IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

RENEE PATIOUS SALAZAR, Plaintiff, v. WAL-MART STORES EAST, L.P., WAL-MART, INC. d/b/a WALMART STORES, INC., DAVID LAND, LIONEL LANGHORN JOHN DOES, and XYZ CORPORATIONS. Defendants.	CIVIL ACTION FILE NO.: 23C02111S1

PLAINTIFF'S MOTION FOR SPOLIATION AND SANCTIONS

COMES NOW, RENEE PATIOUS SALAZAR, Plaintiff in the above-styled action and respectfully moves this Court to sanction Defendant Walmart Stores, et. al., for its spoliation of critical and irreplaceable visual evidence. Specifically, Defendant failed to preserve and/or mutilated the surveillance videotape from the security cameras at Defendant's store that depicted Plaintiff and areas adjacent before, during, and immediately after her injury. Defendant also failed to preserve and/or destroyed the internal incident report documenting the details of Plaintiff's in-store fall. Finally, Defendant destroyed video footage from cameras positioned directly overhead the incident site, which would have provided critical information regarding the condition of the aisle before Plaintiff's fall and the fall itself.

I. INTRODUCTION

Wal-Mart is an enormous company with a ubiquitous presence throughout the nation. However, simply because Wal-Mart is large does not mean that it can conduct itself in any manner that it pleases without there being consequences. [W]hen Wal-Mart's discovery abuses cause the playing field […] to become unlevel the Court must both promptly and adequately act.

Wilson v. Wal-Mart Stores, Inc., 199 F.R.D. 207, 208 (S.D. Tex. 2001)

Walmart is the Tom Brady of discovery abuse. Some of its greatest sanction-worthy plays include destroying all evidence of a display chair falling on a customer and killing him, then blaming the customer's death on his positive HIV status (*Rivera v. Sam's Club Humacao*, 386 F. Supp. 3d 188 (D.P.R. 2018)); destroying all evidence of a delivery driver suffering limb-losing injuries in its warehouse despite immediate knowledge of potential litigation (Tripp v. Walmart, Inc., No. 8:21-cv-510-WFJ-SPF, 2023 U.S. Dist. LEXIS 12867 (M.D. Fla. Jan. 25, 2023)); destroying video footage that it claimed provided direct evidence of employee misconduct which led to the termination of a plaintiff with two pending EEOC claims (Abdulahi v. Wal-Mart Stores E., L.P., 76 F. Supp. 3d 1393 (N.D. Ga. 2014)); and destroying six, ten-pound display reindeers after they fell on a customer's head only to later lie that the reindeer were made of paper-mâché and weighed only ounces (Monroe Johnson v.

Wal-Mart Stores, Inc., 1999 WL 35238334 (Tex. Dist. Ct. Aug. 20, 1999). The above examples are mere droplets in an ocean of deceit.[1]

Given Walmart's long and rich history of destroying damaging evidence, it is unsurprising that Ms. Salazar's case has suffered a similar fate. Since Ms. Salazar slipped and

