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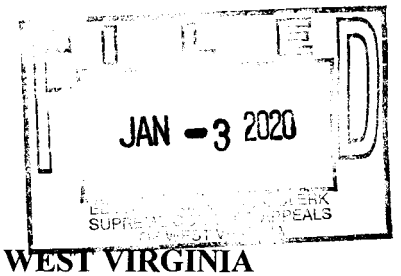

Appeal No. 19-0666

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

WAL-MART STORES EAST, L.P.,

Petitioner,

DO NOT REMOVE FROM FILE

v.

JOHNA DIANE ANKROM,

Respondent

RESPONDENT'S BRIEF AND CROSS ASSIGNMENT OF ERROR

From the Circuit Court of Wood County, West Virginia
Civil Action No. 15-C-3919

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Because the plaintiff offered substantial proof that Wal-Mart violated industry standards and its own policies in its handling of the shoplifter, Leist, including admissions by Wal-Mart's Rule 30(b) witness and others, the trial court correctly ruled that a jury question was presented regarding liability.

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The jury was properly instructed on the issue of proximate cause: Wal-Mart's intervening cause instruction was inapplicable to the facts and conflicted with its joint negligence instruction, which was given by the court.

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The trial court correctly ruled that the allegations in the plaintiff's complaint were not admissible for any purpose, including impeachment.

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By awarding prejudgment interest based on the full amount of medical bills, the trial court followed *Grove v. Myers*, 181 W.Va. 342, 382 S.E.2d 536 (1989) and acted within the discretion authorized by W.Va. Code 56-6-31.

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I. Introduction

Petitioner, Wal-Mart, is the largest retailer in the United States. It operates stores throughout the country, including in West Virginia. As a result, Wal-Mart is intimately familiar with industry standards regarding policies for the apprehension of shoplifters and additionally has its own internal policy regarding the apprehension of shoplifters. These policies set forth, among other things, the manner in which shoplifters should be approached, stopped, and what to do if a shoplifter exhibits conduct which indicates that he is going to attempt to flee.

Respondent, Johna Diane Ankrom ("Ms. Ankrom"), received serious, permanent, and debilitating injuries when she was thrown to the ground by a fleeing shoplifter in a Parkersburg-area Wal-Mart store. Not only did Wal-Mart violate industry standards when it confronted and violently apprehended the shoplifter, it also violated its own corporate policies. By Wal-Mart's own admission, the employees who took the shoplifter into custody should have let him go when the situation turned violent and his escape under the circumstances was clearly foreseeable. Because of Wal-Mart's violations, Ms. Ankrom suffered severe bruising, necrosis, and microperforations in the small intestine that required her to undergo seven surgeries and to incur over $2,700,000 in medical bills. Future medical bills are likely to exceed $3,700,000. Because of the enormity of the harm she suffered, both past and future, the jury returned a verdict of nearly $17,000,000--a figure that Petitioner, Wal-Mart, has never contested.

On February 23, 2015, Ms. Ankrom accompanied her daughter, Sierra, and four-year-old granddaughter to the Wal-Mart store located in South Parkersburg. While Ms. Ankrom was in the front aisle, known as "Action Alley" (as described by Wal-Mart's

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employees), near the front of the store and the cash registers, Sierra was at the Wal-Mart Pharmacy (also located inside of the same store) purchasing prescription medication for her ill daughter. Ms. Ankrom and her granddaughter were simply waiting for Sierra to return from the pharmacy so that they could leave the store with the prescriptions.

Unbeknownst to Ms. Ankrom, at the same time, Wal-Mart's loss prevention team, a/k/a asset protection personnel, was in pursuit of a shoplifter inside of the store. The shoplifter, Robert Leist, had taken gloves, concealed them, and attempted to leave the store with them without paying. Outside of Ms. Ankrom's view, a loss prevention employee, Nate Newbanks, trailed Leist from inside of the store to the vestibule. When Leist arrived inside of the vestibule, Newbanks moved past Leist and positioned himself in front of him, blocking the exit. Newbanks told Leist that he was a Wal-Mart loss prevention employee and that he witnessed the theft of merchandise. Soon, Newbanks and Leist were joined in the vestibule by Wal-Mart's Loss Prevention Manager, Joseph Daniel. Newbanks and Daniel positioned themselves as close to Leist as they could. It was a verbal and physical confrontation.

During this confrontation, Newbanks and Daniel insisted that Leist return the merchandise. The merchandise was described as two pair of work gloves. Leist complied with the request to return the merchandise. Then Newbanks and Daniel commanded Leist to accompany them inside of the store to the office, where they could process him. Leist very clearly communicated that he would not accompany them to the office and he began to push past Newbanks and Daniel. Newbanks and Daniel physically restrained Leist from departing. Leist made two other attempts to leave, and the level of physical restraint from Newbanks and Daniel increased in aggression with each attempt. Though the video produced by Wal-Mart is of poor quality, it is easy to see that Leist physically resisted the

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aggressive efforts to restrain him and take him back inside the store to be processed. By his words and actions, Leist made it very clear that he wanted to leave. Wal-Mart's video of the Leist apprehension also depicts customers coming and going through the vestibule, and their obvious reaction to the physical restraint of Leist.

At the moment that Leist's resistance ceased, he 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. Predictably, Leist then fled through the store as fast as he could. Had Wal-Mart simply followed its policy, AP-09, and allowed Leist to leave the store instead of escalating his level of agitation by physically restraining him, Ms. Ankrom would not have been injured.

II. Response to Assignments of Error

Response to Assignment of Error No. 1:

Because the plaintiff offered substantial proof that Wal-Mart violated industry standards and its own policies in its handling of the shoplifter, Leist, including admissions by Wal-Mart's Rule 30(b) witness and others, the trial court correctly ruled that a jury question was presented regarding liability.

Response to Assignment of Error No. 2:

The jury was properly instructed on the issue of proximate cause: Wal-Mart's intervening cause instruction was inapplicable to the facts and conflicted with its joint negligence instruction, which was given by the court.

Response to Assignment of Error No. 3:

The trial court correctly ruled that the allegations in the plaintiff's complaint were not admissible for any purpose, including impeachment.

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Response to Assignment of Error No. 4:

By awarding prejudgment interest based on the full amount of medical bills, the trial court followed *Grove v. Myers,* 181 W.Va. 342, 382 S.E.2d 536 (1989) and acted within the discretion authorized by W.Va. Code 56-6-31.

III. Combined Statement of Facts and Statement of the Case

A. Safety Standards

Wal-Mart is the world's largest retailer. It owns and operates retail stores throughout West Virginia, including one in Parkersburg. As a West Virginia business owner, Wal-Mart is, of course, subject to the same duty of care that applies to all other business owners: "The duty owed to an invitee is the exercise of ordinary care to keep the business premises in a reasonably safe condition." *Adkins v. Chevron USA, Inc.*, 199 W.Va. 518, 522, 485 S.E.2d 687 (1997); see also *Andrick v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E.2d 247 (1992). During trial, Wal-Mart's witnesses acknowledged that it was required by law to take reasonable steps for the protection of everyone in its store, including its customers. JA 165, 500, 739.[1] In fact, Wal-Mart claims in its written policies that customer safety is its number one priority:

> "PUT PEOPLE FIRST. Protecting the physical well-being of suspects, customers, and Wal-Mart associates is your first priority."[2]

Obviously, a subject that raises significant safety concerns is the handling of shoplifters. Confronting a shoplifter is inherently dangerous: "[I]t's a very adrenaline-ridden process when you, as a loss prevention person, are approaching somebody to accuse

[1]Throughout this brief, "JA" will be used to refer to the joint appendix submitted by the parties.

[2]The language quoted herein appears in Wal-Mart's "Investigation and Detention of Shoplifters Policy, AP-09." In fact, this exact same phrase is repeated ***three different times*** in the same policy. JA 51, 54, 55.

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them of stealing and try to get your merchandise back." JA 208. Therefore, the retail industry as a whole has developed standards that apply whenever loss prevention personnel are dealing with a suspected shoplifter. In light of the dangers, the overriding concern for the retailer is the safety of all concerned, including the safety of its customers: "Safety is always the most important aspect of the loss prevention department within retail. They are a retailer; they're not a police department." JA 204-05.

These industry standards include a few simple, but vitally important principles that all loss prevention personnel must follow:

- As noted earlier, the primary concern of loss prevention personnel during any encounter with a shoplifter must always be safety.
- The personnel who are involved in the encounter must avoid doing anything to frighten the shoplifter.
- Similarly, the personnel involved must avoid doing or saying anything that would potentially escalate the situation.
- If a shoplifter chooses to flee, the personnel involved must not engage in pursuit. JA 200-01.

Wal-Mart itself has developed a set of written policies that apply to the detention and apprehension of shoplifters. The substance of these policies will be discussed in greater detail as we consider the facts of the February 23, 2015 incident. For now, however, we should point out that Wal-Mart's policies are also meant to protect customer safety. See, e.g., JA 165 (Wal-Mart manager testifying that "[w]e take every measure possible to protect customers every day"). Furthermore, these policies are not merely "guides," but are binding policies that are expected to be known, taught, and implemented by Wal-Mart managers and followed by Wal-Mart personnel. JA 616-17.

