No. 19-0666

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

WAL-MART STORES EAST, L.P.,

Petitioner,

v.

JOHNA DIANE ANKROM

Respondent.

From the Circuit Court of Wood County, West Virginia
Civil Action No. 15-C-319

PETITIONER'S BRIEF

Jeffrey M. Wakefield (WV Bar No. 3984)
Erica M. Baumgras (WV Bar No. 6862)
Mitchell B. Tuggle (WV Bar No. 12577)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Charleston, WV 25301
(P) 304-345-0200
(F) 304-345-0260
jwakefield@flahertylegal.com
ebaumgras@flahertylegal.com
mtuggle@flahertylegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 1

I. STATEMENT OF FACTS 1

A. The Incident 1

B. Wal-Mart Policy for Detaining Shoplifters 5

II. PROCEDURAL HISTORY 5

SUMMARY OF ARGUMENT 8

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 10

STANDARD OF REVIEW 10

ARGUMENT 11

I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT WAL-MART'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE WAL-MART BREACHED NO DUTY TO RESPONDENT AND THE UNDISPUTED EVIDENCE ESTABLISHED THAT LEIST'S TORTIOUS CONDUCT PROXIMATELY CAUSED RESPONDENT'S INJURIES 11

A. Wal-Mart's stop of shoplifter Leist was performed in accordance with applicable West Virginia law and Wal-Mart policy. 12

B. The shoplifter's unforeseen decision to flee, without being pursued or chased by any Wal-Mart employees, was the proximate cause of Respondent's injuries. 16

C. Authority from courts nationwide supports entry of judgment in favor of Wal-Mart 20

II. THE CIRCUIT COURT ERRED IN FAILING TO INSTRUCT THE JURY ON INTERVENING CAUSE. 30

III. THE CIRCUIT COURT ERRED BY PRECLUDING WAL-MART FROM UTILIZING THE ALLEGATIONS CONTAINED IN RESPONDENT'S COMPLAINT DURING TRIAL. 34

IV. THE CIRCUIT COURT ERRED IN AWARDING RESPONDENT PREJUDGMENT INTEREST ON PAST MEDICAL EXPENSES 36

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Anderson v. Moulder, 183 W. Va. 77, 394 S.E.2d 61 (1990) 32

Betts v. Jones, 208 N.C. App. 169, 702 S.E.2d 100 (2010) 26

Bond v. City of Huntington, 166 W. Va. 581, 276 S.E.2d 539 (1981) 10, 36, 38

Brown v. Jewel Cos., 175 Ill. App. 3d 729, 125 Ill. Dec. 139, 530 N.E.2d 57 (1988). 28

Buckhannon-Upshur Cty. Airport Auth. v. R & R Coal Contractor, 186 W. Va. 583, 413 S.E.2d 404 (1991) 37

Butler v. K-Mart Corp., 432 So. 2d 968 (La. Ct. App. 1983) 25, 27

Doe v. Pak, 237 W. Va. 1, 784 S.E.2d 328 (2016) 37

Estate of Postlewait ex rel. Postlewait v. Ohio Valley Med. Ctr., Inc., 214 W. Va. 668, 591 S.E.2d 226 (2003) 9, 31

Gamblin v. Ford Motor Co., 204 W. Va. 419, 513 S.E.2d 467 (1998) 11

Gantt v. K-Mart Corp., Appeal No. 02A01-9801-CV-00009, 1999 Tenn. App. LEXIS 100 (Ct. App. Feb. 17, 1999) 27

Giant Food v. Mitchell, 334 Md. 633, 640 A.2d 1134 (1994) 21

Gillingham v. Stephenson, 209 W. Va. 741, 551 S.E.2d 663 (2001) 20

Graham v. Great Atlantic & Pacific Tea Co., 240 So.2d 157 (Fla. App. 1970) 24, 27

Gribben, et al v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995) 11

Grove v. Myers, 181 W. Va. 342, 382 S.E.2d 536 (1989) 10, 36, 37, 38

Henderson v. Kroger Co., 217 Ga. App. 252, 252, 456 S.E.2d 752 (1995) 25

In re J.S., 233 W. Va. 394, 758 S.E.2d 747 (2014) 11

Jackson v. Brown, 239 W. Va. 316, 801 S.E.2d 194 (2017) 11

JWCF, LP v. Farruggia, 232 W. Va. 417, 752 S.E.2d 571 (2013) 10

Kessel v. Leavitt, 204 W. Va. 95, 511 S.E.2d 720 (1998) 10, 31, 32

Kilpatrick v. Dollar Tree Stores, No. 2:13-cv-2659-SHL-tmp, 2014 U.S. Dist. LEXIS 189757 (W.D. Tenn. Sep. 19, 2014) 25

Kmart Corp. v. Lentini, 650 So. 2d 1031 (Fla. Dist. Ct. App. 1995) 21, 22, 27

Knight v. Powers Drygoods Co., 225 Minn. 280, 30 N.W.2d 536 (1948) 22, 23, 27

Lester v. Rose, 147 W. Va. 575, 130 S.E.2d 80 (1963) 31

Maloney v. Great Atl. & Pac. Tea Co., 369 So. 2d 590 (Fla. Dist. Ct. App. 1978) 25

Marcus v. Staubs, 230 W. Va. 127, 736 S.E.2d 360 (2012) 13, 33

Martin v. Piggly-Wiggly Corp., 469 So.2d 1057 (La. App. 1985) 23, 24, 27

Miller v. Fluharty, 201 W. Va. 685, 500 S.E.2d 310 (1997) 37

Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995) 13, 14

Mills v. Jack Eckerd Corp., 224 Ga. App. 785, 482 S.E.2d 449 (1997), ... 24, 25, 27, 33

Perdue v. Doolittle, 186 W.Va. 681, 414 S.E.2d 442 (1992) 11

Peters v. Menard, Inc., 224 Wis. 2d 174, 589 N.W.2d 395 (1999) 27

Raburn v. Wal-Mart Stores, Inc., 776 So.2d 137 (1999) 28, 29

Radloff v. National Food Stores, Inc., 20 Wis.2d 224, 121 N.W.2d 865, *rehearing denied*, 20 Wis.2d 224, 123 N.W.2d 570 (1963) 22, 27

Schreiber v. National Smelting Co., 157 Ohio St. 1, 104 N.E.2d 4 (Ohio 1952) 31

Scott v. Allied Stores of Ohio, Inc., 96 Ohio App. 532, 122 N.E.2d 665 (1953) 26

Scott v. Harris, 550 U.S. 372 (2007) 13

Scott v. Taco Bell Corp., 892 F. Supp. 142 (S.D.W. Va. 1995) 13

Sneberger v. Morrison, 235 W. Va. 654, 776 S.E.2d 156 (2015) 10

State v. Hinkle, 200 W. Va. 280, 489 S.E.2d 257 (1996) 10

Sydenstricker v. Mohan, 217 W. Va. 552, 618 S.E.2d 561 (2005) 31

Tabary v. D.H. Holmes Co., Ltd., 542 So. 2d 526 (La. Ct. App. 1989) 26

Ward v. West, 191 W. Va. 366, 445 S.E.2d 753 (1994) ..... passim

Yourtee v. Hubbard, 196 W. Va. 683, 474 S.E.2d 613 (1996) 32

Statutes

W. Va. Code § 55-7-13c 8

W. Va. Code § 56-6-31 ..... 36, 37

W. Va. Code § 61-3A-1 14

W. Va. Code § 61-3A-3 15

W. Va. Code § 61-3A-4 14

Other Authorities

Black's Law Dictionary (11th ed. 2019) 14

W.P. Keeton, Prosser and Keeton on the Law of Torts (5th ed. 1984) 33

West Virginia Pattern Jury Instruction § 906 31

Rules

West Virginia Rule of Appellate Procedure 18 10

West Virginia Rule of Appellate Procedure 19 10

ASSIGNMENTS OF ERROR

1. The circuit court erred in denying Wal-Mart's post-trial Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial and Motion to Amend Judgment because the undisputed evidence at trial established that Wal-Mart did not expose Respondent to a foreseeable high risk of harm and that Robert Leist's tortious conduct proximately caused Respondent's injuries.

2. The circuit court erred in failing to instruct the jury on intervening cause.

3. The circuit court erred by precluding Wal-Mart from utilizing the allegations contained in Respondent's Complaint during trial.

4. The circuit court erred by awarding prejudgment interest on Respondent's past medical expenses, as Respondent had not suffered a loss of use of any expended funds and Respondent had no medical expense obligations and no out of pocket payments related to medical expenses at the time of trial.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This is an appeal from the denial of Wal-Mart's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial and Motion to Amend Judgment, which was filed following the return of a jury verdict in favor of the Plaintiff/Respondent, Johna Diane Ankrom (hereinafter "Respondent"), in the amount of $16,922,000.00. (JA 929-931; 987-992).

A. The Incident

On February 23, 2015, Respondent, while shopping at the Pike Street Wal-Mart store in Parkersburg, West Virginia, had her shopping cart struck by a shoplifter, Robert Leist ("Leist"), as he fled from two Wal-Mart asset protection employees, neither of which were chasing or

pursuing Leist. (JA 047 at Groc Inside 4:00:37-4:00:59, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10, Smart Style A/A 4:00:45-4:01:19).[1] The impact forced the shopping cart into Respondent, causing her to lose her balance and fall to the ground. *Id.* Store surveillance video from various angles within the store provides a depiction of the subject incident, as well as the events leading up to and following the incident. (JA 047).

