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SC Court of Appeals

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 APPELLANTS WAL-MART STORES, INC. AND WAL-MART STORES EAST, L.P.

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INTRODUCTION

This appeal arises from a familiar fact pattern; it is governed by well-established law; and it is controlled by strikingly similar precedent. April Jones was walking in the Walmart in Florence, South Carolina, when she noticed an unusual noise under her sandal. She investigated and saw a tiny piece of metal on the bottom of her right sandal. She had seen no metal or debris on the floor, had no recollection of stepping on anything in the store, had no pain in her foot, and did not know where the metal came from, what it was, how it got lodged in her sandal, or how long it had been there. She did not immediately remove the metal from her sandal, but continued walking and talking with customers for around 90 seconds before bending down again and removing what turned out to be a 7/8-inch roofing nail from her sandal. Ms. Jones, who was already beset by several preexisting health conditions including sores and ulcers on her right foot, later developed an infection in her foot that, after a series of unsuccessful medical procedures, ultimately led to the amputation of her leg.

Ms. Jones' injuries and amputation are tragic, but there is no evidence that they resulted from any negligence by Walmart. Ms. Jones presented no evidence that Walmart created the alleged hazard, had actual or constructive knowledge of the alleged hazard, or failed to take ordinary care to keep the store in a reasonably safe condition. Rather, she rests her case on unsupported (and implausible) speculation that perhaps the roofing nail *could* have come from a wooden pallet (even though such nails are not used to make pallets) that *might* have previously been in that section of the store and which hypothetically *may* have been overlooked during the regular, recurring cleaning and safety procedures that Walmart had undertaken that morning.

South Carolina law is clear. It is Ms. Jones' burden to present *evidence*, not mere speculation or *res ipsa loquitur*, from which a jury could find Walmart liable. She did not do so.

Indeed, the undisputed evidence showed quite the contrary. Each morning—including the morning at issue—Walmart associates visually inspect and physically sweep and clean the floors before 8:00 a.m. to conclude their overnight stocking activities. Each morning—including the morning at issue—a manager conducts a personal walk-through to inspect the entire store and verify it is in safe condition. Each morning and throughout the day—including the morning and the day at issue—Walmart's employees visually inspect pallets brought into the store to see if they are in appropriate condition. And all day, every day—including the day at issue—Walmart associates performed safety sweeps (visual inspections) of their designated areas every 1.5 to 2 hours. Ms. Jones presented no evidence disputing these inspection practices or showing that they were not conducted that day.

Ms. Jones presented no evidence from which a jury could find mandatory elements of her claim, including (1) that Walmart either created the alleged hazard or had actual or constructive knowledge of it, and (2) that Walmart failed to take reasonable and ordinary care to keep the store in reasonably safe condition. Either one of these failures of proof is a basis on which Walmart was entitled to judgment as a matter of law. The trial court, therefore, reversibly and prejudicially erred by denying Walmart's motions for directed verdict, JNOV, and reconsideration. The trial court further erred by denying Walmart's motion for new trial absolute or *nisi remittitur* given several prejudicial errors throughout the trial. This Court should reverse.

STATEMENT OF THE 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 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?

STATEMENT OF THE CASE

I. Pleadings, initial proceedings, and dispositive motions.

April Jones filed the Summons and Complaint initiating this proceeding on May 22, 2017, in the Florence County Court of Common Pleas. *See* Compl. (R. 29). The Complaint named Tim Ringer individually and as employee/agent of Wal-Mart Stores, as well as Wal-Mart Stores, Inc. *See id*. Ms. Jones alleged that Walmart's negligence allowed Plaintiff to step on a nail while perusing the aisles of her local Walmart, which allegedly caused her an injury that, after a series of unsuccessful medical procedures, caused the amputation of her leg. *See id*. ¶¶ 10–13 (R. 30–31). Based on these allegations, the Complaint claimed negligence. *See id*. ¶ 16 (R. 31).

Defendants removed the action to the United States District Court for the District of South Carolina, Florence Division. *See* Notice of Removal (R. 36). Plaintiff filed a Motion to Remand, and the District Court remanded the matter to the state trial court. *See* Remand Order (R. 1).

Ms. Jones filed an Amended Complaint on January 16, 2018, adding the sole proper corporate defendant: Wal-Mart Stores East, L.P. *See* Am. Compl. (R. 44). Defendants collectively answered the Amended Complaint. *See* Answer to Am. Compl. (R. 50).

On April 24, 2019, Defendants filed a Motion for Continuance and Entry of Scheduling Order, contending that (1) counsel for Defendants had other jury trials scheduled for the same term, (2) Plaintiff failed to produce her Social Security Administration records as mandated in a previous status conference, and (3) Walmart's 30(b)(6) deposition had yet to be scheduled. *See* Mot. for Continuance and Entry of Scheduling Order (R. 59). For these reasons, the Motion asked the trial court to continue the trial beyond the May 13, 2019 term of court. *Id*. The Court denied the Motion but ordered that be called for trial during the May 28, 2019 term of court. *See* Order (May 13, 2019) (R. 11).

On May 17, 2019, Defendants filed a Motion for Summary Judgment, arguing that no genuine issue of material fact existed as to whether Defendants had created the hazard or had actual or constructive notice of it. *See* Defs.' Mot. for Summ. J. (R. 65). Defendants also argued that no genuine issue of material fact existed as to Defendant Tim Ringer. *See id*.

On May 23, 2019, the parties had a telephone conference with the court, during which the Judge stated that if Walmart did not consent to a Rule 40(j) dismissal with leave to refile, the case would proceed to trial on May 28. Walmart did not consent, and Ms. Jones filed a Notice of Appeal about 30 minutes after the telephone call, appealing from the Order denying Walmart's Motion for a Continuance, and asserting, without explanation, that the Order "resulted in, among

other things, subsequent rulings disqualifying counsel." *See* Notice of Appeal (May 23, 2019) (R. 94). Briefing and resolution of Walmart's then-pending Motion for Summary Judgment was delayed during Plaintiff's interlocutory appeal.

II. Plaintiff's interlocutory appeal and subsequent dispositive motions.

Activity before the trial court ceased while the parties awaited an appellate court ruling on Walmart's Motion to Dismiss the Appeal. The Court of Appeals granted the Motion to Dismiss the Appeal, holding that the appealed order was not, in fact, immediately appealable. *See* Order (R. 16). The Court of Appeals subsequently denied Ms. Jones' Petition for Rehearing, and the Supreme Court denied her Petition for Certiorari and remitted the case on June 24, 2020. *See* Order (Nov. 14, 2019) (R. 17); Order (June 24, 2020) (R. 19).

Following the remand to the trial court, Ms. Jones filed a memorandum in opposition to Defendants' still-pending Motion for Summary Judgment. *See* Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J. (August 10, 2020) (R. 96). The court entered a Form 4 Order denying Defendants' Motion for Summary Judgment on August 24, 2020. *See* Order (R. 20).

Fourteen months later, following pandemic-related continuances and delays that were then common throughout the judicial system, Defendants again moved for Summary Judgment, arguing that there was no genuine issue of material fact as to Plaintiff's cause of action for negligence, and, alternatively, arguing that the court should grant summary judgment as to Plaintiff's claim for punitive damages. *See* Defs.' Mot. for Summ. J. (October 27, 2021) (R. 558). The court orally denied the motion. *See* Pre-Trial Hr'g Tr. at 100:11–12 (R. 2645).

III. Pre-trial motions.

The trial court heard pre-trial motions, including several motions *in limine* on various evidentiary issues. *See* Pre-Trial Hr'g Tr. (R. 2546). Defendants' first motion *in limine* sought

the exclusion of photographs of the store and of a staged, purportedly damaged pallet taken by Plaintiff almost four years after the incident during an unauthorized incursion into Walmart, where Plaintiff's counsel partially destroyed a wooden pallet and then photographed it to use as "evidence." *See* Defs.' Mot. in Lim. to Exclude Photographic Evid. and for Sanctions (R. 924). As evidence by store surveillance footage, Plaintiff's counsel, accompanied by two confederates, had entered Walmart without giving notice or seeking leave to conduct an inspection, obtained gloves and a hammer from within the store, located and intentionally damaged one or more wooden pallets, and then took photographs and videos of the "damaged" pallet in the store. *See id*. at 3 (R. 926). Plaintiff's counsel also took photographs and video of pallets located on the opposite side of the store from the location where Ms. Jones noticed the nail in her sandal, and took photographs of pallets located outside the store in the trash collection area. *See id*. at 5 (R. 928). Walmart objected to Plaintiff's attempt to use these photos—taken nearly four years *after* Ms. Jones' injury—as "evidence" in the case. The court excluded the photographs of the staged, partially destroyed pallet, but reserved its ruling on the other photographs of the store, including those taken in 2019 showing pallets in other areas of the store. *See* Pre-Trial Hr'g Tr. at 59:18 to 62:6 (R. 2604 to 2607).