Despite the industry standards and Wal-Mart's own policies, Wal-Mart cultivated a culture that promoted an unhealthy competition among loss prevention employees and

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encouraged them to make arrests. To begin with, Wal-Mart employees received bonuses and pay raises based on the strength of their store's profitability—which turned, in part, on the recovery of stolen merchandise. JA 625. This led to an active and very public competition within the store's loss prevention department. In fact, there was a grease board outside of the loss prevention office showing exactly how many shoplifters each of the loss prevention employees had apprehended the previous month. "Merchandise recoveries [didn't] count; only apprehensions." JA 238, 597-98. The loss prevention personnel who testified admitted they were part of the competition. Wal-Mart managers had full knowledge of the competition. JA 172-73, 507-08, 621. Unfortunately, this competition mentality meant that safety was sacrificed, leading to "bad and risky decisions" any time loss prevention personnel had dealings with a shoplifter. JA 238.

B. A Close Up Look At Wal-Mart's Apprehension of The Shoplifter And Its Violation of The Safety Standards

To fully understand the issues presented, we must take a closer look at the events surrounding Wal-Mart's apprehension of the shoplifter on February 23, 2015.

Nate Newbanks was the employee primarily involved in Leist's apprehension. Importantly, and not coincidentally, Newbanks was twice named Wal-Mart associate of the year for the entire district, including not only Parkersburg, but also Huntington, Vienna, Ripley, and Charleston. This was based on "out-performing [his] competition" in those stores using apprehensions as one of the metrics. JA 648-50. Newbanks testified that he observed Robert Leist select a pair of gloves, conceal them, and proceed to leave the store. JA 634-35. Despite suggesting that the gloves were expensive, they were, in fact, valued at less than $25 apiece. JA 286. Newbanks hurried to the front of the store. Wal-Mart's

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surveillance video shows that Newbanks was the first one to encounter Leist in the vestibule area of the store.

Wal-Mart's policies provide that when loss prevention personnel approach a suspected shoplifter, they should clearly identify themselves and remain approximately an arm's length away. JA 206. This deescalates the situation while still providing an opportunity to observe the shoplifter's demeanor and movements. JA 208. Video, however, shows that Newbanks stood squarely in front of Leist and in close proximity. It is unclear whether he identified himself verbally, but the video shows that he clearly failed to comply with Wal-Mart's policies by producing an ID tag. Joseph Daniel stood nearby and as many as four other employees wearing Wal-Mart uniforms can be seen surrounding Leist. Instead of deescalating the situation, Newbanks and the others managed to aggravate the existing "sense of urgency and panic." JA 209-10.

During this initial encounter in the vestibule, Leist surrendered the gloves. JA 213, 732-33. Moments later, Daniel reached out and grabbed Leist's arm. JA 626, 643-44. Leist then panicked and began running toward the front door. Instead of complying with policy by letting Leist go, Newbanks and Daniel grabbed him by an arm and placed him in what one witness described as a "bear hug." Toward the end of the altercation, Daniel grabbed Leist's arm again and "tr[ied] to pull him into the store." JA 212. All of this was caught on video and played for the jury multiple times.[3]

It is important at this juncture to repeat the industry standard: If a shoplifter chooses to flee, the personnel involved must not pursue them. JA 200-01. This is especially true

[3] The video depicting the events in the vestibule is marked as JA 47 (Groc Vestibule 4:00:48).

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where, as here, the store has already recovered the merchandise. Safety must always be the overriding concern.

Wal-Mart's own policies are consistent with this standard. Wal-Mart's Rule 30(b) witness, Melissa Wacha, confirmed this during her testimony. Interestingly, Wal-Mart did not even call its own Rule 30(b) representative to testify at trial. Perhaps that is because of the damaging nature of her testimony. Despite her absence, Ms. Ankrom was able to play the video of her testimony:

> Q. …Shouldn't the fact that you've recovered the merchandise factor into the decision of what to do next?
> A. Factor into the decision of what to do next?
> Q. Uh-huh.
> A. ***Regardless of whether we get the merchandise back or not, if the suspect attempts to flee or leave the facility, we act the same way.***
> Q. And how is that?
> A. Again, we attempt to verbally—within a few feet—try to get that person to come back into the facility with us. ***And if they do not comply—***
> Q. --let them go?
> A. ***--we let them go.*** JA 735-36.

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. JA 172, 650-51. But the unfortunate reality is that these policies were not followed. Despite their clarity, Newbanks and Daniel physically restrained Leist as he attempted to flee and, even though he was clearly agitated, proceeded to bring him back into the store. JA 628-29.

Not only was Wal-Mart negligent in failing to follow industry standards and its own policies by manhandling Leist when he attempted to flee, that negligence was compounded

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by escorting Leist back into the store. Leist was already agitated as a result of the physical altercation in the vestibule. Furthermore, Newbanks conceded that because Leist had already attempted to flee once, he was a higher flight risk--and, therefore, the risk of harm from yet another flight attempt was clearly foreseeable. JA 647. Nevertheless, they made a deliberate choice to return Leist to the inside of the store. The danger was compounded by the fact that their intention was to escort Leist "back to the [asset protection] office." As Daniel explained, that office is located in the rear of the Parkersburg store "so you have to go a ways back to it." JA 578-79. Thus, it was necessary for them to escort Leist the full length of the store.

Having made its choice, Wal-Mart bore the burden of taking the extra precautions necessary to prevent Leist from escaping their custody. The proper procedure, according to Wal-Mart itself, is "to have bookends" around the suspect--one on each side "with [a] hand interlaced around the [suspect's] bicep." This insures that the loss prevention personnel have adequate control. JA 225. Instead, Newbanks and Daniel adopted a totally "hands off" approach as they proceeded from the vestibule to the store interior. JA 223. Daniel may have placed a hand on Leist's arm. The video, however, is unclear in this regard.[4] If he did, that is the full extent of physical restraint that was used. All of this led inevitably to Leist fleeing from their custody:

> "[T]he moment that Mr. Leist ran, that's the culmination of everything else that took place beforehand. The way it was stopped, the number of people, the struggle, and then they take a very relaxed atmosphere with it. That's why he was able to run." JA 232.

[4]The video depicting Wal-Mart personnel escorting Leist back into the store is marked as JA 47 (Groc Inside 4:00:38).

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Wal-Mart accuses Ms. Ankrom of changing legal theories, resulting in what it says was "a moving target throughout the litigation."[5] Petitioner's Brief, at 10. But the plaintiff pled a single claim in the complaint—i.e., a claim of negligence. Notably, the claim is not cast in terms of a "chase." Instead, the plaintiff alleges that Wal-Mart personnel were "pursu[ing]" Leist as a suspected shoplifter. JA 8 *et seq*. The plaintiff did, in fact, introduce evidence that Wal-Mart personnel were giving chase, including testimony from Ms. Ankrom. JA 383.[6] Wal-Mart's customer service manager also testified that personnel at the store "run" after shoplifters and have been instructed to do so. JA 161. Importantly, however, Ms. Ankrom's ability to prove the movements of loss prevention personnel on the day in question was hampered by the fact that Wal-Mart spoliated evidence by failing to preserve video from all cameras that would have captured their movements. Despite this, Wal-Mart did produce video that clearly depicted the encounter with Leist in the store's vestibule area. Because the Rule 30(b) witness testified that Wal-Mart policy required loss prevention personnel to let a fleeing shoplifter go, and because the video clearly showed they violated the policy, that became the plaintiff's focus.

Having summarized Wal-Mart's breach of its own policy and applicable industry standards, we turn our attention to Leist's collision with Ms. Ankrom.

C. Ms. Ankrom's Being Thrown To The Ground And Her Resulting Injuries

Respondent, Johna Diane Ankrom, was a 49 years old mother and grandmother when, on February 23, 2015, she accompanied her daughter, Sierra, and two of her

[5]It is worth mentioning that Wal-Mart's own theory of the case was also subject to change. Wal-Mart pled in its answer that Ms. Ankrom was guilty of comparative negligence, JA 14-15, and it pursued that claim throughout the course of discovery. However, it finally abandoned the claim at trial.

[6]Wal-Mart personnel are also seen chasing Leist into the vestibule in one of the surveillance videos. JA 47 (Groc Inside 4:00:07).

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grandchildren, Annalise (Annie) and Elijah, to Wal-Mart to fill prescriptions. While Sierra took her older child, Elijah, to the pharmacy, Ms. Ankrom took two-year-old Annie to the front aisle of the store where they waited and shopped for candy. At the time, Annie was laying down in the shopping cart. JA 380-81.

