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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas, Twelfth Judicial Circuit
Hon. Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2022-000303
Civil Action No. 2017-CP-21-01375

April Jones, ...Respondent,

v.

Tim Ringer, individually and as employee/agent of Wal-Mart Stores Inc. d/b/a Wal-Mart Store #630, Wal-Mart Stores, Inc, and Wal-Mart Stores East, L.P., ...Defendants,

of which

Wal-Mart Stores, Inc, and Wal-Mart Stores East, L.P. are .....Appellants.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by denying Walmart's Motion for Directed Verdict and, later, for JNOV when the record lacked any evidence to establish a mandatory element of Plaintiff's claim: that Walmart either negligently created the hazardous condition or had actual or constructive knowledge of it?

2. Did the trial court err by denying Walmart's Motion for Directed Verdict and, later, JNOV when the record lacked any evidence to establish another mandatory element of Plaintiff's claim: that Walmart negligently breached the duty it owed to Plaintiff as an invitee?

3. Did the trial court err by denying Walmart's Motion for New Trial when, during the trial, Plaintiff abruptly and falsely blurted out previously undisclosed testimony in violation of Rule 408, SCRE about a supposed settlement offer made by Walmart shortly after the incident?

4. Did the trial court err by denying Walmart's Motion for New Trial when, during Plaintiff's opening statement, she relied improperly on photographs that the court later excluded, but regarding which the trial court refused to give a curative instruction?

5. Did the trial court err by denying Walmart's Motion for New Trial when the evidence was insufficient to support the verdict and, relatedly, the verdict was improperly motivated by emotion and prejudice towards Walmart?

6. Did the trial court err by denying Walmart's Motion for New Trial nisi remittitur when the verdict amount was excessive and disproportionate?

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. The trial court properly submitted this case to the jury because while there was no direct evidence as to how the nail came to be on the store floor, there was circumstantial evidence that it came from one of the wooden display pallets as well as sufficient testimony, when viewed in the light most favorable to the plaintiff, that Walmart had constructive notice of the hazard and because it failed to remove it, Walmart breached its duty.

2. The trial court in no way abused its discretion in denying Walmart's request for a mistrial because Walmart agreed to a curative instruction and thus the issue is not preserved for review. Even if it is, Walmart cannot show prejudice.

3. The trial court did not err in denying Walmart's motion for a new trial based on a brief

display of photographs during Plaintiff's opening statement that had not been ruled inadmissible during a pretrial hearing and that counsel had a good faith belief as to its admissibility during the trial. In any event, the trial court's decision not to issue a curative instruction is not reversible error.

4. The trial court properly denied Walmart's motion for a new trial under the thirteenth juror doctrine.

5. The trial court correctly denied Walmart's motion for a new trial Nisi Remittitur because the verdict was based on the evidence and not excessive. Further, Walmart relies on unpreserved arguments in advancing this contention.

STATEMENT OF THE CASE[1]

Respondent, April Jones, filed this negligence action on May 22, 2017, against Tim Ringer, individually and as employee/agent of Wal-Mart Stores, Inc. d/b/a Wal-Mart Store #630; Wal-Mart Stores, Inc; and, Wal-Mart Stores East, L.P., because of injuries she sustained which ultimately led to the amputation of her right leg after she stepped on a rusty nail in a Walmart in West Florence, South Carolina on June 26, 2015. (R. p. 29-34). Walmart removed this action to federal court, but the court granted Respondent's motion to remand back to state court. (R. p. 1-10, 35). Thereafter, Respondent filed an amended complaint adding Wal-Mart Stores East, L.P. Appellants filed an Answer, generally denying the allegations of Jones' Complaint. (R. p. 44, 50).

The case proceeded to a trial in the Florence County Court of Common Pleas before the Hon. Michael G. Nettles and a jury from November 8, 2021 to November 12, 2021, when the jury returned a verdict in favor of Jones for ten million dollars in actual damages. (R. p. 2648-3474).

Thereafter, Appellants filed a motion for a judgment notwithstanding the verdict (JNOV) and for a new trial. (R. p. 1517). By Order dated February 15, 2022, Judge Nettles denied the

[1] Walmart's "Introduction" section in its brief is outside the parameters of Rule 208(b), SCACR, and therefore arguably should not be considered by this Court.

motions. (R. p. 26). Appellants timely filed an appeal from the verdict and denial of post-trial motions, and Respondent timely filed a cross-appeal on the issue of failure to charge spoliation of evidence and failure to submit the issue of punitive damages to the jury. Respondent subsequently moved to dismiss that appeal, which this Court granted.[2]

FACTS

On June 26, 2015, at approximately 11:30 a.m., Jones entered the West Florence Walmart to purchase some bleach. (R. p. 3035, lines 2-23). Within minutes of walking in the produce aisle, Jones heard a metal sound and realized she had stepped on something. (R. p. 3042, line 6 – p. 3043, line 9). According to Jones, she felt pressure but no pain initially. (R. p. 3043, lines 10-11). Shortly thereafter, she determined she had stepped on a rusty nail. (R. p. 3044, lines 5-16). A store video, produced to Jones during discovery, showed Jones picking up her foot to see what she had stepped on. (R. p. 3042, lines 5-19). After paying for her bleach, she went to customer service to meet with the store manager and to file an incident report. (R. p. 3058, line 23 – 3059, line 7). Video footage reveals Walmart personnel giving Jones peroxide to wipe off her wound and cleaning up blood from the floor. (R. p. 3072, line 3 – 3073, line 17). Thereafter, the video shows maintenance men arriving in the customer service area and mopping up blood from the floor. (R. p. 3074, lines 1-8, 3081, lines 18-21). Ultimately, Jones exited the store, met her daughter in the parking lot, and requested that she follow her to McLeod Hospital. (R. p. 3091, line 23 – 3092, line 11).

[2] Respondent does not waive its contention that the trial court should have given a spoilation charge or that there was sufficient evidence of punitive damages to go to the jury in the event this case is reversed on appeal and remanded for a new trial, but since the jury returned a verdict in its favor, there is no reason to pursue those claims at this time.

Three days after the event at Walmart, Jones, who suffered from diabetes,[3] saw a general surgeon, Dr. Keith Player, in Florence. (R. p. 2736, lines 6-13). Jones had previously presented at the emergency room with a worsening foot infection, and her kidney doctors had placed her in the hospital and started her on antibiotics. (R. p. 2736, line 22 – 2737, line 6). Following x-rays and a bone scan, she saw Dr. Player, who evaluated the wound on her foot. (R. p. 2737, line 6 – 2738, line 18). After several days in the hospital, Jones was discharged on antibiotics. (R. p. 2738, line 22 – 2739, line 4). Approximately a week later, Dr. Player saw Jones in his office for a worsening foot infection, and she was admitted back into the hospital. (R. p. 2739, lines 1-4). Jones' second toe had developed gangrene and, on July 15, 2015, Dr. Player amputated the toe. (R. p. 2741, line 14 – 2742, line 20). Unfortunately, the wound did not heal properly, and in August of 2015, Jones underwent a second amputation of two more toes, leaving only her fourth and "pinky" toe remaining on her foot. Jones' condition continued to worsen, and in February of 2016, Jones' leg was amputated above the knee. (R. p. 2744, lines 19-22).