Initially, Wal-Mart Asset Protection Manager, Nathan Newbanks, an employee authorized by Wal-Mart to stop shoplifters, observed Leist conceal a pair of auto mechanic gloves within his being while in the Pike Street store. (JA 635). Next, Mr. Newbanks observed Leist meet up with some acquaintances in the electronics department. *Id.* Leist then left those acquaintances and made his way to the front of the grocery side of the store, at which point Leist proceeded past the store cash registers and into the vestibule area. (JA 047 at Groc Inside 4:00:05-4:00:10, Groc Vestibule 4:00:09-4:00:15; 635). The vestibule area is the area where Wal-Mart shopping carts are located and where a customer can exit the building through the store's sliding doors. *See id.*

When Leist passed the last point of sale in the store, i.e., the cash registers, and moved into the vestibule area, Mr. Newbanks, who had been following behind Leist and who can be seen wearing a black shirt and light pants in the store's surveillance video, walked quickly behind Leist into the vestibule area. (JA 047 at Groc Inside 4:00:05-4:00:10, Groc Vestibule 4:00:09-4:00:15; 573, 637). Once in the vestibule, Mr. Newbanks stopped Leist, identified himself as a Wal-Mart employee who was trying to recover store merchandise, and requested

[1] For the Court's benefit, to play the surveillance video, open a Wal-Mart Surveillance Video folder contained on the disc and launch RunReviewer.exe. Once RunReviewer.exe launches, click on the Case Folder tab in the upper left corner, which will launch a directory box. Locate the "Ankrom-Walmart Surveillance" folder and double click. Another folder named "Ankrom-Walmart Surveillance" will appear. Click "OK." The surveillance videos will then appear.

that Leist accompany him to the asset protection office to return the stolen gloves. (JA 047 at Groc Vestibule 4:00:09-4:00:44; 635-638). As Mr. Newbanks stopped Leist and identified himself, Joseph Daniel, another Wal-Mart Asset Protection Manager, who can be seen wearing a blue shirt in the store surveillance video, arrived to assist with the investigation, along with two other Wal-Mart employees who were serving as witnesses to the stop. (JA 047 at Groc Vestibule 4:00:09-4:00:44, Groc Inside 4:00:10-4:00:17; 567-568; 586-587). At a point during the conversation that is not clearly shown on the surveillance video, Leist handed the stolen gloves back to Mr. Newbanks. (JA 047 at Groc Vestibule 4:00:09-4:00:44; 588, 635). Leist also attempted to walk around the Wal-Mart employees, and Mr. Newbanks and Mr. Daniel briefly restrained him by grabbing his jacket and locking arms with him, while also slowly spinning him to where Leist was facing toward the interior of the store. (JA 047 at Groc Vestibule 4:00:09-4:00:44; 635; 639). At no point during the restraint did any fighting or violence take place. (JA 047 at Groc Vestibule 4:00:09-4:00:44; 574-576; 639; 747).

Following the stop, Leist willingly and voluntarily consented to return to the store with Mr. Newbanks and Mr. Daniel, and Mr. Newbanks and Mr. Daniel proceeded to escort Leist to the asset protection office at the back of the store. (JA 047 at Groc Vestibule 4:00:09-4:00:44, Groc Inside 4:00:37-4:00:48; 588; 605; 626; 635-636; 639; 679). As is seen on the surveillance video, Leist, appearing uncombative, returned to the store with Mr. Newbanks behind him and Mr. Daniel to his left. (JA 047 at Groc Vestibule 4:00:35-4:00:44, Groc Inside 4:00:37-4:00:48; 579; 588-589; 640; 697). Neither Wal-Mart employee was using physical force or placing hands on Leist as he returned to the store. *Id.* The video shows that Leist was completely compliant, as Mr. Daniel pointed toward the back of the store. (JA 047 at Groc Inside 4:00:37-4:00:48; 697).

Unexpectedly and through his own conscious decision making, Leist, who had been acting in a peaceful and cooperative manner, fled from Wal-Mart asset protection personnel and ran toward the back of the store. (JA 047 at Groc Inside 4:00:37-4:00:48, Produce Profile 4:00:45-4:00:51; 271; 589; 709). The store surveillance video shows that Leist initially ran straight ahead and then turned to his left into the candy aisle of the store, at which point he made contact with Respondent's shopping cart, knocking her to the floor. (JA 047 at Groc Inside 4:00:37-4:00:48, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10). When Leist fled, no Wal-Mart employees chased after him. (JA 047 at Groc Inside 4:00:37-4:00:59, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10, Smart Style A/A 4:00:45-4:01:19; 181-182; 272-273; 433; 446-447; 541; 589; 595; 640-641; 700-701; 709). Instead, Mr. Newbanks, almost in shock at the moment that Leist began to run, can be observed at the front of the store around the time of the collision, while Mr. Daniel can be observed checking on the Respondent after the collision and calling 911. (JA 047 at Groc Inside 4:00:37-4:00:59, Candywall 4:00:46-4:04:10, Smart Style A/A 4:00:45-4:01:19; 181; 593-594; 641). Several other Wal-Mart employees and customers assisted the Respondent as well. (JA 047 at Candywall 4:00:46-4:19:17).

Leist did not stop running after he made contact with the Respondent's shopping cart. *Id.* at Candywall 4:00:46-4:01:10. Instead, he continued beyond the candy aisle, turned into the women's area, went around several clothing racks, cut towards the jewelry area, and got tackled by a customer who began chasing Leist after he injured the Respondent. *Id.* at Candywall 4:00:46-4:04:10, Ladies 4:00:58-4:01:06, Jewelry Front 4:01:04-4:01:13, Cosmetics 4:01:02-4:01:20. The individuals seen in the surveillance video chasing Leist following the subject collision were store customers, not Wal-Mart employees. *Id.* at Candywall 4:00:46-4:04:10, Cosmetics 4:01:02-4:01:20; (JA 272-273).

B. Wal-Mart Policy for Detaining Shoplifters

In October 2012, Wal-Mart updated its Investigation and Detention of Shoplifters Policy (AP-09)—the applicable policy at the time of the subject incident. (JA 048-062). Pursuant to AP-09, authorized associates are permitted to surveil, investigate and/or detain persons suspected of or who commit shoplifting. *Id.* During an investigation into an unlawful taking of merchandise, an authorized associate who approaches a suspected shoplifter accompanied by another associate may use reasonable force to physically limit or control the movements of a suspect. *Id.*; (JA 576). If any suspect becomes violent, the authorized employee should disengage from the situation. (JA 048-062). Also, if a suspect flees from a Wal-Mart authorized associate, the associate may only pursue the suspect for approximately ten (10) feet beyond the point he or she is located when the suspect begins to run, and an authorized associate is never to attempt to physically re-capture a suspect who breaks free from physical restraint. *Id.*

II. PROCEDURAL HISTORY

On May 29, 2015, Respondent initiated this suit against Wal-Mart and Ryan Matthew Clinton, an employee of Wal-Mart who was voluntarily dismissed prior to trial, alleging negligence. (JA 001; 006-013). In the Complaint, Respondent asserted that Mr. Clinton and another Wal-Mart loss prevention specialist were in "pursuit" of and/or "chasing" a shoplifter, Robert Leist, with the intent to catch and detain and/or restrain Leist for shoplifting when Leist struck Respondent and/or her shopping cart and caused injuries. (JA 006-013). Specifically, Paragraph 11 of the Complaint asserted, "At the time he struck the Plaintiff and/or the shopping cart, Robert Leist was being pursed inside the Walmart Pike Street store by Clinton and another loss prevention specialist employed by Walmart, acting in concert." (JA 008). Respondent

further alleged that Wal-Mart employees were "chasing an alleged shoplifter" through the store. (JA 009).

On December 8, 2017, Wal-Mart moved for summary judgment on the grounds that Respondent could not establish a negligence claim against Wal-Mart and its employees because Wal-Mart and its employees did not breach their duty of reasonable care and because the video of the incident did not depict any employee of Wal-Mart chasing or pursuing Leist as he fled. (JA 002, 047). In her Memorandum in Opposition to Defendant's Motion for Summary Judgment, Respondent, mirroring the allegations in her Complaint, argued that Wal-Mart employees were pursuing Leist at the time of the incident. (JA 002, 006-013). In fact, the first sentence of Respondent's Memorandum stated, "In this case the plaintiff, Johna Diane Ankrom, received serious and life-altering injuries when the defendant, Ryan Matthew Clinton, and other loss prevention personnel chased a shoplifting suspect through the Walmart store located in Parkersburg." *Id.* The circuit court denied Wal-Mart's summary judgment motion. *Id.*

Prior to trial, Respondent filed her Motion in Limine No. 6, which sought to preclude the mentioning or reference of Mr. Clinton as a party in the action. *Id.* The Court granted the motion prior to the start of trial and further ruled that Wal-Mart was not to reference, refer, or argue to the jury the allegations set forth in the Complaint during the trial. *Id.* Respondent also submitted a pretrial memorandum that asserted that "[s]everal Walmart employees vigorously chased Leist throughout the store, ultimately forcing him into the aisle where Diane and her family were shopping," again emphasizing Respondent's theme that Leist was being pursued at the time of the incident. *Id.*

The case proceeded to trial, and on February 28, 2019, following the close of Respondent's case-in-chief, in which the undisputed testimony was that no Wal-Mart employee

chased or pursued Leist after he fled from Wal-Mart asset protection employees, Wal-Mart moved for judgment as a matter of law. (JA 552-553). Wal-Mart maintained there was insufficient evidence to warrant a finding of negligence on the part of Wal-Mart, as the actions of Wal-Mart and its employees—including the decision of Wal-Mart's employees not to chase or pursue the fleeing shoplifter—were not the proximate cause of the Respondent's injuries. *Id.* Instead, the injuries were the result of the independent and intervening conduct of the shoplifter Robert Leist. *Id.*[2] Wal-Mart's motion was denied by the circuit court. (JA 556). On March 1, 2019, Wal-Mart renewed its Motion for Judgment as a Matter of Law following the close of its case-in-chief, which was again denied by the circuit court. (JA 749-750).