Ms. Ankrom testified that she saw one of Wal-Mart's loss prevention employees, Nate Newbanks, "jogging" toward the front of the store like "he was on a mission." Within seconds a young boy came running down the aisle and "blasted into [her] shopping cart." JA 383. Her knee buckled and she was thrown to the floor. As she fell, she lost control of the cart causing Annie to fly out. JA 383-85. The cart itself fell on top of Ms. Ankrom and pinned her abdomen and her legs. JA 386. All of this was captured by Wal-Mart's surveillance videos. JA 47 (Candywall 4:00:48).

Unfortunately, Ms. Ankrom suffered serious and permanent injuries, many of them life-altering. Immediately, she experienced a severe angina attack. The pain was "excruciating," her breathing was labored, and overall it "felt like an elephant was sitting on my chest." JA 389-90. She was treated at the scene and then taken by ambulance to Camden Clark Memorial Hospital in Parkersburg. JA 392. During the next two weeks, she "kept getting worse and worse, the pain...kept getting worse, it was just a nightmare." Eventually, she was life-flighted to Cleveland Clinic. JA 393-94.

Dr. William McGee testified that Ms. Ankrom's condition at that time was urgent and life-threatening. JA 322-23. After arriving at Cleveland Clinic, she underwent emergency surgery that disclosed the presence of three areas of bruising, necrosis, and microperforations in the small intestine, all of which were directly caused by the incident at Wal-Mart. JA 324-25. Her medical course after being discharged from Cleveland Clinic

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was described as a "nightmare," including multiple ER visits, over 20 hospitalizations, and six or seven additional surgeries. JA 329-30.

Since her initial surgery at Cleveland Clinic, Ms. Ankrom has been unable to eat any solid foods without vomiting and it is impossible for her to have a normal bowel movement. Tr. 399-400. The capacity of her stomach has been reduced to 15 cc's, i.e., a single tablespoon. JA 334. Presently, she is on total parenteral nutrition (TPN)—a method of feeding using intravenous fluids to bypass the gastrointestinal tract. JA 403. Because of damage that was done to Ms. Ankrom's bowel, she was also required to undergo an ileostomy, a procedure in which a part of the small intestine is pulled through a hole in the abdomen to redirect waste from the body. Waste is then collected in a small bag, which has to be emptied manually up to 40 times a day. JA 338-40, 343. Ms. Ankrom described the ileostomy as a "big..., round, red blob" that was a constant source of discomfort and embarrassment. JA 406-07.

Unfortunately, the injuries Ms. Ankrom suffered are permanent in nature. It is possible she could have an intestinal transplant in the future, but the procedure is rarely done, it comes with significant risks and, in any event, younger patients would be given priority. JA 344-46. Without a transplant, her condition will be permanent, requiring ongoing care, and she will most likely suffer from future infections, bowel obstructions, and other complications. JA 347-49.

The testimony of Ms. Ankrom's medical expert, life planner, and economist were largely uncontested by Wal-Mart. Past medical expenses were over $2.7 million. JA 350. With a life expectancy of over 30 years, JA 463, the amount required for Ms. Ankrom's future health care would range from $2.9 million to $3.7 million—depending on whether

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she would qualify for a transplant. JA 472. Accordingly, the economic damages alone exceeded $6.4 million. To repeat: Wal-Mart did not contest Ms. Ankrom's injuries, medical bills, or future health care.

D. The Lawsuit

Ms. Ankrom sued Wal-Mart in the Circuit Court of Wood County, alleging that it was negligent in apprehending and detaining Leist. Wal-Mart, in turn, filed a third-party complaint joining Leist. The case was tried to a jury in February, 2019. The jury found that both Wal-Mart and Leist were negligent, and the percentage of negligence attributable to Wal-Mart was 30%. Because of the severe nature of Ms. Ankrom's injuries, the jury assessed damages in the amount of $16,922,000. JA 929. The court entered judgment on April 12, 2019, including prejudgment interest on Ms. Ankrom's past medical expenses running "from the date on which the plaintiff's claim for relief accrued, i.e., February 23, 2015." Ms. Ankrom argued that pursuant to the version of W.Va. Code 55-7-24 applicable to this case, Leist was not a "defendant" and, therefore, there was no basis for entering judgment for anything less than the full amount of the jury's verdict. Additionally, Wal-Mart only sought contribution from Leist in its third-party pleading against him, and at no point in its pleading did it ask that judgment be apportioned according to fault. The court, however, entered judgment against Wal-Mart in the amount of $5,076,600, representing 30% of the verdict. JA 932.

Wal-Mart filed posttrial motions on April 25, 2019, raising the same legal issues that are now being assigned as error in this appeal. At no time did Wal-Mart challenge the amount of the verdict or assert any claim of error relating to the damages Ms. Ankrom suffered. The motions were fully briefed and argued on June 24. The court indicated at the hearing that the motions would be denied, and a formal order setting forth the court's rulings

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was entered on June 28, 2019. JA 982. The court entered an amended order denying the motions on July 2, after which Wal-Mart filed this appeal. JA 987. Ms. Ankrom is also filing a cross appeal, pursuant to Rule 10(f) of the Rules of Appellate Procedure, challenging the court's reduction of the verdict under W.Va. Code 55-7-24.

IV. Summary of Argument

Response to Assignment of Error No. 1:

Because the plaintiff offered substantial proof that Wal-Mart violated industry standards and its own policies in its handling of the shoplifter, Leist, including admissions by Wal-Mart's Rule 30(b) witness and others, the trial court correctly ruled that a jury question was presented regarding liability.

From the start, Wal-Mart deviated from its safety policy by not putting people first. First, the loss prevention associates escalated the anxiety of a shoplifter they were attempting to apprehend by running in the store and jumping in front of him. That conduct certainly did not put the customer first or create an environment of peacefulness before they attempted to apprehend the shoplifter. The mandate from the safety policy requires loss prevention employees to act calmly. There is a reason that Walmart's safety policy mandates calm behavior. Wal-Mart's loss prevention employees created an environment that is the exact opposite of what its safety policy mandated. Instead of calm, they created a torrent of chaos. The chaos is clearly visible in the video footage of the vestibule and clearly depicted in the reactions of customers who are coming and going during the process of confronting and apprehending the shoplifter.

Wal-Mart's employee witnesses testified in deposition, and again at trial after watching Wal-Mart's videos depicting the encounter, that its loss prevention employees

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violated Wal-Mart's AP-09 safety manual, including the command to "Put People First," and should not have physically restrained Leist in the manner portrayed in the videos—especially after he delivered the gloves so quickly and without incident. It was also clear from the testimony of multiple Wal-Mart witnesses that if they had let him go in accordance with policy, Ms. Ankrom would never have been injured. Worse yet, after agitating him with a physical altercation, they forced Leist to return to the interior of the store—which predictably caused a clearly foreseeable risk of harm. Notably, Wal-Mart's employees readily admitted their violations in deposition, but at trial plaintiff's counsel was forced to impeach them with their prior testimony.

Thus, this case is not unlike *Ward v. West,* 191 W.Va. 366, 445 S.E.2d 753 (1994). Where a shopkeeper violates its own policies or industry standards, it is liable for any injuries caused by a fleeing shoplifter. Furthermore, under West Virginia law, and case law from other jurisdictions, liability can arise where the shopkeeper acts in a way that increases the risk of harm. Here, the jury was presented with testimony from Wal-Mart witnesses, including its Rule 30(b) representative, managers, and the loss prevention personnel who apprehended Leist. Perhaps more importantly, the jury had an opportunity to watch the videos of the encounter repeatedly and specifically asked to view the vestibule footage again during its deliberations. Clearly, the jury fully and carefully considered the evidence, and concluded therefrom that Wal-Mart was guilty of negligence proximately causing Ms. Ankrom's injuries.

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Response to Assignment of Error No. 2:

The jury was properly instructed on the issue of proximate cause: Wal-Mart's intervening cause instruction was inapplicable to the facts and conflicted with its joint negligence instruction, which was given by the court.

As the circuit court ruled, an instruction on intervening cause was not proper and would have been confusing for the jury. "An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." *Lester v. Rose*, 147 W. Va. 575, 130 S.E.2d 80 (1963). Furthermore, as this Court held in *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990), intervening cause is not available as a defense where the acts of a third party are foreseeable: "A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct." See also *Hairston v. Alexander Tank and Equipment Co.*, 310 N.C. 227, 311 S.E.2d 559, 567 (1984).

In this case, the conduct of Wal-Mart and its loss prevention employees was inextricably intertwined with the Leist's conduct. When Wal-Mart deviated from the conduct mandated by AP-09, it set the stage for a foreseeable risk to customers inside of the store. Because of those blatant departures from AP-09, and improper motives for doing the same, injury to a customer like Ms. Ankrom was clearly foreseeable. That is why Wal-Mart adopted the rules in the first place and why there was an emphasis on promoting conduct that "Put[s] People First".

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Contrary to Wal-Mart's arguments, Ms. Ankrom was not injured as a result of unforeseeable criminal conduct. Leist's criminal conduct was limited to the act of taking the merchandise from Wal-Mart. When asked, he returned the merchandise and there were no issues with Leist until Wal-Mart escalated his level of agitation by physically engaging him to get him inside of the store to be processed.

