

NO.

In the
Supreme Court of the United States

NORMA HEREDIA,,

Petitioner,

v.

WAL-MART STORES TEXAS, LLC,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Texas

APPENDIX

Harold K. Tummel
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FILE COPY

RE: Case No. 17-0764 DATE: 1/19/2018
COA #: 13-16-00129-CV TC#: C-5719-14-E
STYLE: HEREDIA V. WAL-MART STORES TX LLC

Today the Supreme Court of Texas denied the
petition for review in the above-referenced case.

MR. HAROLD K. TUMMEL
TUMMEL & CASSO
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FILE COPY

RE: Case No. 17-0764 DATE: 1/19/2018
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DISTRICT CLERK HIDALGO COUNTY
HIDALGO DISTRICT CLERK
100 N. CLOSNER, 1ST FLOOR
EDINBURG, TX 78539
* DELIVERED VIA E-MAIL *

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MS. DORIAN E. RAMIREZ
CLERK, THIRTEENTH COURT OF APPEALS
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FILE COPY

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RE: Case No. 17-0764 DATE: 3/9/2018
COA #: 13-16-00129-CV TC#: C-5719-14-E
STYLE: HEREDIA V. WAL-MART STORES TX LLC

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

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FILE COPY

RE: Case No. 17-0764 DATE: 1/19/2018
COA #: 13-16-00129-CV TC#: C-5719-14-E
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DISTRICT CLERK HIDALGO COUNTY
HIDALGO DISTRICT CLERK
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EDINBURG, TX 78539
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901 LEOPARD STREET, 10TH FLOOR
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DAW & RAY, L.L.P
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MCALLEN, TX 78504
* DELIVERED VIA E-MAIL *

CASE NO. 17-0764

IN THE SUPREME COURT OF TEXAS

Norma Heredia,
Petitioner

vs.

Wal-Mart Stores Texas, LLC,
Respondent

From the Court of Appeals
Thirteenth Judicial District of Texas

FIRST AMENDED MOTION FOR REHEARING

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ATTORNEY FOR PETITIONER

1. On 11-30-2015, the trial court granted Wal-Mart's no-evidence motion for summary judgment ("MSJ"). On 7-27-2017, the court of appeal affirmed the judgment. On 1-19-2018, the Court denied Heredia's petition for review. This motion is therefore timely filed.

Point 1

The trial court erred in granting Wal-Mart's MSJ, because Wal-Mart's MSJ did not address all of Heredia's claims.

2. In Heredia's fourth amended original petition, which was filed on 10-30-2015, Heredia alleged that Wal-Mart negligently operated the subject store without use of an appropriate video surveillance system for detection of foreign objects on the store's floor, and without an alternative system for such purpose which was as good or better than a video surveillance system. See said petition at paragraphs 7, 8 and 11. Appendix 1. In Heredia's fifth amended original petition, which was filed on 11-16-2015, Heredia made the same allegations, among others. See said petition at paragraph 23. Appendix 2. Wal-Mart's MSJ, as supplemented, did not address such negligence claims. Appendix 4.
3. Wal-Mart's MSJ clearly did not relate to such negligence claims. Wal-Mart's MSJ, which was filed on 1-15-2015, stated, "Defendant seeks summary judgment on the grounds that Plaintiff cannot set forth any evidence that Defendant had actual or constructive knowledge of the condition so as to have had a reasonable opportunity to discover and remedy the condition." See said motion, at paragraph 1. CR 45-48; Appendix 3. Wal-Mart's supplemental MSJ, which was filed on 9-25-2015, states the same "grounds." See said supplemental motion, at paragraph 1. CR 76-82; Appendix 4. Wal-

Mart's MSJ, as supplemented, focuses on the time of the occurrence in question. CR 45-48, 76-82; Appendices 3, 4. While not expressly saying so, Wal-Mart implies that because Heredia was injured by a dangerous condition in its store, Heredia could have no valid claims against Wal-Mart other than the specific claim addressed by Wal-Mart's MSJ, as supplemented. CR 45-48, 76-82; Appendices 3, 4. However, the Court long ago rejected such contention.

[Safeway] argues, ..., that it is not obligated to protect customers from the acts of other customers in causing grapes to fall to the floor, regardless of whether those acts are foreseeable. Safeway believes the only duty it owes its customers with respect to the prevention of these kinds of falls is to pick up whatever objects it finds or should find on the floors of the store. We do not agree. In all negligence actions, the foreseeability of the harmful consequences resulting from the particular conduct is the underlying basis for liability. Thus, Corbin's right to recover from Safeway depends on his showing Safeway's knowledge of the foreseeable harm of some

course of conduct or method of operation. He is not required to prove one particular instance of negligence or knowledge of one specific hazard, as Safeway contends.

Corbin v. Safeway Stores, Inc., 648 SW2d 292, 296 (Tex. 1983) (emphasis added).

4. The trial court therefore erred in entering a take-nothing summary judgment against Heredia. CR 725; Science Spectrum, Inc. v. Martinez, 941 SW2d 910, 912 (Tex. 1997). In particular, the Science Spectrum, Inc. opinion held, as had many cases before it, that a summary judgment, which adjudicates a claim not addressed by the MSJ in question, is improper, and must be reversed. Id at 912. Hereinafter, such principle of Texas summary judgment law is called the “Science Spectrum Rule.”
5. The court of appeals (“COA”) affirmed the trial court’s judgment, even though the trial court violated the Science Spectrum Rule in rendering that judgment.

Point 2

Given the Science Spectrum Rule, it would be an abuse of discretion for the Court to deny Heredia’s petition for review.

6. There is no Texas rule of appellate procedure which directs the Court in its exercise of

discretion, to review or decline to review an appeal from a ruling by a Texas court of appeals.

7. In particular, there is no rule of appellate procedure which provides a rational basis for the Court's treatment of the case at bar in a way inconsistent with the Science Spectrum Rule.
8. A court abuses its discretion when it acts without reference to any guiding rules or principles. Downer v. Aquamarine Operators, Inc., 701 SW2d 238, 241-242 (Tex. 1985).
9. Therefore, it would be an abuse of discretion for the Court to deny Heredia's petition for review, as Heredia's petition relates to the complaint stated in Point 1.

Point 3

The trial court erred in granting Wal-Mart's MSJ, because it did so in violation of Heredia's due-process rights.

10. The trial court granted Heredia's motion for continuance of the 11-12-2015 summary judgment hearing, as reflected by the trial court's "docket sheet" entry. CR 10. No order setting a new date for hearing of Wal-Mart's MSJ, as supplemented, was ever entered by the trial court. CR 6-36. Nevertheless, on 11-30-2015, and without hearing or notice, the trial court signed an order granting Wal-Mart's MSJ, as supplemented. CR 725.

11. Summary judgment may not properly be rendered, however, if the non-movant has not been given the notice and opportunity to be heard required by TRCP 166a. Moreover, failure to provide such notice and opportunity to be heard amounts to such a violation of the due-process rights of the non-movant, as requires reversal of a summary judgment rendered against him. Lewis v. Black, 876 SW2d 314, 315 (Tex. 1994); Tanksley v. CitiCapital Commerical Corp., 145 SW3d 760, 763 (Tex. App. – Dallas, 2004, pet. denied); Smith v. Mike Carlson Motor Co., 918 SW2d 669, 672 (Tex. App. – Ft. Worth 1996, no writ); Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84-85 (1988); Lopez v. Lopez, 757 SW2d 721, 723 (Tex. 1988); Mosser v. Plano Three Venture, 893 SW2d 8, 12 (Tex. App. – Dallas 1994, no writ).
12. The COA nevertheless affirmed the trial court's judgment, even though the trial court violated Heredia's due-process rights in rendering that judgment.

Point 4

Given the trial court's violation of Heredia's due-process rights, it would be an abuse of discretion for the Court to deny Heredia's petition for review.

13. There is no Texas rule of appellate procedure which directs the Court in its exercise of discretion, to review or decline to review an appeal from a ruling by a Texas court of appeals.

14. In particular, there is no rule of appellate procedure which provides a rational basis for the Court's treatment of the case at bar in a way inconsistent with Heredia's due-process rights.
15. A court abuses its discretion when it acts without reference to any guiding rules or principles. Downer v. Aquamarine Operators, Inc., 701 SW2d 238, 241-242 (Tex. 1985).
16. Therefore, it would be an abuse of discretion for the Court to deny Heredia's petition for review, as Heredia's petition relates to the complaint stated in Point 3.

Point 5

The trial court erred in granting Wal-mart's MSJ, because Heredia presented more than a scintilla of evidence showing that by the exercise of reasonable care Wal-Mart would have discovered the spill that caused the occurrence in question.

11. A no-evidence summary judgment is improperly granted, if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to each element of its claim made a subject of the motion. City of Keller v. Wilson, 168 SW3d 802, 810 (Tex. 2005). Hereinafter, such principle of Texas summary judgment law is called the "Wilson Rule". More than a scintilla of evidence in support of a fact exists, if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds as to the existence of such fact. Kindred

v. Con/Chem, Inc., 650 SW2d 61, 63 (Tex. 1983). Less than a scintilla of evidence in support of a fact exists, if the evidence is so weak as to do no more than create surmise or suspicion of such fact. Kindred, at 63. Where reasonable minds could differ as to an inference to be drawn from the summary judgment evidence, summary judgment is improper. Fort Worth I.S.D. v. City of Fort Worth, 22 SW3d 831, 846 (Tex. 2000). In ruling upon a motion for summary judgment, a trial court must: (1) take as true all evidence favorable to the non-movant; (2) draw every reasonable inference favorable to the non-movant, which is supported by summary judgment evidence; and (3) resolve all doubts about the probative effects of summary judgment evidence in favor of the non-movant. Continental Casing Corporation v. Samedan Oil Corporation, 751 SW2d 499 (Tex. 1988); Nixon v. Mr. Property Management Company, Inc., 690 SW2d 546 (Tex. 1985); Montgomery v. Kennedy, 669 SW2d 309 (Tex. 1984); Wilcox v. St. Mary's University of San Antonio, 531 SW2d 589 (Tex. 1975).

12. Wal-Mart's MSJ, as supplemented, was predicated upon the sole alleged ground that there was no evidence that Wal-Mart had actual or constructive knowledge of the dark-colored fluid on the floor of Wal-Mart's store at the time of the occurrence in question. CR 45-48, 76-82; Appendices 3 and 4. A property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the

property owner knew or should have known. Del Lago Partners, Inc. v. Smith, 307 SW3d 762, 767 (Tex. 2010). An unreasonable risk of harm is one which makes the harm sufficiently probable, that a reasonably prudent person would have foreseen such harm or a similar harm as likely to occur. Seideneck v. Cal Bayreuther Associates, 451 SW2d 752, 754 (Tex. 1970). A property owner is charged with knowledge of any dangerous condition that a reasonable inspection would have revealed. Seideneck, at 451 SW2d 754.

13. In opposition to Wal-Mart's MSJ, as supplemented, Heredia presented the affidavit testimony of James Falasco ("Falasco"). CR 116-124. Falasco received a Master of Science degree in information science from Western Michigan University. CR 118-124. From 2000-2003, Falasco provided consulting services relating to security and surveillance, to clients which included Texas Instruments Inc., Intel Corp., and Maxwell Technologies, Inc. CR 118-124. From 2003-2009, Falasco worked for General Electric Co., for whom he provided technical support to the company's sales personnel relating to surveillance technologies. CR 118-124. From 2009-2012, Falasco worked for Textron Inc. as a business development manager, where his activities included work with surveillance technologies. CR 118-124. Since 2012, Falasco has provided technical advisory services to various organizations, with much of such work involving surveillance technologies. CR 118-124. As disclosed in his

curriculum vitae, Falasco has been consulted on numerous issues in his field, including in connection with the “Shroud of Turin” investigation, the Space Shuttle disaster, and the Minneapolis bridge collapse. CR 118-124.

14. After making a review of a Wal-Mart store in the Dallas, Texas area, Falasco responded to questions posed to him by Heredia’s counsel, as follows:
 - a. It is feasible to use computerized video-surveillance systems, for quick detection of foreign substances on floors accessible to patrons in Wal-Mart stores.
 - b. Such systems could be used to send an email message, sound an alarm, and/or make a public announcement, among other things that might be helpful in protecting patrons, whenever foreign substances are detected upon the floors accessible to patrons.
 - c. Such systems could be used to send an email message, sound an alarm, and/or make a public announcement, among other things that might be helpful in protecting patrons, within 10 seconds or less of the placement or deposit of a foreign substance upon the floors accessible to patrons. With additional computer power, this time could

be reduced, while with less computer power it would be increased.

- d. Such a system could be installed for not more than \$140,000 on a single-store basis (Super Wal-Mart sized). Such a system could be installed for multiple stores, with decreasing per-store costs as the number of stores increases. Given the speed of modern communications systems, it would be feasible to use a multiple-store system for stores spread over a geographic area like the State of Texas.
- e. In arriving at such opinions, Falasco relied upon the existence, characteristics, capabilities and costs of commercially available hardware and software.
- f. In arriving at such opinions, Falasco did not employ any new theories or novel methods.

CR 118-121.

- 15. Falasco's unchallenged opinions are more than a scintilla of evidence to support a finding that Wal-Mart should have known of the presence of the dark-colored fluid within 10 seconds or less of the time when the fluid was spilled or placed on the floor of Wal-Mart's subject store, and that Wal-Mart should have warned of the fluid by public announcement within the store, within

such 10 seconds or less. CR 118-121. King Ranch, Inc. v. Chapman, 118 SW3d 742, 751 (Tex. 2003). Moreover, Heredia's testimony presented in opposition to Wal-Mart's MSJ, as supplemented, was more than a scintilla of evidence to support a finding that such a public announcement within the store would not have been too late to prevent Heredia's subject slip/fall incident. CR 530-533, 118-121. The trial court therefore erred in granting Wal-Mart's MSJ, as supplemented. CR 725. TRCP 166a(i); City of Keller v. Wilson, 168 SW3d 802, 810 (Tex. 2005); Fort Worth I.S.D. v. City of Fort Worth, 22 SW3d 831, 846 (Tex. 2000); In re Estate of Flores, 76 SW3d 624, 629 (Tex. App. – Corpus Christi 2002, no pet.); Zapata v. The Children's Clinic, 997 SW2d 745, 747 (Tex. App. – Corpus Christi 1999, pet. denied); Ortega v. City Nat'l Bank, 97 SW3d 765, 772 (Tex. App. – Corpus Christi 2003, no pet.).

