

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-1674

Krystal Megan Delima

Plaintiff - Appellant

v.

Walmart Stores Arkansas, LLC

Defendant - Appellee

Appeal from U.S. District Court for the Western District of Arkansas - Fayetteville
(5:17-cv-05244-TLB)

JUDGMENT

Before SHEPHERD, STRAS, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 06, 2020

APPENDIX-A

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 19-1674

Krystal Megan Delima

Plaintiff - Appellant

v.

Walmart Stores Arkansas, LLC

Defendant - Appellee

Appeal from United States District Court
for the Western District of Arkansas - Fayetteville

Submitted: February 3, 2020
Filed: February 6, 2020
[Unpublished]

Before SHEPHERD, STRAS, and KOBES, Circuit Judges.

PER CURIAM.

Krystal Delima appeals after the jury returned an adverse verdict in her pro se civil action and the district court¹ denied her motion for a new trial. After careful

¹The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

APPENDIX - A 1

review of the record and consideration of the issues properly before us, we find no basis for reversal.² We conclude that there is no merit to Delima's arguments challenging the district court's rulings concerning a surveillance video tape produced during pretrial discovery, see Sheets v. Butera, 389 F.3d 772, 780 (8th Cir. 2004) (rulings on discovery matters are reviewed for gross abuse of discretion), the admissibility of an exhibit at trial, see Cavataio v. City of Bella Villa, 570 F.3d 1015, 1020 (8th Cir. 2009) (district court has broad discretion in its evidentiary rulings at trial), and the jury instructions, see Otting v. J.C. Penney Co., 223 F.3d 704, 712-13 (8th Cir. 2000) (refusal to submit jury instruction is reviewed for abuse of discretion). Accordingly, we affirm. See 8th Cir. R. 47B.

²We conclude the district court's ruling on Delima's motion for a new trial is not properly before us because she did not file a new or amended notice of appeal after the district court denied that motion. See Miles v. GMC, 262 F.3d 720, 722-23 (8th Cir. 2001). We also decline to consider the arguments she raised for the first time on appeal. See Mau v. Twin City Fire Ins. Co., 910 F.3d. 388, 391 (8th Cir. 2018).

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-1674

Krystal Megan Delima

Appellant

v.

Walmart Stores Arkansas, LLC

Appellee

Appeal from U.S. District Court for the Western District of Arkansas - Fayetteville
(5:17-cv-05244-TLB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

March 13, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX-A²

**General Docket
Eighth Circuit Court of Appeals**

Court of Appeals Docket #: 19-1674

Nature of Suit: 4360 Other Personal Injury

Krystal Delima v. Walmart Stores Arkansas, LLC

Appeal From: U.S. District Court for the Western District of Arkansas - Fayetteville

Fee Status: paid - cs

Docketed: 03/29/2019

Termed: 02/06/2020

Case Type Information:

- 1) Civil
- 2) Private
- 3) null

Originating Court Information:

District: 0861-5 : 5:17-cv-05244-TLB

Court Reporter: Dana Hayden

Trial Judge: Timothy L. Brooks, U.S. District Judge

Date Filed: 11/27/2017

Date Order/Judgment:

02/22/2019

Date NOA Filed:

03/25/2019

Date Rec'd COA:

03/27/2019

Prior Cases:

None

Current Cases:

None

Krystal Megan Delima
Plaintiff - Appellant

Krystal Megan Delima
Direct: 479-238-3566
[NTC Pro Se]
54985 Country Road 586
Kansas, OK 74347

v.

Walmart Stores Arkansas, LLC
Defendant - Appellee

Bryce G. Crawford
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MITCHELL & WILLIAMS
Suite 200
4206 S. J.B. Hunt Drive
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Jacob McElroy
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4206 S. J.B. Hunt Drive
Rogers, AR 72758

APPENDIX-A3

Krystal Megan Delima

Plaintiff - Appellant

v.

