "the facts in the light most favorable to the losing party, while giving no deference to the trial court's legal conclusions." Lister v. Utah Valley Community College, 247 Utah Adv. Rep. 12, 14 (Utah App. 1994)(citing Promark Group, Inc. v.

Harris Corp., 860 P.2d 964, 966 (Utah App. 1993); Ferree v. State; 784 P.2d at 151.

A "party moving for summary judgment must establish a right to judgment based on the applicable law as applied to an undisputed material issue of fact. *A party opposing the motion is required only to show that there is a material issue of fact.*" Ron Shepherd Ins. v. Shields, 882 P.2d 650, 652 (Utah App. 1994) (citing Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983)). Utah Court of Appeals' emphasis.

In this case, several issues of disputed fact exist. The materiality of those facts, and the fact that the Appellee did not deserve judgment as a matter of law, warranted a trial on the merits. The first disputed issue the trial court faced was whether the fact the Appellant and Ms. Priddy brought a non-Shopko bag into the Appellee's store provided a reasonable basis for the Appellee to suspect the Appellant of retail theft. See **Transcript [Addendum H]**, Page 5, lines 4-7. In rebuttal, the Appellant argued that as a matter of custom, tradition or usage in shopping in malls featuring multiple stores, the fact that the Appellant or Ms. Priddy had a non-Shopko bag was not at all unusual. Shoppers go from one store to another, buying from different stores and carrying different stores' bags in and out of neighboring and/or adjacent stores. See Transcript, Page 14, line 4-10.

The trial court emphasized the fact the Appellant and/or Ms. Priddy had a foreign bag in their possession when the Appellant and Ms. Priddy entered the Appellee's store. The trial court

found reasonable grounds for the Appellee's conduct based on this fact. See Transcript, Page 14, line 11-13.

The Appellant respectfully submits that the trial court failed to take into consideration that, as a matter of custom, tradition or usage, shoppers wander from store to store with bags of different stores and the non-Shopko bag should not be construed as a reasonable ground for an accusation or even suspicion of retail theft.

Consequently, Appellant further respectfully submits, the act that the Appellant and/or Ms. Priddy had a non-Shopko bag in their possession creates a material factual dispute whether the Appellee could find a reasonable ground to suspect the Appellant of shoplifting and probable cause to accuse him of a criminal act. Reasonable minds may differ on this issue because of the way people shop in malls featuring multi-stores. "No deference is accorded to the trial court's conclusions that the facts are not in dispute nor the court's legal conclusions based on those facts." Record v. Briggs, _____ P.2d _____, 253 Utah Adv. Rep. 63, 66 (Utah App. 1994); Western Farm Credit Bank v. Pratt, 860 P.2d 376, 378 (Utah App. 1993)(citing Kitchen v. Cal. Gas Co., 821 P.2d 458, 460 (Utah App. 1991), *cert. denied*, 879 P.2d 266 (Utah 1994)).

"[A] genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ" on any material issue. Jackson v. Babney, 645 P.2d 613, 615 (Utah 1982). If this honorable Court finds "a material factual issue," exists, it "must reverse the grant of summary judgment." Pratt, 860 P.2d

at 378; K & T, Inc. v. Koroulis, 254 Utah Adv. Rep. 3, 4 (Utah 1994)(citing Higgins v. Salt Lake County, 885 P.2d 231 at 235)(summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law).

2. *The Material Fact that the Exchange Was Made at the Service Desk.*

The most important feature in the Appellee's presentation and defense was that it acted reasonably because Ms. Priddy did not stop at the checkout counter with the curlers but went directly to the service desk to make the exchange. See Transcript, Page 5, lines 8-14.

This fact is important because the *modus operandi* of the store comes into sharp dispute. In his original complaint, **Addendum D** at ¶ 6, the Appellant alleged that the Appellee issued a rain check, and informed Ms. Priddy that she could keep the defective merchandise and to come back at a later date with the defective merchandise to exchange it for a good set. This important fact was again highlighted for the benefit of the trial court in the Appellant's answer opposing the motion for summary judgment. **Addendum E** at Page 2, 4th paragraph. At oral argument, again the Appellant's counsel amplified that fact. See Transcript, Page 15, lines 17-25.

The following verbal exchange at the oral argument illustrates that the trial court was well-informed of the Appellee's merchandise exchange procedures.

Judge Young: All right. Now they then had the old curlers in a bag.

Mr. de Montreux: Not in a bag--The old curlers were in a bag, yes.

Judge Young: They took the new curlers in their hand--

Mr. de Montreux: Yes.

Judge Young: --Walked through the counter, through the checkout counter and went then to the service desk.

Mr. de Montreux: **As they were instructed to do.**

Judge Young: **Well, as they would have been expected to do, likely.**

Transcript, Page 15, lines 13-25. (Emphasis supplied)

Here, the Appellee's procedures in effectuating exchanges of merchandise were at issue. Recognizing the materiality of the fact that Ms. Priddy did not stop at the checkout counter, the trial court made the following observation to the Appellee's lawyer:

Judge Young: Okay. Now let me just take it one step further. Shouldn't I require this matter than go to a jury to decide whether that action formed an adequate basis for the employer, or the merchant, to believe reasonably that merchandise was being wrongfully taken. Transcript, Page 25, lines 20-25.

The fact that Ms. Priddy went directly to the service desk was crucial and disputed. The trial court saw this fact's materiality and knew it was disputed. **The trial court should have drawn all reasonable inferences from the dispute in a light most favorable to the Appellant.** Nonetheless, the

trial court relied upon this factual dispute as the only grounds for finding the Appellee acted reasonably in accusing the Appellant of retail theft. See Transcript at Page 29, lines 5-15.

The Appellant respectfully submits that the trial court should have found that the Appellee's merchandise exchange procedures were a disputed factual matter which subsequently put into question the reasonableness of the accusation of retail theft or probable cause for its utterance. At trial, Ms. Priddy and others would have testified that Ms. Priddy acted according to Appellee's instructions and according to the store's own rules. Because this material factual dispute existed at the time of summary judgment, it should have been submitted to a jury.

But, the trial court did not see a genuine issue of material fact here and ordered summary judgment. And if it saw an issue of material fact, the trial court wrongly drew all reasonable inferences in a light most favorable to the moving party. The trial court's position was erroneous and should be reversed. Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285 (Utah App. 1994).

3. *The Material Occurrences Which Took Place in Appellee's Parking Lot.*

Another disputed and material fact was the nature of the accusations made to the Appellant by the Appellee's security operatives. The Appellee argued that it approached the Appellant and Ms. Priddy as they left the store. The Appellee

claims that the leader, Ms. Jackie Boysen, wanted to look in Ms. Priddy's bags. See Transcript, Page 5, lines 15-19. This fact is disputed.

The Appellant alleged that the Appellee's security operatives stopped him in the parking lot and accused him of retail theft. (Complaint, **Addendum D** at ¶ 10. See also Affidavit of Jolene Priddy, Exhibit A to the Appellant's answer opposing the motion for summary judgment, and **Addendum F** hereto.) In Ms. Priddy's sworn statement, she clearly testifies that the Appellee accused the Appellant of retail theft and then requested to check Appellant's bags. **Addendum F** at ¶ 7.

The Appellant respectfully submits that Ms. Priddy's testimony goes to her credibility as a witness and is an issue for trial. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984)(trial court must not weigh evidence or assess credibility). Furthermore, "[o]ne sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding summary judgment." Western Farm Credit Bank v. Pratt, 860 P.2d 376, 378 (Utah App. 1993)(citing Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 957 (Utah App. 1989). This reviewing court should accept Ms. Priddy's sworn statement as true. K & T, Inc. v. Koroulis, 254 Utah Adv. Rep. 3, 6 (Utah 1994)(citing Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

The Appellant respectfully submits that the trial court faced two parties with very different stories. The presence of a dispute as to material facts prohibits the granting of summary

judgment. Bill Brown Realty, Inc. v. Abott, 562 P.2d 238 (Utah 1977). See also, Billings ex rel. Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991)(summary judgment proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law); cf. Fashion Place Inv. Ltd. v. Salt Lake County/Salt Lake County Mental Health, 776 P.2d 941, 943, cert. denied, 783 P.2d 53 (Utah 1989)([if extrinsic evidence] is disputed, then a material fact is also disputed, and summary judgment cannot be granted).

When granting a motion for summary judgment, a trial judge must consider each element of the claim under the appropriate standard of proof. Republic Group, Inc. v. Won-Door Corp., 885 P.2d 285, 288 (Utah App. 1994). The trial court ignored most of the disputed facts⁷ and selected only the walk to the service desk as a factual dispute.⁸ From this fact alone, the trial court drew all reasonable inferences in favor of the moving party in violation of the standards for summary judgment. Promark Group, Inc. v. Harris Corp., 860 P.2d 964, 966 (Utah App. 1993); Lister v. Utah Valley Community College, 247 Utah Adv. Rep. 12, 14 (Utah App. 1994).

⁷. The trial court did not see the occurrences in the parking lot as material. It simply blamed the Appellant for being belligerent. See Transcript, Page 29, lines 4-15. Is that not weighing the evidence.

⁸. Actually, neither of the parties relied upon the fact that Ms. Priddy went to service desk without stopping at the checkout counter because that was the Appellee's procedure. It is the trial court who magnified this issue. The parties' issue was whether or not the Appellee committed slander per se in accusing the Appellant of retail theft in the parking lot.

II

THE TRIAL COURT FAILED TO REVIEW ALL THE EVIDENCE

When granting a motion for summary judgment, a trial judge must consider each element of the claim under the appropriate standard of proof. Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046 (Utah Ct. App. 1994); Republic Group, Inc. v. Won-Door Corp., 885 P.2d 285, 288 (Utah App. 1994).

Most crucial to the Appellant's case in the trial court was the video recording which the Appellant submitted as Exhibit B to Appellant's answer opposing the motion for summary judgment, (**Addendum I** on appeal). The recording shows that the Appellee acted with recklessly and with malice and that the Appellee targeted the Appellant and accused him of retail theft because of his race. Regrettably, the trial court did NOT review the recording and, therefore, could not see that the Appellee had no probable cause and lost its statutory privilege to stop the Appellant.

To illustrate the trial court's ignorance of the video tape recording, please consider this excerpt from the transcript of oral argument on the motion for summary judgment. At page 16, lines 14-17, counsel for the Appellant, assuming that the trial court had fully reviewed the evidence, called the trial court's attention to the content of the video tape recording:

Mr. de Montreux: [Your Honor, that is true.] However, when you got the entire evidence, when you look at the evidence of the video tape--

Here, the trial court interrupted Appellant's counsel and asked:

Judge Young: ***The what?***

Transcript, Page 16, lines 14-17.

Further showing the trial court did not review the recording to assess its implication is this additional excerpt from the transcript of the oral argument:

Judge Young: Let me ask you this. Suppose, given all⁹ of their evidence must be viewed in the light most favorable to the non-moving party, if it is true that the store had observed him by video tape for 45 minutes, and the videotape does not show any activity that would be akin to shoplifting, what reasonable basis is there, as the statute requires, is there that would allow the employees to conclude that there had been the potential of shoplifting? Just the walking through the counter?

Transcript. Page 25, lines 8-17 (Emphasis supplied)

The Appellant respectfully submits that it is clear the trial court did not have any knowledge of the content of the video recording and therefore could not assess its importance regarding the significant issues of privilege and probable cause. The trial court was surprised by the reference to the recording. Had the trial court reviewed the video tape, it would have discovered that, from the instant the Appellant entered the Appellee's store, he became a suspect of retail theft. The trial court would have discovered that the Appellant became the focus of a store-wide

⁹. It is ironic that the trial court recognized that "all" the evidence must be viewed in a light most favorable to the Appellant and still based its conclusions on just the fact that Ms. Priddy walked through the checkout counter to the service desk.

manhunt involving all security operatives working for the Appellee, including the Appellee's loss prevention supervisor, Jackie Boysen. The trial court would have discovered that the surveillance cameras in the store targeted every move the Appellant made, focusing, zooming and moving to wide angle to better scrutinize the Appellant's actions. The trial court would have found that the store security operatives even ignored Ms. Priddy and remained focused on the Appellant. The trial court would have found out that the store security operatives did not pay any scrutiny whatsoever to other shoppers who were Caucasian, but remained focused on the Appellant as a suspect. The trial court would have discovered that, at the checkout counter, everything was done legitimately. It would have been able to see that Ms. Priddy returned to the checkout counter from the service desk which is located just behind the checkout counter after the exchange; that the new curlers were in the open and that Ms. Priddy offered to have the checkout clerk verify that everything was proper. The trial court would also have discovered that Jackie Boysen, the first security operative to accuse the Appellant of retail theft was the very same person in charge of loss prevention and that she directed both the camera surveillance and the floor surveillance of the Appellant.¹⁰

In a motion for summary judgment the non-moving party is entitled to all reasonable inferences that could be drawn from the

¹⁰. Appellant's motion to compel wanted the Appellees to provide the identity of the person(s) who operated the surveillance cameras. The Appellee refused to provide that information and instead filed its motion for summary judgment. Deposition of the cameras' operators would have established who ordered the surveillance of the Appellant.

facts of the case, together with the evidence. Utah R.Civ.P 56(c); Higgins v. Salt Lake County, 885 P.2d 231, 233 (Utah 1993); Seare v. Univ. of Utah Sch. of Medicine, 882 P.2d 673, 674 (Utah App. 1994). The trial court is required to consider each element of the claim and every disputed fact under the appropriate standard of proof. Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046 (Utah App. 1994)(Utah App. 1994).

Had the trial court reviewed and considered all the evidence in its analysis as it was supposed to do, *Id.*, it would have been able to follow the standards of this appellate court. *Unfortunately, that just did not happen.* The Appellant respectfully submits that this Court has the authority to review the entire matter *de novo* and in a light most favorable to the Appellant. Briggs v. Holcomb, 740 P.2d 281 (Utah App. 1987).

III

THE APPELLEE LOST ITS QUALIFIED PRIVILEGE IN ACTING RECKLESSLY OR WITH MALICE.¹¹

"Summary judgment allows the parties to pierce the pleadings to determine whether a material issue of fact exists that must be resolved by the fact finder." Lamb v. B & B Amusements Corp., 869 P.2d 926, 928 (Utah 1993)(citing Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 770 (Utah 1984); Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983)).

In defending its defamatory actions, the Appellee invoked the doctrine of conditional or qualified privilege. Merchants

¹¹. The Appellant made this very same argument in his Answer and Opposition to the Appellee's Motion for Summary Judgment in the court below. See Addendum E at Page 10, Argument IV.

traditionally rely upon this privilege when detaining suspected thieves. See Transcript, Page 8, lines 20-24. The Appellant concedes that the law allows this privilege. See generally Brehany v. Nordstrom, Inc. 812 P.2d 49, 58 (Utah 1991).¹² However, the Appellant respectfully submits that there is a magnificent distinction between the Appellee's conditional or qualified privilege and absolute privilege. The Appellee's privilege is subject to attacks and can be defeated. Williams v. Standard Examiner Publishing Co., 27 P.2d 1, 13-14 (Utah 1933) (defendant privilege merely raises a prima facie presumption in favor of the Defendant).

In order for a publication to be conditionally privileged, there must be present a situation warranting a privilege and the use of the privilege in good faith and without express malice. Atlas Sewing Centers v. Nat'l Ass'n of Indep. Sewing Mach. Dealers, 260 F.2d 803, 808 (10th Cir. 1958).

Applying the above law to the instant case, the Appellant respectfully submits that the evidence shows that the only reason he was a suspect of retail theft on February 28, 1993, is because of his race and his ethnicity.

The Appellee targeted the Appellant as a suspect the instant the Appellant entered the Appellee's store. See Shopko Video, Addendum I The Appellee followed the Appellant, trained its cameras on the Appellant wherever the Appellant went in the store while shopping. See Shopko Video, Addendum I. The Appellee did not train its cameras on Ms. Priddy who is Caucasian. The

¹². c.f. U.C.A. 76-9-506 (1990 as amended).

Appellee did not train its cameras on other Caucasian shoppers who, just like the Appellant, were calmly shopping. The Appellant's race is not and cannot be probable cause to warrant suspicion of retail theft, or the public and slanderous accusation of a criminal offense.

The video clearly shows that there was no probable cause to warrant suspicion of shoplifting. Therefore, Appellee's acts constitute violation of the Appellant's civil rights, and **express malice or recklessness**. This malice or recklessness defeats the Appellee's conditional or qualified privilege. Atlas Sewing Centers, supra. See also Seegmiller v. KSL, Inc. 626 P.2d 969, 972 (Utah 1981)(citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). The Thompson Court held:

[R]eckless conduct (or malice) is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless for the truth or falsity and demonstrates actual malice.