Point 6

The COA erred in affirming the trial court's judgment, because Heredia presented more than a scintilla of evidence showing that by the exercise of reasonable care Wal-Mart would have discovered the spill that caused the occurrence in question.

16. The COA was obligated to review the summary judgment record de novo. Emmett, at 583. As discussed above, Heredia presented more than a scintilla of evidence to support findings that Wal-Mart should have known of the subject spill

and acted timely to prevent the spill from causing the occurrence in question. Kindred, at 63. The COA therefore erred in affirming the trial court's judgment. Appendix 5; City of Keller v. Wilson, 168 SW3d 802, 810 (Tex. 2005).

Point 7

Given the Wilson Rule, it would be an abuse of discretion for the Court to deny Heredia's petition for review.

17. There is no Texas rule of appellate procedure which directs the Court in its exercise of discretion, to review or decline to review an appeal from a ruling by a Texas court of appeals.
18. In particular, there is no rule of appellate procedure which provides a rational basis for the Court's treatment of the case at bar in a way inconsistent with the Wilson Rule.
19. A court abuses its discretion when it acts without reference to any guiding rules or principles. Downer v. Aquamarine Operators, Inc., 701 SW2d 238, 241-242 (Tex. 1985).
20. Therefore, it would be an abuse of discretion for the Court to deny Heredia's petition for review, as Heredia's petition relates to the complaints stated in Points 5 and 6.

Point 8

The affirmance of the trial court's judgment by the court of appeals makes this case one subject to the Court's jurisdiction, pursuant to Texas Government Code Section 22.001(a)(2).

21. Because the trial court's judgment contravened the Science Spectrum Rule, the affirmance of that judgment by the court of appeals brings this case within the Court's jurisdiction, within the meaning of Texas Government Code Section 22.001(a)(2).
22. Because the trial court's judgment contravened the Wilson Rule, the affirmance of that judgment by the court of appeals brings this case within the Court's jurisdiction, within the meaning of Texas Government Code Section 22.001(a)(2).

Point 9

The Court's denial of Heredia's petition for review would violate Heredia's right to equal protection under federal law.

23. There is no Texas rule of appellate procedure which directs the Court in its exercise of discretion, to review or decline to review an appeal from a ruling by a court of appeals.
24. In particular, there is no rule of appellate procedure which provides a rational basis for the Court's treatment of individual petitioners for review, less favorably than the Court's

treatment of petitioners for review who are not individuals.

25. However, recent decisions of the Court to review or not to review appeals from decisions of courts of appeals show, that the Court grants review to petitioners who are not individuals much more frequently than the Court grants review to petitioners who are individuals. See the attached declaration of Heredia's counsel (Appendix 6), and the attached declarations of Robert Serfling, Ph. D. (Appendices 7 and 8).
26. Such difference in treatment of petitions for review does not bear "a rational relation to some legitimate end." There is no rule of law that explains such difference. There is no public policy that explains such difference.
27. Therefore, a denial of Heredia's petition for review would violate Heredia's right to equal protection against erroneous rulings of Texas courts of appeals. U.S. Const., Amend. 14, Section 1; Save Palisade Fruitlands v. Todd, 279 F3d 1204, 1213 (10th Cir. 2002) (holding that dissimilar treatment of classes of litigants requires, at a minimum, a rational relation to some legitimate end, to satisfy the equal protection clause of U.S. Const., Amend. 14, Section 1).

PRAYER

Heredia prays that the Court grant Heredia's petition for review, reverse the rulings of the court of appeals, and remand this case to the court of appeals for further proceedings consistent with the Court's rulings in this case.

Respectfully submitted,
/s/ Harold K. Tummel
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ATTORNEY FOR PETITIONER

CERTIFICATE OF COMPLIANCE
WITH TRAP 9.4(i)

According to the software program used to make this petition, this petition contains a total of 2,941 words.

/s/ Harold K. Tummel

CERTIFICATE OF SERVICE

I certify that a true copy of this instrument was served on January 31, 2018 by e-mail to:

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/s/ Harold K. Tummel

Appendix 1

CASE NO. C-5719-14-E

N O R M A	§	IN THE DISTRICT COURT
HEREDIA	§	
	§	HIDALGO COUNTY, TEXAS
V.	§	
	§	
W A L - M A R T	§	
S T O R E S	§	
TEXAS, LLC	§	275 TH JUDICIAL DISTRICT

PLAINTIFF'S FOURTH AMENDED ORIGINAL
PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Norma Heredia, Plaintiff, complaining of Wal-Mart Stores Texas, LLC, Defendant, and would respectfully show to the Court as follows:

1. Plaintiff intends that discovery in this case be conducted pursuant to Texas Rule of Civil Procedure ("TRCP") 190.4, and, pursuant to TRCP 193.7, hereby gives notice of intent to use at trial and hearings all things produced to Plaintiff by other parties in this case.
2. Plaintiff is a natural person, who resides in Hidalgo County, Texas.
3. Defendant is a foreign limited liability company, which has appeared and answered herein.

Defendant is part of the Wal-Mart Stores Inc. (“WMS”) organization, which operates retail stores in various formats worldwide. WMS’s gross revenues in 2014 were reported by WMS to have been equal to \$476,000,000,000.

4. Hidalgo County, Texas is a proper venue for this case, because all or a substantial part of the events or omissions giving rise to Plaintiff’s claims occurred in Hidalgo County, Texas.
5. Slip-and-fall accidents are a major cause of morbidity and mortality in the United States. The U.S. Centers for Disease Control and Prevention (the “CDC”) compiles and publishes statistical data relating to such accidents. The CDC reports: (1) in 2012, such accidents resulted in more than 2.4 million emergency department visits and more than 722,000 hospitalizations; (2) in 2012, the total direct medical costs resulting from such accidents exceeded \$30,000,000,000; (3) during the period 2004-2007, such accidents resulted in far more injuries than resulted from overexertion, being struck, transportation, or being cut or pierced; and (4) in 2012, such accidents were the 10th leading cause of death in persons aged 15-34, the 8th leading cause of death in persons aged 35-44, the 6th leading cause of death in persons aged 45-54, the 4th leading cause of death in persons aged 55-64, and the leading cause of death in persons aged 65 or over. Such facts were known by Defendant, or should have been known by Defendant, at all times relevant to this case.

6. On or about 9-18-13, Plaintiff sustained serious bodily injuries, when, as a business invitee of Defendant, Plaintiff slipped and fell upon premises owned and controlled by Defendant in Edinburg, Texas.
7. On the occasion in question, Defendant caused the subject retail business to be kept open to the public, without the premises having an appropriate video surveillance system for early detection of foreign objects upon the floor of the premises accessible to members of the public. Such conduct was negligent, grossly negligent, and proximately caused the occurrence in question and Plaintiff's damages made subjects of this case.
8. On the occasion in question, Defendant caused the subject retail business to be kept open to the public, without the premises having an appropriate system, which is as good or better than a video surveillance system, for early detection of foreign objects upon the floor of the premises accessible to members of the public. Such conduct was negligent, grossly negligent, and proximately caused the occurrence in question and Plaintiff's damages made subjects of this case.
9. On the occasion in question, Defendant caused the subject retail business to be kept open to the public, without warning those members of the public who enter the premises, that a policy and/or a practice of the business is to destroy

evidence relating to causes of patron slip-fall incidents and thereby to impair the ability of such patrons to obtain compensation for their damages resulting from such incidents. Such conduct was negligent, grossly negligent, and proximately caused the occurrence in question and Plaintiff's damages made subjects of this case.

10. On the occasion in question, Defendant caused the subject retail business to be kept open to the public, without warning those members of the public who enter the premises, that a policy and/or a practice of the business is to operate said business without having exercised ordinary care to make the floor of said premises accessible to patrons reasonably safe for patrons. Such conduct was negligent, grossly negligent, and proximately caused the occurrence in question and Plaintiff's damages made subjects of this case.
11. As proximate results of Defendant's negligence and gross negligence, Plaintiff sustained past and probable future physical pain, past and probable future physical impairment, past and probable future loss of services, past and probable future mental anguish, and past medical care expenses.
12. Plaintiff's damages made subjects of this case are within the jurisdictional limits of the Court.
13. Plaintiff seeks monetary relief over \$200,000 but not more than \$1,000,000.

14. Plaintiff hereby makes demand for trial by jury of all disputed issues of fact.
15. Wherefore, premises considered, Plaintiff respectfully prays that the Court render judgment in favor of Plaintiff and against Defendant, for compensatory damages, exemplary damages, pre-judgment interest, costs of court and post-judgment interest, and that the Court grant Plaintiff such additional relief, to which Plaintiff may show just entitlement.

Respectfully submitted,

[signature]

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

A true copy of this instrument was served in
accordance with applicable law.

[signature]
Harold K. Tummel

Appendix 2

CASE NO. C-5719-14-E

N O R M A	§	IN THE DISTRICT COURT
HEREDIA	§	
	§	HIDALGO COUNTY, TEXAS
V.	§	
	§	
W A L - M A R T	§	
S T O R E S	§	
TEXAS, LLC	§	275 TH JUDICIAL DISTRICT

PLAINTIFF'S FIFTH AMENDED ORIGINAL
PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Norma Heredia, Plaintiff, complaining of Wal-Mart Stores Texas, LLC, Defendant, and would respectfully show to the Court as follows:

1. Plaintiff intends that discovery in this case be conducted pursuant to Texas Rule of Civil Procedure ("TRCP") 190.4, and, pursuant to TRCP 193.7, hereby gives notice of intent to use at trial and hearings all things produced to Plaintiff by other parties in this case.
2. Plaintiff is a natural person, who resides in Hidalgo County, Texas.

3. Defendant is a foreign limited liability company, which has appeared and answered herein. Defendant is part of the Wal-Mart Stores Inc. (“WMS”) organization, which operates retail stores in various formats worldwide, including a Wal-Mart store (“Defendant’s Store”) on South McColl Road in Edinburg, Hidalgo County, Texas. WMS controls many aspects of Defendant’s operations. In particular, WMS determines the policies and practices of Defendant, which relate to slip/fall risks to Defendant’s patrons associated with shopping in Defendant’s stores, including Defendant’s Store.
4. On or about 9-18-13, Plaintiff sustained serious bodily injuries, when, as a business invitee of Defendant, Plaintiff slipped and fell in Defendant’s Store.
5. Hidalgo County, Texas is a proper venue for this case, because all or a substantial part of the events or omissions giving rise to Plaintiff’s claims occurred in Hidalgo County, Texas. In particular, Defendant’s Store is located in Hidalgo County, Defendant’s inspections for dangerous conditions in Defendant’s Store are performed in Hidalgo County, the dangerous condition which caused the occurrence in question was in Defendant’s Store in Hidalgo County, Plaintiff lives in Hidalgo County, and medical care and treatment provided to Plaintiff

for injuries sustained on the occasion in question was provided to Plaintiff in Hidalgo County.

6. It was public knowledge at all times relevant to this case, that slip/fall accidents are a major cause of morbidity and mortality in the United States. In particular, the U.S. Centers for Disease Control and Prevention (the “CDC”) compiles and publishes statistical data relating to such accidents. The CDC reported: (1) in 2012, such accidents resulted in more than 2.4 million emergency department visits and more than 722,000 hospitalizations; (2) in 2012, the total direct medical costs resulting from such accidents exceeded \$30,000,000,000; (3) during the period 2004-2007, such accidents resulted in far more injuries than resulted from overexertion, being struck, transportation, or being cut or pierced; and (4) in 2012, such accidents were the 10th leading cause of death in persons aged 15-34, the 8th leading cause of death in persons aged 35-44, the 6th leading cause of death in persons aged 45-54, the 4th leading cause of death in persons aged 55-64, and the leading cause of death in persons aged 65 or over. Such reports of the CDC were in the public domain and available to Defendant, at all times relevant to this case.
7. On the occasion in question, Plaintiff was in Defendant’s Store shopping for shoes.

8. On the occasion in question, Plaintiff's slip/fall incident was caused by a colored fluid upon the floor of Defendant's Store, in an area of Defendant's Store which Defendant intended to be accessible to Defendant's patrons, and which was accessible to Defendant's patrons, including Plaintiff.
9. The colored fluid made Defendant's Store unreasonably dangerous for Defendant's patrons, including Plaintiff.
10. The colored fluid was on the floor of Defendant's Store for a period of time prior to Plaintiff's slip/fall incident.
11. Prior to the occurrence in question, Plaintiff did not see anyone at or near the location in Defendant's Store, where Plaintiff's slip/fall incident occurred.
12. Prior to the occurrence in question, Plaintiff did not see the colored fluid on the floor in Defendant's Store.
13. Prior to the occurrence in question, Plaintiff did not see any warning signs at or near the location in Defendant's Store, where Plaintiff's slip/fall incident occurred.
14. Prior to the occurrence in question, Plaintiff did not see any obstructions to pedestrian traffic at

or near the location in Defendant's Store, where Plaintiff's slip/fall incident occurred.

15. Prior to the occurrence in question, Plaintiff did not see any indication of the presence of the colored fluid in Defendant's Store, where Plaintiff's slip/fall incident occurred.
16. At the time of Plaintiff's slip/fall incident, Plaintiff was pushing a shopping cart supplied by Defendant.
17. At the time of Plaintiff's slip/fall incident, Plaintiff sustained bruising of her body.
18. At the time of Plaintiff's slip/fall incident, Plaintiff felt pain in her body.
19. Promptly following Plaintiff's slip/fall incident, Plaintiff reported to one or more persons employed in Defendant's Store, the fact and location of Plaintiff's slip/fall incident, that Plaintiff had been bruised in such incident, and that Plaintiff experienced pain as a result of the incident.
20. On the occasion in question, and after receiving such report from Plaintiff, one or more persons employed in Defendant's Store cleaned the floor where the colored fluid was located, and disposed of the colored fluid and the materials used to remove it from the floor.