During the November 5, 2021 hearing, the court allowed into evidence, over Defendants' objections, the 7/8-inch roofing nail that had allegedly caused Plaintiff's injury. *See* Pre-Trial Hr'g Tr. at 71:3–4 (R. 2616). The court noted that the parties agreed not to enter evidence that had not been produced or disclosed in discovery, and declined to allow photographs of alleged hazards from different stores unless needed for impeachment (and only then after a hearing on the issue). *Id*. at 71:9 to 72:9 (R. 2616 to 2617). The court excluded any evidence or testimony about magnetic sweepers as a precautionary measure; declined to rule on the hearsay statements by doctors; and

excluded lay opinion testimony about Plaintiff's medical injuries and causation. *Id*. at 73:9 to 76:3 (R. 2618 to 2621).

Defendants also argued at the hearing that the opinion of Plaintiff's expert, Bryan Durig, should be excluded. The court ruled that Durig could testify that the nail at issue was a roofing nail; that nails used in pallets range from 1.25 inches to 3 inches long; and that the longer the nail, the stronger the connection. *Id*. at 62:8–16 (R. 2607). The court prohibited him from opining that someone could, hypothetically, use a 7/8-inch roofing nail to construct or repair a wooden pallet. *Id*. at 62:17–24 (R. 2607). The court also prohibited him from offering the opinion that the most probable source of the nail was a wooden pallet. *Id*. at 63:8–18 (R. 2608).

IV. Trial.

Trial commenced on November 8, 2021, and continued until November 12, 2021. During opening statements, Plaintiff's counsel showed excluded photographs of damaged pallets taken during Plaintiff's 2019 improper inspection of Walmart's store in Florence, South Carolina. *See* Trial Tr. at 62:24 to 63:18 (R. 2709 to 2710). Defense counsel promptly objected, and the court sustained the objection, ruling that all the disputed photographs would be excluded. *Id*. at 63:21 to 67:2 (R. 2710 to 2714). The trial court did not offer a curative instruction, however, even though the jury had already viewed some of the photographs of damaged pallets with no context as to what they were and when they were taken. *Id*. at 67:3–15 (R. 2714).

On the third day of trial, during Plaintiff's direct examination, she unexpectedly, abruptly, and falsely testified that Walmart had offered to settle with her for $50,000 just three days after the incident and before any of Plaintiff's amputations or significant medical treatment. *Id*. at 449:22 to 450:3 (R. 3097 to 3098). Defendant moved for mistrial on the basis that this testimony was inadmissible under Rule 408 of the South Carolina Rules of Evidence; Plaintiff agreed and

also moved for a mistrial; but the trial court denied the motions and issued a curative instruction to the jury. *Id*. at 456:1 to 458:21 (R. 3104 to 3106). During the trial, the court permitted passionate and emotional testimony from one of Ms. Jones' children about her life as an amputee. *See*, *e.g*., Trial Tr. at 321:10 to 329:1 (R. 2968 to 2976). Even though at least one juror was openly crying during this testimony, the trial court allowed four more of Ms. Jones' children to testify cumulatively in the same manner. *See id.* at 336:13 to 345:5 (R. 2983 to 2992); *id*. at 346:11 to 358:13 (R. 2993 to 3005); *id*. at 361:6 to 365:7 (R. 3008 to 3012); *id*. at 367:11 to 373:6 (R. 3014 to 3020); *see also id*. at 374:2–11(R. 3021) (preserving on the record Walmart's objection pursuant to Rule 403, SCRE, to this cumulative and unduly prejudicial evidence).

At the close of Plaintiff's case, Defendants moved for a directed verdict on liability. *Id*. at 552:25 to 554:13 (R. 3200 to 3202). The court denied the motion without explanation. *Id*. at 563:21–23 (R. 3211). At the close of all evidence, Defendants renewed their Motion for Directed Verdict on liability and also moved for a directed verdict on punitive damages, arguing that Plaintiff had presented no evidence of willful or wanton behavior on behalf of Walmart or Mr. Ringer. *Id*. at 565:14–17 (R. 3213). The court denied the directed verdict as to liability, but granted the directed verdict as to punitive damages, holding there was no evidence of conscious wrongdoing. *Id*. at 572:19–25 (R. 3220).

During closing arguments, and despite the trial court finding as a matter of law that punitive damages were not appropriate, Plaintiff's counsel asked the jury to penalize Walmart and to "make them hear it in Arkansas." *See id*. at 572:1–25 (R. 3220); *id*. at 807:22–23 (R. 3455). The jury found for Defendant Tim Ringer but against Walmart and awarded $10 million dollars in actual damages on submitted actual damages of around $542,000. *See* Form 4 Verdict Form (R. 23).

V. Post-trial motion.

Walmart filed a Motion for JNOV, or, in the alternative, for a new trial absolute or a new trial *nisi remittitur*. *See* Walmart's Mem. in Supp. of Mot. for J. Notwithstanding the Verdict and Mot. for a New Trial (November 22, 2021) (R. 1519). Walmart argued that it was entitled to judgment notwithstanding the jury's verdict because Plaintiff did not introduce evidence that would allow the jury to find for Plaintiff on necessary elements of her claim, including the requirement that she prove that Walmart created the hazard or had actual or constructive knowledge of it *and* that Walmart failed to act with ordinary and reasonable care to keep the store in reasonably safe condition. *Id*. Walmart explained that either one of those failures of proof, standing alone, was a basis on which a directed verdict or JNOV must be entered for the store. *Id*. Walmart argued in the alternative that it was entitled to a new trial absolute or *nisi remittitur* in light of multiple prejudicial errors that occurred during the trial. *Id*. Plaintiff filed a motion in opposition. *See* Pl.'s Resp. in Opp'n to Defs.' Mot. for J. Notwithstanding the Verdict and Mot. for New Trial (R. 1681). The court denied Walmart's motion. *See* Form 4 Order (R. 26).

Walmart timely filed its Notice of Appeal on March 16, 2022. Plaintiff filed a Notice of Cross Appeal on March 18, 2022, but later withdrew her cross-appeal.

STATEMENT OF THE FACTS

Plaintiff is a 53-year-old resident of Florence County, South Carolina. *See* Am. Compl. ¶ 2 (R. 44); Trial Tr. 140:3–6 (R. 2787). Both before and after the incident giving rise to this appeal, she has suffered from non-insulin-dependent diabetes, peripheral vascular disease, pulmonary hypertension, and end-stage renal disease. *See* Trial Tr. 107:10–11 (R. 2754); 110:1–3 (R. 2757); 110:16–20 (R. 2757); 111:6–10 (R. 2758); 112:11–21 (R. 2759).

On June 26, 2015, Plaintiff visited Walmart Store #630 in Florence, South Carolina. *See* Am. Compl. ¶ 1 (R. 44). At the time of this visit, she already had ulcers on the base of her right second toe and in the area from the middle to end of her right foot beyond the arch. *See* Trial Tr. 115:12–24 (R. 2762).

Plaintiff alleges that while walking out of the produce section of the store, she heard a scraping sound under her sandal. *See* Am. Compl. ¶ 12 (R. 46). At 11:32:34 a.m., she bent down to look at her flip-flop sandal and noticed something metal in her right sandal. *See* Trial Tr. 394:1–16 (R. 3042). She had not seen any metal or debris on the floor, had no recollection of stepping on anything in the store, and had no information about where the metal came from, how it became lodged in her sandal, or how long it had been in her sandal. *See id*. at 501:17–25 (R. 3149); *id*. at 539:19 to 540:8 (R. 3187 to 3188). Plaintiff did not feel any pain in her foot and did not immediately remove anything from her sandal. *See id*. at 395:11 (R. 3043); 494:13–20 (R. 3142). Instead, she continued walking and talking with customers for at least one minute and thirty seconds before bending down again and removing what turned out to be a nail from her sandal at 11:34:10 a.m. *See id*. at 495:5 to 498:18 (R. 3143 to 3146). She placed the nail on a shelf and walked down the aisle to get bleach. *See id*. at 401:17 to 402:16 (R. 3049 to 3050); *id*. at 403:10–15 (R. 3051). At 11:35:53 a.m., she retrieved the nail from the shelf and took it to customer service. *See id.* at 403:24 to 404:15 (R. 3051 to 3052).

The nail was later identified as a 7/8th inch roofing nail used to put shingles on a house. *See id*. at 720:15–20 (R. 3368). Multiple witnesses testified that this type of nail is not used in pallets on the Walmart sales floor or in pallets generally. *See id*. at 217:22 to 218:8 (R. 2864 to 2865); *id*. at 306:25 to 307:2 (R. 2953 to 2954).

Plaintiff testified that she had not seen a nail or any other debris on the floor of the Walmart store before the incident, and she did not know if the nail came from Walmart or elsewhere. *See id*. at 501:17–25 (R. 3149); *id*. at 539:19 to 540:8 (R. 3187 to 3188). Store manager Tim Ringer testified that when she found the nail in her sandal, Plaintiff was about sixty-four feet away from the only wooden pallet in the entire area. *See id*. at 224:22 to 225:17 (R. 2871 to 2872). Plaintiff admitted after watching the surveillance video that there were no pallets in her area. *See id*. at 488:23 to 489:2 (R. 3136 to 3137).