By letter dated July 13, 2015, counsel for Jones requested Walmart to preserve all "electronically stored … information potentially relevant in any way to the following: …all video camera footage directed towards the floor area of the main grocery aisle during the six hours prior to the injury and the one hour following the injury." (R. p. 2898, line 6 – 2899, line 18). Those videos, though apparently reviewed by Walmart, were neither preserved nor produced by Walmart.

The case proceeded to a trial before the Honorable Michael G. Nettles and a jury in the Florence County Court of Common Pleas on November 8, 2021. Judge Nettles denied Jones' request for a charge on spoliation of evidence. (R. p. 3218, lines 9-12). He also granted Walmart's

[3] Jones suffered from non-insulin-dependent diabetes mellitus type 2. (R. p. 2754, lines 7-11).

motion to strike Jones' request for punitive damages. (R. p. 3220, lines 1-25). On November 12, 2021, the jury returned a verdict in favor of Jones for ten million dollars actual damages. Judge Nettles denied post-trial motions filed by Walmart and this appeal ensued.

ARGUMENTS

I. THE TRIAL COURT PROPERLY SUBMITTED THIS CASE TO THE JURY BECAUSE WHILE THERE WAS NO DIRECT EVIDENCE AS TO HOW THE NAIL CAME TO BE ON THE STORE FLOOR, THERE WAS CIRCUMSTANTIAL EVIDENCE THAT IT CAME FROM ONE OF THE WOODEN DISPLAY PALLETS AS WELL AS SUFFICIENT TESTIMONY, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO APRIL JONES, THAT WALMART HAD CONSTRUCTIVE NOTICE OF THE HAZARD.

The standard of review when considering a trial court's ruling on a motion for directed verdict or JNOV mirrors that employed by the trial court. The evidence and all inferences that can be reasonably drawn from it must be viewed in the light most favorable to the non-moving party, and if, through that lens, more than one reasonable inference can be drawn or the inferences to be drawn therefrom are in doubt, the case should be submitted to the jury. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399, S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012); *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). It is axiomatic that the motions must be denied when either the evidence gives rise to more than one inference or when its inference is in doubt. *Garrison v. Target*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022). The trial court here correctly denied Walmart's motions for judgment as a matter of law and submitted this case to the jury for its determination.

Jones acknowledges that, under our jurisprudence, Walmart is not an insurer of the safety of its customers, but rather, has a duty to exercise ordinary care to keep its premises in a reasonably safe condition. *Pennington v. Zayre Corp.*, 252 S.C. 176, 178, 165 S.E.2d 695, 696

(1969).[4] Accordingly, the negligence which a plaintiff like Jones must prove is (1) that the object causing the incident was placed on the floor through an agency of the store, or (2) that the store had actual or constructive notice of the presence of the object and failed to remove it. *Id.* In this case, Jones produced sufficient circumstantial evidence that the nail in question came from one of the wooden display pallets used by Walmart, or, in the alternative, that Walmart had constructive notice of the presence of the nail on the floor.

A. Sufficient evidence exists that Walmart created the hazard.

It was indisputably established at trial that Walmart does not sell individual nails, let alone the rusty nail which injured Jones' foot. (R. p. 2889, lines 22-25). There was also evidence adduced that the wooden display pallets used by Walmart contain nails. (R. p. 2829, lines 23-25). Tim Ringer, store manager of the Florence Walmart, testified that the display pallets in the store contain "wood, nails, [and] staples." *Id.* The Florence Walmart's assistant manager, Ayesha Cooke-Simmons, testified that other than one of the wooden pallets, there is nothing inside the store with nails in it. (R. p. 2917, line 24 – 2918, line 16). The store's roof does not have shingles, and the cash registers and conveyor belts are made of metal. *Id.* Additionally, there was testimony that the wooden pallets get damaged in transit to the store. (R. p. 2963, line 23 – 2964, line 16). Store Manager Ringer also testified that although vendor display pallets are inspected for stability and/or appearance, they are not inspected for nails. (R. p. 2889, lines 15-17). Ringer conceded that Walmart did not inspect the pallets coming into the store and that he "had no way of knowing" whether the nail came out of one of the wooden display pallets. (R. p. 2888, line 10 – 2889, line

[4] Significantly, in its Answer, Walmart denied it had a duty to maintain its premises in a safe condition for its customers. (R. p. 45-46, 52, 2817, lines 1-20). It made a similar denial in response to Jones' requests to admit. (R. p. 1455, 2841, lines 12-25).

17, 2890, line 25).

Kevin Lane, an assistant manager at the store who was the acting store manager on the day of the incident because Ringer was off, testified that sometimes, when the pallets are received off the truck, they are broken. (R. p. 3247, lines 6-15). He also stated that he had witnessed pallets on the floor that were not intact, and when that happens, there is "wood everywhere." *Id.* Thus, there was circumstantial evidence presented that this used and weathered nail came from one of the wooden display pallets.

Additionally, Jones intended to call an expert, Dr. Bryan Durig, at trial, to testify that the nail at issue was a roofing nail, that such a nail could be used in either the construction or the repair of a wooden pallet, and that, in his opinion, the probable source of the nail was a wooden pallet. However, Walmart moved in limine for the exclusion of Dr. Durig's testimony. At the hearing, counsel for Walmart argued, "[t]here's no need for specialized or expert testimony such as Doctor Durig's. (R. p. 2550, lines 23-24). During that hearing, the trial court arguably erroneously, or at the very least prematurely, ruled that Durig would not be permitted to testify concerning the use of a nail in the construction or the repair of a wooden pallet or to give an expert opinion that the most probable source of the nail was a wooden pallet. (R. p. 2606, line 22 – 2609, line 6). Rather than allow the parties to undergo a thorough voir dire of the expert's qualifications, the trial court simply accepted Walmart's position that expert testimony was not needed for Jones to prove her case, notwithstanding the fact that Jones' expert also was prepared to refute the opinions of Walmart's expert. (R. p. 2563, line 24 – 2569, line 12). Obviously, in light of the submission of the case to the jury and the ensuing verdict, Jones has not appealed from that arguably erroneous ruling. However, even without the expert testimony that was prohibited by the

trial court, there was sufficient evidence—evidence which came in without objection—that the nail which injured April Jones' foot and ultimately resulted in the loss of her leg, came from one of the wooden pallets used by Walmart for display.

B. Walmart had constructive notice and therefore had sufficient time to discover the nail and remove it from the premises.

Walmart claims the trial court erred by denying its directed verdict and JNOV motions as to liability because there was insufficient evidence of its constructive knowledge of the rusty nail being on the floor. Constructive notice is a substitute for actual notice where a legal inference is created by circumstantial evidence. *Major v. City of Hartsville*, 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014). In the context of premises liability cases, a storekeeper will be charged with constructive notice whenever it appears that the condition has existed for such length of time prior to the injury that, under existing circumstances, he should have discovered and remedied it in the exercise of due care. *Anderson v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122, 165 S.E.2d 627, 629 (1969). While the apparent destruction of the video footage in the hours before this incident certainly impacts the issue of actual notice—as it might have shown how the nail came to be on the floor—it is in the realm of constructive notice that the absence of any video footage in the hours before the incident, is most critical.