21. On the occasion in question, Defendant's employees acted in accordance with Defendant's policies and practices, as relates to removing the colored fluid from the floor, and disposing of the colored fluid and the materials used to remove it from the floor.
22. On the occasion in question, Defendant did not preserve, measure, test or analyze the colored fluid on the floor, or any part of same.
23. On the occasion in question, Defendant did not preserve, measure, test or analyze any physical, chemical or biological property of the colored fluid on the floor, or any part of same.
24. On the occasion in question, Defendant owed a duty to Defendant's invitees, including Plaintiff, reasonably to inspect Defendant's Store to discover dangerous conditions in Defendant's Store which could harm Defendant's invitees, including Plaintiff. Defendant breached such duty, by using an approach to inspecting Defendant's Store which was known to Defendant not to identify timely and reliably the presence of foreign materials on the floor of Defendant's Store. Defendant breached such duty, by choosing not to use computerized video surveillance, or a comparably effective and financially feasible alternative means, to inspect Defendant's Store to identify timely and reliably the presence of foreign materials on the floor of Defendant's Store. Such breaches of duty by

Defendant constituted negligence and gross negligence, which proximately caused Plaintiff's slip/fall incident and Plaintiff's damages resulting from such incident which have been made subjects of this case.

25. On the occasion in question, Defendant owed a legal duty to Plaintiff, to preserve the colored fluid as evidence, because Defendant had reason to believe: (1) that it was reasonably likely that Plaintiff would assert a claim against Defendant for personal injuries, and (2) the colored fluid could be relevant to such a claim. Defendant intentionally breached such duty. Defendant is therefore subject to the imposition of such sanction as the Court in its discretion determines to be appropriate, which may consist of either of the following sanctions, among others: (1) a ruling that Defendant is liable to Plaintiff, as a matter of law; or (2) an instruction to the jury, that it may assume that the colored fluid, had it not been destroyed by Defendant, would have proven Defendant's negligence on the occasion in question.
26. As proximate results of Defendant's negligence and gross negligence, Plaintiff sustained past and probable future physical pain, past and probable future physical impairment, past and probable future loss of services, past and probable future mental anguish, and past medical care expenses.

27. Plaintiff's damages made subjects of this case are within the jurisdictional limits of the Court.
28. Plaintiff seeks monetary relief over \$200,000 but not more than \$1,000,000.
29. Plaintiff hereby makes demand for trial by jury of all disputed issues of fact.
30. Wherefore, premises considered, Plaintiff respectfully prays that the Court render judgment in favor of Plaintiff and against Defendant, for compensatory damages, exemplary damages, pre-judgment interest, costs of court and post-judgment interest, and that the Court grant Plaintiff such additional relief, to which Plaintiff may show just entitlement.

Respectfully submitted,

[signature]

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

A true copy of this instrument was served in
accordance with applicable law.

[signature]
Harold K. Tummel

Appendix 3

CAUSE NO. C-5719-14-E

N O R M A	§	IN THE DISTRICT COURT
HEREDIA	§	
	§	HIDALGO COUNTY, TEXAS
V.	§	
	§	
W A L - M A R T	§	
S T O R E S	§	
TEXAS, LLC	§	275 TH JUDICIAL DISTRICT

DEFENDANT'S NO EVIDENCE MOTION FOR
SUMMARY JUDGMENT AGAINST NORMA
HEREDIA

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES WAL-MART STORES TEXAS, L.L.C. , (hereinafter referred to as "Wal-Mart") Defendant in the above entitled and numbered cause and files its No Evidence Motion for Summary Judgment against Norma Heredia (hereinafter referred to as "Plaintiff") and in support thereof would respectfully show the Court the following:

A.

BACKGROUND

1. This case arises out of an incident that occurred on September 18, 2013 wherein Plaintiff alleges that she slipped and fell on the floor in the Ladies Apparel section in Wal-Mart #3886 in

Edinburg, Texas. Plaintiff makes a claim against Defendant for personal injuries allegedly caused by Defendant's alleged negligence under a premises liability theory. See Plaintiff's Original Petition & Discovery Requests Attached hereto as Exhibit "A JI and incorporated herein by reference for all purposes. Defendant seeks summary judgment on the grounds that Plaintiff cannot set forth any evidence that Defendant had actual or constructive knowledge of the condition so as to have had a reasonable opportunity to discover and remedy the condition. Discovery is substantially complete at this time.

B.

RULE 166a(d) NOTICE

2. Pursuant to Rule 166a(d), all parties are hereby notified that WAL-MART STORES, TEXAS, L.L.C. intends to use the following items as summary judgment proof:
 1. Exhibit "A JI - Plaintiff's Original Petition and Discovery Requests
 2. Exhibit "B JI - Deposition of Norma Heredia

C.

NO EVIDENCE MOTION FOR SUMMARY
JUDGMENT STANDARD

3. A no-evidence summary judgment is properly granted if the nonmovant fails to produce more than a scintilla of probative evidence raising a genuine issue of material fact as to an essential element of a claim on which the nonmovant would have the burden of proof at trial. TEX. R.

C1v. P. 166a(I); Flameout Design v. Pennzoil Caspian, 994 S.W.2d 830, 834 (Tex. App.-Houston [1ST Dist.] 1999, no pet.); Jackson v. Fiesta Mart, 979 S.W.2d 68, 70-71(Tex.App-Austin 1998, no pet.). Evidence is more than a scintilla when it "rises to the level that would enable reasonable and fair-minded people to differ in their conclusions." Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997). "Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. " Fiesta Mart, 979 S.W.2d at 71(quoted Kindred v. Con/Chem, Inc., 650 S.W.2d 61 , 63 (Tex. 1983)).

4. A no-evidence summary judgment motion places the burden of presenting evidence squarely on the nonmovant. Harrill v. A.J. s Wrecker Service, Inc. , 27 S.W.3d 191 , 193 (Tex.App-Dallas 2000, pet. dismiss'd). "If the nonmovant is unable to produce summary judgment evidence raising a genuine issue of material fact on the challenged elements, the trial court must grant the motion." Id. As with a traditional summary judgment motion, the court must construe the evidence in favor of the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. Fiesta Mart, 979 S.W.2d at 70. However, opinions and beliefs, no matter how sincerely held, are not competent summary judgment evidence. Texas Div. - Tranter, Inc. v. Carrozza, 876 S.W.2d 312,

314(Tex. 1994); Cannon v. Texas Indep. Bank, 1 S.W.3d 218, 225 (Tex.App-Texarkana, pet. denied). Likewise, conclusory assumptions, without factual support, are not competent summary judgment evidence. Id.; Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996); Rizkallah v. Conner, 952 S.W.2d 580, 587 (Tex. App. Houston [1st Dist.] 1997).

D.

ANALYSIS AND AUTHORITIES

5. It is undisputed that Wal-Mart was the possessor of the premises where the incident is alleged to have occurred and that Plaintiff was an invitee at the time of the incident. In order to establish a premises liability claim, Plaintiff must also show that Wal-Mart knew or should have known of the danger; failed to use ordinary care to reduce or eliminate an unreasonable risk of harm; and that the Wal-Mart's breach proximately caused Plaintiff's injury. See Brinson Ford, Inc. v. Alger, 228 S.W.3d 161 , 162-63 (Tex. 2007).

Plaintiff cannot set forth any evidence that Wal-Mart had actual or constructive knowledge of the alleged hazardous condition.

6. Wal-Mart owed Plaintiff, its invitee, a duty to exercise reasonable care to protect her from dangerous conditions in the store that were known or reasonably discoverable, but it was not an insurer of her safety. See Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 814 (Tex. 2002). An

essential element of Plaintiff's claim is that Wal-Mart had actual or constructive knowledge of the spill on the floor of the store. See *id.*; *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). Plaintiff may prove this element by establishing that (1) Wal-Mart placed the substance on the floor, (2) Wal-Mart actually knew that the substance was on the floor, or (3) it is more likely than not that the condition existed long enough to give Wal-Mart a reasonable opportunity to discover it. See *Reece*, 81 S.W.3d at 814; *Keetch*, 845 S.W.2d at 265. Plaintiff does not assert that Wal-Mart placed the substance on the floor or actually knew that the substance was on the floor, nor is there any summary-judgment evidence that would raise a fact issue in this regard. Therefore, to avoid summary judgment, there must be summary-judgment evidence raising a fact issue as to constructive notice, i.e. whether the substance had been on the floor for a sufficient period of time that Wal-Mart had a reasonable opportunity to discover it.

7. The rule requiring proof that a dangerous condition existed for some length of time before a premises owner may be charged with constructive knowledge is firmly rooted in Texas jurisprudence. See *Reece*, 81 S.W.3d at 815. This rule emerged from the reluctance of Texas courts to impose liability on a storekeeper for the carelessness of another over whom the storekeeper had no control or for "the fortuitous

act of a single customer" that could instantly create a dangerous condition. See *id.* at 816. This rule is based on the premise that temporal evidence best indicates whether the owner had a reasonable opportunity to discover and remedy a dangerous condition. See *id.* Without some temporal evidence, there is no basis upon which the fact finder can reasonably assess the opportunity the premises owner had to discover the dangerous condition. See *id.* Before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition, there must be some proof as to how long the hazard was there. See *id.*

8. In this case, there is no competent summary-judgment evidence as to how long the substance was on the floor before Plaintiff slipped and fell. In the pertinent part of her deposition, Plaintiff states that while she was shopping at the store, she slipped on a soda spill in the "big women clothing" section of the store. Ex. Bat 18:1-19; 18:25-19:2. She does not know how the spill got on the floor; does not know how long the spill had been on the floor; and cannot identify anyone that might know how long the spill was on the floor. Ex. B at 21 : 13-22:3.
9. Plaintiff cannot present any proof, other than mere speculation, of when the spill came to be on the floor or how long it had been present. Therefore, any inference that the spill had been on the store floor for a long enough period of

time to have given Wal-Mart a reasonable opportunity to have discovered would be based on pure speculation. Such is insufficient to meet Plaintiffs burden in raising a fact issue on whether Wal-Mart had a reasonable opportunity to discovery and remedy the condition. As the First Court of Appeals has held:

An ultimate fact may be established by circumstantial evidence, but the circumstances relied upon must have probative force sufficient to constitute a basis of legal inference. It is not enough that the facts raise a mere surmise or suspicion of the existence of the fact or permit a purely speculative conclusion. The circumstances relied on must be of such a character as to be reasonably satisfactory and convincing, and must not be equally consistent with the nonexistence of the ultimate fact.

See *Summers v. Fort Crockett Hotel, Ltd.*, 902 S.W.2d 20, 25 (Tex. App.-Houston [1st Dist.] 1995, writ denied). Moreover, opinions and beliefs, no matter how sincerely held, are not competent summary judgment evidence. *Texas Div. - Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994); *Cannon v. Texas Indep. Bank*, 1S.W.3d 218, 225 (Tex.App-Texarkana, pet. denied). Likewise, conclusory assumptions, without factual support, are not competent summary judgment evidence. *Id.*; *Ryland Group*,

Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996); Rizkallah v. Conner, 952 S.W.2d 580, 587 (Tex. App.- Houston [1 51 Dist.] 1997). Here, the proof Plaintiff offers regarding how long the substance was on the floor is so weak that it only creates a mere surmise or suspicion of a fact and is therefore less than a scintilla. Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983). Because Plaintiff's proof of knowledge can be based solely on mere speculation, surmise and assumption, it is insufficient to defeat a no evidence motion for summary judgment.

E.

CONCLUSION

10. Defendant, WAL-MART STORES TEXAS, L.L.C. is entitled to summary judgment because, there is no competent summary-judgment evidence indicating when or how the substance came to be on the floor. There is no summary-judgment evidence indicating how long the substance was on the floor before Plaintiff slipped and fell. Under the applicable standard, the evidence does not raise a genuine issue of fact as to whether (1) Wal-Mart placed the substance on the floor, (2) Wal-Mart actually knew that the substance was on the floor, or (3) it is more likely than not that the substance had been on the floor long enough to give Wal-Mart a reasonable opportunity to discover it. See Reece, 81 S.W.3d at 814-17. Thus, the summary-judgment evidence does not raise a genuine issue of fact as to whether Wal-Mart had actual

or constructive knowledge that the substance was on the floor of the store and summary judgment is properly granted. See id.

PRAYER

WHEREFORE, PREMISES CONSIDERED, for all of the foregoing reasons, Defendant WAL-MART STORES TEXAS, L.L.C. respectfully requests the Court to set its No Evidence Motion for Summary Judgment for hearing, and upon hearing or consideration thereof, it respectfully asks the Court to grant its No Evidence Motion for Summary Judgment. WAL-MART STORES TEXAS, L.L.C. also prays for such other and further relief, legal and equitable, general or special, to which it may show itself to be justly entitled.

Respectfully Submitted,
DAW & RAY, L.L.P.
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McAllen, Texas 78504
Phone: (956) 687-3121
Fax: (956) 686-3188
Email: jdrabek@dawray.com
Isl Jaime A. Drabek
JAIME A. DRABEK, SBN: 06102410
ATTORNEYS FOR DEFENDANT,
WAL-MART STORES TEXAS, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served via facsimile on all known counsel of record on the 15th day of January, 2015, to-wit:

Mr. Harold K. Tummel Via Fax No. (956) 664-0522
Ms. Lydia Casso Tummel
Tummel & Casso
4430 South McColl Road
Edinburg, Texas 78539

Isl Jaime A. Drabek
JAIME A. DRABEK

Appendix 4

CAUSE NO. C-5719-14-E

NORMA	§	IN THE DISTRICT COURT
HEREDIA	§	
	§	HIDALGO COUNTY, TEXAS
V.	§	
	§	
WAL-MART	§	
STORES	§	
TEXAS, LLC	§	275 TH JUDICIAL DISTRICT

DEFENDANT'S SUPPLEMENTAL NO EVIDENCE
MOTION FOR SUMMARY JUDGMENT AGAINST
NORMA HEREDIA

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES WAL-MART STORES TEXAS, L.L.C.,
(hereinafter referred to as "Wal-Mart") Defendant in
the above entitled and numbered cause and files its
Supplemental No Evidence Motion for Summary
Judgment against Norma Heredia (hereinafter referred
to as "Plaintiff") and in support thereof would
respectfully show the Court the following :

A

BACKGROUND

1. This case arises out of an incident that occurred
on September 18, 2013 wherein Plaintiff alleges
that she slipped and fell on the floor in the

Ladies Apparel section in Wal-Mart #3886 in Edinburg, Texas. Plaintiff makes a claim against Defendant for personal injuries allegedly caused by Defendant's alleged negligence under a premises liability theory. See Plaintiffs 2ND Amended Petition Attached hereto as Exhibit ".A" and incorporated herein by reference for all purposes. Defendant seeks summary judgment on the grounds that Plaintiff cannot set forth any evidence that Defendant had actual or constructive knowledge of the condition so as to have had a reasonable opportunity to discover and remedy the condition. Discovery is substantially complete at this time.

B.