Response to Assignment of Error No. 3:

The trial court correctly ruled that the allegations in the plaintiff's complaint were not admissible for any purpose, including impeachment.

Although Wal-Mart complains that it was prevented from using allegations contained in the plaintiff's complaint against witnesses at the trial of this matter, the circuit court was correct in its ruling. First and foremost, allegations in a complaint are not verified and do not constitute statements by a party. Instead, a complaint is simply a legal pleading prepared by an attorney. At most, any statements in the complaint could have been used against Ms. Ankrom, who was the only plaintiff. But Wal-Mart chose not to cross examine Ms. Ankrom regarding the complaint and its allegations. Furthermore, Wal-Mart was not in any way prevented from presenting its theory of the case and did, in fact, argue that Ms. Ankrom changed her focus during the course of litigation. Wal-Mart also used the videos of the incident while cross examining Ms. Ankrom, asking if the videos revealed any Wal-Mart employees giving chase. Consequently, the court did not err by ruling that the complaint's allegations were not admissible.

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Response to Assignment of Error No. 4:

By awarding prejudgment interest based on the full amount of medical bills, the trial court followed *Grove v. Myers,* 181 W.Va. 342, 382 S.E.2d 536 (1989) and acted within the discretion authorized by W.Va. Code 56-6-31.

Wal-Mart argues that Ms. Ankrom was not entitled to prejudgment interest because she was receiving disability at the time of the injury and, therefore, was not personally liable for the resulting medical bills.

Prejudgment interest is governed by W.Va. Code 56-6-31. According to *Grove v. Myers,* 181 W.Va. 342, 350, 382 S.E.2d 536 (1989), any award of prejudgment interest lies within the court's sound discretion. Furthermore, *Grove* states that the right to prejudgment interest is unaffected by collateral sources. Therefore, prejudgment interest may be recovered for medical bills "whether [they] have been paid by a public assistance agency, an insurance carrier, an employer—or whether they have not been paid at all." The trial court correctly followed *Groves.*

V. Statement Regarding Oral Argument and Decision

Respondent believes the issues presented by Petitioner's appeal do not raise any new questions of law or otherwise warrant consideration under App.R. 20. Because the trial court acted appropriately in its trial and posttrial rulings, Respondent urges this Court to dispose of the appeal by memorandum decision under App.R. 21 or, alternatively, by scheduling argument under App.R. 19.

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VI. Argument

Response to Assignment of Error No. 1:

Because the plaintiff offered substantial proof that Wal-Mart violated industry standards and its own policies in its handling of the shoplifter, Leist, including admissions by Wal-Mart's Rule 30(b) witness and others, the trial court correctly ruled that a jury question was presented regarding liability.

For its first assignment of error, Wal-Mart argues that the trial court erred by denying its Rule 50(b) motion. Even though the standard of review is *de novo*, this Court stressed in *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009) that its role is limited to determining whether the verdict below could have been returned by "a reasonable trier of fact" after giving the prevailing party the benefit of all conflicts in the evidence and all inferences to be drawn therefrom:

> 1. The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure [1998] is de novo.
>
> 2. When this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the West Virginia Rules of Civil Procedure [1998], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party.
>
> 3. "In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from

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> the facts proved." Syllabus Point 5, Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983).

With that standard in mind, it is clear that the trial court correctly denied Wal-Mart's motion under Rule 50.

Wal-Mart begins by erroneously asserting that its apprehension of Leist "was performed in accordance with West Virginia law and Wal-Mart policy." Petitioner's Brief, at 12. From this erroneous premise, it reaches an equally erroneous conclusion--i.e., that Leist's escape within the store was entirely "unforeseen" and, therefore, it is shielded from liability by *Ward v. West,* 191 W.Va. 366, 445 S.E.2d 753 (1994) and other, similar cases. Petitioner's Brief, at 16. In reality, Wal-Mart violated applicable industry standards and its own policies by escalating the situation, forcibly detaining Leist after he attempted to flee the vestibule, and then returning Leist to the inside of the store. Under these facts, West Virginia law, including *Ward,* together with case law from around the country, clearly establishes Wal-Mart's negligence.

It is important to repeat the standard that applied to all Wal-Mart personnel throughout their encounter with Leist. The industry standard requires that if a shoplifter attempts to flee, loss prevention personnel ***must not engage in any pursuit***. Note that the standard is phrased in terms of ***fleeing*** and not violence. Wal-Mart devotes quite a bit of effort to suggesting that Leist "does not appear violent on the surveillance video." Petitioner's Brief, at 16. Not only is this debunked by viewing the video, it is also a misinterpretation of Wal-Mart's policies. Importantly, the Rule 30(b) witness produced by Wal-Mart (and, thus, designated to be its representative to give testimony on behalf of the company) testified clearly and emphatically regarding Wal-Mart's policy whenever "the suspect ***attempts to flee or leave*** the facility." In those situations, loss prevention personnel

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are to attempt "verbally" to have the subject come back into the facility. If, however, "they do not comply...we let them go." JA 735-36. Other witnesses, including Wal-Mart's store manager, confirmed this was the policy. JA 502.

Clearly, then, the policy is not in any way tied to a suspect's violence. Instead, the requirement to "let them go" is triggered by nothing more than "the suspect attempt[ing] to flee or leave the facility." Under our Rules of Civil Procedure, a witness designated under Rule 30(b) is duty bound to give "knowledgeable, complete and ***binding*** answers on behalf of the corporation." *State ex rel. United Health Care Hospital Corp. v. Bedell,* 199 W.Va. 316, 333, 484 S.E.2d 199 (1997). Therefore, Wal-Mart is bound by this admission and cannot escape it by reinterpreting its policy after the fact.

In its misguided attempt to show that the encounter was nonviolent, Wal-Mart fails to accurately describe the events in the vestibule--even as related by its own witnesses. Thus, it is necessary to review how Wal-Mart's witnesses actually testified. Like most of Wal-Mart's employees, Joseph Daniel downplayed the events during his direct examination. However, he did acknowledge that Leist was "try[ing] to go through us," JA 588, and that he was clearly "attempt[ing] to avoid apprehension." On cross, Daniel also conceded that he and his fellow employee, Nathan Newbanks, "persisted in trying to take [Leist] back into the store." JA 628-29.

Newbanks admitted during direct examination that Leist "tried to get around us" and that a "little struggle" ensued. JA 635. However, his cross examination highlighted the physicality of that encounter. To begin with, Newbanks and the other Wal-Mart personnel "had [Leist] surrounded" in the vestibule. JA 643. Rather than avoiding a conflict, Daniel heightened the tension of the situation by reaching out and "grabbing" Leist by the arm. At

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that point, Leist "tried to break free and get away." The two men kept Leist from leaving the facility by "grabbing his jacket." Leist "put up a struggle," but he could not escape because they "were still restraining him." JA 644. After impeaching Newbanks with his prior testimony, he admitted that there was a danger Leist would flee again because he had already attempted to flee in the vestibule. JA 647.

Even the liability expert retained by Wal-Mart acknowledged the physical nature of the altercation. During direct examination, the expert, William Birks referred to the incident as mere "resistance" on Leist's part. JA 731. When pressed during cross examination, he conceded that Leist's resistance, in fact, led to a "scuffle" between Leist and loss prevention personnel. JA 733.

Try as it might, Wal-Mart cannot avoid the fact that Leist attempted multiple times to leave the facility. Contrary to industry standards and its own policies, Wal-Mart loss prevention personnel restrained Leist and engaged in a physical altercation, eventually compelling Leist to return to the store interior.

Having escalated the situation, and having knowledge that Leist already had attempted to flee while in the vestibule, there is simply nothing to support Wal-Mart's assertion that Leist's escape from custody inside the store was "unforeseen." Petitioner's Brief, at 16 *et seq*. Again, this is contradicted by Wal-Mart's own witnesses. Wal-Mart's manager, Amy Edgar, testified that bringing a shoplifter back into the store against his will creates a flight risk: "If they feel the need to run, yes, they will run." Indeed, she confirmed that injury to a customer was clearly foreseeable under those circumstances. JA 167-68. Newbanks also testified there was a danger that Leist would flee inside the store "because he had already tried once." JA 647. Ms. Ankrom's expert also confirmed that Leist's escape

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was the natural "culmination" of all the violations committed by Wal-Mart's loss prevention personnel during the encounter.

Thus, the facts of this case are markedly different from those in *Ward v. West,* 191 W.Va. 366, 445 S.E.2d 753 (1994). The defendant, West, was detained for shoplifting by security guards at a Sears retail store. It was undisputed that West was compliant with the guards, both at the time he was detained and as he was being escorted inside the store. There was no proof that West was a flight risk and, in fact, affidavits from the security guards confirmed that he gave "no indication that he might try to flee." Suddenly and without warning, he bolted free and began running away. The guards gave chase and West collided with the plaintiff, Ward, who was shopping inside the store. Quoting the trial court with approval, this Court observed:

> "At no time prior to the attempted flight did Ms. Taylor and Mr. Jones expect Mr. West to make an attempt to flee and...Sears and its employees had no duty to take extraordinary safety measures since they could not have reasonably anticipated violence on the part of the suspected shoplifter." 191 W.Va. at 368, 445 S.E.2d at 755.

