

NO. 20-6325

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IN THE  
SUPREME COURT THE UNITED STATES

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KRYSTAL MEGAN DELIMA- PETITIONER

ORIGINAL

v.

WAL-MART STORES ARKANSAS, LLC. -- RESPONDENT(S)

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ON PETITION FOR A WRIT OF CERTIORARI TO  
UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

FILED MAY 06 2020 OFFICE OF THE CLERK SUPREME COURT, U.S.
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PETITION FOR WRIT OF CERTIORARI

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KRYSTAL MEGAN DELIMA, PETITIONER  
54985 COUNTY ROAD 586  
KANSAS, OKLAHOMA 74347  
CELL PHONE NO. (479)238-3566

RECEIVED SEP 23 2020 OFFICE OF THE CLERK SUPREME COURT, U.S.
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## QUESTION PRESENTED

A jury trial was conducted on the charges of Negligence and Premise Liability against the Respondent. During the trial, actions of misrepresentations, misconducts and a malfunctioning court reporter due to transcript being transcribed and prepared in violations to Judiciary Policy that resulted in incomplete and lacked of important details about facts which polluted the truth before jury deliberation. A complaint was filed to the Administrative Office of the United States Courts to address Petitioner's concerns of the malfunctions which compromised the validity and credibility of the transcripts. Another disturbance and misconduct, was respondent's failure to call its key witness, who was subpoenaed to appear to testify for reason of her knowledge of the spoliation of evidence and violation of the store policy when there is an incident. Other respondent's witness came very late and added more disturbances. Due to the irregularities, the proceeding did not achieve a court atmosphere and condition conducive to a fair trial wherein decision or judgment should be made under Due Process or fundamental fairness. But the court had denied on Petitioner's timely filed Motion for a New Trial, FRCP- Rule 59. *It is an application for a retrial of the facts of the case. Castellaw v. Blanchard, 106 Ga. 97 (31 SE 801); Buchanan v. James, 134 Ga. 475 (1) (68 SE (72)).* The Eight Circuit Court of Appeals also did not give the opportunity for Oral Argument, though requested on the beginning of the appeal and this case sit for almost one year unreviewed but finally decided a Per Curiam with Affirmation to Judgment. As a result of its unnecessary and improperly broad analysis, the trial court and Eight Circuit generated a fractured but precedential opinion that will cause confusion and inconsistencies for countless litigants in the future.

## QUESTIONS PRESENTED:

1. Whether a Motion for a New Trial, FRCP Rule 59, should had been granted?
2. Whether Jury's Verdict, went against Preponderance of Evidence due the Irregularities of the Proceeding wherein Substantial Evidences/ facts have been unfairly reviewed due to Miscarriage of Justice?
3. Whether the U.S. Supreme Court, conduct a thorough and fair examination and evaluation as the laws apply and review the damages and penalty in the justification this case. Amendment XIV, states that, "*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

## LIST OF PARTIES

KRYSTAL MEGAN DELIMA v. WAL-MART STORES ARKANSAS, LLC.

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Louis Sw. Ry. Co. v. Pennington, 261 Ark. 650, 662, 553 S.W.2d 436, 441 (1977)---

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
KRYSTAL MEGAN DELIMA, *Petitioner*,  
  
v.  
  
WAL-MART STORES ARKANSAS, LLC. , *Respondent*.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.



## OPINIONS BELOW

The Opinion of the United States Eight Circuit Court of Appeals-JUDGMENT, appears in Appendix A, and its reported Unpublished PER CURIAM opinion of the Court of Appeals on Appendix A1, ORDER appears in Appendix A2. The United States District Court of Western District of Arkansas, Fayetteville Division, JUDGMENT, appears in Appendix B, ORDER OF JURY VERDICT, appears in Appendix B1, OPINION AND ORDER, appears in B2, MEMORANDUM OPINION AND ORDER, appears in Appendix B3.

## JURISDICTION

The date on which the United States Court of Appeals decided my case was on

FEBRUARY 06, 2020. JUDGMENT appears on Appendix A.

FEBRUARY 06, 2020 PER CURIAM OPINION FILED - THE COURT: Bobby E. Shepherd, David R. Stras and Jonathan A. Kobes (UNPUBLISHED) [4878548] [19-1674] (CRJ) [Entered: 02/06/2020 08:23 AM]. Appear on Appendix -A1

MARCH 13, 2020- PETITION FOR HEARING AND ENBAC HEARING was Denied, appears on Appendix- A2

**The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).**

**Ark. Code Ann. § 16-56-105.** To read: “All actions founded on any obligation or liability not in writing, expressed or implied, shall be commenced within three (3) years after the cause of action accrues.”

**Ark. Code Ann. § 16-56-105.** To read: “This statute has been interpreted to include actions Ark. Code Ann. §§ 18-11-301 et seq. based on torts, including negligence, that are not otherwise covered by a specific statute of limitations. Shelter Ins. Co. v. Arnold, 57 Ark. App. 8, 12-13, 940 S.W.2d 505, 506-07 (1997).”

**Amendment XIV** –States that, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

#### **AMI 1104 - Duty Owed to Invitee-**

An owner owes no duty of care to keep premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure or activity on the premises to persons entering for recreational purposes without charge (admission fee) unless the owner maliciously (but not merely negligently) fails to guard or warn against an ultra-hazardous condition or activity actually known to the owner to be dangerous. Ark. Code Ann. §§ 18-11-301 et seq.

#### **AMI 106 Effect of Intentional Destruction or Suppression of Evidence**

If you find that a party intentionally [*destroyed*][*or*][*lost*][*or*][*suppressed*](description of item) with knowledge that [*it*][*its contents*] may be material to a [*pending*][*potential*] claim, you may draw the inference that [the (*contents of the*)(*document*)(*writing*)(*photograph*) ((description of item)))] [*an examination of it*] would have been unfavorable to that party's [*claim*][*defense*]. When I use the term “material” I mean evidence that could be a substantial factor in evaluating the merit of a claim or defense in this case.

#### **AMI1101 Willful or Wanton Conduct—Definition**

When I use the expression “willful or wanton conduct” I mean a course of action which shows an actual or deliberate intention to harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others.

### **AMI 202 Burden of Proof and Preponderance of the Evidence**

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case [or unless a different standard of proof is required by another instruction]. “Preponderance of the evidence” means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

### **AMI501 Proximate Cause—Concurring Proximate Cause—Definition**

Proximate cause exists when a negligent act leads to damages in a natural and continuous sequence, unbroken by any efficient intervening cause. *Kubik v. Igleheart*, 280 Ark. 310, 311–12, 657 S.W.2d 545, 546 (1983). For an injury to be the natural and probable consequence of an act, the consequence of the act might and ought to have been foreseen by the defendant as likely to flow from that act and the act must, in a natural and continuous sequence unbroken by any new cause, operate as the cause of injury. *Ben M. Hogan & Co. v. Krug*, 234 Ark. 280, 285, 351 S.W.2d 451, 454–55 (1961). Foreseeability is an element in determining whether a person is

negligent and has nothing to do with proximate cause. Negligence must proximately cause a given result in order to justify a finding of negligence or contributory negligence, but negligence and proximate cause are two separate and independent legal concepts. *Collier v. Citizens Coach Co.*, 231 Ark. 489, 492, 330 S.W.2d 74, 76 (1959). The question of proximate cause, given negligence, is more often than not a question of fact, to be determined by viewing attendant circumstances, and proximate cause may be shown by circumstantial evidence. *St. Louis Sw. Ry. Co. v. Pennington*, 261 Ark. 650, 662, 553 S.W.2d 436, 441 (1977).