Testimony at trial established that, consistent with store policy, Walmart associates performed required safety sweeps every 1.5 to 2 hours throughout the store during the morning of June 26, 2015. *See id*. at 160:6–12 (R. 2807); 589:3–8 (R. 3237). Kevin Lane, the acting manager that day, specifically recalled inspecting the store that morning and walking the entire store to visually verify that the safety sweeps occurred. *See id*. at 589:9–16 (R. 3237). Security video footage of that day shows Walmart associates traversing the area, including one cleaning with a dust mop. *Id*. at 188:2–7 (R. 2835). Neither Mr. Lane nor any of the Walmart associates who performed the periodic safety sweeps throughout the morning saw a nail in the produce section of the store. *Id*. at 596:8–10 (R. 3244).

Following the incident, Plaintiff did not immediately seek medical attention. *See id*. at 89:9–13 (R. 2736). She eventually sought care several days later from Dr. Keith Player, a surgeon in Florence, South Carolina. Dr. Player identified a wound at the bottom of her foot at the base of her second toe—the same location where she had a preexisting ulcer at the time of the incident—and performed a debridement to fix the infection. *See id*. at 90:14 to 91:8 (R. 2737 to 2738). A few weeks later, Plaintiff returned with a worsening foot infection, and Dr. Player decided to remove the second toe. *See id*. at 92:1–4 (R. 2739); *id*. at 93:11–14 (R. 2740). The wound did not

heal properly, and she developed a worsening infection that led to removal of her big and third toes, and, eventually, the removal of her leg above the knee. *See id*. at 97:19–22 (R. 2744); *id*. at 100:22–24 (R. 2747). Dr. Player later testified that Plaintiff's pre-existing diseases caused or contributed to all the amputations, and that all her underlying conditions increased her risk of limb loss. *See id*. at 115:3–8 (R. 2762); *id*. at 122:16 to 123:6 (R. 2769 to 2770).

On May 22, 2017, Plaintiff filed this lawsuit.

STANDARD OF REVIEW

Directed verdict and JNOV. "When reviewing the trial court's ruling on a motion for directed verdict or a JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012); *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (same). The plaintiff in a premises liability claim bears the burden to produce affirmative evidence—not mere speculation or the absence of evidence—to support each element of her claim. *Wimberly v. Winn-Dixie Greenville, Inc*., 252 S.C. 117, 165 S.E.2d 627 (1969). If the plaintiff fails to present such evidence, the trial court should direct a verdict for the defendant. *Wintersteen*, 344 S.C. at 35, 542 S.E.2d at 729. If the plaintiff's evidence is insufficient to support the jury's verdict, the trial court should grant JNOV for the defendant. *Richardson v. Piggly Wiggly Cent., Inc*., 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013). In either situation, a trial court's failure to direct a verdict or grant JNOV is reversible error. *Id*.; *Wintersteen*, 344 S.C. at 35, 542 S.E.2d at 729; *Young v. Meeting St. Piggly Wiggly*, 288 S.C. 508, 343 S.E.2d 636 (Ct. App. 1986).

New trial absolute or *nisi remittitur*. A trial court "may grant a new trial absolute when it finds the evidence does not justify the verdict. *Trivelas v. S.C. Dept. of Transp*., 357 S.C. 545,

553, 593 S.E.2d 504, 508 (Ct. App. 2004); *see also Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) ("The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict."). A new trial *nisi remittitur* is warranted when verdict is so excessive that it clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. *Cock-N-Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996).

A trial court's decision to deny a new trial, either absolute or nisi remittitur, will be reversed if it "is wholly unsupported by the evidence or the conclusion reached was controlled by error of law." *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460, 460 (1978) (citations omitted).

ARGUMENT

I. The trial court erred by denying Walmart's Motion for Directed Verdict and, later, JNOV because no evidence supported several mandatory elements of her claim.

South Carolina law is clear. "A merchant is not an insurer of the safety of his customer," and a "merchant is not required to maintain the premises in such condition that no accident could happen to a patron using them." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628 and 629 n.1, 541 S.E.2d 831, 832 and 833 n.1 (2001) (citations omitted). Rather, a merchant owes patrons "only the duty of exercising ordinary care to keep the premises in reasonably safe condition." *Id.* at 628, 541 S.E.2d at 832 (citing *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969)).

When (as here) a plaintiff brings a premises liability suit alleging negligence by a storeowner, she must prove three things: "(1) the defendants owed her a duty of care; (2) the defendants breached that duty by a negligent act or omission; and (3) she suffered damage as a proximate result of that breach." *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 780 (Ct. App. 2010) (citation omitted).

In addition, when (as here) a plaintiff alleges her injury was caused by a dangerous or defective condition on the property, she must also prove that the property owner either negligently created the hazard or had actual or constructive knowledge of it:

> To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.

Garvin, 343 S.C. at 628, 541 S.E.2d at 832 (2001) (citations omitted); *see also Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009) (same, and also holding that "[t]he showing that a defendant created a condition that led to a plaintiff's injury is not, however, sufficient . . . unless there is evidence that in creating the condition, the defendant acted negligently.") (citation omitted).

If a plaintiff fails to present evidence to establish each of the foregoing, mandatory elements of her premises liability claim, the claim fails, and the trial court must enter JNOV for the defendant. *See*, *e.g*., *Wintersteen v. Food Lion, Inc.*, 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999) (reversing trial court's denial of the store's Motion for JNOV because the plaintiff failed to present evidence capable of supporting each of the required elements of her premises liability claim); *Richardson v. Piggly Wiggly Cent., Inc*., 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013) (same); *Young v. Meeting St. Piggly Wiggly*, 288 S.C. 508, 343 S.E.2d 636 (Ct. App. 1986) (same); *Wimberly v. Winn-Dixie Greenville, Inc*., 252 S.C. 117, 165 S.E.2d 627 (1969) (same).[1]

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[1] Indeed, a case ought not even proceed to trial when a plaintiff fails to adduce evidence to support these mandatory elements. *See*, *e.g*., *Nelson v. Piggly Wiggly Central, Inc*., 390 S.C. 382, 391, 701 S.E.2d 776, 780 (Ct. App. 2010) (affirming trial court's grant of summary judgment for retailer in a premises liability case because the evidence could not establish mandatory elements of the claim); *Legette v. Piggly Wiggly, Inc*., 368 S.C. 576, 579, 629 S.E.2d 375, 377 (Ct. App. 2006) (same).

As explained more fully below, Ms. Jones' case suffers from the same defect fatal to the claims in *Wintersteen*, *Richardson*, *Young*, and *Wimberly*: the absence of any evidence capable of supporting one or more of the mandatory elements of her claim. For this reason, just like in *Wintersteen*, *Richardson*, *Young*, and *Wimberly*, the trial court erred here by denying Walmart's Motion for JNOV. And just like in *Wintersteen*, *Richardson*, *Young*, and *Wimberly*, this Court should reverse.

A. There is no record evidence from which a jury could find that Walmart negligently created the hazard or had actual or constructive knowledge of it.

Ms. Jones' claim against Walmart fails because the record contains no evidence from which a jury could find that Walmart created the alleged hazard, knew about it, or should have known about it. As noted above, a plaintiff who alleges that her injury was caused by a dangerous or defective condition in a store must point to evidence that can establish that the property owner either negligently created the hazard or had actual or constructive knowledge of it. *Garvin*, 343 S.C. at 628, 541 S.E.2d at 832 (2001); *Pringle*, 382 S.C. at 404, 675 S.E.2d at 787. In the case of a foreign object on the floor of a retail store, the plaintiff must prove either that the object was placed there by the store or its employees, or that the defendant had actual or constructive notice the object was on the floor at the time of the injury. *Wintersteen*, 344 S.C. at 35, 542 S.E.2d at 729–30. The mere existence of a dangerous foreign object on the floor, standing alone, is insufficient to support a finding of negligence. *See Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971).

Ms. Jones presented no evidence that Walmart or its agents placed the nail on the floor. Her speculation of where it *might* have come from or *could* have come from cannot satisfy the requirement. *Wimberly*, 252 S.C. at 122–23, 165 S.E.2d at 629. Likewise, the mere presence of pallets in the store cannot prove Walmart created the hazard. If it were, then the mere presence of

rice, grapes, and a soda fountain in *Wimberly*, *Simmons*, *Bessinger*, and *Wintersteen* would have been enough in those cases. It was not then, and it is not now.

Nor can Ms. Jones point to any evidence that Walmart had actual knowledge of the nail. Not one witness or piece of evidence suggests that Walmart or its personnel were aware of any nail on the floor, and, in fact, the unrebutted testimony unqualifiedly proves that Walmart was *not* aware of any such hazard. *See* Trial Tr. at 596:8–10 (R. 3244).

Ms. Jones' efforts to establish constructive knowledge fare no better. A plaintiff can establish a shopkeeper's constructive notice of a hazardous condition by proving that the condition existed long enough that the shopkeeper would or should have learned of it. *See Wintersteen*, 336 S.C. at 136, 518 S.E.2d at 830. If, however, the evidence shows that the retailer took measures to monitor and inspect the store—*e.g.*, by sweeping the floor each morning or evening or by doing periodic walking inspections throughout the day—the retailer will *not* be deemed to have constructive knowledge, and the case should *not* be submitted to the jury. *See*, *e.g.*, *Calvert v. House Beautiful Paint and Decorating Center, Inc.*, 313 S.C. 494, 443 S.E.2d 398 (1994); *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122–23, 165 S.E.2d 627, 629 (1969); *Young*, 288 S.C. at 511, 343 S.E.2d at 638.