The video tape clearly shows that the Appellee did not have any reasonable ground to stop and accuse the Appellant of retail theft. See Affidavit of Greg Markham, **Addendum G**. The Appellee's defamatory accusation was flagrantly based on race and race only, as the video tape shows nothing to arouse Appellee's suspicion. The Appellee acted from an improper motive, from a desire to do harm, knowing that its statements were not true and could not be proven. See Ogden Bus Lines v. KSL, Inc. 551 P.2d

222, 225 (Utah 1976). The Appellee's actions constitute actual malice.

The Appellant respectfully submits that the general view is that the Appellee must have an actual and honest belief in the truth of the defamatory matter in order to be protected by a conditional privilege. Berry v. Moench, 331 P.2d 814, 819 (Utah 1958)(conditional privilege will not be recognized if the Defendant knows that his statements are unfounded). The requirement of good faith does not only apply to professional news organizations. Direct Import Buyers Ass'n v. KSL, Inc., 572 P.2d 692, 694 (Utah 1977), it exists as well for private individuals. Moench, 331 P.2d at 819.

Even in cases dealing with shopkeepers' statutory immunity, Utah courts recognize the duty of shopkeepers to have probable cause before arresting, or as in this case, accusing a person of a crime. In Terry v. Zions Co-op. Mercantile Inst., 605 P.2d 314, on rehearing 617 P.2d 700 (Utah 1979), the Utah Supreme Court held that in determining reasonableness of detention and arrest of suspected shoplifters for purposes of statutory immunity from civil suits, the applicable test is one that is practical under the circumstances, *i.e.*, "whether a reasonable and prudent man in his position would be justified in believing facts which would warrant arrest." *Id.* at 320-321; Isaiah v. Great Atlantic & Pacific Tea Co., 174 N.E.2d 128 (Ohio App. 1959).

The Appellant respectfully submits that the Appellee's security operatives focused on his actions in the Appellee's store for about 45 minutes. During that time, the Appellant did not do

anything to warrant suspicion. The Appellant did not leave the floor until he exited the store. Nothing on the tape shows even an inference of improper behavior. Any reasonable and prudent person would have known that there was no reasonable basis to accuse the Appellant of retail theft. Terry, 605 P.2d at 320-321.

The Terry case also held that to obtain statutory immunity from civil suits arising out of detention and arrest of suspected shoplifters, the officer or merchant must allege and prove not only that he believed in good faith that his conduct was lawful, but also that his belief was reasonable. *Id.* at 320. (Emphasis supplied).

Without viewing the video recording which was the principal evidence regarding the question of Appellee's claimed privilege, the Appellant respectfully submits that the trial court erroneously ruled that the Appellee had a reasonable basis to accuse the Appellant of retail theft. The trial court erred in holding that, just because Ms. Priddy went to exchange the hair curlers as she was instructed, the Appellee had a reasonable basis to accuse the Appellant of retail theft. See Transcript, Page 29, lines 1-19.

- a. When Facing a Mixed Question of Fact and Law, a Jury, not the Trial Court, should Decide the Outcome.

The Appellant further respectfully submits that this Court should reversed the findings of the trial court for failure to review the evidence and for failure to send the case to a jury because of the presence of a mixed question of law and fact.

When reasonableness and probable cause are disputed, a trial court faces a mixed question of law and fact. If the question of fact is undisputed, the trial court faces only a question of law that it should determine. But, as in this case, if reasonableness and probable cause are in dispute, the trial court is required to send the case to a jury to decide which story to believe. Then the trial court instructs the jury regarding the law to apply to the facts. However, in this case, faced disputed facts as to the reasonableness and the probable cause issues, the trial court regrettably *only* saw a question of law. Terry v. Zions, 605 P.2d at 320, n. 15.¹³

IV

THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD OR PRODUCED AN INCOMPLETE OR DEFICIENT LEGAL ANALYSIS

The Appellant sued the Appellee for slander. The Appellant alleged that the Appellee made a slander per se in accusing him of

¹³. Footnote 15 reads as follows: "The standard is generally stated as:

"The question of probable cause is a mixed one of law and fact. The court submits the evidence offered to the jury with instructions as to what will amount to probable cause if proved. If the facts are undisputed, the question is one of law to be determined by the court." 22 Am.Jur., False Imprisonment, Section 218, p. 429. Under this standard if the question of reasonable or probable cause for the detention of a customer is undisputed, it is only one of law for the court, but if the evidence is conflicting, it is a mixed question of law and fact in which the trier of fact must determine which of the conflicting stories is true and the judge must decide whether this story satisfies the requirements of reasonable cause. See *Stienbaugh v. Payless Drug Stores, Inc.*, 75 N.M. 118, 401 P.2d 104 (1965); *Lukas v. J.C. Penny Corp.* 233 Or. 345, 378 P.2d 717 (1963).

retail theft in public. The only statute the trial court used in ruling against the Appellant provides:

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 type of claim or action unless the custody and detention are unreasonable under all circumstances.

Utah Code Annotated 78-11-18 (1975 as amended).

Apparently, the statute gives merchants the authority to request a suspected shoplifter to stop or to be detained for a reasonable period of time. However, in this case, the Appellant was not invited to participate in an investigation. The Appellee's security operatives abruptly accused the Appellant of retail theft in a public parking lot in full view of Ms. Priddy and other customers. The Appellee is a merchant. U.C.A. 78-11-18 (1975 as amended) only gives it a conditional privilege to act reasonably in detaining a suspect, but not to openly vilify the Appellant as it did.

Therefore, the Appellant respectfully submits that the trial court's ruling [Transcript Page 29, lines 4-15] that the Appellee acted reasonably is deficient. The trial court faced a mixed question of fact and law. The principal facts of reasonableness

and probable cause were disputed. The trial court was required to submit the dispute to a jury to determine the truthfulness of the stories.¹⁴

The Appellant also respectfully submits that the trial court faced a defamation of character issue in which a witness, Ms. Priddy, submitted a sworn statement that the Appellee slandered the Appellant.¹⁵ This presented an issue of fact for a jury to decide. The trial court did not consider the implication of the slander issue or the disputed testimony in granting summary judgment. This, the Appellant submits, amounts to the trial court rendering a deficient legal analysis which failed to take into account every element of the case. Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046 (Utah App. 1994)

V

U.C.A. 78-11-18 BARS THE APPELLANT'S RIGHT TO OPEN COURT IN VIOLATION OF ART.1, § 11 OF THE UTAH STATE CONSTITUTION

Utah Code Annotated 78-11-18 (1975 as amended). 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

¹⁴. See Footnote 13, *supra*, and accompanying text.

¹⁵. "[o]ne sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding summary judgment." *Western Farm Credit Bank v. Pratt*, 860 P.2d 376, 378 Utah Ct.App. 1993)(quoting *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah App. 1989)).

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 type of claim or action unless the custody and detention are unreasonable under all circumstances.

Utah State Constitution. Article I, Section 11. Courts Open
— Redress of injuries.

All courts shall be open, and every person, for any 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.

The trial court's ruling, meaning to rely upon U.C.A. §§ 77-11-17 and 18,¹⁶ but instead cited to U.C.A. §§ 78-12-17, 18, found that Utah law gives a merchant the privilege to detain a customer suspected of shoplifting. However, as interpreted by the trial court, the statute allows a merchant an absolute privilege to indiscriminately detain people and not be amenable to a court of law, even when the merchant has no probable cause to act. The Appellant respectfully submits that the merchant immunity statute and the interpretation it invites, operates to keep the courts closed to aggrieved individuals. Article 1, Section 11 places a limitation upon the Legislature to prevent that branch of state government from closing the doors of the courts to a person who has a legal right which is enforceable. The Appellant was injured

¹⁶. See Transcript Page 29, lines 4-5.

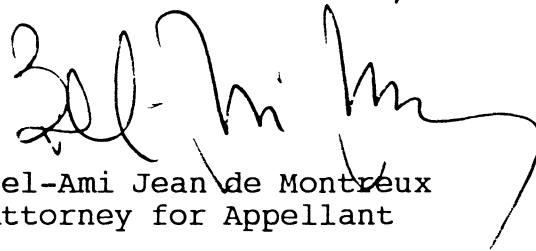
by the Appellee and sought relief. The statute stood as a bar against him and his claims. Utah State Const. Article 1, Section 11; See generally Brown v. Wightman, 151 P. 366 (Utah 1915).

CONCLUSION

The trial court committed reversible error in failing assess the materiality of the disputed facts and to draw all reasonable inferences in a light most favorable to the Appellant, the non-moving party. The trial court DID NOT review the video which was the most important piece of evidence the Appellant provided. Thus the trial court could not assess the disputed issues of reasonableness and probable cause or draw any inferences from the evidence. Because of the errors highlighted above, and based on other points argued in this brief, this case should be remanded for trial on the merits.

Respectfully submitted this 10th day of January 1995.

MONTREUX FRÈRES, P.C.

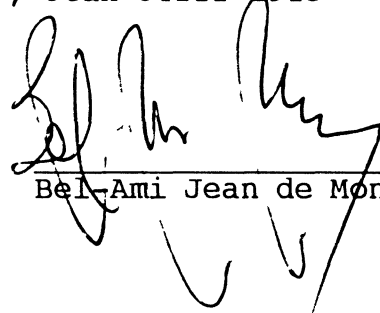
A handwritten signature in black ink, appearing to read "Bel-Ami Jean de Montreux", with a long, sweeping horizontal line extending to the right.

Bel-Ami Jean de Montreux
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that, on January 10, 1995, I caused to be hand-delivered two (2) true and correct copies of the foregoing Brief of Appellant to the following:

Royal I. Hansen, Esq.
H. Dennis Piercy
Moyle & Draper, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111-1915



Bel Ami Jean de Montreux

ADDENDUM A

Trial Court's Final Order

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H. Dennis Piercey (#3746), of
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Attorneys for Uvalko ShopKo Stores, Inc.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111-1915
Telephone: (801) 521-0250

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

JOHN PRIDDY,	:	
	:	
Plaintiff,	:	JUDGMENT AND ORDER
	:	
v.	:	
	:	
SHOPKO CORPORATION,	:	Civil No. 930905722 CV
	:	
Defendant.	:	Judge David S. Young
	:	

Uvalko ShopKo Stores, Inc.'s Motion for Summary
Judgment came on regularly for hearing on August 5, 1994, before
the Honorable David S. Young. Plaintiff John Priddy was
represented by Bel-Ami De Montreux, Esq. of Montreux Freres, P.C.
Defendant Uvalko ShopKo Stores, Inc. was represented by Royal I.
Hansen and H. Dennis Piercey of Moyle & Draper, P.C. Based upon
the defendant's Motion for Summary Judgment, dated July 12, 1994,
Memorandum in Support of Motion for Summary Judgment, dated July
12, 1994, Reply Memorandum in Support of Motion for Summary
Judgment, dated August 1, 1994, Objection and Response to
Plaintiff's "Notice of Additional Authority," dated August 3,
1994, together with the statements of counsel, the contents of

the file, and being fully advised as to the premises, and good cause appearing, now, therefor, it is

ORDERED, DECREED AND ADJUDGED:

1. Uvalko ShopKo Stores, Inc.'s Motion for Summary Judgment is granted;

2. Plaintiff's Complaint, and each cause of action therein, is dismissed with prejudice, no cause of action, defendant is awarded its costs, the amount of which are to be inserted herein by the Clerk pursuant to Utah R. Civ. P. 54(e) when taxed or ascertained (costs: \$_____), and this action is dismissed.

DATED: August _____, 1994.

BY THE COURT:

By _____
Honorable David S. Young
District Court Judge

Approved as to form:

MONTREUX FRERES, P.C.

by _____
Bel-Ami De Montreux
Attorney for Plaintiff

MOYLE & DRAPER, P.C.

by H. Dennis Piercey
Royal I. Hansen
H. Dennis Piercey
Attorneys for Uvalko ShopKo Stores, Inc.

CERTIFICATE OF SERVICE

I certify that on August 8, 1994, I hand-delivered a copy of the foregoing Judgment and Order to the following:

Bel-Ami De Montreux, Esq.
MONTREUX FRERES, P.C.
Attorneys for Plaintiff
310 South Main, Twelfth Floor
Salt Lake City, Utah 84101



ADDENDUM B

N o t i c e o f A p p e a l

BEL-AMI DE MONTREUX, # 6207
ATTORNEY AT LAW
MONTREUX LAW OFFICES
310 SOUTH MAIN, TWELFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-3021
FAX NUMBER (801) 359-7406

ATTORNEY FOR PLAINTIFF/APPELLANT

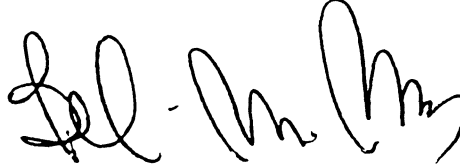
IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY STATE OF UTAH

JOHN PRIDDY,	:	
	:	
PLAINTIFF/APPELLANT,	:	NOTICE OF APPEAL
	:	
VS.	:	
	:	
	:	
SHOPKO CORPORATION,	:	CIVIL No. 930905722 CV
	:	
DEFENDANT/APPELLE.	:	JUDGE DAVID S. YOUNG

COMES NOW the Plaintiff/Appellant, John Priddy, by and through his attorney of record, Bel-Ami de Montreux, and appeals to the Utah Supreme Court from the summary judgment order entered by the trial court on August 5, 1994.

DATED this 24th day of August, 1994.

MONTREUX LAW OFFICES

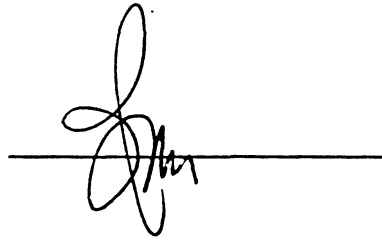


Bel-Ami de Montreux
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that on August 24, 1994 I mailed a true and correct copy of the foregoing to:

Royal I. Hansen, Esq.
Moyle & Draper
600 Deseret Plaza
No. 15 East First South
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

A handwritten signature in dark ink, appearing to be "R. I. Hansen", is written over a solid horizontal line. The signature is stylized with loops and a long horizontal stroke at the end.

ADDENDUM C

Supreme Court's Assignment

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

October 12, 1994

OFFICE OF THE CLERK

BelaAmi DeMontreux
DeMontreux, BelAmi
Attorney at Law
310 South Main, 12th Floor
Salt Lake City, UT 84101

John Priddy,
Plaintiff and Appellant,
v.
Shopko Corporation,
Defendant and Appellee.

No. 940413
930905722CV

Pursuant to the authority vested in this Court, this case is poured-over to the Court of Appeals for disposition. All further pleadings and correspondence should be directed to that Court. The address is 230 South 500 East, Suite 400, Salt Lake City, Utah 84102.

Geoffrey J. Butler
Clerk

ADDENDUM D

A p p e l l a n t ' s V e r i f i e d C o m p l a i n t

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J
80.
BEL-AMI DE MONTREUX, # 6207
ATTORNEY AT LAW
MONTREUX FRÈRES, P.C.
310 SOUTH MAIN, TWELFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-3021
FAX NUMBER (801) 359-7406

ATTORNEY FOR PLAINTIFF

3:12 PM '00
J. Kendall

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

JOHN PRIDDY,

PLAINTIFF,

VS.

SHOPKO CORPORATION,

DEFENDANT.

:
:
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:

VERIFIED COMPLAINT

CIVIL No. 930905722CV

JUDGE DAVID S. YOUNG

The Plaintiff in this matter, John Priddy, by and through his attorney of record, Bel-Ami de Montreux, complains of the Defendant, Shopko Corp., and alleges as follows:

JURISDICTION AND PARTIES

1. The Plaintiff is an individual residing in Salt Lake County, State of Utah.

2. The Defendant is believed to be a Wisconsin Corporation that is authorized to do business in the State of Utah by virtue of the laws of the State of Utah.

4. In Addition to U.C.A. 78-27-24 (Long Arm Statute), jurisdiction is invoked as follows:

(a) Article 1, Section 1 of the CONSTITUTION OF UTAH (Inherent and inalienable right to protect against wrongs and petition for redress and grievance)

(b) Article I Section 11 of the CONSTITUTION OF UTAH (Courts Open—Redress of Injuries); and

(c) The common law of Utah

GENERAL ALLEGATIONS

5. On Sunday, February 28, 1993, the Plaintiff and his fiancée, Ms. Jolene Patience, went to the Shopko Store located in Sugarhouse, Salt Lake City, to return a set of defective hair rollers that Ms. Patience had purchased from Shopko on February 20, 1993. The set of rollers was missing a few pins.