**AMI 1110 Duty Owed by Owner or Occupier of Land—Injuries or Damages Off Premises-**

It is the duty of an *[owner][occupier]* of land to protect *[persons][and][property]* on land of another from damages resulting from *[a structure][an artificial condition]* upon *[his][her]* land if

(A) *[he][she]* knows, or should know, of an unreasonable danger created by that *[structure][condition]* and

[(B) *[he][she]* knows, or should know, that the danger exists without the consent of those affected by it, and]

(C) *[he][she]* fails, after having a reasonable opportunity, to eliminate the danger or otherwise to protect such *[persons][or][property]* against it. A violation of this duty is negligence.

**AMI 2203 Measure of Damages—Aggravation of Pre-existing Condition**

In this regard you should consider the full extent of any injury sustained, even though the degree of injury is found by you to have proximately resulted from the aggravation of a *[condition]*

[*disease*] that already existed and that predisposed to injury to a greater extent than another person. [However, you may not award [*him*]/[*her*] damages for any (*pain*)(*mental anguish*) (*disability*) ((other appropriate element of damage)) which [*he*]/[*she*] would have suffered even though the accident had not occurred.

#### **AMI 2204 Measure of Damages—Medical Expense—Past and Future**

The reasonable expense of any necessary medical care, treatment and services received, [including (*transportation*)(*and*)(*board*)(*and*)(*lodging*) expenses necessarily incurred in securing such care, treatment, or services] [and the present value of such expense reasonably certain to be required in the future.]

#### **AMI 2205 Measure of Damages-Pain, Suffering, and Mental Anguish—Past and Future**

In an action based on negligence, plaintiff may be entitled to recover damages for mental anguish as well as for physical pain and suffering; and mental anguish may be inferred from the degree of physical pain. *Chicago, R.I. & P. Ry. Co. v. Caple*, 207 Ark. 52, 179 S.W.2d 151 (1944). Humiliation and embarrassment are included within the damage element of mental anguish, and it is error to instruct the jury that they are separate elements of recovery. *Yam's Inc. v. Moore*, 319 Ark. 111, 116-17, 890 S.W.2d 246, 249 (1994); *Bruns v. Bruns*, 290 Ark. 347, 350, 719 S.W.2d 691, 693 (1986) (holding it error to so instruct the jury and noting the Per Curiam Order of April 19, 1965). Plaintiff may recover for mental anguish suffered in the past and reasonably certain to be experienced in the future. Bill for mental anguish does not require physical harm. *Midwest Buslines, Inc. v. Johnson*, 291 Ark. 304, 305, 724 S.W.2d 453, 454 (1987).

#### **AMI 2218 Punitive Damages**

In addition to compensatory damages for any actual loss that (plaintiff) may have

sustained, [he][she] asks for punitive damages from (defendant). Punitive damages may be imposed to punish a wrongdoer and to deter the wrongdoer and others from similar conduct. In order to recover punitive damages from (defendant), (plaintiff) has the burden of proving by clear and convincing evidence [either, first]: [That (defendant) knew or ought to have known, in the light of the surrounding circumstances, that [his] [her][its] conduct would naturally and probably result in (injury)(damage) and that [he][she] [it] continued such conduct (with malice or) in reckless disregard of the consequences from which malice may be inferred] [Or, second] [That (defendant) intentionally pursued a course of conduct for the purpose of causing (injury)(damage)] [Or both]. [In arriving at the amount of punitive damages you may consider the financial condition of (defendant), as shown by the evidence.]

“Clear and convincing evidence” is proof that enables you without hesitation to reach a firm conviction that the allegation is true. You are not required to assess punitive damages against (defendant) but you may do so if justified by the evidence. [You may consider an award of punitive damages only if you found that (plaintiff) is entitled to recover compensatory damages.]

## STATEMENT OF THE CASE

### A. BACKGROUND:

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On November 27, 2014, the Respondent, Wal-Mart Store Arkansas, LLC., conducted two scheduled Sales-Events for their Black Friday Sales, 6:00pm and 8:00pm as advertised by the Respondent, featuring various electronics such as IPAD Mini, Samsung Galaxy Tablets, and other items. Petitioner and daughter, responded to the advertised sales and attended two sales events at Walmart Super Center at 2901 E. Highway 412 Siloam Springs Arkansas 72761. The first sales event at 6:00pm, Walmart

implemented crowd control but on the second scheduled sales event at 8:00pm, failed to implement crowd control and did not provide guidance and left the crowd without proper warning and instructions to avoid potential danger due to unorganized and unsafe premise.

At approximately 7:30 pm, a female assistant manager, Melanie Houchin and some Walmart staffs came by and surveyed the crowd of customers at the Samsung Galaxy tablet location. They stood behind the display racks and were walking back and forth. But did not do anything with customers situation at the Samsung Galaxy tablet location. At approximately, 7:45pm, two police officers C. Jackson and T. Hall, came and stood in front the of Samsung Galaxy tablet rack, before 8:00pm. Petitioner's daughter, Zenith Thompson and Petitioner also stood there before 8:00pm. Zenith Thompson went to check other for sale items displayed near the Samsung Galaxy tablet rack before 8:00pm.

#### **1. WALMART'S NEGLIGENCE AND PREMISE LIABILITY**

Respondent conducted two Black Friday Sales-Events: at 6:00pm and at 8:00pm November 27, 2014, (see Appendix J-10, Walmart Advertisement for Samsung Galaxy Tablet. See APPENDIX J10 (JOINT EXHIBIT # 10). There were two hours between two sales events but Respondent had omitted the crowd control it implemented during 6:00pm and without giving proper warning to customers including Petitioner for the preparation of the upcoming next sales-event at 8:00pm, for the advertised Samsung Galaxy tablet that was on sale for special reduced price. Prior to the opening of the sales at 8:00pm, Respondent had left the crowd to build up on the middle of main aisle in between grocery aisle and apparel aisle in front of the Samsung Galaxy Tablet near the main entrance. The crowd of neglected customers were blocking the traffic of incoming customers and Walmart staff did not come to manage lines. At approximately 7:30 pm, Melanie Houchin and as well as other staffs, saw Petitioner and crowd of customers standing in front of the Samsung Galaxy tablet rack standing for approximately almost two

hours waiting for more guidance by the management. At Approximately 7:45 pm, two police officers came: Officer C. Jackson and Deputy T. Hall and stood on the Crowd Line, lying parallel in front of Samsung Galaxy rack and other sale items but it not a customer line. The crowd line was a buffer space to serve as boundary for customer and the merchandise. See Appendix J3A, (JOINT EXHIBIT 3, page4, paragraph 2). They stood in front of Petitioner prior to the opening of the sale and saw the unmanaged crowd. See also Appendix J 15, page 16, line 19, 20,21,22,23,24,25,25 and page 17, line 1,2,3,4,5,6,7,8,9,10,11,12 and 13. See APPENDIX J-3A (JOINT EXHIBIT 3, POLICE REPORT page3, also marked as WM-KD-0008 paragraph 2 ). Petitioner's daughter, Zenith Thompson, who came together with Petitioner to participate both two sales-events, came to Samsung Galaxy tablet location to visit Petitioner approximately 7:45pm, and before 8:00 pm, left Petitioner to check other items displayed nearby the Samsung Galaxy Rack. (see APPENDIX J-20,Plaintiff's Affidavit of Witness, ZENITH THOMPSON, page1-4, paragraph 01,02,03,04 and 05 ). Few minutes before 8:00pm, the store manager, Christopher Milam, came and made an announcement to customers to be "courteous and calm" but that was all he said. (see Appendix J-3A, Police Incident Report, JOINT EXHIBIT, # 3, Page WM-KD-0008 paragraph 3 and 4. At 8:00pm, he announced that the sale was open. Christopher Milam's announcement was like a, "flood gate", lifted. His announcement had caused the waiting crowd to an immediate rush forward towards Petitioner's back and hit Petitioner's back who was yet standing in front of the Samsung Galaxy tablet rack. (see Appendix J-3, POLICE INCIDENT REPORT, JOINT EXHIBIT # 3, page WM-KD-0008, paragraph 3 and 4. Also see Appendix J20, Affidavit of Witness, Zenith Thompson page 3, paragraph 05. Petitioner's, head, neck, upper back, middle back, lower back, shoulder, thighs, legs, arms and hands were injured Petitioner was trapped and crushed with heavy weight under the crowd of customers and was afraid to die and got pushed towards the Samsung Galaxy tablet



rack and squatted as the customers were reaching the special reduced-price limited items. (see Appendix -J-3, Police Incident Report, JOINT EXHIBIT #3, page WM-KD-0008, paragraph 4 . Respondent's disregard for safety had caused multiple injuries to Petitioner and exposed to imminent danger. Respondent's negligence and reckless conducts had breached its duty of care and violated its Duty Owed to Petitioner as an invitee.

