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No. 19-0666

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

FILED
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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 REPLY BRIEF

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STATEMENT OF THE CASE

Rule 10(g) of the West Virginia Rules of Appellate Procedure provides that "[t]he petitioner may file a reply brief, which must comply with such parts of this rule applicable to the respondent . . ." The Respondent, in turn, is required to comply with the requirements of Rule 10(c) in filing a brief which may include a statement of the case to correct any inaccuracy or omissions. *See* W.Va. R. App. P. 10(d). Here, Respondent's Brief does not set forth an accurate or complete recitation of the facts. Therefore, Wal-Mart is compelled to supplement its previous Statement of the Case to address certain inaccuracies in the Introduction and Combined Statement of Facts and Statement of the Case in Respondent's Brief.[1]

The incident of February 23, 2015 is clearly depicted, in an objective manner, in the series of surveillance videos presented at trial. (JA 047). The videos reflect that the detention of Leist was in complete compliance with the Wal-Mart Investigation and Detention of Shoplifters Policy (AP-09), a copy of which was introduced at trial. (JA 048-062). The videos also demonstrate that the incident did not occur as described by Respondent. There is no evidence Leist "panicked and began running toward the front door." *See Respondent's Brief and Cross Assignment of Error* (pg. 7). Nor is it correct to state that the Wal-Mart witnesses conceded that if applicable policies had been followed on February 23, 2015, Leist would not have fled inside the store and Respondent would not have sustained any injuries. *See Respondent's Brief and Cross Assignment of Error* (pg. 8). Wal-Mart employees also did not testify that after watching the videos, the loss prevention employees violated Wal-Mart policies. *See Respondent's Brief and Cross Assignment of Error* (pp.14-15). Indeed, there is no citation to the Joint Appendix for such testimony.

The videos also establish that Wal-Mart employees did not "violently apprehend the shoplifter." *See Respondent's Brief and Cross Assignment of Error* (pg. 1). And the situation with Leist did not turn violent. There was no pursuit and no escalation of the situation. In short, the

[1] There are also a number of inaccuracies or mischaracterizations of the evidence in Respondent's Brief which are not set forth in the Statement of the Case. Wal-Mart will identify and address these in the Argument section of this Reply.

videos clearly depict the events of that unfortunate day, and Wal-Mart submits that the video depiction should be controlling.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT WAL-MART JUDGMENT AS A MATTER OF LAW BECAUSE THE UNDISPUTED EVIDENCE DEMONSTRATED THAT WAL-MART BREACHED NO DUTY TO RESPONDENT.

Respondent's shifting theory of the case against Wal-Mart continues even within this appeal. When suit was filed, Respondent maintained that Wal-Mart chased Leist prior to Leist colliding with Respondent's shopping cart. (JA 006-013). Respondent even alleged that Leist did not shoplift or attempt to leave the Wal-Mart premises without paying for the gloves. (JA 008). Once the evidence to be presented at trial did not support a chase theory, Respondent focused on the initial stop and detention of Leist as being allegedly improper. When confronted on appeal with dispositive authority from this Court in *Ward v. West*, 191 W.Va. 366, 445 S.E.2d 753 (1994), the Respondent then overstates and mischaracterizes the incident, all in an effort to escape the clear conclusion that Wal-Mart, as a matter of law, did not violate any duty to Respondent or otherwise engage in acts which proximately caused her injuries. Indeed, under Respondent's present theory, Wal-Mart or any other retailer in West Virginia can do essentially nothing when confronted with theft, a serious problem as identified by the *amicus curiae*, West Virginia Retailer's Association.[2] But the law does not require such apathy.

Examples of the overreach by Respondent in describing the February 23, 2015 incident include the following:

Respondent's Brief	Language	Mischaracterization
Page 1	"Wal-Mart...confronted and violently apprehended the shoplifter,...."	Inconsistent with video. (JA 047)
Page 1	"By Wal-Mart's own admission, the employees who took the shoplifter into custody should have let him go when	Inconsistent with video, inconsistent with policy language, and not supported

[2] The *amicus curiae*, which is the voice of the retail industry in West Virginia, notes that shoplifting is a serious crime which costs billions of dollars each year. *See* Brief of *Amicus Curiae*, page 3.

	the situation turned violent and his escape under the circumstances was clearly foreseeable."	by testimonial evidence. (JA 047) (JA 048-62) (JA 735-36)
Page 3	"Leist...communicated his conditional agreement to accompany Wal-Mart's loss prevention employees inside of the store. Leist made it clear that he would go so long as they kept their hands off of him. As the three men proceeded into the store, he was grabbed."	Inconsistent with video and not supported by testimonial evidence. (JA 047) (JA 063-914)
Page 7	"Leist then panicked and began running toward the front door."	Inconsistent with video. (JA 047)
Page 7	"Instead of complying with policy by letting Leist go..."	Inconsistent with policy language. (JA 048-62)
Page 8	"Wal-Mart's witnesses conceded that if they had followed the applicable policies on February 23, 2015, Leist would not have fled inside the store and Ms. Ankrom would not have sustained any injuries."	Witnesses never conceded that policy was violated. (JA 063-914)
Page 10	"Wal-Mart spoliated evidence by failing to preserve video from all cameras that would have captured their movements."	No evidence of spoliation introduced at trial and no spoliation instruction ever offered. (JA 915-928)
Page 14	"...escalated the anxiety of a shoplifter they were attempting to apprehend by running in the store and jumping in front of him."	Inconsistent with video. (JA 047)
Page 14	"Instead of calm, they created a torrent of chaos."	Inconsistent with video. (JA 047)
Page 16	"Blatant departures from AP-09, and improper motives for doing the same...."	Inconsistent with policy language. (JA 048-62)
Page 20	"Wal-Mart...testified clearly and emphatically regarding Wal-Mart's policy whenever 'the suspect *attempts to flee or leave* the facility'"	Inconsistent with written policy which speaks only of fleeing and defines fleeing as running. (JA 048-62)
Page 21	"Instead, the requirement to 'let them go' is triggered by nothing more than 'the suspect attempt[ing] to flee or leave the facility.'"	Inconsistent with policy language. (JA 048-62)
Page 24	"That Wal-Mart personnel were running in the store, which served to agitate Leist."	Action allegedly serving to agitate Leist not supported by any evidence. (JA 047)
Page 24	"Worst yet, they refused to let Leist flee the premises – as Wal-Mart policy dictated – and, instead, purposefully engaged in a physical altercation with	Inconsistent with policy language or video. (JA 047) (JA 048-62)

	Leist in which he was forcibly subdued."	
Page 25	"The manager of the Parkersburg store...testified that it was foreseeable 'a customer would get hurt' if Wal-Mart's apprehension policy AP-09, 'was not followed.'"	Manager did not say policy was not followed. (JA 490-514)

All of the above characterizations are consciously made by Respondent in an effort to create the wrong impression that the incident fell outside of what West Virginia law and Wal-Mart policies clearly permit.