6. Ms. Patience had attempted to return the defective hair rollers to the store before, on February 20, 1993. The store was out of the brand. Therefore, the store's return clerk had told Ms. Patience to go on using the hair rollers until the store received a new shipment. The Store gave Ms. Patience the appropriate *rain check* paper to execute the exchange. (See Exhibit "A" featuring all relevant store receipts)

7. On February 28, 1993, the Plaintiff and Ms. Patience entered the Shopko store to exchange the rollers and purchase a few household items.

8. While shopping, the Plaintiff and his companion went to the area where the Defendant kept the hair rollers, and got a new set.

9. Thereafter the Plaintiff selected a few household items and went to the cashier to pay for the household items while Ms. Patience went to the Customer Service/Return Desk to effectuate the exchange of rollers.

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10. Upon paying for the purchase, the Plaintiff and Ms. Patience walked out of the Defendant's store where the Defendant's employees and/or agents surrounded the Plaintiff and loudly accused the Plaintiff of shoplifting.

11. The Defendant did not have probable cause to stop and retain the Plaintiff. The Defendant's only cause for retaining the Plaintiff was the fact that the Plaintiff was an African-American. The Defendant apparently assumed that the Plaintiff must have been a shoplifter because of his race.

12. The Plaintiff was not only harassed, but he was ridiculed and humiliated before his companion. The Plaintiff was held to public scorn because the Defendant's employees and agents made him look like a common criminal in arresting him and in accusing him of stealing the Defendant's goods before all the other customers leaving and entering the Defendant's store at the time of the occurrences.

13. All of the Defendant's accusations and all of the Defendant's collateral statements were untrue, libelous and damaging.

14. The Defendant assassinated the Plaintiff's character and reputation.

**FIRST CAUSE OF ACTION
(DEFAMATION OF CHARACTER)**

15. The Plaintiff incorporates by reference paragraphs one (1) through 14, the same as if fully set forth herein.

16. The Plaintiff was a legitimate shopper who paid valuable consideration to the Defendant.

17. The Plaintiff was an invitee to whom the Defendant owed a higher degree of care and the Defendant lacked probable cause to retain the Plaintiff except that the Defendant assumed the Plaintiff was shoplifting because the Plaintiff is Black.

18. The Defendant's humiliating accusations, arrest and ensuing public character assassination of the Plaintiff were made willfully, wantonly and maliciously and in a discriminatory fashion in order to injure, ridicule, embarrass and humiliate the Plaintiff before his companion and the general public.

19. At all times mentioned, the Defendant Corporation had knowledge of, authorized, and ratified the mentioned willful, wanton, discriminatory and malicious statements made by the Defendant's agents and employees. This is true because the Defendant failed to adequately train its employees and agents and authorized such illegal acts from its employees and agents.

20. As a direct result of the wanton, malicious and false statements, the Plaintiff's former excellent character is sabotaged.

21. As a direct and proximate result of the slander committed by Defendant Corporation's agents and employees, Plaintiff has sustained special damages. The Court should award to the Plaintiff damages in the amount of \$550,000.00 or an approximate amount to be established at the time of trial as a warning to the Defendant and others that society does not countenance their egregious behavior.

**SECOND CAUSE OF ACTION
(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)**

22. The Plaintiff incorporates by reference paragraphs one (1) through 21, the same as if fully set forth herein.

23. The Defendant by and through its employees and/or agents recklessly and negligently caused severe emotional distress to the Plaintiff.

24. As a result of the Defendant's employees and/or agents' treatment of the Plaintiff, the Plaintiff has had to suffer emotionally as he were left facing extreme humiliation while being held to public scorn in a situation where the Defendant did not have probable cause but decided to abuse and ridicule the Plaintiff merely because of his race.

25. The manner in which the Defendant's employees and/or agents with the conspiracy or connivance or under the influence of Defendant Shopko Corporation handled Plaintiff's misfortune—a misfortune which they caused—was reckless, negligent, extreme and outrageous, the actors knew or should have known that such conduct would and has caused the Plaintiff mental anguish and suffering, humiliation and embarrassment.

26. The Plaintiffs' mental anguish and suffering, humiliation and embarrassment are justified under the circumstances, and further, because, aside from having to face public scorn and ridicule, the Plaintiff has had to endure and is still enduring the humiliation that is collateral to racial discrimination.

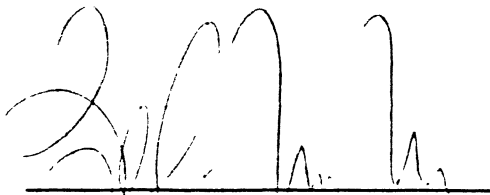
27. As a direct and proximate result of the slander and/or libel committed by Defendant Corporation's agents and employees, the Plaintiff has suffered extreme humiliation and embarrassment for which the Plaintiff is entitled to recover general damages in the amount of \$2,000,000.00, or a proximate amount to be established at the time of trial.

WHEREFORE, the Plaintiff requests judgment against the Defendant as follows:

1. Trial by Jury;
2. Plaintiff should recover from Defendant as to the first cause of action, damages in the amount of \$550,000.00;
3. As to the second cause of action, Plaintiff should recover from the Defendant damages in the amount of \$2,000,000.00;
4. The Court should award Plaintiff all reasonable attorney fees and court costs incurred herein; and
5. The Court should award Plaintiff such other and further relief which it deems just and proper.

DATED this 30 day of ~~September~~^{October}, 1993.

MONTREUX FRERES, P.C.

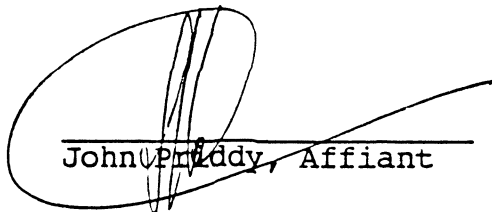


BEL-AMI DE MONTREUX
ATTORNEY FOR PLAINTIFF

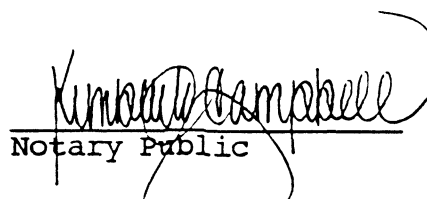
VERIFICATION

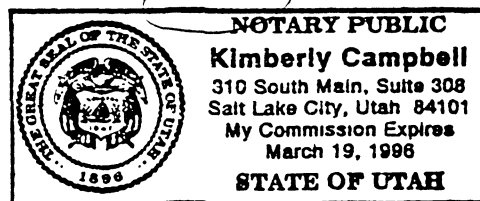
STATE OF UTAH)
 :
County of Salt Lake)

John Priddy, being first duly sworn upon his oath, deposes and says that he is the Plaintiff in the above entitled matter; that he has read the foregoing Complaint, and understands the contents thereof, and the same is true of his own knowledge, information and belief.


John Priddy, Affiant

SUBSCRIBED and Sworn to before me this 28 day of September, 1993.


Notary Public



ADDENDUM E

A n s w e r t o S u m m a r y J u d g m e n t

BEL-AMI DE MONTREUX, # 6207
ATTORNEY AT LAW
MONTREUX LAW OFFICES
310 SOUTH MAIN, TWELFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-3021
FAX NUMBER (801) 359-7406

ATTORNEY FOR PLAINTIFF

COPY €

*MOTION to
Amend Compl
Proposed Amend
Compla*

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

JOHN PRIDDY,	:	
	:	
PLAINTIFF,	:	ANSWER AND OPPOSITION TO DEFENDANT'S
	:	MOTION FOR SUMMARY JUDGMENT
VS.	:	
	:	
	:	CIVIL No. 930905722 CV
SHOPKO CORPORATION,	:	
	:	
DEFENDANT.	:	JUDGE DAVID S. YOUNG

The Plaintiff in this matter, John Priddy, by and through his attorney of record, Bel-Ami de Montreux, respectfully submits this Memorandum of Points and Authorities as Answer and in Opposition to the Defendant's, Shopko Corporation, Motion for Summary Judgment. This Memorandum is supported by Affidavits of witnesses, including the Plaintiff's, and by the Plaintiff's Deposition.

INTRODUCTION

(a) The Defendant is not entitled to summary judgment because this case presents controverted facts and issues warranting a trial on the merits.

(b) The Defendant made defamatory statements amounting to *slander per se* in publicly accusing the Plaintiff of committing a criminal act; Retail Theft. The Defendant's defamatory statements were published in the parking lot of the Defendant's facilities

and heard by other shoppers, including the Plaintiff's companion, See Affidavit of Jolene Priddy, Exhibit "A." Several other people also heard the defamatory statements. The Plaintiff suffered special damages as a matter of law.

(c) The Defendant does not enjoy absolute immunity or privilege in this matter. The Defendant's privilege, if available, is a qualified or conditioned privilege. The Defendant's sole reason for accusing the Plaintiff of retail theft is based on the Plaintiff's race; Black. As a matter of law, the Defendant's actions amount to express malice which defeats the Defendant's qualified immunity.

(d) The Plaintiff suffered emotional distress as a result of the Defendant's outrageous, recklessly discriminatory and intolerable conduct.

STATEMENT OF MATERIAL FACTS

1. On or about February 20, 1994, Mrs. Jolene Patience—now known as Jolene Priddy—purchased a set of hair curlers (hereinafter "the set") from the Defendant Corporation's store located in Sugarhouse, Salt Lake City, Utah.

2. Shortly thereafter, because the set was defective, Jolene Priddy returned the set to the store. The store was out of similar merchandise. The store's customer service clerk gave Jolene Priddy a rain check document so she could make the exchange at another date. The clerk also told Jolene Priddy to keep the defective rollers until the exchange.

3. On Sunday, February 28, 1993, The Plaintiff and Jolene Priddy, together, went to the Defendant's store to effectuate the

exchange and to shop.

4. At the store, the Plaintiff shopped around and selected a few household items he fully intended to pay for. The Plaintiff also helped Jolene Priddy select a replacement set (of hair curlers).

5. After completing his shopping, the Plaintiff went to the cashier to pay for the household items while Jolene Priddy went to the Customer Service Desk to effectuate the exchange.

6. Upon paying the cashier for the items, the Plaintiff and Jolene Priddy left the store.

7. Several employees of the Defendant Corporation surrounded the Plaintiff and his companion in the Parking lot where one Ms. Jackie Boysen, the Defendant's loss prevention officer, loudly accused the Plaintiff of retail theft and demanded to inspect the shopping bags. See Affidavits of Jolene Priddy, Exhibit "A" & Affidavit of John Priddy, Exhibit "D."

8. All of the employees of the Defendant Corporation witnessed the accusation of retail theft.

9. Jolene Priddy witnessed the accusation of retail theft. See Affidavit of Jolene Priddy, Exhibit "A."

10. Several shoppers either exiting or entering the store gathered around to view the spectacle. They heard the open, vocal and repeated accusation of retail theft or became aware of it as the Defendant's employees, namely Jackie Boysen, continued accusing the Plaintiff of retail theft and demanding to inspect the Plaintiff's and his companion's shopping bags.

11. During discovery, the Defendant Corporation produced a

video tape featuring the Plaintiff shopping in the Defendant's store. See Shopko Video Tape, Exhibit "B."

12. Nothing in the video suggests or even allows the reasonable inference that the Plaintiff did anything to warrant suspicion of retail theft. See Affidavit of Greg Markham, Exhibit "E." In fact, in the video, it is only obvious the Plaintiff was stopped and accused of retail theft because of his race and ethnic heritage. See Shopko Video Tape, Exhibit "B."

13. The Plaintiff is a Black man. The Plaintiff is a professional and an executive affiliated with U.S. West Telecommunications. The Plaintiff does not have any criminal record.

14. Since the incident, the Plaintiff has been unable to sleep well, often having nightmares.

15. Since the incident, the Plaintiff has been unable to feel at ease in any store in the United States because the reckless and outrageous occurrences of February 28, 1993 make him feel that, because of his race, he may be a perpetual suspect in retail theft.

ARGUMENT

I

STANDARD FOR SUMMARY JUDGMENT

Summary Judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Utah R. Civ. P. 56(c). "In determining whether there is an issue of material fact, we view all facts and draw all

inferences from the facts in favor of the non-moving party." Clemmons v. Bohannon, 956 F.2d 1523, 1525 (10th Cir. 1992) (citations omitted); Neiderhausser Bldrs. & Dev. Corp. v. Campbell, 824 P.2d 1193 (Utah Ct. App. 1992).

II

THERE ARE CONTROVERTED AND ISSUES OF MATERIAL FACTS SUMMARY JUDGMENT IS NOT AVAILABLE TO THE DEFENDANT

The presence of a dispute as to material facts disallows the granting of summary judgment. Bill Brown Realty, Inc. v. Abott, 562 P.2d 238 (Utah 1977).

The Defendant's motion for summary judgment is basically unsupported. But for a few carefully selected pages of the Plaintiff's 168-page deposition (See addendum attached to Defendant's Memorandum), the motion would have been naked.

However, the Plaintiff respectfully submits that, conversely to the Defendant's addendum, other portions of the Deposition together with the Affidavits supporting this Answer, show that there are many controverted and genuine issues of material facts defeating the Defendant's summary judgment request.

The Defendant's main argument appears to propose that it deserves summary judgment because the Plaintiff did not specifically utter the word shoplifting during a particular exchange in the deposition. However, please consider the following exchange in the Deposition:

Q. (Defendant's counsel questioning): Okay. Did she say anything specifically? I want to know if you can recall any --

A. (Plaintiff answering): I cannot recall anything specific.

This happened -- See Priddy Depo. Page 57 Lines 4,5,6,7, Exhibit "C."

During the Deposition, Mr. Priddy simply could not focus on the entire event. Mr. Priddy was not at ease and he was angry while reliving the humiliating moments when he was accused publicly of retail theft. Also, the questioning attorney often interfered with answers before they were completed. Mr. Priddy contends, under oath, that the Defendant's agents restrained him in the parking lot, made the accusations of retail theft, see Affidavit of John Priddy, Exhibit "D," and the Defendant's agents said further: "Didn't you see me? I was watching you down the street." See Priddy Depo. Page 64 Lines 4,5,6,7, Exhibit "C."

An eyewitness to the entire event, the Plaintiff's companion, was at the epicenter of the dispute. She heard the accusations of retail theft. See Affidavit of Jolene Priddy, Exhibit "A." The contentions of the Plaintiff, together with the affidavits, buttress his position that he was publicly and wrongly accused of theft.

In effect, for purposes of this Motion, the Plaintiff's position is diametrically contrary to the Defendant's contentions. These controverted material facts create issues of credibility of witnesses. The presence of a dispute as to material facts disallows the granting of summary judgment. Bill Brown Realty, Inc. v. Abott, *supra*. See also, Billings ex rel. Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991)(summary judgment proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact

and that the moving party is entitled to summary judgment as a matter of law).

The Plaintiff respectfully submits that at this point in the litigation, there are controverted issues of facts and of witnesses' credibility which the Court should not assess. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984)(trial court must not weigh evidence of or assess credibility). The Court should deny the motion for summary judgment.

II

THE DEFENDANT MADE A SLANDER PER SE IN ACCUSING PLAINTIFF OF A CRIMINAL OFFENSE

The Defendant accused the Plaintiff of committing a criminal act. See Affidavit of Jolene Priddy, Exhibit "A" and Affidavit of John Priddy, Exhibit "D."

The Defendant accused the Plaintiff of THEFT, specifically RETAIL THEFT. This a crime of a serious nature. Retail theft is codified at Utah Code Annotated, Section 76-6-602 (1993 as amended). This law states in relevant part:

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

(1) Takes possession of, conceals, carries away, transfers or causes to be 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

....

Utah criminal law punishes retail theft the same as theft. See U.C.A. 76-6-606. This section refers to U.C.A. 76-4-412 which

classifies (retail) theft ranging from a class B misdemeanor to a felony of the second degree punishable by up to 15 years in prison and fines.

W. Prosser lists accusations of a crime as the first of the four categories that constitute *slander per se* if they are published without privilege or justification. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 755 (4th ed. 1971).

The Plaintiff respectfully submits that it is clear the Defendant's defamatory communication (commission of a criminal offense), which was repeated in public, amounts to *slander per se*. *Id.* The Plaintiff further submits that "*slander per se* requires no showing of special damages." Allred v. Cook, 590 P.2d 318, 321 (Utah 1979).

Contrary to the Defendant's contention that there does not exist ~~a~~ a case of *slander per se* and that it deserves summary judgment [See Plaintiff's Memorandum at Page 7(B)], the Plaintiff respectfully submits that the Defendant is in error.