## **2. THE POLICE INCIDENT REPORTS OF THE INJURY INCIDENT :**

Right after the incident, few minutes after 8:00pm, petitioner complained to Police Officer, CPL. Timothy Filbeck, who saw the incident at the Samsung Galaxy tablet location and reported the incident. Petitioner showed to the police officer her injured pinky finger and the officer responded and stated that, "Petitioner came voluntarily and placed herself in front of the crowd". Police officer statement was like adding insult to injury. Officer Filbeck, had been hired by Walmart to work for the Black Friday holiday detail. (see Appendix J-3 page WM-KD, 0008, paragraph 1, Officer Filbeck, did not know what time Petitioner and daughter arrived to participate the advertised sales-events. Petitioner felt intimidated by the attitude of officer Filbeck. Petitioner also complained that her back was injured and demanded to complain to management. Officer CPL. Timothy Filbeck, called the assistant manager, escorted Petitioner to optical department.

## **3. PETITIONER'S COMPLAINT WAS RECEIVED AND SIGNED BY MELANIE HOUCHIN**

The female police officer called the paramedics and Petitioner waited at the optical department. While there, Petitioner was handed a Customer Complaint form and wrote her complaint and handed it to the assistant manager, Melanie Houchin, who then received, signed and dated and gave a copy to Petitioner for her record. (see Appendix J-2, Customer's Complaint, JOINT EXHIBIT # 2. While there, Zenith

Thompson, heard Ms. Houchin refused to Petitioner's request to show Petitioner, the footage of the surveillance video where the injury incident occurred at the Samsung Galaxy tablet location. She heard Ms. Houchin stating that she could not allow the Petitioner to see the recorded surveillance video but only Ms. Houchin is allowed, See Appendix\_J-20 Zenith Thompson Affidavit, page 4 , paragraph 07. Petitioner waited for the paramedic to arrive which later found out Respondent will not pay for the paramedics the fee of approximately more than \$1,000.00. The Petitioner could not afford for that amount, but told the paramedics her daughter will drive her to the nearby emergency, at Siloam Springs Regional Hospital after she will pay for the purchased items at the cash register.

#### **4. MELANIE HOUCHIN, REPORTED THE INJURY CLAIM # L4200771**

On the night of the incident Melanie Houchin, made the report, (see Appendix J-1, WM-KD-0002. She reported that Petitioner was injured at 8:00pm but did not report the location of the injury. She also reported that no one had witnessed the incident but reported that the petitioner had a companion. (see Appendix J-1, page 2 of 2, also marked, WM-KD-0003. Ms. Houchin, did not fill up all the important details as required on this report: "You must immediately search for and preserve any and all information and evidence related to this incident. Please follow the guidelines on the Evidence Collection Sheet and Document Preservation Direction. Your form has been sent to the claims division. PLEASE PRINT THIS FORM for your record before returning to main screen". (see Appendix J-1, page 1 of 2 ,also marked WM-KD-0002, printed in bold letter on the top of this document. Ms. Houchin, had lied in her claim form. Ms. Houchin had knowledge of the spoliation of evidences related to this case. Ms. Houchin was subpoenaed to appear to testify to the jury trial but failed to appear on February 20-22, 2019 on KRYSTAL MEGAN DELIMA v. WAL-MART STORES ARKANSAS, LLC.

## **5. TREATMENTS FOR THE MULTIPLE INJURIES AT THE EMERGENCY:**

At approximately after 9:00 pm., Zenith Thompson drove Petitioner to Siloam Springs Regional Hospital, Emergency and stayed with her all the time during the treatment until Petitioner was discharged close to midnight on November 27, 2014.

### **FOLLOWING THE INCIDENT FOR THE MULTIPLE INJURIES AND DAMAGES:**

LONG TERM TREATMENTS FOR THE FOLLOWING AFFECTED PARTS OF THE

See attached Exhibits appear on Appendices: G to G-22, H to H5, I,12,13,14,15 and Appendix-I1

BODY AND PAIN AND SUFFERINGS DUE TO RESPONDENT'S NEGLIGENCE

BACK PAIN THAT BECAME CHRONIC BACKPAIN.

ARM, SHOULDER, THIGH, AND LEG CRAMS

TINGLING NERVES AND MUSCLE SPASMS

COMPLICATIONS DUE TO EXISTING PRE- MEDICAL CONDITION.

COMPLICATION TO KIDNEY AND OTHER ORGANS DUE TO MORE THAN 3 YEARS OF

TREATMENTS OF PAIN MEDICATIONS/ MANAGEMENT

ON AND OFF TREATMENTS WITH PHYSICAL THERAPIES

EMOTIONAL DISTRESS AND MENTAL ANGUISH

PHYSICAL LIMITATIONS

DEPRIVATIONS FROM SOCIAL ACTIVITIES

TRAUMA

CONTINUING PAIN AND PHYSICAL LIMITATIONS.

LESS ENJOYMENT OF LIFE.

LOSS QUALITY OF LIFE.

GRIEVANCE

### **Updated Computation:**

Medical Bills past and after 2017 not yet included and accruing medical expenses.

Paid by Blue Shield Blue Cross Health Insurance----- \$13, 970.0

Note: Defendant has to pay the past medical bill, \$13,970.00 to the insurance, Blue

Shield Blue cross that paid the past.

Below are the Adjusted Computation

Future Medical Bills \$13,970.00 x 3	\$41,910.00
Continued Treatment	

Loss of Quality life	\$300,000.00
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Past Pain and Suffering	300,000.00
Future Pain and Suffering	300,000.00
Punitive Damages	<u>1,000,000.00</u>
<u>Total Compensatory and Punitive Damages</u>	<u>\$1,941,910.00</u>

B. Arkansas Laws (retailer): Duty of Care and Duty Owed to Invitee

“A property owner has a duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees.” *Wilson v. J. Wade Quinn Co., Inc.*, 330 Ark. 306, 308, 952 S.W.2d 167, 169 (1997). The owner will be subject to liability if he or she knows, or would discover through reasonable care, a condition that involves an unreasonable risk of harm that invitees either would not discover or will not protect themselves against, and the owner does not use reasonable care to protect the invitee from the danger. Negligence in Arkansas is “a failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them.” *Marlar v. Daniel*, 368 Ark. 505, 508, 247 S.W.3d 473, 476(2007). The operator of premises does not have a duty to guard against “merely possible” harm. To create a duty, the harm must be likely or probable. *Ethyl Corp. v. Johnson*, 345 Ark. 476,482, 49 S.W.3d 644, 648 (2001).

In *Brooks v. Wal-Mart Stores, Inc.*, 535 SE 2d 55 - 2000 - NC: Court of Appeals, which awarded the Plaintiff, was entitled to recover \$2,490,000.00 from Wal-Mart. Wal- Mart’s Negligence.

Punitive Damages:

Clearly, Petitioner would have not been injured if the retailer, Walmart adhered to the Safely Guidelines recommended by OSHA when conducting Black Friday sales-events.