Here, Walmart officials testified there were several procedures in place that *should* have prevented the nail from remaining on the floor long enough for a customer to step on it. Store Manager Ringer testified that every sales associate is "supposed to" conduct a sweep of his or area every hour and half to two hours. (R. p. 2806, line 24 – 2807, line 8). However, when queried what follow-through process was in place to ensure these sweeps were actually done, such as

logging them in, Ringer admitted there were none. (R. p. 2807, lines 13-16).[5]

In addition to the lack of logs showing these alleged safety sweeps actually occurred, Walmart neither produced nor presented any video footage of the sweeps taking place. Manager Ringer admitted that videos of the six hours prior to this incident would show not only three to four safety sweeps taking place, but also "You'd see associates walking those area, yes." (R. p. 2897, line 9). Ringer also testified that videos three hours before the incident would show whether or not, after the pallets were removed and taken to the back, whether the employees came to clean up the floor afterwards. *Id.* Ringer also acknowledged that considering how good the store video cameras were, footage would show not only the nail on the floor, but "we would be able to determine how long it had been there." *Id.* This testimony came in without objection.

Thereafter, Jones' counsel proceeded to question Ringer about the lack of any video footage of the area prior to the time Jones stepped on the nail. Ringer conceded that he hadn't seen any footage of that time frame, and that all he had seen were "the clips I have been shown." (R. p. 2899, line 13). According to Ringer, Walmart retains the store videos for thirty days. (R. p. 2900, lines 11-14). Ringer was then questioned about the request for this video footage by Respondent's counsel.

Jones' prior counsel, Rod Jernigan, requested—three times—that Walmart preserve and

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[5] Interestingly, Ringer was questioned at trial about the allegation in Jones' Complaint that "as manager, Ringer's responsibilities and duties include, but are not limited to, cleaning, monitoring, and maintaining the premises of Walmart Store No. 630 to ensure that it is safe, clean, and not dangerous for its customers, patrons, and invitees," an allegation that both Walmart and Ringer specifically denied in their Answers. (R. p. 2817, lines 1-20). Nevertheless, upon objection of Walmart's counsel, the trial court ruled that this line of questioning was "inappropriate." (R. p. 2819, lines 21-25). Thereafter, Ringer was examined concerning the defendants' answer to one of Jones' requests to admit. The requests asked both defendants to "Admit that Defendant is responsible for managing, maintaining, controlling, safeguarding, caring for, and inspecting Walmart No. 630." The response was "Denied as stated." (R. p. 2841, lines 12-25). These denials by Walmart of any responsibility for maintaining its premises in a safe condition for its customers were not lost on the jury.

produce video footage recorded within the store on the day of the incident. By letter dated July 13, 2015—just seventeen days after the incident—he requested Walmart to preserve "all video camera footage directed towards the floor area of the main area of the main grocery aisle during the six hours prior to the injury and the one hour following the injury." (R. p. 2898 line 8 – 2899, line 18). Nevertheless, these videos were not preserved by Walmart nor turned over to Jones' counsel. No Walmart official could explain why, but it appears that Jernigan's written requests were never transmitted beyond the claims department.

Ringer conceded that he had not seen any such videos, although it is clear that the videos existed. (R. p. 2901, lines 5-8). Ringer also admitted his receipt of a letter dated July 21, 2015—still within thirty days of the incident—which stated that Jones had sustained a puncture wound to her foot and was currently in the hospital, having had one of her toes amputated. (R. p. 2901, line 14 – 2902, line 13). This letter was addressed to Ringer and bore a stamp that it went through the Walmart legal department. (R. p. 2901, line 14-17). A third letter, dated September 21, 2015, from Jones' counsel to Walmart's Claims Department, reiterated that Jones had sustained a puncture injury and that a previous letter had requested the preservation of video and other records surrounding the date and time of her injury. (R. p. 2903, line 21 – 2905 line 2). Importantly, that letter also stated: "*We acknowledge your telephone conversation with my staff stating the videos have been reviewed and you would be issuing a formal denial of this claim*; however, we have not received any further communication at this time. We would reiterate our request for the videos to be forwarded to us." (R. p. 2904, lines 7-12) (emphasis added). Ringer testified that he had never seen those videos and that he did not know what had happened to them. (R. p. 2904, line 23 – 2905, line 1). Thus, although Ringer acknowledged there were video cameras in place throughout

the store and that the requested video footage would be a good way to determine how the nail came to be on the floor, how long it remained there, and whether the required safety sweeps were in fact conducted, he also testified that he had never seen the videos that had been requested and that he did not know what had happened to them. (R. p. 2903, line 21 – 2905, line 2). Moreover, Ringer stated that under normal circumstances, Walmart retains video footage for sixty days, and further acknowledged that the three written requests outlined above were all within sixty days of the incident. (R. p. 2900, line 19 – 2901, line; 2902, lines 7-9). All of this testimony came in without objection.

Throughout the trial, Walmart touted its maintenance of Store 630 and the measures in place to protect its customers. Virginia Wright, the "asset protection" manager for Walmart, testified that the video cameras installed in the store were so powerful that one could count the freckles on someone's face and could discern not only the type of coins that might be dropped on the store floor, but also whether they were heads or tails. (R. p. 2922, line 6 – 2923, line 2). Wright also revealed that she was never asked to pull any additional videos surrounding this incident, but that if she had been requested to within ninety days of the event, she "most likely" would have been able to do so. (R. p. 2931, line 15 – 2932, line 4). No witness disputed the statement in Jernigan's third and final letter to the claim department that "the videos had been reviewed" by Walmart; nevertheless, instead of turning them over to Jones' counsel, the videos were apparently destroyed.

In this case, Walmart wanted to be able to have its proverbial cake and eat it too. It wanted credit for the maintenance procedures it claimed to have in place, as well as for its sophisticated video cameras that were allegedly scanning the stores constantly for foreign substances, yet it

failed to turn over the video footage of the day in question despite three separate written requests to do so. Kevin Lane, the acting store manager on the day in question, conceded that if the videos of the area on the day in question still existed, they would have shown whether these highly touted "sweeps" were in fact conducted. The following colloquy is telling:

> Q. And in the six hours' time before the time that Ms. Jones stepped on this nail, if we had video of the area where Ms. Jones walked those six hours, you would have expected to see three, maybe four, safety sweeps take place in that area; right?
>
> A. Up to three or four, yes.
>
> Q. Okay. And we don't have that video, do we?
>
> A. We do not.

(R. p. 3249, line 19 – 3250, line 1).

Even though all video footage of the area taken during the six hours immediately prior to the incident—which admittedly could have shown how the rusty nail got on the floor as well as the numerous safety sweeps which were allegedly taking place—that request was never transmitted to Wright, and those videos were destroyed. Despite this fact, the trial court denied Jones' request for a spoliation of evidence charge. Although not pursued by Jones in light of the verdict in her favor, this denial may well have been error. *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 521, 629 S.E.2d 675, 678-79 (Ct. App. 2006) (noting where appellant's malpractice claim against the hospital hinged on the jury believing Stokes died from lack of oxygen rather than from a sudden and unexpected heart attack, two missing pieces from Stokes' record were prejudicial and warranted a spoliation of evidence charge). Nevertheless, Jones' counsel argued

this issue to the jury, which was certainly aware of the significance of the missing footage.[6]

By failing to come forward with any evidence of the condition of the area containing the nail for the four to six hours before it pierced April Jones' foot, the jury was presented with a quintessential jury issue as to credibility. *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022) ("[N]either the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." (quoting *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006))). Walmart's assertions of its continuous "safety sweeps" as well as the supposed cleanliness of the store were seriously called into question by its failure to produce this video footage, even though admittedly timely requested by Jones.[7] Despite the trial court's refusal to give a spoliation of evidence charge, this issue was clearly presented to the jury through the reading of the letters requesting production of the videos, the testimony of Ringer and other Walmart personnel concerning the receipt of those letters, the maintenance and apparent destruction of the videos, and the closing argument of counsel.