III

THE SLANDER PER SE WAS PUBLISHED

The Defendant contends there was no publication of the *slander per se*. The Defendant offers nothing to support this contention. Instead, the Defendant invokes an opinion from the Georgia Court of Appeals. To wit, Fly v. Kroger, 432 S.E.2d 664 Ga.App. 1993).

The Plaintiff respectfully submits that the Defendant's reliance upon Kroger is misplaced. The facts herein do not support application of that alien case. Kroger proposes that

"absence of publication to individuals other than those involved in investigation of alleged shoplifting, the defendant deserves summary judgment." *Id.* at 666 (Plaintiff paraphrasing).

However, in the case at bar, the publication was made in front of the general public exiting and entering the Defendant's store. Besides the presence of the general public, of paramount importance is the fact that the Plaintiff sustained the accusation of retail theft in the presence of his companion. See Affidavit of Jolene Priddy, Exhibit "A."

Therefore, the Plaintiff respectfully submits the slander *per se* was published for purposes of the Georgia ruling and *prima facie* requirements in the instant case.

III

THE PLAINTIFF NEED NOT SPECIFY HIS SPECIAL DAMAGES. THEY ARE INFERRED AS A MATTER OF LAW

The Defendant accused the Plaintiff of a criminal act, retail theft [see Exhibits "A" & "D"], which carries fines and imprisonment of up to 15 years under Utah law. U.C.A. 76-6-412 (1993 as amended). The Plaintiff has established that the Defendant's defamatory utterances constitute *slander per se*. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra*.

Therefore, the Plaintiff, having been the victim of *slander per se*, respectfully submits that he is not required to specify or enumerate his special damages and equitable damages if available. The injury to the Plaintiff can be presumed, as a matter of law, from the very words of the Defendant. Allred v. Cook, 590 P.2d 318 (Utah 1979). Besides, as explained below, the Defendant

should be assessed punitive damages as well as special damages because the defamation was willful and malicious. Prince v. Peterson, 538 P.2d 1325, 1329 (Utah 1975) See also Allred v. Cook *Supra*.

IV

THE DEFENDANT IS ESTOPPED FROM INVOKING QUALIFIED PRIVILEGE BECAUSE OF MALICE

The Defendant, defending its defamatory actions, invokes the doctrine of conditional or qualified privilege merchants traditionally rely upon when detaining suspected thieves. The Plaintiff concedes that the law allows this privilege. See generally Brehany v. Nordstrom, Inc. 812 P.2d 49, 58 (Utah 1991); U.C.A. 76-9-506 (1990 as amended). However, the Plaintiff respectfully submits that there is a magnificent distinction between the Defendant's conditional or qualified privilege and absolute privilege. The Defendant's privilege is subject to attacks and can be defeated. Williams v. Standard Examiner Publishing Co., 27 P.2d 1, 13-14 (Utah 1933)(defendant privilege merely raises a prima facie presumption in favor of the Defendant).

In order for a publication to be conditionally privileged, there must be present both a situation warranting a privilege and the use of the privilege in good faith and without express malice. Atlas Sewing Centers v. National Ass'n of Indep. Sewing Mach. Dealers, 260 F.2d 803, 808 (10th Cir. 1958).

Applying the above law to the instant case, the Plaintiff respectfully submits that it is apparent, on the face of the evidence, that the only reason he was a suspect of retail theft on

February 28, 1993, is because of his race and his ethnicity. The Plaintiff further submits that he is a Black man.

The Defendant targeted the Plaintiff as a suspect the instant the Plaintiff entered the Defendant's store. See Shopko Video, Exhibit "C." The Defendant followed the Plaintiff, trained its cameras on the Plaintiff wherever the Plaintiff went in the store while shopping. See Shopko Video, Exhibit "B." The Defendant did not train its cameras on the Plaintiff's companion who is Caucasian. The Defendant did not train its cameras on other Caucasian shoppers who, just like the Plaintiff, were calmly shopping. The Plaintiff's race is not reasonable ground to warrant his suspicion of retail theft and the ultimate, public and serious accusation of a criminal offense.

The video clearly shows that there was no reason—not one—warranting suspicion. See Affidavit of Greg Markham, Exhibit "E." Therefore, the acts of the Defendant constitutes, not only violations of the Plaintiff's civil rights, but **EXPRESS MALICE**. This malice defeats the Defendant's conditional or qualified privilege. Atlas Sewing Centers, supra. See also Seegmiller v. KSL, Inc. 626 P.2d 969, 972 (Utah 1981)(quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). The Thompson Court held:

[R]eckless conduct (or malice) is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless for the truth or falsity and demonstrate actual malice.

The video tape clearly shows that the Defendant did not have

any reasons to stop and accuse the Plaintiff of retail theft. See Affidavit of Greg Markham, Exhibit "D." The defamatory accusation was recklessly and flagrantly based on race and race only since the video tape shows nothing to arouse suspicion. The Defendant acted from an improper motive, from a desire to do harm, knowing that its statements were not true and could not be proven. See Ogden Bus Lines v. KSL, Inc. 551 P.2d 222, 225 (Utah 1976). The Defendant's actions constitute actual malice.

The Plaintiff respectfully submits that the general view is that the Defendant must have an actual and honest belief in the truth of the defamatory matter in order to be protected by a conditional privilege. Berry v. Moench, 331 P.2d 814, 819 (Utah 1958)(conditional privilege will not be recognized if the Defendant knows that his statements are unfounded). The requirement of good faith does not only apply to professional news organizations, Direct Import Buyers Ass'n v. KSL, Inc., 572 P.2d 692, 694 Utah 1977), it exists as well for private individuals. Moench, 331 P.2d at 819.

V

THE PLAINTIFF SUFFERED AND CONTINUES TO SEVERE SUFFER EMOTIONAL DISTRESS

The Utah Supreme Court recognized a cause of action for infliction of emotional distress

where the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress or, (b) where any reasonable person would have known that such would be the result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of

decency and morality.

Samms v. Eccless, 358 P.2d 344, 346-47 (Utah 1961).

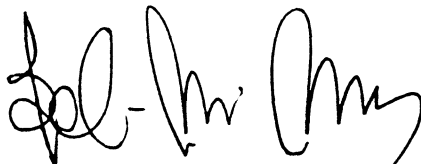
The Plaintiff respectfully submits that, in the case at bar, the Defendant's actions were reckless, outrageous and intolerable. The Defendant knew they were not true when the Defendant made the defamatory statements. Since the Defendant made the accusations, the Plaintiff has been physically unable to have a good night sleep as a direct result of the Defendant's actions. Further, the Plaintiff is mentally conscious of the unfortunate events the Defendant initiated on February 28, 1993, each time he enters a store. The Plaintiff will call, at trial, a psychiatrist to testify as to the symptoms and pathologies victims of racial prejudice suffers. At that time, the Plaintiff will be able to show the full effects of the racial victimization he sustained. The Plaintiff will also show that more often victims of racial discrimination do not seek psychiatric help. The just suffer.

CONCLUSION

This entire matter presents nothing but controverted facts. The issues in this case are disputed and the Defendant is not entitled to summary judgment as a matter of law. Thanks.

Respectfully submitted this 22nd day of July, 1994.

MONTREUX LAW OFFICES

A handwritten signature in black ink, appearing to read 'Bel-Ami de Montreux', written over a horizontal line.

Bel-Ami de Montreux
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 1994, by First Class United States mail, I sent a true and correct copy of the foregoing Memorandum to the following address:

Royal I. Hansen, Esq.
H. Dennis Piercy, Esq.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111



Bel-Ami de Montreux

EXHIBIT "A"

AFFIDAVIT OF JOLENE PRIDDY

BEL-AMI DE MONTREUX, # 6207
ATTORNEY AT LAW
MONTREUX LAW OFFICES
310 SOUTH MAIN, TWELFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-3021
FAX NUMBER (801) 359-7406

ATTORNEY FOR PLAINTIFF

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

JOHN PRIDDY,	:	
	:	
PLAINTIFF,	:	AFFIDAVIT OF JOLENE PRIDDY
	:	IN SUPPORT OF PLAINTIFF'S
VS.	:	ANSWER TO DEFENDANT'S MOTION
	:	FOR SUMMARY JUDGMENT
	:	
SHOPKO CORPORATION,	:	CIVIL No. 930905722 CV
	:	
DEFENDANT.	:	JUDGE DAVID S. YOUNG

STATE OF UTAH)
 :SS
County of Salt Lake)

I, Jolene Priddy, having been sworn upon my oath, depose and state the following:

1. On February 28, 1993, the Plaintiff accompanied me to Shopko to exchange a set of hair curlers that I had purchased at the Defendant's store and which were defective.

2. Prior to returning the defective set of rollers, the Defendant had given me authorization to return the rollers and to make the exchange.

3. The Plaintiff and me did some shopping on that day for some household items.

4. After shopping, the Plaintiff proceeded to the cashier to pay for the items he intended to buy and I went to the customer

service desk to make the exchange.

5. After making the exchange, I returned to the cashier's station where the Plaintiff was checking out. The Plaintiff paid for the merchandise he bought and, with me carrying the bag containing the new rollers I had just exchanged and the Plaintiff carrying the bag containing the household items he had just paid for, we exited the Defendant's store.

6. When we reached the parking lot, a group composed of several of the Defendant's employees encircled us and made it clear that we would not go anywhere.

7. At that time, the leader of the group, a lady, told the Plaintiff very loudly that he was shoplifting and that he must open the shopping bags for inspection and return to the store to be searched.

8. I told the lady no one was shoplifting and she said to me: "You are a liar. We saw him shoplifting."

9. Several of the customers entering and exiting the Defendant's store stopped to witness the arrest.

10. The Plaintiff was accused of shoplifting on that day.

DATED this 18th day of July, 1994.

Jelene Priddy
Jelene Priddy, Affiant

SUBSCRIBED and sworn to before me this 18 day of July, 1994.

Richard P. Fought
Public Notary



NOTARY PUBLIC
RICHARD P. FOUGHT
310 South Main, Suite 303
Salt Lake City, Utah 84101
My Commission Expires
May 22, 1998
STATE OF UTAH

EXHIBIT "B"

SHOPKO VIDEO TAPE

SEE COPY OF VIDEO TAPE PROVIDED WITH THIS ANSWER

(DEFENDANT HAS ITS OWN COPY OF THE TAPE)

EXHIBIT "C"

JOHN PRIDDY DEPO.

1 A She was insistent -- my recollection, she
2 was insistent that we're going to go in the office
3 and, you know, find out what was in the bag.

4 Q Okay. Did she say anything specifically
5 to you? I want to know if you can recall any --

6 A I can't recall anything specific. This
7 happened --

8 Q That's the sense is she still wanted to
9 know what was in the bag?

10 A She wanted to know what was in the bag.
11 And I wasn't going to have -- be searched in a
12 public environment.

13 Q Okay. And so you are walking there, and
14 you and Jolene, and Jolene doesn't have any
15 conversation with ShopKo people?

16 A She may have had. I -- I don't recall.

17 Q Okay.

18 A I don't recall.

19 Q And did you have -- do you recall any
20 other things that were said between you and Jolene?
21 Did you have a conversation with her on the way in
22 after you said, "Fine, let's go in"?

23 A I probably said, "I told you so. I told
24 you so." I may have -- I may have, you know, said
25 that to her a couple of times. "I can't believe

MARY D. QUINN CSR, RPR
(801) 328-1188

1 down" was the first thing. The next item of
2 conversation that takes place. That's by Jackie,
3 once again. And what's your response to that?

4 A I says, "No. I'm not going to sit down."
5 And then she proceeds to tell me, "Don't you --
6 didn't you think I was watching you?"

7 Q Okay. This is the first time to you she
8 said, "Didn't you think --" this is --

9 A "Didn't you see me? Didn't you see me?
10 I've been watching you.."

11 Q She said that to you, "Didn't you see me?"

12 A Yeah. And I'm thinking --

13 Q And what was your response?

14 A "No. I didn't see you.."

15 Q Okay. You said, "No, I didn't see you"?

16 A No.

17 Q And was it a fairly calm conversation, or
18 was it a heated conversation? How would you
19 describe it?

20 A It was a heated conversation.

21 Q Okay. And was it heated from the very
22 beginning, or was it becoming more heated as you
23 were going along?

24 A It was boiling. Not there yet, but --
25 circumstances.

MARY D. QUINN CSR, RPR
(801) 328-1188

EXHIBIT "D"

AFFIDAVIT OF JOHN PRIDY

BEL-AMI DE MONTREUX, # 6207
ATTORNEY AT LAW
MONTREUX LAW OFFICES
310 SOUTH MAIN, TWELFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-3021
FAX NUMBER (801) 359-7406

ATTORNEY FOR PLAINTIFF

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

JOHN PRIDDY,	:	
	:	
PLAINTIFF,	:	AFFIDAVIT OF JOHN PRIDDY
	:	IN SUPPORT OF PLAINTIFF'S
VS.	:	MOTION TO STRIKE EXHIBIT
	:	
	:	
SHOPKO CORPORATION,	:	CIVIL No. 930905722 CV
	:	
DEFENDANT.	:	JUDGE DAVID S. YOUNG

STATE OF UTAH)
 :ss
County of Salt Lake)

I, John Priddy, having been sworn upon my oath, depose and state the following:

1. I am the Plaintiff in the above-entitled matter.
2. On February 28, 1994, I went to Shopko with Jolene Priddy to exchange a defective set of hair curlers. While at Shopko, I purchased some household items for which I paid the cashier.
3. After shopping, I left the store with Jolene Priddy.
4. In the parking lot of the store, several of the Defendant's employees encircled me and Jolene Priddy.
5. Then and there, Ms. Jackie Boysen, the Defendant's loss

prevention employee accused me directly and loudly of shoplifting and demanded to inspect the shopping bags for evidence.

6. Several people stop to view the spectacle.

7. I was humiliated and embarrassed. Since this unfortunate episode, I have been unable to get a good night sleep and any time I go shopping anywhere I am afraid of being accused of shoplifting simply because of my race.

DATED this 18TH day of July, 1994.


John Priddy, Affiant

SUBSCRIBED and sworn to before me this 18 day of July, 1994.


Public Notary

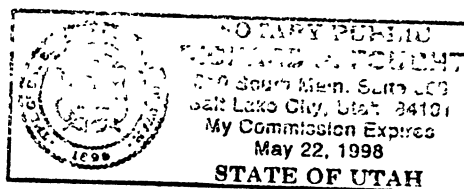
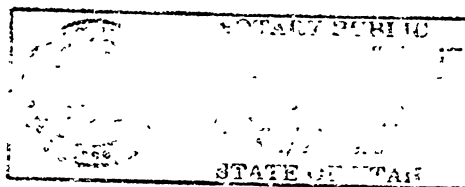


EXHIBIT "E"

AFFIDAVIT OF GREG MARKHAM

BEL-AMI DE MONTREUX, # 6207
ATTORNEY AT LAW
MONTREUX LAW OFFICES
310 SOUTH MAIN, TWELFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-3021
FAX NUMBER (801) 359-7406

ATTORNEY FOR PLAINTIFF

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

JOHN PRIDDY,	:	
	:	
PLAINTIFF,	:	AFFIDAVIT OF GREG MARKHAM
	:	IN SUPPORT OF PLAINTIFF'S
VS.	:	ANSWER TO DEFENDANT'S MOTION
	:	FOR SUMMARY JUDGMENT
	:	
SHOPKO CORPORATION,	:	CIVIL No. 930905722 CV
	:	
DEFENDANT.	:	JUDGE DAVID S. YOUNG

STATE OF UTAH)
 :ss
County of Salt Lake)

I, Greg Markham, having been sworn upon my oath, depose and state the following:

1. I am a resident of the State of Utah and I worked for 14 years in management for K-Mart Enterprises.

2. As part of my duties, I supervised loss prevention personnel.

3. I have had the opportunity to review the video tape produced by the Defendant in the above-entitled matter which featured the Plaintiff shopping at Shopko.

4. There is not, in my expert opinion, any reason to warrant a reasonable doubt that the Plaintiff was shoplifting at

the store based on the evidence.

5. If anything, the tape clearly shows that the Plaintiff should not have been stopped at all.


6. It is my opinion that the Defendant did not have any reasons to accused the Plaintiff of shoplifting.

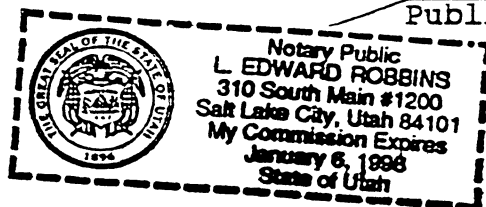
7. It is my opinion that the Defendant accused the Defendant of Shoplifting for reasons other than reasonable suspicion of retail theft.