Punitive damages may be awarded in wrongful death actions in Arkansas. Ark. Code Ann. § 16-55-201(a). An award of punitive damages is justified only where the evidence indicates that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred. *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992). Punitive damages do not depend on the underlying theory or cause of action, but instead rest on the defendant's conduct. *See Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001 (W.D. Ark 1996). Punitive damages are appropriate when the defendant acts with malice. *Satterfield v. Rebsamen Ford, Inc.*, 253 Ark. 181, 485 S.W.2d 192 (1972).

#### Past Medical Bills

A plaintiff is entitled to recover the reasonable expense of any necessary medical care incurred in the past. Arkansas applies the collateral source rule which allows a plaintiff to recover for those bills paid by insurance. Pursuant to ARK. CODE ANN. § 16-55-212(b), the General Assembly purportedly reversed the collateral source rule; however, this statute has been ruled unconstitutional by the Arkansas Supreme Court. *See Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135. Accordingly, plaintiffs can “blackboard” all medical bills incurred provided they are fair and reasonably related to the injury at issue.

2. Future Medical Bills A plaintiff is entitled to recover the reasonable expense of future medical care that is reasonably certain to be required in the future. Recovery of future

medical bills will be reduced to present day value.

#### Loss Of Normal Life

Arkansas recognizes loss of normal life as an element of damages.

#### Past Pain And Suffering

Arkansas recognizes past pain and suffering as a compensable element of damages. Pain and suffering can be inferred from the serious nature of the injury, and mental anguish can be inferred from the extent of physical pain. There are no definite rules or standards to measure compensation for pain and suffering. The extent of medical expenses is not a controlling factor. Arkansas allows plaintiffs to use a per diem basis to justify an award of pain and suffering. Arkansas does not, however, allow for an attorney to ask the jurors to put themselves in the shoes of the plaintiffs.

#### Future Pain And Suffering

Arkansas allows for a plaintiff to recover for pain and suffering that is reasonably certain to be experienced in the future, provided that the evidence establishes with a reasonable degree of certainty that the future pain and suffering will occur. Awards for future pain and suffering are not reduced to present value. See Appendices for health damages as mentioned above. Petitioner's health had deteriorated rapidly after the injury.

### SUMMARY OF ARGUMENT

#### A. The Facts:

Petitioner was injured inside defendant's premise when Respondent failed to implement adequate safety procedure/ crowd control and failed to safely facilitate the Black Friday Sales-Event on November 27, 2014 at 8:00pm at Walmart store #0004, at 2901 Highway 412 E. Siloam Springs AR 72761.

Respondent neglected its Duty of Care owed to Petitioner. Respondent omitted crowd control it had implemented during the 6:00pm sales-event but became inconsistent with its method and customers including Petitioner lacked the knowledge Respondent will do next for 8:00pm sales-event. Respondent's

reckless conducts and disregard to plaintiff's safety and without proper or adequate warning would have prevented Petitioner to move away from the area for safety but Respondent reckless conducts exposed Petitioner to imminent danger that caused multiple injuries to Petitioner and life miserable with pain and sufferings.

To be negligent a person must be in a position to realize that his conduct involves a hazard to others. *In the Hill case we described a negligent act as "one from which an ordinary prudent person in the actor's position in the same or similar circumstances would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner."* Later, in *Collier v. Citizens Coach Co.*, 231 Ark. 489, 330 S.W.2d 74 Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care is the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm. See Restatement (Third) of Torts: Liability for Physical Harm § 3 (P.F.D. No. 1, 2005). Negligent conduct may consist of either an act, or an omission to act when there is a duty to do so. See Restatement (Second) of Torts § 282 (1965).

### **Petitioner Has a Prima Facie Case**

#### **1. The existence of a legal duty that the Respondent owed to the Petitioner.**

There is no argument that Respondent, Wal-Mart Stores Arkansas LLC., is the owner of the Walmart store, # store, at 2901 E. Highway 412 Siloam Springs AR 72761.

Wal-Mart Stores Arkansas LLC., head office is at:

702 SW 8th St, Bentonville, Arkansas 72716 Tel No. (479) 273-4000

#### **2. The Respondent Breached Duty of Care and Duty Owed to Invitee.** Business operators are liable

for the actions of its employees. When store manager, Christopher Milam, failed to implement proper crowd control such as que lines, barricade lines to avoid injury incident that could possibly happen when retailer fail to implement proper crowd control. Safety First, Not Profit! It was only proper to limit customers for the limited items to avoid rush and use reasonable care, needed for this big sales-event. OSHA (Occupations Safety and Health Administration (see Appendix J-12). Customers and Petitioner did not only waited almost two hours for the opening of the unveiling but also waited for further instructions as to how safely the Petitioner can achieve its goal to buy the advertised merchandized safely without any harm, operator must use safety procedure appropriate for the event. *"An invitee can recover from an owner for failure to use ordinary care if the invitee can show that (1) the premises was defective; (2) the owner created the defect, or the defect was apparent to a reasonable owner who should have then warned the invitee; and (3) the defect caused the injury. See Gann v. Parker, 315 Ark. 107; 865 S.W.2d 282 (1993)."*

But Respondent's store manager Mr. Milam took the risk and injured Petitioner during its reckless business conducts and consummated the big sales without regard to safety . for si Respondent reckless conducts had breached its Duty of Care Owed to the Petitioner. *The operator of the premise does not have a duty to guard against "merely possible" Harm. To create a duty the harm must be likely or probable. Ethyl Corp. v. Johnson, 345, Ark. 476, 482, 49, S.W. 3d 644, 648 (2001).*

### 3. Petitioner's Sufferance of the Injuries-

Petitioner was injured after the Respondent, had recklessly conducted the event without regards to safety at the opening of the sales-event at 8:00pm, November 27, 2014. Zenith Thompson who had witnessed the rush of crowd of customers towards where Petitioner was standing. (see Appendix J-20, page3 paragraph 04, Zenith Thompson Affidavit of Witness. After the injury incident, she witnessed



Petitioner, Krystal Megan Delima was distraught (see Appendix J-20, page 3, paragraph 05 and was on pain and told her how she was hurt when the crowd rushed on her back to reach the limited sale items. She also saw Petitioner talking to the Police Officer CPL. Filbeck, on the main aisle between the grocery aisle and apparel aisle near where the Samsung Galaxy tablet was displayed few minutes after the injury incident. Zenith Thompson drove Petitioner to Siloam Springs Regional Hospital Emergency, and was with her the whole time while Petitioner's multiple injuries were treated and then drove her home close to midnight on November 27, 2014. (See Appendix J-20, Zenith Thompson Affidavit of Witness, page 4, paragraph 09) , Siloam Spring Regional Hospital Medical Record. (see Appendix J-18, (3 pages) Plaintiff Exhibit 8, 8a, and 8b. Following the injury incident subsequent medical treatments, physical therapists and chiropractor followed. See other medical providers as stipulated by both parties on the records more than 3 years of medical records and until now plaintiff/ appellant is suffering with pain and have lost her quality of life due to injuries suffered caused by the Respondent, Wal-Mart Stores Arkansas, LLC.'s Negligence.

#### **PROXIMATE CAUSE**

##### **4. Proofs that Respondent's breach of duty caused the injury (typically defined through Proximate Cause)**

Respondent had the legal duty to protect Petitioner, as an invitee when it conducted the two Black Friday sales-events The Respondent became inconsistent on its method and omitted adequate Crowd Control and became reckless on its conducts when it facilitated the scheduled sales at 8:00pm. Christopher Milam's warning "be calm and courteous", was inadequate and improper for

this big sales-event. (see Appendix J 3, Police Incident Report, also marked as Joint Exhibit #3, page WM-KD-0008, paragraph 3).