Walmart Stores Arkansas, LLC

Defendant - Appellee

| | | |
|------------|--|---|
| 03/29/2019 | <input type="checkbox"/>  4 pg, 104.26 KB | Civil case docketed. [4772405] [19-1674]–[Edited 04/08/2019 by RLS] (RLS) [Entered: 03/29/2019 04:31 PM] |
| 03/29/2019 | <input type="checkbox"/>  20 pg, 777.32 KB | Originating court document filed consisting of notice of appeal, docket entries, order 02/22/2019, judgment dated 02/22/2019. [4774991] [19-1674] (RLS) [Entered: 04/08/2019 10:50 AM] |
| 04/03/2019 | <input type="checkbox"/>  1 pg, 63.55 KB | APPEARANCE filed by Karen P. Freeman for Appellee Walmart Stores Arkansas, LLC w/service 04/03/2019 [4773859] [19-1674] (KPF) [Entered: 04/03/2019 03:39 PM] |
| 04/03/2019 | <input type="checkbox"/>  1 pg, 58.85 KB | APPEARANCE filed by Bryce G. Crawford for Appellee Walmart Stores Arkansas, LLC w/service 04/03/2019 [4773864] [19-1674] (BGC) [Entered: 04/03/2019 03:44 PM] |
| 04/10/2019 | <input type="checkbox"/>  13 pg, 894.64 KB | Originating court document filed consisting of originating court order of 04/10/2019 , [4776207] [19-1674] (RLS) [Entered: 04/10/2019 11:59 AM] |
| 04/10/2019 | <input type="checkbox"/>  1 pg, 11.57 KB | <p>BRIEFING SCHEDULE SET AS FOLLOWS: If the original file of the U.S. District Court is available for review in electronic format, the court will rely on the electronic version of the record in its review. The appendices required by 8th Circuit Rule 30A shall not be required. In accordance with 8th Circuit Local Rule 30A (a)(2), the clerk of the United States District Court is requested to forward to this Court forthwith any portions of the original record which are not available in an electronic format or filed under seal, exhibits, administrative records and state court files.</p> <p>Transcript due on or before 05/20/2019. Appendix due 05/30/2019. BRIEF APPELLANT, Krystal Megan Delima due 05/30/2019</p> <p>Appellee brief is due 30 days from the date the court issues the Notice of Docket Activity filing the brief of appellant.</p> <p>Appellant reply brief is due 21 days from the date the court issues the Notice of Docket Activity filing the appellee brief. [4776210] [19-1674] (RLS) [Entered: 04/10/2019 12:02 PM]</p> |
| 05/01/2019 | <input type="checkbox"/> | RECORD FILED - TESTIMONY TRANS, 1 volumes, Location STL, Comments: Testimony of Christopher Milam held on 02/21/2019 - District Court document #143 [Copy do not return to the District Court at end of case], Source Location: USDC / WAF [4783494] [19-1674]–[Edited 05/01/2019 by STL] (STL) [Entered: 05/01/2019 02:49 PM] |
| 05/02/2019 | <input type="checkbox"/> | RECORD FILED - TESTIMONY TRANS, 1 volumes, Location STL, Comments: Excerpt - Testimony of Zenith Thompson held on 02/20/2019 - District Court document #144 [Copy do not return to the District Court at end of case], Source Location: USDC / WAF [4783652] [19-1674] (STL) [Entered: 05/02/2019 08:13 AM] |
| 05/02/2019 | <input type="checkbox"/> | RECORD FILED - TESTIMONY TRANS, 1 volumes, Location STL, Comments: Excerpt - Testimony of Timothy Filbeck held on 02/21/2019 - District Court document #145 [Copy do not return to the District Court at end of case], Source Location: USDC / WAF [4783657] [19-1674] (STL) [Entered: 05/02/2019 08:20 AM] |
| 05/02/2019 | <input type="checkbox"/> | RECORD FILED - TESTIMONY TRANS, 1 volumes, Location STL, Comments: Excerpt - Testimony of Krystal Megan Delima held on 02/21/2019 - District Court document #146 [Copy do not return to the District Court at end of case], Source Location: USDC / WAF [4783660] [19-1674] (STL) [Entered: 05/02/2019 08:24 AM] |
| 05/02/2019 | <input type="checkbox"/> | RECORD FILED - TESTIMONY TRANS, 1 volumes, Location STL, Comments: Amended Reporter's Record - Excerpt of Testimony of Zenith Thompson held on 02/20/2019 - District Court document #157 [Copy do not return to the District Court at end of case], Source Location: USDC / WAF [4783663] [19-1674] (STL) [Entered: 05/02/2019 08:31 AM] |
| 05/08/2019 | <input type="checkbox"/>  3 pg, 14.17 KB | DESIGNATION of record filed by Appellee Walmart Stores Arkansas, LLC. w/service 05/08/2019 [4785727] [19-1674] (KPF) [Entered: 05/08/2019 04:24 PM] |
| 05/21/2019 | <input type="checkbox"/>  2 pg, 100.38 KB | CLERK LETTER sent regarding new caption in case. [4789615] [19-1674] (EDG) [Entered: 05/21/2019 10:02 AM] |
| 05/29/2019 | <input type="checkbox"/>  2 pg, 43.93 KB | MOTION for extension of time to file brief until 06/10/2019, filed by Appellant Ms. Krystal Megan Delima w/service by USCA-8 nda on 05/30/2019. [4792317] [19-1674] (JMM) [Entered: 05/30/2019 07:40 AM] |
| 05/30/2019 | <input type="checkbox"/> | <p>CLERK ORDER: [4792317-2] Granting motion for extension of time to file brief filed by Appellant Ms. Krystal Megan Delima. Brief of Krystal Megan Delima due 06/10/2019. Appendix due on 06/10/2019. [4792318] [19-1674]</p> <p>** THIS ORDER HAS BEEN CORRECTED ON 06/04/2019 - BY REMOVING THE APPENDIX DEADLINE AS ONE IS NOT REQUIRED IN A PRO SE CASE. –[Edited 06/04/2019 by JMM] (JMM) [Entered: 05/30/2019 07:42 AM]</p> |
| 05/31/2019 | <input type="checkbox"/>  66 pg, 3.82 MB | DOCUMENT FILED - APPELLANT'S RESPONSE TO APPELLEE DESIGNATION OF RECORD FOR APPEAL, with exhibits attached filed by Ms. Krystal Megan Delima. w/service 05/31/2019 [4793060] [19-1674] (JMM) [Entered: 05/31/2019 12:28 PM] |
| 06/04/2019 | <input type="checkbox"/>  | CLERK ORDER: We are correcting our previous order dated 05/30/2019 which was clerk order ,[4792318-2] [19-1674] (JMM) [Entered: 06/04/2019 09:45 AM] |