DATED this 19th day of July, 1994.


Greg Markham, Affiant

SUBSCRIBED and sworn to before me this 19th day of
July, 1994.


Public Notary



ADDENDUM F

Jolene Priddy's Affidavit

BEL-AMI DE MONTREUX, # 6207
ATTORNEY AT LAW
MONTREUX LAW OFFICES
310 SOUTH MAIN, TWELFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-3021
FAX NUMBER (801) 359-7406

ATTORNEY FOR PLAINTIFF

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

JOHN PRIDDY,	:	
	:	
PLAINTIFF,	:	AFFIDAVIT OF JOLENE PRIDDY
	:	IN SUPPORT OF PLAINTIFF'S
VS.	:	ANSWER TO DEFENDANT'S MOTION
	:	FOR SUMMARY JUDGMENT
	:	
SHOPKO CORPORATION,	:	CIVIL NO. 930905722 CV
	:	
DEFENDANT.	:	JUDGE DAVID S. YOUNG

STATE OF UTAH)
 :SS
County of Salt Lake)

I, Jolene Priddy, having been sworn upon my oath, depose and state the following:

1. On February 28, 1993, the Plaintiff accompanied me to Shopko to exchange a set of hair curlers that I had purchased at the Defendant's store and which were defective.

2. Prior to returning the defective set of rollers, the Defendant had given me authorization to return the rollers and to make the exchange.

3. The Plaintiff and me did some shopping on that day for some household items.

4. After shopping, the Plaintiff proceeded to the cashier to pay for the items he intended to buy and I went to the customer

service desk to make the exchange.

5. After making the exchange, I returned to the cashier's station where the Plaintiff was checking out. The Plaintiff paid for the merchandise he bought and, with me carrying the bag containing the new rollers I had just exchanged and the Plaintiff carrying the bag containing the household items he had just paid for, we exited the Defendant's store.

6. When we reached the parking lot, a group composed of several of the Defendant's employees encircled us and made it clear that we would not go anywhere.

7. At that time, the leader of the group, a lady, told the Plaintiff very loudly that he was shoplifting and that he must open the shopping bags for inspection and return to the store to be searched.

8. I told the lady no one was shoplifting and she said to me: "You are a liar. We saw him shoplifting."

9. Several of the customers entering and exiting the Defendant's store stopped to witness the arrest.

10. The Plaintiff was accused of shoplifting on that day.

DATED this 18th day of July, 1994.

Jolene Priddy
Jolene Priddy, Affiant

SUBSCRIBED and sworn to before me this 18 day of July, 1994.

Richard P. Fought
Public Notary



NOTARY PUBLIC
RICHARD P. FOUGHT
310 South Main, Suite 303
Salt Lake City, Utah 84101
My Commission Expires
May 22 1998

ADDENDUM G

Greg Markham's Affidavit

BEL-AMI DE MONTREUX, # 6207
ATTORNEY AT LAW
MONTREUX LAW OFFICES
310 SOUTH MAIN, TWELFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-3021
FAX NUMBER (801) 359-7406

ATTORNEY FOR PLAINTIFF

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

JOHN PRIDDY,	:	
	:	
PLAINTIFF,	:	AFFIDAVIT OF GREG MARKHAM
	:	IN SUPPORT OF PLAINTIFF'S
VS.	:	ANSWER TO DEFENDANT'S MOTION
	:	FOR SUMMARY JUDGMENT
	:	
SHOPKO CORPORATION,	:	CIVIL No. 930905722 CV
	:	
DEFENDANT.	:	JUDGE DAVID S. YOUNG

STATE OF UTAH)
 :SS
County of Salt Lake)

I, Greg Markham, having been sworn upon my oath, depose and state the following:

1. I am a resident of the State of Utah and I worked for 14 years in management for K-Mart Enterprises.

2. As part of my duties, I supervised loss prevention personnel.

3. I have had the opportunity to review the video tape produced by the Defendant in the above-entitled matter which featured the Plaintiff shopping at Shopko.

4. There is not, in my expert opinion, any reason to warrant a reasonable doubt that the Plaintiff was shoplifting at

the store based on the evidence.

5. If anything, the tape clearly shows that the Plaintiff should not have been stopped at all.

6. It is my opinion that the Defendant did not have any reasons to accused the Plaintiff of shoplifting.

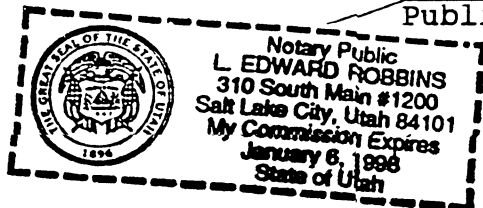
7. It is my opinion that the Defendant accused the Defendant of Shoplifting for reasons other than reasonable suspicion of retail theft.

DATED this 19th day of July, 1994.


Greg Markham, Affiant

SUBSCRIBED and sworn to before me this 19th day of
July, 1994.


Public Notary



ADDENDUM H

Transcript of Oral Argument
at Summary Judgment

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

3 * * *

4 *Copy*

5 JOHN PRIDDY,)
6 PLAINTIFF,) CIVIL NO. C-93-090-5722
7 -VS-) PLAINTIFF'S MOTION TO
8 SHOPKO CORPORATION,) COMPEL & DEFENDANT'S
9 DEFENDANT.) MOTION FOR SUMMARY
) JUDGMENT

10
11 * * *

12 BE IT REMEMBERED THAT ON FRIDAY, THE 5TH DAY OF
13 AUGUST, 1994, COMMENCING AT THE HOUR OF 8:40 O'CLOCK A.M.,
14 THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE
15 COURTROOM OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT
16 LAKE COUNTY, STATE OF UTAH; SAID CAUSE BEING HELD BY THE
17 HONORABLE DAVID S. YOUNG, JUDGE IN THE THIRD JUDICIAL
18 DISTRICT COURT, STATE OF UTAH.

19 * * *

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A P P E A R A N C E S

FOR THE PLAINTIFF: BEL-AMI DE MONTREUX
 MONTREUX LAW OFFICES
 310 SOUTH MAIN STREET
 TWELFTH FLOOR
 SALT LAKE CITY, UTAH 84101

FOR THE DEFENDANT: ROYAL I. HANSON,
 H. DENNIS PIERCEY
 MOYLE & DRAPER, P.C.
 600 DESERET PLAZA
 NO. 15 EAST FIRST SOUTH
 SALT LAKE CITY, UTAH 84111

* * *

I N D E X

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* * *

1 P R O C E E D I N G S

2 JUDGE YOUNG: THE MATTER TO BE CONSIDERED BEFORE
3 THE COURT IS THE MATTER OF JOHN PRIDDY, P-R-I-D-D-Y,
4 VERSUS SHOPKO CORPORATION. THE CASE IS NUMBER 93-090-
5 5722.

6 COUNSEL, WILL YOU STATE YOUR APPEARANCES,
7 PLEASE?

8 MR. DE MONTREUX: BEL-AMI DE MONTREUX.

9 JUDGE YOUNG: LET ME JUST SAY THAT THAT NAME
10 STATED THAT WAY IS NOT GOING TO BE VERY CLEAR FOR ME TO
11 KNOW HOW TO PUT ON THE RECORD SO YOU MAYBE BETTER SPELL
12 IT, PLEASE.

13 MR. DE MONTREUX: IT'S B AS IN BOY, E-L DASH
14 CAPITAL A-M-I, DE MONTREUX, D AS IN DAVID, E SPACE CAPITAL
15 M-O-N-T AS IN TOY, R-E, U-X.

16 JUDGE YOUNG: THANK YOU. NOW I NOTICE THAT YOUR
17 ACCENT IS PRINCIPALLY FRENCH; IS THAT CORRECT?

18 MR. DE MONTREUX: YES, YOUR HONOR, IT IS.

19 JUDGE YOUNG: I WOULD JUST CAUTION YOU TO BE
20 CAREFUL BECAUSE WE ARE MAKING A RECORD HERE. AND I THINK
21 A FRENCH ACCENT IS DELIGHTFUL BUT I NEED TO BE SURE THAT
22 THE REPORTER GETS EVERYTHING ACCURATELY. SO PLEASE BE
23 CAREFUL TO BE SLOW ENOUGH TO BE ACCURATE YOURSELF.

24 MR. DE MONTREUX: THANK YOU.

25 MR. HANSEN: ROYAL HANSEN FOR THE DEFENDANT AND

1 DENNIS PIERCEY.

2 JUDGE YOUNG: AND HOW DO YOU DETERMINE YOU WISH
3 TO ARGUE?

4 MR. HANSEN: MR. PIERCEY WILL. WE HAVE GOT A
5 MOTION FOR SUMMARY JUDGMENT, YOUR HONOR. AND I'M
6 WONDERING, THAT MAY MOOT THE OTHER MATTERS. IF IT'S
7 POSSIBLE TO HEAR THAT I THINK WE COULD DO THAT AND SEE IF
8 WE CAN'T DISPOSE OF EVERYTHING AT ONE TIME.

9 JUDGE YOUNG: ALL RIGHT. MR. DE MONTREUX, DO
10 YOU DESIRE--DO YOU HAVE ANY OBJECTION TO THAT?

11 MR. DE MONTREUX: I DO NOT HAVE ANY OBJECTION,
12 YOUR HONOR. A MOTION FOR SUMMARY JUDGMENT WAS FILED
13 INITIALLY. FIRST. THANK YOU.

14 JUDGE YOUNG: WE WILL HAVE THAT MATTER GO FIRST.

15 MR. PIERCEY: THANK YOU, YOUR HONOR. IF IT
16 PLEASE THE COURT, THIS MATTER INVOLVES TWO CLAIMS. THE
17 FIRST CLAIM IS DEFAMATION OR SLANDER AND THE SECOND CLAIM
18 IS NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS.

19 THE ACTION ARISES OUT OF AN INCIDENT AT SHOPKO
20 IN SUGARHOUSE FEBRUARY 28, 1993. YOUR HONOR, THE FACTS IN
21 THIS CASE ARE UNDISPUTED IN CONNECTION WITH THIS MOTION
22 BECAUSE WE HAVE RELIED ON THE PLAINTIFF'S OWN DEPOSITION
23 TESTIMONY FOR THE FACTS AND ACCEPTED THEM FOR PURPOSES OF
24 THIS MOTION.

25 THE PLAINTIFF AND HIS FIANCEE, AND THEY'VE

1 SUBSEQUENTLY MARRIED, WENT TO SHOP AT SHOPKO. AND HIS
2 FIANCEE HAD PURCHASED SOME CURLERS THAT SHE WAS GOING TO
3 EXCHANGE.

4 THEY ENTERED THE STORE. AND THEY HAD A NON-
5 SHOPKO BAG. AND APPARENTLY THE CURLERS WERE IN THAT, THAT
6 THEY BROUGHT IN TO RETURN, BUT THEY DID NOT STOP AND TALK
7 TO ANYONE AT THE SERVICE DESK BEFORE GOING INTO THE STORE.

8 ON THE WAY OUT THE PLAINTIFF PAID FOR OTHER
9 ITEMS THAT THEY PICKED UP WHILE THEY WERE SHOPPING. AND
10 PLAINTIFF'S FIANCEE WENT THROUGH THE CHECKOUT LINE WITH
11 THE NEW CURLERS AND SHE DIDN'T PAY FOR THEM THERE BUT SHE
12 WENT TO THE SERVICE DESK--SHE WENT THROUGH THE CHECKOUT
13 LINE WITH THE NEW CURLERS WITHOUT PAYING FOR THEM BUT SHE
14 WENT TO THE SERVICE DESK TO AFFECT THE EXCHANGE.

15 AS THEY LEFT THE STORE SOME SHOPKO EMPLOYEES
16 APPROACHED THEM AND THE LEADER SAID THAT SHE WANTED TO
17 LOOK IN THE BAG OF PLAINTIFF'S FIANCEE. PLAINTIFF SAID
18 NO. AND SHOPKO'S EMPLOYEES SAID, LET'S GO IN THE OFFICE,
19 AND THE PLAINTIFF SAID FINE.

20 INSIDE, THE PLAINTIFF REFUSED TO SIT DOWN AND
21 DEMANDED TO SEE THE STORE MANAGER. THE STORE MANAGER CAME
22 IN AND PLAINTIFF AND HIS FIANCEE EXPLAINED THE CIRCUM-
23 STANCES OF THE EXCHANGE. AND THE PLAINTIFF TESTIFIES THAT
24 AT THAT POINT THE EMPLOYEE RECOGNIZED THAT SHE HAD MADE A
25 MISTAKE AND THE MANAGER RECOGNIZED THE MISTAKE. AND

1 PLAINTIFF HIMSELF SAYS THAT AT LEAST ONE EMPLOYEE
2 EXPRESSED REAL REMORSE.

3 AND PLAINTIFF AND HIS FIANCEE WENT TO THEIR CAR
4 AND THEY LEFT.

5 NOW, WHAT IS PROBABLY THE MOST IMPORTANT
6 QUESTION, YOUR HONOR, IS THAT PLAINTIFF CLEARLY TESTIFIED
7 EXTENSIVELY AT THE DEPOSITION THAT THE EMPLOYEES ASKED TO
8 LOOK IN THE BAG, BUT HELD BY PLAINTIFF'S FIANCEE, BUT
9 NOBODY CALLED PLAINTIFF A THIEF. WE'VE QUOTED IN OUR
10 REPLY MEMORANDUM TWO FULL PAGES OF DEPOSITION TESTIMONY
11 GOING INTO THIS. AND I THINK IT'S ALL SUMMED UP BY THIS
12 QUESTION AND ANSWER AT PAGE 125. THE QUESTION TO PLAIN-
13 TIFF, STARTING AT THE END OF THESE TWO PAGES IS, "WHAT'S
14 IMPORTANT TO ME IS THAT NOBODY CALLED YOU A THIEF, BUT
15 THEY DID ASK YOU TO LOOK IN YOUR BAG." AND PLAINTIFF
16 SAYS, "RIGHT."

17 NOW, IN ADDITION, THERE'S NO--THERE'S BEEN NO
18 EVIDENCE OF ANY SPECIAL, ECONOMIC DAMAGES WHICH ARE
19 REQUIRED FOR A CLAIM OF SLANDER, THAT IS NOT SLANDER
20 PER SE, AND THERE'S NO CLAIM OF MENTAL ILLNESS IN THIS
21 CASE. AND THE INCIDENT OCCURRED ALMOST A YEAR AND A HALF
22 AGO AND PLAINTIFF HAS NEVER SOUGHT ANY MEDICAL TREATMENT
23 DUE TO THE INCIDENT.

24 NOW, YOUR HONOR, THE DEPOSITION CLEARLY SHOWS
25 THAT THERE WAS NO DEFAMATORY STATEMENT. AFTER WE FILED

1 THE MOTION, BASED ON PLAINTIFF'S OWN DEPOSITION, IN
2 OPPOSING THE MOTION FOR SUMMARY JUDGMENT, PLAINTIFF HAS
3 TRIED TO DISOWN HIS TESTIMONY THAT NOBODY CALLED HIM A
4 THIEF. YOUR HONOR, WE'VE CITED IN OUR REPLY THE CASE OF
5 WEBSTER V. SILL. AND THIS IS A CASE DIRECTLY ON POINT
6 THAT PREVENTS THE PLAINTIFF FROM SWITCHING POSITIONS LIKE
7 THIS AT THIS POINT.

8 WHAT THE FACTS WERE, ESSENTIALLY, IN WEBSTER V.
9 SILL, IS THAT A RENTER HAD SLIPPED ON THE LAWN WHILE
10 MOWING AND HAD SUFFERED A PHYSICAL INJURY. AND THE DEPO-
11 SITION TESTIMONY WAS THAT THE RENTER DIDN'T NOTICE THAT
12 THE LAWN WAS WET OR SLIPPERY. AND THEN WHEN THE MOTION
13 FOR SUMMARY JUDGMENT WAS FILED, APPARENTLY THE PLAINTIFF
14 SAYS, WELL, THE DEFENDANT TOLD ME THAT THEY WATERED THE
15 LAWN. SO THIS SHOULD BE A FACTUAL ISSUE ABOUT WHAT
16 HAPPENED, BUT THE COURT SAID NO, DEPOSITIONS ARE VERY
17 IMPORTANT BECAUSE THEY ALLOW CROSS-EXAMINATION AND A
18 PLAINTIFF CAN'T DISOWN THE DEPOSITION TESTIMONY FOR
19 PURPOSES OF CREATING AN ISSUE FOR SUMMARY JUDGMENT.
20 THAT'S NOT A GENUINE ISSUE BECAUSE THE PLAINTIFF HAS
21 ALREADY ESTABLISHED THE FACT WITH THE DEPOSITION.