His announcement that the sale was then open at 8:00pm, was like a “flood gate” lifted. The Respondent’s failure to implement crowd control due to customers that were left to build on the main aisle between the grocery aisle and apparel aisle, without guide and any supervised customer’s line for safety when reaching the advertised merchandise, Customers rushed from different directions and pushed forward to select the advertised special reduced price limited items (see Appendix J-3, Police Incident Report, Joint Exhibit 3, also marked as WM-KD-0008, paragraph 4). See Appendix J-20, Affidavit of Zenith Thompson also marked as Plaintiff Exhibit 81, page 3 paragraph 4. Petitioner’s Affidavit of Witness by Zenith Thompson, was submitted with Petitioner’s Motion for a New Trial on March 15, 2019. According to this affidavit, prior to the scheduled sales, the premise became defective: customers were unmanaged and unorganized and were left on middle aisle between the grocery aisle and apparel aisle without queue lines and customers were waiting for the sales and the respondent did not fix the problems in the premise.

There were 2 hours between the two sales-event and would had been enough to implement proper crowd control but the Respondent’s reckless conducts had caused multiple injuries to Petitioner.

*Proximate cause exists when a negligent act leads to damages in a natural and continuous sequence, unbroken by any efficient intervening cause. Kubik v. Igleheart, 280 Ark. 310, 311–12, 657 S.W.2d 545, 546 (1983). For an injury to be the natural and probable consequence of an act, the consequence of the act might and ought to have been foreseen by the defendant as likely to flow*

*from that act and the act must, in a natural and continuous sequence unbroken by any new cause, operate as the cause of injury.*

### **BURDEN OF PROOF AND PREPONDERANCE OF EVIDENCE:**

#### **AMI 202 Meaning of Burden of Proof and Preponderance of the Evidence**

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case [or unless a different standard of proof is required by another instruction]. “Preponderance of the evidence” means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

Petitioner has substantial evidences: Customer’s Complaint, Appendix J2, ,Police Incident Report, Appendix J-3, Walmart Claim # L4200771, Affidavit of Witness, Zenith Thompson, AppendixJ-20. Medical Record at Siloam Springs Regional Hospital, Appendix J-18 and many more evidences that are mentioned on the Appendices of this PETITION OF WRIT OF CERTIORARI, in support of Petitioner’s claims of negligence safety and premise liability against the Respondent. It only needed 1% more to add to 50 percent on one side of the scale and tip the scale of justice, hence the Preponderance of Evidence is essential in the determination of the verdict. The Petitioner had met the Burden of Proof.

### **CLAIMS AGAINST RESPONDENT UNDER NEGLIGENCE AND PREMISE LIABILITY**

Petitioner was injured inside Respondent's premise when it recklessly conducted the sales-event at 8:00pm, November 27, 2014. See damages indicated above and computations both compensatory and punitive damages, which include physical, emotional and mental distress, economic and punitive damages. Respondent's reckless conducts was the PROXIMATE CAUSE of Petitioner's multiple injuries.

**Under Common Law,**

*Negligence in Arkansas is "a failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." Marlar v. Daniel, 368 Ark. 505, 508, 247 S.W.3d 473, 47 (2007).*

**PRESERVATION OF EVIDENCE**

A party's obligation to preserve evidence can arise even before litigation is commenced if the party knows or should know litigation is likely.

1. To determine whether a party should know litigation regarding an incident is likely, the Eastern District of Arkansas has considered whether the party is frequently involved in lawsuits regarding that type of incident.
2. For example, in Harrison, defendant Union Pacific Railroad Company had "frequently been a party to litigation involving highway crossing accidents..." and had the experience necessary to know "what evidence [was] relevant, what evidence [was] likely to be requested in discovery, and what evidence [was] likely to be found Harrison v. Union Pac. R.R. Co., 2002 U.S. Dist. LEXIS 29004, \*4 (E.D. Ark. 2002). 2 Id. at \*9.
- 3 Id. discoverable by the courts."3 Therefore, the court concluded Union Pacific knew litigation was likely after a fatal highway crossing accident occurred. 4. A party should know litigation is likely when

it has frequently been a party to litigation regarding a particular type of incident, or otherwise knows the potential for litigation regarding that type of incident is high. Thus, a party should begin to preserve evidence as soon as it knows or should know litigation regarding an incident is likely.

**WAL-MART STORES ARKANSAS, LLC. FAILED TO PRESERVE EVIDENCE**

In Arkansas, spoliation is defined as the intentional destruction of evidence. A failure to preserve evidence may be considered spoliation where it is intentional. There is no independent cause of action in Arkansas for claims of first or third-party spoliation. There are, however, other means by which a party may be reprimanded for engaging in spoliation, such as special jury instructions, discovery sanctions, and criminal liability.

The adverse inference under the doctrine of spoliation has been drawn where a physician failed to dictate a post-surgical note, when required by standard medical procedure and public policy to do so. *Smith v. United States*, 128 F. Supp. 2d 1227, 1233–34 (E.D. Ark. 2000).

4.RESPONDENT HAD VIOLATED ITS OWN PRESERVATION POLICY WHEN THERE IS AN INCIDENT, JOINT EXHIBIT # 4, CUSTOMER EVIDENCE COLLECTION SHEET, (SEE APPENDIX J-4.

The Policy requires one hour before and one hour after and must depict the location, orientation, materials and details of the incident. Melanie Houchin had prepared this report on November 27, 2014, the night of the incident and missed important details and factual information and did not depict the location of the incident on the report. Melanie Houchin, had knowledge of the spoliation of the video, she knew that WM-KD-0001, is not the location of the incident because she was there together with Christopher Milam when he made the announcement of the opening of the scheduled sales-event at the Samsung Galaxy tablet location at 8:00pm. WM-KD-001, recorded surveillance video, Joint Exhibit # 8, is an evidence of spoliation, a look alike video of incident EXCEPT that, it did not depict the

orientation, the location, time stamped, and related material facts found on the Police Report, Police Incident Report, Joint Exhibit # 3. The video, WM-KD-0001 was used by the Petitioner during jury trial as a demonstrative presentation of Respondent's Spoliation of Evidence, showing that Respondent intended to mislead the fact finders. It was a "scapegoat" to cover Respondent's violations, and to avoid charges of Negligence and Premise Liability. But instead, the video WM-KD-0001, highlighted negligence and premise liability and how store hazardously and recklessly operated during the time of 8:00pm, on November 27, 2014. This video was submitted by the Respondent's counsel during the discovery as the video of the incident. (see Appendix\_\_\_\_, Joint Initial Disclosure Which means the intention was to establish the ground that Respondent was not negligent on its conducts or operation of the store for its defense. The controversies around the video, WM-KD-0001 was noted and questions aroused because it did not depict the location and people involved material facts on the Police Incident Report, Joint Exhibit #3, Appendix J-3.

### SPOLIATION OF EVIDENCE

Melanie Houchin, the assistant store manager who had knowledge of the spoliation of evidence for reasons that she stood by the side of Christopher Milam, the store manager that made the announcement of the scheduled sales event at 8:00pm at the Samsung Galaxy tablet location , where the Petitioner was injured during the announcement. The two were both at close proximity and Petitioner saw them before and after the injury. After the injury at 8:00pm, the petitioner approached the police officer Filbeck, who was assigned to work near the Samsung Galaxy tablet display where the injury occurred, who made the Police Report (Joint Exhibit #3. Police Officer Filbeck, called store manager assistant to report the injury. Also, the Petitioner filed a handwritten complaint, Joint Exhibit # 2 and was handed to Melanie

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Houchin who then received, signed and dated, November 27, 2014, the complaint few minutes after the injury, responsible for Walmart Injury Report ( Claim Report), Joint Exhibit # 1 (see Appendix J-3).

On the Claim Report, she reported the Krystal Delima was injured but did not reported the location of the incident and failed to preserve the evidence which violated its own store policy.