| | | |
|------------|---|---|
| | 1 pg, 9.1 KB | 2] The correction made was: removing appendix due deadline - appendices are not required in a pro se case. Appellant's brief deadline is still set for June 10, 2019. [4793655] [4793655] [19-1674] (JMM) [Entered: 06/04/2019 07:38 AM] |
| 06/10/2019 | <input type="checkbox"/>  48 pg, 465.78 KB | APPELLANT brief of Ms. Krystal Megan Delima submitted for review. The time for filing the subsequent brief (if any) does not begin to run until the brief has been approved and filed. To open/view this brief, you must first login to CM/ECF and then open the document link in your Notice of Docket Activity. Only direct recipients on accounts can open this document. [4796068] [19-1674] (KMD) [Entered: 06/10/2019 10:23 PM] |
| 06/10/2019 | <input type="checkbox"/>  52 pg, 19.28 MB | APPELLANT brief of Ms. Krystal Megan Delima submitted for review. The time for filing the subsequent brief (if any) does not begin to run until the brief has been approved and filed. To open/view this brief, you must first login to CM/ECF and then open the document link in your Notice of Docket Activity. Only direct recipients on accounts can open this document. [4796069] [19-1674]** NOTE - PER MEG ATTACHMENT WAS PRINTED AND FILED AS EXHIBITS-[Edited 06/12/2019 by JMM] (KMD) [Entered: 06/10/2019 10:33 PM] |
| 06/10/2019 | <input type="checkbox"/>  1 pg, 198.31 KB | Addendum of APPELLANT submitted for review by Ms. Krystal Megan Delima. To open/view this addendum, you must first login to CM/ECF and then open the document link in your Notice of Docket Activity. [4796070] [19-1674] (KMD) [Entered: 06/10/2019 10:38 PM] |
| 06/12/2019 | <input type="checkbox"/>  49 pg, 443.17 KB | BRIEF FILED - APPELLANT BRIEF filed by Ms. Krystal Megan Delima. w/service 06/12/2019 , Length: 9,761 words , 5 copies made by USCA-8. Brief of Walmart Stores Arkansas, LLC due on 07/12/2019 [4796600] [19-1674] (JMM) [Entered: 06/12/2019 07:39 AM] |
| 06/12/2019 | <input type="checkbox"/>  3 pg, 235.25 KB | ADDENDUM of APPELLANT FILED by Appellant Ms. Krystal Megan Delima , w/service 06/12/2019 [4796601] [19-1674] (JMM) [Entered: 06/12/2019 07:41 AM] |
| 06/12/2019 | <input type="checkbox"/>  1 pg, 9.03 KB | RECORD FILED - EXHIBITS, Comments: 1 copy, Source Location: St. Louis [4796602] [19-1674] (JMM) [Entered: 06/12/2019 07:43 AM] |
| 06/13/2019 | <input type="checkbox"/> | RECORD FILED - EXHIBITS, Location STL, Comments: 1 mailing tube containing 2 Exhibits labeled Joint Exhibit #5-A and Joint Exhibit #5-B [Received from Kyrstal Megan Delima - Appellant - return at end of case], Source Location: Krystal Megan Delima / Appellant [4797314] [19-1674] (STL) [Entered: 06/13/2019 11:33 AM] |
| 06/13/2019 | <input type="checkbox"/> | RECORD FILED - EXHIBITS, Location STL, Comments: 1 envelope containing 1 DVD - marked Video Copy [Received from Krystal Megan Delima - Appellant - return at end of case], Source Location: Krystal Delima / Appellant [4797327] [19-1674] (STL) [Entered: 06/13/2019 11:39 AM] |
| 06/28/2019 | <input type="checkbox"/> | RECORD FILED - TRIAL TRANSCRIPT, 4 volumes, Location STL, Comments: 3 Volumes of Trial and 1 volume of Master Index [Copies do not return to the District Court at end of case], Source Location: USDC / WAF, Dt. of Proceeding/Hearing: 02/20/2019 - 02/22/2019, Court Reporter: Hayden, Dana [4802841] [19-1674] (STL) [Entered: 06/28/2019 08:20 AM] |
| 07/03/2019 | <input type="checkbox"/>  4 pg, 16.55 KB | MOTION for extension of time to file brief until 08/12/2019, filed by Appellee Walmart Stores Arkansas, LLC w/service 07/03/2019. [4804717] [19-1674] (BGC) [Entered: 07/03/2019 01:28 PM] |
| 07/03/2019 | <input type="checkbox"/> | On December 1, 2016, the Federal Rules of Appellate Procedure were amended to require a certificate of compliance for motions/petitions filed under the following [Rule 27/Rule 5/Rule 21/Rule 35/Rule 40], certifying that the document complies with the type-volume limitations and stating the number of words in the document. Your recently filed motion did not contain this certificate of compliance. No action will be taken on your motion for extension of time to file brief, [4804717-2], submitted by Walmart Stores Arkansas, LLC in 19-1674 , pending the filing of a certificate of compliance using the 'Certificate of Compliance' event. Please do not refile your motion [19-1674] (YML) [Entered: 07/03/2019 02:25 PM] |
| 07/03/2019 | <input type="checkbox"/>  3 pg, 13.96 KB | CERTIFICATE OF COMPLIANCE filed by Ms. Karen P Freeman for Appellee Walmart Stores Arkansas, LLC and Mr. Bryce G. Crawford for Appellee Walmart Stores Arkansas, LLC correcting [4804717-2] motion filed by Appellee. [4804901] [19-1674] (BGC) [Entered: 07/03/2019 04:16 PM] |
| 07/03/2019 | <input type="checkbox"/>  1 pg, 8.78 KB | CLERK ORDER:Granting [4804717-2] motion for extension of time to file brief filed by Appellee Walmart Stores Arkansas, LLC. Brief of Walmart Stores Arkansas, LLC due 08/12/2019. [4804933] [19-1674] (YML) [Entered: 07/03/2019 05:12 PM] |
| 08/12/2019 | <input type="checkbox"/>  33 pg, 113.43 KB | APPELLEE brief of Walmart Stores Arkansas, LLC submitted for review. The time for filing the subsequent brief (if any) does not begin to run until the brief has been approved and filed. To open/view this brief, you must first login to CM/ECF and then open the document link in your Notice of Docket Activity. Only direct recipients on accounts can open this document. [4818145] [19-1674] (BGC) [Entered: 08/12/2019 02:35 PM] |
| 08/12/2019 | <input type="checkbox"/>  1 pg, 95.09 KB | Brief deficiency notice sent to counsel, Mr. Bryce G. Crawford for Appellee Walmart Stores Arkansas, LLC and Ms. Karen P Freeman for Appellee Walmart Stores Arkansas, LLC. [4818158] [19-1674] (JMM) |

[Entered: 08/12/2019 02:52 PM]

08/12/2019  33 pg, 115.68 KB APPELLEE brief of Walmart Stores Arkansas, LLC submitted for review. The time for filing the subsequent brief (if any) does not begin to run until the brief has been approved and filed. To open/view this brief, you must first login to CM/ECF and then open the document link in your Notice of Docket Activity. Only direct recipients on accounts can open this document. [4818199] [19-1674] (BGC) [Entered: 08/12/2019 03:22 PM]

08/12/2019  34 pg, 145.05 KB **BRIEF FILED - APPELLEE BRIEF** filed by Walmart Stores Arkansas, LLC, Appellant's reply brief deadline will be set, based on the Certificate of Service in appellee's paper brief. w/service 08/12/2019 , Length: 24 pages **10 COPIES OF PAPER BRIEFS (WITHOUT THE APPELLATE PDF FOOTER) FROM Walmart Stores Arkansas, LLC due 08/19/2019 WITH certificate of service for paper briefs** [4818253] [19-1674] (JMM) [Entered: 08/12/2019 03:52 PM]

08/13/2019  1 pg, 53.2 KB APPEARANCE filed by Jacob McElroy for Appellee Walmart Stores Arkansas, LLC w/service 08/13/2019 [4818789] [19-1674] (JM) [Entered: 08/13/2019 04:08 PM]