A final instruction conference was held by the court on March 1, 2019. At the conference, Wal-Mart requested that the circuit court include an intervening cause jury instruction, which it had submitted before the start of trial, but the circuit court denied that request. (JA 759-763; 769-770).

On March 4, 2019, the jury returned its verdict and found that both Wal-Mart and Leist were negligent and the proximate cause of Respondent's injuries. (JA 929-931). The jury apportioned seventy percent (70%) fault to Leist and thirty percent (30%) fault to Wal-Mart. The verdict totaled $16,922,000.00. *Id.* A Judgment Order was entered on April 12, 2019. (JA 932-934). In the Judgment Order, the circuit court ordered that Respondent recover $5,076,600.00, plus interest from Wal-Mart. *Id.* The circuit court ordered prejudgment interest on Respondent's past medical expenses to accrue at 4.0% simple interest, and for post-judgment interest to run at

[2] Despite the fact that Respondent's pursuit and chase allegations served as the basis of Respondent's lawsuit and also served as the basis for defeating Wal-Mart's Motion for Summary Judgment, the undisputed evidence at trial revealed that no Wal-Mart employees were chasing or pursuing Leist before, during, or after the subject incident. (JA 002, 006-013, 047, 063-914).

5.5% on the amount of judgment, each proportional to the percentage of fault of each defendant. *Id.*[3]

On April 25, 2019, Wal-Mart filed a Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial and Motion to Amend Judgment, setting forth the assignments of error discussed herein. (JA 935-949). The circuit court heard oral arguments on Wal-Mart's post-trial motion on June 24, 2019, and the Court denied Wal-Mart's motion. (JA 963-981). The Court entered an Order denying Wal-Mart's motion on June 28, 2019, and an Amended Order denying Wal-Mart's motion on July 2, 2019. (JA 982-992). Wal-Mart timely appealed to this Court.

SUMMARY OF ARGUMENT

The circuit court committed several reversible errors. These errors require that the judgment be vacated and the case remanded with instruction to enter judgment in favor of Wal-Mart as a matter of law or, in the alternative, award a new trial.

First, the circuit court erred in denying judgment as a matter of law to Wal-Mart where Wal-Mart breach no duty to Respondent, where Wal-Mart did not expose Respondent to a foreseeable high risk of harm, and where the undisputed evidence established that Leist's unforeseen criminal actions and negligence caused Respondent's injuries. Wal-Mart initially and properly stopped Leist in the vestibule of the store for taking and concealing store merchandise. Thereafter, Leist willingly and voluntarily agreed to return to the store. Leist was escorted by two Wal-Mart asset protection employees in a calm and non-combative manner, with no struggle or force being asserted against him. Unforeseeably, Leist made his own decision to flee toward

[3] Pursuant to West Virginia Code §55-7-13c, should Respondent be unable to collect her judgment against Leist, the circuit court may reallocate thirty percent of the judgment against Leist to Wal-Mart.

the inside of the store, unpursued by any Wal-Mart employees. Leist then collided with the Respondent's shopping cart and caused injuries to Respondent. West Virginia law and Wal-Mart policy specifically permitted Wal-Mart to stop Leist. Moreover, an application of dispositive precedent, *Ward v. West*, 191 W. Va. 366, 445 S.E.2d 753 (1994) (per curiam), and substantial persuasive authority from around the country, establishes that the unforeseen actions of Leist, who was not pursued or chased by Wal-Mart employees, did not create a question for the jury. Thus, judgment as a matter of law in favor of Wal-Mart would have been appropriate.

Second, following the error in not granting judgment as a matter of law, the circuit court further erred by failing to instruct the jury on intervening cause where (1) intervening cause was a correct statement of West Virginia law—an intervening cause is "a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury," *Estate of Postlewait ex rel. Postlewait v. Ohio Valley Med. Ctr., Inc.*, 214 W. Va. 668, 674, 591 S.E.2d 226 (2003)(quoting Syl. Pt. 16, *Lester v. Rose*, 147 W. Va. 575, 130 S.E.2d 80 (1963)—(2) the intervening cause instruction was not covered in the charge actually given to the jury, and (3) intervening cause was an important point in the trial so that the failure to give it seriously impaired Wal-Mart's ability to effectively present its defense that Leist, who willingly and voluntarily returned to the store, unexpectedly fled, unpursued, and struck the shopping cart of Respondent, was the proximate cause of the Respondent's injuries. *See Kessel v. Leavitt*, 204 W. Va. 95, 144, 511 S.E.2d 720, 769 (1998).

Third, the circuit court erred in prohibiting Wal-Mart from being able to utilize the allegations in the Respondent's Complaint at trial, thus prohibiting Wal-Mart from making a full and complete presentation of its case to the jury. The Complaint averred that Wal-Mart employees chased and pursued Leist prior to Leist's collision with Respondent, yet no evidence

at trial suggested that any chase or pursuit occurred. Wal-Mart should have been able to call into question the consistency of Respondent's claims against Wal-Mart, revealing to the jury that Respondent's liability theories were a moving target throughout the litigation.

Fourth, the circuit court erred in awarding prejudgment interest to Respondent on her past medical bills where there was no evidence or testimony presented that Respondent, a recipient of Social Security Disability, paid for any of her past medical expenses with her own funds or that she had any outstanding payment obligations or out of pocket payments related to her medical expenses at the time of trial. *See Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989); *Bond v. City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539 (1981).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in West Virginia Rule of Appellate Procedure 18(a). Wal-Mart respectfully requests that the case be set for Rule 19 oral argument since this appeal involves assignments of error in the application of settled law.

STANDARD OF REVIEW

This matter is before the Court for review of the circuit court's denial of Wal-Mart's Renewed Motion for Judgment as a Matter of Law. A circuit court's denial of a motion for judgment as a matter of law is reviewed *de novo* by this Court. *Sneberger v. Morrison*, 235 W. Va. 654, 667, 776 S.E.2d 156, 169 (2015); *JWCF, LP v. Farruggia*, 232 W. Va. 417, 422, 752 S.E.2d 571, 576 (2013) (per curiam).

The matter is also before the Court for review of the circuit court's decision not to give the jury an intervening cause instruction. "As a general rule, the refusal to give a requested instruction is reviewed for an abuse of discretion." *Kessel v. Leavitt*, 204 W. Va. at 144, 511 S.E.2d at 769 (citing Syl. pt. 1, in part, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996)).

In addition, the circuit court's decision to prohibit Wal-Mart from utilizing Respondent's Complaint is an evidentiary issue that will be reviewed for an abuse of discretion. *In re J.S.*, 233 W. Va. 394, 401, 758 S.E.2d 747, 754 (2014); *Gamblin v. Ford Motor Co.*, 204 W. Va. 419, 422, 513 S.E.2d 467, 470 (1998) (per curiam) ("The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.").

Finally, this matter is before the Court for review of the circuit court's award of prejudgment interest on past medical damages. The standard of review for an award of prejudgment interest is as follows:

> In reviewing a circuit court's award of prejudgment interest, we usually apply an abuse of discretion standard. *See generally Perdue v. Doolittle*, 186 W.Va. 681, 414 S.E.2d 442 (1992). Under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances. However, when the award hinges, in part, on an interpretation of our decisional or statutory law, we review de novo that portion of the analysis.

Jackson v. Brown, 239 W. Va. 316, 327, 801 S.E.2d 194, 205 (2017) (citing *Gribben, et al v. Kirk*, 195 W.Va. 488, 500, 466 S.E.2d 147, 159 (1995)).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT WAL-MART'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE WAL-MART BREACHED NO DUTY TO RESPONDENT AND THE UNDISPUTED EVIDENCE ESTABLISHED THAT LEIST'S TORTIOUS CONDUCT PROXIMATELY CAUSED RESPONDENT'S INJURIES.

The circuit court failed to apply the undisputed facts of this matter to controlling West Virginia precedent. A proper application of the facts to the law would have resulted in judgment as a matter of law in Wal-Mart's favor. No evidence was presented at trial that Wal-Mart breached a duty to Respondent. Further, Respondent's injuries were clearly the direct and

proximate result of the unforeseen criminal acts and negligence of the shoplifter, not the actions of Wal-Mart. Wal-Mart initially and properly stopped Leist in the vestibule of the store for taking and concealing store merchandise, and Leist willingly and voluntarily agreed to return to the store. Leist was escorted by Wal-Mart asset protection employees in a calm and non-combative manner and, once in the store, Leist made his own decision to flee toward the inside of the store. He was unpursued by any Wal-Mart employees before or after colliding with the Respondent's shopping cart and injuring her. West Virginia law and Wal-Mart policy specifically permitted Wal-Mart to stop Leist. Further, an application of *Ward v. West*, 191 W. Va. 366, 445 S.E.2d 753 (1994) (per curiam), as well as persuasive authority from outside of West Virginia, establishes that the unforeseen actions of a shoplifter, who was not pursued or chased by Wal-Mart employees, did not create a question for the jury. The circuit court thus erred in letting the question of whether Wal-Mart was negligent be considered by the jury. This Court, therefore, should reverse and grant judgment in Wal-Mart's favor as a matter of law.

A. Wal-Mart's stop of shoplifter Leist was performed in accordance with applicable West Virginia law and Wal-Mart policy.

There was undisputed evidence at trial that Wal-Mart complied with applicable law and policy in the stop of Leist. Despite the evidence, much of Respondent's focus at trial was spent arguing that Wal-Mart should have let Leist go after Wal-Mart employees approached and stopped him, claiming that "[t]he real issue in the case is the vestibule. And at that point, they should have let him go." (JA 795-859). Respondent's assertions, however, were not supported by the facts of this case, West Virginia law or Wal-Mart policy.[4]

[4] Again, this focus was in stark contrast with Respondent's theory of chase and pursuit as set forth in the Complaint and in opposition to Wal-Mart's Motion for Summary Judgment. (JA 002, 006-013).