Indeed, Walmart's credibility, as well as the credibility of Jones, was ever at the forefront in this case. From the beginning, Walmart denied that Jones ever stepped on a nail in its store.

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[6] Any possible contention that counsel's closing argument in this respect was improper, which is not the case, is not preserved for review. *See Wright v. Hiester Const. Co., Inc.*, 389 S.C. 504, 524, 698 S.E.2d 822, 833 (Ct. App. 2010) (arguing to the jury about a negative inference despite the lack of such a charge was not preserved for review). *See also State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 583 (2019) ("It is axiomatic that some matters appropriate for jury argument are not proper for charging. Do jurors need the court's permission to infer something? The answer is, of course not." (quoting *State v. Belcher*, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009) (overruled by *Burdette*))).

[7] For this reason, Walmart is simply wrong that the evidence was undisputed that Walmart performed its supposed safety sweeps. *See* App. B. at 25-26. However, even accepting *arguendo* Walmart's view of the evidence, which of course is the exact opposite of the standard of review for this issue, "[t]he fact that testimony is not contradicted directly does not render it undisputed . . . There remains the question of the inherent probability of the testimony and the credibility of the witness or the interest of the witness in the result of the litigation." *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991). In other words, "the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no." Thus, there is nothing "nonsensical" about Respondent's argument. *See* App. B. at 26.

This denial continued in Walmart's Answer and in its Responses to Plaintiff's Requests to Admit. (R. p. 45-46, 52, 1455, 2817, lines 1-20, 2841, lines 12-25). At trial, Walmart's video of the incident—clearly depicting the moment when Jones stepped on the nail—was shown to the jury. (R. p. 3042, lines 5-11). Nevertheless, Walmart continued, in the words of Jones' counsel "to deny the undeniable." Further, in its memorandum in support of its post-trial motions, weeks after the trial and the jury verdict, Walmart made this astonishing assertion: "It is pure conjecture to assume whether she even stepped on the nail inside the Walmart store." (R. p. 1526). This apparent strategy of denial by Walmart was readily apparent to the jury, and the credibility of the parties was clearly an issue in this case.

Our jurisprudence unequivocally supports the trial court's decision to submit this case to the jury. While Appellant cites numerous cases in its brief which allegedly strengthen its position that this case should have been decided as a matter of law, some are inapposite because they do not involve an injury which occurred as a result of a foreign substance on the floor and others have completely distinguishing facts. For example, in both *Young v. Meeting Street Piggly-Wiggly*, 288 S.C. 508, 343 S.E.2d 636 (Ct. App. 1986) and *Howard v. K-Mart Discount Stores*, 293 S.C. 134, 359 S.E.2d 81 (Ct. App. 1987), customers slipped and were injured on a rainy day after stepping inside a store. The allegations in *Howard* included that K-Mart was negligent in failing to put floor mats down, in failing to keep the floor from becoming extremely slick, and in over-waxing the floor so that it was slick. As the court of appeals noted, "The evidence necessary to show a merchant's negligence for slippery wax or finish on a floor differs from the showing necessary where the presence of foreign substances is alleged." 293 S.C. at 137, 359 S.E.2d at 82. Similarly in *Young*, the customer fell after taking a few steps inside the store on a rainy day while the store's

employees were almost continually mopping the floor near the entrance. 288 S.C. at 509, 343 S.E.2d at 637. In *Wintersteen*, this Court noted the plaintiff had "failed to present any evidence that Food Lion had actual or constructive notice of the presence of the liquid in which she fell." 336 S.C. 132, 138, 518 S.E.2d 828, 831 (Ct. App. 1999).

Walmart also relies on a case more than fifty years old from our Supreme Court, *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 116, 165 S.E.2d 627 (1969). There, a customer slipped and fell on some rice on the floor in one of the aisles of the defendant's store. In the ensuing trial, the only issue was whether the plaintiff submitted any evidence that the defendant store had constructive notice of the rice. The Supreme Court reversed the submission of the case to the jury, holding there was no evidence which would reasonably prove how long the rice had been on the floor. *Id.* at 252 S.C. 121, 165 S.E.2d at 629. However, this 3-2 decision included a strong dissent that concluded there was sufficient circumstantial evidence to support a reasonable inference of constructive notice.[8]

Juxtaposed against these decisions is the recent precedent from this Court and the Supreme Court in *Garrison v. Target Corporation*, 435 S.C. 566, 869 S.E.2d 797 (2022). Respondent Jones contends *Garrison* is much more relevant to the case at hand than the dated jurisprudence cited by Appellant. Inexplicably, albeit predictably, Appellant mentions *Garrison* only once in its brief, relegating it to a footnote.

Garrison was injured in Target's parking lot when she instinctively swatted away a

[8] For example, the two dissenting justices aptly noted, "When liability of a defendant, if any, is predicated upon constructive notice, as is the case here, the instances are, indeed, rare in which a plaintiff can prove constructive notice by other than circumstantial evidence, regardless of how grossly negligent the storekeeper may have been." 252 S.C. at 123, 165 S.E.2d at 630 (Bussey, J., dissenting). While that principle certainly was true then, the use of technologically-advanced video cameras means it may actually be less relevant today—provided a store actually complies with repeated instructions to preserve its footage, which of course Walmart failed to do here.

discarded syringe, picked up by her eight-year-old daughter, thereby pricking her hand. Garrison brought suit against Target, asserting it had constructive notice of the syringe in its parking lot. A jury ultimately returned a verdict for $100,000 in compensatory damages and $4.5 million in punitive damages.[9] On appeal, this Court, relying on testimony regarding the "old, dirty, and nasty" as well as "weathered" appearance of the syringe, held there was sufficient evidence of constructive notice to permit the jury to resolve the question of Target's liability. *Garrison v. Target Corp.*, 429 S.C. 324, 341, 838 S.E.2d 18, 27-28 (Ct. App. 2020). The Supreme Court granted certiorari, and affirmed, agreeing with this Court that there was sufficient evidence to support the trial court's decision to submit the matter to the jury. 435 S.C. at 578, 869 S.E.2d at 804. Two key takeaways from the Supreme Court's decision are significant here. First, the Supreme Court held that the damaged and weathered appearance of the syringe[10] was probative of the length of time it had been in the parking lot. Second, the Court focused on the asserted cleaning procedures which Target employees testified were in place, including a third-party cleaning company which Target hired to allegedly sweep the parking lot weekly. However, despite this testimony, there was no "invoice or other documentation presented which confirmed such a company actually performs this service." *Id.* at 579, 869 S.C. at 804. Accordingly, the Supreme Court determined the jury reasonably could have found that the syringe had been in the parking lot for a sufficient period of time for Target to discover and remove it.[11]

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[9] Jones elected not to pursue an appeal on the issue of punitive damages, but *Garrison* is strong support for the error in the trial court's decision not to send that question to the jury.