[1] See generally Banovez v. Wal-Mart Associates, Inc., 243 Wis.2d 115 (2001); Race v. Wal-Mart Stores, Inc., No. HHDCV126030536S, 2012 WL 6743576 (Conn. Super. Ct. 2012); Woodard v. Wal-Mart Stores East, LP, 801 F.Supp.2d 1363 (M.D.Ga. 2011); Gaffield v. Wal-Mart Stores East, LP, 616 F. Supp.2d 329 (N.D.N.Y. 2009), Nuckles v. Wal-Mart Stores, Inc., No. 4:06CV00178 WRW, 2007 WL 1546092 (E.D. Ark. 2007); Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796 (Kentucky 2000), Wal-Mart Stores, Inc. v. Lynch, 981 S.W.2d 353 (Tex. App. 1998); Wal-Mart Stores, Inc. V. Christ, 2001 WL 1782611, No. 09-01-141CV (Feb. 21, 2002 Tx. App.); Wal-Mart Stores, Inc. v. Davis, 979 S.W.2d 30 (1998); Testa v. Wal-Mart Stores, 144 F.3d 173 (1st Cir. 1998); McAdoo v. Wal-Mart Stores, E., L.P., No. 3:15-cv-00917, 2017 U.S. Dist. LEXIS 132420 (M.D. Tenn. Aug. 18, 2017); Thaqi v. Wal-Mart Stores East, LP, 2014 U.S. Dist. LEXIS 45107 (E.D. N.Y. Marc. 31, 2014); Britton v. Wal-Mart Stores E., L.P., No. 4:11cv32-RH/WCS, 2011 U.S. Dist. LEXIS 86901 (N.D. Fla. June 8, 2011); Gaffield v. Wal-Mart Stores East, LP, 616 F. Supp. 2d 329, 332-33, 340 (N.D. N.Y. 2009); McDonald v. Wal-Mart Stores East, LP, 2008 U.S. Dist. LEXIS 2626, 2008 WL 153783, at *1, 4-7 (E.D. Va. Jan. 14, 2008); Turner v. Wal-Mart Stores East, L.P., 2007 U.S. Dist. LEXIS 71721, 2007 WL 2872419, at *6-7 (S.D. Miss. Sept. 26, 2007); Monroe Johnson v. Wal-Mart Stores, Inc., 1999 WL 35238334 (Tex. Dist. Ct. Aug. 20, 1999); Bland v. Sam's E., Inc., No. 4:17-CV-190 (CDL), 2019 U.S. Dist. LEXIS 15319 (M.D. Ga. Jan. 31, 2019); Hunter v. Sam's W. Inc., No. 2:15-cv-01964-LDG-CWH, 2018 U.S. Dist. LEXIS 13387 (D. Nev. Jan. 26, 2018); Ballard v. Wal-Mart Stores E., LP, No. 5:17-cv-03057, 2018 U.S. Dist. LEXIS 176505 (S.D. W. Va. Oct. 15, 2018); Culhane v. Wal-Mart Supercenter, 364 F. Supp. 3d 768 (E.D. Mich. 2019); Tripp v. Walmart, Inc., No. 8:21-cv-510-WFJ-SPF, 2023 U.S. Dist. LEXIS 12867 (M.D. Fla. Jan. 25, 2023); Martinez v. Walmart Inc., No. 2:20-cv-01065-JCM-DJA, 2021 U.S. Dist. LEXIS 198033 (D. Nev. Aug. 30, 2021); Flowers v. Wal-Mart Stores, Inc., No. 3:03-CV-35 (CAR), 2005 U.S. Dist. LEXIS 25578 (M.D. Ga. Oct. 27, 2005); Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 659 S.E.2d 905 (2008); Meissner v. Wal-Mart Stores, Inc., A-159,432 (Tex. Dist. Ct. Jefferson Co. Apr. 1999); Woska v. Wal-Mart Stores, Inc., No. 95-3998 (Fl. Cir. Ct. Orange Co. Jan 1998); Shafer v. Wal-Mart Stores, Inc., No. 96-650 (D.Nev. June 1996); New v. Wal-Mart Stores, Inc., 96-8-10571 (Tex. Dist. Ct. Jackson Co.); Anderson v. Wal-Mart Stores, Inc., No. 2:10-cv-02235-GMN-GWF, 2011 U.S. Dist. LEXIS 132901 (D. Nev. Nov. 16, 2011); Bellamy v. Wal-Mart Stores, Texas, LLC, 2019 WJ 3936992 (W.D. Tex. 2019); Rivera v. Walmart, 2010 NY Slip Op 32447(U), (2010); Mack v. Wal-Mart Stores, No. 2:07-CV-0982-BES-RJJ, 2008 U.S. Dist. LEXIS 138400 (D. Nev. July 14, 2008); Wilson v. Wal-Mart Stores, Inc., 199 F.R.D. 207 (S.D. Tex. 2001); Greenwalt v. Wal-Mart Stores, Inc., 253 Neb. 32, 567 N.W.2d 560 (Neb. 1997); Stevenett v. Wal-Mart Stores, Inc., 1999 UT App 80, 977 P.2d 508, 512-14 (Utah Ct. App. 1999) (affirming sanctions); GTFM, Inc. v. Wal-Mart Stores, Inc., 98 Civ. 7724 (RPP) 2000 U.S. Dist. LEXIS 3804 (S.D.N.Y. Mar. 28, 2000); Osterhoudt v. Wal-Mart, No. 86433 (N.Y. App. Div. July 2000); Fisher v. Wal-Mart Stores, Inc and Ricky Phillips, Unpublished, Oct. 16, 1998, State of Michigan Court of Appeals, Calhoun Circuit Court LC No. 95-002672-NZ; Worthington v. Wal-Mart Stores, Inc., No. 01-2106-JWL, 2002 U.S. Dist. LEXIS 20059 (D. Kan. Aug. 29, 2002); In Re Wal-Mart Stores, Inc. Court of Appeals Eighth, Dec. 14, 2016, Docket No. 08-15-00126-CV; Rivera v. Sam's Club Humacao, 386 F. Supp. 3d 188 (D.P.R. 2018); Wal-Mart Real Estate Business Trust, et. al., case number 4:18-cv-03127; In Re: National Prescription Opiate Litigation, United States District Court Northern District of Ohio Eastern Division, Case No. 1:17-MD-2804.

fell on a puddle of water in her local Walmart, the economic behemoth has employed every trick in its offensive playbook to hide the ball. The incident scene where she fell was manipulated; the manipulated scene was then memorialized, thereby destroying direct evidence of Walmart's negligence. Video surveillance footage which would have shown an overhead view of Plaintiff's fall as well as the condition of the aisle before she fell, was destroyed. The video surveillance that *was* turned over – recorded from an angle that fails to show the aisle before Plaintiff's fall or the fall itself – was so heavily manipulated as to make it barely discernable. It is inarguable that the evidence in its unspoliated state existed, that Walmart had a duty to preserve it, and that the evidence was crucial to Plaintiff's negligence and fraud claims.

It is also inarguable that Walmart has acted deceptively and maliciously in destroying this damning evidence. Walmart cannot argue that it was not on notice of potential litigation – it saved the manipulated footage that was later surrendered to Plaintiff's counsel (footage that otherwise would have been recorded over) *because* of potential litigation. Walmart also can't argue that it didn't alter the incident scene by placing an orange cone on the aisle – even the heavily manipulated video footage shows the Walmart associated placing the cone that Walmart initially claimed was already on the scene before Plaintiff fell *after* Plaintiff's fall. Finally, expert testimony will confirm that the video surveillance footage that Walmart turned over was edited to degrade its resolution and reduce the presence of visible information. Walmart cannot explain these actions away.

This case demands the severest of sanctions. There is nothing innocent about what Walmart has done in this case. It acted with malicious dishonesty to shift the burden onto Plaintiff when the evidence it destroyed would have conclusively shown that Walmart failed to maintain its store in a non-negligent manner and later committed fraud to cover its tracks. Because Walmart's spoliation was both malicious, self-serving, and greatly prejudicial to

Plaintiff's case, Plaintiff requests that this court **GRANT** her motion and strike Defendant's Answer.

II. STATEMENT OF RELEVANT FACTS

On May 28, 2021, Plaintiff was an invitee at Walmart Supercenter located at 1234 Alphabet Hwy in Gwinnett County. Plaintiff was walking down a checkout aisle examining snack foods when she suddenly slipped in a puddle of water. Upon later investigation, the water appeared to have dripped onto the floor from the sky roof directly above the aisle where Plaintiff slipped. There was a known defect in the sky roof, and water often leaked onto the aisle where Plaintiff fell. (Deposition of Luke Williams, hereinafter "Williams Depo." 36:14-17). Plaintiff fell backward violently and suffered severe injuries to her back, neck, and head. Immediately after Plaintiff fell, her son, Allen Patious, reported the incident to Walmart employees. Several Walmart employees responded to the scene and cleaned the water with towels. Walmart personnel also placed a trash can under the leak to catch the falling water and a warning cone on the area of the floor that was still damp.