Under the common law of West Virginia, a property owner has no duty to protect visitors to their property from the deliberate criminal conduct of a third party. *Miller v. Whitworth*, 193 W. Va. 262, 266, 455 S.E.2d 821, 825 (1995). The Court, however, has set forth two exceptions to the general rule:

(1) When a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct; or

(2) When the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct.

Id.; *see also* Syl. pt. 5, *Marcus v. Staubs*, 230 W. Va. 127, 736 S.E.2d 360, 363 (2012) (per curiam) ("One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm."); *Scott v. Taco Bell Corp.*, 892 F. Supp. 142, 145 (S.D.W. Va. 1995) (Under West Virginia law "there is no duty upon a person to protect another from the unforeseen criminal activity of a third party. This rule holds whether the person injured by the third party is a social guest, a tenant, an occupant, or a business invitee. An exception exists if the Defendant, by action or omission, unreasonably created or increased the risk of injury from the criminal activity of a third party.").

Wal-Mart's asset protection employees did not increase the foreseeable risk of harm to customers inside the Wal-Mart store during the approach, stop and restraint of Leist in the vestibule area of the store, as evidenced by the indisputable surveillance video. *See* (JA 047).[5] Rather, Wal-Mart's actions were specifically permitted by West Virginia law and Walmart AP-

[5] The United State Supreme Court in *Scott v. Harris*, 550 U.S. 372 (2007) stated that a plaintiff cannot rely upon "visible fiction" to avoid video that depicts the incident forming the basis of the lawsuit. Further, the Supreme Court went on to say that a court should view facts "in the light depicted by the videotape." The surveillance video introduced at trial clearly shows the Wal-Mart employees' interactions with Leist in the vestibule area.

09 policy. (JA 048-062). Undoubtedly, an act permitted by West Virginia law cannot serve as a means to expose another individual to a foreseeable high risk of harm, nor can such act serve as a basis for imposing liability.[6]

Pursuant to West Virginia statute, a person commits the offense of shoplifting if, with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, such person, alone or in concert with another person, knowingly conceals the merchandise upon his or her person or in another manner. W. Va. Code § 61-3A-1. Here, Leist falls squarely within the definition of a shoplifter under West Virginia law—Mr. Newbanks testified that he observed Leist conceal merchandise upon his person and proceed past the last point of sale. (JA 635). No evidence at trial was submitted to the contrary.

Once a shoplifter, such as Leist, is identified, Wal-Mart may reasonably detain the shoplifter pursuant to West Virginia Code §61-3A-4:

> An act of shoplifting as defined herein, is hereby declared to constitute a breach of peace and any owner of merchandise, his agent or employee, or any law-enforcement officer who has reasonable ground to believe that a person has committed shoplifting, may detain such person in a reasonable manner and for a reasonable length of time not to exceed thirty minutes, for the purpose of investigating whether or not such person has committed or attempted to commit shoplifting. Such reasonable detention shall not constitute an arrest nor shall it render the owner of merchandise, his agent or employee, liable to the person detained.

W. Va. Code. §61-3A-4.[7] The statute reflects the public policy, originally enacted by the Legislature in 1957, that owners of a store have the right to use reasonable means to protect their merchandise from theft. *Id.* The policy behind the statute even extends beyond protection of a

---

[6] No evidence exists that Wal-Mart had any type of special relationship which gave rise to a duty to protect Respondent from intentional misconduct. *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825. Thus, only the second exception in *Miller* warrants discussion.

[7] Detention is defined by Black's Law Dictionary as "[t]he act or an instance of holding a person in custody; confinement or compulsory delay." DETENTION, Black's Law Dictionary (11th ed. 2019). By its very definition, detention is the act of holding a person in custody who is present involuntarily.

store's merchandise. It establishes that reasonable detention of a shoplifter shall not constitute an arrest and it further immunizes an owner of merchandise from liability toward the shoplifter in such detentions. *Id.*[8]

Here, West Virginia law expressly permitted Wal-Mart to detain Leist following Leist's attempted shoplifting, and Wal-Mart's compliance with West Virginia law did not increase the foreseeable risk of harm to Respondent. To hold otherwise would be to hold that an owner of a store increases the foreseeable risk of harm to a third party each time the owner stops a suspected shoplifter pursuant to West Virginia Code §61-3A-4, thereby making the owner of the store—Wal-Mart in this case—liable for any harm that occurs to third parties following a stop, all while the store owner is entitled to immunity from the shoplifter for its reasonable detention of the shoplifter. The circuit court's failure to grant judgment as a matter of law under the facts of this case invites potential liability for any store owner for any stop that may somehow cause injury to a third party. In the same circumstance, however, the store owner would be immune from liability to the shoplifter when the stop is performed in a reasonable manner.

Not only was Wal-Mart permitted to detain Leist under West Virginia law, it was also permitted to do so under its own policies. Pursuant to AP-09, authorized associates, such as Mr. Newbanks, are permitted to surveil, investigate, and/or detain persons suspected of or who commit shoplifting, such as Leist. (JA 048-062; 635). During the investigation into an unlawful taking of merchandise, AP-09 permitted Mr. Newbanks, accompanied by Mr. Daniel, to use reasonable force to physically limit or control the movements of Leist, which was done here in

[8] Not only did the Legislature make a determination that the policy behind the detention of shoplifters by store owners would be to deter shoplifting and protect store merchandise, while also immunizing the store owner from liability against the shoplifter, but the Legislature has also made shoplifting a punishable criminal offense. *See* W. Va. Code § 61-3A-3.

response to Leist's attempt to walk around the two in the vestibule area. (JA 048-062; 047 at Groc Vestibule 4:00:09-4:00:44; 576). Had Leist become violent, Mr. Newbanks and Mr. Daniel would have been required to disengage from the situation. (JA 048-062). Leist's attempt to walk around Mr. Newbanks and Mr. Daniel in the vestibule does not appear violent on the surveillance video, and no witness at trial considered this action violent. (JA 047 at Groc Vestibule 4:00:09-4:00:44; 574-577; 639; 690-691; 747). Mr. Newbanks and Mr. Daniel were permitted to control the situation through restraint and use of minimal force to guide Leist toward returning to the store. (JA 576; 639). As a result, Leist agreed to return to the store while in the vestibule, ending any type of physical contact or restraint. (JA 047 at Groc Vestibule 4:00:35-4:00:44, Groc Inside 4:00:37-4:00:48; 588; 605; 626; 635-636; 639-640; 679).

Because the employees' approach, stop, and restraint were in accordance with West Virginia law and Wal-Mart policy, they did not increase the risk of harm to Respondent. Therefore, such actions were insufficient grounds for denying Wal-Mart's Renewed Motion for Judgment as a Matter of Law. Finding otherwise could lead to strict liability for any harm that befalls a third party after a shoplifter is stopped, as the mere act of stopping a shoplifter would increase the risk of harm to third parties.

B. The shoplifter's unforeseen decision to flee, without being pursued or chased by any Wal-Mart employees, was the proximate cause of Respondent's injuries.

As with the approach, stop, and restraint of Leist, Wal-Mart also did not increase the risk of harm to Respondent by escorting Leist back into the store or through its employees' decision not to pursue Leist once he began to flee. Following the appropriate stop of Leist by Wal-Mart asset protection employees and the agreement of Leist to return to the store, Leist made the unexpected decision to flee toward the inside of the Wal-Mart store. Leist fled despite being

escorted by two Wal-Mart asset protection employees, one walking beside him and one walking behind him, and he continued fleeing despite the fact that no Wal-Mart employees were chasing or pursuing him. (JA 047 at Groc Inside 4:00:37-4:00:48, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10). Leist's unforeseeable decision to run away from Wal-Mart's employees, without anyone in pursuit, was the proximate cause of Respondent's injuries. No evidence from the trial exists to the contrary.

The testimony from Wal-Mart asset protection employees Mr. Newbanks and Mr. Daniel confirmed that Leist advised them prior to returning to the store that he intended to comply with their directives and return to the store for additional investigation. (JA 588; 605; 635-636; 639; 679). The surveillance video clearly shows that Leist, after being initially and properly stopped, was escorted by Wal-Mart asset protection employees in a calm and non-combative manner from the vestibule area back into the store. (JA 047 at Groc Vestibule 4:00:35-4:00:44, Groc Inside 4:00:37-4:00:48). The video evidence also clearly shows that there was no force being used against Leist while being escorted back into the store. *See id.* Respondent's own expert, Patrick Murphy, even acknowledged that the decision to run from Wal-Mart asset protection employees was Leist's decision alone. (JA 271). Mr. Daniel testified to having never been in a situation where a shoplifter fled toward the inside of the store. (JA 605). Further, the undisputed evidence at trial revealed that no Wal-Mart employees chased or pursued Leist as he fled. (JA 047 at Groc Inside 4:00:37-4:00:59, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10, Smart Style A/A 4:00:45-4:01:19; 181-182; 272-273; 433; 446-447; 541; 589; 595; 640-641; 700-701; 709).