08/14/2019 PUBLIC DOCKET NOTE: Appellant's REPLY BRIEF DEADLINE is set September 3, 2019. [4818938] [19-1674] (JMM) [Entered: 08/14/2019 09:38 AM]

08/19/2019 Paper copies Appellee/Respondent brief, [\[4818253-2\]](#) filed by Walmart Stores Arkansas, LLC 10 paper copies received. [4820421] [19-1674] (JMM) [Entered: 08/19/2019 10:35 AM]

09/06/2019  29 pg, 326.74 KB APPELLANT brief of Ms. Krystal Megan Delima submitted for review. The time for filing the subsequent brief (if any) does not begin to run until the brief has been approved and filed. To open/view this brief, you must first login to CM/ECF and then open the document link in your Notice of Docket Activity. Only direct recipients on accounts can open this document. [4827865] [19-1674] (KMD) [Entered: 09/06/2019 03:48 PM]

09/09/2019  29 pg, 327.26 KB **BRIEF FILED - APPELLANT REPLY BRIEF** filed by Ms. Krystal Megan Delima. w/service 09/09/2019 , Length: 6,294 words, 4 copies made by USCA-8. [4828013] [19-1674] (JMM) [Entered: 09/09/2019 08:43 AM]

02/03/2020 CASE SUBMITTED Screening Case Submission before Judges Bobby E. Shepherd, David R. Stras, Jonathan A. Kobes in St. Louis [4877644] [19-1674] (CRJ) [Entered: 02/04/2020 08:54 AM]

02/06/2020  3 pg, 132.8 KB **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]

02/06/2020  1 pg, 9.08 KB **JUDGMENT FILED -** The judgment of the Originating Court is AFFIRMED in accordance with the opinion BOBBY E. SHEPHERD, DAVID R. STRAS and JONATHAN A. KOBES Scrg Jan 2020 [4878557] [19-1674] (CRJ) [Entered: 02/06/2020 08:29 AM]

02/21/2020  16 pg, 308.82 KB **PETITION for enbanc rehearing and also for rehearing by panel** filed by Appellant Ms. Krystal Megan Delima w/service 02/20/2020 [4883524] [19-1674] (KMD) [Entered: 02/21/2020 12:00 AM]

03/13/2020  1 pg, 8.83 KB **JUDGE ORDER:** Denying [\[4883524-2\]](#) petition for enbanc rehearing filed by Appellant Ms. Krystal Megan Delima. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter. [4891035] [19-1674] (MDS) [Entered: 03/13/2020 10:46 AM]

03/20/2020  1 pg, 8.81 KB **MANDATE ISSUED.** [4893561] [19-1674] (CMD) [Entered: 03/20/2020 07:34 AM]

Clear All Documents and Docket Summary Documents Only Include Page Numbers

Selected Pages: 0

Selected Size: 0 KB

Totals reflect accessible documents only and do not include unauthorized restricted documents.

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| Description: | Docket Report (filtered) | Search Criteria: | 19-1674 |
| Billable Pages: | 4 | Cost: | 0.40 |

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

KRYSTAL MEGAN DELIMA

PLAINTIFF

V.

CASE NO. 5:17-CV-5244

WAL-MART STORES ARKANSAS, LLC

DEFENDANT

ORDER ON JURY VERDICT

On the 20th day of February, 2019, this matter came before the Court for trial to a duly qualified and selected jury consisting of eight members. After three days of trial the jury was instructed on applicable law and the case was submitted on interrogatories, whereupon the jury retired to deliberate its verdict. Thereafter, the jury returned to open court and delivered the following verdict:

INTERROGATORY NO. 1: Do you find by a preponderance of the evidence that there was negligence on the part of Walmart which was a proximate cause of any damages sustained by Ms. Delima?

Answer: No

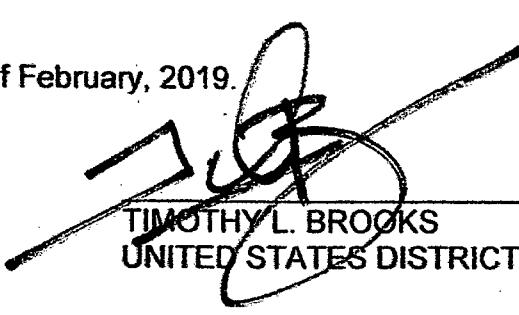
/s/ Jury Foreperson February 22, 2019

The parties waived polling of the jury.

The Court finding no irregularity and/or objections to the procedure or form of the jury's verdict, hereby accepts the same as true and proper in all respects.

APPENDIX - B1

DATED this 21st day of February, 2019.


TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

KRYSTAL MEGAN DELIMA

PLAINTIFF

v.

CASE NO. 5:17-CV-5244

WAL-MART STORES ARKANSAS, LLC

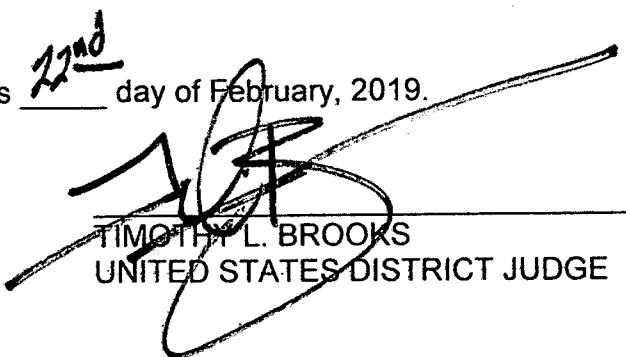
DEFENDANT

JUDGMENT

Pursuant to the verdict returned by the jury on February 22, 2019 (Doc. 138) and the Court's Order thereupon (Doc. 139), the Court hereby finds and directs that the Defendant, Wal-Mart Stores Arkansas, LLC, is entitled to a judgment in its favor and a dismissal of Plaintiff's Complaint against it.

IT IS THEREFORE ORDERED AND ADJUDGED that judgment is rendered in favor of the Defendant, and that Plaintiff's claims against the Defendant are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED on this 22nd day of February, 2019.


TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX-B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

KRYSTAL MEGAN DELIMA

PLAINTIFF

v.