Plaintiff's son and his wife, Felicia Antoinne, spoke with the store manager, David Land, about Plaintiff's fall. Mr. Land reviewed the incident on an electronic tablet and later apologized to Plaintiff and her family. With the help of Ms. Antoinne as an interpreter, Plaintiff gave a statement to Mr. Land concerning the details of the incident. Walmart Stores East LP's Discovery Responses ¶ 32. Plaintiff informed Mr. Land that there was no receptacle or warning cone at the incident scene at the time of her fall. This fact was also confirmed by Ms. Antoinne and Mr. Patious. Claiming to be simply transcribing Plaintiff's telling of the events, Mr. Land instead wrote that, at the time that Plaintiff fell, the aisle contained a trashcan to catch falling water, an orange caution cone, and had been cordoned off by a rope to prevent customer foot traffic. Despite the family's request, Mr. Land never

showed Plaintiff, her son, or her daughter-in-law the incident report in contravention of Walmart's company policy.

On April 21, 2022, Walmart's claims agent, Mandy Freeman, emailed Plaintiff's counsel a photo of the aisle where Plaintiff fell. In the photo, a caution cone was placed near a trash can that was catching leaking water from the roof. The aisle was also cordoned off with a yellow chain to prevent customer foot traffic. Freeman claimed that the photo represented the incident area *before* Plaintiff's fall. Freeman also reported that Mr. Land had informed her that both the caution cone and the receptacle were present at the incident scene when Plaintiff fell. Ms. Freeman later shared incident reports purported to have been given by Plaintiff, which stated that there was a caution cone and trash can on the aisle, which she had not noticed before she fell.

Video surveillance footage surrendered by Walmart later showed Walmart Associate Luke Williams carrying an orange caution cone to the aisle after Plaintiff fell.

III. ARGUMENT AND CITATION TO AUTHORITY

A. WALMART SPOLIATED EVIDENCE.

"Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. Such conduct creates the presumption that the evidence would have been harmful to the spoliator." Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 226 (2011). "To establish spoliation, the party seeking sanctions must prove several things; first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to preserve the evidence; and third, that the evidence was crucial to the movant being able to prove its prima facie case or defense." Ledesma v. Ross Dress for Less, Inc., No. 20-20405-Civ-WILLIAMS/TORRES, 2021 U.S. Dist. LEXIS 259111, at *4 (S.D. Fla. Apr. 8, 2021).

1. The following evidence existed and was spoliated.

a. Walmart spoliated surveillance footage from the cameras directly above the aisle where Plaintiff fell.

Plaintiff slipped and fell between aisles 10 and 11. Two cameras are positioned directly above those aisles, which would have provided video footage with a direct overhead view of both the aisle that Plaintiff slipped on and Plaintiff's fall. (Cheek Depo. 68:18-69:23). *See below.*

Had footage from these videos been retained, the video would have provided direct evidence of the state of the aisle before Plaintiff fell, specifically, whether there was a trashcan placed under the leak to catch water, how much water had accumulated on the floor, and whether or not the aisle had been cordoned off to prevent customers from using it.

Instead of providing footage from either of these surveillance cameras, Walmart provided footage from a camera located on the opposite side of the store. Footage from this camera provided neither information about the aisle before Plaintiff fell nor the nature of Plaintiff's fall. The image below shows the viewpoint from which the other camera recorded.

The blackish area circled in the above image is Plaintiff seconds before she fell. A candy rack obstructs the view of Plaintiff and the aisle where she slipped. This vantage point is completely useless for determining the main issues in this case: whether or not there was spilled water on the aisle, how long it had been there, and whether there were any warning signals that would have provided Plaintiff with equal knowledge of the hazard.

It is clear from the photos inserted above that more than one of the available camera angles would have depicted Plaintiff's fall or the condition of the aisle before Plaintiff's fall. Based on the positions of the cameras in the store, Walmart had recordings of Plaintiff falling from at least three different angles: two overhead angles that would have provided

information concerning not just Plaintiff's fall and the remedial efforts taken after her fall but also the state of the aisle before she fell, and one angle from across the store which showed neither the state of the aisle before Plaintiff fell nor the actual fall itself. Because Defendant's surveillance footage is automatically taped over after thirty days, Defendant proactively chose to preserve surveillance footage for foreseeable litigation. When deciding which of the three camera angles to preserve, Defendant chose the one with the least amount of information and deleted the rest.

b. The surveillance footage that Walmart surrendered was manipulated to reduce visibility.

The make and model of the camera that captured the surveillance footage produced by Walmart was a BC-3I-01G Hi-Res Bullet Camera manufactured and distributed by Wren Solutions. Defendants' Responses and Objections to Plaintiff's Second Interrogatories and Request for Production of Documents ¶ 1. This camera has a resolution of 540 TVL, which is equivalent to 720 x 540 pixels. Affidavit of William Hunter, hereinafter "Hunter Aff" ¶ 4. Below is a comparison of 430 TVL next to lower and higher resolution still images. [2]

[2] First Image: "Comparison of Image Quality of TVL (TV Lines) Facebook," https://nicechmk.best/product_details/55250161.html; Second Image: Q-See, "Technology Overview: Analog – Analog 480-540 TV Lines, Jan. 22, 2016, https://medium.com/@QSee/technology-overview-analoganalog-480-540-tv-lines-6d1b4f4b387d.

As this court can tell from the images embedded above, 540 TVL or 720 x 540 pixels yields images of high resolution and visibility – the kind of resolution and visibility that would be necessary for the primary purpose for which the surveillance cameras in Walmart's are used, i.e., to detect and prosecute theft.

The images that Walmart surrendered clearly do not have a resolution of 720 x 540 pixels. *See below.*

That is because editing of the surveillance video, which occurred after the encoding process, significantly reduced the video's resolution. Hunter Aff. ¶ 11. As this Court can see from the image above, this post-encoding editing resulted in far less visible information. Hunter Aff. ¶7.