RULE 166a(d) NOTICE

2. Pursuant to Rule 166a(d), all parties are hereby notified that WAL-MART STORES, TEXAS, L.L.C. intends to use the following items as summary judgment proof:
 1. Exhibit "A " - Plaintiffs 2ND Amended Petition
 2. Exhibit "B" - Deposition of Norma Heredia

C.

NO EVIDENCE MOTION FOR SUMMARY
JUDGMENT STANDARD

3. A no-evidence summary judgment is properly granted if the nonmovant fails to produce more

than a scintilla of probative evidence raising a genuine issue of material fact as to an essential element of a claim on which the nonmovant would have the burden of proof at trial. TEX. R. CIV. P. 166a(I); *Flameout Design v. Pennzoil Caspian*, 994 S.W.2d 830, 834 (Tex. App.-Houston [1 ST Dist.] 1999, no pet.); *Jackson v. Fiesta Mart*, 979 S.W.2d 68, 70-71 (Tex.App-Austin 1998, no pet.). Evidence is more than a scintilla when it "Arises to the level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). "Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact." *Fiesta Mart*, 979 S.W.2d at 71 (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

4. A no-evidence summary judgment motion places the burden of presenting evidence squarely on the nonmovant. *Harrill v. A.J.=s Wrecker Service, Inc.*, 27 S.W.3d 191, 193 (Tex.App-Dallas 2000, pet. dismissed). "If the nonmovant is unable to produce summary judgment evidence raising a genuine issue of material fact on the challenged elements, the trial court must grant the motion." *Id.* As with a traditional summary judgment motion, the court must construe the evidence in favor of the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant=s favor. *Fiesta Mart*,

979 S.W.2d at 70. However, opinions and beliefs, no matter how sincerely held, are not competent summary judgment evidence. Texas Div. - Tranter, Inc. v. Carrozza, 876 S.W.2d 312, 314(Tex. 1994); Cannon v. Texas Indep. Bank, 1 S.W .3d 218, 225 (Tex.App-Texarkana, pet. denied). Likewise, conclusory assumptions, without factual support, are not competent summary judgment evidence. Id.; Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996); Rizkallah v. Conner, 952 S.W.2d 580, 587 (Tex. App.- Houston [1 st Dist.] 1997).

D.

ANALYSIS AND AUTHORITIES

5. It is undisputed that Wal-Mart was the possessor of the premises where the incident is alleged to have occurred and that Plaintiff was an invitee at the time of the incident. In order to establish a premises liability claim, Plaintiff must also show that Wal-Mart knew or should have known of the danger; failed to use ordinary care to reduce or eliminate an unreasonable risk of harm; and that the Wal-Mart's breach proximately caused Plaintiff=s injury. See Brinson Ford, Inc. v. Alger, 228 S.W .3d 161, 162-63 (Tex. 2007).

Plaintiff cannot set forth any evidence that Wal-Mart had actual or constructive knowledge of the alleged hazardous condition.

6. Wal-Mart owed Plaintiff, its invitee, a duty to exercise reasonable care to protect her from

dangerous conditions in the store that were known or reasonably discoverable, but it was not an insurer of her safety. See *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002). An essential element of Plaintiff's claim is that Wal-Mart had actual or constructive knowledge of the spill on the floor of the store. See *id.*; *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). Plaintiff may prove this element by establishing that (1) Wal-Mart placed the substance on the floor, (2) Wal-Mart actually knew that the substance was on the floor, or (3) it is more likely than not that the condition existed long enough to give Wal-Mart a reasonable opportunity to discover it. See *Reece*, 81 S.W.3d at 814; *Keetch*, 845 S.W.2d at 265. Plaintiff does not assert that Wal-Mart placed the substance on the floor or actually knew that the substance was on the floor, nor is there any summary-judgment evidence that would raise a fact issue in this regard. Therefore, to avoid summary judgment, there must be summary-judgment evidence raising a fact issue as to constructive notice, i.e. whether the substance had been on the floor for a sufficient period of time that Wal-Mart had a reasonable opportunity to discover it.

7. The rule requiring proof that a dangerous condition existed for some length of time before a premises owner may be charged with constructive knowledge is firmly rooted in Texas jurisprudence. See *Reece*, 81 S.W.3d at 815. This

rule emerged from the reluctance of Texas courts to impose liability on a storekeeper for the carelessness of another over whom the storekeeper had no control or for "the fortuitous act of a single customer" that could instantly create a dangerous condition. See *id.* at 816. This rule is based on the premise that temporal evidence best indicates whether the owner had a reasonable opportunity to discover and remedy a dangerous condition. See *id.* Without some temporal evidence, there is no basis upon which the fact finder can reasonably assess the opportunity the premises owner had to discover the dangerous condition. See *id.* Before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition, there must be some proof as to how long the hazard was there. See *id.*

8. In this case, Plaintiff can present no competent summary-judgment evidence as to how long the substance was on the floor before Plaintiff slipped and fell. In the pertinent part of her deposition, Plaintiff states that while she was shopping at the store, she slipped on a soda spill in the "big women cloth ing" section of the store. See Ex. B at 18: 1-19; 18:25-19:2. She does not know how the spill got on the floor; does not know how long the spill had been on the floor; and cannot identify anyone that might know how long the spill was on the floor. See Ex. Bat 21 :13-22:3. Notably, Plaintiff testified that after the incident allegedly occurred, a member of

management spoke with her about the incident; asked her if she required medical treatment and requested that she file a report to which Plaintiff responded that she did not require medical treatment and declined filing a report. See Ex. B at 28: 1-17. Plaintiff returned to the store later that same day and requested to file a report. See Ex. Bat 29: 17-30:7. In taking the depositions of Assistant Managers of the store, Plaintiff failed to elicit any testimony that either knew how the spill had come to be on the floor or how long it had been on the floor prior to the Plaintiff's incident.

9. In sum, Plaintiff cannot present any proof, other than mere speculation, of when the spill came to be on the floor or how long it had been present before her incident. Therefore, any inference that the spill had been on the store floor for a long enough period of time to have given Wal-Mart a reasonable opportunity to have discovered would be based on pure speculation. Such is insufficient to meet Plaintiff's burden in raising a fact issue on whether Wal-Mart had a reasonable opportunity to discovery and remedy the condition. As the First Court of Appeals has held:

An ultimate fact may be established by circumstantial evidence, but the circumstances relied upon must have probative force sufficient to constitute a basis of legal inference. It is not enough

that the facts raise a mere surmise or suspicion of the existence of the fact or permit a purely speculative conclusion. The circumstances relied on must be of such a character as to be reasonably satisfactory and convincing , and must not be equally consistent with the nonexistence of the ultimate fact.

See *Summers v. Fort Crockett Hotel, Ltd.*, 902 S.W.2d 20, 25 (Tex. App.-Houston [1st Dist.] 1995, writ denied). Moreover, opinions and beliefs, no matter how sincerely held, are not competent summary judgment evidence. *Texas Div. - Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994); *Cannon v. Texas Indep. Bank*, 1S.W.3d 218, 225 (Tex.App-Texarkana, pet. denied). Likewise, conclusory assumptions , without factual support , are not competent summary judgment evidence. *Id.*; *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.- Houston [1st Dist.] 1997). Here, the proof Plaintiff offers regarding how long the substance was on the floor is so weak that it only creates a mere surmise or suspicion of a fact and is therefore less than a scintilla. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). Because Plaintiff's proof of knowledge can be based solely on mere speculation, surmise and assumption, it is insufficient to defeat a no evidence motion for summary judgment.

E.

CONCLUSION

10. Defendant, WAL-MART STORES TEXAS, L.L.C. is entitled to summary judgment because, there is no competent summary-judgment evidence indicating when or how the substance came to be on the floor. There is no summary-judgment evidence indicating how long the substance was on the floor before Plaintiff slipped and fell . There is no evidence whether Wal-Mart had a reasonable opportunity to discover and remedy the alleged condition. Under the applicable standard, the evidence does not raise a genuine issue of fact as to whether (1) Wal-Mart placed the substance on the floor, (2) Wal-Mart actually knew that the substance was on the floor, or (3) it is more likely than not that the substance had been on the floor long enough to give Wal-Mart a reasonable opportunity to discover it. See *Reece*, 81 S.W .3d at 814-17. Thus, the summary-judgment evidence does not raise a genuine issue of fact as to whether Wal-Mart had actual or constructive knowledge that the substance was on the floor of the store and summary judgment is properly granted. See *id.*

F.

PRAYER

WHEREFORE, PREMISES CONSIDERED, for all of the foregoing reasons, Defendant WAL-MART STORES TEXAS, L.L.C. respectfully reurges the Court to set its No Evidence Motion for Summary Judgment

for hearing, and upon hearing or consideration thereof and of this supplemental motion, it respectfully asks the Court to grant its No Evidence Motion for Summary Judgment. WAL-MART STORES TEXAS, L.L.C. also prays for such other and further relief, legal and equitable, general or special, to which it may show itself to be justly entitled.

Respectfully Submitted,
DAW & RAY, L.L.P.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served via facsimile on all known counsel of record on the 25th day of September, 2015, to-wit:

Mr. Harold K. Tummel Via Fax No. (956) 664-0522
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Appendix 5

THE THIRTEENTH COURT OF APPEALS

13-16-00129-CV

NORMA HEREDIA
v.
WAL-MART STORES TEXAS, LLC

On Appeal from the
275th District Court of Hidalgo County, Texas
Trial Cause No. C-5719-14-E

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be affirmed. The Court orders the judgment of the trial court AFFIRMED. Costs of the appeal are adjudged against appellant, Norma Heredia.

We further order this decision certified below for observance.

July 27, 2017

NUMBER 13-16-00129-CV
COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI - EDINBURG

NORMA HEREDIA,		Appellant,
	v.	
WAL MART STORES, TEXAS, LLC,		Appellee.

On appeal from the 275th District Court
of Hidalgo County, Texas.

MEMORANDUM OPINION
Before Chief Justice Valdez and Justices Longoria
and Hinojosa Memorandum Opinion by Justice
Hinojosa

Appellant Norma Heredia appeals from a summary judgment granted in favor of appellee Wal-Mart Stores Texas, LLC, (Wal-Mart) in a premises liability case. By one issue, which we treat as three, Heredia argues the trial court erred in granting Wal-Mart's no-evidence motion for summary judgment because: (1) Heredia presented more than a scintilla of evidence that Wal-Mart had constructive knowledge of a dangerous condition; (2) Heredia was not provided notice and an opportunity to be heard which constituted a denial of due process; and (3) Wal-Mart improperly destroyed evidence, making it impossible for appellant to present any evidence that Wal-Mart

had constructive knowledge of a dangerous condition. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The summary judgment evidence shows that Heredia entered Wal-Mart and while pushing a shopping cart in the women's department, Heredia slipped on an unknown dark and sticky fluid on the floor and fell, injuring herself. According to Heredia's deposition testimony, she did not know how long the spill had been on the floor, how the fluid got onto the floor, or whether Wal-Mart had knowledge of the spill. Heredia testified that no other customers or Wal-Mart employees were in the area at the time of her slip and fall. Heredia remained on the floor for roughly three minutes, but she was eventually able to stand on her own. Heredia waited in the same area until Wal-Mart associate Elizabeth Sanchez arrived at her location. Heredia pointed out the spill to Sanchez, who notified Wal-Mart manager Bill Daniels of the situation. Daniels offered to call an ambulance and file a report. Heredia stated she did not need an ambulance and declined to file a report with the manager. Sanchez proceeded to clean up the spill. Heredia checked out with her purchases and left Wal-Mart. After remaining at home for a few hours, Heredia testified that the pain she experienced from the fall worsened. Heredia returned to Wal-Mart to file a report with store manager Maria E. Del Angel. Heredia then asked an acquaintance to drive her to a local hospital to receive treatment for her injuries.

After meeting with Heredia and completing the report, Del Angel went to the location where Heredia was injured. Del Angel met with Sanchez, the Wal-Mart associate who cleaned up the spill, and took pictures of the location. Del Angel also testified by deposition that a video request form was submitted to a Wal-Mart asset protection member. The asset protection member stated that the store's surveillance equipment did not record Heredia's incident as a camera was not directed toward the location of the fall.

Heredia filed a premises liability suit against Wal-Mart claiming that she, as a business invitee, sustained injuries when she slipped and fell on an unknown fluid. Wal-Mart filed a no-evidence motion for summary judgment arguing that, "plaintiff cannot set forth any evidence that Defendant [Wal-Mart] had actual or constructive knowledge of the condition so as to have had a reasonable opportunity to discover and remedy the condition." The trial court granted Heredia's motion for continuance so that the parties could attend mediation. Wal-Mart later filed a supplemental no-evidence motion for summary judgment. Wal-Mart supported its motion with plaintiff's original petition and discovery requests, and Heredia's deposition.

Heredia filed a response to the no-evidence motion for summary judgment arguing that Wal-Mart had knowledge of the current spill based on Wal-Mart's knowledge of prior spills that occurred at multiple stores since April of 1988. Heredia also argued that Wal-Mart's practice of cleaning up spills and disposing of the spills resulted in spoliation of evidence,

preventing Heredia from obtaining evidence of Wal-Mart's constructive knowledge. Heredia attached to her response the depositions of Wal-Mart assistant manager Alfredo Sandoval, Del Angel, the declarations of Heredia and James Falasco, an expert witness for Heredia, Wal-Mart's responses to Heredia's first set of requests for admissions, and Heredia's deposition testimony. Wal-Mart filed a reply to Heredia's response arguing that Heredia presented no evidence that would prove the length of time the spill was on the floor prior to Heredia's incident.

Heredia later filed a fifth amended original petition alleging that Wal-Mart owed a legal duty to Heredia to preserve the fluid she slipped on as evidence relevant to her claim and that Wal-Mart owed a duty to Heredia to utilize a computerized video surveillance system "for early detection of foreign substances on floors[.]" Wal-Mart filed a "Motion for Summary Judgment for Failure to State a Claim" asserting that there is no legal requirement or duty that retail stores use a video surveillance system. Heredia filed a response to Wal-Mart's failure-to-state-a-claim motion for summary judgment stating that Wal-Mart owed a duty to Heredia to reasonably inspect the store to discover dangerous conditions such as fluids on the floor, and that Wal-Mart breached this duty by failing to use computerized video surveillance which amounts to negligence that proximately caused Heredia's slip and subsequent injuries.

The trial court granted Wal-Mart's no-evidence motion for summary judgment and dismissed Heredia's claims.¹ This appeal followed.