It bears repeating that Wal-Mart's actions on February 23, 2015 were grounded in West Virginia public policy. W.Va. Code § 61-3A-4 provides as follows:

> 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.

It is significant that West Virginia public policy reposes to retailers the unquestionable right not only to investigate shoplifting, but also to employ reasonable means to detain suspects. It is of no moment that Respondent's expert testified as to purported industry standards which may suggest otherwise, as the law of this state is plain and unequivocal. Thus, Respondent's argument that Wal-Mart should have simply allowed Leist to leave the store and not detained him flies in the face of what West Virginia law clearly allows.

It is equally important to recognize that Wal-Mart's written policies clearly comport with West Virginia law and were followed on the day of the incident. Those policies are a part of the record and their contents are clear, regardless of whatever characterization the Respondent might make in her brief. (JA 048-62). In fact, these policies were recognized by Respondent's expert as very solid. (JA 212-213). He testified that "I will say this up front: I have always liked Wal-

Mart's policies, procedures and training program. It's comprehensive. It really exposes a loss prevention person to a much wider view of how a store operates than any other retail that I have come across in 44 years." (JA 235). Consequently, it is important to look at what the Investigation and Detention of Shoplifters Policy (AP-09) actually provides to determine whether any breach of duty occurred.

AP-09 contains the following provisions which are pertinent to a review of the February 23, 2015 incident:

- Authorized Associates "may surveil, investigate and/or *detain* persons suspected of or who commit shoplifting" (emphasis supplied). (JA 048)

- Authorized Associates investigating an unlawful taking must follow the following steps:

    - Approach the suspect.
    - Disclose the Authorized Associate's name and job title to the Suspect.
    - Explain the reason that the Authorized Associate approached the Suspect.
    - Attempt to verify that the Suspect is in possession of Facility merchandise that was not purchased.
    - Listen to any explanation that Suspect may offer for having possession of the merchandise.
    - Decide whether to detain the Suspect, in accordance with this policy, based on a reasonable evaluation of the available facts. (JA 051)

- If at any point the Suspect or any other involved person becomes violent, disengage from the confrontation, withdraw to a safe position and contact law enforcement. (JA 052).

- If at any point the Suspect or any other involved person exerts physical resistance, determine whether your next reasonable step is to disengage from the confrontation or move to an authorized detention method. (JA 052)

- An Authorized Associate investigating an unlawful taking may detain the Suspect, in a reasonable manner, for a reasonable period of time using only those methods of detention authorized by the policy. (JA 052-053)

- There are several authorized methods of detention.

    - Request – Authorized Associates may ask a suspect to follow them to a detention area (no physical contact). (JA 053)
    - Verbal Command – Authorized Associates may instruct a Suspect to follow them to a detention area (no physical contact). (JA 053)
    - Physical Redirection – Initially, Authorized Associates should motion in a non-aggressive manner in the direction they would like a Suspect to

proceed. If that is unsuccessful, the Authorized Associate may utilize respectful, light physical contact in directing the Suspect toward the AP office or other location. An open hand on the shoulder or arm of a Suspect is acceptable. (JA 053)

- Restraint – Authorized Associates may use reasonable force to physically limit or control the movements of a Suspect. Only the least amount of force necessary to affect the detention under the circumstances may be utilized. If restraint is attempted and the suspect cannot be controlled with a reasonable level of force, disengage from the situation, withdraw to a safe position, and contact law enforcement. (JA 053)

- Suspects are only to be processed in a private location inside the facility. (JA 054)

- Detention is to be terminated after one hour, unless the Facility Manager in charge, Market Asset Protection Manager or Regional Asset Protection Manager Authorizes continued detention. Detention is not to exceed the maximum period of detention allowed by state law, even if shorter than one hour. (JA 055)

- An Authorized Associate may only pursue fleeing Suspect for approximately 10 feet beyond the point they are located when the Suspect begins to run. 10 feet is about three long steps. This limitation applies both inside and outside the Facility. (JA 056)

- Never attempt to physically re-capture a Suspect who breaks free from physical restraint. (JA 056)

Comparison of the videos with the pertinent provisions of AP-09 demonstrates that the actions of Wal-Mart personnel were appropriate and well within the policies. Wal-Mart Asset Protection personnel approached Leist. The Associate disclosed his name and job title (they were not required to show any ID or badge as alleged by Respondent). The reason for the stop was explained, and it was verified that Leist was in possession of the merchandise.[3] There was discussion with Leist about the merchandise, and the decision was clearly made to detain the suspect, all in accordance with the policy.

It is also clear from the video that the Wal-Mart Asset Protection personnel maintained a calm, confident, and professional demeanor with Leist. To the extent the video reflects that Leist exerted physical resistance, the personnel were authorized to determine whether the next

[3] Respondent's brief contains the following statement: "Despite suggesting that the gloves were expensive, they were, in fact valued at less than $25 apiece." *See Respondent's Brief and Cross Assignment of Error* (pg. 6). This statement seems to suggest that actions in compliance with West Virginia public policy and Wal-Mart's written policies are not justified if the value of the merchandise is relatively small.

reasonable step was to disengage or move to an authorized detention method. Contrary to the characterization of the Respondent in her brief, Leist did not become violent. Had the situation truly turned violent, the Wal-Mart Asset Protection personnel would have disengaged from the confrontation.