CASE NO. 5:17-CV-5244

WAL-MART STORES ARKANSAS, LLC

DEFENDANT

OPINION AND ORDER

Currently before the Court are Plaintiff Krystal Megan Delima's Motion for Order to Correct Testimony (Doc. 148), and three separate Motions for Correction (Docs 149, 150, 151) which detail the proposed corrections Ms. Delima seeks.

Ms. Delima's motions explain that she ordered several transcripts of excerpts of witness testimony from the jury trial held in February.¹ After reviewing those transcripts, Ms. Delima accuses the court reporter of numerous indiscretions, including "fabrication of non-sensible words," and deletions and replacements with words that were out of context with what Ms. Delima claims the testimony really was. See, e.g., Doc. 148, p. 1. She additionally requests the audio back-up file of these transcripts.

The Court has reviewed the numerous alleged errors in the transcript excerpts and finds that Ms. Delima's allegations are almost entirely without merit. The vast majority of Ms. Delima's proposed changes are labeled "clarifications." Ms. Delima claims that the transcript is incorrect because it contains words that repeat, incomplete sentences, incorrect verb tense, etc. What Ms. Delima fails to appreciate is that the court reporter's job is not to take what was said from the witness stand or the bench and convert it into

¹ To be clear, Ms. Delima did not order the entire trial transcript. Instead, she ordered excerpts, consisting of the testimony of four specific fact witnesses. See Docs. 143-146.

the Queen's English. Her job is to transcribe exactly what was said. Therefore, when a witness, Judge, or attorney repeats phrases, interrupts prior thoughts to begin anew, or uses incomplete sentences, that is what the transcript should (and in this case does) reflect. Thus, Ms. Delima's wishes that the transcript be updated to reflect the complete thoughts of how she contends the witness intended to testify is misplaced.² It is improper to change a transcript after the trial to reflect testimony that was never given.

There are, however, two instances where a correction will be ordered.³ First, Ms. Delima is correct that the index for the transcript of Zenith Thompson's testimony incorrectly lists the Court Reporter's Certification as being on page 33. It really is on page 14. Second, the transcript of Ms. Delima's narrative testimony includes the word "open" when Ms. Delima contends that it should be "often." After reviewing the audio, it is an extremely close call about whether the word said was "open" or "often." It appears that the way Ms. Delima pronounced the word may have contributed to it being transcribed as "open." Nevertheless, after reviewing the context, the Court is left with the impression that the transcript should be corrected to "often." Therefore, the Court will direct the Court Reporter to amend the transcripts to 1) correct the page number of the Court's Reporter's Certification on the index of Doc. 144 and 2) to change the word "open" to "often" on page

² For example, the transcript reflects that Ms. Delima testified that she arrived at the store at 6 p.m. She now wishes the transcript to reflect that she arrived between 5 and 5:30. (Doc. 151, p. 1). But, as that is not what her testimony was during the trial, it is inappropriate to change the transcript.

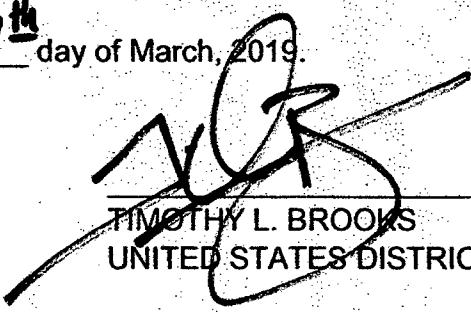
³ Technically, Federal Rule of Appellate Procedure 10(e)(2) only envisions corrections of "material" errors or omissions. The Court will give Ms. Delima the benefit of the doubt here, even though the Court is extremely skeptical as to how or why these matters are material.

4 of Doc. 146. Her requests for "clarifications" are in all other respects denied. Her request for the audio back-up file is also denied. See Guide to Judiciary Policy § 510.40.10(c).

Finally, the Court cautions Ms. Delima about lodging such accusations of malpractice and obstruction of justice against the Court or any of its personnel in the future, especially when those accusations are as unfounded as those lodged here. All of the officers of this Court take their duty seriously to ensure that each litigant has a full and fair opportunity to present its case. It is clear that Ms. Delima is unhappy with the jury's verdict, but this disappointment provides no excuse to baselessly accuse court personnel of deliberately altering official records in order to obstruct plaintiff's "quest for justice." (Doc. 148, p. 2).

IT IS THEREFORE ORDERED that Ms. Delima's Motion for Order to Correct Testimony (Doc. 148), Motion for Correction of Transcript of Zenith Thompson (Doc. 149), and Motion for Correction of Transcript of Krystal Delima (Doc. 151) are **GRANTED IN PART AND DENIED IN PART** as described above. Ms. Delima's Motion for Correction of Transcript of Christopher Milam (Doc. 150) is **DENIED**.

IT IS SO ORDERED on this 27th day of March, 2019.



TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

KRYSTAL MEGAN DELIMA

PLAINTIFF

v.

CASE NO. 5:17-CV-5244

WAL-MART STORES ARKANSAS, LLC

DEFENDANT

MEMORANDUM OPINION AND ORDER

Currently before the Court is Plaintiff Krystal Megan Delima's Motion for a New Trial (Doc. 141). The Court has also received a Response in Opposition (Doc. 155) from Defendant Wal-Mart Stores Arkansas, LLC ("Walmart"). For the reasons explained below, Ms. Delima's Motion is **DENIED**.

I. BACKGROUND

Ms. Delima filed her complaint against Walmart on November 27, 2017. At bottom, her lawsuit claims that she was injured as a result of Walmart's failure to properly organize and conduct a holiday sale at its Siloam Springs Walmart store on November 27, 2014. Her original Complaint (Doc. 1) sought compensatory and punitive damages totaling over two million dollars. After denying Walmart's motion for summary judgment, the case proceeded to a three-day jury trial. On February 22, 2019, the jury returned with a verdict in favor of Walmart. (Doc. 138). A few weeks later, Ms. Delima filed the present motion.