22 NOW, THIS ISN'T JUST AN ASIDE IN THIS CASE, IT'S
23 A CENTRAL ISSUE. PLAINTIFF WAS PRESENT THE ENTIRE TIME
24 THAT WE'RE TALKING ABOUT. THE DEPOSITION TESTIMONY IS
25 EXTENSIVE AND UNEQUIVOCAL AND PLAINTIFF WAS REPRESENTED BY

1 COUNSEL ON THIS IMPORTANT ISSUE. IF THERE WERE ANY
2 MISTAKE AT ALL THEN PLAINTIFF WAS REPRESENTED BY COUNSEL
3 WHO COULD CORRECT THE MISTAKE BY QUESTIONING THE PLAIN-
4 TIFF. BUT IN THE DEPOSITION PLAINTIFF TESTIFIED THERE WAS
5 NO DEFAMATORY STATEMENT AND HE'S BOUND BY HIS TESTIMONY
6 AND CANNOT DENY HIS OWN WORDS TO AVOID SUMMARY JUDGMENT.

7 NOW, YOUR HONOR, IN ADDITION TO THE LACK OF ANY
8 DEFAMATORY STATEMENTS, CERTAINLY THERE'S NO SLANDER
9 PER SE, NOBODY'S SAYING HE'S A THIEF, OR WORDS THAT ARE SO
10 DAMAGING THAT THE COURT MUST PRESUME SPECIAL DAMAGES,
11 NOTHING LIKE THIS IS IN PLAINTIFF'S TESTIMONY, SO IN
12 ADDITION TO THIS THE CLAIM WOULD FAIL FOR OTHER REASONS.

13 THERE ARE NO SPECIAL, ECONOMIC DAMAGES WHICH ARE
14 REQUIRED. THERE IS NO EVIDENCE, YOUR HONOR, THAT ANY
15 OTHER CUSTOMERS HEARD ANYTHING. THE PLAINTIFF'S FIANCEE
16 WAS PRESENT FOR EVERYTHING AND SHE KNEW--AND SHE SAYS SHE
17 KNEW AND SHE TOLD THEM THAT THE PLAINTIFF HAD NOT SHOP-
18 LIFTED AND, IN FACT, IT WAS HER BAG THAT THE EMPLOYEE
19 WANTED TO LOOK IN.

20 FINALLY, YOUR HONOR, MERCHANTS HAVE AN EXPRESS
21 STATUTORY RIGHT IN UTAH CODE IN SECTION 8-11-17 TO ASK TO
22 VIEW MERCHANDISE FROM THE STORE. AND THE EMPLOYEE IN
23 ASKING TO, ASKING TO LOOK IN THE BAG, WAS JUST DOING WHAT
24 THE LAW EXPRESSLY ALLOWS.

25 NOW, THE PLAINTIFF ADMITS THAT QUALIFIED

1 PRIVILEGES EXIST IN THIS CASE. AND PRIVILEGE MEANS THAT,
2 ACCORDING TO BREHANY V. NORDSTORM, THAT THE INTEREST, IN
3 THIS CASE THE MERCHANT'S INTEREST IN PREVENTING THE
4 ENORMOUS LOSSES THAT MERCHANTS CAN SUFFER, THAT MEANS THAT
5 THE INTERESTS IS SO IMPORTANT THAT THERE SHOULD BE SOME
6 LATITUDE FOR MISTAKE.

7 BUT FINALLY, YOUR HONOR--NOW PLAINTIFF'S TESTI-
8 MONY INDICATES THAT THERE WAS, THEY RECOGNIZE THE MISTAKE
9 AND OFF THEY WENT. THAT WAS THE END OF IT. BUT I THINK
10 THE CRITICAL POINT, YOUR HONOR, IS THERE WAS NO DEFAMATORY
11 STATEMENT. THAT'S ESTABLISHED IN DEPOSITION.

12 NOW THE SECOND CLAIM IS NEGLIGENT INFLICTION OF
13 EMOTIONAL DISTRESS. IN RESPONSE TO OUR MOTION FOR SUMMARY
14 JUDGMENT PLAINTIFF CITED SAMMS V. ECCLESS, WHICH IS A CASE
15 FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, WHICH
16 ISN'T ALLEGED HERE. THE CLAIM IS ENTITLED, NEGLIGENT
17 INFLICTION OF EMOTIONAL DISTRESS, BUT WE'VE RESPONDED TO
18 THAT TO THE EXTENT, YOUR HONOR, THAT IT WAS NEITHER INTEN-
19 TIONAL NOR--WE'VE CITED BOISJOLY, A JUDGE WINDER FEDERAL
20 DISTRICT COURT CASE. AND PLAINTIFF, IN FACT, CITED
21 SPERBER, A UTAH CASE. AND BOTH OF THOSE CASES FOUND THE
22 CONDUCT WAS NOT "SO OUTRAGEOUS IN CHARACTER, SO EXTREME IN
23 DEGREE AS TO GO BEYOND ALL POSSIBLE BOUNDS OF DECENCY, AND
24 TO BE REGARDED AS ATROCIOUS, AND UTTERLY INTOLERABLE IN A
25 CIVILIZED SOCIETY."

1 IN SPERBER THE COURT SAID, "FIRING AN EMPLOYEE
2 FOR A FALSE REASON, AS UNDESIRABLE AS THAT CAN BE, ISN'T
3 THE SORT OF ATROCITY THAT IS REQUIRED FOR INTENTIONAL
4 INFLECTION." SO IT DOESN'T APPLY BECAUSE PLAINTIFFS OWN
5 TESTIMONY, THERE WAS THE RECOGNITION OF THE MISTAKE. AND
6 THAT'S ALL THIS IS. BUT THE ISSUE IN THE COMPLAINT IS
7 NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS. AND WE CITED
8 THE HANSEN V. MOUNTAIN FUEL SUPPLY CASE, I BELIEVE, WHICH
9 HOLDS THAT ABSENT PHYSICAL INJURY, WHICH IS NOT INVOLVED
10 HERE, NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS REQUIRES
11 EXPERT TESTIMONY SHOWING MENTAL ILLNESS. AND IN HANSEN
12 THE COURT SPECIFICALLY DEALT WITH CLAIMS OF SLEEPLESSNESS
13 AND CITED A CASE INVOLVING HEADACHES, INSOMNIA, AND THOSE
14 KINDS OF THINGS. AND THAT SAID THAT IS NOT MENTAL ILL-
15 NESS, THAT DOESN'T RISE TO THE LEVEL OF WHAT IS REQUIRED
16 FOR A CLAIM OF NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS.

17 NOW IN THIS CASE, AS THE COURT RECOGNIZED IN THE
18 ANDALEX CASE, TO AVOID SUMMARY JUDGMENT THE PARTY WITH THE
19 BURDEN, IN THIS CASE PLAINTIFF HAS THE BURDEN ON THESE
20 CLAIMS, MUST MAKE HIS SUFFICIENT SHOWING TO ESTABLISH ALL
21 OF THE ESSENTIAL ELEMENTS OF THE CLAIM ON WHICH THEY HAVE
22 A BURDEN TO OVERCOME SUMMARY JUDGMENT. IN THIS CASE, YOUR
23 HONOR, IT IS CLEAR FROM THE PLAINTIFF'S DEPOSITION THAT
24 THESE CLAIMS DO NOT EXIST AND THE COMPLAINT SHOULD BE
25 DISMISSED. THANK YOU.

1 JUDGE YOUNG: THANK YOU, MR. PIERCEY.

2 MR. DE MONTREUX?

3 MR. DE MONTREUX: THANK YOU, YOUR HONOR. MAY IT
4 PLEASE THE COURT, I WORK FOR MR. PRIDY.

5 JUDGE YOUNG: I'M SORRY, I AM NOT UNDERSTANDING
6 YOU.

7 MR. DE MONTREUX: I'M JUST INTRODUCING MYSELF
8 AGAIN.

9 JUDGE YOUNG: THANK YOU.

10 MR. DE MONTREUX: ASKING THE COURT FOR PERMIS-
11 SION TO SPEAK.

12 JUDGE YOUNG: YES.

13 MR. DE MONTREUX: I WILL TRY TO SPEAK AS SLOW AS
14 I CAN, YOUR HONOR, TO HELP OUT.

15 YOUR HONOR, THE DEFENDANTS HAVE TRIED TO SHOW
16 YOU SOME FACTS. THEY'VE TRIED TO PUT FORTH SOME FACTS AND
17 THEY ARE ARGUING THAT THE FACTS ARE NOT DISPUTED. HOW-
18 EVER, THE FACTS ARE DISPUTED.

19 MY CLIENT CONTENTS THAT WHEN HE LEFT SHOPKO AND
20 WAS OUTSIDE IN THE PARKING LOT HE WAS ACCOSTED BY SIX
21 DIFFERENT, SIX PEOPLE, BY THE PEOPLE WORKING FOR THE
22 DEFENDANT AND THAT THEY ACCUSED HIM OF SHOPLIFTING. AND
23 THE PLAINTIFF, MY CLIENT, FILED A VERIFIED MOTION, A
24 VERIFIED COMPLAINT. IN THAT COMPLAINT PARAGRAPH 10
25 CLEARLY, CLEARLY SAYS THAT THEY LOUDLY ACCUSED ME OF

1 SHOPLIFTING. AT PARAGRAPH 10 OF THE COMPLAINT. AND THE
2 INFORMATION THERE--THE INFORMATION WAS NOT VERY CLEAR AS
3 TO WHAT DEFENDANT WERE DOING. HOWEVER, THERE ARE SEVERAL
4 PAGES IN THAT DEPOSITION THAT CLEARLY, CLEARLY SHOW THAT
5 MY CLIENT IN THE DEPOSITION HAS GIVEN, IN THE AFFIDAVITS,
6 ENOUGH EVIDENCE TO SUPPORT PARAGRAPH 10 OF THE COMPLAINT,
7 WHICH IS A VERIFIED COMPLAINT AND THERE ARE EVIDENCE--

8 JUDGE YOUNG: IN WHAT?

9 MR. DE MONTREUX: THE AFFIDAVITS.

10 JUDGE YOUNG: AFFIDAVIT?

11 MR. DE MONTREUX: YES. THAT ARE GIVEN IN
12 SUPPORT OF THE COMPLAINT THAT DO NOT CONTRADICT THE DEPO-
13 SITION. THEY SIMPLY AMPLIFY WORDS OUT OF THE DEPOSITION
14 AND THEY ALSO AMPLIFY THE VERIFIED COMPLAINT.

15 JUDGE YOUNG: LET ME JUST ASK YOU THIS, MR. DE
16 MONTREUX.

17 MR. DE MONTREUX: YES.

18 JUDGE YOUNG: SUPPOSE THAT THEY DID SAY--WELL,
19 FIRST, GIVEN THAT ALL OF THE SIX EMPLOYEES CAME OUT, THEY
20 SURROUNDED MR. PRIDY AND HIS FIANCEE THEN, AND THEY DID
21 SAY WE THINK YOU HAVE BEEN SHOPLIFTING, OR SOMETHING TO
22 THAT EFFECT, THERE IS NOTHING WRONG WITH THAT IN THE
23 STATUTE IF THEY HAVE A REASONABLE BASIS TO COME TO THAT
24 CONCLUSION, IS THERE?

25 MR. DE MONTREUX: I AGREE WITH YOUR HONOR, IF

1 THERE IS A REASONABLE GROUND FOR IT. HOWEVER--

2 JUDGE YOUNG: NOW IS THERE A REASONABLE GROUND
3 FOR IT IF THEY OBSERVE THEM, OR I DON'T KNOW WHO DID IT,
4 BUT IF THEY OBSERVE THEM PICKING UP SOME CURLERS, A NEW
5 SET OF CURLERS AND PUTTING THEM IN A BAG, AND WALKING
6 THROUGH THE CHECKOUT COUNTER TO THE SERVICE DESK WHILE ONE
7 OF THEM REMAINS AT THE CHECKOUT COUNTER PAYING FOR OTHER
8 ITEMS, BUT THE BAG WITH THE CURLERS IN IT IS TAKEN THROUGH
9 THAT CHECKOUT COUNTER, THEN OFF TO A SERVICE DESK?

10 MR. DE MONTREUX: WELL, YOUR HONOR, YOU MUST
11 UNDERSTAND AGAIN THE FACTS OF THE CASE. IT HAPPENS THAT
12 MRS. PRIDDY, NOW THEY ARE MARRIED, WENT TO SHOPKO BEFORE
13 THAT DAY. SHE WAS GIVEN A RAINCHECK. SHE WAS TOLD TO GO
14 TO THE STORE, MAKE THE EXCHANGE AND THEN TAKE IT TO THE
15 CAR, WHICH IS WHAT SHE DID. NOW THE CURLERS WERE NOT IN A
16 BAG, THEY WERE IN HER HAND.

17 JUDGE YOUNG: I SEE.

18 MR. DE MONTREUX: AND IF YOU LOOK AT THE FLOOR
19 PLAN OF THE STORE, THE CASH REGISTERS ARE HERE, THAT'S THE
20 CHECKOUT, AND THE CUSTOMER DESK TO MAKE THE EXCHANGE IS
21 RIGHT THERE. SO SHE WALKED THERE TO MAKE THE EXCHANGE
22 WHILE MR. PRIDDY HAS TO PAY. THAT'S BY THE STORE'S OWN
23 MODUS OPERANDI, YOU WOULD DO BUSINESS. YOU GO, YOU TAKE
24 WHAT YOU ARE TRYING TO EXCHANGE, YOU GO TO THE DESK AND
25 MAKE THE EXCHANGE. THEY FOLLOWED THE INSTRUCTIONS OF THE

1 STORE. SO, THEREFORE, YOUR HONOR--AND EVEN THE ARGUMENT
2 THAT THEY WENT BACK TO THE STORE--

3 JUDGE YOUNG: I AM NOT UNDERSTANDING YOU.

4 MR. DE MONTREUX: EVEN THE ARGUMENT THAT MY
5 CLIENT TOOK A BAG FROM A DIFFERENT STORE TO THEIR STORE IS
6 NOT A VERY GOOD ARGUMENT BECAUSE AS A WAY OF DOING BUSI-
7 NESS IN THIS COUNTRY EVERY TIME YOU GO TO THE MALL YOU
8 ALWAYS CARRY BAGS FROM DIFFERENT STORES AS YOU ARE
9 SHOPPING. SO THAT IS JUST NOT ANYTHING SO NOVEL HERE TO
10 CREATE A PRESUMPTION THAT MR. PRIDDY SHOPLIFTED.

11 JUDGE YOUNG: LET ME ASK YOU, SO THAT I'M CLEAR,
12 THE PRIDDYS WERE CARRYING A SEPARATE BAG WITH THE CURLERS
13 THAT THEY HAD BEFORE?

14 MR. DE MONTREUX: THE CURLERS THAT THEY HAD
15 BEFORE WERE IN A DIFFERENT BAG, YES.

16 JUDGE YOUNG: OKAY. NOW, I DIDN'T UNDERSTAND
17 WHAT YOU SAID--I DON'T UNDERSTAND WHY THERE WAS A
18 RAINCHECK FOR CURLERS IF THEY BOUGHT SOME CURLERS AND THEY
19 HAD SOME CURLERS THEY WERE BRINGING IN. THE RAINCHECK
20 WOULD MEAN THEY DIDN'T HAVE WHAT THEY WANTED.

21 MR. DE MONTREUX: WHEN THEY TOOK THE CURLERS
22 BACK THE FIRST TIME TO MAKE THE EXCHANGE, SHOPKO WAS OUT
23 OF 'EM. IN ORDER TO KEEP THE PRICE, SO THE PRICE WOULDN'T
24 CHANGE, SHOPKO GAVE THEM A DOCUMENT IN ORDER TO EFFECTUATE
25 THAT EXCHANGE IN THE FUTURE.

1 JUDGE YOUNG: OKAY. SO THEY HAD SOME INITIAL
2 CURLERS, THEY WANTED TO EXCHANGE THEM FOR BOTH A DIFFERENT
3 TYPE AND ALSO SOME THAT WORKED, I GUESS.

4 MR. DE MONTREUX: YES.

5 JUDGE YOUNG: THESE CURLERS WERE DEFECTIVE THEY
6 HAD?

7 MR. DE MONTREUX: YES, YOUR HONOR.

8 JUDGE YOUNG: SO THEY HAD THEN THE DEFECTIVE
9 CURLERS PLUS THE RAINCHECK FOR THE CURLERS THAT SHOPKO HAD
10 BEEN OUT OF AND THEY WERE PRESERVING THE PRICE OF THOSE
11 CURLERS BY THE RAINCHECK.