This Court addressed a strikingly similar factual situation in *Ward v. West*, 191 W. Va. 366, 445 S.E.2d 753 (1994) (per curiam). In that case, the plaintiff was a customer at the Sears,

Roebuck, & Co. store located in the Barboursville Mall when a suspected shoplifter, Darrin West ("West"), fled from Sears loss prevention officers and struck the plaintiff. *Id.* at 367, 445 S.E.2d at 754. West, who had been shoplifting, was approached by two loss prevention officers of Sears and he agreed to accompany them to the loss prevention office. *Id.* West was neither violent nor disorderly. *Id.* at 368, 445 S.E.2d at 755. As West was being escorted by the two Sears employees to the Sears security office, he bolted, ran away, and knocked the plaintiff to the ground and broke her coccyx. *Id.* at 367, 445 S.E.2d at 754. Plaintiff filed suit in the Circuit Court of Cabell County and claimed that Sears failed to use appropriate care in chasing and pursing the suspected shoplifter and failed to take reasonable precautions to protect her from the dangers inherent in the design, layout, and arrangement of its premises. *Id.* The circuit court granted Sears' motion for summary judgment finding that Sears and its employees had the authority under West Virginia statute to detain the suspected shoplifter, that West had committed shoplifting, that West agreed to be escorted to the loss prevention office, and at that time West was neither violent or disorderly and gave no indication of a propensity to flee. *Id.* at 368, 445 S.E.2d at 755. The circuit court concluded that the evidence presented showed that the employees of Sears did not know they were dealing with a vicious or violent person in West nor was there any evidence to indicate that they should have known. *Id.* The lower court went on to state "[k]nowledge of the fact that Darrin West was a shoplifter was not knowledge that he was vicious, violent, or dangerous as well." *Id.* Further, the lower court concluded that "West's negligence and willful conduct was the proximate cause of the injuries to [the plaintiff] and that Sears and its employees maintained the premises in a reasonably safe condition and exercised ordinary care to protect their customers, including [the plaintiff]." *Id.*

On appeal, this Court reversed the summary judgment decision, finding a question of material fact existed as it related to whether the Sears employees were actually pursuing the shoplifter at the moment of the collision and whether any pursuit may constitute negligence on the part of Sears and its employees. *Id.* at 369-70, 445 S.E.2d at 756-57. A witness to the incident had testified at a deposition that two individuals were chasing a man around the time of the incident. *Id.* According to this Court, the dispositive element to be considered when a fleeing shoplifter injuries a patron is whether the shoplifter was being pursued or chased by store employees. *Id.* Along these lines, this Court indicated that a storeholder should not be liable when a seemingly peaceful shoplifter is being escorted and he bolts and injures a store customer while not being pursued by store employees. *Id.* at 369, 445 S.E.2d at 756.

Ward compels the inescapable conclusion that the circuit court should have granted Wal-Mart's Motion for Judgment as a Matter of Law. As in *Ward*, the evidence at trial established that Wal-Mart and its employees were permitted under West Virginia law and Wal-Mart policies to detain Leist (discussed *supra*), that Leist was a confirmed shoplifter, that Leist agreed to return to the asset protection office, that Leist was not combative and became cooperative prior to being escorted back into store, and that Leist was peacefully escorted back into the store by two asset protection employees. (JA 047 at Groc Vestibule 4:00:35-4:00:44, Groc Inside 4:00:37-4:00:48; 588; 605; 635-636; 639-640). Unlike the *Ward* case, there was no evidence that Wal-Mart's employees pursued or chased Leist after he made the conscious decision to bolt and run away from Wal-Mart employees, ultimately colliding with Respondent's shopping cart.[9] The surveillance video as well as undisputed testimony at trial clearly proved that no employee

[9] In contrast to the trial evidence, the Complaint, Respondent's resistance to Wal-Mart's Motion for Summary Judgment, and Respondent's pre-trial memorandum all were predicated on the argument that Wal-Mart employees had pursued and chased Leist in the store, causing the alleged injuries. (JA 001-013)

of Wal-Mart chased or pursed Leist at any point in time after he fled from Wal-Mart's employees until the time he was apprehended by Wal-Mart customers within the store. (JA 047 at Groc Inside 4:00:37-4:00:59, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10, Smart Style A/A 4:00:45-4:01:19; 181-182; 272-273; 433; 446-447; 541; 589; 595; 640-641; 700-701; 709). Indeed, the testimony of Wal-Mart employee Amy Edgar, Respondent's daughter, Mr. Daniel, Mr. Newbanks, and even Respondent's liability expert, viewed in conjunction with the incident video, all confirm that no Wal-Mart employee was chasing or pursuing Leist at the time of the incident. (JA 047 at Groc Inside 4:00:37-4:00:59, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10, Smart Style A/A 4:00:45-4:01:19; 181-182; 272-273; 433; 446-447; 541; 589; 595; 640-641; 700-701; 709).[10]

Based upon the undisputed evidence presented at trial, Leist was responsible for own his actions and conduct on the date of the incident, and he alone was the proximate cause of the injuries sustained by the Respondent. *Gillingham v. Stephenson*, 209 W. Va. 741, 749, 551 S.E.2d 663, 671 (2001) (per curiam) ("Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence" (citation omitted)). As such, this Court should enter judgment as a matter of law in favor of Wal-Mart in light of the circuit court's erroneous denial of Wal-Mart's post-trial Motion for Judgment as a Matter of Law.

C. Authority from courts nationwide supports entry of judgment in favor of Wal-Mart.

Courts nationwide, including courts cited by this Court in *Ward*, have considered similar facts to those present here and have, for years, consistently granted summary judgment or judgment as a matter of law in favor of the defendants. While liability in fleeing shoplifter cases

[10] The only individuals who chased Leist were store customers. (JA 047 at Candywall 4:00:46-4:04:10, Cosmetics 4:01:02-4:01:20; 272-273). The fact that store customer chased and tackled Leist following the collision with Respondent's shopping cart is evidence of the clear wrongdoing on the part of Leist.

can vary "based on the facts, and to some extent, on the legal analysis applied[,] . . . [t]he common denominator of the cases is their recognition that the storekeeper generally has a right to attempt to apprehend a shoplifter. Consequently the cases focus on whether the attempted apprehension, under the particular facts presented, did or did not involve an unreasonable risk of harm to business invitees." *Giant Food v. Mitchell*, 334 Md. 633, 645, 640 A.2d 1134, 1140 (1994) ("Simply because flight by some shoplifters is foreseeable, a storekeeper is not per se liable when a shoplifter, fleeing apprehension by the storekeeper, collides with a customer. Rather, taking into account all of the circumstances, the degree of risk of flight and the degree of risk of harm to invitees must be weighed against the privilege when determining if exercise of the privilege created an unreasonable risk of injury to invitees."). In considering the risk involved to customers, courts often give great weight to the foreseeability of the incident and/or to whether the store pursued the shoplifter after the shoplifter fled.

For example, in *Kmart Corp. v. Lentini*, 650 So. 2d 1031 (Fla. Dist. Ct. App. 1995), a Florida appellate court reversed and remanded a jury verdict for entry of judgment in favor of Kmart under facts similar to the present case. *Id.* at 1032. In *Lentini*, a loss prevention manager confronted a shoplifter and escorted the shoplifter to a nearby conference room, accompanied by the department manager and an assistant store manager. *Id.* While the loss prevention manager went to call the police, "the other two employees remained outside the conference room door. The shoplifter, who had been calm and cooperative, suddenly left his chair and ran out of the conference room and through the store, colliding with the plaintiff. The plaintiff was knocked to the floor and suffered a knee injury." *Id.* The appellate court found "that the trial court erred in not granting the defendant's motion for directed verdict at the close of the plaintiff's case"

because no evidence existed to show that apprehending and detaining the shoplifter "foreseeably created a broader 'zone of risk' that posed a general threat of harm to others." *Id.*

Likewise, in *Radloff v. National Food Stores, Inc.*, 20 Wis.2d 224, 121 N.W.2d 865, *rehearing denied*, 20 Wis.2d 224, 123 N.W.2d 570 (1963), a decision cited by this Court in *Ward*, store employees stopped a shoplifter outside of the store and asked the shoplifter to come back inside to the rear of the store. *Id.* at 227, 121 N.W.2d at 867. The shoplifter initially resisted, but the store employees reassured the shoplifter that they would not gang up on him. *Id.* The shoplifter then agreed to return to the store. *Id.* As the employees and shoplifter reentered the store, one of the employees asked a policewoman to call additional police. *Id.* The shoplifter was escorted with one employee in front of him and one behind. *Id.* While proceeding down an aisle, stolen cigarettes fell out of the shoplifter's coat and onto the floor. *Id.* As a store employee bent down to pick up the cigarettes, the shoplifter pushed the store employee over and ran toward the exit, ultimately pushing down and injuring the plaintiff on his way out of the building. *Id.* Upon appeal of a plaintiff's verdict, the Wisconsin Supreme Court held that a directed verdict should have been granted to the defendant, as no evidence established that "the proprietor knew or by the exercise of reasonable care could have discovered that the shoplifter was going to attempt to break loose and to rush out of the store, bumping into customers that might be in the way." *Id.* at 236, 121 N.W.2d at 871.