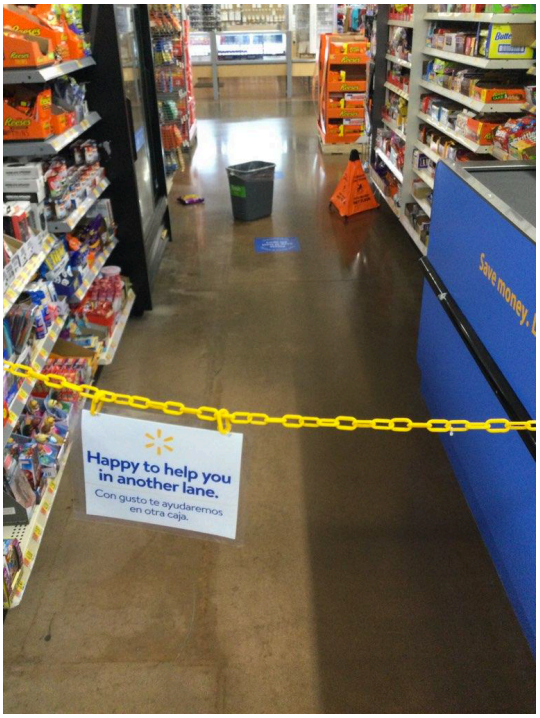
Importantly, encoding the footage did not require a reduction of resolution because the incident was captured on a digital camera. Hunter Aff. ¶ 5. This means that the video footage that Walmart surrendered should have had a resolution of 720 x 540 pixels instead of the video's current resolution of 352 x 240 pixels. Importantly, pixel degradation cannot happen spontaneously: this reduction in resolution can only come from manipulating and editing the video footage to reduce the resolution, thereby lowering the quality and visibility. Hunter Aff. ¶¶ 8,11.

c. Walmart destroyed direct evidence of the incident scene.

"Direct evidence is evidence which immediately points to the question at issue. It is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Hicks v. Heard, 286 Ga. 864, 868 (2010) (internal citation

and punctuation omitted). The scene where an incident occurred is direct evidence relevant to litigation. Failing to accurately memorialize or intentionally altering the scene of an incident that will likely result in litigation is spoliation. See Langlois v. Wolford, 246 Ga. App. 209 (2000) (Court of Appeals affirmed trial court's holding that defendant intentionally prevented direct evidence of the collision "through his act of spoliation by leaving the scene of the incident.").

In the instant case Walmart spoliated the incident scene. Walmart took no photographs of the aisle immediately after Plaintiff's fall. Instead, *after* Plaintiff's fall, Walmart responded to the dangerous condition on the aisle by cleaning up the leaked water, cordoning off the aisle, placing a trashcan under the leak, and placing an orange caution cone on the damp floor. Walmart then photographed this scene and represented, both in its incident report and to its claims adjuster, that the photograph was a proper depiction of the condition of the aisle *before* Plaintiff fell.



Associate Title: ASST MANAGER
Role in Incident: firstOnScene, reporter, additionalWitness

Contact Information
Phone Number: [redacted]
E-Mail Address:

Work Shifts:	Morning	Afternoon	X Evening
Best Contact Time(s):	Morning	Afternoon	X Evening

Physical Injury
Signs of Physical Injury: Yes X No
Description of Injury:

Observation:

Customer said she slipped on water coming around the corner from register 11 to register 10. The was a trash can on floor, some water, and a caution cone. The water appeared to be leaking from the skylight from the roof. Customer was wearing flip flops. She said her knee hurt from the fall, her left hand and her lower back. Said she hit ground.

Later, after turning over the video surveillance footage in discovery, Walmart admitted that, despite having initially claimed that these photographs represented the incident site at the time of Plaintiff's fall, they, in fact, were not a proper illustration. Defendants' Responses and Objections to Plaintiff's First Request for Admissions, Interrogatories, and Request for Production of Documents ¶ 29. Below, in still shots taken from the video immediately *after* Plaintiff fell, Walmart associate Luke Williams can be seen retrieving a caution cone from another aisle and placing it in the aisle where Plaintiff fell.

As mentioned above, Defendant took no images of the aisle before placing the trash can, the warning cone, and the rope. Defendant spoliated the incident scene by altering it, thereby preventing the discovery of direct evidence of its negligence.

2. <u>Walmart had a duty to preserve the evidence that it spoliated</u>.

"Because the spoliation of evidence may give rise to sanctions against the spoliator, including dismissal of the complaint, an initial determination must be made that the spoliator had a duty to preserve the evidence at the time it was destroyed. <u>Cooper Tire & Rubber Co. v. Koch</u>, 339 Ga. App. 357, 359 (2016). "For the injured party to pursue a remedy for spoliation, the spoliating party must have been under a duty to preserve the evidence at

issue." Sheats v. Kroger Co., 342 Ga. App. 723, 726 (2017) (internal citation and punctuation omitted).

> Litigation may be reasonably foreseeable to the defendant based on circumstances such as the type and extent of the injury; the extent to which fault for the injury is clear; the potential financial exposure if faced with a finding of liability; the relationship and course of conduct between the parties, including past litigation or threatened litigation; and the frequency with which litigation occurs in similar circumstances.

Id. (internal citation and punctuation omitted). The court may also consider "what the defendant did or did not do in response to the plaintiff's alleged injury, including the initiation and extent of any internal investigation, the reasons for any notification of counsel and insurers, and any expression by the defendant that it was acting in anticipation of litigation." Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336, 340 (2018) (internal citation and punctuation omitted).

a. Plaintiff suffered a severe and immediately painful injury.

From the moment Plaintiff fell, it was clear she had suffered injury. She immediately complained to the manager that she had hurt her knee, the hand she had used to brace her fall, and her lower back. Her daughter-in-law also reported to Walmart that Plaintiff "hit the ground hard" and that Plaintiff was unable to get up unassisted.

b. Walmart is clearly at fault.

Plaintiff shared no fault in her injury. When Plaintiff slipped and fell on a puddle of water in Defendant's store, there was nothing on the aisle to warn her about any dangerous situation. Despite Defendant repeatedly maintaining that there was a warning cone at the scene when Plaintiff fell, the video shows Walmart Associate Luke Williams carrying an orange warning cone to the aisle *after* he responded to Plaintiff's fall. Walmart's initial insistence that the warning cone was there further supports the conclusion that it was at fault – Walmart misrepresented the cone's presence on the aisle because it knew that the dangerous condition on the aisle required some sort of warning sign and that its failure to

place one made it at fault for Plaintiff's injuries. Further, the sky roof posed a *known* hazard to Walmart – despite knowing that the defective sky roof often leaked, Walmart had repeatedly failed to repair it. (Williams Depo. 36:14-17). Importantly, Walmart has no direct evidence of Plaintiff's equal knowledge of the hazard – only an image of the incident scene that it later *admitted* had been manipulated.

c. Walmart's potential financial exposure was great.