Here, the undisputed evidence proves that Walmart easily meets the standard used by our appellate courts to conclude that a storekeeper lacked constructive knowledge of an allegedly hazardous condition. Each night—or, technically, very early each morning—Walmart associates visually inspect the floors after the overnight stocking activities and they physically sweep and clean the floors before the "soft reopening" each day at 8:00 a.m. *See* Trial Tr. at 216:18 to 217:5 (R. 2683 to 2684). The store manager, Mr. Ringer, typically arrives at the store by 6:30 a.m. and walks the entire store to visually inspect the floors, the pallets, and the store's safety and readiness

for the day. *See id*. at 240:14 to 241:19 (R. 2887 to 2888). Kevin Lane, the acting manager that day, specifically recalled inspecting the store that morning and walking the entire store to visually verify that the safety sweeps occurred. *See id*. at 589:9–16 (R. 3237). And all day, every day, Walmart's sales associates perform required safety sweeps every 1.5 to 2 hours throughout the store, including during the morning of June 26, 2015. *Id*. at 160:6–12 (R. 2807); *id*. at 589:3–8 (R. 3237). Security video footage from that day shows Walmart associates traversing the area, including one who was cleaning with a dust mop. *Id*. at 188:2–7 (R. 2835). None of them saw a nail in the produce section of the store. *Id*. at 596:8–10 (R. 3244).

These facts are strikingly similar to cases in which our appellate courts have held a retailer *cannot* be liable for negligence in a premises liability suit when the evidence cannot support a finding that the retailer had constructive knowledge of the hazard. In *Wimberly* for example, the grocer swept its floor shortly before 8:00 a.m.; the assistant manager did a visual inspection before opening the store for the day; the assistant manager visually inspected the store several times throughout the day; the produce manager periodically passed by the place where the fall occur; and the plaintiff slipped on some rice and fell between 10:00 and 11:00 a.m. *Wimberly*, 252 S.C. at 122–23, 165 S.E.2d at 629. The trial court denied the grocer's motions for directed verdict and JNOV, but the Supreme Court reversed, holding the plaintiff had not carried her burden:

> In passing on the denial of a directed verdict this court must of course consider all the testimony and the inferences therefrom in the light most favorable to the plaintiff. *The burden, however, was on the plaintiff* to show that the defendant or its agents knew or should have known that the rice was on the floor and was thereby making the aisle a hazard to customers, and in our opinion the plaintiff has not carried this burden.
>
> * * *
>
> A search of the record fails to reveal any evidence showing how long the rice had been on the floor. The store had been swept just before opening at 8 a.m., and the fall occurred between 10 and 11 a.m. in

> an area adjoining the produce area. The produce manager testified that although he went to the back of the store from time to time to procure goods from a storage area, he passed over the point where the fall occurred every ten or fifteen minutes and was stationed in the immediately adjacent produce area the entire morning. He saw no rice on the floor prior to the fall.
>
> Mr. Boykin, in charge as assistant manager, testified that he walked up and down the aisle before the opening of the store and several times during the day. He did not see rice on the floor prior to the fail [sic].
>
> * * *
>
> No evidence is pointed out which reasonably tends to prove that the rice was on the floor at any particular time prior to the actual fall. *The jury should not be permitted to speculate* that it was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it.
>
> From a review of the entire evidence we conclude that the plaintiff has failed to carry the burden of proof and judgment for defendant shall be forthwith[.]

Id. at 121–23, 165 S.E.2d at 629 (emphasis added). So too in *Calvert*, the Supreme Court reversed the Court of Appeals and held that the plaintiff did not *and could not* establish the requisite elements of his premises liability claim when the evidence showed that the storekeeper swept the store at the close of each day and inspected the store each morning, including the day of the plaintiff's incident, when the storekeeper inspected the floor 1.5 hours before the plaintiff slipped and fell. *Calvert*, 313 S.C. 494, 443 S.E.2d 398 (1994); *see also Young*, 288 S.C. at 511, 343 S.E.2d at 638 (citing with approval a premises liability case in which the storekeeper "had exercised reasonable care" by taking action "every hour or two" throughout the day to ensure its floors were in a safe condition) (citation omitted); *Hunter v. Dixie Home Stores*, 232 S.C. 139, 143, 101 S.E.2d 262, 264 (1957) (reversing the trial court and noting that there was no evidence that the store "had any actual knowledge that beans were in the aisle where she was walking," nor evidence "tending to show how the beans got on the floor or how long they had been there before

the respondent stepped on them and slipped," and noting that "the doctrine of *res ipsa loquitur* does not apply in this State").

In sum, the mere allegation—based solely on speculation, and with no supporting testimony or evidence—that Ms. Jones encountered the nail on Walmart's floor, standing alone, does not and cannot support her burden to prove that Walmart created the hazard or had actual or constructive knowledge of it. This is all the more true when there is no evidence at all that could establish that the nail had been there long enough to impute constructive knowledge to Walmart, particularly when the evidence shows the contrary.

Ms. Jones failed to meet her burden of proof as there was no evidence that (1) Walmart placed the nail on the floor; (2) Walmart knew the nail was on the floor before Ms. Jones' incident; or (3) the nail was on the floor for so long that Walmart should have located it before Ms. Jones' incident—the only three possible avenues of liability. Because Ms. Jones failed to present evidence capable of supporting this mandatory element of her claim, the case should not have been submitted to the jury, and the trial court erred by denying Walmart's motions for directed verdict and JNOV.

B. There is no record evidence from which a jury could find that Walmart negligently breached the duty it owed to Plaintiff.

The trial court's denial of Walmart's motions for Directed Verdict and JNOV erred for a second, independent reason: the record contains no evidence from which a jury could find that Walmart negligently breached the duty it owed her as an invitee. As noted above, a merchant is not required to maintain its store in such condition that no accident could ever befall a customer. *Legette v. Piggly Wiggly, Inc*., 368 S.C. 576, 579, 629 S.E.2d 375, 377 (Ct. App. 2006). Further, "merchants are not required to continuously inspect their floors," *id*., and South Carolina's courts have repeatedly held that merchants cannot be liable merely because it might be foreseeable that a

foreign object may fall to the floor. *See Wintersteen*, 344 S.C. at 36, 542 S.E.2d at 730 ("To date, we have not required storekeepers to prevent or minimize the foreseeable risk of a foreign substance on the floor of its premises."); *Simmons v. Winn-Dixie Greenville*, 318 S.C. 310, 457 S.E.2d 608 (1995); *Bessinger v. Bi-Lo, Inc.*, 329 S.C. 617, 496 S.E.2d 33 (Ct. App. 1998).[2] Rather, a merchant is obliged only to take ordinary care to keep the premises, including the floors, in a reasonable safe condition. *Legette*, 368 S.C. at 579, 629 S.E.2d at 377; *see also Garvin v. Bi-Lo, Inc.*, 343 S.C. at 628–29, 541 S.E.2d at 832–33.

The plaintiff in a premises liability action bears the burden to produce *affirmative evidence*—not (as here) mere speculation—to demonstrate that the merchant failed to take reasonable actions to keep its premises in a reasonably safe condition. *See Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122–23, 165 S.E.2d 627, 629 (1969). Without such evidence, her claim fails. *Id*. ("No evidence is pointed out which reasonably tends to prove that the rice was on the floor at any particular time prior to the actual fall. The jury should not be permitted to speculate that it was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it. . . . [W]e conclude that the plaintiff has failed to carry the burden of proof and judgment for defendant shall be forthwith entered[.]"); *see also Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 463–64, 702 S.E.2d 372, 374 (Ct. App. 2010) ("South Carolina does not recognize the doctrine of *res ipsa loquitur*.") (citation omitted); *Hunter*, 232 S.C. at 142–44, 101 S.E.2d at 264–65 (reversing trial court's denial of store's motions for directed verdict and JNOV in a premises liability case because "[t]here is no evidence tending to show how the beans got on

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[2] In a different factual context, a premises owner must take reasonable steps to protect invitees from the foreseeable, intentional *criminal* acts of third parties. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011). Later courts have understood that *Bass* applies only to foreseeable third-party criminal acts, and the cases cited above remain good law and continue to be cited with approval by our courts in the context of *negligence* claims.

the floor or how long they had been there" and that "to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should also be kept in mind that the doctrine of *res ipsa loquitur* does not apply in this State.") (citation omitted).