[10] The syringe had been lost by Target so the trial court gave a spoliation of evidence charge to the jury. *Id.* at 435 S.C. 579, 869 at 804.

[11] Jones not only disagrees with Walmart's dismissive approach to *Garrison* but also with its characterization that Target had no policy for regular cleaning or maintenance of its parking lot. App. B. at 29. In some respects, Target actually introduced *more* evidence to support its asserted cleaning procedures than did Walmart here, as its property maintenance technician testified regarding his "walk the vibe" inspections of the premises and submitted a two-page

In its brief mention of *Garrison,* Appellant maintains the Court's discussion of the absence of evidence which could have established the cleaning procedures allegedly in place in the Target parking lot was not outcome-determinative. Respondent does not suggest that it was; however, it was most definitely *some evidence* which the Court relied on in reaching its decision to affirm the jury's verdict. Unlike the *Garrison* case, which was premised solely on constructive notice since there was no suggestion that Target was responsible for placing the syringe in the parking lot, Jones, though constrained by the trial court's ruling to prohibit expert testimony on the source of the nail, as well as its refusal to give a spoliation of evidence instruction, presented circumstantial evidence that the nail came from one of Walmart's wooden display pallets. Additionally, just as in *Garrison,* Jones, through testimony of Walmart employees and through the missing video footage, adduced sufficient circumstantial evidence that Walmart had constructive notice of the nail in question. The missing footage and the acknowledgement by Walmart employees of what that footage would have shown had it not been destroyed, raised a serious issue of credibility that only the jury could resolve. As reiterated in *Garrison*, motions for judgment as a matter of law should be denied "when either the evidence yields more than one inference or its inference is in doubt." 435 S.C. at 577, 869 S.E.2d at 803.

The trial court properly denied Walmart's motions for judgment as a matter of law and correctly submitted the issue of liability to the jury. There was evidence beyond speculation that the nail came from one of the wooden pallets used by Walmart for display. Walmart employees acknowledged that the pallets were at times broken before being brought into the store and were sometimes observed in disrepair while on the floor, resulting in "wood everywhere." Just as the

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log demonstrating several dates on which he had done so. 435 S.C. at 573, 869 S.E.2d at 801. Here, Walmart produced no logs supporting its alleged safety sweeps.

syringe in *Garrison*, the appearance of the nail here was important. The nail was old and rusty, and there were no similar nails anywhere in the store, neither on the roof nor on the conveyor belt; Walmart sold only new nails in packages, not single nails. If the video footage that concededly existed and was admittedly reviewed by Walmart's claims department had been preserved and produced, it could have shown how the nail got on the floor. Therefore, there was competent evidence that Walmart was responsible for placing the nail on the floor.

Additionally, as in *Garrison*, there was ample circumstantial evidence that Walmart had constructive notice of the presence of the nail on the floor. In addition to its rusty appearance, if indeed Walmart employees had conducted the thorough safety sweeps they were so proud of, or if the footage from the sophisticated video cameras they touted had been preserved and produced, the length of time the nail was on the floor could have been definitively established. In view of all the safety measures which were allegedly in place in Walmart Store 630 on the day in question, it cannot be enough for the employees to simply *claim* that the sweeps were accomplished without producing logs of those sweeps or video footage to support it. Respondent Jones submits the evidence and the inferences reasonably drawn therefrom during this lengthy trial exceeded the degree of evidence necessary for submission of a case to the jury. Indeed, had the trial court here not permitted the jury to resolve the question of liability, it would have been reversible error.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING WALMART'S MOTION FOR A NEW TRIAL ABSOLUTE AND *NISI REMITTITUR* BECAUSE IN NO WAY WAS THE TRIAL OR THE VERDICT "IRREVOCABLY TAINTED" BY ERRORS.

A. The trial court had abundant discretion to deny Walmart's request for a mistrial based on testimony that fell within the parameters of Rule 408, SCRE.

The trial court properly exercised its broad discretion in denying Walmart's request for a

mistrial during the third day of trial after the plaintiff unexpectedly testified as to a purported settlement offer made by a Walmart representative. The trial court sustained the objection, and the record fully shows that the trial court was receptive to counsel's arguments and weighed them carefully—the very essence of exercising discretion. Moreover, this argument is also unavailing because Walmart cannot show prejudice from the failure to declare a mistrial.

Although Appellant sets forth the relevant portions of the record in its argument concerning Rule 408, it conveniently omits material aspects of how this issue evolved, especially what remedy Walmart initially sought and what it agreed to. Following Walmart's objection, both parties as well as the trial court immediately understood the testimony was inadmissible. The court acknowledged that it placed defense counsel in a difficult position. (R. p. 3099, lines 15-16). The court explored the possibility of plaintiff's counsel stipulating to the fact that this settlement discussion did not occur, but counsel understandably, and correctly, declined to do so. Importantly, the court specifically asked defense counsel, "What do you want me to do about it, Ms. Boyd?" (R. p. 3101, line 20). Counsel responded, "We'd like to offer a curative instruction, Your Honor. I understand that it would reiterate [sic], but, at this juncture, I mean, we don't see mistrial as being –." (R. p. 3101, lines 21-23). Counsel then requested an opportunity to discuss the matter with co-counsel, which the court granted. (R. p. 3101, line 25 – 3102, line 6, 3103, lines 7-8). Before breaking however, the trial court indicted that if it were to give a curative charge, it would ask for suggested language. (R. p. 3102, lines 8-10).

After a lunch recess, Walmart changed its position from requesting a curative instruction to moving for a mistrial. (R. p. 3104, lines 1-11). The trial court denied Walmart's motion, and instead, issued a curative instruction. (R. p. 3104, lines 12-16). Jones' counsel subsequently

informed the trial court that he agreed with Walmart's request, but the court stood by its ruling. (R. p. 3104, lines 21-25). The trial court then informed the parties that it would give the following instruction:

> You heard testimony about settlement negotiations. If there were such conversations, it is inadmissible and improper to testify as to such. You are to disregard that testimony. It is stricken from the record. It shall not be discussed in the jury room. Mr. Foreman, you are to enforce this order. There is to be no discussion whatsoever about this matter.

R. p. 3105, lines 1-7). The trial court welcomed input from the parties, and Walmart responded, "*We're fine with the charge as indicated by the Court.*" (R. p. 3105, lines 22-23) (emphasis added). Before giving this instruction to the jury, Jones' counsel requested a mistrial, which the court denied. (R. p. 3106, lines 9-17).[12] The trial court ultimately gave a nearly identical version of this instruction, except for only a couple minor differences in word choice. (R. p. 3106, line 25 – 3107, line 6).