II. LEGAL STANDARD

Under Rule 59 of the Federal Rules of Civil Procedure, a district court may grant a new trial "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." A motion for a new trial may be granted if "the verdict is against the weight of the evidence, . . . the damages are excessive, or . . . for other

reasons, the trial was not fair to the party moving." See *Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1017 (8th Cir. 2001) (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). A motion for a new trial may also "raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." See *id.* The decision whether to grant a new trial is committed to this Court's discretion. See *id.*

III. DISCUSSION

Ms. Delima recites numerous grounds upon which she bases her request for a new trial. The Court considers each reason in turn.

1. Ms. Delima's Laptop

Ms. Delima first claims that she was unable to effectively participate in the Court's final jury instruction conference because she could not access the internet on the last day of trial due to her battery in her laptop dying. It seems from the briefing that the laptop and/or its charger was left in the courtroom on the preceding day. Although not explained with much clarity, if Ms. Delima's argument is premised on the notion that she wasn't able to charge her device from the courtroom on the day of the final jury instruction conference, it is without merit. Counsel are able to plug in their devices using the outlets that are directly beneath each counsel table in the courtroom.

To the extent Ms. Delima is implying that she was unable to send the Court comments on proposed final instructions because she left her charger in the courtroom and therefore faced a laptop with a dead battery when she returned to her hotel for the evening, the Court similarly finds this reason unpersuasive. First of all, her failure to bring her charging equipment home with her was a problem entirely of her own making. It is not

the type of procedural irregularity justifying a new trial. Moreover, the argument that the dead battery prevented her from meaningfully participating in the jury instruction conference is simply belied by the record. For one thing, the Court consulted with the parties on jury instructions multiple times over multiple days, distributing at least two separate draft versions of the instructions in hard copy form. Moreover, the record shows that Ms. Delima meaningfully participated during each conference. See, e.g., Docs. 134, 135 (compilation of email communications between the Court and counsel over proposed jury instructions). Contrary to her assertions now, Ms. Delima did participate in these conferences by suggesting specific jury instructions that she desired to be incorporated into the final set. Thus, any complications caused by her laptop were of her own making and did not hinder her ability to fully participate in the jury instruction conferences.

2. Failure to Give Certain Requested Jury Instructions

Ms. Delima's suggestion that her laptop prevented her from assisting the Court in finalizing jury instructions is also at odds with her second purported ground for a new trial: that the Court refused to give certain jury instructions that she requested. According to Ms. Delima, the Court should have given instructions on the following: spoliation of evidence, [ad]verse inference, aggravation of pre-existing condition, loss of normal or quality of life, past pain and suffering, future pain and suffering and mental anguish, medical expenses, and punitive damages. As an initial matter, the Court did in fact instruct the jury that it could award damages to Ms. Delima for medical expenses as well as past and future pain and suffering and mental anguish. See Doc. 136, p. 15 (the Court's final jury instruction on the measure of damages). The Court now considers the other requested instructions.

Ms. Delima first contends that the Court should have given both a spoliation of evidence instruction and an adverse inference instruction. Both of these requested instructions center around a copy of the video surveillance footage that Walmart has from the night in question. Ms. Delima argues, as she did in two separate motions to compel (Docs. 24, 82), that Walmart did not produce video footage that actually depicted the alleged incident. However, as this Court ruled both times in denying Ms. Delima's motions, see Docs. 32, 109, the fact that the video footage in question did not catch a bird's eye view¹ of the alleged incident does not mean that Walmart has intentionally withheld video surveillance. Walmart has consistently maintained, and the witnesses at trial explained in extensive detail, why the video footage that was produced was the best footage of the area where the incident occurred. Ms. Delima's suggestions to the contrary are simply not supported by the record. There is no evidence that the footage produced by Walmart and submitted as a joint stipulated exhibit at trial was intentionally altered or that other footage was withheld from production. Therefore, neither an adverse inference or spoliation instruction was appropriate.

Ms. Delima next contends that the jury should have been instructed on two additional elements of damages: aggravation of a pre-existing medical condition and future medical expenses. After hearing oral argument from both parties during the final jury instruction conference, the Court ruled that the evidence at trial did not support giving

¹ Ms. Delima appears to be laboring under the impression that Walmart should have had a camera directly above the incident. However, as the witnesses testified, Walmart's camera coverage of the "grocery action alley" where the sale took place is considerably less extensive than in other parts of the store, as customers tend to steal electronics and personal items, not vegetables.

either of these instructions. As to her claim for aggravation of a pre-existing condition, Ms. Delima contends that her anxiety was worsened as a result of the alleged incident. In support, she called Dr. Clemens to the stand to explain her medical history. However, as Walmart rightly notes, Dr. Clemens expressly declined to testify that Ms. Delima's anxiety was aggravated by the incident. Ms. Delima offered no other proof sufficient to justify instructing the jury on this element. As to future medical expenses, the Court also ultimately removed it from the measure of damages instruction it gave the jury. The reason was simply because Ms. Delima failed to introduce evidence or testimony sufficient to enable a jury to conclude that she has a continuing need for future medical expenses related to the incident. Relatedly, there was no evidence from which a jury could reasonably determine the amount of such future expenses. Therefore, the Court continues to conclude that these instructions were properly denied.²

Finally, Ms. Delima argues that the jury should have been instructed on punitive damages. In her motion for a new trial, Ms. Delima contends that "Plaintiff has clear evidence through preponderance of the evidence" of Walmart's negligence. (Doc. 142, p. 11). However, the standard is not preponderance of the evidence. Under Arkansas law, as reflected in AMI 2218, a plaintiff may not recover punitive damages unless, *by clear and convincing evidence*, she proves that the defendant either: 1) knew or should have known that its conduct would lead to injury and continued with malice or in reckless

² Of course, some of this discussion as to what damage elements should have been submitted to the jury strikes the Court as more of an academic exercise given that the jury didn't even get to the question of damages because it found that Ms. Delima had not proven by a preponderance of the evidence that Walmart was liable. See, e.g., *Green v. Am. Airlines, Inc.*, 804 F.2d 453, 456 (8th Cir. 1986) ("Because the jury returned a verdict for [the Defendant], the damage issue was not reached, and any error in instructions or evidence relating to damages was harmless.").

disregard of the consequences, or 2) that the defendant intentionally pursued a course of conduct for the purpose of causing injury. See Ark. Code Ann. § 16-55-206. There simply was no evidence, much less clear and convincing evidence, that either of these two conditions was met. Therefore, a punitive damages instruction was inappropriate.