Moreover, the additional actions taken by Wal-Mart personnel with respect to physical redirection and restraint of Leist were clearly warranted. The policies provide that Authorized Associates should initially motion in a non-aggressive manner in the direction they would like the suspect to proceed. If that is unsuccessful, the Authorized Associate may utilize respectful light physical contact in directing the suspect toward the Asset Protection office or other location. Significantly, the Authorized Associate may use reasonable force to physically limit or control the movements of the suspect. Of course, the least amount of force necessary to affect the detention under the circumstances may be utilized. Here, there was physical redirection and some form of restraint utilized with Leist, and then Leist became compliant.

Nothing within Wal-Mart policies, or West Virginia law, required Wal-Mart personnel to "bookend" Leist while peacefully escorting him back to the asset protection office, as suggested by Respondent's expert. After the initial detention in the vestibule, Leist was calm and clearly compliant. From that point forward, the actions of the Wal-Mart personnel were appropriate and certainly not contrary to Wal-Mart's policies. They were required to use the least amount of restraint after the initial step. In fact, it is incongruent for Respondent to criticize Wal-Mart personnel for utilizing some form of restraint with Leist in the vestibule and then subsequently criticize them for not using physical restraint while escorting Leist to the Asset Protection office. *See Respondent's Brief and Cross Assignment of Error* (pg. 24); (JA 225).

Against this backdrop, this Court's decision in *Ward v. West*, 191 W.Va. 366, 445 S.E.2d 753 (1994), becomes dispositive. There, this Court found that summary judgment was not appropriate because there was a disputed issue of material fact as to whether the shoplifter was being chased at the time the plaintiff was struck. If a seemingly peaceful shoplifter is being

escorted and bolts, liability does not rest with the retailer. *Ward*, 191 W.Va. at 369, 445 S.E.2d at 756.

Respondent attempts to distinguish *Ward* by asserting that Leist was a flight risk, and that under those circumstances, the retailer must take all steps reasonable and necessary to prevent the flight and any resulting injury. *See Respondent's Brief and Cross Assignment of Error* (pp. 23 – 24). Nothing in *Ward* states this proposition. What the Respondent's argument ignores is that all shoplifters are potentially flight risks. Any detention of a shoplifting suspect creates a circumstance of consternation or agitation in the shoplifter. Thus, even though the shoplifter may not want to be stopped, may be concerned about being accused of a crime, and may want to leave the premises, that does not necessarily mean that once the shoplifter agrees to be escorted to the Asset Protection office, a flight or escape will necessarily ensue. In this case, the video evidence shows that Leist agreed to return inside the store and go to the Asset Protection office. He appeared calm. While obviously not happy at having been detained for shoplifting, there was nothing at that moment to indicate that he would bolt and run throughout the store. More importantly, when Leist did run from the Asset Protection personnel, they did not chase him, and the lack of active pursuit renders *Ward* dispositive.

Likewise, Respondent's reliance upon *Scott v. Taco Bell, Corp.*, 892 F. Supp. 142 (S.D. W.Va. 1995), is misplaced. The District Court in that case granted summary judgment in favor of Taco Bell, finding that there was no reason to foresee the customer's assault of a fellow customer. In so holding, the court recognized that in West Virginia there is no duty upon a person to protect another from the unforeseen criminal activity of a third party. The court further acknowledged there was an exception if the defendant, by act or omission, unreasonably created or increased the risk of injury from the criminal activity of the third party.

Again, Respondent's argument is simply inconsistent with what the law permits in dealing with shoplifters. If merely stopping the shoplifter and detaining him increased the risk of injury to the plaintiff, there could never be any detention of a shoplifter because the mere detention itself

would increase the likelihood that he might want to take action to avoid prosecution. Here, Wal-Mart Asset Protection personnel stopped and detained Leist in a manner consistent with West Virginia statutory authority and Wal-Mart policies. Admittedly, Leist did not want to be stopped. He wanted to steal and to leave. He was detained and appropriately so. He agreed to return inside the store to the Asset Protection office and was proceeding in an orderly and peaceful fashion. It was then, and only then, that Leist took it upon himself to flee inside the store and collided with the Respondent's shopping cart. Nothing that Wal-Mart personnel did increased the risk of injury to the Respondent, unless it were to be concluded that any effort to detain or apprehend a shoplifter creates the circumstance where injury might occur because the shoplifter does not want to be stopped or prosecuted. This is not the law in West Virginia. If that were to become the law, no retailer could actually ever detain a shoplifter because they would, by that very action, create an alleged foreseeable risk of injury to third persons when the shoplifter decided to flee.

Respondent also continues to rely upon two cases cited to the Circuit Court in this appeal. *See Rayburn v. Wal-Mart Stores, Inc.*, 776 So.2d 137 (Ala. Civ. App. 1999), and *Columbo v. Wal-Mart Stores*, 303 Ill. App. 3d 932, 237 Ill. Dec. 315, 709 N.E.2d 301 (1999). As Wal-Mart noted in its opening brief, these cases merely provide examples of the factually specific nature of cases involving fleeing shoplifters. In *Rayburn*, summary judgment had been granted by the trial court and that ruling was reversed on appeal. *Columbo* involved the granting of a motion to dismiss and, again, the appellate court reversed the dismissal. Both cases essentially stand for the proposition that the record has to be fully developed before the trial court can make a decision on whether there is sufficient evidence to establish a breach of duty. Wal-Mart has already acknowledged that had the Circuit Court in this case granted summary judgment in favor of Wal-Mart, it is likely that this Court would have reversed that decision because there would have been a disputed issue of material fact as to whether Wal-Mart personnel were chasing Leist: the dispositive element set forth in *Ward*. It is again noteworthy that the theme of the Respondent's case, up until the point of trial, was that Wal-Mart personnel were chasing or pursuing Leist.

However, once the evidence was fully developed at trial, no evidence of chasing or pursuit was presented and any such testimony would have been belied by the videos. Accordingly, the Circuit Court should have granted Wal-Mart's renewed motion for judgment as a matter of law.