As a threshold matter, this issue is not preserved for this Court's review because, as set forth above, Walmart expressly agreed with the trial court's curative instruction. The general rule is that "[i]f a trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996). Further, "No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an *additional* objection to the sufficiency of the curative charge or move for a mistrial." *Id.* at 510, 476 S.E.2d at 912 (emphasis added). While Walmart initially sought a curative instruction rather than a mistrial, counsel changed its position and moved for a mistrial but subsequently accepted the trial court's

[12] Obviously, Jones' counsel feared their client would be prejudiced by the offer of a mere $50,000 for the catastrophic injuries sustained by Jones.

proposed curative instruction. (R. p. 3105, lines 22-23). *Walmart never renewed its mistrial motion immediately following the trial court's curative instruction. See State v. McEachern*, 399 S.C. 125, 146-47, 731 S.E.2d 604, 614-15 (Ct. App. 2012) (finding an issue unpreserved where defense counsel requested a curative instruction, alternatively asked for a mistrial if an instruction was not given, and did not object to the contents of the curative instruction or renew his mistrial motion).[13]

Even if this Court reaches the merits, Walmart's argument still fails, as the record makes it abundantly clear the trial court carefully weighed its options in issuing a curative instruction rather than declaring a mistrial. The granting of a mistrial is an extraordinary remedy, the responsibility for which rests with the trial judge. Accordingly, "the decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *Id.* at 145-46, 731 S.E.2d at 614. Because granting a mistrial is such a drastic remedy, it should only be granted "when absolutely necessary." *Id.* at 146, 731 S.E.2d at 614; *see also State v. Taylor*, 427 S.C.208, 212, 829 S.E.2d 723, 726 (Ct. App. 2019) ("A trial court should declare a mistrial as a last resort, when all other alternatives have been exhausted. A mistrial is a drastic step, 'an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way.'" (quoting *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009))).

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[13] Although the court of appeals in *McEachern* noted that the mistrial request was conditioned on whether the trial court gave a curative instruction, it also acknowledged that defense counsel specifically stated, "And you have overruled my motion for a mistrial." 399 S.C. at 144, 731 S.E.2d at 613. The trial court responded, "At this point." *Id.* The trial court subsequently issued the curative instruction, to which there was no objection and defense counsel did not renew his request for a mistrial. *Id.* As a result, the court of appeals held, "Because [defense counsel] failed to object to the curative instruction, and additionally *failed to move for a mistrial after the trial court gave its curative instruction*, we find the mistrial issue is not preserved for review." *Id.* at 146-47, 731 S.E.2d at 615 (emphasis added).

Walmart implies that because both parties eventually sought the same relief, it was incumbent on the trial court to acquiesce and declare a mistrial. This is not so, not only because of the reluctance of our courts to declare a mistrial except under the most compelling circumstances, but also because the trial court is not bound by the parties' arguments. *See Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 40-41, 331 S.E.2d 783, 784 (Ct. App. 1985) ("In acting on a motion for a new trial, a trial judge is not bound by the position taken by parties. *Cf. Sherer v. James*, Opinion No. 0587 (S.C.Ct.App. filed April 15, 1985) ('The question of whether a party's motion for a mistrial should be granted . . . does not depend upon the opposing party's stance concerning the motion.')"). While *Porter Bros* addressed the trial court's denial of motions for a new trial filed by both parties, it relied on a case concerning motions for a mistrial, and therefore, demonstrates Walmart's repeated reliance upon plaintiff's counsel's acquiescence is unavailing. It was the trial court's responsibility to determine whether a mistrial was warranted, and neither it nor this Court are bound by the attorneys' opinions on the matter.

Moreover, Walmart cannot satisfy the high threshold for proving prejudice. Walmart would have this Court believe that the brief mention of a settlement offer by Jones—merely two lines in a multi-day trial with numerous witnesses—requires reversal, but Walmart utterly fails to demonstrate that it had any effect at all, let alone that it formed the basis of the jury's decision. The trial court ordered the jury to disregard the testimony and struck it from the record, stating unequivocally that the alleged offer of settlement should not be discussed in the jury room. (R. p. 3106, line 25 – 3107, line 6). Not only was the court's instruction sufficient to cure the error, the

law presumes that the jury followed that instruction.[14] *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("An instruction to disregard incompetent evidence is usually deemed to have cured the error ... Moreover, jurors are presumed to follow the law as instructed to them."). Not only does this presumption severely undermine Walmart's argument, the trial court here went even further to ensure that the jury would adhere to its curative instruction by specifically admonishing the foreman as follows: "Mr. Foreman, you are to enforce this order. There is to be no discussion whatsoever about this matter." (R. p. 3107, lines 5-6). This additional language, together with the fact that there was no other mention of this matter in the record, provides additional proof that the jury in fact obeyed the court's instruction. Accordingly, the trial court did not abuse its discretion in denying Walmart's motion for a mistrial and thus, reversal is not warranted.

B. The trial court did not err in denying Walmart's motion for a new trial based on a brief display of photographs during Plaintiff's opening statement.

The trial court did not err in declining to give a curative instruction during opening statements, and even if one should have been given, Walmart cannot demonstrate the failure to do so was prejudicial. Respondent's counsel sought to display photographs during his opening statement that had not been excluded during the pretrial hearing. (R. p. 2606, line 22 – 2607, line 6). Walmart objected and the trial court sustained the objection. (R. p. 2608, line 15 – 2612, line 2). Because the trial court ultimately sustained Walmart's objection, it now has the burden to show that the failure to give a curative instruction was prejudicial error.

[14] Walmart relies on a case involving a request for specific performance before a master-in-equity, but that case is vastly different. *See Fesmire v. Digh*, 385 S.C. 296, 309, 683 S.E.2d 803 (Ct. App. 2009). Because there was no jury, there was no curative instruction or presumption that the jury follow the instructions given. Further, there is no mention of a mistrial either in the court's opinion.

Walmart mischaracterizes the record in contending the trial court excluded the photographs shown during Jones' opening statement. During the hearing on Walmart's motion *in limine*, the trial court only excluded the photos that it concluded demonstrated destructive testing; the court concluded the remaining were admissible. (R. p. 2606, line 22 – 2607, line 6). The trial court's ruling was in response to Walmart's contention that all of the 2019 photographs were admissible. (R. p. 2605, line 17 – 2606, line 11). Accordingly, for Walmart to contend that the photographs displayed to the jury were previously excluded is disingenuous. Even though the trial court cautioned that its ruling was preliminary as to the remaining, admissible photographs, this was sufficient for Jones to rely on those during the opening statement.

Regardless, Walmart received what it wanted, as the trial court sustained the objection. Walmart completely fails to show that the display of these photographs served as the basis for the jury's verdict. Not only did the trial court instruct the jury that the evidence must come from the witness stand and through corresponding evidence, (R. p. 3457, lines 12-15), the overall length of the trial, including the eleven witnesses that testified during Respondent's case-in-chief, militates strongly against the suggestion that Walmart suffered any prejudice from the brief display of these photos. *State v. Reyes*, 432 S.C. 394, 409, 853 S.E.2d 334, 342 (2020) ("Jurors are presumed to follow the law as instructed to them."). Evidentiary matters are addressed to the sound discretion of the trial court. *Busillo v. City of North Charleston*, 404 S.C. 604, 610, 745 S.E.2d 142, 146 (Ct. App. 2013) ("The admission of evidence is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent an abuse of that discretion.). Here, the trial court sustained Walmart's objection to the use of the photos during Jones' counsel's opening statement, thereby providing Walmart the relief it requested, and Walmart fails to demonstrate any prejudice

in the brief display. *State v. White*, 371 S.C.439, 446, 639 S.E.2d 160, 164 (Ct. App. 2006) ("[E]ven without a curative instruction, an error not shown to be prejudicial to the appellant does not constitute grounds for reversal.").