Ms. Jones offered no evidence, only speculation and the *absence* of evidence (as if it were Walmart's burden in the first instance to prove its innocence), in support of her claim that Walmart did not exercise ordinary care to keep the premises, including the floors, in a reasonably safe condition. By Ms. Jones' account, the following "evidence" establishes Walmart's negligence:[3]

1. Ms. Jones elicited testimony suggesting the roofing nail probably didn't come from Walmart's roof (which lacks shingles), its floor (which is not hardwood), or its hardware department (which does not sell single nails). *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1693) (citing Trial Tr. at 271:13–16). From these premises, Ms. Jones concludes the nail *must* have come from a pallet rather than from some more plausible source outside of Walmart's control, *e.g.*, a customer—perhaps a roofer or a tradesman—who dropped it from his pocket a moment earlier. *Id*. Her stunning logical leap, even if it were plausible (which it is not), is mere conjecture and speculation, not evidence, and it cannot, as a matter of law, sustain a finding of negligence. *Wimberly*, 252 S.C. at 122–23, 165 S.E.2d at 629. If Ms. Jones' fallacious syllogism could prove that Walmart failed to take ordinary care to keep the store reasonably safe, there might as well be no standard at all. If Ms. Jones' analysis were the law, a plaintiff could establish negligence merely by ruling out a few sources of the hazardous condition and then simply supposing that the store's negligence must be to blame, instead of one of the other remaining

[3] To the extent Ms. Jones argues that this "evidence" can also prove Walmart's constructive knowledge (discussed in Section I(A) of this Brief, *supra*), that argument fails for the same reasons described below as to Walmart's ordinary and reasonable care.

plausible causes. That is not the law. *See*, *e.g.*, *id*. (holding that the plaintiff failed to bear her burden to prove the elements of her claim when some of her case rested on supposition or speculation); *Wintersteen*, 344 S.C at 37, 542 S.E.2d at 731 (noting that a foreign object can be deposited onto a retailer's floor by a third party, and thus "[t]o require shopkeepers to anticipate and prevent the acts of third parties is, in effect, to render them insurers of their customers' safety. This is simply not the law of this state.") (citation omitted).

2. Ms. Jones elicited testimony that it is possible to use a nail for a purpose other than its intended purpose or descriptive name (*i.e.*, you can use a roofing nail for something other than attaching shingles to a roof). *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1693) (citing Trial Tr. at 240:4–3). From this premise, Ms. Jones speculates that the roofing nail she found in her sandal *could* conceivably have been used in a pallet. *Id*. But, again, the Supreme Court has already held that mere speculation cannot support a premises liability claim and is not a basis on which a jury could find negligence. *Wimberly*, 252 S.C. at 122–23, 165 S.E.2d at 629. And for good reason. If mere hypothetical conjecture like this were capable of supporting a premises liability claim, any plaintiff could "prove" her claim with just a little bit of creativity and imagination.

3. Ms. Jones elicited testimony that the store manager, Mr. Ringer, does not personally inspect every wooden pallet at the moment it is brought into the store during the overnight stocking hours, but inspects them (along with the entire sales floor) during his morning inspection of the store at 6:30 a.m. each day. *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1693) (citing Trial Tr. at 242:15–17; 246:7–13; and 314:25 to 315:3). This testimony does not establish or even *suggest* that Walmart's actions or omissions constituted a failure to take ordinary care to keep the store reasonably safe, particularly when reviewed in its

context. *See* Trial Tr. 240:14 to 241:19 (R. 2887 to 2888) (testimony that Mr. Ringer typically arrives at the store at 6:30 a.m. and would visually inspect the pallets and the store at that time); *id*. at 216:18 to 217:5 (R. 2863 to 2864) (testimony that after the overnight stocking activities, Walmart associates visually inspect and physically sweep and clean the floors before the "soft reopening" each day at 8:00 a.m.). At most, the testimony on which Ms. Jones relies shows merely that the store manager *himself* is not on constant, permanent, 24-hours-a-day inspection duty. That is not a basis on which a jury could find a failure to take ordinary care to keep the store reasonably safe. If it were, *every* store would be negligent in *every* premises liability case. That is not the law. *See Legette*, 368 S.C. at 579, 629 S.E.2d at 377 (holding that "merchants are not required to continuously inspect" for hazards); *Calvert v. House Beautiful Paint and Decorating Center, Inc.*, 313 S.C. 494, 443 S.E.2d 398 (1994) (reversing the Court of Appeals and holding the plaintiff did not and could not establish the requisite elements of his premises liability claim when the evidence indicated that the storekeeper swept the store at the close of each day and inspected the store each morning before opening, including doing so 1.5 hours before the plaintiff slipped and fell); *Young*, 288 S.C. at 511, 343 S.E.2d at 638 (citing with approval a premises liability case in which the storekeeper "had exercised reasonable care" by taking action "every hour or two" throughout the day to ensure its floors were in a safe condition) (citation omitted).

4. Ms. Jones elicited testimony that pallets are made of wood; pallets contain nails; and there are pallets on the Walmart sales floor. *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1683) (citing Trial Tr. at 181:19–24; 182:23–25; 242:10–18; 390:24–27; 397:11–12). Yet again, this testimony does not and cannot provide the support Ms. Jones needs to prove her claim. The mere presence of pallets made of wood and nails is not evidence of a failure to exercise due care. If it were, then the mere presence of rice in *Wimberly*, the mere

presence of grapes in *Simmons* and *Bessinger*, and the mere presence of a self-service soda fountain in *Wintersteen* (to name but a few examples) would have sufficed to establish those storekeepers' negligence. It did not. Something more was required in those cases: evidence that could actually demonstrate a negligent act or omission and which established actual or constructive knowledge of the hazard. Such evidence was absent in those cases; such evidence is absent here. *See also Howard v. K-Mart Disc. Stores*, 293 S.C. 134, 137, 359 S.E.2d 81, 83 (Ct. App. 1987) (reversing trial court's denial of motions for directed verdict, JNOV, and new trial, and holding that mere "[t]estimony that a floor was slick, without evidence that the slickness constituted an unsafe condition, is insufficient to present a jury question on a merchant's conduct in the care of his floors"). The absurdity of Ms. Jones' position is further evident from the fact that if her argument were correct, every Home Depot, Lowes, PetSmart, Aldi, Costco, and many other stores in the State are in a current and constant state of negligence merely by the presence of wooden pallets in their sales area.

5. Ms. Jones elicited testimony supposedly showing that Walmart does not inspect the pallets that enter its premises. *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1683) (citing Trial Tr. at 242:1–17; 306:3–9) (R. 2889; 2953). In reality, the cited testimony does not establish the proposition that Ms. Jones claims. To the contrary, it shows that Mr. Ringer, the store manager, *does* inspect the pallets in his store, though he does not get down at floor level to peer into each pallet and examine every nail individually. *See* Trial Tr. at 242:1–17 (R. 2889). Likewise, the testimony shows that Mr. Pavlovich, Walmart's general manager for special projects, *does* inspect pallets at the distribution center, though he does not disassemble them or empty them to examine and count each nail as the pallets pass through the distribution center laden with goods *en route* to stores. *See id*. at 306:3–9 (R. 2953); *id*. at 297:30 to 298:10

(R. 2944 to 2945); *id*. at 306:12 to 309:5 (R. 2001 to 2004) (testimony of Mr. Pavlovich that Walmart has "specific and extremely rigorous requirements" for pallet specifications; that Walmart inspects pallets to ensure compliance with its standard; and that Mr. Pavlovich has never, in 22 years in the distribution field, seen a pallet containing a roofing nail). South Carolina precedent provides no support for Ms. Jones' argument that anything less than an inch-by-inch inspection of each pallet could constitute negligence. Rather, all the law requires is that a shopkeeper take "ordinary" care to keep its premises in a "reasonably safe" condition. *See*, *e.g.*, *Wimberly*, 252 S.C. at 120–21, 165 S.E.2d at 628 (noting that this rule "has been long settled in South Carolina); *see also Estate of Cantrell v. Green*, 302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990) (affirming summary judgment in favor of property owner, noting that the property owner was not required to inspect his land "yard by yard to meet the standard of care imposed on him," and that the property owner's ignorance of a hazard on his property that was hidden by tall grass was not negligence and could not support the plaintiff's premises liability claim).

6. Ms. Jones elicited testimony that allegedly proves that Walmart did not follow its own cleaning and safety policies. *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1693) (citing Trial Tr. at 160:9–21; 180:3–10; 181:2–10; 252:14–18; 286:15–19; 727:1–18) (R. 2807; 2827; 2828; 2899; 2993; 3375). The cited testimony, however, proves no such thing. Indeed, the undisputed evidence is quite the opposite. It shows Walmart's policy required employees to conduct "safety sweeps" (*i.e.*, inspections) of their designated areas of the store every 1.5 to 2 hours; that Walmart's policy required employees to timely and safely remove pallets and stocking equipment from the sales floor; *and that these policies* ***were followed,*** *including on the day Ms. Jones discovered the nail in her sandal*. *See* Trial Tr. at 159:15 to 161:23 (R. 2806 to 2808); *id*. at 180:3 to 181:18 (R. 2827 to 2828); *id*. at 188:2–7 (R. 2835); *id*. at 589:3–

16 (R. 3237). Walmart's policy does not require employees to log these sweeps or to maintain surveillance video footage to document every safety sweep. As a result, Ms. Jones' anticipated argument that the absence of such logs or videos is a "violation" of Walmart's policy is nonsensical. The undisputed evidence established that Walmart and its employees complied with Walmart's policy, including on the day in question. Additional, cumulative evidence in the form of a log or video is thus not required, and its absence cannot give rise to an inference of a negligent omission. *See*, *e.g.*, *Anderson v. Winn-Dixie Greenville, Inc*., 257 S.C. 75, 80, 184 S.E.2d 77, 79 (1971) (reversing a verdict and judgment entered for the plaintiff in a slip-and-fall case, holding in part that the absence of evidence to confirm that the employee assigned to sweep the floor the night before had, in fact, done so, was inconsequential, did not relieve the plaintiff of the need to prove her case, and did not warrant sending the case to the jury).