II. NO-EVIDENCE SUMMARY JUDGMENT STANDARD OF REVIEW

We review a trial court's ruling on a summary judgment motion *de novo*. *Travelers Ins. Co v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010); *Alejandro v. Bell*, 84 S.W.3d 383, 390 (Tex. App.—Corpus Christi 2002, no. pet). A no-evidence motion must state the elements as to which there is no evidence. TEX. R. CIV. P. 166a(i); *Timpte Indus. v. Gish*, 286 S.W.3d 306 (Tex. 2009). When reviewing a no-evidence summary judgment, “we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor.” *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017). A trial court must grant a no-evidence motion for summary judgment unless the nonmovant produces more than a scintilla of summary judgment evidence to raise a genuine issue of material fact on the challenged elements. See TEX. R. CIV. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam); *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005); *Forbes Inc. v. Granada Biosciences*, 124 S.W.3d 167, 172 (Tex. 2003). A nonmovant produces no more than a scintilla of evidence when the evidence is so weak that it does no more than create a mere surmise

¹The trial court did not rule on Wal-Mart's “Motion for Summary Judgment for Failure to State a Claim.”

of suspicion of a fact. *Forbes*, 124 S.W.3d at 172. “More than a scintilla of evidence exists if it would allow reasonable and fair-minded people to differ in their conclusions.” *Id.*

III. PREMISES LIABILITY

By her first issue, Heredia argues the trial court erred in granting Wal-Mart’s no-evidence motion for summary judgment because Heredia presented more than a scintilla of evidence that Wal-Mart had constructive knowledge of the spill.

A. Applicable Law

In order to establish a premises liability claim, an invitee must prove the following four elements: (1) the owner or occupier had actual or constructive knowledge of a condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) the owner or occupier did not exercise reasonable care to reduce or eliminate the risk; and (4) the owner or occupier’s failure to use such care proximately caused the plaintiff’s injury. *Henkel v. Norman*, 441 S.W.3d 249, 251–52 (Tex. 2014) (per curiam) (citing *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000)). The challenged element in this case is the first element, whether Wal-Mart had actual or constructive knowledge of the spill. See *id.*

A slip and fall plaintiff satisfies the knowledge element by establishing that: (1) the defendant placed the substance on the floor; (2) the defendant actually knew that the substance was on the floor; or (3) it is

more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it. *Wal-Mart Stores v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002). “The rule requiring proof that a dangerous condition existed for some length of time before a premises owner may be charged with constructive notice is firmly rooted in our jurisprudence.” *Id.* at 815. The “time-notice rule” is applied to slip-and-fall cases, and is based on the principle that temporal evidence most accurately indicates whether a premises owner had a reasonable opportunity to learn of, and remedy, the dangerous condition. *Id.* When determining if a premises owner had a reasonable time to discover a spill, proximity, conspicuity, and longevity evidence will be relevant to the analysis. *Id.*; see also *Coward v. H.E.B, Inc.*, No. 01-13-00773-CV, 2014 WL 3512800, at *4 (Tex. App.—Houston [1st Dist.] July 2014, no pet.) (mem. op.). Specifically, “there must be some proof of how long the hazard was

there before liability can be imposed on the premises owner for failing to rectify, or warn of, the dangerous condition. Otherwise, owners would face strict liability for any dangerous condition on their premises, an approach [the Texas Supreme Court has] clearly rejected.” *Reece*, 81 S.W.3d at 815; see *Daenen*, 15 S.W.3d at 101. The

dangerous condition for which a premises owner may be liable is the condition at the time and place the injury occurs, not some antecedent situation that produced the condition. *Gillespie v. Kroger Texas, L.P.*, 415 S.W.3d 589, 593 (Tex. App.—Dallas 2013, pet. denied) (citing *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 407 (Tex. 2006)).

B. Analysis

Heredia argues that Wal-Mart had constructive knowledge of spills generally since 1988² and, “armed with such knowledge, [Wal-Mart] adopted and employed a practice of responding to reports of patrons having been involved in slip/fall incidents” and that the practice of responding to reports of spills “involves the prompt removal and destruction of evidence with which such patrons might prove [Wal-Mart] had constructive knowledge of foreign substances in [Wal-Mart] stores.” However, Heredia did not present evidence in this case that Wal-Mart placed the liquid substance on the floor or that Wal-Mart knew the substance was on the floor. See *Reece*, 81 S.W.3d at 814. To the contrary, Heredia testified that there were no Wal-Mart associates in the general vicinity that had knowledge of the spill. The Wal-Mart associates who testified also stated that prior to Heredia’s fall, they had no knowledge of the spill. Heredia points to spills that occurred previously at Wal-Mart stores, arguing that prior spills are sufficient to establish that Wal-Mart had constructive knowledge of the condition causing Heredia’s injury. However, the “time-notice” rule establishes that temporal evidence best indicates whether a premises owner would reasonably know of a dangerous condition. *Id.* Evidence of spills occurring at other Wal-Mart stores at different times does not constitute temporal evidence that Wal-Mart had

²Heredia attached to its summary judgment response copies of lawsuits involving Wal-Mart as a defendant in cases where the plaintiff was injured on Wal-Mart’s property from slipping on substances on the floor.

constructive notice in this case. Heredia failed to introduce temporal evidence to show that the spill existed long enough to give Wal-Mart a reasonable opportunity to discover it. See *id.*

Heredia also argues that Wal-Mart should have known of the potential for a slip and fall incident. Heredia's expert witness testified that "the use of a computerized video-surveillance equipment would have given [Wal-Mart] such knowledge, and would have been economically feasible." However, "evidence that an owner or occupier knew of a safer, feasible alternative design, without more, is not evidence that the owner knew or should have known that a condition on its premises created an unreasonable risk of harm." *Daenen*, 15 S.W.3d at 102. Moreover, the duty owed to a business invitee is not that of an insurer, and premises owners are not held strictly liable for any injury that occurs on their property. *Id.*; *Rice Food Markets Inc., v. Hicks*, 111 S.W.3d 610, 613 (Tex. App.—Houston [1st. Dist.] 2003, pet. denied). Considering the evidence in light most favorable to Heredia, we hold that there is no evidence to support the conclusion that Wal-Mart had actual or constructive notice of the dangerous condition. See *Nassar*, 508 S.W.3d at 254. Because Heredia failed to present more than a scintilla of evidence on an essential element of her claim, we overrule Heredia's first issue. See TEX. R. CIV. P. 166a(i); *Hamilton*, 249 S.W.3d at 426.

IV. DUE PROCESS

By her second issue, Heredia argues that she was not provided notice and an opportunity to be heard which constituted a denial of due process.

A. Applicable Law

To be entitled to a no-evidence summary judgment, the movant must comply with the requirements set forth in Texas Rule of Civil Procedure Rule 166a. TEX. R. CIV. P. 166a. Due process requires notice and an opportunity to be heard. See *Campbell v. Stucki*, 220 S.W.3d 562, 570 (Tex. App.—Tyler 2007, no pet.). “The reason that notice of hearing or submission of the motion is mandatory is because the hearing date determines the time for response to the motion.” *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998). Rule 166a(c) gives the nonmovant twenty-one days’ notice before a summary judgment hearing and provides the non-movant may file its response and opposing affidavits not later than seven days before the hearing date. TEX. R. CIV. P. 166a(c). The notice provisions of Rule 166a are strictly construed, and notice of a hearing for submission of a summary judgment is mandatory and essential to due process. See *id.*; *Ready v. Alpha Building Corp.*, 467 S.W.3d 580, 584 (Tex. App.—Houston [1st Dist.] May 2015, no pet.).

B. Analysis

Wal-Mart filed a no-evidence motion for summary judgment on January 15, 2015. The original

hearing date was passed by agreement on February 27, 2015. Wal-Mart proceeded to file a supplemental no-evidence motion for summary judgment on September 25, 2015. The trial court notified the parties on October 22, 2015 that it would consider the motion for summary judgment on November 11, 2015, thereby providing Heredia with twenty-one days' notice of the hearing. See TEX. R.CIV. P. 166a(c). Heredia responded to the motion for summary judgment within the required seven days before the hearing date. See *id.* Wal-Mart replied to Heredia's response to the motion for summary judgment on November 10, 2015. The trial court heard the arguments on the motion for summary judgment on November 11, 2015 and requested additional briefing from the parties. On November 30, 2015, the trial court signed an order granting the no-evidence motion for summary judgment. Because Heredia received twenty-one days' notice of the hearing and responded to the motion for summary judgment, Heredia was not deprived of her due process right to notice and a hearing. See *id.*; Richards, 989 S.W.2d at 359. We overrule Heredia's second issue.

V. SPOILIATION OF EVIDENCE

By her third issue, Heredia argues that Wal-Mart improperly destroyed evidence of the spill, and without the retained sample of the spill, it was impossible for appellant to present evidence that Wal-Mart had constructive knowledge of the spill.

A. Standard of Review and Applicable Law

We review a trial court's decision to admit evidence and to impose a remedy for spoliation of evidence under an abuse of discretion standard. *Brookshire Bros. Ltd., v. Aldridge*, 438 S.W.3d 9, 27 (Tex. 2014). Whether a party spoliated evidence and whether a certain remedy is appropriate are questions of law for the trial court. *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015). It is well established that evidentiary matters, including a determination of whether spoliation has occurred, are resolved by the trial court. *Aldridge*, 438 S.W.3d at 19–21. Further, “spoliation is essentially a particularized form of discovery abuse, in that it ultimately results in the failure to produce discoverable evidence, and discovery matters are also within the sole province of the trial court.” *Id.* at 19–20. When a trial court evaluates spoliation, a two-step process is conducted: (1) the trial court must determine as a question of law whether a party spoliated evidence; and (2) if the trial court determined spoliation occurred, the trial court must address an appropriate remedy. *Id.* at 14. When addressing whether a party spoliated evidence, the court will determine whether the party had a duty to preserve the evidence in question. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). “Before any failure to produce material evidence may be viewed as discovery abuse, the opposing party must establish that the non-producing party had a duty to preserve the evidence in question.” *Id.* A duty to preserve evidence arises only when a party knows or reasonably should know that there is a substantial chance that a

claim will filed and that the evidence will be material and relevant to that claim. *Id.*

B. Analysis

Heredia filed several responses to Wal-Mart's no-evidence summary judgment motion concerning spoliation of evidence. After considering the available evidence, the trial court granted a no-evidence summary judgment in favor of Wal-Mart. Because Heredia raised the issue of improperly destroyed evidence in her response to the no-evidence summary judgment motion, and the trial court nevertheless granted Wal-Mart's no-evidence summary judgment motion, we presume the trial court considered and rejected Heredia's request for a presumption of spoliation of evidence. See *Aldridge*, 438 S.W.3d at 27; *Adobe Land Corp. v. Griffin L.L.C.*, 236 S.W.3d 351, 356–357 (Tex. App.—Fort Worth 2007, pet. denied.).

Heredia testified that after slipping and injuring herself at Wal-Mart, she declined to immediately file a report with Wal-Mart. When Heredia filed the report with Wal-Mart later in the day, the spill had been cleaned up and disposed of in the normal course of business. Heredia points out that Wal-Mart has a history of spills at their facilities, and has “long known that what can be learned from the substance on the floor which precipitates a slip/fall incident may help a plaintiff prove that defendant had a reasonable time within which to discover and protect against the slip/fall risk created by presence of such substance.” However, Heredia had to show that Wal-Mart disposed of the spill after it knew, or should have known, that

there was a substantial chance there would be litigation and that the spill would be material to it. See Johnson, 106 S.W.3d at 722. The evidence is undisputed that at the time of Heredia's injury, she declined to file a report and declined Wal-Mart's offer to call an ambulance. Accordingly, Wal-Mart was not on notice of a potential claim and that preservation of the spill would be material to the claim. *Id.* Since the evidence was destroyed in the ordinary course of business and Wal-Mart was not on notice of a potential claim, the trial court did not abuse its discretion in determining that Wal-Mart did not have a duty to preserve the evidence. See Johnson, 106 S.W.3d at 723; Doe v. Mobile Video Tapes, 43 S.W.3d 40, 56 (Tex. App.—Corpus Christi 2001, pet. denied) (holding that evidence destroyed in the normal course of business and before notice of a claim is an adequate defense against an assertion of negligence or intentional destruction of evidence). We overrule Heredia's third issue.

VI. CONCLUSION

We affirm the judgment of the trial court.

LETICIA HINOJOSA
Justice

Delivered and filed the
27th day of July, 2017.

Appendix 6

CASE NO. 17-0764

IN THE SUPREME COURT OF TEXAS

Norma Heredia,
Petitioner

vs.

Wal-Mart Stores Texas, LLC
Respondent

DECLARATION PURSUANT TO
TEXAS CIVIL PRACTICE & REMEDIES CODE
SECTION 132.001

1. My name is Harold Kenneth Tummel.
2. My date of birth is 3-18-1952.
3. My residence address is 5516 N. 1st St., McAllen, Texas 78504, USA.
4. I have never been adjudicated to be mentally incompetent, and I believe I am of sound mind.
5. I have personal knowledge of the facts stated in this declaration, and they are true.

6. Since 1981, I have continuously been licensed to practice law in the State of Texas, and a member in good standing of the State Bar of Texas. Since 1981, I have continuously been involved in the practice of law on a full-time basis. I am also admitted and in good standing to practice law before all of the following courts: all of the courts of the States of New York and Texas; the U.S. District Courts for the Northern, Southern, Eastern and Western Districts of Texas; the U.S. Courts of Appeals for the Fifth and Ninth Circuits; the U.S. Court of Federal Claims; and the U.S. Supreme Court.
7. I represent Petitioner Norma Heredia ("Plaintiff") in the case at bar. I represented Plaintiff before the trial court and the court of appeals, in the cases which culminated in the case at bar.
8. I obtained the case history from the Texas Supreme Court website, of each case filed in the Texas Supreme Court in 2012. I also obtained from that website copies of pages of petitions for review filed in 2012, to the extent that same were available at said website. I used such histories and petition pages to construct the table hereto attached as Ex. 1. I believe that the contents of Ex. 1 are true and correct.
9. The numbers in paragraph 10 of the attached declaration of Robert Serfling, Ph. D. were provided to Dr. Serfling by me. Those numbers

were calculated by me from information in Ex. 1.

10. I declare under penalty of perjury that the foregoing statements of fact are true and correct.
11. Executed in Hidalgo County, State of Texas, on February 1, 2018.