At 9:00pm EST (Eastern Standard Time) which is in Arkansas time zone, is 8:00pm CDT. The scheduled sales event was opened, When the video is paused at 9:00pm EST(Eastern Standard Time and that is 8:00pm CDT, Central Daylight Time, which is Arkansas time. when the store manager, Christopher Milam, made his announcement, he could not be seen on the video. The three police officers, Filbeck, Jackson and Hall were all not seen on the video. Melanie Houchin together with Christopher Milam were also not seen and the worst Petitioner talking to Officer Filbeck were also not seen on the footage of this recorded surveillance video but this video had concealed the scene of the injury incident and the controversy that surrounded this video evidence produced by Respondent. Spoliation of Evidence begun with assistant manager, Ms. Houchin

C.. THE WORST PART OF THIS VIDEO, WM-KD-0001, is that, this video is not showing the main aisle\_between a grocery aisle and an apparel aisle which was the description of the orientation of the location where the injury occurred. (see Appendix J-3 police incident report, Joint Exhibit 3, page WM-KD-0001 paragraph 2). Respondent's reasons that there was only one surveillance camera and it was on the back opposite to the front main entrance. WM-KD-0001, has not been in compliance to the Rule of Evidence 901 (9) *Evidence About a Process or System*. Evidence describing a process or system and showing that it produces an accurate result. Rule of Evidence 902, That is Self Authenticating, and 902 (13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified

person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11). The Respondent had failed to comply the requirements and failed to authenticate the evidence. During the Final Pre-Trial Disclosure, the Respondent did not include this video on its List of Evidence (doc.29) filed on 01/15/2019, due to the facts that the video was prepared on February 22, 2018, by the Respondent's counsel, Mitchell, Williams, Selig, Gates and Woodyard PLLC. , and therefore not on the original format or media. That alone is Spoliation of Evidence. (see image of video disc, Appendix J-22), WM-KD-0001, Exhibit # 11 - Spoliation Evidence (doc 85). What more? the video had a time stamped EST (Easter Standard Time) Arkansas belongs to CDT (Central Daylight Time). There are so many discrepancies on this video and would not pass on the above requirements under Rules of Evidence for validity.

But what the video, WM-KD-0001, was showing is that Respondent had been operating its business under a hazardous condition wherein customers were left to build up under unsafe condition. Respondent had operated its business under unsafe premise and it failed to implement crowd control and operating over the maximum capacity and endangering customers, and showing customers elbow to elbow and were not walking smoothly due to the compactness of the premise. This footage demonstrates that Respondent had been Negligent, lacked of care for safety and took the risk of injury in the Premise and what more? Spoliation is considered Negligence in the conduct of accountability of its actions especially when conducting big business sales events to demonstrate its control.

### **PREPONDERANCE OF EVIDENCE**

All of Petitioner's claims against the Respondent are supported with facts such as police report, Joint Exhibit, Emergency at Siloam Springs Regional Hospital, Customer's Complaint, (see Appendix J-18 Exhibit 8, 8a, 8b, affidavit of witness, Exhibit 81, Medical and all evidentiary materials on file.



## **PETITIONER'S WITNESS OF THE INJURY INCIDENT**

ZENITH THOMPSON, Petitioner's daughter appeared and testified during the jury trial. She was a witness to the injury incident due to the facts that she was with Petitioner during the two sales-events on November 27, 2014, in which she witnessed that before the scheduled sales-event at 8:00pm, she saw that the crowd of customers were left unattended and were left to build up in the middle aisle behind Petitioner's back. She witnessed that the crowd of customers rushed towards the Petitioner. (see J-20, Zenith Thompson Affidavit of Witness, page 3, paragraph 02). After the crowd dispersed, she saw and talked to Petitioner, who appeared distraught. After few minutes, she saw Police Officer Filbeck, talking with the Petitioner, while making the incident report. She also saw Melanie Houchin, the assistant manager who received the Petitioner's Customer Complaint handed to her by the Petitioner. She heard Melanie Houchin refused to show the recorded surveillance video of the incident after Petitioner requested to watch video injury incident, stating that only Ms. Houchin can see the video of the incident. Zenith Thompson drove Petitioner to the emergency department at the Siloam Spring Regional Hospital few minutes after 9:00pm after she paid for Petitioner's purchased items. She appeared and testified during jury trial. Affidavit submitted with the Motion for a New Trial, ( doc. 141-2), filed on 03/15/2019. Appendix \_ .

### **PROOFS THE RESPONDENT WAS NEGLIGENT:**

During the 3rd day of Jury Trial, Respondent's store manager, Chris Milam, testified that his word, "be courteous and calm" was enough to control the big crowd of customers which was contrary to the guidelines by OSHA ( Occupational Safety and Health Administration) (see Appendix J-18, Safety Guidelines Recommended for Retailers like Walmart during Black Friday Sales-Event. According to Respondent's store manager, Chris Milam, that the crowd line act as buffer so he can walk around and

talk to customers. He did not implement que lines for customers' safety, its for him to walk around for big guy like him, as noted on his testimonies. The Court also confirmed that testimony of Chris Milam, (see Appendix- J-15B, on page 62, line 12, 13, 14, or 15:

Line 12- THE COURT: Ma'am, he is testified that he

Line 13- walked the area in the buffer space, that he engaged

Line 14- people in conversation, he looked for things, he relied on his experience. (see appendix J

Christopher Milam, the store manager did implement que line for customers to move safely towards the sale items and managed by Walmart staff. (See Exhibit 105 filed at Eight Circuit Court of Appeals). He did not manage his staff to make sure that the customers will have specific line to line-up for Samsung Galaxy tablet and other limited items that were displayed on each sides and make sure the customers were limited according to the number of limited items displayed in the Samsung Galaxy Table location to avoid injuries. According to Mr. Milam, his word, "be calm and courteous" is enough to control the crowd as many as this video footage of WM-KD-0001, is showing.

During the jury trial February 21, 2019, Police Officer Timothy Filbeck, appeared at the trial and testified that the Respondent did not establish que lines to make customers line up towards the limited items offered for sale at special reduced sale price. That the customers and Petitioner were standing on the boundaries in front of the merchandise where the two Police Officers, C. Jackson and T. Hall were Standing prior to the unveiling of the sale items. was established. ( see Appendix 19, page 10,11,13,14,15,15,and 17. The court also confirmed that que lines were not established. (see Appendix 20, page 17.

That the only announcement for the customers was "be calm and courteous". No other warning was given by the Respondent's store manager, Christopher Milam. (see above appendices)

## RESPONDENT HAD FAILED TO PRODUCE THE VIDEO OF THE INCIDENT

As agreed by Respondent on its Joint Rule 26 (f)- Exhibit 12A, paragraph 2. (see Appendix J-19.

Instead Respondent produced to Petitioner a video, WM-KD-0001, prepared by Mitchell Williams, Selig, Gates, and Woodyard, PLLC. on February 22, 2018. The video was not on its original format and did not meet the requirements under the above mentioned Rules of Evidence

## THE MISCARRIAGE OF JUSTICE

### THE IRREGULARITIES DURING THE PROCEEDING:

#### FAILURE TO CALL ITS WITNESS THAT WAS SUBPOENAED

Respondent's Key Witness Melanie Houchin had failed to appear to testify for Respondent's defense, though was subpoenaed and Notice to Appear to Testify (doc. 124) filed on 02/14/2019. ( see AppendixJ-30). Returned service was also filed (doc. 125) filed on 02/14/2019. (see Appendix J-32). Respondent's Pre-Trial Disclosure (doc 79) filed on 01/15/2019, included Melanie Houchin, in the List of Witnesses to testify for its defense for the jury trial on 02/20-22/2019. During the proceeding, Melanie Houchin's name was called to come to the witness stand to testify but Respondent failed to call its witness. It was a disruption during the jury session and the judge had to call a sidebar then Respondent's counsel, Atty. Crawford, told the judge and the Petitioner that the witness had been moved to another store about 2 weeks ago, but the Respondent's counsel, Atty. Crawford had not communicated way in advance before the trial time to avoid surprises and disruptions during the trial. The courtroom atmosphere was disturbed. Respondent's misconducts had contributed to the irregularities of the proceeding.