Contrary, then, to the thrust of Wal-Mart's argument, a reversal of the jury's verdict is certainly not warranted by *Ward. Ward* was strictly a case involving allegations that the security guards were chasing a shoplifter. Even on the strength of those facts, this Court found that an issue of fact existed for the jury to decide whether, or not, the Sears loss prevention personnel were acting appropriately. In the present case, we have conflicting proof regarding the chase within the Wal-Mart store--which, standing alone, is enough to support the verdict that was returned in Ms. Ankrom's favor. But beyond that, we have additional and undisputed proof that Wal-Mart knew the shoplifter, Leist, was a flight risk and that his escape inside the store was foreseeable.

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Ward clearly envisioned a set of facts where the store owner could have "reasonably anticipated violence" on the shoplifter's part, i.e., an escape from custody, giving rise to a duty to take additional safety measures. In other words, under *Ward*, knowledge by the owner that the shoplifter's escape is reasonably foreseeable under the circumstances fundamentally alters the legal analysis. Where the owner knows or should know that the shoplifter is a flight risk, ***the owner must take all steps that may be reasonable and necessary to prevent his flight and any resulting injury***.

That is exactly the set of facts presented here. There was testimony presented at trial that Wal-Mart personnel were running in the store, which served to agitate Leist. But the primary focus was the conduct of Wal-Mart's personnel before and during the apprehension. By arriving in force and essentially surrounding Leist, they escalated an already tense situation. Worse yet, they refused to let Leist flee the premises--as Wal-Mart policy dictated--and, instead, purposefully engaged in a physical altercation with Leist in which he was forcibly subdued. Instead of permitting him to leave or detaining Leist in the vestibule or some other safe location, Wal-Mart then made a conscious, deliberate choice to reenter the store and escort Leist to the office in the rear of the store. Having made its choice, Wal-Mart was dutybound to prevent Leist from escaping or otherwise causing harm to others. Given the events that transpired in the vestibule, Wal-Mart was on notice of increased risk to customers; yet again, however, Wal-Mart failed to follow industry standards, which required their personnel to "bookend" Leist and secure him by the arm. Because of these multiple violations, Leist did what was entirely foreseeable under the circumstances: he fled. Before he fled, Leist may have begun as the peaceful shoplifter described in *Ward*, but by the time that Daniel and Newbanks physically engaged him, it was quite obvious that

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Leist's demeanor had changed and that he was not only a flight risk, he was a risk to the safety of other shoppers by his mere presence in the store.

As mentioned earlier, the foreseeability of Leist fleeing after being returned to the interior of the store was confirmed repeatedly by Wal-Mart's own witnesses. Wal-Mart's customer service manager, Amy Edgar, acknowledged the risk of "get[ting] a shoplifter back inside the store who doesn't want to be inside," stating that "if they feel the need to run, yes, they will run." JA 167. In addition, she observed Leist "resist[ing]" apprehension "on more than one occasion" during the encounter in the vestibule and Wal-Mart personnel "wrestling" Leist back toward the store. JA 175. The manager of the Parkersburg store, James Kevin Ohse, also testified that it was foreseeable "a customer would get hurt" if Wal-Mart's apprehension policy, AP-09, "was not followed." JA 493. Admissions were also obtained from the loss prevention personnel themselves. Joseph Daniel conceded Leist "attempted to flee" while in the vestibule area of the store, but that he and Nathan Newbanks "persisted" in bringing Leist back into the store. JA 628-29. For his part, Newbanks admitted "there was a danger that [Leist] was going to flee" because of his attempted escape in the vestibule. Beyond that, he also admitted that "combative" shoplifters posed a threat of injury to others, including shoppers. JA 647-48.

Because Wal-Mart, through its managers, agents, and employees, had knowledge that Leist was a flight risk, and because his escape inside the store was clearly foreseeable, *Ward* recognizes that Wal-Mart owed a duty to take reasonable steps to prevent Leist from escaping and causing injury.

Not only was this kind of factual scenario anticipated by *Ward* itself, it was also anticipated by *Scott v. Taco Bell Corp.,* 892 F.Supp. 142 (S.D. W.Va. 1995). The plaintiff

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in *Scott* received injuries when a fellow customer became angry and assaulted him. The court granted summary judgment to the defendant, Taco Bell, finding under the circumstances that it had no reason to foresee the customer's assault. However, the court also pointed out an exception to this rule: "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." 892 F.Supp. at 145.

Of course, this is really nothing new in West Virginia law. The same basic principle was adopted in *Robertson v. LeMaster,* 171 W.Va. 607, 301 S.E.2d 563 (1983). The defendant in *Robertson* was compelled by this employer to work continuously for 27 hours and then drive home by himself. The defendant fell asleep at the wheel, crashing into the plaintiff's car. The plaintiff sued the defendant and his employer, alleging that the employer was negligent in requiring the defendant to work long hours, without rest, and then failing to provide transportation for his drive home. This Court held in syllabus point 2: "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."

Robertson has been consistently reaffirmed and followed. See, e.g., *Brammer v. Taylor*, 175 W.Va. 728, 338 S.E.2d 207 (1985); *Price v. Halstead*, 177 W.Va. 592, 355 S.E.2d 380 (1987); *Courtney v. Courtney*, 186 W.Va. 597, 413 S.E.2d 418 (1991). Courts around the country have applied a *Robertson*-type analysis to cases involving shoplifters finding that where, as here, the store has acted in a way that increases the risk of harm, it is liable for injuries caused by a shoplifter's flight.

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Interestingly, Wal-Mart cites two of these cases in its brief, but then casually dismisses them. *Columbo v. Wal-Mart Stores, Inc.,* 303 Ill. App.3d 932, 709 N.E.2d 301 (1999); *Raburn v. Wal-Mart Stores, Inc.,* 776 So. 2d 137 (Ala. App. 2000). According to Wal-Mart, these cases "provide examples of the factually specific nature of cases involving fleeing shoplifters." Petitioner's Brief, at 29. Exactly so! By this admission, Wal-Mart undercuts its entire argument. Wal-Mart would have us believe that *Ward* establishes a hard-and-fast rule of nonliability. But cases like *Columbo* and *Raburn*--both of which, coincidentally, were brought against Wal-Mart--show us that every case turns on its own unique facts. Where a store violates industry standards or otherwise assumes a duty of care by creating a risk of harm in its dealings with a shoplifter, ***there is liability***.

This is borne out by the case law. In *Columbo,* a shoplifter at a Wal-Mart was detained outside of the store, but was then escorted back into the store for additional questioning or to wait for police. Once inside the store, the shoplifter fled and collided with a customer. The trial court dismissed the case, claiming that Wal-Mart was not under any legal duty. The appellate court reversed:

> "In the present case, the shoplifter was detained and was under the control of Wal-Mart security. Security personnel brought the suspect back into the store, where he broke free and ran. There is no "to chase or not to chase" issue involved in this case. There was little or no chance that the suspect would injure a customer outside the store. ***When security brought the suspect back into the store, the likelihood of injury to Wal-Mart customers increased.*** To hold that security personnel who detain a suspect and escort the suspect back into the store have a duty to protect their customers from that suspect does not encourage shoplifting or burden the retailer. It is readily apparent, as noted in *Brown,* that a shoplifting suspect will flee. It is equally foreseeable that the same fleeing suspect will run into a customer. We, therefore, hold that, ***once security personnel undertook the duty of detaining the suspect and escorting him back into the store, they were***

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> ***under a duty to use reasonable care in carrying out that process***." *Columbo*, 303 Ill. App.3d at 934, 709 N.E.2d at 303.

Similarly, in *Raburn,* a loss prevention associate, acting alone, detained two shoplifters in the front of a Wal-Mart store. The associate then directed the shoplifters to follow him to an office in the rear. With the shoplifters walking behind the associate, one of them "turned away and bolted toward the doors at the front of the store." The shoplifter ran into the plaintiff, Raburn, causing serious injuries. The plaintiff sued, alleging that the loss prevention associate had violated Wal-Mart policies and otherwise acted negligently.

Raburn began by observing that "Alabama law recognizes the principle that liability to third parties can result from the negligent performance of a voluntary undertaking... [O]ne who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care." Next, the court reviewed Wal-Mart policies, noting that shoplifters had to be detained by at least two loss prevention personnel. In addition, the shoplifter was to be escorted by at least two Wal-Mart personnel, one of whom was required to follow behind to provide additional security. Thus, the record demonstrated multiple violations of the applicable standard of care.

The appellate court concluded:

> "Although he had no initial duty to protect Raburn against the criminal act of the shoplifter or to apprehend the shoplifters, ***once White, acting in the line and scope of his employment with Wal-Mart, voluntarily assumed the duty of apprehending the two shoplifters, any negligence or wantonness in White's discharge of that duty is imputed to Wal-Mart*** under the doctrine of respondeat superior." *Raburn*, 776 So. 2d at 140.