3. Use of Separate Interrogatories for Each Element of Damages

Relatedly, Ms. Delima contends that the Court should have used separate interrogatories for each element of damages. The Court disagrees. Its Final Instruction No. 14 followed the AML, giving a combined instruction as to all of the submitted elements of damages and then breaking down and explaining each of those elements in a separate instruction. There was no reason to require the jury to complete separate interrogatories on each element. And, again, because the jury never reached the question of damages at all, this is certainly not a factor which would justify a new trial.

4. Improper Testimony of Her Medical Provider

Ms. Delima next argues that her own medical provider, Dr. Clemens, gave improper testimony regarding myalgia and fibromyalgia during cross examination by Walmart. But, Ms. Delima failed to object at any point to any of Dr. Clemens testimony during this cross-examination. And, Ms. Delima never attempted to re-direct to refocus the jury on what she believes was most important about these two medical conditions. Moreover, Dr. Clemens' records were a part of the group of exhibits that were admitted as stipulated exhibits at the beginning of trial. Therefore, this reason does not support her request for a new trial.

5. Court's Reference to the Incorrect Defendant

Ms. Delima next contends that the Court incorrectly referred to the Defendant as "Walmart Corporation" at the beginning of the trial.³ Apparently, Ms. Delima believes that the Court's use of "Walmart Corporation" somehow prejudiced her case. But, Ms. Delima never explains why she believes this to be so, and the Court is simply at a loss to see how this misstatement in any way prejudiced her case or tainted the jury.

6. Ms. Delima's Exhibits

Ms. Delima's sixth reason for a new trial is because the jury did not see her Blue Cross Blue Shield summary of her medical charges or an Occupational Safety and Health Administration fact sheet with guidelines for retailers conducting special sales.

Ms. Delima is correct that these exhibits were not received into evidence at trial. But, the failure to do so is entirely a creature of her own making. The Court at numerous times during the trial explained that a party may not simply have documents admitted into evidence at will. Rather, the party must lay a foundation for their introduction and then move for their admission. Ms. Delima failed to do both things for each item.

Moreover, it is simply untrue that only Walmart's exhibits were introduced.⁴ The parties each submitted proposed exhibits in accordance with the Court's scheduling order. After review, Walmart advised Ms. Delima that some of her exhibits were missing

³ Although any misstatement of Defendant's name by the Court was unintentional, it is likely due in part to the fact that Ms. Delima's initial Complaint named "Walmart Corporation" as the defendant. At the Court's case management hearing, Defendant explained that the correct entity to be sued was Wal-mart Stores, Arkansas, LLC.

⁴ For instance, one of the exhibits that received the most attention at trial, the video footage from the incident, was a plaintiff's exhibit. Nevertheless, it was included in the group of joint exhibits introduced at the beginning of trial.

pages and the numbering of the exhibits was quite unusual. See Doc. 133-1, pp. 9, 12. Nevertheless, it agreed to stipulate to the admission of many of these exhibits *en masse* at the beginning of trial. Thus, where the parties both included the same exhibit on their exhibit list and to avoid any confusion and ensure that the complete versions of the exhibits were submitted, the Court combined Walmart's complete version of those agreed-to exhibits into a Joint Exhibit packet. *Id.* at p. 12. The Joint Exhibit packet had an index that cross-referenced both parties' original exhibit numbers to ensure that it was clear that both parties had originally intended for these exhibits to be admitted. The Court then sent an email to the parties explaining this process and providing an opportunity for counsel to review the joint exhibits and ensure that there were no objections. The Court never received any objections from Ms. Delima, and the parties jointly moved these agreed-to exhibits into evidence at the beginning of trial.

For all of these reasons, Ms. Delima is not entitled to a new trial because of her failure to get any additional exhibits into evidence.

7. Misconduct of Defense Counsel⁵

Ms. Delima next accuses Defense counsel of misconduct. Specifically, she claims that Walmart's attorneys concealed from her specific facts surrounding two maps of the layout of the Walmart store that were produced to her in response to various Requests for Admission ("RFA") and at the Court's direction following a discovery dispute conference. In short, Ms. Delima served a lengthy list of RFAs on Walmart during

⁵ Ms. Delima has already been cautioned once by the Court to refrain from accusing other parties of misconduct without sufficient justification. (Doc. 152, p. 3). As explained below, the Court again finds little support for Ms. Delima's accusations and would reiterate its admonishment to her here.

discovery in this matter. Many of those RFAs attempted to nail down where in the Walmart store the sale took place that night. Because of the number and nature of these RFAs, Walmart filed numerous objections. To obviate the need for lengthy responses and to clear the matter up, the Court requested that Walmart provide Ms. Delima a copy of the store layout that night. Ms. Delima then took one of the two maps Walmart provided and converted it into two blown-up exhibits, labeled Joint Exhibits 5A and 5B. She then sought to examine witnesses by having them mark on the exhibits where the sale of the Samsung Galaxy tablet occurred in the store.⁶ When store manager Christopher Milam took the stand, Ms. Delima asked him about the legend that appeared on the blown-up exhibits. That legend did not list the Samsung Galaxy tablet. Mr. Milam informed Ms. Delima that the reason for this was because the legend on that map corresponded to the 6PM sale, and not the 8PM sale, which featured the Samsung Galaxy tablets.

From this set of events, Ms. Delima contends that Walmart and its attorneys knowingly provided incorrect and/or misleading exhibits to her during discovery. The Court disagrees. Walmart was directed by the Court to provide these maps of the layout of the store. The fact that the Samsung Galaxy tablet did not appear on one of these maps does not indicate that Walmart intentionally misled her. It was simply complying with the Court's order to turn over any maps in its possession that would depict the layout of the store on the night in question. Moreover, the location of the sale has little to do with the ultimate issue in this case—whether or not Walmart negligently conducted the sale.

⁶ Her intent in doing so appears to the Court to be related to her contention that the surveillance video footage did not capture the area where the sale took place. However, as noted above, despite asking numerous questions to numerous witnesses on this issue, Ms. Delima failed to establish testimony that would undermine the accuracy of the video footage provided to her in discovery.