The law is an application of basic fairness and presentations of truth for which the case is adjudged and lawyers are expected to obey the laws.

Mis-conducts are against the law: Rule 8.4:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;'

[https://www.americanbar.org/groups/professional\\_responsibility/publications/  
model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/). 9:59am, 9/17/2020.

Mis-conducts:

1. Preparation of Recorded Surveillance Video, WM-KD-0001.

Respondents counsel, Atty. Crawford was asked by Petitioner during the discovery period on March 5, 2018 (see Appendix J-24) and again on March 15, 2018 (see Appendix- J25), about the Walmart surveillance video, WM-KD-0001, because it was not in an original storage but it was prepared on February 22, 2018, by Mitchell, Williams, Selig, Gates and Woodyard, P.L.L.C. (see image of Surveillance Video disc Mark as Exhibit WM-KD-0001, and it was not in compliance to Federal Rules of Evidence 901(13) and 902 (11) and NO certification was included. (see Appendix J-22- Image of WM-KD-0001) and that alone is already an evidence of Spoliation. This evidence is already violating the certification requirement and voided the validity of this evidence. The reference to the "certification requirements of **Rule 902(11)** or (12)" is only to the procedural requirements for a valid certification, because the preparer of WM-KD-0001, was not the custodian of record of the surveillance video camera of the Respondent Walmart. Up to the date of Jury Trial, February 20-22, 2019, the video WM-KD-

0001 was never certified for authentication. Therefore, the recorded surveillance video did not qualify under the RULES of EVIDENCE 902(11) or (12), since it was not authenticated and not valid for evidence.

Similarly, a person could not become a lawyer without passing the American Bar.

2. Failure to Disclose Information About Exhibit 5A, Walmart Store Lay-out, also marked Appendix-J-13. See AppendixJ-13. It is a known facts that the injury occurred at 8:00pm on 11/27/2014, during the sale of Samsung Galaxy tablet as evidenced by the following Exhibits: Police Report, (see APPENDIX - J-3A POLICE INCIDENT REPORT (WM-KD-0008/ page 4), see also, Injury Reported on 11/27/2014, by Melanie Houchin appears in **APPENDIX- J-1 WALMART CLAIM** (2 pages, JOINT EXHIBIT # 1) and **APPENDIX- J2 CUSTOMER COMPLAINT** (1 page, JOINT EXHIBIT # 2). So, why Walmart present another time evidence?

3. Failure to call to call to testify witness, Melanie Houchin, during the Jury Trial as stated on its Final Pre-Trial Disclosure, (see **APPENDIX- J28 RESPONDENT'S FINAL PRE-TRIAL DISCLOSURE** on 01/15/2019. This is an act of obstruction to justice for reasons that the jury was prevented to hear the testimony of the witness, Melanie Houchin and the acts had caused the jury to “stall” and disrupted the jury judgment process which resulted in a cloudy verdict. For the Respondent’s counsel to announced that the witness could not appear to testify when her name was called several times during the jury trial session, this is a Misconduct and caused confusion and disturbed the jury’s judgment process. The act was unfair and prejudicial to Petitioner’s case. Walmart counsel had knowledge of the plan for Melanie not to appear to strategically confused the jury and move without any evidence to exhibit in support of its position but turn around and took advantage of the condition of the jury trial which was unfairly conducted since it was a defective trial and justice was not serve.

## Arkansas Rules of Civil Procedure 59:

Rule 59 - New Trials(a)*Grounds*. A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party:(1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial;(2) misconduct of the jury or prevailing party;(3) accident or surprise which ordinary prudence could not have prevented;(4) excessive damages appearing to have been given under the influence of passion or prejudice;(5) error in the assessment of the amount of recovery, whether too large or too small;(6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law;

Respondent counsel only answered misleading information and made an alibi that there were some stipulations on its Answer at (Request for Admission) RFA, but failed to answer with sufficiency and failed to reference the item number of Respondent's Answer to Petitioner's Request for Admission that supported its claims. Another email clarifying the facts behind Joint Exhibit #5 was sent to Respondent counsel but Respondent had failed to disclose the facts store map, was not the 8:00pm sales -event where the injury incident occurred. It was used to mislead the fact finders, the jury, judge and Petitioner and all others who were there in the courtroom and created disruptions and confusion in the proceeding.

Below is the excerpt of Christopher Milam's Transcript- on the 3<sup>rd</sup> day of the jury trial, 02/22/2019.  
(see Appendix J-14, J-14A)

Page 59, Line 12. Q. It doesn't say this is 6:00 o'clock. This is

Page-59, Line 13. The photo thing of your store, and the only missing here is

Page 59, Line 14. The Samsung Galaxy here. Can you please look at the

Page 59, Line 15. Samsung Galaxy on this map?

Page 59, Line 16. A. It is not there ma'am.

Page 59, Line 17. Q. Yeah, it's not there. So,

Page 59, Line 18. A. It's the 6:00 o'clock sale here. It is not going to

Page 59, Line 19. be on the map here.

### Another Disruption:

Respondent's witnesses, Heather Reddell, was late for more or less 15 minutes. The court, the jury, and

everybody inside the Court Room were held in suspense of her delay. It was a disturbance and disruption on the jury trial or proceeding.

All of the above misconducts, misrepresentation and disruptions, all added in the irregularities of the proceeding on February 20-21, 2019. The above mentioned irregularities were all sufficient ground to have Motion for a New Trial, under *Arkansas Fiduciary - Rule 59. New Trials*.

*(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (5) error in the assessment of the amount of recovery, whether too large or too small; (6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law;*

*1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial;*

But the court had denied Petitioner's Motion for a New Trial and Petitioner lost the opportunity for a fair trial to have the facts tried with fairness under the DUE PROCESS of Laws as stated in Amendment XIV,  
“

*, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Petitioner's right for a fair was violated and justice was not served due to lacked of fundamental fairness on the jury trial or proceeding that resulted in a cloudy verdict. The jury did not reach an “impartial

verdict” and resulted the verdict going against the Preponderance of Evidence and Judgment in favor to the Petitioner.

**Malpractice of Federal Court Reporter, Dana Hayden, a Violation on**

Judiciary Policy § 520.46.10 (c)- “A separate table in the index must indicate the page at which any exhibit was marked for identification and received in evidence.”

Dana Hayden had caused some difficulty in the analysis of the transcripts because of the missing information supposedly written on a separate table in the index as indicated on Judiciary Policy § 520.46.10 (c) Under the above policy, a separate table in the index must indicate the page at which any exhibit was marked for identification and received in evidence. This was crucial because before deliberation of the verdict, the jury panel reviewed and read the details of the transcripts in the jury room. The transcript lacked important details for consideration before jury deliberation and verdict and was clouded due to Federal Court Reporter’ malpractices and violation of the above mentioned, judiciary policy. The Federal Court Reporter’s violation was prejudicial to the jury trial and had caused the jury not to reach an impartial verdict. The Court Report Dana Hayden did not identify the page at which any exhibit was marked for identification that evidence was received in a separate table on the index. Judiciary Policy § 520.46.10 (c)

Below are transcripts of the following testimony of witnesses that were affected: (note: actual copy of exhibits below are filed at the Eight Circuit Court of Appeals) All of the transcript below were prepared in violation to the above Judiciary Policy.

Zenith Thompson, Exhibit 90, 90A and 90B.

Krystal Megan Delima, Exhibit 96, 96A and 96B.

Timothy Filbeck, Exhibit 97, 97A and 97B.



Christopher Milam, Exhibits 98. 98A and 98B.