Moreover, Walmart employees testified the wooden pallets are sometimes damaged in transit to the store. (R. p. 2963, line 23 – 2964, line 16). Store Manager Ringer testified that although vendor display pallets are inspected for stability and/or appearance, they are not inspected for nails. (R. 2889, lines 15-17). Kevin Lane testified that occasionally, when the pallets are received off the truck, they are broken. (R. p. 3247, lines 6-15). He also stated that he had witnessed pallets on the floor that were not intact, and when that happens, there is "wood everywhere." *Id.* Accordingly, Walmart cannot show how the isolated display of photographs during Jones' opening statement tainted the jury's verdict when multiple witnesses testified about the damaged nature of the wooden pallets. In sum, Walmart received the relief it requested by having its objection sustained, and it cannot show prejudice from the trial court's discretionary decision not to give a curative instruction.

C. The trial court properly denied Walmart's motion for a new trial under the thirteenth juror doctrine.

In arguing that it was entitled to a new trial based on the thirteenth juror doctrine, Walmart rehashes its argument concerning the lack of evidence to support the jury's verdict. In so doing, Walmart relies on cases where our appellate courts have affirmed the trial court's decision to grant a new trial pursuant to the thirteenth juror doctrine but fails to identify how they relate to the specific factual scenario here. Indeed, Walmart never presents a case with analogous procedural facts; that is, it fails to cite a *single* case where an appellate court determined a trial court erred in

denying a motion for a new trial based on this doctrine.[15] However, given the broad discretion accorded to trial courts in deciding whether to invoke the thirteenth juror doctrine, this is not surprising. *Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("The trial court's discretion to grant or deny a new trial as the thirteenth juror is very broad."). This wide discretion is accurately summed up with the following principle: "[a]n order denying a new trial on this theory will hardly ever be reversed." *Id.*

Respondent refers the Court to its discussion on the sufficiency of the evidence to demonstrate that more than enough evidence was presented to show that Walmart was negligent, and thus, the trial court committed no error in declining to rely on the thirteenth juror doctrine to invade the province of the jury. Walmart's second argument is equally meritless, as there is no evidence that the damages award was motivated by emotion and prejudice towards Walmart. Rather, Walmart makes light of the fact that Respondent endured multiple surgeries culminating in an amputation above her knee—a catastrophic injury which prevents her from ever walking normally again—thereby severely and permanently impacting the quality and enjoyment of her life. April Jones' permanent impairment is immediately obvious to everyone, yet Walmart advances the rather stunning argument that it was error to permit her children to testify as to the debilitating effects of her injuries, notwithstanding the fact that it is commonplace for spouses, children, and other family members to describe the effects of a loved one's injury at trial.

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[15] Accordingly, it is clear the cases Walmart relies on turn on the standard of review. *See Trivelas v. S.C. Dept. of Transp.*, 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004); *S.C. Dept. of Highways and Pub. Transp. v. Mooneyham*, 275 S.C. 205, 269 S.E.2d 329 (1980); *Ex parte Travelers Home and Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 830 S.E.2d 718 (Ct. App. 2019); *Sorin Equip. Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996). In each case, the trial court *granted* a new trial, unlike here, which was affirmed on appeal based on the standard of review. Nothing in these cases suggest that the appellate courts determined that a new trial was mandatory as a matter of law; thus, they shed no light on whether the trial court abused its broad authority when declining to invoke the thirteenth juror doctrine.

Moreover, even assuming there was a meritorious objection to be made to this testimony, Walmart never made it, thus rendering this issue unpreserved. Not only was Walmart's purported Rule 403, SCRE objection not properly raised, defense counsel specifically declined to assert it on the record, stating, "We briefly discussed our Rule 403 motion. I think we'll just let that – let that lie and *not* make that on the record." (R. p. 3021, lines 2-4) (emphasis added). *See York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review."). Thus, even assuming *arguendo* that Walmart could have validly objected to this line of testimony—something Jones strenuously denies—it did not do so contemporaneously and specifically waived its prior objection.

Further, Walmart's insistence that the trial court should have ordered a new trial based on the size of the verdict ignores longstanding precedent that a "trial court and [an appellate court] must give 'substantial deference' to the jury's determination of damages." *Kelley v. Wren*, 415 S.C. 379, 393, 782 S.E.2d 406, 413 (Ct. App. 2016) (quoting *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008)). Additionally, Walmart belatedly challenges the sufficiency of the evidence supporting the size of the verdict, but that challenge is equally unavailing because the jury returned a general verdict; therefore, it is impossible to delineate the specific categories of damages. *See Steele v. Dillard*, 327 S.C.340, 343, 486 S.E.2d 278, 279 (Ct. App. 1997) ("[A]ppellate review cannot be readily had here because we cannot discern the precise basis of the jury's determination."). Jones' injuries were devastating and readily apparent for everyone to see, and her medical expenses exceeded half a million dollars. The trial court properly refused to order a new trial based on the size of the verdict.

D. The trial court correctly denied Walmart's motion for a new trial *Nisi Remittitur* because the verdict was based on the evidence and not excessive.

It is well-established that "compelling reasons must be given to justify invading the jury's province" when deciding whether to grant a new trial *nisi remittitur*. *Howard v. Roberson*, 376 S.C. 143, 155, 654 S.E.2d 877, 883 (Ct. App. 2007). Further, the decision to grant or deny a "new trial *nisi remittitur* is left to the sound discretion of the trial judge." *Proctor v. Dep't. of Health and Env't Control*, 368 S.C. 279, 322, 628 S.E.2d 496, 519 (Ct. App. 2006). Affording a trial court this discretion is consistent with the fact that the trial court, not an appellate court, is "more familiar than we with the evidentiary atmosphere at trial . . .." *Becker v. Wal-Mart Stores, Inc.*, 399 S.C. 629, 639, 529 S.E.2d 758, 763 (Ct. App. 2000) (quoting *Daniel v. Sharpe Construction Co.*, 270 S.C. 687, 690-91, 244 S.E.2d 312, 314 (1978)). Deference is especially necessary where the damages award encompasses intangible and nonpecuniary components. *Id.* ("The fact [the trial judge] heard the evidence and was more familiar than we with the evidentiary atmosphere at trial gives him, we think, a better informed view than we have. This is particularly true when the elements of damage are intangibles and the appraisal depends somewhat on an observation of the beneficiaries and evaluation of their testimony."). Additionally, an appellate court shall not disturb the amount of the verdict because "[t]he credibility of witnesses is for the triers of the facts . . . A reviewing court will not interfere with the amount of the verdict unless [it] is either so grossly excessive or inadequate that it must be deemed the result of the jury's disregard of the facts and the court's instructions." *Craven v. Cunningham*, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987).

Walmart relies on *Becker* in an attempt to show the trial court abused its discretion in failing to find the verdict excessive, however, that case actually supports Respondent's position. In *Becker*, the Court of Appeals upheld a grant of *nisi remittitur* in which the verdict was reduced

to 17.19 times the amount of the admitted medical bills.[16] The plaintiff, Barbara Becker, was injured while shopping at Walmart when an item fell off a shelf and landed on her foot. Although she suffered a permanent injury to her foot, the chronic pain was analogized to having a fracture that would not heal. Unlike April Jones, Becker still had the use of her foot. Walmart's suggestion that the damages award somehow should not account for her amputation because that was allegedly caused by poor healing utterly ignores the fact that the jury clearly found the root cause of her injury to be from stepping on the nail, which is supported by the expert testimony. (R. p. 2750, line 18 – 2751, line 16). Walmart's efforts to blame Jones' injuries on her pre-existing condition was obviously rejected by the jury and should likewise be rejected by this Court.