It is equally significant that the other authorities cited by Respondent in her brief articulate principles which are at odds with this Court's decision in *Ward.* This includes *Rayburn* and *Columbo.* There may indeed be jurisdictions which impose duties upon a retailer that are greater than those imposed by West Virginia law. Certainly, nothing within *Ward* adopts the view of some courts that once a shoplifter is detained, additional measures must be taken in handling the shoplifter. *Ward* stands for the simple proposition that liability may be imposed only if there is an active pursuit or chase of a shoplifter who otherwise appears peaceful. It contains no language indicating that additional actions could or should have been taken by store personnel to prevent the shoplifter from fleeing in that case.

Wal-Mart again urges this Court to reverse the jury verdict because the record clearly establishes that there was no breach of legal duty by Wal-Mart. The failure of the Circuit Court to grant its Renewed Motion for Judgment as a Matter of Law was fatal error.

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

Having denied Wal-Mart's motion and renewed motion for judgment as a matter of law, the Circuit Court should have at least allowed the jury to make the determination of whether the actions of Leist in fleeing were negligent acts which constituted a new effective cause, and which operated independently of any other acts by Wal-Mart, making them the only proximate cause of the injury sustained by Respondent. Failing to so instruct the jury was reversible error. The proposed intervening cause instruction submitted by Wal-Mart to the Circuit Court was a correct statement of West Virginia law, pursuant to *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)), and based on West Virginia Pattern Jury Instruction §

906, (JA 026). The intervening cause instruction was not covered elsewhere in the charge actually given to the jury. (JA 771-795; 915-928). Intervening cause was a material issue in the trial of the case, such that the failure to give the instruction seriously impaired Wal-Mart's ability to effectively present its defense that the shoplifter's actions of unexpectedly fleeing through the store - without being pursued by Wal-Mart personnel - and striking Respondent's shopping cart after having voluntarily returned to the store once he was stopped in the vestibule, were the sole proximate cause of Respondent's injuries. The Circuit Court's refusal to give the requested instruction constituted reversible harmful error. *See Kessell v. Leavitt*, 204 W.Va. 94, 145, 511 S.E.2d 720, 770 (1998) (quoting *State v. Wade*, 200 W.Va. 637, 646, 490 S.E.2d 724, 733 (1997)).

Respondent contends in her brief that Wal-Mart is wrong because Wal-Mart requested and the Circuit Court gave an instruction on joint negligence, and West Virginia law does not permit inconsistent jury instructions. Respondent also contends there was no basis under the facts presented for giving an intervening cause instruction. Respondent cites to *Burdette v. Maust Coal and Coke Co.*, 159 W.Va. 335, 343, 222 S.E.2d 293 (1976), which held that "[i]t is error to give inconsistent instructions, even if one of them states the law correctly, inasmuch as the jury, in such circumstances, is confronted with the task of determining which principle of law to follow, and inasmuch as it is impossible for a court later to determine upon what legal principle the verdict is founded." Syl. Pt. 1, *Burdette* (quoting *State Road Commission v. Darrah*, 151 W.Va. 509, 513, 153 S.E.2d 408, 411 (1967)). Respondent misses the mark, however, because jury instructions that present alternate theories of the defense are not inconsistent under West Virginia law. *Sydenstricker v. Mohan*, 217 W.Va. 552, 618 S.E.2d 561 (2005); *Catlett v. MacQueen*, 180 W.Va. 6, 375 S.E.2d 184 (1988). Further, the evidentiary threshold for giving an instruction which embodies a theory of the case under West Virginia law is "exceedingly low." *Danco, Inc. v. Donahue*, 176 W.Va. 57, 341 S.E.2d 676 (1986). As set forth below, the proffered intervening cause instruction was not inconsistent with other instructions and was amply supported by the evidence at trial.

Burdette, the principal case cited by Respondent, involved three consolidated wrongful death actions arising out of a coal mining accident. At issue on appeal was Defendants' Instruction No. 11, to which the plaintiffs objected because it ignored their theory of concurrent negligence. This Court found their objection well-taken, stating that it was misleading because of its incompleteness and its inconsistency with the rule relating to concurrent negligence. *Burdette*, 159 W.Va. at 342, 222 S.E.2d at 298. "Plaintiffs do not have the burden of proving what the 'real cause' of the accident was; their burden, under the law of negligence generally, and of concurrent negligence specifically, is to prove whether the alleged negligence of the various defendants together proximately caused or contributed to the death of their husbands. *Id.* (citing *Long v. City of Weirton*, 214 S.E.2d 832 (1975); *Lester v. Rose*, 147 W.Va. 575, 130 S.E.2d 80 (1963)). Plaintiffs' Instruction No. 12, however, correctly stated the law of concurrent negligence. *Burdette*, 159 W.Va. at 343, 222 S.E.2d at 298. Because Defendants' Instruction No. 11 misstated the law and conflicted with a proper statement of the law in Plaintiffs' Instruction No. 12, the Court was of the opinion that the trial court committed prejudicial error in giving defendants' instruction. *Burdette*, 159 W.Va. at 343-44, 222 S.E.2d at 298.

Inconsistent instructions were also at issue in *John D. Stump & Associates, Inc. v. Cunningham Memorial Park, Inc.*, 187 W.Va. 438, 419 S.E.2d 699 (1992), a civil action by a sales representative against cemetery owners alleging breach of contract granting him an "exclusive option" to purchase a cemetery and the right to commissions on the sales of certain cemetery items. On appeal, the defendants alleged error regarding the verdict on the plaintiff's claim to unpaid commissions under the agreement. The issue raised by the defendants was whether walk-in pre-need sales were sales upon which commissions had to be paid under the agreement. This Court found that the agreement itself was silent as to the payment of commissions on walk-in pre-need sales, thus giving rise to an ambiguity, and that the evidence at trial was conflicting. Accordingly, the Court believed that the trial court was correct in submitting the question to the jury. *John D. Stump & Associates, Inc.*, 187 W.Va. at 446, 419 S.E.2d at 707. However, the

defendants also contended on appeal that the trial court erred in giving Plaintiff's Instruction No. 6 on the ground that it advised the jury as a matter of law that the word "exclusive" controlled the entire dispute over pre-need walk-in commissions, thereby foreclosing any jury consideration of the issue, which was the crucial controversy on the commission claim. *John D. Stump & Associates, Inc.*, 187 W.Va. at 446-47, 419 S.E.2d at 707-08. This instruction was inconsistent with Defendant's Instruction No. 23, which dealt with the same issue, but left its resolution up to the jury. *John D. Stump & Associates, Inc.*, 187 W.Va. at 447, 419 S.E.2d at 708. Citing *Burdette*, the Court found that the conflicting instructions were erroneous, and reversed the judgment of the circuit court on that ground. *Id.*