Similarly, in *Knight v. Powers Drygoods Co.*, 225 Minn. 280, 30 N.W.2d 536 (1948), another decision cited by this Court in *Ward*, a book thief was apprehended on a sidewalk by store employees, where he agreed to accompany the employees back into the store. *Id.* at 282, 30 N.W.2d at 537. Once in the store, one of the store employees took hold of the shoplifter's arm and directed him to her office, where their exchange would be less conspicuous. *Id.* Shortly

thereafter, another employee took hold of the shoplifter's other arm. *Id.* The shoplifter looked "rather chagrined," but he walked along quietly. *Id.* While waiting for an elevator, the shoplifter started to run, showing his first signs of violent behavior and vicious character. *Id.* The shoplifter approached the plaintiff in an aisle, grabbed her wrist, twisted it, kicked her leg out from under her, and she fell to the floor, semi unconscious. *Id.* at 284, 30 N.W.2d at 538. A jury returned a verdict in favor of plaintiff, but on appeal, the Minnesota Supreme Court reversed and ordered judgment for the defendant, finding that the evidence at trial did not establish that the store employees knew or should have known that they were dealing with a vicious or violent person. *Id.* at 286, 30 N.W.2d at 539. Indeed, "[k]nowledge of the fact that [the shoplifter] was a shoplifter, a type of sneak thief, was not knowledge that he was vicious, violent, or dangerous as well." *Id.*

Moreover, in *Martin v. Piggly-Wiggly Corp.*, 469 So.2d 1057 (La. App. 1985), which was also cited by this Court in *Ward*, a known shoplifter entered the Piggly Wiggly Store and began to eat doughnuts. *Id.* at 1059. A store security guard approached the shoplifter and asked him to accompany her to a "security area." *Id.* The shoplifter did so while an assistant manager summoned the police. *Id.* A security guard then searched the shoplifter and discovered a package taped to his chest beneath his coat. At that point, the shoplifter started "bending over," indicating to the security guard that he intended to run. *Id.* As the guard attempted to handcuff the shoplifter, she was knocked to the floor by a woman who had come to the shoplifter's aid. *Id.* The shoplifter fled and ran into a patron, the plaintiff, causing the plaintiff to fall on top of his granddaughter. *Id.* When the plaintiff tried to get up, the shoplifter struck him in the mouth with the handcuffs. *Id.* The appeals court affirmed the trial court's finding that "the defendant

supermarket had no duty to protect patrons from unforeseeable or unanticipated intentional acts perpetrated by a third party." *Id.*

In *Graham v. Great Atlantic & Pacific Tea Co.*, 240 So.2d 157 (Fla. App. 1970), yet another case cited by this Court in *Ward*, the appellate court affirmed dismissal of a complaint for lack of foreseeability of an incident. In that case, a store manager detained a shoplifter outside of the building and the shoplifter "voluntarily agreed to accompany the manager back inside the store." *Id.* at 157-58. As the store manager and shoplifter were walking inside the store, the store manager told the shoplifter "that he intended to call the sheriff, and the suspect broke and ran, knocking down and injuring the plaintiff, who was completing her business." *Id.* at 158. That court found that "[a]bsent some foreknowledge of danger against which the store might have had time to prepare itself, we believe that the defendant did not breach its duty of reasonable care to guard its business invitees against injuries by third persons." *Id.* at 159.

In *Mills v. Jack Eckerd Corp.*, 224 Ga. App. 785, 786-87, 482 S.E.2d 449, 450 (1997), defendant's security personnel attempted to interview an individual about possible shoplifting activity. The individual had voluntarily accompanied loss prevention personnel to an upstairs office at defendant's store. *Id.* at 786, 482 S.E.2d at 449. "After either mall security or the Atlanta Police was contacted, suddenly and without warning, [the suspected shoplifter] decided to flee. In order to escape, [the suspected shoplifter] had to jump on a chair then leap over a four foot wall directly onto the stairs." *Id.* As he was running toward an exit, the suspected shoplifter slammed into the plaintiff and knocked her down. *Id.* The trial court's granting of summary judgment was upheld on appeal because plaintiff presented no evidence that the defendant's store "had any prior incidents involving customers being injured by fleeing suspected shoplifters who initially voluntarily cooperated with security personnel" and because it was not reasonably

foreseeable that the suspected shoplifter would unintentionally rush into the plaintiff. *Id.* at 786-87, 482 S.E.2d at 449-50.

In *Butler v. K-Mart Corp.*, 432 So. 2d 968 (La. Ct. App. 1983), summary judgment was upheld on appeal after a fleeing shoplifter flung open a door and exited a store owned by defendant and the door hit plaintiff in the chest. Other than plaintiff's assertion that "she saw the suspect being chased by the guard only in the parking lot, . . . [n]o other evidence was introduced below to indicate that any store employee chased the suspect while he was still in the store." *Id.* at 969. The appeals court found that "[t]he incident causing the injury suffered by plaintiff was not foreseeable by defendant." *Id.* "Although it is arguable that shoplifting is a foreseeable occurrence, the likelihood that a shoplifter would bolt from the store [without being chased], throw open a door and injure someone is remote." *Id.*

Numerous other decisions throughout the nation are in accord. *See, e.g.*, *Kilpatrick v. Dollar Tree Stores*, No. 2:13-cv-2659-SHL-tmp, 2014 U.S. Dist. LEXIS 189757 (W.D. Tenn. Sep. 19, 2014) (granting defendant's motion for summary judgment where the risk of the plaintiff being run into by a fleeing shoplifter was not foreseeable, as plaintiff offered "no proof to suggest that shoplifters frequently flee from stores in such a way as to present a risk to other patrons, or that some action by Defendant could have prevented the event at its store that day"); *Maloney v. Great Atl. & Pac. Tea Co.*, 369 So. 2d 590 (Fla. Dist. Ct. App. 1978) (granting summary judgment where a shoplifter ran into plaintiff after a "rather extended chase up and down the aisles" of a store); *Henderson v. Kroger Co.*, 217 Ga. App. 252, 252, 456 S.E.2d 752 (1995) (upholding the granting of summary judgment where a Kroger employee observed a theft and called "Code Red" over the public intercom, signaling to Kroger employees that shoplifting was occurring while also putting the shoplifter on notice, who began to run to the exit, being

chased by the store manager, and collided with the plaintiff at the exit door); *Tabary v. D.H. Holmes Co., Ltd.*, 542 So. 2d 526 (La. Ct. App. 1989) (upholding summary judgment for the defendant merchant where plaintiff was knocked over by a fleeing shoplifter); *Giant Food v. Mitchell*, 334 Md. 633, 640 A.2d 1134 (1994) (awarding judgment in favor of the defendant where the defendant's employee stopped a shoplifter in the vestibule of the store, a scuffle ensued, the shoplifter fled from the store, and the shoplifter pushed the plaintiff down as the plaintiff was walking in the store; and stating that "[e]ven assuming as foreseeable that the shoplifter might not return the goods peacefully, that he might struggle, that he might break free, and that he would then run, the purpose of running would be to escape. Most fleeing shoplifters would seek to avoid collisions because they would only impede flight. As a matter of law under all of these circumstances, [the shoplifter] did not expose Giant's business invitees to an unreasonable risk of injury. To conclude otherwise, under the circumstances here, would impose liability to customers for almost any attempted apprehension of a shoplifter by storekeepers."); *Betts v. Jones*, 208 N.C. App. 169, 702 S.E.2d 100 (2010) (affirming summary judgment because "it was not foreseeable that when [an asset protection employee] revealed his identity to [a shoplifter] that she would exit the store, enter a vehicle parked 20 feet from the store entrance, speed through the parking lot, turn left down the traffic aisle where plaintiff was standing, and strike plaintiff."); *Scott v. Allied Stores of Ohio, Inc.*, 96 Ohio App. 532, 122 N.E.2d 665 (1953) (affirming a jury's verdict in favor of the defendant where a shoplifter was approached outside of the store, was asked to return to the store, agreed to return to the store peacefully and willingly, broke away from store personnel, ran for the store exit, and was tackled by a store customer who had no relationship to the store or its employees, knocking the plaintiff to the ground in the process); *Gantt v. K-Mart Corp.*, Appeal No. 02A01-9801-CV-00009, 1999 Tenn. App. LEXIS

100 (Ct. App. Feb. 17, 1999) (affirming summary judgment where plaintiff was knocked to the floor by a shoplifter, who was attempting to leave the premises with stolen merchandise, and who was allowed to enter the foyer whereby he attempted to exit the store before any apprehension was attempted by defendant's employees); *Peters v. Menard, Inc.*, 224 Wis. 2d 174, 189-90, 589 N.W.2d 395, 403 (1999) ("A failure to catch shoplifters would likely result in merchants raising their prices to make up for increased losses of stolen goods. Second, shoplifters, knowing that merchants could not pursue them, would be encouraged to dash out of stores with their stolen loot as fast as their legs could carry them. The potential would increase for injuries to innocent shoppers caused by fleeing shoplifters.").

In this case, like the actions set forth above, none of Wal-Mart's actions created a broader zone of risk for the Respondent. Leist was stopped appropriately and in accordance with West Virginia law; he willingly returned to the store in a peaceful manner, not showing any violent or vicious tendencies; he was escorted by two Wal-Mart asset protection employees; he made the unforeseen decision to flee toward the inside of the Wal-Mart store; and no Wal-Mart employees chased or pursued him. *See* discussion *supra*; (JA 047 at Groc Inside 4:00:37-4:00:59, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10, Smart Style A/A 4:00:45-4:01:19; 181-182; 272-273; 433; 446-447; 541; 589; 595; 640-641; 700-701; 709). These cases, especially *Kmart Corp.*, *Radloff*, *Knight*, *Martin*, *Graham*, *Mills*, and *Butler*, together with this Court's decision in *Ward*, are illustrative of the analysis that the circuit court should have undertaken, which would have resulted in judgment in favor of Wal-Mart as a matter of law.[11] This Court, therefore, should reverse the circuit court and direct that judgment as a matter of law be entered.

[11] At least one court has noted that"[t]he likelihood of such an injury occurring is not increased very much because of the guard's pursuit, since most shoplifters will flee as quickly as possible when they have been

At the circuit court level, rather than relying on *Ward*, the dispositive authority for the facts of this case, Respondent relied on two distinguishable cases to support her negligence claim: *Raburn v. Wal-Mart Stores, Inc.*, 776 So.2d 137 (Ala. Civ. App. 1999), and *Columbo v. Wal-Mart Stores*, 303 Ill. App. 3d 932, 933, 237 Ill. Dec. 315, 316, 709 N.E.2d 301, 302 (1999). In those cases, the appellate courts reversed a granting of a motion to dismiss and a motion for summary judgment that had been granted in favor of Wal-Mart, indicating that the record needed to be fully developed before an ultimate determination of liability in the cases could occur.[12]

In *Raburn*, two shoplifting suspects were apprehended by one Wal-Mart loss prevention associate inside of a Wal-Mart store. *Raburn*, 776 So.2d at 138. The associate asked the suspects to accompany him to his office in the rear of the store. *Id.* While walking to the rear of the store, with the suspects following behind the associate, one of the suspected shoplifters fled toward the front of the store and ran directly into the plaintiff, causing the plaintiff to fall through the door and sustain injuries. *Id.* at 138-139. Plaintiff contended that Wal-Mart was liable because its employee did not follow the then applicable policies and provisions of shoplifter apprehension that it had established and put in place. *Id.* at 139. The court reversed the trial court's award of summary judgment in favor of Wal-Mart. *Id.* at 141.

