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

GAFFNEY LEWIS, LLC
Nashiba Boyd
Robert C. Blain
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
(803) 790-8838

NELSON MULLINS RILEY & SCARBOROUGH, LLP
Miles E. Coleman
Abigail L. Wood
2 W. Washington Street, Fourth Floor
Greenville, SC 29601
(864) 250-2300

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

April Jones' case against Walmart suffers from multiple independent defects, any one of which warrants reversal. She admits as much in her appellate brief, which concedes that there is no direct evidence from which a jury could find Walmart liable. *See* Brief of Respondent at 5. Instead, she rests her case on speculative possibilities, which she creatively characterizes as "circumstantial evidence," and argues that because she can conjure a scenario in which Walmart *might* have been negligent, the jury was properly permitted to find that Walmart *was* negligent. *Id*. at 5–7. No South Carolina court has ever held a storekeeper could be found liable based on such "circumstantial evidence." Rather, our courts have consistently and repeatedly rejected arguments indistinguishable from this one, holding that the mere presence of a hazardous condition in a store, even when accompanied by a plausible hypothesis as to how it may have gotten there, was not sufficient to submit a premises liability claim to the jury. *See* Brief of Appellants at 14–18, 21–24 (collecting cases).

Without affirmative evidence from which a jury could find Walmart liable, Ms. Jones resorts to an argument based on the *absence* of evidence: (1) the fact that Walmart does not use a log book to memorialize its cleaning and inspection practices, and (2) Walmart's supposed failure to produce additional video footage from earlier on the day of the incident, and the trial court's refusal to charge the jury on spoliation. *See* Brief of Respondent at 4, 8–18. As to the former, no South Carolina court has ever held that the lack of a cleaning log was a basis to find a shopkeeper liable, particularly when (as here) the consistent testimony from multiple witnesses, supplemented by video footage, establish the shopkeeper's reasonable efforts to keep the store safe and clean. Ms. Jones' argument to the contrary misapprehends a critical distinction between this case and the Supreme Court's recent opinion in *Garrison v. Target Corp*., namely the fact that in *Garrison* Target did not have *any* cleaning policy or *any* evidence of systematic, routine cleaning activities. Walmart, in contrast, has shown both. The absence of a log in *Garrison* was merely reflective of the absence of any cleaning. It was the absence of cleaning, not the absence of a written log, that led to liability in *Garrison*.

Ms. Jones' emphasis on the "missing" video footage from even earlier the day of the incident is improper, irrelevant, and substantively wrong. For one, she has not appealed and thus cannot seek relief from any alleged error below, including the evidentiary issue she tries to inject into this appeal.[1] Further, her speculation about what the additional footage *might* have shown and what the jury *might* have inferred from its absence cannot remedy the flaw in her case. Even if a jury could draw some theoretical inference from the absence of additional footage, the law is clear that the inference must be *reasonable*. Here, it would be patently *un*reasonable to infer that footage from earlier in the day could establish Walmart's liability when the videos *already in evidence* show Walmart's associates performing their regular, periodic safety inspections during the time before Ms. Jones entered the store. Those videos confirm that the floor was clean and clear before her entrance. More footage cannot change that fact. The question on appeal is not what the jury *didn't* see, but what they *did* see and whether the evidence that *was* presented to them provides a basis on which they could find Walmart liable. Ms. Jones' reliance on this "missing evidence"—an argument that occupies more space in her brief than any other—invites the Court to speculate what the additional video footage "might" or "could" have shown. *See id*. at 8, 17–18. The Court should decline her invitation and reject her attempt to color the analysis with a supposed error that she chose not to appeal. Instead, the Court should see her invitation for what it is: an admission that the evidence she actually presented does not support the verdict.

Ms. Jones fares no better in her arguments trying to defend the trial court's erroneous ruling denying Walmart's motion for new trial absolute or *nisi remittitur* given several prejudicial errors throughout the trial. This Court should reverse.

[1] Jones initially filed a Notice of Cross Appeal challenging the trial court's ruling, but later voluntarily withdrew it. *See* Brief of Respondent at 3 n.2; Notice of Cross Appeal (March 17, 2022); Letter withdrawing cross-appeal (June 9, 2022); Order dismissing cross-appeal (June 28, 2022).