Similarly, in *AIG Domestic Claims, Inc. v. Hess Oil Company, Inc.*, 232 W.Va. 145, 751 S.E.2d 31 (2013), an oil distribution company brought an unfair trade practices action against its insurers following their denial of coverage on an environmental remediation claim, and the insurers brought a cross-claim for breach of contract and negligent misrepresentation. The insurance companies objected to the trial court's decision to offer two instructions to the jury on the issue of misrepresentation. *Hess*, 232 W.Va. at 155, 751 S.E.2d at 41. The applicable law on the issue of insurance misrepresentation was provided in a jury instruction that fully comported with W.Va. Code § 33-6-7(b), (c) (2011), the statutory provision under which the insurance companies pursued their claim for misrepresentation against Hess Oil. *Id.* The insurance companies argued that the trial court created the potential for jury confusion by introducing the instruction on misrepresentation offered by Hess Oil, which advised the jury about a type of misrepresentation not at issue in the case. *Id.* Because they did not seek recovery under subsection (a) of W.Va. Code § 33-6-7, the section requiring a showing of an insured's fraudulent misrepresentation, the insurance companies argued that there was no foundation for the trial court to give this particular instruction. *Hess*, 232 W.Va. at 156, 751 S.E.2d at 42. This Court agreed and stated that the instruction in question directed the jury to apply the wrong standard, a significantly elevated standard that required a specific intent to deceive, in deciding whether Hess

Oil had made a misrepresentation in its insurance application. In addition, by giving one instruction that required the insurance companies to prove a material misrepresentation through evidence of a mere failure to report, while at the same time providing another instruction which required proof of an intentional failure to report, the jury was presented with contradictory and competing legal standards. *Id.* Again citing *Burdette*, this Court stated that it is error to give inconsistent instructions, even if one of them states the law correctly. The Court held that due to the conceivable injection of jury confusion into the trial as the result of these conflicting instructions, the insurance companies were entitled to a new trial. *Id.*

Each of these cases illustrate that jury instructions are inconsistent when they are *competing and contradictory on the same point of* law; one is correct and the other is incorrect as applied to the case. Jury instructions are not, however, inconsistent if they merely offer alternative theories of the case or the defense. In *Sydenstricker v. Mohan*, 217 W.Va. 552, 618 S.E.2d 561 (2005), a mother filed a medical malpractice claim against a physician for misdiagnosing her child's illness, resulting in the child sustaining permanent brain damage. The Circuit Court entered judgment on the jury verdict in favor of the physician and denied the mother's motion for a new trial. Both the mother and the physician appealed. The mother argued that the trial court erred in denying her motion to preclude the physician from presenting inconsistent defenses to the jury and to reflect the same in the verdict form. The inconsistent defenses raised by the physician were lack of negligence, contribution, and intervening cause. *Sydenstricker*, 217 W.Va. at 562, 618 S.E.2d at 571. The mother contended that the physician could not invoke the intervening cause defense to make the negligence of another defendant an issue at trial and also put on a defense alleging that he was not negligent. This Court held that the mother's position was flawed. Rule 8(e)(2) of the West Virginia Rules of Civil Procedure permits alternative, inconsistent, and mixed pleadings. *Id.* (quoting Cleckley, Davis & Palmer, *Litigation Handbook* § 8(e)(2), at 201). "Consequently, [n]othing prevents a party from asserting inconsistent defenses[.]" *Id.* (quoting *Granus v. North American Philips Lighting Corp.*, 821 F.2d 1253, 1256 (6th Cir. 1987)).

In *Catlett v. MacQueen*, 180 W.Va. 6, 375 S.E.2d 184 (1988), a patient brought a medical malpractice action against a surgeon. The Circuit Court entered judgment on a jury verdict in favor of the surgeon, and the patient appealed, asserting error in the trial court giving two instructions. The first instruction related to informed consent, and the plaintiff argued consent was not at issue, so the instruction served only to mislead the jury and divert its attention from the determinative issues in the case, which were whether the defendant was negligent in treating the plaintiff and, if so, whether the negligence caused a greater level of amputation than was necessary. *Catlett*, 180 W.Va. at 10-11, 375 S.E.2d at 188-89. The second instruction exculpated the physician from the initial injury, and the plaintiff argued that the language erroneously mislead the jury to find for the defendant. *Catlett*, 180 W.Va. at 11, 375 S.E.2d at 189. This Court was not persuaded by these arguments and concluded that the jury verdict against the plaintiff should not be disturbed because Instructions No. 7 and 15 were given. *Id.* This Court stated that a trial court's authority to give an instruction embodying a particular theory is reviewed by the Court under the "slight evidence" test:

> If there be evidence tending in some appreciable degree to support the theory of proposed instructions, it is not error to give such instructions to the jury, though the evidence be slight, or even insufficient to support a verdict based entirely on such theory.

Id. (quoting Syl. Pt. 2, *Snedeker v. Rulong*, 69 W.Va. 223, 71 S.E. 180 (1911)). In addition, this Court has consistently held that each party is entitled to instructions which present their theory of the case. "Where conflicting theories of a case are presented by the evidence, each party is entitled to have his view of the case presented to the jury by proper instructions." *Id.* (quoting Syl. Pt. 2, *Morris v. Parris*, 110 W.Va. 102, 157 S.E. 40 (1931)). The plaintiff sought recovery under the "value of a chance" theory, contending that his original injuries had been improperly treated by the defendant and, as a result, the injuries were aggravated to the extent that unnecessary amputations were required. The defendant presented two theories of defense: the first that the plaintiff's foot injuries were so severe that the amputation would have been necessary irrespective

of the defendant's treatment, and the second that the plaintiff's below-the-knee amputation of the right leg was necessitated in part by the restrictiveness of the initial limited consent given by the plaintiff. *Id.* This Court held that sufficient evidence was presented to allow the trial court to instruct the jury on the defendant's alternative defense theories. *Catlett*, 180 W.Va. at 11-12, 375 S.E.2d at 189-90.