_____[signature]_____
Harold K. Tummel

Ex. 1

	CASE NUMBER	PFR GRANTED		PETITIONER(S)
1.	12-0001	Y	N	I
2	12-0002	Y	N	I
2.	12-0003	Y	N	I
3.	12-0004	N	—	—
4.	12-0005	N	—	—
5.	12-0006	N	—	—
6.	12-0007	N	—	—
7.	12-0008	—	—	—
8.	12-0009	N	—	—
9.	12-0010	Y	Y	C
10.	12-0011	Y	N	I/C
11.	12-0012	Y	N	I
12.	12-0013	Y	N	C
13.	12-0014	Y	N	I
14.	12-0015	N	—	—
15.	—	—	—	—
16.	12-0017	Y	N	I/C
17.	12-0018	N	—	—
18.	12-0019	Y	N	C
19.	12-0020	N	—	—
20.	12-0021	Y	N	I/C
21.	12-0022	Y	N	I
22.	12-0023	Y	N	C
23.	12-0024	N	—	—
24.	12-0025	N	—	—
25.	12-0026	Y	N	I
26.	12-0027	N	—	—
27.	12-0028	N	—	—
28.	12-0029	Y	N	I
29.	12-0030	Y	N	I
30.	12-0031	Y	N	I
31.	12-0032	Y	Y	C

32.	12-0033	Y	N	I
33.	12-0034	Y	N	I/C
34.	12-0035	N	—	—
35.	12-0036	Y	N	I
36.	12-0037	Y	N	I
37.	12-0038	Y	Y	I/C
38.	12-0039	N	—	—
39.	12-0040	N	—	—
40.	12-0041	Y	N	C
41.	12-0042	Y	N	I
42.	12-0043	N	—	—
43.	12-0044	Y	N	I
44.	12-0045	Y	Y	I/C
45.	12-0046	Y	N	C
46.	12-0047	Y	Y	I
47.	12-0048	Y	N	I
48.	12-0049	N	—	—
49.	12-0050	Y	N	C
50.	12-0051	Y	N	I
51.	12-0052	Y	N	I
52.	12-0053	Y	N	I
53.	12-0054	Y	N	C
54.	—	—	—	—
55.	12-0056	N	—	—
56.	12-0057	Y	N	I
57.	12-0058	N	—	—
58.	12-0059	N	—	—
59.	—	—	—	—
60.	12-0061	N	—	—
61.	12-0062	N	—	—
62.	12-0063	Y	N	C
63.	12-0064	Y	N	I
64.	12-0065	N	—	—
65.	12-0066	Y	N	C
66.	12-0067	Y	N	I

67.	12-0068	N	—	—
68.	12-0069	Y	N	I
69.	12-0070	Y	N	C
70.	12-0071	Y	N	I
71.	12-0072	N	—	—
72.	—	—	—	—
73.	12-0074	N	—	—
74.	12-0075	Y	N	I
75.	12-0076	N	—	—
76.	12-0077	Y	N	I
77.	12-0078	Y	N	C
78.	12-0079	N	—	—
79.	12-0080	Y	N	C
80.	12-0081	Y	N	I
81.	12-0082	Y	N	I
82.	12-0083	Y	N	C
83.	12-0084	Y	N	I
84.	12-0085	N	—	—
85.	12-0086	Y	N	I
86.	12-0087	N	—	—
87.	12-0088	Y	N	C
88.	12-0089	Y	N	I
89.	12-0090	Y	N	I
90.	12-0091	Y	N	I
91.	12-0092	Y	N	I
92.	12-0093	N	—	—
93.	12-0094	—	—	—
94.	12-0095	N	—	—
95.	12-0096	N	—	—
96.	12-0097	N	—	—
97.	12-0098	Y	N	I
98.	12-0099	N	—	—
99.	12-0100	Y	N	I
100.	12-0101	Y	N	C
101.	12-0102	Y	Y	C

102.	12-0103	Y	N	I
103.	12-0104	Y	N	I
104.	12-0105	Y	N	I
105.	12-0106	N	—	—
106.	12-0107	Y	N	I
107.	12-0108	N	—	—
108.	12-0109	N	—	—
109.	12-0110	N	—	—
110.	12-0111	Y	N	C
111.	12-0112	N	—	—
112.	12-0113	N	—	—
113.	12-0114	N	—	—
114.	—	—	—	—
115.	12-0116	Y	N	C
116.	12-0117	Y	N	I
117.	—	—	—	—
118.	12-0119	N	—	—
119.	12-0120	Y	N	I
120.	12-0121	N	—	—
121.	12-0122	N	—	—
122.	12-0123	Y	N	I/C
123.	12-0124	N	—	—
124.	12-0125	N	—	—
125.	12-0126	N	—	—
126.	12-0127	N	—	—
127.	12-0128	Y	N	C
128.	12-0129	Y	N	I
129.	12-0130	N	—	—
130.	12-0131	N	—	—
131.	12-0132	N	—	—
132.	12-0133	Y	N	C
133.	12-0134	Y	N	C
134.	12-0135	Y	N	C
135.	12-0136	Y	Y	C
136.	12-0137	Y	N	I

137.	12-0138	Y	N	C
138.	12-0139	Y	N	I
139.	12-0140	Y	N	I
140.	12-0141	Y	N	C
141.	12-0142	Y	Y	I/C
142.	12-0143	N	—	—
143.	12-0144	Y	N	I
144.	12-0145	N	—	—
145.	12-0146	Y	N	I
146.	12-0147	Y	N	I
147.	12-0148	N	—	—
148.	12-0149	N	—	—
149.	12-0150	Y	N	C
150.	12-0151	Y	N	I
151.	12-0152	Y	N	C
152.	12-0153	Y	N	I
153.	12-0154	Y	N	C
154.	12-0155	N	—	—
155.	12-0156	N	—	—
156.	12-0157	Y	N	I
157.	12-0158	N	—	—
158.	12-0159	Y	N	I
159.	12-0160	Y	N	C
160.	12-0161	N	—	—
161.	12-0162	Y	N	I
162.	12-0163	N	—	—
163.	12-0164	N	—	—
164.	12-0165	N	—	—
165.	12-0166	N	—	—
166.	12-0167	Y	N	C
167.	12-0168	N	—	—
168.	12-0169	Y	N	C
169.	12-0170	Y	N	I
170.	12-0171	Y	N	I
171.	12-0172	N	—	—

172.	12-0173	N	—	—
173.	12-0174	Y	N	I
174.	12-0175	Y	N	C
175.	12-0176	N	—	—
176.	12-0177	Y	N	C
177.	12-0178	N	—	—
178.	12-0179	Y	N	C
179.	12-0180	Y	N	I
180.	12-0181	Y	N	I
181.	12-0182	Y	N	I
182.	12-0183	Y	Y	I
183.	12-0184	Y	N	C
184.	12-0185	Y	N	I
185.	12-0186	Y	N	C
186.	12-0187	Y	N	I/C
187.	12-0188	N	—	—
188.	12-0189	Y	N	I
189.	12-0190	Y	N	I
190.	12-0191	N	—	—
191.	12-0192	N	—	—
192.	12-0193	Y	N	I/C
193.	12-0194	Y	N	C
194.	12-0195	N	—	—
195.	12-0196	Y	N	I
196.	12-0197	Y	N	C
197.	12-0198	Y	Y	C
198.	12-0199	N	—	—
199.	—	—	—	—
200.	—	—	—	—
201.	—	—	—	—
202.	12-0203	Y	Y	C
203.	12-0204	Y	N	I/C
204.	12-0205	N	—	—
205.	12-0206	N	—	—
206.	12-0207	Y	N	C

207.	12-0208	N	—	—
208.	12-0209	Y	N	C
209.	12-0210	Y	N	I
210.	12-0211	N	—	—
211.	12-0212	Y	N	I
212.	12-0213	N	—	—
213.	12-0214	Y	N	I
214.	12-0215	N	—	—
215.	12-0216	Y	N	I
216.	12-0217	Y	N	I
217.	12-0218	N	—	—
218.	12-0219	N	—	—
219.	12-0220	N	—	—
220.	12-0221	Y	N	I
221.	12-0222	N	—	—
222.	12-0223	N	—	—
223.	12-0224	N	—	—
224.	12-0225	Y	N	I
225.	12-0226	Y	N	I
226.	12-0227	N	—	—
227.	12-0228	Y	N	I/C
228.	12-0229	Y	N	C
229.	12-0230	N	—	—
230.	12-0231	N	—	—
231.	12-0232	N	—	—
232.	12-0233	Y	N	C
233.	12-0234	N	—	—
234.	12-0235	N	—	—
235.	12-0236	Y	N	I
236.	12-0237	Y	N	I
237.	12-0238	N	—	—
238.	12-0239	Y	N	C
239.	—	—	—	—
240.	—	—	—	—
241.	12-0242	Y	N	I

242.	12-0243	Y	N	C
243.	12-0244	Y	N	I
244.	12-0245	Y	N	I
245.	12-0246	N	—	—
246.	12-0247	Y	N	I
247.	12-0248	N	—	—
248.	12-0249	Y	N	I
249.	12-0250	N	—	—
250.	12-0251	Y	Y	C
251.	12-0252	N	—	—
252.	12-0253	Y	Y	I/C
253.	12-0254	Y	N	I/C
254.	12-0255	Y	Y	I/C
255.	12-0256	N	—	—
256.	12-0257	Y	Y	I/C
257.	12-0258	N	—	—
258.	12-0259	N	—	—
259.	12-0260	N	—	—
260.	12-0261	N	—	—
261.	12-0262	N	—	—
262.	12-0263	Y	N	C
263.	12-0264	Y	N	C
264.	12-0265	Y	N	I
265.	12-0266	Y	N	C
266.	12-0267	Y	N	I
267.	12-0268	Y	N	I
268.	12-0269	Y	N	I
269.	12-0270	Y	N	C
270.	12-0271	N	—	—
271.	12-0272	Y	N	C
272.	12-0273	N	—	—
273.	12-0274	Y	Y	C
274.	12-0275	Y	N	C
275.	12-0276	Y	N	I
276.	12-0277	Y	N	C

277.	12-0278	Y	N	C
278.	12-0279	Y	N	I
279.	12-0280	Y	N	I/C
280.	12-0281	Y	N	I
281.	12-0282	Y	N	I
282.	12-0283	Y	N	I/C
283.	12-0284	Y	N	I
284.	12-0285	Y	N	I
285.	12-0286	Y	N	I
286.	12-0287	Y	N	C
287.	12-0288	Y	N	C
288.	12-0289	Y	Y	C
289.	12-0290	Y	N	C
290.	12-0291	Y	N	C
291.	12-0292	Y	N	I/C
292.	12-0293	Y	Y	I
293.	12-0294	Y	N	I
294.	12-0295	Y	N	I
295.	12-0296	Y	N	I
296.	12-0297	N	—	—
297.	12-0298	Y	N	I
298.	12-0299	N	—	—
299.	12-0300	Y	N	C
300.	12-0301	Y	N	C
301.	12-0302	Y	N	C
302.	12-0303	Y	N	I
303.	—	—	—	—
304.	12-0305	N	—	—
305.	12-0306	N	—	—
306.	12-0307	N	—	—
307.	12-0308	N	—	—
308.	12-0309	Y	N	I
309.	12-0310	Y	N	I
310.	12-0311	Y	N	I
311.	12-0312	Y	N	I/C

312.	12-0313	Y	N	C
313.	12-0314	N	—	—
314.	12-0315	Y	N	I/C
315.	—	—	—	—
316.	12-0317	Y	N	C
317.	12-0318	N	—	—
318.	12-0319	Y	N	I
319.	12-0320	Y	N	I
320.	12-0321	Y	N	I
321.	12-0322	N	—	—
322.	12-0323	N	—	—
323.	12-0324	Y	N	I
324.	12-0325	Y	N	I
325.	12-0326	N	—	—
326.	12-0327	N	—	—
327.	12-0328	Y	N	C
328.	12-0329	N	—	—
329.	12-0330	N	—	—
330.	12-0331	Y	N	C
331.	12-0332	Y	N	I
332.	12-0333	N	—	—
333.	12-0334	N	—	—
334.	12-0335	Y	N	I
335.	12-0336	Y	N	I
336.	12-0337	Y	N	I
337.	12-0338	Y	N	I
338.	12-0339	Y	N	I/C
339.	12-0340	Y	N	C
340.	12-0341	Y	N	I
341.	12-0342	N	—	—
342.	12-0343	Y	N	I
343.	12-0344	Y	N	I
344.	12-0345	Y	N	I
345.	12-0346	Y	N	I
346.	12-0347	N	—	—

347.	12-0348	Y	Y	I
348.	12-0349	Y	N	I
349.	12-0350	N	—	—
350.	—	—	—	—
351.	12-0352	Y	N	C
352.	12-0353	Y	N	C
353.	12-0354	Y	N	C
354.	12-0355	Y	N	I
355.	12-0356	Y	N	C
356.	12-0357	Y	Y	C
357.	12-0358	Y	Y	C
358.	12-0359	N	—	—
359.	12-0360	Y	Y	I
360.	12-0361	N	—	—
361.	12-0362	N	—	—
362.	12-0363	Y	N	I
363.	12-0364	N	—	—
364.	12-0365	Y	N	C
365.	—	—	—	—
366.	12-0367	N	—	—
367.	12-0368	Y	N	I
368.	—	—	—	—
369.	12-0370	Y	N	I
370.	12-0371	Y	N	I
371.	12-0372	Y	N	I
372.	12-0373	Y	N	I
373.	12-0374	Y	N	I
374.	12-0375	N	—	—
375.	12-0376	N	—	—
376.	12-0377	N	—	—
377.	12-0378	Y	N	I
378.	12-0379	Y	N	C
379.	12-0380	Y	N	I
380.	12-0381	Y	N	C
381.	12-0382	Y	N	I

382.	12-0383	Y	N	I
383.	12-0384	Y	N	I
384.	12-0385	Y	N	C
385.	12-0386	Y	N	C
386.	12-0387	Y	N	C
387.	12-0388	Y	Y	C
388.	12-0389	Y	N	I/C
389.	—	—	—	—
390.	12-0391	N	—	—
391.	12-0392	N	—	—
392.	12-0393	Y	N	I
393.	12-0394	Y	N	I
394.	—	—	—	—
395.	—	—	—	—
396.	—	—	—	—
397.	—	—	—	—
398.	—	—	—	—
399.	—	—	—	—
400.	12-0401	Y	N	C
401.	12-0402	N	—	—
402.	12-0403	N	—	—
403.	12-0404	N	—	—
404.	12-0405	N	—	—
405.	12-0406	Y	N	C
406.	12-0407	Y	N	C
407.	12-0408	Y	N	C
408.	12-0409	Y	N	C
409.	12-0410	N	—	—
410.	12-0411	N	—	—
411.	12-0412	N	—	—
412.	—	—	—	—
413.	12-0414	Y	N	I
414.	12-0415	N	—	—
415.	12-0416	N	—	—
416.	12-0417	N	—	—