Based on Defendant's immediate response to Plaintiff's fall, i.e., fabricating the details of the incident scene, it was clear that Walmart knew or believed that Plaintiff's fall exposed it to significant financial risk. Defendant was also aware that Plaintiff's injury was caused by a known dangerous element on its premises – the leaky sunroof. Defendant knew that its failure to repair a known dangerous element on the property would only increase its financial exposure.

d. Walmart and other retailers frequently face litigation because of slip and falls.

In 2005, Forbes reported that Walmart defended 5,000 lawsuits yearly, with over 20 filed daily.[3] Walmart has defended thousands of personal injury cases, and a large proportion of those have been slip-and-fall cases. In fact, slip and fall cases are so common that Walmart has implemented a "towel in pocket" program so that their associates are always ready to clear a spill, thereby avoiding customer injury and litigation.

e. Defendant immediately began to gather evidence in anticipation of litigation in response to Plaintiff's injury.

In response to Plaintiff's injury, Defendant immediately took witness statements from Plaintiff, Plaintiff's son, and Plaintiff's daughter-in-law. Defendant's manager then prepared a witness statement in which he attempted to stave off liability by falsely reporting that there was a warning cone on the scene when Plaintiff fell – a fact later disproved by surveillance

[3] Tom Van Riper, *Wal-Mart Stands Up To Waive of Lawsuits,* Forbes, Nov. 10, 2005, https://www.forbes.com/2005/11/09/wal-mart-lawsuits-cx_tvr_1109walmart.html.

footage. Defendant's employee then took photographs of the scene – photographs that showed a cordoned-off aisle, a warning cone, and a trash can – which were later supplied to the Walmart claims adjuster. Walmart also took proactive steps to maintain video surveillance footage of the fall. Walmart's actions were clearly taken in anticipation of – or more specifically, to avoid – litigation.

3. <u>The spoliated evidence was essential to Plaintiff's prima facie case.</u>

a. Negligence Claim

To establish a prima facie case of negligence in Georgia, "it is necessary to establish the essential elements of duty, breach of that duty, and proximate causation, as well as damages, as a basis for liability for the injuries of another." <u>Peters v. Davis</u>, 214 Ga. App. 885, 887 (1994) (internal citation omitted). In the instant case, it is inarguable that Walmart, as a business soliciting the presence of invitees, owed Plaintiff a duty to exercise ordinary care in keeping its premises safe premises safe. O.C.G.A. § 51-3-1. "When undertaking the duty to keep the premises safe by the exercise of ordinary care, this includes inspecting the premises to discover anticipated dangerous conditions about which the owner does not have actual knowledge and taking reasonable precautions to protect invitees from dangers foreseeable from the use of the premises." <u>Williams v. GK Mahavir, Inc.</u>, 314 Ga. App. 758, 760 (2012). It is inarguable that Walmart had a duty to Plaintiff to inspect its premises and discover dangerous situations.

Walmart has destroyed all evidence of its breach of its duty of ordinary care and its duty to inspect. In *The Kroger Co. v. Walters* (319 Ga. App. 52), the Court of Appeals upheld the trial court's ruling that Kroger committed spoliation by deleting video of the plaintiff's fall. The court noted that the deleted video "could have shown that Kroger failed to reasonably inspect the area of the fall or even that, prior to the fall, an employee was near the banana but failed to clean it up. Thus, the video could have established that Kroger was

negligent and knew that it was negligent." The Kroger Co. v. Walters, 319 Ga. App. 52, 58 (2012). In the instant case, the deleted overhead video would have provided evidence that would have established whether Walmart knew or should have known that water had accumulated on the floor and whether Walmart employees failed to inspect the aisle and discover the dangerous situation. These facts are crucial to establishing the breach element of Plaintiff's prima facie case of negligence.

This reasoning also extends to the destruction of the incident scene. The unspoliated incident scene would have provided crucial evidence regarding what kind of cautionary measures – if any – Defendant had taken to ensure that a customer would not slip on the accumulated water. This evidence is made even more important because Defendant initially claimed that a caution cone was already at the scene when Plaintiff fell – a claim later disproven by the surrendered surveillance footage. Walmart's initial misrepresentation of the conditions of the aisle at the time that Plaintiff fell threatens the legitimacy of its claim that there was a trash can on the aisle to catch the falling water and that the aisle had been cordoned off by a chain to prevent foot traffic. Walmart's spoliation of the above-described evidence has reduced this trial to a swearing match when negligence or contributory negligence could have been easily and definitively proven.

b. Fraud Claim

In addition to her negligence claim, Plaintiff has also brought a fraud claim against Walmart. Plaintiff claims that Walmart intentionally misrepresented the incident scene with the photo it provided to its claims adjuster; that Walmart intentionally altered the quality of the video surveillance footage that it surrendered during discovery; that Walmart intentionally failed to produce the best footage of Plaintiff's fall and the circumstances surrounding it; and that Walmart withheld the identity of the person who took the photo. All of these measures were taken in an effort to deny Plaintiff's claim.

Establishing a prima facie case of fraud "requires proof of five elements: false representation, scienter, intent to induce another to act or to refrain from acting, justifiable reliance, and damage." Walden v. Smith, 249 Ga. App. 32, 35 (2001). In the instant case, all of the previously mentioned evidence – the unspoliated incident scene, the deleted video of the overhead views of the aisle, and the unmanipulated video surveillance footage – would have provided invaluable and irreplaceable evidence regarding whether or not Walmart's claim that a container to catch water was placed under the leak and that a chain had cordoned off the aisle. By destroying this evidence, Walmart intentionally created a situation in which Plaintiff has no direct evidence of its false representations.