As stated by this Court in *Danco, Inc. v. Donahue*, 176 W.Va. 57, 341 S.E.2d 676 (1986):

> Where there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so.

Syl. Pt. 1, *Danco* (quoting Syl. Pt. 7, *State v. Alie*, 82 W.Va. 601, 96 S.E. 1011 (1918)). "It is also well-established that the evidentiary threshold that must be crossed in order to justify the giving of a particular instruction which embodies a litigant's theory of the case is exceedingly low." *Danco*, 176 W.Va. at 59, 341 S.E.2d at 678. Further, "[i]t is difficult to imagine a situation where proper instructions to a jury on a theory supported by competent evidence would result in reversible error. On the other hand, refusing to instruct the jury on a litigant's theory of the case when it is supported by competent evidence prevents consideration of that theory by the jury, and thus invites reversal." *Danco,* 176 W.Va. at 60, 341 S.E.2d at 679.

Thus, although a trial court cannot give inconsistent jury instructions, which are conflicting and inaccurate statements of the law, a trial court can instruct the jury on alternative defense theories, including intervening cause. Moreover, the failure to instruct the jury on a theory of the case which is supported by competent evidence, even though the evidence is "slight" or meets only the "exceedingly low" threshold, is reversible error. Here, the jury instruction regarding intervening cause,[4] which Wal-Mart requested but the Court denied, was not inconsistent with the

[4] Proposed Jury Instruction #6, Intervening Negligence, states that:

> Wal-Mart and Ryan Clinton claim that they were not the proximate cause of Plaintiff, Johna Diane Ankrom's injuries and damages because there was an intervening negligent act that caused the injury and damages of Plaintiff. Wal-Mart and Ryan Clinton 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

jury instruction on joint negligence[5], which Wal-Mart requested and the Court gave. These instructions simply presented alternate theories of defense: one in which only the independent negligent actions of Leist were the proximate cause of the injury or damage to the plaintiff, and the other in which the negligent actions of both Wal-Mart and Leist were each regarded as the proximate cause of the injury or damage to the plaintiff.

Further, the intervening cause instruction was supported by the evidence in the record. As set forth above, where conflicting theories of a case are presented by the evidence, each party is entitled to have its view of the case presented to the jury by proper instructions. *Catlett*, 180 W.Va. at 11, 375 S.E.2d at 189. If there is evidence tending "in some appreciable degree" to support the theory of the proposed instructions, it is not error to give such instructions to the jury, even though "the evidence be slight, or even insufficient to support a verdict based entirely on such theory." *Id. See also, Danco*, 176 W.Va. at 59, 341 S.E.2d at 678 (the evidentiary threshold that must be crossed to justify giving a particular instruction which embodies a theory of the case is "exceedingly low").

Leist willingly and voluntarily agreed to return to the store after the initial stop. He was escorted by Wal-Mart Asset Protection employees in a calm and non-combative manner. He then made his own decision to flee toward the inside of the store, where he was not pursued by any Wal-Mart employees. (JA 047). Although the Respondent contends that Wal-Mart improperly stopped Leist and created a foreseeable risk of flight in apprehending the shoplifter, whether the

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> there was a new independent, negligence act or omission of another party that occurred after the conduct of Wal-Mart and Ryan Clinton; 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).

[5] Proposed Jury Instruction #4, Combined Proximate Cause, states that:

> If a party commits a negligent act or acts that join together with the negligent act or acts of another party, and the two combine to cause the injury or damage, each negligent party may be found at fault for the resulting injury or damage and the negligence of each party will be regarded as the proximate cause of the injury or damage. (JA 024).

subsequent flight of Leist was actually an independent and intervening cause was an issue about which the jury should have been instructed as a part of the overall consideration of negligence and proximate cause. (JA 990-991).

The failure to give an intervening cause instruction significantly impaired the ability of Wal-Mart to fully defend itself at trial. Much of the theory of negligence at trial was that Wal-Mart performed an improper stop of Leist and that Wal-Mart should have let him go, rather than escorting him back into the store. (JA 795-859). The evidence presented at trial showed that the allegedly improper detention in the vestibule ceased once Leist voluntarily and calmly returned to the store. (JA 047). Leist was not struggling with Wal-Mart employees, nor was he moving at a quick or rapid pace. *See id.* Then Leist unexpectedly decided to start running. Wal-Mart personnel did not chase or otherwise pursue him. It was Leist alone 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 he was going to comply with their directives. (JA 588; 605; 635-636; 639).

Given the evidence presented during the trial, the jury should have been instructed on intervening cause and should have been permitted to consider the actions of Leist as the sole proximate cause of Respondent's injuries. *See Marcus v. Staubs*, 230 W. Va. 127, 139, 736 S.E.2d 360, 372 (2012); *Mills v. Jack Eckerd Corp.*, 224 Ga. App. 785, 786, 482 S.E.2d 449 (1997) (noting that the proximate cause of a plaintiff injured by a fleeing shoplifter would have been the intervening act of the shoplifter); *Henderson v. Kroger Co.*, 217 Ga. App. 252, 253, 456 S.E.2d 752, 753 (1995) (same); *Giant Food v. Mitchell*, 334 Md. 633, 642, 640 A.2d 1134, 1138 (1994). 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 should still reverse the judgment and award Wal-Mart a new trial because the Circuit Court's erred in not giving an intervening cause jury instruction.

III. THE CIRCUIT COURT ERRED IN PRECLUDING WAL-MART FROM USING THE ALLEGATIONS IN THE COMPLAINT DURING TRIAL.

The Circuit Court further erred in precluding Wal-Mart from using the allegations contained in the Complaint during trial. Because Wal-Mart could not use the Complaint at trial, it was not able to show how the Respondent shifted the theory of liability from the start of the case, when it was first alleged that at the time Leist struck Respondent and/or her shopping cart, he was being pursued inside the Wal-Mart store by loss prevention employees, to the time of trial, when it was alleged that the stop of Leist in the vestibule by Wal-Mart employees was improper. This shift occurred only after Respondent was shown the surveillance videos and admitted that she did not see any Wal-Mart employees running toward her prior to the incident. (JA 433, 439). Wal-Mart should have been permitted to show that inconsistent claims were being asserted and that the theories of liability were a moving target. The Circuit Court committed reversible error by prohibiting Wal-Mart from doing so.