7. Ms. Jones elicited testimony supposedly showing that Walmart has store security cameras that could be used to look for items as small as a nail on the floor. *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1693) (citing Trial Tr. at 250:19–23; 252:19–21; 275:10–25) (R. 2897; 2899; 2922). This supposed capability, however, and Walmart's alleged failure to use it cannot, as a matter of law, give rise to an inference of negligence. The undisputed and express testimony about the surveillance cameras was that this capability is possible only when using *live* operators who are *actively* surveilling the store in *real time* with the specific objective of detecting tiny objects on the floor. *See* Trial Tr. at 287:7–21 (R. 2934); *id*. at 290:22 to 291:7 (R. 2937 to 2938). But a shopkeeper is not required to constantly inspect its floors, and a shopkeeper's failure to do so does not—and cannot—give rise to an inference of negligence. *See Legette*, 368 S.C. at 579, 629 S.E.2d at 377 (holding that "merchants are not required to continuously inspect" for hazards).

8. Ms. Jones elicited testimony that pallets can be damaged in transit and that "pallet guards" are commercially available. *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1693) (citing Trial Tr. at 202:23–25; 236:12–18; 316:23–25; 317:1–7) (R. 2849; 2883; 2963; 2964). Yet again, Ms. Jones' arguments fail to establish the missing element of her claim. As to the alleged fact that pallets can be damaged in transit, that proves (at most) only that it may be foreseeable that there could be a damaged pallet at Walmart. But even assuming that is true, South Carolina's courts have repeatedly and expressly held that merchants cannot be liable based only on the foreseeability that a foreign object may fall to the floor. *See Wintersteen*, 344 S.C at 137, 542 S.E.2d at 730; *Simmons*, 318 S.C. 310, 457 S.E.2d 608; *Bessinger*, 329 S.C. 617, 496 S.E.2d 33. Indeed, in *Wintersteen*, this Court expressly held that the fact the store could have done something different to reduce the chance of a spill could not impute actual or constructive knowledge to the store, and was not a basis on which a jury could find liability. *See Wintersteen*, 344 S.C. at 139, 518 S.E.2d at 831 ("In this case, Food Lion's actions in positioning the drink machine and failing to put a mat in front of the machine may well have increased the likelihood that ice or liquids would fall on the floor. Nevertheless, because Wintersteen failed to present any evidence that Food Lion had actual or constructive notice of the presence of the liquid in which she fell, the trial court erred by denying Food Lion's motions for a directed verdict and judgment notwithstanding the verdict.").

Ms. Jones' "evidence" about "pallet guards" fares no better. She introduced a photograph of this product at trial, but elicited no testimony and introduced no evidence to actually establish what it is, what it does, whether it can prevent parts of a pallet from breaking away, whether any other retailer uses the product, whether it is available for the size and type of pallets Walmart uses, or any relevant information about it. *See* Trial Tr. at 200:10 to 203:13 (R. 2847 to 2850). A

photograph of a third party's product, introduced with no explanation, testimony, evidence, or arguments, does not and cannot provide a basis on which a jury could find negligence.

9. Testimony that Walmart has internal policies to conduct safety sweeps every 1.5 to 2 hours, but does not keep records to memorialize each of those sweeps.[4] *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (R. 1693) (citing Trial Tr. at 159:15–25; 160:22–25; 161:7–23; 208:5–11; 208:14–22). Walmart admittedly has such a policy and does not require employees to "log" or memorialize the fact that they have completed their safety sweeps. But neither the timing of the sweeps nor the lack of a "log" is any basis on which a jury could find Walmart to be negligent. As to the timing of Walmart's safety sweeps, the South Carolina Supreme Court has held that a storekeeper is entitled to judgment as a matter of law when (as here) he swept the store each night, inspected it each morning, and had checked the floor an hour-and-a-half before a customer slipped and fell. *Calvert*, 313 S.C. 494, 443 S.E.2d 398 (1994); *see also Young*, 288 S.C. at 511, 343 S.E.2d at 638 (citing with approval a case in which a storekeeper satisfied its duty to take "reasonable care" by attending to its floors "every hour or two" to ensure they were in a safe condition). As to Walmart's lack of a "logging" requirement to memorialize the sweeps, no South Carolina appellate court has ever held that a safety policy or practice constitutes "reasonable care" *only* if the activity is logged in a checklist, nor has any South Carolina appellate court ever held that oral testimony regarding a store's compliance with its policies is suspect because there is no cumulative evidence in the form of a "log" to confirm it. To the contrary, our appellate courts have relied on oral testimony regarding a store's safety efforts and activities in opinions holding that a store was entitled to judgment as a matter of law in a premises

[4] This supposed "evidence" differs from number 6, above, in that here it appears Ms. Jones may argue not that Walmart "violated" its policy by failing to log the safety sweeps, but that Walmart's policy was itself improper by failing to require logging.

liability case. *See*, *e.g.*, *Legette*, 368 S.C. at 580, 629 S.E.2d at 377; *Wimberly*, 252 S.C. at 122, 165 S.E.2d at 629.[5]

10. Testimony that Walmart had a duty to Plaintiff as an invitee. *See* Pltf's Resp. in Opp. to Defs' Mot. for JNOV and Mot. for New Trial at 13 (citing Trial Tr. at 815:1–5) (R. 3463). Walmart does not dispute that Ms. Jones was an invitee and that Walmart, therefore, owed her a duty to take ordinary care to keep the store in a reasonably safe condition. Her status and Walmart's duty, however, cannot save her claim because the flaws in her case lie in other prongs of the premises liability test.

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[5] The Supreme Court's recent opinion in *Garrison v. Target Corp*., 435 S.C. 566, 869 S.E.2d 797 (2022) does not stand for a contrary proposition. In *Garrison*, the Supreme Court concluded that whether Target had constructive notice of a discarded syringe that injured a patron in its parking lot was a question for the jury. In reaching this conclusion, the Court relied in part on the fact that Target *did not have a policy* for regular cleaning or maintenance of its parking lot and presented *no evidence* of any periodic, systematic cleaning efforts. *See Garrison*, 435 S.C. at 572, 869 S.E.2d at 801 ("At trial, Target's store manager testified the store did not have a formal policy regarding regular cleaning and maintenance of the parking lot[.]"); *id*. at 578, 869 S.E.2d at 804 ("When questioned about Target's cleaning standards and protocols, the store's manager and property maintenance technician were often unable to provide any meaningful information regarding Target's efforts to ensure the parking lot is regularly cleaned and maintained. For example, they testified there is no specific cleaning policy in place[.]").

The absence of written logs memorializing the performance of cleaning and maintenance efforts in *Garrison* was not itself outcome-determinative or even outcome-influential because there *were no such systematized efforts*. The absence of records merely reflected the lack of any policy or practice of conducting regular, formal, systematic cleaning and maintenance. *See id*. at 578, 869 S.E.2d at 804 ("[T]here is no specific cleaning policy in place, and they do not keep any records indicating that maintenance has been performed."); *id*. at 578–79, 869 S.E.2d at 804 (noting the absence of any testimony, recollection, or documentary evidence in support of assertion that a third-party cleaning truck ever "swept" the lot).

In sum, *Garrison* holds that the absence of *any* evidence of efforts to clean and maintain a retail facility can be one factor that may create a jury question of whether a foreign object in that facility has been there long enough that the storekeeper has constructive notice of it. But *Garrison* did *not* hold, and does not stand for the proposition, that a retailer's efforts can be deemed "reasonable care" to keep the premises in safe condition only if those efforts are established both by testimony *and* log books.

None of the foregoing "evidence" is capable of supporting the elements Ms. Jones must establish to maintain her premises liability claim, nor can this sheer volume of misdirection compensate for the absence of actual evidence. Because there is no evidence from which a jury could conclude that Walmart failed to exercise ordinary or reasonable care to keep the store in a reasonably safe condition, the trial court erred by denying Walmart's motions for directed verdict and JNOV.

II. The trial court erred by denying Walmart's Motion for New Trial absolute or *nisi remittitur* because the trial and the verdict were irrevocably tainted by material, prejudicial errors.

A. The trial court erred by denying Walmart a new trial because Walmart was prejudiced by Plaintiff's violation of Rule 408 and the trial court's subsequent denial of a mistrial..

Walmart's Motion for a New Trial Absolute was based in part upon the trial court's refusal to grant a mistrial when Plaintiff violated Rule 408 of the South Carolina Rules of Evidence, which prejudiced Walmart.