Other courts have applied a similar analysis. For example, in *Bolden v. Winn Dixie,* 513 So. 2d 341 (La. App. 1987), a suspected shoplifter was taken into custody and detained

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in the rear of store. By their own admission, the employees who were guarding the shoplifter "turned away." Taking advantage of their lapse, the shoplifter bolted and collided with a customer, Willie Joe Bolden. Bolden sued and recovered a judgment against the store for its negligence. The appellate court affirmed, stating:

> ***"Once Winn Dixie employees undertook the duty of guarding the shoplifter they were bound to exercise reasonable care in carrying out that duty.*** There is no evidence in the record to support a conclusion that the shoplifter was especially cooperative and tame. Furthermore, although the shoplifter did not resist when he was detained, it is clearly foreseeable that a person detained for willful criminal conduct will attempt to escape by running away if given the opportunity to do so. ***Relaxing one's guard and looking away while one is guarding a criminal under these circumstances is not reasonable."***

Under similar facts, the appellate court in North Carolina also affirmed a judgment against a retail store in a case involving a fleeing shoplifter. *Jones v. Lyon Stores, d/b/a Peace Street Open Air Market,* 82 N.C. App. 438, 346 S.E.2d 303 (1986). Employees in *Jones* detained a shoplifter in the front of the store. Consistent with store policy, the exit door was locked to prevent his escape. However, the entrance door remained open. When the plaintiff, Jones, opened the door to enter the store, the shoplifter ran through the door and knocked Jones to the ground. Jones sued, alleging that the store's actions were negligent. The trial court granted summary judgment for the store. Reversing, the appellate court phrased the issue as follows:

> "[U]nder the circumstances was injury to someone more likely to occur if the suspect could only exit through the "In" door?" An act is negligent if the actor intentionally creates a situation which he knows, or should realize is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another.
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> ***

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> [I]n our view, ***the facts herein require the question of foreseeability of harm to plaintiff, which could have been prevented by the exercise of ordinary care, to be answered by a jury***." *Jones*, 82 N.C. App. at 440-41, 346 S.E.2d 304-05.

We see the same kind of analysis in *Brock v. Winn Dixie,* 617 So.2d 1234 (La. App. 1993). The shoplifter in *Brock* was a 17 year old boy. The manager who first observed the boy "hollered" to another employee to "go up front." This alerted other employees to the presence of a shoplifter, and a large number of them began moving through the aisles toward the front of the store. The boy surrendered the stolen items, but then ran, after which the employees began to give chase. The plaintiff, Brock, was injured when she was struck by the fleeing suspect.

Brock had no hesitation recognizing a duty of care on the store's part: "When store owners undertake to exercise their 'police-like' authority to detain shoplifters, they must do so with reasonable caution to avoid placing patrons in foreseeable danger." 617 So.2d at 1237. Here, the manager of the store was required to approach and detain the boy "quietly without arousing [him], if possible." Unfortunately, the manger's actions--like the actions of Wal-Mart in our case--only served to "excite" the situation, making it reasonably foreseeable that the shoplifter would flee.

In *Reyes v. Dollar Tree Stores, Inc.,* 221 F.Supp.3d 817 (W.D. Tex. 2016), a federal court applied Texas law to a fleeing shoplifter case. The shoplifter took approximately $2 worth of candy. The store's loss prevention employee approached the shoplifter, prompting him to flee. The employee then followed in pursuit and a customer, Reyes, was knocked over and suffered injuries. Reyes sued Dollar Tree, which argued that the shoplifter's flight was unforeseeable; therefore, it owed no duty of care. However, the court noted that the store's policy only authorized detention where the merchandise taken exceeded $25 in value.

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"Whether employees violated store policy has proven to be an important fact for courts to consider" in determining whether a shoplifter's flight was foreseeable. 221 F.Supp.3d at 830. Because there was evidence that the store's detention policy had, in fact, been violated by its loss prevention employee, a jury question existed.

These cases, taken together, categorically reject Wal-Mart's view that the owner of a store cannot be held liable for damages caused by a fleeing shoplifter unless its employees are actively giving chase. To the contrary, two principles can be distilled from these cases--either one of which can impose liability.

First, a store owner is liable if it acts in way that violates industry standards or its own policies regarding shoplifter apprehensions. Here, the violation of Wal-Mart's policy was confirmed by the testimony of its Rule 30(b) witness and others, including its own loss prevention personnel. Furthermore, the videos produced by Wal-Mart clearly depicted the fracas in the vestibule. The jury watched the video multiple times, and specifically asked to watch the video again during its deliberations. Wal-Mart's refusal to let Leist leave the premises when he attempted to do so amounted to a violation of both industry standards and Wal-Mart policy.

Second, a store owner is liable if its acts create an increased risk of harm and the owner fails to reasonably protect against that harm. As we saw earlier, this is already syllabus law in West Virginia by virtue of the *Robertson* case. Here, Wal-Mart increased the risk of harm to Ms. Ankrom and others by (1) returning an already agitated Leist through the interior of the store where it was foreseeable that he would flee and injure its customers, and (2) relaxing its guard and failing to take appropriate steps to prevent Leist from escaping custody while being escorted through the store.

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Under *Fredeking*, this Court must give Ms. Ankrom, as the prevailing party, the benefit of all conflicts in the evidence and all inferences that can fairly be drawn from the evidence. Because the evidence was more than sufficient to support a verdict against Wal-Mart under either or both of the foregoing principles, the circuit court correctly denied Wal-Mart's motion for judgment as a matter of law under Rule 50(b). Accordingly, Wal-Mart's first assignment of error is without merit.

Response to Assignment of Error No. 2:

The jury was properly instructed on the issue of proximate cause: Wal-Mart's intervening cause instruction was inapplicable to the facts and conflicted with its joint negligence instruction, which was given by the court.

Next, Wal-Mart argues that it was error for the trial court to refuse its intervening cause instruction. Error involving the refusal to give a requested jury instruction is reviewed under an abuse-of-discretion standard. See, e.g., *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996). The trial court's discretion in drafting instructions is quite broad:

> "A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." Syl. Pt. 4, *State v. Guthrie,* 461 S.E.2d 163, 194 W.Va. 657 (1995).

The trial court's discretion is so broad, in fact, that it will be ***presumed*** the court acted appropriately in refusing an instruction: "Where...the error complained of involves a

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trial court's refusal to give a particular requested instruction, we 'will ... presume[ ] that [the] trial court acted correctly ... unless it appears from the record in the case ... that the instructions refused were correct and should have been given.'" *Kessel v. Leavitt*, 204 W.Va. 95, 144, 511 S.E.2d 720 (1998)(quoting *Coleman v. Sopher,* 201 W.Va. 588, 602, 499 S.E.2d 592, 606 (1997)).

According to Wal-Mart, Leist's conduct constituted "a new, independent act that occurred after any alleged negligence on the part of Wal-Mart." Thus, it argues that "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." Petitioner's Brief, at 30. But Wal-Mart is wrong for two reasons.

First, Wal-Mart completely ignores the fact that it also requested an instruction on the subject of joint negligence. Under this instruction, the jury was informed that if the negligent acts of two or more parties joined together, ***they are both at fault*** for the resulting injury and, more importantly, that "***the negligence of each party will be regarded as the proximate cause of the injury***." The court gave Wal-Mart's instruction exactly as it was proffered. JA 24, Tr. 719.

West Virginia law is clear: it is error for a court to give inconsistent jury instructions. This principle was set forth in *Burdette v. Maust Coal and Coke Co.,* 159 W.Va. 335, 343, 222 S.E.2d 293 (1976):

> ***"It 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 at law to follow, and inasmuch as it is impossible for a court later to determine upon what legal principle the verdict is founded. See also *State Road Commission v. Darrah*, 151 W.Va. 509, 153 S.E.2d 408

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(1967); *Quality Bedding Co. v. American Credit Indemnity Co.*, 150 W.Va. 352, 145 S.E.2d 468 (1965)."

Here, Wal-Mart specifically asked for an instruction explaining that parties whose negligent acts combine to produce a single injury are jointly liable--they are both at fault, and the negligence of both is deemed to be the proximate cause of the injury. Now, however, after a bad outcome, Wal-Mart complains that the court also should have given an instruction covering independent cause. *Burdette* will not let Wal-Mart have it both ways. Because the joint negligence instruction is inconsistent with the independent cause instruction, the court acted appropriately in refusing to give the latter.

In any event, there is simply no basis for giving an independent cause instruction under the facts presented. Under *Estate of Postlewait ex rel. Postlewait v. Ohio Valley Medical Center, Inc.*, 214 W.Va. 688, 591 S.E.2d 226 (2003), an independent cause can only be a "new, effective" cause that "operates independently of any other act." As this Court has observed, the question of whether a cause is independent and, therefore, the proper subject of an independent cause instruction, turns on the concept of foreseeability. Where the acts of a third party are foreseeable, an independent cause instruction cannot be given: "A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct." *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990); see also *Hairston v. Alexander Tank and Equipment Co.*, 310 N.C. 227, 311 S.E.2d 559, 567 (1984) (finding that "the test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury").