B. WALMART *MUST* BE SANCTIONED FOR THESE DISCOVERY VIOLATIONS.

> Once a trial court has determined that spoliation has occurred, the court should weigh the following five factors when deciding the appropriate penalty: (1) whether the party seeking sanctions was prejudiced as a result of the destroyed evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the destroying party acted in good or bad faith; and (5) the potential for abuse if any expert testimony about the destroyed evidence was not excluded.

MARTA v. Tyler, 360 Ga. App. 710, 712 (2021) (internal citations and punctuation omitted).

1. <u>The destroyed evidence was of great importance to this case.</u>

The practical importance of the destroyed surveillance footage and direct evidence cannot be overstated. Regarding the overhead video that Walmart destroyed, images from the video would resolve the issues of whether Walmart had actual or constructive knowledge of the hazard on the aisle where Plaintiff fell and what warning signs or water receptacles were in place at the time of Plaintiff's fall. The direct evidence of the unspoliated incident scene would also resolve the question of what, if any, caution signs were in place at the time of Plaintiff's fall that would have put her on notice of a dangerous situation. Regarding the surrendered surveillance footage, which was heavily manipulated post-encoding, the original resolution of the video would provide important information about how Plaintiff fell and

what actions Defendant's employees took after her fall. Rather than rely on the testimony of various witnesses attempting to recall a relatively mundane situation that occurred several years ago, the jury would have been able to watch exactly what happened and see direct evidence of the situation that Plaintiff confronted prior to her fall.

2. Plaintiff was prejudiced as a result of the destroyed evidence.

As outlined extensively above, Plaintiff was significantly prejudiced by Defendant's destruction and manipulation of evidence. Specifically, Defendant's destruction of evidence has reduced Plaintiff's claims of fraud and negligence to a match of he said she said, when, if the evidence existed, Plaintiff could have established a bona fide case of negligence and fraud, which would have made filing a suit unnecessary.

3. The prejudice cannot be cured.

There is no way to recreate the video that Walmart destroyed, discover the original footage that Walmart manipulated, or see the incident scene before Walmart took remedial safety measures after Plaintiff's fall. See Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 545 (2008). The spoliated video and photographs had significant importance to this case as they may have shown how and why Plaintiff's fall occurred, as well as matters relating to Defendant's failure to inspect its premises and keep them safe. Importantly, unlike the cases mentioned at length in Section C of the instant brief, Defendant has surrendered **absolutely no evidence** relevant to the primary issue in this case: whether Walmart had actual or constructive knowledge of the dangerous condition in its store. Walmart has not offered better quality photos. See Ballard v. Wal-Mart Stores E., LP, No. 5:17-cv-03057, 2018 U.S. Dist. LEXIS 176505 (S.D. W. Va. Oct. 15, 2018). Walmart has not provided video from other angles showing Plaintiff's fall or the aisle on which she fell. See Alvarez v. Walmart, Inc., No. 2:19-cv-02189-GMN-DJA, 2021 U.S. Dist. LEXIS 256318 (D. Nev. June 11,

2021). The record is absolutely devoid of discovery that could mitigate the prejudice of this spoliation.

4. Walmart acted in bad faith.

Important to this Court's determination of whether Walmart acted in bad faith is that Walmart made the proactive decision to save surveillance footage from the vantage point of Plaintiff's fall that obscured the conditions of the aisle, while making the same proactive decision to delete the footage from the overhead cameras. This action demonstrates that Walmart knew that it was under a duty to retain video footage of the fall, and made the decided to delete the overhead video footage – footage that would have likely shown that there was no trash can or caution cone on the aisle, and no rope closing the aisle to foot traffic. Walmart acted in bad faith by only preserving the evidence most favorable to its defense.

The District Court for the Northern District of Florida has propounded a test to determine bad faith that this Court may find instructive. The court found that bad faith exists where

> (1) the evidence is plainly central to a potential claim that might arise and the party knows it or reasonably should know it, (2) the lack of the evidence will significantly benefit the party who fails to preserve it, (3) the evidence of what happened is unsettled and probably would be significantly clarified if the lost evidence still available, and (4) the reasons given by for not preserving the critical evidence are suspiciously irrational.

Britton v. Wal-Mart Stores E., L.P., No. 4:11cv32-RH/WCS, 2011 U.S. Dist. LEXIS 86901, at *38 (N.D. Fla. June 8, 2011).

It is inarguable that all of these factors are met in the instant case. The deleted evidence, manipulated evidence, and destroyed incident scene are central to Plaintiff's claim that Walmart was negligent for failing to inspect and correct a hazard of which they had actual or constructive knowledge. Lack of this evidence significantly benefits Walmart

because it reduces what could have been an open and shut case of premises liability into a game of he-said she-said. As it stands, the evidence in this case is riddled with obvious and admitted flaws – overhead video of the incident and an image of what the aisle looked like before Plaintiff fell would have clarified the question of whether there were any warning signs on the aisle at the time of Plaintiff's fall, as well as how long the hazard had been on the floor and whether Walmart had either actual or constructive knowledge of its existence. Finally, Walmart's reasons for not preserving the evidence range from the irrational to the blatantly dishonest. Not only did Walmart intentionally mispresent the aisle on which Plaintiff fell, it also claims that it did not retain footage from surveillance cameras placed **directly above cash registers –** a high foot traffic, high security area where working surveillance cameras would be integral to theft prevention.

5. <u>The potential for abuse if any expert testimony about the destroyed evidence was not included.</u>

Regarding the manipulated video footage, there is potential for abuse because Walmart may attempt to assert at trial that the video footage that it surrendered during discovery was the best footage available. This statement would be patently incorrect. Evidence that Walmart manipulated the footage to reduce its visibility goes to Walmart's culpability and its bad faith.

C. STRIKING WALMART'S ANSWER IS THE APPROPRIATE SANCTION.

1. <u>Walmart's behavior must be deterred.</u>

"Wal-Mart is a sophisticated business entity with a long track record of wrongfully destroying video footage and other evidence, and has been repeatedly sanctioned for this type of conduct."

