**IN THE MAGISTRATE COURT OF COBB COUNTY**
**STATE OF GEORGIA**

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| MARY JOHNSON, | ) | |
| | ) | |
| Plaintiff | ) | CIVIL ACTION |
| | ) | |
| vs. | ) | FILE NO. 05J2421 |
| | ) | |
| PUBLIX SUPER MARKETS, INC., and SECURITY OF AMERICA, | ) | |
| | ) | |
| | ) | |
| Defendants | ) | |

**BRIEF IN SUPPORT OF MOTION FOR DIRECTED VERDICT OF SECURITY SERVICES OF AMERICA, LLC**

COMES NOW Security Services of America, LLC ("SSA"), Defendant in the above styled action and hereby files its brief in support of its motion for directed verdict.

**STATEMENT OF FACTS**

Wilburn was employed by Security Services of America, LLC as a loss prevention officer and assigned to work at the Publix store in question. Wilburn observed Plaintiff pick up two small drink packages and later conceal them in her handbag. Wilburn then observed Plaintiff pass through the cashier area without paying for the items. Wilburn's observations provided probable cause for him to stop Plaintiff for questioning. Plaintiff pitched a fit but voluntarily complied with Wilburn's request to show him where she had placed the two drink items. When Plaintiff showed where she had placed the items and that she had nothing in her purse, no further action was taken by the Defendants. Plaintiff acknowledges that no one with Publix or SSA made physical contact with her.

Plaintiff filed this lawsuit alleging she was detained for 15-20 minutes. She acknowledges that, "After 20 minutes, the manager apologized extensively to Plaintiff."

Plaintiff seeks damages, attorneys fees, and court costs for being inconvenienced, embarrassed, and suffering damage to her reputation.

## ARGUMENT AND CITATION OF AUTHORITY

Malicious prosecution suits are disfavored in Georgia courts and citizens are encouraged to bring to justice those who are apparently guilty. K-Mart Corp. v. Coker, 261 Ga. 745, 747-48 (1991); Monroe v. Sigler, 256 Ga. 759, 761 (1987). The Supreme Court has stated, "[c]itizens have a duty to report crimes. Disputes concerning that duty should be handled within the legal system and not by extralegal means. We do not encourage the reporting of crimes when a criminal victim easily, and at great hazard, can become a civil defendant." Monroe, 256 Ga. at 761-762.

The record before the Court on Defendants' Motion for directed verdict is completely devoid of any evidence demonstrating a genuine issue of material fact as to the Defendants' liability for Plaintiff's alleged injuries. Plaintiff does not state a claim for malicious prosecution, assault and battery, or intentional infliction of emotional distress. Defendants are entitled to judgment as a matter of law.

### 1. Plaintiff Cannot Recover from these Defendants for Assault

Plaintiff cannot recover from Defendants for assault because actionable assault only occurs under Georgia law when "all the apparent circumstances, reasonably viewed, are such as to lead a person reasonably to apprehend a violent injury from the unlawful act of another." Bulluck v. Jeon, 226 Ga. App. (1997). Plaintiff admits she never apprehended anyone subjecting her to a violent injury under the circumstances. Therefore, Defendants are entitled to judgment as a matter of law as to any assault claim. See e.g. Bullock v. Jeon, 226 Ga. App. 875 (1997); Miller v. Smith & Smith Land Surveyors, P.C., 194 Ga. App. 474 (1990); Hallford v. Kelley,

184 Ga. App. 90 (1987); Nunnally v. Revco Discount Drug Centers of Ga., Inc., 170 Ga. App. 320 (1984).

**2. Plaintiff Cannot Recover from Defendants for Battery**

Plaintiff cannot recover from Defendants for battery because an actionable battery only occurs under Georgia law when the defendant intentionally makes physical contact of a harmful or offensive type with the plaintiff. Hendricks v. Southern Bell Telephone & Telegraph Co., 193 Ga. App. 264 (1989). Plaintiff admits that no one made physical contact with her at any time. Further, Plaintiff admits she was not harmed by any contact in any way. Therefore, Plaintiff cannot recover for battery.

**3. Plaintiff Cannot recover from these Defendants for False Arrest, Malicious Arrest or False Imprisonment**

Georgia law precludes recovery for detention or arrest of a person suspected of shoplifting under circumstances such as these. O.C.G.A. § 51-7-60 states plaintiff cannot recover for false imprisonment or false arrest whenever the owner, operator, agent or employee of a mercantile establishment detains, arrests or causes to be detained or arrested any person reasonably thought to be engaged in shoplifting where it is established: (1) the plaintiff had conducted herself or behaved in such a manner as to cause a person of reasonable prudence to believe plaintiff, at or immediately prior to the time of the detention or arrest, was committing the offense of shoplifting, as defined by O.C.G.A. § 16-8-14[1]; or (2) the manner of the detention or arrest and length of time during which plaintiff was detained was under all the circumstances reasonable. See O.C.G.A. § 51-7-60. Further, the Georgia Court of Appeals has held that

[1]O.C.G.A. § 16-8-14 states in relevant part, "[a] person commits the offense of theft by shoplifting when he, with the intent of appropriating merchandise to his own use without paying for the same or to deprive the owner of possession thereof or of the value thereof, in whole or in part, conceals or takes possession of the goods or merchandise of any store or retail establishment."

grocery stores are not liable for false imprisonment when a patron by his own free choice surrendered his freedom of motion by remaining in the checking aisle to clear himself of suspicion. See Williams v. Food Lion, Inc., 213 Ga. App. 865 (1994). The facts of the present case are clearly analogous to those in Williams v. Food Lion, Inc., in which the Court pointed out that the facts did not support a finding of detention:

> It is essential, however, that the restraint be against the plaintiff's will; and **if he agrees of his own free choice** to surrender his freedom of motion, as by **remaining in a room or accompanying the defendant voluntarily, to clear himself of suspicion** or to accommodate the desires of another, rather than yielding to the constraint of a threat, then there is no imprisonment. . . . an actual detention must have occurred whether caused by **force or fear**. . . . Additionally, OCGA § 51-7-60 precludes a recovery for false imprisonment when it is shown that the owner or operator of a store reasonably believed the person detained was engaged in shoplifting. OCGA § 51-7-60 implicitly recognizes the right of a shop owner to protect himself from shoplifting by reasonably detaining a customer who has acted in a suspicious manner. Where a detention occurs, its reasonableness is a jury question; however, **a jury issue does not exist unless there has been a detention**. . . .

Williams v. Food Lion, Inc., 213 Ga.App. 865, 865-867, 446 S.E.2d 221, 223-224 (1994)(emphasis added). Thus, under the authority of the Williams case, this Court must find that Plaintiff voluntarily re-entered the store to show the security officer where she had left the items she was suspected of concealing. There was never any use of force or threat of force. Since there was no detention by these Defendants, Plaintiff cannot recover.

In addition, under Georgia law, in order for Plaintiff to recover she must prove a complete absence of probable cause for her detention AND malice on the part of the Defendants. O.C.G.A. § § 51-7-40. "The mere fact that a person has been charged with a criminal offense and upon hearing such charges were dismissed would not give a right of action against the prosecutor. The plaintiff must go further and prove 'the prosecution was instituted with malice and without probable cause. Unless he shows this, his action must fail. However innocent he

may have been, unless plaintiff was prosecuted with malice and without probable cause, he cannot maintain his action.'" Ayala v. Sherrer, 135 Ga. App. 431, 434, 218 S.E.2d 84 (1975), cert. denied.

"In a suit for malicious prosecution the [essence] of the action is the want of probable cause on the part of the person instituting the prosecution. And whether the plaintiff was guilty or innocent of the charge for which he was prosecuted is not material." Wilson v. Home Depot, Inc., 180 Ga. App. 218, 348 S.E.2d 588 (1986). Here, Wilburn observed Plaintiff conceal store merchandise in her purse, pass the point of payment and attempt to exit the grocery store. Plaintiff later voluntarily re-entered the store to show where she had left the items she was suspected of concealing There is no evidence that Wilburn stopped the Plaintiff for any reason other than the fact he truly believed Plaintiff had committed the offense of shoplifting. Thus, there was clearly probable cause for the detention of Plaintiff. Plaintiff fails to show any evidence the manner of the detention and length of time during which she was detained was under all the circumstances unreasonable because there is no such evidence. Under Georgia law, it is clear Plaintiff cannot recover for false arrest or false imprisonment or malicious prosecution because there was probable cause to believe she had committed the offense of shoplifting as soon as she concealed the items in her purse.

In addition, Plaintiff has failed to come forward with any evidence of malice on the part of Wilburn or SSA or Publix, another necessary element of her claims. "Malice consists in personal spite or in a general disregard of the right consideration of mankind, directed by chance against the individual injured." O.C.G.A. § 51-7-2. Further, "where there is no evidence of malice other than such inference as may be drawn from proof of the want of probable cause, and that proof shows some circumstances pointing to the guilt of the accused, although insufficient to

exclude every other reasonable hypothesis, the essential ingredient of malice is not so established as to entitle the Plaintiff in an action for [false arrest] to recover." Id., citing Barber v. H & H Muller Enterprises, 197 Ga. App. 126 (1990).

In the present case, there is no evidence to suggest Plaintiff's stop was made maliciously. To the contrary, the Wilburn did not know the Plaintiff prior to this arrest and did not have any personal ill will toward her. He did not have any reason for stopping the Plaintiff other than the fact he truly believed Plaintiff had, in fact, committed the crime of theft by shoplifting.

**4. Plaintiff Cannot Recover from these Defendants for Emotional Distress**

Plaintiff cannot recover for intentional infliction of emotional distress because Georgia law permits recovery only for conduct which is of outrageous or egregious nature or so terrifying or insulting as to humiliate embarrass, or frighten the plaintiff. Jenkins v. General Hosp. of Humana, Inc., 196 Ga. App. 150 (1990). The Restatement (Second) of Torts § 46(1)(1995) defines emotional distress as follows: "One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." See *Georgia Law of Torts,* § 29-2 at p. 340; see also Trimble v. Circuit City Stores, Inc., 220 Ga. App. 498 (1996). Whether a claim rises to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law for the court. Yarbray, 261 Ga. at 706.

Here, as a matter of law, there is no evidence to support a claim for intentional infliction of emotional distress since the conduct of Wilburn as described by the Plaintiff was not outrageous and extreme. This is a question of law, and one resoundingly settled in favor of

Defendants. Hendrix v. Phillips, 207 Ga.App. 394 (1993); Turnbull v. Northside Hospital, 220 Ga. App. 883, 470 S.E.2d 464 (1996); Kornegay v. Mundy, 190 Ga. App. 433 (1989).

**CONCLUSION**

Since none of Plaintiff's asserted claims against these Defendants are legally viable, these Defendants are entitled to judgment as a matter of law.

This _____ day of April, 2006.

Respectfully submitted,

SWIFT, CURRIE, McGHEE & HIERS, LLP

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing Defendants' Brief in Support of its Motion for Directed Verdict upon all parties to this matter by hand delivery to counsel of record as follows:

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This _____ day of April, 2006.

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