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Wal-Mart argues that Leist's flight was independent of its own negligence, but the facts clearly say otherwise. Wal-Mart improperly stopped Leist. Then its employees escalated an already dangerous situation by wrestling with him and forcing him to remain in the vestibule. Finally, it made a deliberate choice to return a demonstrably dangerous suspect to the inside of the store. Throughout this encounter, Leist was exclusively within Wal-Mart's custody and control.

Flight is a foreseeable risk of apprehending a shoplifter, which is why Wal-Mart--and the industry as a whole--has adopted policies dictating how shoplifters are to be detained, moved, and interrogated. Wal-Mart's personnel acknowledged this. See, e.g., JA 167 (Wal-Mart's customer service manager acknowledging the risk of "get[ting] a shoplifter back inside the store who doesn't want to be inside," and stating that "if they feel the need to run, yes, they will run"); JA 493 (the Parkersburg store manager testifying that it was foreseeable "a customer would get hurt" if Wal-Mart's apprehension policy, AP-09, "was not followed"). Here, of course, the risk of flight was even more foreseeable because Leist had already attempted to leave the facility—a fact conceded by Wal-Mart's own witnesses. See, e.g., JA 628-29 (Leist "attempted to flee" while in the vestibule area of the store, but Wal-Mart's loss prevention personnel "persisted" in bringing Leist back into the store); JA 647-48. ("there was a danger that [Leist] was going to flee" because he had already attempted to escape in the vestibule).

Therefore, the fact that Leist fled the custody of Wal-Mart's personnel is not in any sense a new, effective, or independent cause of Ms. Ankrom's injuries. As the trial court noted in its order: "The evidence presented as to the conduct of Leist and Wal-Mart security personnel while in the vestibule area...was sufficient to refuse an instruction on independent,

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intervening cause." JA 990-91. For this reason, too, the court correctly refused to give an independent cause instruction.

Response to Assignment of Error No. 3:

The trial court correctly ruled that the allegations in the plaintiff's complaint were not admissible for any purpose, including impeachment.

Wal-Mart's third assignment of error relates to the allegations contained in the plaintiff's complaint. Specifically, Wal-Mart sought to introduce allegations that its employees "chased" Leist inside the store--allegedly for purposes of testing the credibility of Ms. Ankrom and her daughter, Sierra Thomas.[7] Petitioner's Brief, at 34. The trial court correctly ruled that the allegations in the complaint had no probative value and were, therefore, inadmissible.

We begin with the standard of review. This Court recognizes that trial courts have broad discretion in making evidentiary rulings and, therefore, reviews those rulings under an abuse-of-discretion standard:

> "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence ... are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syllabus Point 1, in part, *McDougal v. McCammon,* 193 W.Va. 229, 455 S.E.2d 788 (1995).

Reviewing the trial court's rulings in light of that standard, those rulings clearly must be affirmed.

[7]As noted earlier, Respondent's Brief, at 9-10, the complaint does not allege that Wal-Mart's employees were "chasing" Leist, but only that he was being pursued by them as he was leaving the store—a fact that is undisputed by anyone.

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Allegations contained in a complaint are exactly that--i.e., allegations. Put another way, the allegations that are made by a party in a pleading have no independent probative value. See, e.g., *Pearson v. Pearson*, 200 W.Va. 139, 146, 488 S.E.2d 414 (1997)("Mere allegations standing alone without any proper proof or testimony cannot be considered as evidence by the family law master or circuit court."); *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329 (1995)("self-serving assertions without factual support in the record" have no force or effect). The complaint here was not even verified by Ms. Ankrom but was, instead, drafted by her attorneys to set forth the legal claims she was asserting. Because the complaint was not evidence, but was, instead, a formal pleading setting forth allegations on behalf of Ms. Ankrom, the court acted properly in precluding Wal-Mart from introducing it.

Even if Wal-Mart could somehow justify using the complaint to impeach the credibility of witnesses, its argument is still disingenuous. Wal-Mart was never interested in using the complaint for impeachment, and, in any event, it was able to address the alleged inconsistencies through other means.

Ms. Ankrom did not testify in person at trial. Her testimony was presented to the jury via video deposition, which was taken several weeks before the trial began. Tellingly, Wal-Mart never even attempted to impeach Ms. Ankrom with the complaint. It did, however, replay the videos of the incident and specifically asked Ms. Ankrom if they depicted any Wal-Mart personnel running inside the store before she was knocked to the ground. Tr. 371 et seq. Therefore, Wal-Mart's argument is self-defeating. Contrary to the arguments it is advancing through its appeal, Wal-Mart did, in fact, address what it alleged

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to be Respondent's "inconsistent theories regarding Wal-Mart's pursuit." Petitioner's Brief, at 35.[8]

Ms. Ankrom's daughter, Sierra, did testify at trial and was subject to a full cross examination. Importantly, however, Wal-Mart could not have impeached Sierra with the complaint because she is not a party to this litigation; therefore, any statements made in the complaint are not her statements. See, e.g., Rule 613 of the Rules of Evidence (limiting impeachment to situations involving "***the witness's*** prior statement"); F. Cleckley, *Handbook on Evidence For West Virginia Lawyers* §6-9(B)(1)("***A witness*** may be impeached by a showing with any competent evidence ***that s/he made*** a previous statement, oral or written, inconsistent with his or her in-court testimony"). The bottom line is that Wal-Mart was not attempting to test the credibility of Ms. Ankrom or her witnesses but was, instead, attempting to use the complaint ***as substantive evidence***. For this reason, the circuit court's *in limine* order correctly precluded Wal-Mart from introducing the complaint or its allegations.

Response to Assignment of Error No. 4:

By awarding prejudgment interest based on the full amount of medical bills, the trial court followed *Grove v. Myers*, 181 W.Va. 342, 382 S.E.2d 536 (1989) and acted within the discretion authorized by W.Va. Code 56-6-31.

In its fourth and final assignment of error, Wal-Mart alleges that the court erred by making an award of prejudgment interest.

Wal-Mart concedes, as it must, that an award of prejudgment interest under W.Va. 56-6-31 is "within the court's discretion." Petitioner's Brief, at 36. Accordingly, this Court

[8]In closing argument, WalMart's attorney argued this same point, stating that the allegations of a chase "seem[ed] to have gone away." JA 866-67.

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applies an abuse-of-discretion standard when reviewing the propriety of a trial court order awarding prejudgment interest:

> "In reviewing a circuit court's award of prejudgment interest, we usually apply an abuse of discretion standard." 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." *Gribben v. Kirk,* 195 W.Va. 488, 500, 466 S.E.2d 147, 159 (1995)

Wal-Mart has not made any showing that the trial court abused its discretion in making its award in this case. In fact, West Virginia law has always provided that "prejudgment interest on special or liquidated damages is calculated from the date on which the cause of action accrued, which in a personal injury action is, ordinarily, when the injury is inflicted." *Grove v. Myers,* 181 W.Va. 342, 349, 382 S.E.2d 536 (1989). Because that is exactly what the circuit court did, there is no error.

Wal-Mart's argument regarding prejudgment interest has been retooled throughout this litigation. Pointing to the fact that Ms. Ankrom was receiving disability benefits, Wal-Mart now argues that "[t]here was no evidence that Respondent paid for any of her past medical expenses from her own funds." Petitioner's Brief, at 37. According to Wal-Mart, prejudgment interest can only be awarded where medical bills have resulted in an "out of pocket impact on the plaintiff" or, alternatively, where the plaintiff is obligated to pay the bills at some future time. In other words, Wal-Mart is advocating a rule that bars a plaintiff from recovering prejudgment interest unless she can prove that she has paid or will pay medical bills "with her own funds." Petitioner's Brief, at 37.

However, this issue was specifically addressed and resolved by *Grove*. This Court in *Grove* recognized that "[i]njured plaintiffs should not have to forego the collateral source

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rule merely to recover prejudgment interest." Consequently, prejudgment interest is recoverable on "hospital and medical expenses, whether such expenses have been paid by a public assistance agency, an insurance carrier, an employer—or whether they have not been paid at all." 181 W.Va. at 350, 382 S.E.2d at 544 (quoting *Quinones v. Passaic Boys Club,* 183 N.J.Super. 531, 535, 444 A.2d 630 (Law Div.1982)). *Groves* was, and still is, the controlling law. Because the court followed the law, there were no grounds for granting any posttrial relief.

VII. Cross Assignment of Error

The trial court erred by failing to enter judgment against Wal-Mart for the full amount of the verdict and, instead, entering judgment for only 30% of the verdict, thereby misinterpreting and misapplying W.Va. Code §55-7-24.