<u>Stedeford v. Wal-Mart Stores, Inc.</u>, No. 2:14-cv-01429-JAD-PAL, 2016 U.S. Dist. LEXIS 83019, at *8 (D. Nev. June 24, 2016).

"[O]ne of the rationales for the sanction is that it deters parties from pretrial spoliation of evidence and serves as a penalty, placing the risk of an erroneous

judgment on the party that wrongfully created the risk." Wilkins v. City of Conyers, 347 Ga. App. 469, 473 (2018) (internal citations and punctuation omitted). Over the years Walmart has often employed the strategy of destroying relevant video surveillance footage to weaken a plaintiff's claim and nothing any court has previously done has served to deter this behavior.

In *Stedeford v. Wal-Mart Stores, Inc.*, (2016 U.S. Dist. LEXIS 83019) the District Court for the District of Nevada addressed a slip and fall case in which the plaintiff slipped and fell on liquid in front of a register. Walmart surrendered hours long surveillance footage that abruptly (and conveniently) ended ten minutes before plaintiff's fall. As in the instant case, Walmart maintained that it had produced the only video of the incident that had been preserved. In *Stedeford*, like in the instant case, Walmart also destroyed direct evidence of the fall, i.e., a damaged liquid soap bottle. Like in the instant case, the court noted that

> The video surveillance would have shown the manner in which Plaintiff slipped and how hard the fall was which would enable a jury to understand the fall caused serious injuries. It would also have established how Plaintiff reacted immediately after the fall to controvert Wal-Mart's arguments that Plaintiff did not immediately manifest any injuries.

Stedeford v. Wal-Mart Stores, Inc., No. 2:14-cv-01429-JAD-PAL, 2016 U.S. Dist. LEXIS 83019, at *7 (D. Nev. June 24, 2016). The court also noted that the incident *should have been recorded* because, like the instant case, the plaintiff fell at a checkout aisle.

> Wal-Mart has often explained that the reason certain areas of stores do not have video footage is because its cameras are primarily focused on high traffic, high security areas, and in particular its cash registers. **This incident occurred in front of the front cash register area of the store.** An abrupt end to fifty minutes of video in front of the cash registers ten minutes before the accident is therefore inherently suspect in light of what the court has been told about how Walmart focuses its camera coverage in prior cases.

Id. (emphasis added). After addressing and weighing the various factors, the *Stedeford* court imposed discovery sanctions and an adverse inference instruction. Not even five years later, Walmart employed an identical tactic to deny Plaintiff a chance to rightfully recover for her injury. Walmart has not been deterred.

In *Britton v. Walmart Stores E., L.P* (2011 U.S. Dist. LEXIS), the district court for the Northern District of Florida addressed a case where Walmart deleted video surveillance footage of its security officer abusing two teenage boys after wrongfully accusing them of theft. "The court held that Walmart let the evidence be lost because Defendant knew that it would not help, and probably would hurt, its defense." Britton v. Wal-Mart Stores E., L.P., No. 4:11cv32-RH/WCS, 2011 U.S. Dist. LEXIS 86901, at *39 (N.D. Fla. June 8, 2011). The court in *Britton* prohibited Walmart from presenting a defense of probable cause, justifiable probable cause, or any other justification or mitigation. The court also ordered Walmart to reimburse the plaintiff's fees for litigating the spoliation issue and litigating the motion to expedite the production of the video evidence in advance of the depositions. Walmart has not been deterred.

In *Walmart Stores, Inc. v. Lee* (290 Ga. App. 541), the Georgia Court of Appeals addressed a case where a Walmart customer was carjacked and shot in a Walmart parking lot. "A Wal-Mart unmonitored video camera recorded the criminal incident, and that night, store personnel turned over the videotape to the police department to aid its investigation of the crime." Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 542, 659 S.E.2d 905, 907 (2008). The plaintiff and the plaintiff's mother also viewed the tape. Walmart later destroyed the tape. The trial court found that Walmart had spoliated the evidence and ordered the following sanctions:

> (a) the jury would accept as stipulated facts the recollections of Lee and her mother about the events that had been depicted on the videotape; (b) Wal-Mart would not be allowed to contradict their recollections or add cumulative evidence, but it would be allowed to explain their stated recollections; (c) Wal-Mart would not be precluded from calling an expert to interpret evidence established by Lee's and her mother's testimony, *except as to what would contradict their testimony*; (d) Wal-Mart would not be precluded from calling an expert to testify as to what security measures, if any, should have been taken, *except as to what would contradict Lee's and her mother's testimony*; and (e) the jury would be charged that the spoliation of evidence creates a rebuttable presumption that the evidence lost would have been harmful to the spoliator.

Id. at 543. Walmart remains undeterred.

In *Ballard v. Wal-Mart Stores, E., LP* (2018 U.S. Dist. LEXIS 176505), the United States District Court for the Southern District of West Virginia addressed a case where the plaintiff slipped and fell while shopping at Walmart. Immediately after the plaintiff fell, Walmart initiated an investigation, which included taking pictures of the incident site, including the liquid on which the plaintiff slipped. When the plaintiff initiated suit against Walmart two months after her fall, she was provided with "poor quality photocopies of the photo prints taken by [the asset protection manager] during the initial discovery phases." Ballard v. Wal-Mart Stores E., LP, No. 5:17-cv-03057, 2018 U.S. Dist. LEXIS 176505, at *3 (S.D. W. Va. Oct. 15, 2018). **Two years later**, after the close of discovery, Wal-Mart surrendered better-quality photo prints. Walmart also failed to preserve the surveillance footage of the plaintiff's time in the store.

The *Ballard* court ordered Walmart to bear the cost for the plaintiff to "take new depositions, re-depose certain witnesses, and/or retain an expert is a more appropriate cure […]." Id. at *7. Walmart has not been deterred.

2. Walmart's behavior was both malicious and greatly prejudiced Plaintiff.

> [T]he harsh sanction of dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence. As a general rule, this is true. However, malice may not always be required before a trial court determines that dismissal is appropriate. As the Fourth Circuit has noted, even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case. Thus, in determining whether sanctions for spoliation are warranted, the trial court must weigh the degree of the spoliator's culpability against the prejudice to the opposing party.