Moreover, the appellate courts of this state have upheld verdicts in excess of the ratio in *Becker*. For example, in *Curtis v. Blake*, the court of appeals upheld the trial court's decision not to alter a $450,000 jury verdict that represented "almost one hundred times the cost of [the plaintiff's] medical treatment and his lost wages." 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011). In *Hassell v. City of Columbia*, the court of appeals determined the trial court did not abuse its discretion in denying the defendant's motion for a new trial absolute or *nisi remittitur* when the jury's verdict was within the range suggested to the jury. 430 S.C. 620, 636, 846 S.E.2d 373, 382 (Ct. App. 2020).[17]

Walmart also raises another unpreserved issue concerning Respondent's closing argument wherein counsel allegedly invited the jury to "punish" Walmart. The record clearly shows that at

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[16] In *Becker*, the verdict was reduced to $525,000.00 on $30,538.44 in medical bills. That is a multiplier of 17.19 on far less serious injuries. Applying the same 17.19 multiplier that Walmart advocates to this Plaintiff's medical bills of $534.935.70 yields a verdict of $9,195,544.68. In its memorandum in opposition to Walmart's post-trial motions, Jones offered to accept this multiple argued by Walmart, but Walmart refused the offer. (R. p. 1694).

[17] Here, Respondent's counsel suggested a verdict of nearly $16.7 million. (R. p. 3425, line 12). Walmart did not object to this figure.

no time did Walmart ever object to any of Respondent's closing argument, and therefore, the issue is not preserved for review. *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) ("CSX complains the jury was erroneously allowed to focus on its net worth, citing to Plaintiff's closing argument. Since there was no contemporaneous objection, this issue is not preserved for appellate review."). This Court should not permit Walmart to bootstrap its arguments concerning the trial court's failure to grant a new trial or reduce the jury's verdict by relying on unpreserved arguments.[18] *Hassell*, 430 S.C. at 637, 846 S.E.2d at 382 (finding whether counsel inappropriately argued to the jury during closing argument that the City "needed to 'pay attention'" was not preserved for review since there was no objection). Moreover, Walmart is simply wrong in its characterization of Jones' counsel's closing argument. Despite Walmart's claim, Jones' counsel never used the word "punish" in closing argument, likely because the trial court had struck Jones' request for punitive damages. Walmart's mischaracterization of the record should not be countenanced by this Court.

Finally, Respondent presented abundant evidence of the life-changing effects of Jones' catastrophic injuries. For example, her children testified that it was a struggle for each of them to help their mom with simple tasks that she previously could do herself, including entering and moving around the house, bathing, washing clothes, raking the leaves, and cooking dinner. (R. p. 2972, lines 10-11, 2973, lines 2-11, 2987, line 24 – 2988, line 3, 2996, line 22 – 2998, line 24). The eldest child, Christian Jones, awoke one night to his mother's calling for him. (R. p. 2980,

[18] Walmart should also not be heard to claim that a few isolated statements by Jones' counsel to send a message to Walmart headquarters were improper as a request that the jury "punish" Walmart. Similar to closing arguments utilized by every plaintiff's attorney in a lawsuit against a giant corporation, Jones' trial counsel simply stated to the jury that: "[W]hen you render a verdict in this case, make them hear it in Arkansas." (R. p. 3455, lines 22-23). There is nothing improper about this argument, and moreover, there was no objection to it.

lines 2-15). Thinking she just needed water, Christian walked into her room to discover that she had fallen partially out of the bed. *Id.* Without his help, she would have fallen completely and hit the floor. *Id.* Pitiably, Jones' daughter, Chelsea Riley, had to take her mother to a local truck stop in Lexington County every other day to shower when her mother stayed with her because Jones could not access the shower on the second floor of Riley's house. (R. p. 2995, line 24 – 2998, line 25, 3002, line 8 – 3003, line 24). Jones, who once actively participated in her church's praise dance team and choir, no longer can do so due to her injuries. (R. p. 3009, lines 4-19).

Additionally, Jones testified that she suffers excruciating "phantom pain," which is pain where her right leg, ankle, and foot used to be, so much so that she sometimes reaches to grab her ankle that is no longer there. (R. p. 3116, line 18 – 3117, line 8). The pain medication does not help, and she does not want to become dependent or even worse, addicted to it. (R. p. 3117, lines 7-16). Jones testified that she feels as if she is a burden to her family since she requires constant care. (R. p. 3129, lines 10-25). Jones recounted how when her granddaughter was three years old, the child would help her finish getting dressed. *Id.* Having to rely on a three-year old to do simple tasks is something she never experienced prior to her devastating injuries. These injuries resulted in $534,935.70 in medical bills from multiple hospitals and other health care centers. (R. p. 3120, line 19 – 3128, line 14). At one point, Jones testified, "God, just let me die." (R. p. 3132, line 25). To be sure, this is emotional testimony, but it is emotional because it is now sadly the reality of Jones' life. It was never objected to on the record, and it provides ample basis to support the jury's verdict.

CONCLUSION

This case presented a quintessential jury question regarding how the rusty nail in question

came to be on the floor of Walmart's Florence store and whether Walmart had constructive notice that it was there. The issues of Walmart's negligence—its duty to provide a safe environment for its customers, the breach of that duty, proximate cause, and April Jones' ensuing damages—were all questions for the jury to resolve. Moreover, the credibility of April Jones and of Walmart were issues before the jury. From the beginning, Walmart has denied April Jones even stepped on a nail in its Florence store. This continued even until Walmart's post-trial motions, despite the existence of a video clearly depicting the moment this tragic event occurred. The jury was well aware of Walmart's position on this threshold issue as well as its assertion concerning the cleanliness of the store and the power of its video cameras. The jury was also fully apprised of Walmart's failure to turn over any video footage of the store area in the hours prior to Jones' accident, despite three separate written letters requesting that it do so. Even without a spoliation of evidence instruction, the absence of this video footage was an issue for the jury. The trial court properly submitted these matters to the jury for its consideration.

Additionally, the trial court exercised its discretion on all trial motions and evidentiary issues presented to it, and Walmart has utterly failed to show how any of those rulings prejudiced it. Accordingly, Respondent Jones requests this Court affirm the decision of the jury.

Respectfully submitted,

September 9, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas, Twelfth Judicial Circuit
Hon. Michael G. Nettles, Circuit Court Judge

Appellate Case No.: 2022-000303
Civil Action No. 2017-CP-21-01375

April Jones, ...Respondent,

v.

Tim Ringer, individually and as employee/agent of
Wal-Mart Stores, Inc. d/b/a Wal-Mart Store #630;
Wal-Mart Stores, Inc.; and Wal-Mart Stores East, L.P.....Defendants,

of which

Wal-Mart Stores, Inc.; and Wal-Mart Stores East, L.P. are ..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

November 22, 2022

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