On the third day of trial, November 10, 2021, during the direct examination of Ms. Jones, she suddenly testified that a claims agent from Walmart supposedly offered her $50,000 for her alleged injuries. *See* Trial Tr. 448:9 to 450:2 (R. 3096 to 3098). She testified that this purported settlement offer was made three days after the incident, well before any of her amputations or significant medical treatment. *See id*. Walmart's counsel timely objected to Ms. Jones' testimony on the ground that it was inadmissible pursuant to Rule 408 and moved for a mistrial. *See id*. at 450:3 (R. 3098); *id*. at 456:1–11 (R. 3104). Ms. Jones' counsel *agreed* that a mistrial was appropriate based on her improper and unanticipated testimony. *See id*. at 456:21–24 (R. 3104). Yet the trial court denied Walmart's motion for mistrial and instead offered a mere curative instruction. *See id*. at 456:25 to 457:7 (R. 3104 to 3105). Before offering the curative instruction,

however, the court requested that Ms. Jones stipulate on the record that no such offer existed (which Ms. Jones refused to do), revealing the court's understanding and tacit acknowledgment that a curative instruction alone would not be enough to remedy the harm caused by Ms. Jones' testimony. *See id*. at 454:7–13 (R. 3102); *id*. at 455:2–3 (R. 3103). In fact, the court expressed disbelief that the settlement conversation even took place, noting that "it kind of puts the defense in a bad spot. First of all, I sincerely doubt Walmart offered $50,000 for what, at the time, was a puncture to her heel at that time. I do not anticipate that was said." *See id*. at 451:15–18 (R. 3099).

Rule 408 of the South Carolina Rule of Evidence provides that evidence of negotiations or offers to compromise are inadmissible to prove liability. The Rule states that:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Rule 408, SCRE.

South Carolina courts have long held that evidence of settlement offers cannot be used as a basis of liability. *See QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 209, 600 S.E.2d 105, 111 (Ct. App. 2004); *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.,* 347 S.C. 545, 558, 556 S.E.2d 718, 725 (Ct. App. 2001); *Hunter v. Hyder,* 236 S.C. 378, 387, 114 S.E.2d 493, 497 (1960); *Neal v. Clark,* 199 S.C. 316, 19 S.E.2d 473 (1942). For example, in *Fesmire v. Digh*, the Court of Appeals reversed a judgment entered by a special master and granted a mistrial, because the special master, as the factfinder, used settlement evidence as the basis of liability in violation of Rule 408. *See* 385 S.C. 296, 309, 683 S.E.2d 803 (Ct. App. 2009). The

court found that the admission of such Rule 408 evidence clearly prejudiced the non-offering party, as it affected the outcome of the case. *Id*.

Here, Ms. Jones' inadmissible testimony was "clearly prejudicial," because any reasonable juror would consider such a large, unsolicited offer of settlement to be an admission of liability by Defendants. Despite the trial court's curative instruction, the jury still heard testimony that Walmart offered to pay Ms. Jones immediately after the incident and, ultimately, the jury could have and likely did assess liability based on this alleged offer. Walmart was not allowed the opportunity to offer evidence to rebut Ms. Jones' assertion without placing the alleged offer back into the jury's minds and possibly waiving their claims of prejudice. *See* Trial Tr. 451:9–16 (R. 3099). Without such rebuttal evidence, the jurors may well have believed that the alleged $50,000 offer did in fact exist and that Walmart had tried (unsuccessfully, in their minds) to use legal wrangling to keep the jury from considering it. Because Walmart did not get the chance to present contrary evidence, the jury heard only that Walmart offered to settle with Ms. Jones for a large amount very soon after her injury, insinuating an admission of liability by Walmart. That is the exact type of testimony Rule 408 is designed to exclude.

Walmart was further prejudiced by Plaintiff's testimony because even the court itself recognized that the statement was almost certainly fabricated. Walmart has no record of ever making any settlement offer to Plaintiff, let alone an offer for $50,000 within three days of the alleged incident. Even her counsel admitted that they knew nothing about this alleged settlement offer before Plaintiff's testimony at trial. *See* Trial Tr. 450:13–14 (R. 3098). The trial court agreed that Ms. Jones' testimony "put[] the defense in a bad spot" and was likely untrue. *See id*. at 451:15–18 (R. 3099). The trial court advised that it did not believe that Walmart had ever made such an offer to Ms. Jones and went even further by asking that Ms. Jones stipulate that no offer

ever existed on the record to try to cure the harm of her statement. *See id.*; *id*. at 454:10–13 (R. 3102). Perhaps not surprisingly, she declined to do so. *See id*. at 455:2–3 (R. 3103). Yet the jury never heard that the statements about the alleged settlement offer were untrue and instead were only told to ignore what they heard, leaving this false settlement narrative in their minds for the rest of trial.

Even further, Plaintiff's own counsel *agreed* that her statements were prejudicial to Defendants. Her own counsel acknowledged and agreed with Walmart that her testimony was inadmissible and warranted a mistrial. *See id*. at 453:11–18 (R. 3101). Plaintiff's counsel not only agreed that Ms. Jones' statements were improper, but they also consented to Defendants' request for a mistrial, recognizing the grave prejudice her statements caused. *See id*. at 456:21–24 (R. 3104). Yet the jury found Walmart negligent, despite a complete lack of evidence, likely because the jury reasonably believed that Walmart had already admitted liability when they offered Ms. Jones' $50,000 within days of her incident.

Under South Carolina law, a Rule 408 violation warrants a mistrial when the violation prejudices the non-offering party. *See Collins & Sons Fine Jewelry, Inc. v. Carolina Safety Sys., Inc.* 296 S.C. 219, 371 S.E.2d 539 (Ct. App. 1988). As discussed above, the Rule 408 violation here was clearly prejudicial to Defendants and demanded a mistrial. Instead, the court merely offered a curative instruction.

While the decision to grant or deny a mistrial is generally within the sound discretion of the trial judge, when a party shows error and resulting prejudice, a mistrial is appropriate. *See State v. Council,* 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999); *State v. Tenant*, 383 S.C. 254, 678 S.E.2d 816 (Ct. App. 2009). "To prove prejudice, the complaining party must show there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack

thereof." *Tenant,* 383 S.C. at 254, 678 S.E.2d at 817. Here, because Defendants have shown error and resulting prejudice, the trial court's decision to deny a mistrial should be overturned.

B. The trial court erred by denying Walmart's Motion for a New Trial because Plaintiff used inadmissible photographs in opening statements and the trial court refused to offer a curative instruction..

Walmart also brought a Motion for a New Trial because Ms. Jones improperly used inadmissible photographs in opening statements, and the court refused to offer a curative instruction. During opening statement, Ms. Jones' counsel showed photographs of damaged pallets taken during a 2019 improper inspection of the Walmart store (years *after* her injury). As shown by store surveillance footage, Plaintiff's counsel, accompanied by two confederates, had entered Walmart without giving notice or seeking leave to conduct an inspection, obtained gloves and a hammer from within the store, located and intentionally damaged one or more wooden pallets, and then took photographs and videos of the "damaged" pallet in the store. Plaintiff's counsel also took photographs and video of pallets located on the opposite side of the store from the location Ms. Jones noticed the nail in her sandal, as well as photographs of pallets located outside the store in the trash collection area. *See id*. at 5 (R. 928). Plaintiff then sought to use these photographs and videos—taken nearly four years after Ms. Jones' injury—as "evidence" in the case. *See* Defs.' Mot. in Lim. to Exclude Photographic Evid. and for Sanctions at 3 (R. 926).

These photographs had already been the subject of a motion *in limine* and pre-trial hearing. *See id*.; *see also* Trial Tr. 63:3–23 (R. 2710). The court had excluded photos of the staged, damaged pallet, but had deferred ruling on the other photos. When Ms. Jones displayed those photos in her opening, Defense counsel promptly objected to the use of these photographs and the trial court sustained the objection, ruling that all of the disputed photographs were excluded from evidence based on Plaintiff's counsel improper inspection of the subject store. *See id*. at 66:24 to

67:2 (R. 2713 to 2714) (ruling the photographs were excluded from opening statements); *id*. at 178:1–9 (R. 2825) (ruling the photographs were excluded from evidence entirely). But the trial court refused to offer a curative instruction regarding the excluded photos even though the "bell had already been rung" and the jury was allowed to view photographs of damaged pallets lying on the salesfloor of the subject store. *See id*. at 67:3–11 (R. 2714). These photographs were prejudicial to Defendants' case because Plaintiff improperly displayed them in an attempt to support her theory that Walmart had failed to follow internal policies regarding leaving pallets on the sales floor *several years earlier*, when she was injured. Despite the prejudicial nature of the photographs, the trial court only asked that Plaintiff remove them from her opening presentation, with no instruction to the jury that they should disregard the photographs that had already been seen (much less an explanation that the photographs were taken years later through the misconduct of Plaintiff's counsel). *See id*. The failure of the trial court to offer any such instruction was reversible error. *See State v. Wiley*, 387 S.C. 490, 498, 692 S.E.2d 560, 564 (Ct. App. 2010) (citation omitted).