417.	12-0418	N	—	—
418.	12-0419	N	—	—
419.	12-0420	Y	N	I
420.	12-0421	Y	N	I
421.	12-0422	Y	N	I
422.	12-0423	Y	N	I
423.	12-0424	Y	N	C
424.	12-0425	Y	N	I/C
425.	12-0426	Y	N	I
426.	12-0427	Y	N	C
427.	12-0428	Y	N	I
428.	12-0429	Y	N	I
429.	12-0430	Y	N	I/C
430.	12-0431	Y	N	I/C
431.	12-0432	N	—	—
432.	12-0433	Y	N	C
433.	12-0434	N	—	—
434.	12-0435	N	—	—
435.	12-0436	Y	N	I
436.	—	—	—	—
437.	—	—	—	—
438.	12-0439	Y	N	I
439.	12-0440	Y	N	I
440.	—	—	—	—
441.	12-0442	Y	N	I
442.	12-0443	Y	N	I
443.	12-0444	Y	N	I
444.	12-0445	Y	N	I
445.	12-0446	Y	N	I
446.	12-0447	N	—	—
447.	12-0448	N	—	—
448.	12-0449	Y	N	I
449.	12-0450	N	—	—
450.	12-0451	Y	Y	C
451.	12-0452	Y	Y	C

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452.	12-0453	Y	N	I
453.	12-0454	N	—	—
454.	12-0455	N	—	—
455.	12-0456	Y	N	I
456.	12-0457	N	—	—
457.	12-0458	N	—	—
458.	12-0459	N	—	—
459.	12-0460	Y	N	I
460.	12-0461	Y	N	C
461.	12-0462	Y	N	C
462.	12-0463	Y	N	I/C
463.	12-0464	Y	N	I
464.	12-0465	Y	N	C
465.	12-0466	Y	N	I
466.	12-0467	N	—	—
467.	12-0468	N	—	—
468.	12-0469	N	—	—
469.	12-0470	N	—	—
470.	12-0471	N	—	—
471.	12-0472	N	—	—
472.	12-0473	N	—	—
473.	12-0474	N	—	—
474.	12-0475	N	—	—
475.	12-0476	N	—	—
476.	12-0477	N	—	—
477.	12-0478	N	—	—
478.	12-0479	Y	N	I
479.	12-0480	N	—	—
480.	12-0481	Y	N	I
481.	12-0482	N	—	—
482.	12-0483	Y	Y	I/C
483.	12-0484	Y	N	I
484.	12-0485	N	—	—
485.	12-0486	Y	N	I
486.	12-0487	Y	Y	I

487.	12-0488	Y	N	I
488.	12-0489	Y	N	I
489.	12-0490	Y	Y	C
490.	12-0491	Y	Y	I
491.	12-0492	Y	N	C
492.	12-0493	Y	N	I/C
493.	12-0494	N	—	—
494.	12-0495	N	—	—
495.	12-0496	Y	N	C
496.	12-0497	Y	N	I
497.	12-0498	N	—	—
498.	—	—	—	—
499.	12-0500	Y	N	I
500.	12-0501	Y	Y	I
501.	12-0502	N	—	—
502.	12-0503	Y	N	I
503.	12-0504	N	—	—
504.	12-0505	Y	N	C
505.	12-0506	Y	N	I
506.	12-0507	Y	N	I/C
507.	12-0508	Y	N	C
508.	12-0509	Y	N	I
509.	12-0510	Y	N	I/C
510.	12-0511	Y	N	C
511.	12-0512	Y	N	C
512.	12-0513	N	—	—
513.	12-0514	Y	N	I
514.	12-0515	Y	N	I
515.	12-0516	Y	N	I
516.	12-0517	Y	N	C
517.	12-0518	N	—	—
518.	12-0519	N	—	—
519.	12-0520	Y	N	C
520.	12-0521	Y	N	I/C
521.	12-0522	Y	Y	C

522.	12-0523	Y	N	C
523.	12-0524	Y	N	C
524.	12-0525	N	—	—
525.	12-0526	Y	N	I/C
526.	12-0527	Y	N	I
527.	12-0528	N	—	—
528.	12-0529	N	—	—
529.	12-0530	Y	N	I
530.	12-0531	Y	N	C
531.	12-0532	Y	N	C
532.	12-0533	Y	N	I
533.	12-0534	Y	N	I
534.	12-0535	N	—	—
535.	12-0536	Y	N	C
536.	12-0537	Y	N	I/C
537.	12-0538	N	—	—
538.	12-0539	Y	Y	I
539.	12-0540	Y	N	I
540.	12-0541	Y	N	C
541.	12-0542	Y	N	I
542.	12-0543	Y	N	C
543.	12-0544	Y	N	I
544.	12-0545	Y	N	I
545.	12-0546	N	—	—
546.	12-0547	Y	N	C
547.	12-0548	Y	N	I
548.	12-0549	Y	N	I
549.	12-0550	Y	N	I
550.	12-0551	Y	N	I
551.	12-0552	Y	N	C
552.	12-0553	Y	N	C
553.	12-0554	Y	N	C
554.	12-0555	N	—	—
555.	12-0556	Y	N	I
556.	12-0557	Y	N	I

557.	12-0558	Y	N	I
558.	12-0559	N	—	—
559.	12-0560	Y	N	C
560.	12-0561	Y	N	I
561.	12-0562	Y	N	I
562.	12-0563	Y	Y	I
563.	—	—	—	—
564.	—	—	—	—
565.	12-0566	Y	N	I/C
566.	12-0567	Y	N	I
567.	12-0568	Y	N	I
568.	12-0569	N	—	—
569.	12-0570	N	—	—
570.	12-0571	Y	N	I/C
571.	12-0572	Y	N	I
572.	12-0573	Y	N	I
573.	12-0574	Y	N	I
574.	12-0575	Y	N	I
575.	12-0576	Y	N	I
576.	12-0577	Y	N	I
577.	12-0578	Y	N	I
578.	12-0579	Y	N	I
579.	12-0580	Y	N	I/C
580.	12-0581	N	—	—
581.	12-0582	Y	N	I
582.	12-0583	Y	N	C
583.	12-0584	Y	N	I
584.	12-0585	Y	N	C
585.	12-0586	Y	N	I
586.	12-0587	Y	N	C
587.	12-0588	Y	N	C
588.	12-0589	Y	N	I
589.	120590	N	—	—
590.	12-0591	Y	N	I
591.	12-0592	Y	N	I

592.	12-0593	N	—	—
593.	12-0594	Y	N	I
594.	12-0595	Y	N	C
595.	12-0596	Y	N	I
596.	12-0597	Y	N	I
597.	12-0598	Y	N	I
598.	12-0599	Y	N	C
599.	12-0600	Y	N	I
600.	12-0601	Y	Y	I/C
601.	12-0602	Y	N	C
602.	12-0603	Y	N	I
603.	12-0604	Y	Y	C
604.	12-0605	Y	N	C
605.	12-0606	Y	N	I
606.	12-0607	N	—	—
607.	12-0608	Y	N	I
608.	12-0609	N	—	—
609.	12-0610	Y	N	I
610.	12-0611	Y	N	C
611.	12-0612	Y	N	C
612.	12-0613	N	—	—
613.	12-0614	Y	N	C
614.	12-0615	Y	N	C
615.	12-0616	N	—	—
616.	12-0617	Y	Y	C
617.	12-0618	Y	N	I
618.	12-0619	Y	N	I
619.	12-0620	Y	Y	I
620.	12-0621	Y	Y	C
621.	12-0622	Y	N	I
622.	12-0623	Y	N	I
623.	12-0624	N	—	—
624.	12-0625	Y	N	I
625.	12-0626	N	—	—
626.	12-0627	Y	Y	I

627.	12-0628	Y	Y	I
628.	12-0629	N	—	—
629.	12-0630	Y	N	I
630.	12-0631	Y	N	C
631.	12-0632	N	—	—
632.	12-0633	Y	N	C
633.	12-0634	N	—	—
634.	12-0635	N	—	—
635.	12-0636	N	—	—
636.	12-0637	N	—	—
637.	12-0638	N	—	—
638.	12-0639	N	—	—
639.	12-0640	N	—	—
640.	12-0641	Y	N	I/C
641.	12-0642	Y	N	I/C
642.	12-0643	Y	N	C
643.	12-0644	N	—	—
644.	12-0645	N	—	—
645.	12-0646	N	—	—
646.	12-0647	Y	N	I
647.	12-0648	Y	N	I
648.	12-0649	Y	N	C
649.	12-0650	Y	N	I
650.	12-0651	Y	N	I
651.	12-0652	Y	N	I
652.	12-0653	N	—	—
653.	12-0654	N	—	—
654.	12-0655	Y	N	C
655.	12-0656	Y	N	C
656.	12-0657	Y	Y	I/C
657.	12-0658	N	—	—
658.	12-0659	Y	N	I
659.	12-0660	Y	N	I
660.	12-0661	N	—	—
661.	12-0662	N	—	—

662.	12-0663	N	—	—
663.	12-0664	Y	N	I
664.	12-0665	Y	N	C
665.	12-0666	Y	N	C
666.	12-0667	Y	N	C
667.	12-0668	Y	N	I
668.	12-0669	Y	N	I
669.	12-0670	N	—	—
670.	12-0671	Y	N	I
671.	12-0672	N	—	—
672.	12-0673	Y	N	I
673.	12-0674	Y	N	C
674.	12-0675	Y	N	I
675.	12-0676	Y	N	C
676.	12-0677	Y	N	C
677.	12-0678	N	—	—
678.	12-0679	Y	N	C
679.	12-0680	N	—	—
680.	12-0681	Y	N	I
681.	12-0682	N	—	—
682.	12-0683	N	—	—
683.	12-0684	Y	N	I
684.	12-0685	Y	Y	C
685.	12-0686	N	—	—
686.	12-0687	Y	N	I
687.	12-0688	Y	N	I
688.	12-0689	N	—	—
689.	12-0690	Y	N	I
690.	12-0691	Y	N	C
691.	12-0692	Y	N	I
692.	12-0693	Y	N	C
693.	12-0694	N	—	—
694.	12-0695	Y	N	I
695.	12-0696	Y	N	I
696.	12-0697	Y	N	I

697.	12-0698	Y	N	I
698.	12-0699	Y	N	C
699.	12-0700	Y	N	I
700.	12-0701	Y	N	I/C
701.	12-0702	Y	N	I
702.	12-0703	N	—	—
703.	12-0704	N	—	—
704.	12-0705	Y	N	I
705.	12-0706	Y	N	I
706.	12-0707	Y	N	I
707.	12-0708	Y	N	I
708.	12-0709	N	—	—
709.	12-0710	Y	N	I/C
710.	12-0711	Y	Y	C
711.	12-0712	Y	N	I
712.	12-0713	Y	N	I
713.	12-0714	Y	N	I
714.	12-0715	N	—	—
715.	12-0716	Y	N	I
716.	12-0717	Y	N	I
717.	12-0718	Y	Y	C
718.	12-0719	Y	N	I/C
719.	12-0720	N	—	—
720.	12-0721	Y	Y	C
721.	12-0722	Y	N	I
722.	12-0723	Y	N	I
723.	12-0724	Y	N	I
724.	12-0725	N	—	—
725.	12-0726	Y	N	I/C
726.	12-0727	Y	N	I
727.	12-0728	Y	Y	I
728.	12-0729	Y	N	I
729.	12-0730	N	—	—
730.	12-0731	Y	N	C
731.	12-0732	Y	Y	C

732.	12-0733	N	—	—
733.	12-0734	Y	N	I
734.	12-0735	Y	N	I
735.	12-0736	N	—	—
736.	12-0737	N	—	—
737.	12-0738	N	—	—
738.	12-0739	Y	Y	C
739.	12-0740	Y	N	I
740.	12-0741	Y	N	I
741.	12-0742	Y	N	I
742.	12-0743	Y	N	I
743.	12-0744	Y	Y	I
744.	12-0745	N	—	—
745.	12-0746	N	—	—
746.	12-0747	Y	N	I
747.	12-0748	N	—	—
748.	12-0749	N	—	—
749.	12-0750	Y	N	C
750.	12-0751	Y	N	I
751.	12-0752	N	—	—
752.	12-0753	N	—	—
753.	12-0754	Y	N	C
754.	12-0755	N	—	—
755.	12-0756	Y	N	I
756.	12-0757	Y	N	I
757.	12-0758	N	—	—
758.	12-0759	Y	Y	C
759.	12-0760	Y	N	I
760.	12-0761	N	—	—
761.	12-0762	Y	N	I/C
762.	12-0763	Y	N	I
763.	12-0764	N	—	—
764.	12-0765	N	—	—
765.	12-0766	Y	N	C
766.	12-0767	Y	N	C

767.	12-0768	Y	N	I
768.	12-0769	N	—	—
769.	12-0770	Y	N	C
770.	12-0771	Y	N	I
771.	12-0772	Y	Y	C
772.	12-0773	Y	N	I
773.	12-0774	Y	N	I
774.	12-0775	N	—	—
775.	12-0776	Y	N	I
776.	12-0777	N	—	—
777.	12-0778	Y	N	I
778.	12-0779	N	—	—
779.	12-0780	Y	N	I
780.	12-0781	Y	N	C
781.	12-0782	N	—	—
782.	12-0783	Y	N	C
783.	12-0784	Y	N	I
784.	12-0785	N	—	—
785.	12-0786	Y	N	I
786.	12-0787	Y	N	C
787.	12-0788	N	—	—
788.	12-0789	Y	Y	C
789.	12-0790	Y	N	I/C
790.	12-0791	Y	N	I
791.	12-0792	Y	N	I
792.	12-0793	Y	N	C
793.	12-0794	Y	N	I
794.	12-0795	N	—	—
795.	12-0796	Y	N	C
796.	12-0797	Y	Y	I
797.	12-0798	Y	N	C
798.	12-0799	Y	N	I/C
799.	12-0800	Y	N	I
800.	12-0801	Y	N	I
801.	12-0802	Y	N	C