Bridgestone/Firestone N. Am. Tire v. Campbell Nissan N. Am., 258 Ga. App. 767, 770, 574 S.E.2d 923, 927 (2002). "[W]hen key evidence has been destroyed, exclusion of evidence or dismissal of a case may be warranted. Phillips v. Harmon, 297 Ga. 386, 398-99, 774 S.E.2d 596, 606 (2015) (internal citations and punctuation omitted). But see *AMLI Residential*

Properties v. Georgia Power Co., 293 Ga. App. 358, 363 (1) (a) (iii) (667 SE2d 150) (2008) ("Exclusionary sanctions may be appropriate where the spoliator has not acted in bad faith.").

This court can find meaningful guidance on this issue from *Alvarez v. Walmart, Inc.* (2021 U.S. Dist LEXIS 256318). In *Alvarez,* the District Court of Nevada addressed a case in which a Walmart customer slipped on a puddle while walking through the store's self-checkout area. During discovery, Walmart produced eight video clips. Importantly, *only two* of the eight video angles depicted the plaintiff falling – like the footage produced in the instant case, the two clips were wide-angle video taken from far away. The court noted that the overhead video that Walmart failed to preserve "would have depicted the scene […] before and after the incident." Alvarez v. Walmart, Inc., No. 2:19-cv-02189-GMN-DJA, 2021 U.S. Dist. LEXIS 256318, at *8 (D. Nev. June 11, 2021). The court noted that Walmart failed to retain footage that would capture action relevant to Plaintiff's claim, i.e., what happened in the aisle before her fall, yet managed to save video "*showing the obscured scene from far away*." Id. The *Alvarez* court sanctioned Walmart in an effort to deter future spoliation and restore Plaintiff to the position she would have been in absent the wrongful destruction of evidence. In holding that the most severe sanctions would have been too extreme, the court noted that "video from other angles show Plaintiff falling to the ground and the Defendant's employee using paper towels to wipe the floor after Plaintiff got up […]." Id at *13.

The instant case of spoliation is almost identical to the one that the District Court addressed in *Alvarez.* It is inarguable that the video taken from directly above the aisle where Plaintiff fell would have provided relevant information related to Plaintiff's claim and Defendant's defense. Specifically, because Defendant has *repeatedly admitted* that the sky roof above the aisle where Plaintiff fell had a known leak, the surveillance footage likely contained evidence relevant to Defendant's actual or constructive knowledge of accumulated

water on the aisle. (Williams Depo. 35:19-36:17). Footage depicting the aisle before Plaintiff fell would have provided relevant information regarding whether or not water from the known leak had been accumulating on the floor and what, if anything, had been placed on the aisle to prevent customers from slipping and falling on a known hazard. Instead of preserving that footage, Walmart preserved the footage they believed would be the most helpful to their defense – footage taken from far away at an angle that failed to depict Plaintiff's actual fall or the state of the area before she fell. And, unlike in *Alvarez*, there is no mitigating video footage showing Plaintiff's fall or Defendant's agents cleaning the aisle after Plaintiff fell. Unlike the far-away video taken in *Alvarez,* the far-away video in the instant case contains absolutely zero information about the site where Plaintiff fell or how she fell. Following the court's reasoning in *Alverez,* the fact that Defendant's spoliation left Plaintiff with exactly **zero** relevant evidence to prove her prima facie case, the severest sanction is appropriate in this case.

Georgia courts have stricken answers in cases similar to those presented in *Alvarez* and the instant case. In *The Kroger Co. v. Walters* (319 Ga. App. 52), the Court of Appeals addressed a case where the plaintiff slipped and fell on a piece of banana while in the defendant's store. In *The Kroger Co.*, the store co-manager deleted footage from all of the cameras, including the camera nearest to the vicinity of the fall, after determining that the cameras didn't capture the actual fall. The plaintiff argued, and both the lower and appellate courts accepted, that while the cameras didn't capture the fall, deleted video from the camera closest to the spot where the plaintiff fell "could have shown that Kroger failed to reasonably inspect the area of the fall or even that, prior to the fall, an employee was near the banana but failed to clean it up." The Kroger Co. v. Walters, 319 Ga. App. 52, 58 (2012). The Court of Appeals noted that "if the video would have shown that Kroger was negligent, then Walters was forced to file suit in a case where there was no bona fide controversy as to negligence."

Id. In upholding the lower court's decision to strike Defendant's answer, the Court of Appeals held that Kroger "acted in bad faith in failing to preserve the evidence and manipulating evidence to excuse its actions." The Kroger Co. v. Walters, 319 Ga. App. 52, 55 (2012).

In the instant case, Walmart intentionally manipulated the aisle on which Plaintiff fell and then tried to pass this manipulated photo off as an accurate representation of the incident scene. Walmart intentionally deleted the overhead video of the aisle on which Plaintiff fell. Walmart intentionally manipulated the only footage that it did turn over, in an obvious maneuver to meet the bare minimum of its discovery demands while also attempting to obscure the fact that its associate placed a warning cone in the aisle after Plaintiff fell – when it initially represented that a cone was already in place. Walmart is now arguing that Plaintiff has no proof of the dangerous condition she confronted prior to falling. This is a blatantly obvious ploy to deter Plaintiff from pursuing this case. "A defendant without a defense may still gamble on a person's unwillingness to go to the trouble and expense of a lawsuit; but there will be, as in any true gamble, a price to pay for losing." Id. The price for losing *must* be this Court striking Walmart's answer. Not only is this sanction appropriate, Walmart's behavior in this case demands it.

IV. CONCLUSION

"[N]efarious conduct is all too common in lawsuits in which Wal-Mart is a party."
Wilson v. Wal-Mart Stores, Inc., 199 F.R.D. 207, 208 (S.D. Tex. 2001)

While Wal-Mart may lack the moves and muscle of Tom Brady, it makes up for this loss with money and manipulation. Walmart never misses an opportunity to employ its vast resources to pin its opponents against the ropes, and this case is a veritable play-by-play of Walmart's greatest discovery destruction hits. The clock has run out. As so many other courts have concluded over the past decade, the time has long come to hang Wal-Mart's jersey from the rafters.