The Respondent cites to *Pearson v. Pearson*, 200 W.Va. 139, 146, 488 S.E.2d 414 (1997), and *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329 (1995), in her brief, yet those cases stand for the proposition that allegations without supporting factual proof in the record cannot, alone, be considered as evidence. Those cases do *not* hold that the allegations in a complaint cannot be introduced to examine a plaintiff. *See, e.g., Merck v. Swift Transportation Co.*, No. CV-16-01103-PHX-ROS, 2018 WL 4492362, *1-2 (D. Ariz. Sept. 19, 2018) (allegations in plaintiff's complaint are attributable to plaintiff because, pursuant to Rule 11, court presumes factual allegations in complaint were made after plaintiff's counsel conducted reasonable inquiry of client; plaintiff cannot make unsubstantiated factual assertions in complaint without fear of being cross-examined on them should case proceed to trial so long as complaint was unverified because that would undermine efficiency of legal system and basic purpose of rules of civil

procedure; allegations in complaint are relevant as they may impugn plaintiff's credibility and they are not unfairly prejudicial as they do not encourage jury to reach conclusion on improper basis); *Street v. The Kroger Co.*, No. 01-A01-9207-CV00263, 1993 WL 38002, *1-2 (Tenn. Ct. App. Feb. 17, 1993) (citing *First Tennessee Bank v. Mungan*, 770 S.W.2d 798 (Tenn. Ct. App. 1989)) (factual statements in pleadings are judicial admissions against pleader in proceedings in which they are filed unless they have been amended or withdrawn, but under latter circumstance, continue to be evidentiary admissions).

Respondent also contends that Wal-Mart was able to address her inconsistent theories because it was able to "replay the videos of the incident and specifically ask Ms. Ankrom if they depicted any Wal-Mart personnel running inside the store before she was knocked to the ground." *See Respondent's Brief and Cross Assignment of Error* (pp. 37-38). Being able to cross-examine the Respondent on the surveillance videos and get her admission that she did not see anyone from Wal-Mart running towards her while she was standing in the candy aisle, before Leist came into contact with her cart, and that she did not observe any Wal-Mart employees chasing him after the cart came down (JA 433, 439), is simply not the same as being able to contrast this testimony with inconsistent allegations in the Complaint that "[a]t the time he struck the Plaintiff and/or the shopping cart, Robert Leist was being pursued inside the Wal-Mart Pike Street store by Clinton and another loss prevention specialist employed by Wal-Mart, acting in concert." (JA 008, ¶ 11) (emphasis added).

This allegation in the Complaint regarding "pursuit" of the shoplifter inside the store at the time he struck the Respondent continued well into the case. The Respondent made the same argument in opposing the Motion for Summary Judgment filed by Wal-Mart, asserting in the very first sentence of her Response that "[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 Wal-Mart store located in Parkersburg." *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary*

Judgment (emphasis added). In her pretrial memorandum, the Respondent 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." *Plaintiff's Pretrial Memorandum* (emphasis added).

Further, in the Complaint, Respondent alleged that "[a]t the time he struck the Plaintiff and/or the shopping cart, Robert Leist was being pursued inside the Wal-Mart Pike Street store by Clinton and another loss prevention specialist employed by Wal-Mart, acting in concert." (JA 008, ¶11) (emphasis added). However, in her deposition, even prior to being shown the surveillance video, the Respondent testified that she "noticed one of the loss prevention employees jogging in front of the registers," that the person jogging "would have been Nate Newbanks," that "he was on a mission," and after she saw him, "[w]ithin seconds, this young boy just blasted into [her] shopping cart." (JA 382-83) (emphasis added). Respondent not only revised her story as to whether there was a pursuit, but also as to who was allegedly chasing the shoplifter. It is also worth noting that in the Complaint, Respondent alleged that "Robert Leist was allegedly engaged in the act of shoplifting gloves at the time Clinton and the other Wal-Mart loss prevention specialist initiated their pursuit; however, Robert Leist never left or attempted to leave the premises of Wal-Mart without paying for the gloves at issue" (JA 008, ¶13) (emphasis added). Yet in her deposition when she was asked to tell how she was injured, she described it as follows: "I was at Walmart, and I had my shopping cart, and I was blasted by a shoplifter. He ran into my buggy, and the buggy went out of control." (JA 379, lines 7-12) (emphasis added).

By precluding the use of the allegations in the Complaint, the Circuit Court denied Wal-Mart the ability to fully present its defense to the jury, including issues of these inconsistencies in the claims by the Respondent. By denying Wal-Mart the ability to present a complete defense and the best evidence to the jury, the Circuit Court abused its discretion and committed reversible error.

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

Wal-Mart acknowledges that the Circuit Court decision to award prejudgment interest was discretionary and permitted by the provisions of W.Va. Code §56-6-31(b). Wal-Mart also acknowledges that an abuse of discretion standard is applied in reviewing a circuit court's award of prejudgment interest. *See Gribben v. Kirk*, 195 W.Va. 488, 466 S.E.2d 147 (1995). It is further recognized that a plaintiff can actually recover the value of benefits even if paid for by a third-party, including social legislation benefits. *See Kenney v.* Liston, 233 W.Va. 620, 760 S.E.2d 434 (2014). Here, however, the Circuit Court's award of prejudgment interest was an abuse of discretion when no obligation was actually incurred by Respondent.

The record establishes that 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 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 also been on disability since 2006. (JA 549). Consequently, there was no evidence or testimony presented that Respondent paid for any of her past medical expenses or that she had any outstanding payment obligations.