A-100

802.	12-0803	N	—	—
803.	12-0804	Y	Y	I
804.	12-0805	Y	N	I/C
805.	12-0806	Y	N	C
806.	12-0807	Y	N	C
807.	12-0808	N	—	—
808.	12-0809	Y	N	I
809.	12-0810	Y	N	I
810.	12-0811	Y	N	I
811.	12-0812	Y	N	I
812.	12-0813	Y	N	I
813.	12-0814	Y	N	C
814.	12-0815	N	—	—
815.	12-0816	Y	N	I
816.	12-0817	Y	N	C
817.	12-0818	Y	N	C
818.	12-0819	Y	N	I
819.	12-0820	Y	N	C
820.	12-0821	N	—	—
821.	12-0822	Y	N	I/C
822.	12-0823	Y	N	I
823.	12-0824	N	—	—
824.	12-0825	Y	N	C
825.	12-0826	Y	N	I/C
826.	12-0827	Y	N	I
827.	12-0828	Y	N	C
828.	12-0829	N	—	—
829.	12-0830	Y	Y	I/C
830.	12-0831	Y	N	I
831.	12-0832	Y	N	I
832.	12-0833	Y	N	C
833.	12-0834	Y	Y	C
834.	12-0835	Y	N	C
835.	12-0836	Y	Y	I
836.	12-0837	Y	N	I

837.	12-0838	Y	Y	I/C
838.	12-0839	Y	Y	C
839.	12-0840	Y	N	I
840.	12-0841	Y	N	I
841.	12-0842	N	—	—
842.	12-0843	Y	Y	C
843.	12-0844	Y	N	I
844.	12-0845	Y	N	I
845.	12-0846	Y	N	C
846.	12-0847	N	—	—
847.	12-0848	N	—	—
848.	12-0849	Y	N	I
849.	12-0850	Y	N	I
850.	12-0851	Y	N	I
851.	12-0852	N	—	—
852.	12-0853	Y	N	I
853.	12-0854	Y	N	I
854.	12-0855	Y	Y	I/C
855.	12-0856	Y	N	C
856.	12-0857	N	—	—
857.	12-0858	Y	N	C
858.	12-0859	Y	N	I/C
859.	12-0860	Y	N	C
860.	12-0861	Y	N	I
861.	12-0862	N	—	—
862.	12-0863	N	—	—
863.	12-0864	N	—	—
864.	12-0865	N	—	—
865.	12-0866	N	—	—
866.	12-0867	Y	Y	I
867.	12-0868	Y	N	I
868.	12-0869	Y	N	I
869.	12-0870	Y	N	I
870.	12-0871	Y	N	C
871.	12-0872	Y	N	I

872.	12-0873	Y	N	I/C
873.	12-0874	N	—	—
874.	12-0875	N	—	—
875.	12-0876	Y	N	C
876.	12-0877	N	—	—
877.	12-0878	Y	N	C
878.	12-0879	Y	N	I
879.	12-0880	Y	N	I
880.	12-0881	N	—	—
881.	12-0882	Y	N	I
882.	12-0883	N	—	—
883.	12-0884	Y	N	C
884.	12-0885	Y	N	I
885.	12-0886	N	—	—
886.	12-0887	Y	N	I
887.	12-0888	N	—	—
888.	12-0889	N	—	—
889.	12-0890	N	—	—
890.	12-0891	Y	N	I
891.	12-0892	Y	N	I
892.	12-0893	Y	N	I
893.	12-0894	Y	N	I
894.	12-0895	N	—	—
895.	12-0896	Y	N	I
896.	12-0897	N	—	—
897.	12-0898	N	—	—
898.	12-0899	N	—	—
899.	12-0900	Y	N	I
900.	12-0901	Y	N	C
901.	12-0902	N	—	—
902.	12-0903	Y	N	C
903.	12-0904	N	—	—
904.	12-0905	Y	Y	C
905.	12-0906	Y	N	I/C
906.	12-0907	Y	Y	I

907.	12-0908	N	—	—
908.	12-0909	Y	N	I
909.	12-0910	Y	N	C
910.	12-0911	Y	N	I
911.	12-0912	Y	N	I
912.	12-0913	Y	N	I
913.	12-0914	Y	N	C
914.	12-0915	Y	N	I
915.	12-0916	Y	N	C
916.	12-0917	Y	N	I
917.	12-0918	Y	N	C
918.	—	—	—	—
919.	12-0920	Y	Y	I/C
920.	12-0921	Y	N	I
921.	—	—	—	—
922.	12-0923	Y	N	I/C
923.	12-0924	Y	N	I
924.	12-0925	Y	N	I/C
925.	12-0926	Y	N	C
926.	12-0927	Y	N	I
927.	12-0928	N	—	—
928.	12-0929	N	—	—
929.	12-0930	Y	N	I
930.	12-0931	Y	N	I
931.	12-0932	Y	N	I
932.	12-0933	Y	N	I
933.	12-0934	N	—	—
934.	12-0935	Y	N	I
935.	12-0936	Y	N	I
936.	12-0937	Y	Y	I
937.	12-0938	Y	N	I
938.	12-0939	Y	N	I/C
939.	12-0940	N	—	—
940.	12-0941	N	—	—
941.	12-0942	N	—	—

942.	12-0943	Y	N	C
943.	12-0944	N	—	—
944.	12-0945	Y	N	C
945.	12-0946	N	—	—
946.	12-0947	N	—	—
947.	12-0948	Y	N	I
948.	12-0949	Y	N	I
949.	12-0950	Y	N	I
950.	12-0951	N	—	—
951.	12-0952	N	—	—
952.	12-0953	N	—	—
953.	12-0954	Y	N	I
954.	12-0955	N	—	—
955.	12-0956	N	—	—
956.	12-0957	N	—	—
957.	12-0958	N	—	—
958.	12-0959	Y	N	I
959.	12-0960	N	—	—
960.	12-0961	Y	Y	C
961.	12-0962	N	—	—
962.	12-0963	N	—	—
963.	12-0964	N	—	—
964.	12-0965	Y	N	I
965.	12-0966	N	—	—
966.	12-0967	N	—	—
967.	12-0968	Y	Y	C
968.	12-0969	Y	N	I
969.	12-0970	Y	N	I
970.	12-0971	N	—	—
971.	12-0972	Y	N	I
972.	12-0973	N	—	—
973.	12-0974	Y	N	I
974.	12-0975	Y	N	I
975.	12-0976	Y	N	C
976.	12-0977	Y	N	I

977.	12-0978	Y	N	I
978.	12-0979	Y	N	I
979.	12-0980	N	—	—
980.	12-0981	Y	N	I
981.	12-0982	Y	N	C
982.	12-0983	Y	Y	C
983.	12-0984	Y	N	I
984.	12-0985	Y	N	I
985.	12-0986	Y	N	C
986.	12-0987	Y	Y	C
987.	12-0988	N	—	—
988.	12-0989	Y	N	I
989.	12-0990	N	—	—
990.	12-0991	N	—	—
991.	12-0992	N	—	—
992.	12-0993	N	—	—
993.	12-0994	Y	N	C
994.	12-0995	Y	N	C
995.	12-0996	Y	N	C
996.	12-0997	Y	N	I
997.	12-0998	Y	N	I
998.	12-0999	N	—	—
999.	12-1000	N	—	—
1000.	12-1001	Y	N	C
1001.	12-1002	Y	Y	I
1002.	12-1003	Y	N	C
1003.	12-1004	Y	N	I
1004.	12-1005	Y	N	I
1005.	12-1006	Y	Y	C
1006.	12-1007	Y	Y	C
1007.	12-1008	N	—	—
1008.	12-1009	N	—	—
1009.	12-1010	Y	N	I
1010.	12-1011	Y	N	C
1011.	12-1012	Y	N	I

1012.	12-1013	Y	Y	C
1013.	—	—	—	—
1014.	—	—	—	—
1015.	12-1016	N	—	—
1016.	12-1017	Y	N	I/C
1017.	12-1018	Y	N	I
1018.	12-1019	Y	N	C
1019.	12-1020	N	—	—
1020.	12-1021	N	—	—
1021.	12-1022	N	—	—
1022.	12-1023	N	—	—
1023.	12-1024	N	—	—
1024.	12-1025	N	—	—
1025.	12-1026	N	—	—
1026.	12-1027	N	—	—
1027.	12-1028	Y	N	C
1028.	12-1029	N	—	—
1029.	12-1030	N	—	—
1030.	12-1031	Y	N	I
1031.	12-1032	N	—	—
1032.	12-1033	Y	N	I
1033.	12-1034	Y	N	I
1034.	12-1035	N	—	—
1035.	12-1036	N	—	—
1036.	12-1037	N	—	—
1037.	12-1038	Y	N	I
1038.	12-1039	Y	Y	C
1039.	12-1040	Y	N	C
1040.	12-1041	Y	N	I/C
1041.	12-1042	N	—	—
1042.	12-1043	Y	N	C
1043.	12-1044	Y	N	I
1044.	12-1045	Y	N	I
1045.	12-1046	Y	N	I

Appendix 7

DECLARATION PURSUANT TO
TEXAS CIVIL PRACTICE & REMEDIES
CODE SECTION 132.001

1. My name is Robert Serfling.
2. My date of birth is 1-23-39.
3. My address is 1921 Sparrows Point Drive, Plano, Texas 75023, USA.
4. I am over eighteen years of age. I have never been found by a court of law to be mentally incompetent, and believe myself to be of sound mind. I have personal knowledge of the facts stated in this declaration, and they are true. Attached hereto as Ex. 1 is a true copy of my curriculum vitae. The information contained In Ex. 1 is true and accurate.
5. I am familiar with probability and statistics, as they are taught in American colleges and universities.
6. I am familiar with probability and statistics, as they are used in research in the United States of America.
8. I am familiar with probability and statistics, as they are used in forensic cases in the United States of America.

9. At the request of Tummel & Casso, I have arrived at certain opinions, which are set forth in this declaration. Such opinions are consistent with the current state of human knowledge regarding statistics and probability.
10. My opinions in this declaration are based upon the following assumptions concerning petitions for review received by the Texas Supreme Court in 2012: (a) the number of petitions for review, which involved one or more petitioners all of whom were natural persons, and which were denied, equals 363; (b) the number of petitions for review, which involved one or more petitioners all of whom were natural persons, and which were granted, equals 22; (c) the number of petitions for review, which involved one or more petitioners none of whom were natural persons, and which were denied, equals 184; and (d) the number of petitions for review, which involved one or more petitioners none of whom were natural persons, and which were granted, equals 40.
11. The percentage obtained by dividing the 22 by the 385 equals 5.71%.
12. The percentage obtained by dividing the 40 by the 224 equals 17.86%.
13. The hypothesis that the observed difference between the 5.71% and the 17.86% is due solely to random variation is rejected by a chi-square

test with 99.9% certainty, on the basis of the above-stated data.

14. With 95% confidence, the actual difference being estimated by the observed difference $17.86\% - 5.71\% = 12.15\%$ lies in the range 6.60% to 17.66% , on the basis of the above-stated data.
15. I declare under penalty of perjury that the foregoing statements of fact are true and correct.
16. Executed in Collin County, State of Texas, on January 10, 2018.

[signature]
Robert Serfling, Ph.D.

Appendix 8

FIRST SUPPLEMENTAL DECLARATION
PURSUANT TO TEXAS CIVIL PRACTICE
& REMEDIES CODE SECTION 132.001

1. My name is Robert Serfling.
2. My date of birth is 1-23-39.
3. My address is 1921 Sparrows Point Drive, Plano, Texas 75023, USA.
4. I am over eighteen years of age. I have never been found by a court of law to be mentally incompetent, and believe myself to be of sound mind. I have personal knowledge of the facts stated in this declaration, and they are true.
5. Attached hereto as Ex. 1 is a true copy (without exhibits) of a declaration signed by me on January 10, 2018.
6. The number 385 in paragraph 11 of Ex. 1 is the sum of the numbers 363 and 22 referenced in paragraph 10 of Ex. 1.
7. The number 224 in paragraph 12 of Ex. 1 is the sum of the numbers 184 and 40 in paragraph 10 of Ex. 1.
8. I declare under penalty of perjury that the foregoing statements of fact are true and correct.

9. Executed in Collin County, State of Texas, on
January 12, 2018.

[signature]
Robert Serfling, Ph.D.

Ex. 1

DECLARATION PURSUANT TO
TEXAS CIVIL PRACTICE &
REMEDIES CODE SECTION 132.001

1. My name is Robert Serfling.
2. My date of birth is 1-23-39.
3. My address is 1921 Sparrows Point Drive, Plano, Texas 75023, USA.
4. I am over eighteen years of age. I have never been found by a court of law to be mentally incompetent, and believe myself to be of sound mind. I have personal knowledge of the facts stated in this declaration, and they are true.
5. Attached hereto as Ex. 1 is a true copy of my curriculum vitae. The information contained in Ex. 1 is true and accurate.
6. I am familiar with probability and statistics, as they are taught in American colleges and universities.
7. I am familiar with probability and statistics, as they are used in research in the United States of America.
8. I am familiar with probability and statistics, as they are used in forensic cases in the United States of America.

9. At the request of Tummel & Casso, I have arrived at certain opinions, which are set forth in this declaration. Such opinions are consistent with the current state of human knowledge regarding statistics and probability.
10. My opinions in this declaration are based upon the following assumptions concerning petitions for review received by the Texas Supreme Court in 2012: (a) the number of petitions for review, which involved one or more petitioners all of whom were natural persons, and which were denied, equals 363; (b) the number of petitions for review, which involved one or more petitioners all of whom were natural persons, and which were granted, equals 22; (c) the number of petitions for review, which involved one or more petitioners none of whom were natural persons, and which were denied, equals 184; and (d) the number of petitions for review, which involved one or more petitioners none of whom were natural persons, and which were granted, equals 40.
11. The percentage obtained by dividing the 22 by the 385 equals 5.71%.
12. The percentage obtained by dividing the 40 by the 224 equals 17.86%.
13. The hypothesis that the observed difference between the 5.71% and the 17.86% is due solely to random variation is rejected by a chi-square

test with 99.9% certainty, on the basis of the above-stated data.

14. With 95% confidence, the actual difference being estimated by the observed difference $17.86\% - 5.71\% = 12.15\%$ lies in the range 6.60% to 17.66% , on the basis of the above-stated data.
15. I declare under penalty of perjury that the foregoing statements of fact are true and correct.
17. Executed in Collin County, State of Texas, on January 10, 2018.

[signature]
Robert Serfling, Ph.D.