In *Columbo*, Wal-Mart security apprehended an individual suspected of shoplifting outside of the store, detained the suspect outside of the store for questioning, and brought the suspect back inside the store presumably for more questioning. *Columbo*, 303 Ill. App. 3d at 933, 709 N.E.2d at 302. Inside the store, the suspect fled from the Wal-Mart security and

---

stopped, regardless of whether pursuit takes place" and that "[t]he consequence of a rule against pursuit would be a substantial encouragement to shoplifting and would place an unreasonable burden upon the retailer." *Brown v. Jewel Cos.*, 175 Ill. App. 3d 729, 125 Ill. Dec. 139, 530 N.E.2d 57 (1988).

[12] *Ward*, likewise, overturned the circuit court's granting of summary judgment so that additional record development could occur. *Ward*, 191 W. Va. at 370, 445 S.E.2d at 757.

subsequently struck the plaintiff. *Id.* The Court reversed the trial court's grant of a motion to dismiss and held that "once security personnel undertook the duty of detaining the suspect and escorting him back into the store, they were under a duty to use reasonable care in carrying out that process." *Id.* at 934-935, 709 N.E.2d at 303. Further, it held that plaintiff had alleged that Wal-Mart did in fact, under the facts and circumstances of that case, breach that duty. *Id.* at 935, 709 N.E.2d at 303.

At best, *Raburn* and *Columbo* provide examples of the factually specific nature of cases involving fleeing shoplifters. Both cases merely emphasize that the record in a case needs to be fully developed before a trial court can make a dispositive ruling. In *Raburn*, the court reversed the circuit court's granting of a motion for summary judgment, while the *Columbo* court reversed the granting of a motion to dismiss. Here, had the circuit court granted summary judgment in favor of Wal-Mart, it is likely that this Court would have reversed that decision, much like the courts did in *Raburn* and *Columbo*, because a dispute of material fact existed as to whether Wal-Mart employees were chasing Leist—the dispositive element set forth in *Ward*. In this case, the theme of Respondent's case, up until the point of trial, was that Wal-Mart employees chased and pursued Leist, causing Respondent's injuries. (JA 001-013). Respondent even utilized the pursuit argument to help defeat Wal-Mart's Motion for Summary Judgment. *Id.* However, once the evidence was fully developed at trial, no evidence of chasing or pursuit was presented. As a result, Wal-Mart's motion and/or renewed motion for judgment as a matter of law should have been granted. Consistent with the great weight of authority throughout the nation, this Court should reverse the circuit court's decision and issue judgment in favor of Wal-Mart.

II. THE CIRCUIT COURT ERRED IN FAILING TO INSTRUCT THE JURY ON INTERVENING CAUSE.

With the circuit court's erroneous denial of Wal-Mart's motion and renewed motion for judgment as a matter of law, the circuit court should have, at the very least, let the jury make its own determination on whether the flight of Leist constituted an intervening cause—a new independent act that occurred after any alleged negligence on the part of Wal-Mart—but no such opportunity was provided. *Marcus*, 230 W. Va. at 139, 736 S.E.2d at 372 ("The questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusions from them.") (citations omitted).

Prior to commencement of trial, Wal-Mart submitted proposed jury instructions to the Court for consideration. (JA 021-046). The following instruction was included in the proposed instructions:

> Walmart claims that they were not the proximate cause of Plaintiff, Diane Ankrom's injuries and damages because there was an intervening negligent act that caused the injury and damages of Plaintiff.
>
> Walmart is not responsible for Plaintiff's injuries and damages if it is proven, by the greater weight of the evidence, all of the following:
>
> 1. That there was a new independent, negligent act or omission of another party that occurred after the conduct of Walmart; and
> 2. That the new independent, negligent act or omission was a new, effective cause of the injury or damages, and
> 3. That the new independent, negligent act or omission operating independently of anything else caused the injuries.

(JA 026).

Wal-Mart argued for the inclusion of the intervening cause instruction during the circuit court's instruction conference. (JA 759-760; 762). However, the circuit court ruled that an

intervening cause instruction would not be included in the jury charge. (JA 769-770).[13] Thus, the jury was not instructed on intervening cause. (JA 771-795; 915-928). By failing to instruct the jury on intervening cause, the circuit court erred.

This Court has previously held that "[a] trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense." *Kessel*, 204 W. Va. at 145, 511 S.E.2d at 770.

As to the first element, intervening cause is a defense under West Virginia law, and the proposed instruction accurately set forth the law on intervening cause. In fact, the instruction proposed by Wal-Mart was constructed from West Virginia Pattern Jury Instruction § 906. (JA 026); *see, e.g.*, *Sydenstricker v. Mohan*, 217 W. Va. 552, 559 n.13, 618 S.E.2d 561, 568 (2005); West Virginia Pattern Jury Instruction § 906. Under West Virginia law, an intervening cause is "a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." *Estate of Postlewait ex rel. Postlewait v. Ohio Valley Med. Ctr., Inc.*, 214 W. Va. 668, 674, 591 S.E.2d 226(quoting Syl. Pt. 16, *Lester v. Rose*, 147 W. Va. 575, 130 S.E.2d 80). The defense of intervening cause can be established "only through the introduction of evidence by a defendant that shows the negligence of another party or a nonparty." *Sydenstricker,* 217 W. Va. at 559, 618 S.E.2d at 568 (citing *Schreiber v. National Smelting Co.,* 157 Ohio St. 1, 104 N.E.2d 4, 8 (Ohio 1952)) (Utilizing the following instruction: "An intervening cause of an injury is an independent negligent act or omission which constitutes

[13] The circuit court did not provide a rationale for its refusal to include the intervening cause instruction in the jury charge. (JA 769-770).

a new effective cause and, which operating independently of anything else, is the proximate cause of the injury. Such a negligent act by a third person breaks the causal connection of the first actor, and relieves him of the legal responsibility for the harmful result."). "Generally, a willful, malicious, or criminal act breaks the chain of causation." *Yourtee v. Hubbard*, 196 W. Va. 683, 474 S.E.2d 613 (1996); *see also Marcus*, 230 W. Va. at 139, 736 S.E.2d at 372 (allowing a jury to consider whether criminal actions constituted intervening causes). While the intervening acts of a third person do not relieve a tortfeasor from liability if such acts were reasonably foreseeable, the record is clear that the flight of Leist was not an act which was foreseeable. Syl. Pt. 13, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990). Leist willingly and voluntarily agreed to return to the store after being stopped, he was escorted by Wal-Mart asset protection employees in a calm and non-combative manner, and then he made his own decision to flee toward the inside of the store, unpursued by any Wal-Mart employees. (JA 047 at Groc Vestibule 4:00:09-4:00:44, Groc Inside 4:00:37-4:00:48, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10, Smart Style A/A 4:00:45-4:01:19; 271-273; 433; 446-447; 541; 579; 588-589; 595, 605; 626; 635-636; 639-641; 679; 697; 700-701; 709).

As to *Kessel*'s second element, Wal-Mart submitted a proposed jury instruction on intervening cause to the circuit court, but the circuit court ruled that the instruction would not be included. (JA 759-760; 762; 769-770). The circuit court did not provide any explanation as to why the intervening cause instruction would not be given to the jury and the concept of intervening cause was not covered elsewhere in the charge. (JA 771-795; 915-928).

As to *Kessel*'s third element, intervening cause was an important point in the trial and the failure to give an intervening cause instruction seriously impaired Wal-Mart's ability to effectively present the issue of causation. Much of Respondent's theory of negligence at trial

was that Wal-Mart performed a bad stop of Leist and that Wal-Mart should have let Leist go rather than escorting him back into the store. (JA 795-859). The evidence presented at trial reveals that any elements of the allegedly improper stop ended when Leist willingly and voluntarily returned to the store in a collected manner following the stop in the vestibule. (JA 047 at Groc Vestibule 4:00:38-4:00:43). Leist was not struggling with Wal-Mart employees nor was he moving at a quick or rapid pace. *See id.* Then, unexpectedly, Leist made the decision to start running, and it was he who struck the Respondent's shopping cart and caused her injuries. *Id.* at Groc Inside 4:00:37-4:00:48, Produce Profile 4:00:45-4:00:51, Candywall 4:00:46-4:01:10. Wal-Mart Asset Protection Manager Joseph Daniel and another Wal-Mart asset protection employee both testified that upon their return to the store with Leist, they believed Leist was going to comply with the directives. (JA 588; 605; 635-636; 639).

Given the evidence presented during the course of the trial, the jury should have been instructed on an intervening cause and should have been permitted to consider the flight of Leist as an intervening cause of the Respondent's injuries. *See Marcus*, 230 W. Va. at 139, 736 S.E.2d at 372; *Mills*, 224 Ga. App. at 786, 482 S.E.2d at 449 (noting that the proximate cause of a plaintiff injured by a fleeing shoplifter would have been the intervening act of the shoplifter); *Henderson*, 217 Ga. App. at 252-53, 456 S.E.2d at 753 (same); *Giant Food*, 334 Md. at 642, 640 A.2d at 1138 ("Even though the intervening cause may be regarded as foreseeable, the defendant is not liable unless the defendant's conduct has created or increased an unreasonable risk of harm through its intervention." (citing W.P. Keeton, Prosser and Keeton on the Law of Torts § 44, at 305 (5th ed. 1984))). Absent proper instruction on intervening cause, Wal-Mart's ability to effectively present the issue of causation was extraordinarily impaired. Indeed, Wal-Mart was prohibited from arguing at trial that the criminal actions of Leist broke the chain of any

wrongdoing of Wal-Mart and that those criminal actions were the intervening cause of Respondent's injuries.