Although this Court in *Grove v. Meyers*, 181 W.Va. 342, 382 S.E.2d 536 (1989), quoted language from a New Jersey case which concluded that prejudgment interest was recoverable even if the bills had been paid by a public assistance agency, that was not the precise ruling from this Court. Instead, in Syl. Pt. 3, this Court stated:

> Under *W.Va. Code* §56-6-31, as amended, prejudgment interest is to be recovered on special or liquidated damages incurred by the time of trial, *whether or not the injured party has by then paid for the same.* If there is sufficient evidence to *demonstrate that the injured party is obligated to pay for medical or other expenses* incurred by the time of the trial, and if the amount of such expenses is certain or reasonably ascertainable, prejudgment interest on those expenses is to be recovered from the date the cause of action accrued (emphasis added).

Since *Grove*, this Court has reached decisions which suggest that the prejudgment interest rule should only be applied in instances where there is an actual obligation incurred by the plaintiff. *See 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 attorneys fees and costs was improper as there was no "out-of-pocket" impact on the plaintiff); *Buchannan-Upshur Cty. Airport Auth. v. R&R Coal Contractor*, 186 W.Va. 583, 413 S.E.2d 404, 405 (1991) ("prejudgment interest, according to W.Va. Code §56-6-31 (1981) and the decisions of this Court interpreting that statute, as not a cost, but as a form of compensatory damages intended to make an injured plaintiff whole *as far as loss of use of funds is concerned*") (emphasis added).

Wal-Mart submits that it was an abuse of discretion to award substantial prejudgment interest on medical expenses or other out of pocket payments not actually incurred by Respondent or for which Respondent bore no payment obligation. Thus, this Court should reverse the Circuit Court's April 12, 2019 Judgment Order that awarded prejudgment interest.

CROSS ASSIGNMENT OF ERROR

I. THE CIRCUIT COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST WAL-MART FOR THIRTY PERCENT OF THE VERDICT BECAUSE THE JURY APPORTIONED ONLY THIRTY PERCENT OF THE NEGLIGENCE TO WAL-MART.

Respondent contends that judgment should have been entered against Wal-Mart for the full amount of the verdict of $16,922,00.00, even though the jury determined that both Wal-Mart and Leist were negligent and apportioned seventy percent (70%) of the negligence to Leist and only thirty percent (30%) to Wal-Mart, because the provisions of W.Va. Code § 55-7-24 (2005) did not apply to the judgment. *See Respondent's Brief and Cross Assignment of Error* (pg. 40). But the Circuit Court did not err in deciding that W.Va. Code § 55-7-24 applied to the apportionment of damages in this case, and pursuant to the statute, Wal-Mart should be

responsible for only thirty percent (30%) of the total verdict. The Circuit Court was correct in determining that W.Va. Code § 55-7-24 is applicable "[i]n any cause of action involving the tortious conduct of more than one defendant," and that "defendant" encompasses third-party defendants such as Leist.

The Circuit Court correctly concluded that the repeal of W.Va. Code § 55-7-24 and the enactment of W.Va. Code § 55-7-13a through 13d, effective May 25, 2015, was a continuation of the State's historical development of the law of negligence premised on making a more equitable adjustment of liability based on each tortfeasor's degree of fault. (SA 000003). In that context, the more recently enacted definition of "defendant" in W.Va. Code § 55-7-13b (2015) "for purposes of determining an obligation to pay damages to another under this chapter, any person against whom a claim is asserted including a counter-claim defendant, cross-claim defendant or third-party defendant" did not fundamentally alter the previously undefined meaning in W.Va. Code § 55-7-24. Rather, it clarified the term without effecting a substantive change in the class of persons obligated to pay damages that it comprised. (SA 000003).

The Circuit Court, in its April 12, 2019 Order, aptly explained that the 2005 statute, W.Va. Code § 55-7-24, effected a fundamental change in tort law by creating an exception to joint and several liability and adopting what has become known as the "thirty percent rule." This change would have been rendered essentially meaningless if Respondent's interpretation of the term "defendant" as used in W.Va. Code § 55-7-24 were accepted. In that event, plaintiffs alone would control which tortfeasors would be subject to joint and several liability and which would not, and those tortfeasors whose degree of fault was thirty percent (30%) or less would necessarily be prejudiced. (SA 000003-000004). Although the Circuit Court agreed with Respondent that in a joint and several liability tort system at common law, Leist would not be a "defendant," the Court properly found that Respondent was incorrect in asserting that was how the term "defendant" was used in W.Va. Code § 55-7-24. Respondent's argument fails to recognize that the new model of tort law created in 2005, and continued in 2015, necessarily requires a different meaning for the

term "defendant." Otherwise, as explained by the Circuit Court, "[i]f the term continued to mean what it did prior to the statute's enactment, the very change it effected would be nullified or the statute would become internally inconsistent. Neither of these alternatives is tenable." (SA 000008).

The Circuit Court also offered a cogent explanation as to why W.Va. Code § 55-7-24 did not define "defendant precisely and universally to include all species of the family" as W.Va. Code § 55-7-13a through 13d later did. The 2005 statute constructed a model in which the principles of joint and several liability co-existed with the principles of comparative fault which, for the first time, extended beyond contribution issues to include the liability of a joint tortfeasor to a plaintiff, although only when a joint tortfeasor was found thirty percent or less at fault. Thus, the term "defendant" retained the more restrictive meaning it had in a joint and several liability model when all joint tortfeasors were more than thirty percent (30%) at fault, but incorporated a broader class if one or more joint tortfeasors were thirty percent (30%) or less at fault. (SA 000008-000009). In the present case, the jury verdict finding Wal-Mart only thirty percent (30%) at fault places Respondent, Wal-Mart, and Leist, as the joint tortfeasor, squarely within the model where comparative fault and not joint and several liability controls the analysis. As such, the third-party defendant, Leist, is indeed a "defendant" under the applicable statute, W.Va. Code § 55-7-24 (2005). The Circuit Court's analysis is consistent with this Court's holding in *Landis v. Hearthmark, LLC*, 232 W.Va. 64, 74, 750 S.E.2d 280, 290 (2013), that W.Va. Code § 55-7-24(a)(1) requires the consideration of the proportionate fault of each of the parties in the litigation at the time the verdict was rendered, and does not prevent the alleged negligence of the third-party defendants from being considered.

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; and/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; and/or

5. Affirm the Circuit Court's Order entering judgment against Wal-Mart for only thirty percent (30%) of the verdict amount.

Respectfully submitted,

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