12 MR. DE MONTREUX: YES, YOUR HONOR.

13 JUDGE YOUNG: ALL RIGHT. NOW THEY THEN HAD THE
14 OLD CURLERS IN A BAG.

15 MR. DE MONTREUX: NOT IN A BAG--THE OLD CURLERS
16 WERE IN A BAG, YES.

17 JUDGE YOUNG: THEY TOOK THE NEW CURLERS IN THEIR
18 HAND--

19 MR. DE MONTREUX: YES.

20 JUDGE YOUNG: --WALKED THROUGH THE COUNTER,
21 THROUGH THE CHECKOUT COUNTER AND WENT THEN TO THE SERVICE
22 DESK.

23 MR. DE MONTREUX: AS THEY WERE INSTRUCTED TO DO.

24 JUDGE YOUNG: WELL, AS THEY WOULD HAVE BEEN
25 EXPECTED TO DO, LIKELY.

1 MR. DE MONTREUX: YES.

2 JUDGE YOUNG: I'M HAVING A HARD TIME UNDER-
3 STANDING, MR. DE MONTREUX, WHY MR. PRIDDY DIDN'T JUST SAY
4 IN THE PARKING LOT, THERE MUST BE SOME MISTAKE AND WE HAVE
5 THESE CURLERS THAT WE HAD THE RIGHT TO EXCHANGE, AND WE
6 HAD THE CLAIM CHECK TO DEAL WITH IT.

7 MR. DE MONTREUX: YOUR HONOR, PERHAPS THAT IS A
8 GOOD ARGUMENT, HOWEVER, IT IS THE ENTIRE WAY THE MATTER
9 HAPPENED. SUDDENLY MR. PRIDDY FOUND HIMSELF SURROUNDED
10 AND ACCUSED OF SHOPLIFTING.

11 JUDGE YOUNG: IS THERE ANYTHING UNUSUAL ABOUT
12 THAT? IT SEEMS TO ME THAT'S WHAT ANYONE WOULD DO WITH A
13 SHOPLIFTER IS THEY WOULD SURROUND.

14 MR. DE MONTREUX: YOUR HONOR, THAT IS TRUE.
15 HOWEVER, WHEN YOU GOT THE ENTIRE EVIDENCE, WHEN YOU LOOK
16 AT THE EVIDENCE OF THE VIDEOTAPE--

17 JUDGE YOUNG: THE WHAT?

18 MR. DE MONTREUX: THE VIDEOTAPE FROM THE STORE'S
19 CAMERA. THAT THE VIDEOTAPE THAT THEY RECORDED YOU WILL
20 SEE, IF YOU HAD A CHANCE, WE SUBMITTED THAT INTO EVIDENCE,
21 THAT THE INSTANT MR. PRIDDY ENTERED THE STORE HE BECAME A
22 SUSPECT. THEY FOLLOWED HIM EVERYWHERE WITH THAT CAMERA.
23 THOSE CAMERAS, WHEN MR. PRIDDY'S GIRL WOULD GO BEHIND SOME
24 KIND OF DISPLAY THE CAMERA WOULD GO WIDE FOR HIM. IF THEY
25 CAN'T FIND HIM THEY WOULD LOOK FOR HIM OVER THE STORE.

1 AND WHEN THEY FIND MR. PRIDDY THEY WOULD PULL HIM IN, ZOOM
2 HIM IN JUST TO FIND OUT EXACTLY, IN ORDER TO FIND OUT
3 EXACTLY WHAT MR. PRIDDY WAS SHOPLIFTING. IF ANYTHING
4 ELSE, THE EVIDENCE THAT THE STORE ALREADY HAD--AND THEY
5 PUT, ANYWAY, BETWEEN 35 AND 45 MINUTES--EVIDENCE WOULD
6 TELL THEM THIS MAN IS NOT SHOPLIFTING. THIS MAN NEVER
7 WENT TO THE DOOR. HE NEVER WENT TO THE BATHROOM. HE WAS
8 ALWAYS SHOPPING, LOOKING FOR COUPONS. THE CURLER THAT WAS
9 IN THE DEFECTIVE SET WAS IN THE BASKET THAT THEY PUSH
10 AROUND. THE NEW SET WAS CHOSEN AND PUT IN THE BASKET.
11 THE STORE HAD NO REASON AT ALL--THE STORE KNEW MR. PRIDDY
12 WAS NOT SHOPLIFTING. THE STORE DID NOT HAVE ANY GROUNDS
13 TO STALK MR. PRIDDY OUTSIDE IN THE MALL AND SAID YOU WERE
14 SHOPLIFTING.

15 JUDGE YOUNG: I AM NOT SURE I UNDERSTAND THE
16 PROFFER THAT YOU'RE JUST MAKING. IF I WALK THROUGH A
17 STORE THERE IS NO--AND THEY FOLLOW ME WITH A CAMERA THE
18 WHOLE TIME I'M THERE, AND THERE IS NO BASIS TO THINK I
19 HAVE TAKEN ANYTHING, AND YET, SOME EMPLOYEE WHO IS
20 SEPARATE FROM THE CAMERA OBSERVES ME AND THINKS I DID TAKE
21 SOMETHING, WHY CAN'T THEY STOP ME?

22 MR. DE MONTREUX: IT'S NOT JUST AN EMPLOYEE,
23 YOUR HONOR, THIS IS THE MANAGER, THIS IS THE PERSON
24 ACTUALLY IN CHARGE OF THIS KIND OF BUSINESS AT SHOPKO.
25 THIS IS THE PERSON THAT IS IN CHARGE OF IT. IN FACT, THAT

1 PERSON, AT SOME POINT IN THE INFORMATION, AND SOME FACTS
2 OF THE CASE, SAYS, DIDN'T YOU SEE ME, I WAS WATCHING YOU.
3 YOUR HONOR, IT HAPPENS, THAT WITH THE HELP OF THE VIDEO-
4 TAPE, THE DEFENDANT WAS ON NOTICE THAT NOTHING WAS WRONG,
5 THAT MY CLIENT DID NOTHING WRONG. MY CLIENT DID NOT
6 SHOPLIFT. THEY KNEW BECAUSE OF THE VIDEOTAPE THAT MY
7 CLIENT WENT AND MADE AN EXCHANGE. THE EXCHANGE WAS MADE.
8 THEY KNEW MY CLIENT STOOD BACK AND PAID. ALL THAT IS ON
9 VIDEOTAPE. AND THEN MY CLIENT WALKED OUT OF THE STORE AND
10 THEN THEY STILL STALKED MY CLIENT AND SAY, YOU WERE SHOP-
11 LIFTING, WE WANT TO LOOK IN YOUR BAG. IT IS WHEN YOU LOOK
12 AT THE ENTIRE EVIDENCE IT SUPPORTS THE FACT THAT THEY DID
13 NOT HAVE ANY REASON, ANY PRIVILEGE TO STALK MR. PRIDY
14 BECAUSE THEY WERE NOT--

15 JUDGE YOUNG: DON'T THEY HAVE THE PRIVILEGE TO
16 STOP ANYONE?

17 MR. DE MONTREUX: YOUR HONOR, IF THEY HAVE
18 REASONABLE GROUNDS FOR IT.

19 JUDGE YOUNG: IS THAT WHAT'S REQUIRED IN THE
20 STATUTE?

21 MR. DE MONTREUX: THAT'S WHAT'S REQUIRED. IF
22 THEY HAVE A REASONABLE SUSPICION, A BONA FIDE SUSPICION
23 THAT THERE WAS SOMEBODY STEALING IN THAT STORE OR SOMEBODY
24 ACTED IN A FASHION TO WARRANT SUSPICION.

25 JUDGE YOUNG: NOW THE STATUTE SAYS, 78-11-18,

1 "ANY MERCHANT WHO HAS REASON TO BELIEVE THAT MERCHANDISE
2 HAS BEEN WRONGFULLY TAKEN BY AN INDIVIDUAL CONTRARY TO,
3 THEN THE CITED SECTIONS, AND THAT HE CAN RECOVER SUCH
4 MERCHANDISE BY TAKING SUCH INDIVIDUAL INTO CUSTODY AND
5 DETAINING HIM MAY, FOR THE PURPOSE OF ATTEMPTING TO EFFECT
6 SUCH RECOVERY OR FOR THE PURPOSE OF INFORMING THE PEACE
7 OFFICER OF THE CIRCUMSTANCES OF SUCH DETENTION, TAKE THE
8 INDIVIDUAL INTO CUSTODY AND DETAIN HIM IN A REASONABLE
9 MANNER AND FOR A REASONABLE LENGTH OF TIME. SUCH TAKING
10 INTO CUSTODY AND DETENTION BY A MERCHANT OR HIS EMPLOYEE
11 SHALL NOT RENDER SUCH MERCHANT OR HIS EMPLOYEE CRIMINALLY
12 OR CIVILLY LIABLE FOR FALSE ARREST, FALSE IMPRISONMENT,
13 SLANDER, OR LAWFUL DETENTION OR FOR ANY OTHER TYPE OF
14 CLAIM OR ACTION UNLESS THE CUSTODY AND DETENTION ARE
15 UNREASONABLE UNDER ALL THESE CIRCUMSTANCES."

16 SO YOUR POSITION IS THAT IT IS A QUESTION OF
17 FACT TO GO TO THE JURY AS TO WHETHER THE TAKING INTO
18 CUSTODY IS UNREASONABLE UNDER ALL OF THE CIRCUMSTANCES?

19 MR. DE MONTREUX: YOUR HONOR, I DON'T BELIEVE
20 THAT'S THE ISSUE BEFORE YOU. THE ISSUE IS WHETHER OR NOT
21 THEY HAD REASON TO STOP. WHEN YOU STUDY THAT STATUTE, IN
22 THAT VERY FIRST LINE YOU SAID, "IF THE MERCHANT HAS A
23 REASON TO BELIEVE."

24 JUDGE YOUNG: OKAY. NOW DON'T I HAVE TO START
25 WITH THE PROPOSITION THAT THE MERCHANT HAS A REASON TO

1 BELIEVE, WHEN THE MERCHANT SAW SOMEONE WALK THROUGH THE
2 CHECKOUT COUNTER WITH CURLERS THAT WERE THEN NOT PAID FOR,
3 EVEN THOUGH THE PERSON WENT DIRECTLY TO THE SERVICE DESK?

4 MR. DE MONTREUX: THE MERCHANT CAN AND HAS--THE
5 MERCHANT HAS AT HIS DISPOSITION EVERY TOOL AVAILABLE TO
6 FIND OUT THAT AN EXCHANGE WAS MADE EITHER BY CHECKING OUT
7 WHERE THE CUSTOMER DESK IS AND ASKING, WAS AN EXCHANGE
8 MADE--

9 JUDGE YOUNG: WELL NOW, THE MERCHANT DOESN'T
10 HAVE THE LUXURY OF TIME ON THAT. WHEN THE PERSON IS
11 LEAVING THE STORE AND HAS WALKED THROUGH THE CHECKOUT
12 COUNTER WITH A NEW CONTAINER OF CURLERS, EVEN THOUGH THE
13 EMPLOYEE MADE THE MISTAKE, ADMITTEDLY AND OPENLY NOW, THEN
14 DON'T THEY HAVE THE RIGHT TO BELIEVE THAT WHEN THEY
15 HAVEN'T CHECKED IT OUT PROPERLY AT THE PAYMENT COUNTER
16 THAT THEY MAY BE SHOPLIFTING?

17 MR. DE MONTREUX: YOUR HONOR, ASSUME FOR THIS
18 VERY SAME THING, AND IF YOU SO READ THE DEPOSITION, THE
19 CLIENT OFFERED TO LET THEM LOOK IN THE BAG, OFFERED TO
20 SHOW THEM THE RECEIPTS TO SHOW THAT EVERYTHING WAS
21 CORRECT, EVEN BEFORE MY CLIENT LEFT THE STORE.

22 JUDGE YOUNG: RIGHT.

23 MR. DE MONTREUX: THEY KNEW EVERYTHING. IF
24 THERE WAS ANYTHING ELSE, THEY HAD ALL THE TIME IN THE
25 WORLD TO DO WHATEVER THEY WANTED TO DO. THE FOLLOWING OF

1 MY CLIENT. MY CLIENT STOPPED AT THE CASH REGISTER, A
2 TELEPHONE CALL CAME TO THE CASHIER SAYING THAT APPARENTLY
3 TO INFER SOMETHING, SAYING THAT THOSE PEOPLE ARE MAYBE
4 SHOPLIFTING. MY CLIENT OFFERED TO LET THEM LOOK IN HIS
5 BAG. MS. PRIDDY CAME BACK WITH THE CURLER AND STAYED WITH
6 HIM AT THE CASH REGISTER. THAT IS ON THE FILM. EVERY-
7 THING IS CORRECT. EVERYTHING IS DONE. EVERYTHING IS IN
8 THE PROPER BAGS. UNTIL THEY LEFT THE STORE. THERE WAS
9 AMPLE TIME TO VERIFY EVERYTHING. THERE WAS NO GROUNDS
10 WHATSOEVER. THE MERCHANT HAD NO GROUNDS TO STOP MR.
11 PRIDDY OUT THERE AND ACCUSE HIM OF SHOPLIFTING.

12 THE EVIDENCE IN ITS ENTIRETY, THE VIDEOTAPE,
13 EVERYTHING THAT HAPPENED IN THAT STORE CLEARLY SUPPORT
14 THAT THERE WAS NO REASONABLE GROUND TO STOP HIM. THERE
15 WAS AMPLE TIME TO INVESTIGATE. AN OFFER WAS MADE TO
16 VERIFY EVERYTHING, THAT ALL OF THE EXCHANGE WAS MADE.

17 IF WE ARE GOING TO READ THE STATUTE AS TO WHERE
18 THE MERCHANT CAN SIMPLY JUST ACT ON IMPULSE, EVEN THOUGH
19 THERE ARE NO REASONABLE GROUNDS, PEOPLE LIKE MY CLIENT
20 WOULD NEVER HAVE A CHANCE TO COME TO THIS COURT AND ASSERT
21 THEIR CLAIMS, YOUR HONOR.

22 JUDGE YOUNG: ARE YOU FINISHED?

23 MR. DE MONTREUX: SHALL I CONTINUE, YOUR HONOR?

24 JUDGE YOUNG: ARE YOU FINISHED WITH YOUR
25 ARGUMENT?

1 MR. DE MONTREUX: NO. YOUR HONOR, THERE IS A
2 STANDARD FOR SUMMARY JUDGMENT IS THAT ALL REASONABLE
3 INFERENCE THAT SHOULD BE DRAWN FROM THE EVIDENCE SHOULD BE
4 VIEWED IN FAVOR OF THE NON-MOVING PARTY. WHEN YOU LOOK AT
5 THE EVIDENCE IN ITS ENTIRETY IT SUPPORTS MY CLIENT'S
6 POSITION.

7 DEFENDANT'S ARGUMENT IS THAT IN THE DEPOSITION
8 MY CLIENT DID NOT SAY THEY SAID, "I AM A THIEF." HOWEVER,
9 IN LOOKING AT CERTAIN PAGES OF THIS DEPOSITION YOU CAN SEE
10 THAT MY CLIENT, SHOPLIFTING--SHOPLIFTERS ARE SORT OF THE
11 ENTIRE DEPOSITION. FOR EXAMPLE, IF YOU ALLOW ME, I WILL
12 SHOW YOU AT PAGE 78 OF THE DEPOSITION THE QUESTION WAS,
13 "CAN YOU REMEMBER THE SUBSTANCE OF HER CONVERSATION?" AND
14 THE ANSWER IS, "THE SUBSTANCE OF THE CONVERSATION, WITHOUT
15 RECALLING THE EXACT WORDS WAS THAT, YOU KNOW, SHE HAD
16 OBSERVED US SHOPLIFTING, AN ATTEMPT TO SHOPLIFT.

17 "QUESTION: WAS SHE SAYING THAT TO THE STORE
18 MANAGER?

19 "ANSWER: SHE WAS SAYING THAT TO ANYBODY IN
20 EARSHOT.

21 "QUESTION: SHE OBSERVED SHOPLIFTING?

22 "ANSWER: YES, SHE OBSERVED SHOPLIFTING."