Accordingly, even if this Court does not reverse the circuit court and grant judgment to Wal-Mart as a matter of law, it still should reverse the judgment and award Wal-Mart a new trial due to the circuit court's failure to provide an intervening cause jury instruction.

III. THE CIRCUIT COURT ERRED BY PRECLUDING WAL-MART FROM UTILIZING THE ALLEGATIONS CONTAINED IN RESPONDENT'S COMPLAINT DURING TRIAL.

In her Complaint, Respondent alleged that Wal-Mart employees, including Ryan Clinton, pursued Leist throughout the store, which resulted in Respondent's injuries. (JA 006-013). Specifically, Paragraph 11 of the Complaint asserted, "At the time he struck the Plaintiff and/or the shopping cart, Robert Leist was being pursed inside the Walmart Pike Street store by Clinton and another loss prevention specialist employed by Walmart, acting in concert." (JA 008). Respondent further alleged that Wal-Mart employees were "chasing an alleged shoplifter" through the store. (JA 009).

Respondent continued to utilize the "pursuit" argument throughout the case. In fact, Respondent asserted that very argument to defeat Wal-Mart's Motion for Summary Judgment. The first sentence of Respondent's Memorandum in Opposition to Defendant's Motion for Summary Judgment stated "[i]n this case the plaintiff, Johna Diane Ankrom, received serious and life-altering injuries when the defendant, Ryan Matthew Clinton, and other loss prevention personnel chased a shoplifting suspect through the Walmart store located in Parkersburg." (JA 001-005). In her pretrial memorandum, Respondent also averred "[s]everal Walmart employees vigorously chased Leist throughout the store, ultimately forcing him into the aisle where Diane and her family were shopping." *Id.*

Prior to trial, Respondent filed Plaintiff's Motion in Limine No. 6 which sought to preclude the mentioning or reference of Mr. Clinton as a party in the action, and the motion was granted by the circuit court prior to the start of trial. *Id.* As part of that ruling, the circuit court held that Wal-Mart was not to reference, refer, or argue to the jury the allegations set forth in the Complaint during the trial. *Id.*

At trial, Wal-Mart was not permitted to utilize the allegations contained in Respondent's Complaint. Respondent initially testified that she observed Nathan Newbanks running at the front of the store and within seconds a boy blasted into her shopping cart. (JA 0383). She testified that the boy was running fast "like he was running away from something," implying that the shoplifter was being chased. (JA 0384). Upon being shown the surveillance video, Respondent admitted that she did not see any Wal-Mart employees running toward her prior to the incident. (JA 433; 439). Likewise, Respondent's daughter, Sierra Thomas, also conceded that she did not see any Wal-Mart employees chasing Leist in the store. (JA 541). Wal-Mart was not permitted to cross-examine Respondent Respondent's daughter as to Respondent's allegations in the Complaint, which contradicted their concessions at trial.

By preventing Wal-Mart from being able to discuss the averments set forth in Respondent's Complaint, the circuit court denied Wal-Mart the ability to make a full and complete presentation of the case to the jury. The inconsistency of Respondent's claims was vital in the trial of this matter, as Respondent's inconsistent theories regarding Wal-Mart's pursuit, or lack thereof, would have revealed to the jury that Respondent's liability theories were a moving target throughout the litigation. By precluding discussion of the Complaint, the jury was not presented with the best evidence (or full and complete information) to assist them in

determining liability. For this reason, Wal-Mart alternatively requests that the Court to order a new trial in this matter.

IV. THE CIRCUIT COURT ERRED IN AWARDING RESPONDENT PREJUDGMENT INTEREST ON PAST MEDICAL EXPENSES

Following the verdict, Respondent requested pre-judgment interest on the award of her past medical expenses. (JA 005). Wal-Mart objected to the award of prejudgment interest, but the circuit court entered its Judgment Order on April 12, 2019, and ordered for Respondent to be awarded 4.0% pre-judgment interest on the $2,500,000.00 award for Respondent's past medical expenses. (JA 005; 932-934).[14] The Court abused its discretion in making an award of prejudgment interest on Respondent's past medical expenses.

Pursuant to W. Va. Code § 56-6-31(b), it is clearly within the Court's discretion to award prejudgment interest: "In any judgment or decree that contains special damages, as defined below, or for liquidated damages, the court ***may*** award prejudgment interest on all or some of the amount of the special or liquidated damages, ..." W. Va. Code § 56-6-31(b), *in part*, (emphasis added). Prejudgment interest is meant to fully compensate an injured party for the loss of the use of funds they have expended. *Bond v. City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539 (1981). This principle was expanded upon by this Court in *Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989), where the Court held that prejudgment interest could be recovered on medical bills in situations where those medical bills had not been paid by the time of trial, but the bills were, in fact, obligations of the plaintiff by the time of trial. Rather than "penalize an uninsured injured party who cannot afford to pay the incurred expenses before trial and *who*

[14] The circuit court ordered for the interest to be apportioned between Leist and Wal-Mart in accordance with their assigned fault percentage, the circuit court further ordered for the award to run from February 23, 2015, until April 12, 2019, at $273.97 per day.

normally will pay interest upon the delinquent payment of such expenses," the Court held that prejudgment interest on those medical expenses was appropriate. *Grove*, 181 W. Va. at 351 n.9, 382 S.E.2d at 545 (emphasis in original). However, the Court did not specifically address whether past medical expenses are appropriate when a plaintiff has past medical expenses but no monetary obligations or out of pocket payments related to those expenses at the time of trial.

In other similar situations, this Court has found that prejudgment interest is improper where the plaintiff has no payment obligations at the time of trial. *See, e.g.*, *Doe v. Pak*, 237 W. Va. 1, 7, 784 S.E.2d 328, 334 (2016) (holding that a plaintiff was not entitled to prejudgment interest for loss of household services where plaintiff had not "incurred an obligation to pay some sort of compensation for household services"); *Miller v. Fluharty*, 201 W. Va. 685, 701, 500 S.E.2d 310, 326 (1997) (an award of prejudgment interest on plaintiff's attorney's fees and cost was improper as there was no "out-of-pocket" impact on the plaintiff); *Buckhannon-Upshur Cty. Airport Auth. v. R & R Coal Contractor*, 186 W. Va. 583, 413 S.E.2d 404, 405 (1991) ("Prejudgment interest, according to West Virginia Code § 56-6-31 (1981) and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far *as loss of use of funds is concerned.*" (emphasis added)).

Here, prejudgment interest on Respondent's past medical expenses should not be awarded because Respondent had no obligation for medical expenses or out of pocket payments related to those expenses at the time of trial. Respondent testified at trial that she had been receiving Social Security Disability benefits on the date of the accident as the result of a knee injury that she previously sustained. (JA 377-378, 443, 549). Respondent had been on disability since 2006. (JA 549). There was no evidence or testimony presented that Respondent paid for any of her past medical expenses with her own funds or that she had any outstanding payment

obligations or out of pocket payments related to her medical expenses at the time of trial. To award Respondent prejudgment interest on the past medical bills that the jury awarded to her would result in a significant windfall for the Respondent and would be inconsistent with prior decisions of this Court.

In accordance with *Bond*, 166 W. Va. 581, 276 S.E.2d 539 and *Grove*, 181 W. Va. 342, 382 S.E.2d 536, this Court should reverse the circuit court's April 12, 2019, Judgment Order that awarded Respondent prejudgment interest on her past medical expenses.

CONCLUSION

For all of the foregoing reasons, Wal-Mart respectfully requests that this Court:

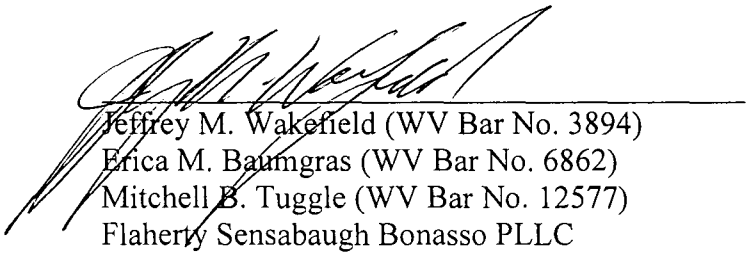
1. Reverse the circuit court's July 2, 2019, Amended Order denying Wal-Mart's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial and Motion to Amend Judgment and order entry of judgment as a matter of law in favor Wal-Mart; or

2. Reverse the circuit court's July 2, 2019, Amended Order denying Wal-Mart's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial and Motion to Amend Judgment and grant Wal-Mart a new trial due to the circuit court's failure to instruct the jury on intervening cause; and/or

3. Reverse the circuit court's July 2, 2019, Amended Order affirming the exclusion of Wal-Mart's utilizing of the Complaint from evidence at trial, and order a new trial so that Wal-Mart can have the opportunity to question the consistency of Respondent's liability theories; and/or

4. Reverse the circuit court's July 2, 2019, Amended Order to the extent that it granted Respondent's request for prejudgment interest on past medical damages in the jury verdict.

Respectfully submitted,



Jeffrey M. Wakefield (WV Bar No. 3894)
Erica M. Baumgras (WV Bar No. 6862)
Mitchell B. Tuggle (WV Bar No. 12577)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Charleston, WV 25301
(P) 304-345-0200
(F) 304-345-0260
jwakefield@flahertylegal.com
ebaumgras@flahertylegal.com
mtuggle@flahertylegal.com