The failure to offer a curative instruction was prejudicial to Walmart. As outlined above, Ms. Jones presented no other evidence of an alleged policy violation by Walmart. Despite this lack of evidence, Plaintiff's counsel repeatedly stated in his closing arguments that the jury could find Walmart negligent by finding that it violated its own internal policies. That the jury found Walmart negligent, despite a lack of evidence that it placed the roofing nail on the floor, or any evidence that Walmart had actual or constructive notice of the roofing nail before Plaintiff's incident, suggests the jury's finding rests on an improper (and incorrect) basis: that Walmart was supposedly negligent because it supposedly violated its own internal policy. The only evidence of such a violation were the photographs in Plaintiff's opening that they were never instructed to

disregard. This led to justice being denied by the jury's verdict. Because the jury relied on excluded photographs to find Walmart liable to Ms. Jones, Walmart is entitled to a new trial absolute.

C. The trial court erred in denying Walmart a new trial because the evidence was insufficient to support the verdict..

The verdict in this case was unconscionable and unsupported by the evidence, and the trial court should have exercised its authority as the thirteenth juror to direct a new trial. *See Trivelas v. S.C. Dept. of Transp.*, 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004) (affirming grant of new trial absolute pursuant to thirteenth juror doctrine); *see also S.C. Dept. of Highways and Pub. Transp. v. Mooneyham*, 275 S.C. 205, 269 S.E.2d 329 (1980) (granting new trial absolute because the verdict was contrary to the fair preponderance of the evidence); *Ex parte Travelers Home and Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 830 S.E.2d 718 (Ct. App. 2019) (granting new trial where verdict was against the fair preponderance of the evidence); *Sorin Equip. Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996) (granting new trial absolute in action for breach of contract based on the thirteenth juror doctrine).

As the thirteenth juror, the trial court may weigh the evidence as a juror and is not required to view it in the light most favorable to the non-moving party. *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003). Rather, the trial court should evaluate whether the fair preponderance of the evidence supports the verdict. *Id*. In fact, the trial court need not state the reasons for granting a new trial as the thirteenth juror. *Folken*s, 300 S.C. at 254, 387 S.E.2d at 267. As long as there is conflicting evidence, a trial judge's grant of a new trial will not be disturbed. *Lane v. Gilbert Const. Co., Ltd.*, 383 S.C. 590, 597–98,

681 S.E.2d 879, 883 (2009). This Court should reverse the trial court's denial of a new trial for the following reasons:

1. No reasonable juror could have found Walmart negligent.

The trial court should have exercised its position as the thirteenth juror and ordered a new trial because the verdict, finding Walmart negligent, was not supported by the evidence. As outlined extensively in the JNOV section above, Ms. Jones presented no evidence that Walmart created the hazardous condition or had any notice of its existence before her incident. Ms. Jones had to prove that Walmart either placed the nail on the floor or that it had actual or constructive notice that the nail was on the floor before Ms. Jones stepped on it. *See Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001); *Wintersteen*, 344 S.C. at 35, 542 S.E.2d at 729–30. She failed to meet her burden of proof as there was no evidence that (1) Walmart placed the nail on the floor; (2) Walmart knew the nail was on the floor before Ms. Jones' incident; or (3) the nail was on the floor for so long that Walmart should have located it before Ms. Jones' incident—the only three possible avenues of liability. Because no evidence supports a finding that Walmart was negligent, Walmart is entitled to a new trial.

2. The damages award was improperly motivated by emotion and prejudice towards Walmart.

The trial court should have exercised its position as the thirteenth juror and ordered a new trial because the verdict of $10 million dollars was not supported by the evidence. No evidence supported a verdict of that size, and very little testimony even addressed the nature and extent of any future economic or non-economic damages that Ms. Jones would realistically continue to suffer. At trial, Ms. Jones introduced no evidence—not a single dollar—of any actual future monetary damages. There was no evidence of any lost future income as Ms. Jones had been deemed disabled well before the alleged incident at Walmart.

The jury's award of $10 million in actual damages was shockingly disproportionate to the injuries suffered and suggests that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. "[W]hen the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge and this Court to set aside the verdict absolutely." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015).

A large aspect of Plaintiff's case was rooted in eliciting sympathy, including passionate and emotional testimony from her children regarding her life as an amputee. *See*, *e.g*., Trial Tr. at 321:10 to 329:1 (R. 2968 to 2976); *id.* at 336:13 to 345:5 (R. 2983 to 2992); *id*. at 346:11 to 358:13 (R. 2993 to 3005); *id*. at 361:6 to 365:7 (R. 3008 to 3012); *id*. at 367:11 to 373:6 (R. 3014 to 3020). In addition, Plaintiff's counsel improperly tasked the jury with blaming Walmart for delaying Plaintiff's day in court for more than six years, including a visual countdown of the number of weeks and hours since her alleged injury, when it was *Plaintiff* who caused a two-year delay in these proceedings by inappropriately appealing an interlocutory order. *See id*. at 743:24 to 744:6 (R. 3391 to 3392).

The evidence did not justify the result and the jury's verdict is contrary to the evidence. Absent passion and prejudice, no reasonable jury would have reached the results reached by the jury in this case. Walmart is thus entitled to a new trial absolute.

D. The trial court erred in denying Walmart's Motion for a New Trial *Nisi Remittitur* because the verdict was excessive..

The trial court heard Walmart's Motion for a New Trial Nisi Remittitur because the damages awarded by the jury were excessive compared to the evidence presented at trial. Plaintiff alleged $534,935.70 in medical bills related to various hospitalizations and surgeries, including

her above-knee amputation of her right leg. *See* Trial Tr. 769:16–18 (R. 3417). After four days of trial and less than two hours of deliberation, the jury rendered a verdict of $10 million in actual damages. *See* Verdict Form (R. 23).

The Court "may grant a new trial *nisi remittitur* when it finds the verdict is merely inadequate or excessive." *Howard v. Roberson,* 376 S.C. 143, 654 S.E. 2d 877, 883 (2007). "The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive." *See, e.g.*, *Rush v. Blanchard*, 310 S.C. 372, 381, 426 S.E.2d 802, 806 (1993) (affirming trial court's remittitur); *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 637, 529 S.E.2d 758, 762 (Ct. App. 2000) (affirming trial court's granting of motion for remittitur on grounds that amount awarded by jury was "merely excessive"). "The consideration of a motion for new trial *nisi remittitur* requires the court to consider the adequacy of the verdict in the light of the evidence presented." *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000).

Here, the jury verdict of $10 million is about 20 times Plaintiff's claimed damages. Such a verdict is excessive and unbelievably disproportionate to Plaintiff's actual damages, especially considering the lack of evidence of Walmart's liability, as discussed above, as well as the testimony from Dr. John Ross, who opined that Plaintiff's above-knee amputation was due to Plaintiff's poor healing and the progression of her vascular disease. *See* Trial Tr. 665:14–19 (R. 3313).

Additionally, the verdict amount is unreasonable, as there was no evidence presented to the jury that would allow it to assess Plaintiff's future damages, let alone quantify it to the extent of $10 million. No witness, treating provider, or life care planner provided any testimony about future damages or the need for additional medical treatment or expenses related to the amputation.

In *Becker v. Wal-Mart, Inc.*, the Court of Appeals affirmed the trial court's decision to grant Defendant's motion for new trial *nisi remittitur* and reduced the jury's verdict based on the amount of Plaintiff's medical expenses, her age, and her statutory life expectancy. 339 S.C. at 637–38, 529 S.E.2d at 762. Like the verdict in *Becker*, the jury verdict here is excessive.[6] The jury verdict of $10 million, constituting about 20 times Plaintiff's claimed damages, is not rooted in evidence, as there was no evidence that Plaintiff will have any future medical treatments or expenses related to the incident at Walmart. Nor did the jury verdict include a punitive award, as the trial court found as a matter of law that punitive damages were not appropriate in this case. Despite that ruling, Plaintiff's counsel made clear that the jury should penalize Walmart for its alleged wrongdoing, stating in closing arguments:

> And I know that's a big number. But here is what I want you to think about. It's Walmart. In your verdict that will speak the truth, that's the opportunity to tell Walmart that, if you don't do what you're supposed to do and, as a result, a member of our community is injured, when you get to that courtroom and you're on equal footing, we're going to do the right thing.

Trial Tr. 777:12–18 (R. 3425). Counsel further argued, "And so I just ask that, when you render a verdict in this case, make them hear it in Arkansas. Make Walmart corporate . . . know that, in Florence County, if you don't do what you're supposed to do and one of our neighbors gets injured, we're going to take care of her." *See id.* at 807:19 to 808:1 (R. 3455 to 3456).

The jury award here was unreasonably high given the evidence of damages actually presented in trial and the lack of evidence supporting liability generally. As a result, this Court should reverse the trial court's denial of Walmart's Motion for New Trial *Nisi* and reduce the excessive verdict.

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[6] The rule of *Becker* is not that a 17x ratio is always permissible. Rather, *Becker* teaches that the damages amount must have some basis in actual, verifiable evidence and calculation methodology.

CONCLUSION

For these reasons, Appellants respectfully request that this Court reverse the judgment of the lower court or, alternatively, remand for new trial absolute or *nisi remittitur*.

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November 21, 2022
Greenville, South Carolina

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SC Court of Appeals

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 COMPLIANCE

Undersigned counsel certifies that the Final Brief and Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

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