Finally, to the extent that Ms. Delima believed that whether the sale took place in one part of grocery action alley or another part was so fundamental to her case, Walmart is correct that she spent a great deal of time—probably the majority of her case—examining and cross-examining witnesses about the location of the sale. Therefore, the Court finds that the jury heard more than sufficient evidence on this point and finds nothing in Ms. Delima's argument that would justify a new trial.

8. Weight of the Evidence

Ms. Delima next contends that a new trial is warranted because the jury's verdict went against the weight of the evidence. Ms. Delima makes no argument in support of this assertion, and the Court finds little in the record to support it. The fact is that the jury heard hours of testimony regarding the incident in question, the steps that Walmart took to prepare for the sale, and Ms. Delima's alleged injuries. After hearing all of this evidence, the jury simply disagreed with Ms. Delima's characterization of the facts. The jury could easily have—and apparently did—credit the testimony of Heather Reddell, Christopher Milam, and Officer Timothy Filbeck that Walmart took extensive precautions when organizing and conducting the sale. Thus, the jury had sufficient evidence from which to conclude that Walmart was not negligent in how it conducted the sale and that it did not breach any duty it might have owed to Ms. Delima. While Ms. Delima may believe that there is sufficient evidence in the record on which a jury could have found Walmart liable, the law is clear that a new trial should not be granted where “reasonable persons can differ in evaluating credible evidence.” *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1267 (8th Cir. 1994). Here, the jury simply did its job “to choose between plausible versions of the evidence.” *Id.*

9. Absence of Melanie Houchin

Ms. Delima's final reason for requesting a new trial is because one of the witnesses she desired to call, Melanie Houchin, did not appear. Ms. Houchin was an assistant manager at the Walmart store at the time of the incident, and she was the Walmart employee who signed her name to the written statement that Ms. Delima completed on the night of the sale and whose name appears on Walmart's internal report of the incident.⁷ Ms. Delima complains that Walmart failed to call Ms. Houchin during the trial, referring to her as one of Walmart's "key" witnesses.

As an initial matter, Walmart had no duty to call Ms. Houchin in its case. As the jury was correctly instructed, the burden of proof in this case was at all times on Ms. Delima. Walmart was not required to call any witnesses in its defense or to call witnesses that Ms. Delima would have liked to question. As Walmart rightly notes, the correct way to ensure the attendance of key witnesses you desire to examine at trial is to properly serve them with a subpoena. However, as the Court found during its side bar conference once Ms. Houchin failed to appear, it seems that Ms. Delima failed to properly serve Ms. Houchin at the Walmart store in Siloam Springs where the incident occurred. The problem was that Ms. Houchin had not worked at that Walmart for some time.⁸ Therefore, the

⁷ These two documents were included in the exhibits received as joint exhibits by stipulation of the parties at the beginning of the trial.

⁸ In fact, Christopher Milam testified that it had been years since she left that particular Walmart store, and that he had learned recently that, after transferring to a Walmart in Missouri, she had not worked for Walmart *at all* since around 2016. See Doc. 143, p. 35.

Court found that she had not perfected service of the subpoena under Rule 45, which generally requires "delivering a copy to the named person." F.R.C.P. 45(b)(1).⁹

However, the Court agrees with Walmart that even if Ms. Houchin had been properly served with a subpoena in this case, Ms. Delima has not demonstrated how her absence warrants a new trial. Ms. Delima intended to ask Ms. Houchin questions about Walmart's preservation of the video footage from the night in question, about the location of the incident, and about her statement in the incident report that no other customers witnessed the alleged incident.

However, this testimony would likely have been objectionable as cumulative. For instance, the jury heard extensive testimony concerning the preservation of the video footage, including from the Walmart employee, Heather Reddell, whose job it was to ensure that Walmart complied with its own policies on evidence preservation. Ms. Delima had a full and fair chance to cross-examine Ms. Reddell and the other Walmart witnesses with knowledge of the video, and Ms. Delima offers no explanation as to how or why Ms. Houchin's purported additional testimony on these same issues was necessary given the testimony that had already been elicited. Similarly, as explained in more detail above, the jury heard numerous hours of testimony from witnesses concerning the precise location

⁹ The Court would note that Walmart's pre-trial disclosure sheet listed Melanie Houchin as a witness it expected to call. See Doc. 79, p. 6. It also explained that she "may be contacted through Walmart's counsel of record in this matter." *Id.* However, the Court does not interpret this to be a statement that Walmart would make its former employee available for trial without a subpoena, or that it would accept service of a subpoena on her behalf. Rather, it merely advised that Ms. Houchin's contact information could be obtained through Walmart's counsel. It appears that Ms. Delima never attempted to acquire this information, from Walmart or any other source, in order to properly serve Ms. Houchin, given that she ended up mailing the subpoena via FedEx to a store where Ms. Houchin had not worked in some time.

where the incident occurred. There again is no indication why additional testimony on that topic would have been necessary or non-cumulative.

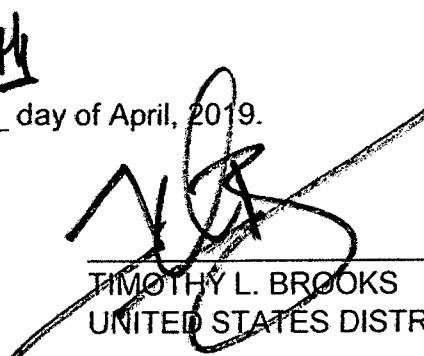
Finally, Ms. Delima argues that Ms. Houchin's statement on the incident report that no customers witnessed the incident was false because her daughter did in fact witness the incident. The Court cannot fathom why this would justify a new trial. For one thing, the witness in question, her daughter Zenith Thompson, testified at trial regarding what she saw and heard. The fact that Ms. Delima was deprived of an opportunity to question Ms. Houchin about one alleged misstatement simply has no bearing on the jury's ultimate determination that Walmart was not negligent in how it conducted the sale.

IV. CONCLUSION

None of the reasons recited by Ms. Delima, alone or in tandem, justify a new trial.

IT IS THEREFORE ORDERED that Ms. Delima's Motion for a New Trial (Doc. 141) is **DENIED**.

IT IS SO ORDERED on this 10th day of April, 2019.


TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**