The jury returned a verdict against Wal-Mart for $16,922,000, an amount reflecting the catastrophic nature of Ms. Ankrom's injuries. In addition, the jury apportioned 70% of the negligence to Leist and 30% to Wal-Mart. The parties submitted competing judgment orders. Ms. Ankrom insisted that the provisions of W.Va. Code §55-7-24 did not apply and that judgment should, therefore, be entered for the full amount of the verdict. However, the trial court applied W.Va. Code §55-7-24 and entered judgment for $5,076,600, representing 30% of the verdict. The court's refusal to enter judgment for the full amount of the verdict constitutes error.

We begin with the relevant statutory language. The 2005 version of W.Va. Code §55-7-24 reads, in relevant part:

> "(a) In any cause of action ***involving the tortious conduct of more than one defendant***, the trial court shall:
> (1) Instruct the jury to determine, or, if there is no jury, find, the total amount of damages sustained by the claimant and the proportionate fault of each of the parties in the litigation at the time the verdict is rendered; and

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> (2) Enter judgment against each ***defendant*** found to be liable on the basis of the rules of joint and several liability, except that if any ***defendant*** is thirty percent or less at fault, then that ***defendant's*** liability shall be several and not joint and he or she shall be liable only for the damages attributable to him or her, except as otherwise provided in this section."

The introductory language makes it clear that W.Va. Code §55-7-24 only applies in cases "involving the tortious conduct of more than one ***defendant***." It is undisputed that the shoplifter, Leist, was not a defendant. Instead, he was a ***third-party defendant*** who was joined under Rule 14 of the Rules of Civil Procedure for the enforcement of contribution rights. At no time did Ms. Ankrom assert a claim against Leist or seek recovery of damages from Leist.

The court below believed that W.Va. Code §55-7-24 represented a "profound, fundamental change...in our model or system of tort law...in which the doctrine of joint and several liability is not at the center but is, indeed, inapplicable." SA 8.[9] Without citing any supporting authority, it opined that "defendant" had a "hybrid meaning" that was "broader" in some contexts and "restrictive" in others. SA 8-9. If, however, the trial court had applied the rules of statutory construction mandated by this Court, it would have interpreted W.Va. Code §55-7-24 strictly, not broadly, and it would have entered judgment under traditional joint and several liability principles.

Because W.Va. Code §55-7-24 seeks to revise the common law rule of joint and several liability, we must briefly review the history of that rule. "This jurisdiction is committed to the concept of joint and several liability among joint tortfeasors. A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from

[9]Throughout this brief, "SA" will be used to refer to the supplemental appendix submitted by Respondent in connection with the cross appeal.

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whomever is able to pay, irrespective of their percentage of fault." Syl. Pt. 2, *Sitzes v. Anchor Motor Freight, Inc.,* 169 W.Va. 698, 289 S.E.2d 679 (1982). Simply put, the "aim" of joint and several liability was to "fully compensate[e] an injured party" by allowing damages to be collected from the wrongdoers as the injured party saw fit. *Strahin v. Clevenger,* 216 W.Va. 175, 188, 603 S.E.2d 197 (2004).

One of the cardinal rules of statutory interpretation is that "[s]tatutes in derogation of the common law are strictly construed." Syl. Pt. 1, *Kellar v. James,* 63 W.Va. 139, 59 S.E. 939 (1907). This Court explained in *Bank of Weston v. Thomas,* 75 W.Va. 321, 83 S.E. 985 (1914) that "[s]tatutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms." This same rule of strict construction was reaffirmed in Syl. Pt. 5, *Phillips v. Larry's Drive-In Pharmacy, Inc.,* 220 W.Va. 484, 647 S.E.2d 920 (2007): "Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the ***least*** rather than the most change in the common law." The trial court failed to cite or apply any of these principles.

Furthermore, "[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); see also *State ex rel. Riffle v. Ranson,* 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995)("*Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction."). Again, however, the trial court neglected to apply this interpretive principle in its analysis.

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Without availing itself of these most basic rules of interpretation, the trial court was left unguided and unchecked. If it had chosen to follow these rules as part of its analysis, the Legislature's intent would have been obvious: it made a deliberate choice to limit the scope of W.Va. Code §55-7-24 to "defendants." Under longstanding law, the Legislature's inclusion of "defendants" necessarily excludes any other types of parties, including third-party defendants. In fact, it was not until May 15, 2015--***after*** the plaintiff's injury--that the Legislature expanded the definition of "defendant" to include a third-party defendant like Leist.[10] At the time of Ms. Ankrom's injury, "defendant" meant exactly that--i.e., a defendant. Consequently, the apportionment provisions of W.Va. Code §55-7-24 do not apply where, as here, the plaintiff has sued only one defendant and judgment will be entered only against that defendant.

This is consistent with the rest of the statutory language and its purposes. W.Va. Code §55-7-24(a)(2) provides that judgment is to be entered "on the basis of the rules of joint and several liability." As noted above, the rule of joint and several liability is inseparably linked to the plaintiff's right to sue whomever he wishes and to collect his damages however he wishes: "This right of the plaintiff to sue one or more joint tortfeasors ***is a companion principle of the doctrine of joint and several liability***, which permits a plaintiff to recover the entire judgment from any joint judgment debtor." *Board of Education of McDowell County v. Zando, Martin and Milstead, Inc.*, 182 W.Va. 597, 603, 390 S.E.2d 796 (1990); see also *Modular Bldg. Consultants of West Virginia, Inc. v. Poerio*, 235 W.Va.

[10]The 2015 revisions were codified in W.Va. Code 55-7-13a *et seq.* According to 55-7-13b: "'Defendant' means, 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***."

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474, 774 S.E.2d 555 (2015)("the practical effect of West Virginia Code §55–7–24 concerns the *collectability* of a judgment by a plaintiff").

In this particular case, it was impossible to enter a judgment against Leist for his proportionate share, i.e., 70%. Because Ms. Ankrom did not assert a claim against Leist, it follows that she could not obtain a judgment against Leist. Consequently, Leist and Wal-Mart are not joint tortfeasors for purposes of W.Va. Code §55-7-24, and a joint and several judgment could not be entered against them. Accordingly, W.Va. Code §55-7-24 does not apply to this judgment, and the trial court's entry of judgment for less than the full amount of the verdict was clear error.

If Ms. Ankrom's judgment had predated W.Va. Code §55-7-24, there is no doubt that judgment would have been entered against Wal-Mart only without any reduction for any alleged negligence by Leist. Wal-Mart was, and is, the only party Mrs. Ankrom sued and the only party against whom she was seeking recovery. To justify a different result here, the burden lies with Wal-Mart to point to statutory language "clearly indicat[ing] that the Legislature was altering the common law rules. Wal-Mart cannot satisfy that burden. W.Va. Code §55-7-24 expressly directs the court to enter judgment according to the common law "rules of joint and several liability," and then recognizes only one exception--i.e., where "any ***defendant*** is 30% or less at fault." Again, the Legislature purposefully used the term "defendant." Under *Kellar, Thomas,* and *Phillips,* this Court cannot expand that term beyond its plain, ordinary meaning. Doing so would not only violate a well-settled rule of construction, but would also deprive Ms. Ankrom of the full compensation that joint and several liability was meant to afford.

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It was, of course, always within Wal-Mart's power to join Leist as a defendant via Rule 19, the indispensable party rule. Rule 19 authorizes the joinder of any party whose presence is required for "complete relief." If Wal-Mart wished to bring Leist into the litigation as a defendant for purposes of apportionment, joint and several liability, and contribution, then it was certainly free to do so. Having failed to exercise that power, it must now live with the consequences.

Not only did Wal-Mart fail to bring a Rule 19 motion to join Leist as a defendant, it did not even ask for an apportionment in its pleadings. The demand for judgment in its third party complaint only seeks three forms of relief against Leist: (1) judgment in Wal-Mart's favor, (2) a finding that Leist was "solely liable to the plaintiff" for her injuries, and (3) judgment against Leist "for contribution." SA 13. Wal-Mart did not ask the court to enter judgment according to the percentage of negligence apportioned by the jury under W.Va. Code §55-7-24. Instead, it asked only "for contribution." Therefore, the court should have entered judgment against Wal-Mart for the full amount of the verdict. At a time of its own choosing, Wal-Mart can pursue its claim for contribution against Leist--which is exactly the relief it prayed for.

For all these reasons, the trial court's order entering judgment against Wal-Mart for only 30% of the verdict amount is error. W.Va. Code §55-7-24 did not authorize the court to reduce the judgment. Instead, the court should have entered judgment against Wal-Mart for 100% of the verdict amount as required by West Virginia's common law of joint and several liability.

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VIII. Conclusion

None of the assignments of error asserted by Wal-Mart warrants reversal. The trial court correctly denied Wal-Mart's Rule 50(b) motion. Furthermore, Wal-Mart was not entitled to any other form of posttrial relief. The trial court did, however, err by applying W.Va. Code §55-7-24 and entering judgment for only 30% of the verdict amount. This Court should, therefore, reverse that portion of the judgment order and remand the case with directions enter judgment for 100% of the verdict amount.

Respectfully submitted,
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