23 EVERYTHING IN THIS CASE POINTS TO THE FACT THAT
24 MY CLIENT DID SAY THAT THEY ACCUSED HIM OF SHOPLIFTING.
25 THE VERIFIED COMPLAINT ALLEGED THAT MY CLIENT WAS ACTUALLY

1 SHOPLIFTING AT PARAGRAPH 10. THE AFFIDAVIT OF MY CLIENT
2 DOES NOT IN ANY WAY--

3 JUDGE YOUNG: WHAT WAS THAT WORD?

4 MR. DE MONTREUX: AFFIDAVIT. THE TESTIMONY THAT
5 MY CLIENT GAVE SUPPORTS THE ANSWER. THAT IS NOT CONTRARY
6 TO THE DEPOSITION. IT DOES NOTHING BUT AMPLIFY IT.

7 YOUR HONOR, WE HAD AN EYE WITNESS AT THE CENTER,
8 AT THE VERY CENTER OF THIS DISPUTE. THE EYE WITNESS WAS
9 NOT DEPOSED. THAT EYE WITNESS, THEY HAVE SUPPLIED HER
10 TESTIMONY TO YOU, IN SUPPORT OF DEFENDANT--IN SUPPORT OF
11 PLAINTIFF, I'M SORRY. THE DEFENDANT HAS NOT ATTACKED THAT
12 AFFIDAVIT. THE DEFENDANT KNEW FROM THE VERY BEGINNING
13 THAT THAT WITNESS EXISTED. THE DEFENDANT HAS NOT DEPOSED
14 THAT WITNESS. THE WITNESS TESTIFIED SHE HEARD THAT MY
15 CLIENT WAS ACCUSED OF SHOPLIFTING IN THE PARKING LOT IN
16 FRONT OF THE GENERAL PUBLIC.

17 THERE IS A QUESTION OF PRIVILEGE, YOUR HONOR.
18 OF COURSE, A MERCHANT HAS A PRIVILEGE. HOWEVER, A PRIVI-
19 LEGE SUBJECT TO ATTACK. AND THE LAW, I BELIEVE, WILL
20 RENDER WHERE THERE IS MALICE THERE IS NO PRIVILEGE. AND
21 THE FACT THAT THE EVIDENCE, THE VIDEOTAPE AND EVERYTHING
22 SHOWS THAT THE REASON WHY MR. PRIDDY WAS STOPPED IS
23 BECAUSE OF HIS RACE, MALICE. HE WAS FOLLOWED FOR SOME 45
24 MINUTES AND HE WAS STOPPED OUT THERE AND ACCUSED OF SHOP-
25 LIFTING WHEN THERE IS NO REASONS, NO GROUNDS TO ACCUSE HIM

1 OF IT. YOUR HONOR, THAT PRIVILEGE IS DIFFERENT.

2 AS FAR AS EMOTIONAL DISTRESS IS CONCERNED WE DID
3 PLEAD NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS. IT IS
4 OUR INTENT TO AMEND OUR COMPLAINT TO ALLEGE INTENTIONAL
5 INFLECTION OF EMOTIONAL DISTRESS BECAUSE OF THE EVIDENCE
6 THAT WE HAVE DISCOVERED THROUGH DISCOVERY OF THIS CASE.
7 THANK YOU, YOUR HONOR.

8 JUDGE YOUNG: THANK YOU. DO YOU WISH TO REPLY,
9 MR. PIERCEY?

10 MR. PIERCEY: YES, YOUR HONOR. YOUR HONOR, THIS
11 IS EXACTLY THE SORT OF SITUATION THAT THE COURT IN WEBSTER
12 V. SILL TRIED TO ADDRESS IN PREVENTING A PLAINTIFF FROM
13 MOVING AWAY AND DISOWNING THE PLAINTIFF'S OWN TESTIMONY IN
14 A DEPOSITION. IN THE COMPLAINT--THIS WAS ONE OF THE
15 PROBLEMS THAT GAVE RISE TO THE TAKING OF THE DEPOSITION.

16 IN THE COMPLAINT THE ALLEGATION IS THAT THERE
17 WAS A LOUD ACCUSATION OF SHOPLIFTING AND THERE WERE
18 LETTERS BACK AND FORTH, BUT THERE WAS NOTHING EVER SAID
19 ABOUT THE WORDS OR THE WORDS TO THAT EFFECT THAT WERE
20 SPOKEN. AND THIS IS--WE'VE CITED THE BOISJOLY CASE, JUDGE
21 WINDER'S DECISION, ABOUT IT'S IMPORTANT TO HAVE PARTICU-
22 LARITY WHEN YOU'RE TALKING ABOUT SLANDER BECAUSE IF YOU'RE
23 SAYING YOU WERE SLANDERED YOU OUGHT TO SAY WHAT THOSE
24 WORDS WERE. AND THE REASON FOR TAKING THE DEPOSITION WAS
25 TO GET PAST THIS "LOUDLY ACCUSED," BECAUSE AS THE

1 PLAINTIFF'S DEPOSITION SHOWS THE WORDS, IN FACT WHAT HE
2 SAYS IS, SOMETIMES WHAT'S NOT SAID IS MOST IMPORTANT HERE.
3 SO AS FAR AS THE PLAINTIFF IS CONCERNED HE THINKS, HE
4 THOUGHT THAT IT IS NOT IMPORTANT WHETHER OR NOT HE WAS
5 CALLED A THIEF, WHAT'S IMPORTANT IS HE FELT THAT WAY, I
6 GUESS. SO THE REASON FOR THE DEPOSITION IS TO GET OVER
7 THAT AND FIND OUT WHAT WAS SAID.

8 JUDGE YOUNG: LET ME ASK YOU THIS. SUPPOSE,
9 GIVEN THAT ALL OF THEIR EVIDENCE MUST BE VIEWED IN THE
10 LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY, IF IT IS
11 TRUE THAT THE STORE HAD OBSERVED HIM BY VIDEOTAPE FOR 45
12 MINUTES, AND THE VIDEOTAPE DOES NOT SHOW ANY ACTIVITY THAT
13 WOULD BE AKIN TO SHOPLIFTING, WHAT REASONABLE BASIS IS
14 THERE, WHAT REASON TO BELIEVE, AS THE STATUTE REQUIRES, IS
15 THERE THAT WOULD ALLOW THE EMPLOYEES TO CONCLUDE THAT
16 THERE HAD BEEN THE POTENTIAL OF SHOPLIFTING? JUST THE
17 WALKING THROUGH THE COUNTER?

18 MR. PIERCEY: YOUR HONOR, THERE IS--YES. I
19 THINK THAT'S CORRECT.

20 JUDGE YOUNG: OKAY. NOW LET ME JUST TAKE IT ONE
21 STEP FURTHER. SHOULDN'T I REQUIRE THIS MATTER THEN TO GO
22 TO A JURY TO DECIDE WHETHER THAT ACTION FORMED AN ADEQUATE
23 BASIS, THAT'S A FACTUAL QUESTION, AN ADEQUATE BASIS FOR
24 THE EMPLOYER, OR THE MERCHANT, TO BELIEVE REASONABLY THAT
25 MERCHANDISE WAS BEING WRONGFULLY TAKEN?

1 MR. PIERCEY: YOUR HONOR, I THINK THERE ARE TWO
2 REASONS THAT THE COURT SHOULD DISMISS THE CLAIM. AND THE
3 FIRST IS THAT THE QUESTION ISN'T WHAT SOMEBODY WOULD HAVE
4 DONE WITH PERFECT KNOWLEDGE. THAT'S NOT WHAT THE STATUTE
5 IS ADDRESSED TO. OBVIOUSLY, IF THERE WAS PERFECT KNOW-
6 LEDGE THEN NOTHING WOULD HAPPEN, BUT A STATUTE IS
7 ADDRESSED TO WHEN THERE'S A REASON TO BELIEVE, AND THEN
8 THE INFORMATION COMES IN THAT IT'S NOT A CASE OF SHOP-
9 LIFTING AND TO PROTECT THE MERCHANT IN MAKING THAT
10 INQUIRY.

11 NOW, THE PLAINTIFF TALKS ABOUT THE VIDEOTAPE,
12 SHOWING THE ABSENCE OF PRIVILEGE, AS POINTED OUT IN THE
13 WEST CASE, IS THE PLAINTIFF'S BURDEN. AND THE PLAINTIFF
14 HASN'T DONE ANYTHING. THEY TALK ABOUT THIS VIDEOTAPE, BUT
15 AS THE COURT POINTED OUT, THERE'S AN EMPLOYEE AND THIS
16 EMPLOYEE, THIS EMPLOYEE SEES THEM COME IN WITH THE NON-
17 SHOPKO BAG. DOESN'T MEAN THEY ARE GOING TO SHOPLIFT,
18 DOESN'T MEAN THEY ARE NOT GOING TO SHOPLIFT, BUT IT'S
19 SOMETHING THAT SOMEONE COULD PUT SOMETHING IN. SO THEY
20 SEE THEM COME IN WITH A NON-SHOPKO BAG AND THEY SEE THEM
21 LEAVE AND THEY SEE HIS FIANCEE TAKE SOMETHING THROUGH THE
22 CHECKOUT. AND SO THE QUESTION IS--AND THEN THEY GO OUT.
23 AND THEN AS YOUR HONOR POINTED OUT, THEY SAY THEY WANTED
24 TO LOOK IN THE BAG. AND THE PLAINTIFF COULD SAY THERE
25 MUST BE SOME MISTAKE, OR WE'VE MADE AN EXCHANGE, OR, YOU

1 KNOW, WHAT'S YOUR CONCERN, BUT THE PLAINTIFFS--AND THAT,
2 YOUR HONOR, IS SQUARELY WITHIN THE STATUTE, SECTION 17,
3 BUT THE PLAINTIFF SAYS NO AND THEN--AND I THINK, YOUR
4 HONOR, THIS GETS TO THE SECOND QUESTION. THE PLAINTIFF'S
5 OWN TESTIMONY IS THAT THE EMPLOYEE RECOGNIZED A MISTAKE,
6 YOUR HONOR, AND SO THERE WERE REASONS TO BELIEVE, BUT THE
7 PLAINTIFF--THE EMPLOYEE RECOGNIZED A MISTAKE, THAT WAS THE
8 END OF IT.

9 BUT, YOUR HONOR, THE SECOND REASON IS--AND I
10 THINK IT'S IMPORTANT TO KEEP IN MIND WHAT THE CLAIMS ARE
11 THAT ARE BEING MADE HERE. THE FIRST CLAIM IS SLANDER AND
12 THE SECOND CLAIM IS NEGLIGENT INFLICTION. AND THERE ISN'T
13 ANY CLAIM HERE OF FALSE IMPRISONMENT. WHAT HAPPENED WAS
14 THAT THEY GO OUT, THEY ASKED THE QUESTION ALOUD, BY
15 SECTION 17, AND THE PLAINTIFF SAYS NO. AND THEN THEY SAY,
16 LET'S GO IN THE OFFICE AND THE PLAINTIFF SAYS FINE. HE
17 SAYS FINE, THAT'S A GOOD IDEA, OR FINE, LET'S DO THAT.
18 AND SO--EVEN THOUGH THE PLAINTIFF SAYS THAT AT THE
19 CHECKOUT COUNTER HE MADE AN OFFER TO LET THE CHECKOUT
20 PERSON LOOK IN THE BAG, THAT'S NOT--WE'VE GOT TO TALK
21 ABOUT THE EMPLOYEE WHO MADE THE REQUEST. AND HE DOESN'T
22 SAY THAT THE EMPLOYEE WAS THERE OR THAT SHE HAD THE OPPOR-
23 TUNITY TO LOOK IN THE BAG THEN.

24 AND SO THE IMPORTANT THING IS THAT MR. PRIDY,
25 RATHER THAN BE WILLING TO TALK AT THAT POINT, SAID, FINE,

1 LET'S GO IN THE OFFICE. THEN THEY GO IN THE OFFICE, HE
2 WON'T TALK TO HER, HE REFUSES TO SIT DOWN. HE SAYS, LET
3 ME SEE THE MANAGER. THE MANAGER COMES IN. NOW, TO THE
4 MANAGER, HE'LL EXPLAIN, HE'LL EXPLAIN WHAT HAPPENED. THEY
5 SAY, WE MADE AN EXCHANGE AND THEY TELL ABOUT IT AND THEN
6 THEY REALIZE THE MISTAKE WAS MADE.

7 NOW, THESE ARE JUST BALD ASSERTIONS AND STATE-
8 MENTS ABOUT MALICE. THEY'RE CONTRADICTED BY THE DEPOSI-
9 TION WHICH RECOGNIZES THE MISTAKE. AND THIS WASN'T A CASE
10 OF, THIS WASN'T A CASE OF DETENTION. IT WAS A CASE WHERE
11 A QUESTION WAS ASKED AND THE PLAINTIFF WAS NOT WILLING TO
12 TALK THEN, BUT WAS WILLING TO GO IN AND TALK, SO HE WASN'T
13 HELD AGAINST HIS WILL. AND THAT--AND SO I THINK THE
14 PROPER STANDARD IS RECOGNIZED IN BREHANY. THE CLAIM IS
15 SLANDER. THERE WAS NO DEFAMATORY STORY BUT, IN ADDITION
16 TO THAT, BREHANY SAYS THERE'S GOT TO BE ROOM, LATITUDE FOR
17 MISTAKE. AND THAT'S ALL THIS WAS. PLAINTIFF HAS NOT MET
18 THE BURDEN OF SHOWING ANY FACTS TO SHOW MALICE OR LACK OF
19 REASON IN THE MIND OF THE EMPLOYEE.

20 JUDGE YOUNG: THANK YOU, MR. PIERCEY.

21 MR. PIERCEY: THANK YOU, YOUR HONOR.

22 JUDGE YOUNG: THE COURT FINDS THAT THE MOTION
23 FOR SUMMARY JUDGMENT SHOULD BE AND THE SAME IS HEREBY
24 GRANTED. THE COURT FINDS THAT THERE WAS A REASONABLE
25 BASIS TO MAKE A REQUEST AND THAT THERE SHOULD HAVE SIMPLY

1 BEEN COOPERATION. HAD MR. PRIDDY COOPERATED IN THE
2 PARKING LOT HE WOULDN'T HAVE BEEN TAKEN BACK INTO THE
3 OFFICE. WHEN HE WENT INTO THE OFFICE THEY SIMPLY
4 EXPLAINED THE CASE. AND 78-12-17 AND -18 ALLOW A MERCHANT
5 TO MAKE A REQUEST UNDER A REASONABLE BASIS. AND THE COURT
6 FINDS THAT REASONABLE MINDS COULD REALLY NOT DIFFER ON THE
7 BASIS THAT TAKING CURLERS OFF THE SHELF, THROUGH THE
8 CHECKOUT COUNTER, EVEN THOUGH YOU WENT TO A SERVICE
9 COUNTER, COULD HAVE CAUSED A REASONABLE BASIS TO THINK
10 SOMETHING WAS AWRY. AND THEY HAVE THE RIGHT TO STOP
11 PEOPLE AND TO INQUIRE OF THEM AS TO THEIR CIRCUMSTANCES.
12 AND IT WOULD HAVE BEEN VERY EASY FOR MR. PRIDDY TO SIMPLY
13 SAY, WELL, THERE MUST BE A MISTAKE HERE, I'LL EXPLAIN TO
14 YOU WHAT THE CIRCUMSTANCES ARE, WE EXCHANGED THESE. AND
15 THAT COULD HAVE WELL BEEN TAKEN CARE OF.

16 I DON'T THINK IT'S REASONABLE TO EXPECT EVERYONE
17 TO BE AWARE OF THE CONTENT OF A VIDEOTAPE THAT IS BEING
18 RECORDED IN AN OFFICE. AND THAT IS, ALL OF THE OTHER
19 EMPLOYEES TO BE AWARE OF THAT, WHO WENT OUT.

20 I DON'T FIND THE FACT THAT SIX EMPLOYEES STOPPED
21 HIM TO BE UNREASONABLE BECAUSE YOU USUALLY WOULD WANT TO
22 STOP SOMEBODY WITH THE EVIDENCE, THAT YOU CAN DETAIN THEM
23 IF THEY DECIDE TO FLEE. SO THE EMPLOYEES GOING OUT IN
24 THAT WAY, AS LONG AS THEY ARE COURTEOUS, AND THE SIX HERE
25 SEEM THAT THEY WERE, AND MR. PRIDDY'S TESTIMONY SEEMS TO

1 AFFIRM THAT, AND ON THAT BASIS THE COURT FINDS THAT THE
2 MOTION SHOULD BE GRANTED.

3 IF YOU WILL PREPARE THE ORDER, MR. PIERCEY,
4 CONSISTENT BOTH WITH YOUR PLEADINGS AND THE RECORD?

5 MR. PIERCEY: THANK YOU, YOUR HONOR.

6 MR. DE MONTREUX: THANK YOU, YOUR HONOR.

7 (WHEREUPON, THE HEARING WAS CONCLUDED).
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ADDENDUM I

Shopko Video Tape