Federal Court Reporter, Dana Hayden's, violation to Guideline to Judiciary Policy-§ 520.46.10

Requirement (b) The index must also indicate on behalf of whom the witness or witnesses were called.

The transcripts due to Federal Court Reporter's malpractice or violation Judiciary Policy-§ 520.46.10

Requirement (b) lacked important details that the following witness:

(1) Zenith Thompson was a Plaintiff's witness.

(2) Christopher Milam was a Defendant's witness

(3) Timothy Filbeck was a defendant's witness

(4) Krystal Megan Delima was a plaintiff's witness.

Judiciary Policy, § 520 Transcript Format

The Judicial Conference first adopted the uniform transcript format in 1944 to assure that each party is treated equally throughout the country. JCUS-SEP 44, Appendix. Due to Court Reporter, malpractices and violations in preparing the transcripts, plaintiff/appellee's case had lost or missed the chance for a fair judgment and have contributed to the miscarriage of justice. Some missing pages of Zenith Thompson's Transcript from pages 15 to 32, because it stated on the index, that the Certification of Court Reporter Page is at 33 but the page of the Certification is at page 14. ( see attached Certification Page by Dana Hayden, Exhibit- 90, 90A and 90B. (Note: Copy of Exhibits are filed at the Eight Circuit Court of Appeals). The complaint was filed on June 05, 2019 at the Administrative of the United States Courts at One Columbus Circle, NE Washington DC 20544. A copy of the complaint is included in the Appendix J-36A)

USPS Tracking 9590 9402 3796 8032 9767 81, Appendix J-36 AND J-36A.)

In addition Petitioner had included on the APPENDICES, additional support:

APPENDIX -J-36B PETITIONER'S EMAIL TO COURT REPORTER, DANA HAYDEN  
FOR PAYMENT OF ALL THE TRANSCRIPTS ON MARCH 19, 2019  
CHRISTOPHER MILAM , ZENITH THOMPSON, TIMOTHY FILBECK

APPENDIX- J-37 PLAINTIFF SUPPLEMENTAL PRE-TRIAL DISCLOSURE- ABOUT WRONG  
FILE MARK BY COURT CLERK. EMAILED JANUARY 28, 2019

APPENDIX - J-38 PETITIONER EMAIL TO COURT ABOUT AMI2203- MEASURE OF DAMAGE  
AGGRAVATION OF PRE-EXISTING CONDITION BE ADDED. 02/20/2019

APPENDIX -J-39 PETITIONER PROPOSED JURY INSTRUCTIONS IN COMPLIANCE TO COURT  
REQUIREMENTS FOR THE PREPARATION OF THE TRIAL 02/20-22/2019

APPENDIX J-40 PETITIONER'S OBJECTION ABOUT WALMART'S EXHIBIT  
RESPONDENT HAS NOT BEEN SPECIFIC AND MAKING THE PETITIONER  
BLIND TO WHAT RESPONDENT WILL OFFER. FEBRUARY 15, 2019

APPENDIX J-41 PETITIONER'S EMAIL TO COURT TO RESERVE SPOILIATION JURY  
INSTRUCTIONS AND VERDICT FORM OPEN. FEBRUARY 20, 2019

APPENDIX J-42 PETITIONER'S ERRATA ABOUT DEPOSITION CORRECTION BECAUSE THE  
TRANSCRIBER DROPPED A LOT OF WORDS AND PUT DIFFERENT WORDS  
INSTEAD. THE DEPOSITION WAS CONDUCTED AT THE RESPONDENT  
COUNSEL'S OFFICE AND THE TRANSCRIBER DROPPED A LOT OF WORDS  
OR WORDS WERE DIFFERENT THAN WHAT PETITIONER STATED . THE  
TRANSCRIPTION MADE PETITIONER'S STATEMENT INCONSISTENT WITH  
HER OWN STAND ABOUT THE CASE. THIS ERRATA SHEET MADE THE  
NECESSARY CORRECTION TO MAKE CLEAR OR PUT BACK THE WORDS  
TO CLARIFY, AND COMPLETE THE MISSING WORDS.

## STANDARD OF REVIEW

### A. Substantial Evidence

Substantial evidence means more than a mere scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See Richardson v. Perales, 402 U.S. 389, 401 (1971); Gebhart v. SEC, 595 F.3d 1034, 1043 (9th Cir. 2010); Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1011 (9th Cir. 2003). The court of appeals must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency's decision. See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001); see also Int'l Union of Painter & Allied Trades v. J & R Flooring, Inc., 656 F.3d 860, 865 (9th Cir. 2011); Hawaii Stevedores, Inc. v. Ogawa, 608 F.3d 642, 652 (9th Cir. 2010) ("The ALJ is expected to consider the record as a whole, including all witness testimony and each medical report, before entering findings"). The court must affirm where there is such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw contrary conclusions from the evidence. See Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1011 (9th Cir. 2003).

### B. The District Court Abuse of Discretion-

"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." Rabkin v. Oregon Health Sciences Univ., 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted);

- District court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011) (citing *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)).
- District court rules in an irrational manner. *See Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003); *see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1084 (9th Cir. 2010) (concluding district court did not rule in an irrational manner).

Record contains no evidence to support district court's decision. *See Oregon Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995)

#### Court's Abuses:

1. At the beginning of the jury trial, day 1, February 20, 2019, I heard Atty. Crawford, defendant's counsel saying that the defendant has no evidences for submission for the trial and there was a commotion. Even the style of the case was improperly used, it was KRYSTAL MEGAN DELIMA vs. WAL-MART CORPORATION during the jury trial on February 20-22, 2019. Note that, It has been ordered by Court since 02/20/2018, to change the style of the case and the case participant name to reflect the correct name of the Respondent and to change the name from Walmart Corporation to Wal-Mart Stores Arkansas, LLC. ordered and signed by Judge Timothy L. Brooks.

Krystal Megan Delima vs. Walmart Corporation was not the proper respondent for the trial. The trial showed significant defects and miscarriage of justice.

The judge opinion (see Appendix- to justify that Melanie Houchin's failure to appear to testify is not essential to the jury trial and the case was tried without the facts? This is an abuse of discretion due to the

fact that Respondent Final Disclosure had stated that Melanie Houchin is to appear to testify. The Laptop issue had been resolved during the 7:00 meeting at the court and final Jury instruction were given that is why petitioner filed a Motion to Produce a copy of the audio recorded jury trial due to its defects.

The Core Values of the Federal Courts: **Equal Justice**: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect.

### REASON FOR GRANTING THE PETITION

The reason for the review is that there were irregularities of the proceeding and the Motion for a New Trial would have given the administration of justice a fair chance. Petitioner has the right for a Fair Trial. In order for the jury to reach an "impartial verdict", a fair trial must be conducted with observance to the guidelines of Judiciary Policy as prescribed in the preparation of the transcripts and observance of the basic fundamental fairness in the administration of justice. There are substantial evidences that the Respondent, Wal-Mart Stores Arkansas, LLC., have violated the laws that were involved under Negligence and Premise Liability. Claims made by the Petitioner against the Respondent are all supported with substantial evidences to give credits to the Preponderance of Evidence in the prosecution of this case and it only need 1 (one) percent for scale of justice to tip on the Petitioner's favor. The Respondent is guilty as charged and failed to present essential facts for its Defense.

Another consideration is the importance to the public of the issue. That defective jury trial as experienced on this case as noted that some defects of had been admitted by the Court such as court reporter mal-functions on the preparation of the transcripts, which Petitioner had submitted the complaints to the Administrative Office of the Federal Court System at Washington DC.

Which appears of Appendices: J36, J36A Respondent's mis-conducts such as

These are the reasons this case deserves a review so that justice will be served.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Krystal M. Delima

KRYSTAL MEGAN DELIMA- PETITIONER

Date: 9/18/2020