ARGUMENT

I. No evidence supports several mandatory elements of Ms. Jones' claim.

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 a reasonably safe condition. *See* Brief of Appellants at 13–30. Ms. Jones admits as much in her brief, conceding that "there was no direct evidence" that could establish Walmart's liability. *See* Brief of Respondent at 5.[2] She argues, however, that there was "circumstantial evidence that [the nail] came from one of the wooden display pallets," and that there was testimony "that Walmart had constructive notice of the hazard." *Id*. Both of her assertions are incorrect.

A. The supposed "circumstantial evidence" on which Ms. Jones relies is merely an amalgam of speculation, foreseeability, and *res ipsa loquitur*, none of which can establish premises liability in South Carolina.

Ms. Jones argues that she presented "circumstantial evidence" from which a jury could find that Walmart "created the hazard." *See* Brief of Respondent at 5, 6. Her argument misapprehends both the definition and effect of circumstantial evidence. Long-standing South Carolina precedent recognizes that a fact "may be established by circumstantial evidence, *if* the circumstances, *which must themselves be proved*, lead to the conclusion with reasonable certainty." *McCready v. Atlantic Coast Line R.*, 212 S.C. 449, 455, 48 S.E.2d 193, 196 (1948); *see also Bradley v. Doe*, 374 S.C. 622, 631, 649 S.E.2d 153, 158–59 (Ct. App. 2007) (same) (quoting *Marks v. Indus. Life & Health Ins. Co*., 212 S.C. 502, 505, 48 S.E.2d 445, 446 (1948)).

Even circumstantial evidence requires actual proof of the existence of the circumstances from which an inference of liability can be drawn; it cannot rest on "mere speculation." *Bradley*, 374 S.C. at 634, 649, S.E.2d at 160 (citation omitted); *see also McCready,* 212 S.C. at 455, 48 S.E.2d at 196;

[2] The outline headings in the body of Ms. Jones' brief differ from the headings in the brief's Table of Contents. The quotation above is from Argument heading I as it appears in the body of the brief.

Legette v. Smith, 265 S.C. 573, 577, 220 S.E.2d 429, 430 (1975) (affirming directed verdict for the defendant and holding that a plaintiff relying on circumstantial evidence "must show such circumstances as would justify the inference that the injuries . . . were due to a negligent act . . . ; the matter may not be left to mere conjecture or speculation"); *Holland v. Georgia Hardwood Lumber Co*., 214 S.C. 195, 205, 51 S.E.2d 744, 749 (1949) (discussing circumstantial evidence and holding that "[t]he existence of a fact or facts cannot rest in speculation, surmise or conjecture").

This rule applies in premises liability cases, and our Supreme Court has expressly rejected claims that, like this one, relied on speculative "circumstantial evidence" that was just *res ipsa loquitur* by another name. *See*, *e.g.*, *Wimberly v. Winn-Dixie Greenville, Inc*., 252 S.C. 117, 165 S.E.2d 627 (1969); *Orr v. Saylor*, 253 S.C. 155, 169 S.E.2d 396 (1969); *Wintersteen v. Food Lion, Inc.*, 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999); *Anderson v. Winn-Dixie Greenville, Inc*., 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971); *Pennington v. Zayre Corp*., 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969);[3] *Lytle v. Bi-Lo, LLC*, No. 2012-CP-26-09164, 2013 WL 8477948, at *2 (S.C. Ct. Comm. Pl., June 17, 2013) (granting summary judgment for the retailer and expressly rejecting plaintiff's reliance on "circumstantial evidence," ruling that "our courts have routinely held that the plaintiff is held to a higher standard to avoid summary judgment in slip and fall cases").[4]

The "circumstantial evidence" on which Ms. Jones purports to rely does not satisfy the well-settled standard. The "evidence" she relies on consists of the propositions that:

- There were wooden pallets in the store;

[3] *Wintersteen*, *Anderson*, and *Pennington* do not use the term "circumstantial evidence," but they specifically rejected the same type of argument that Ms. Jones makes here, holding that, in the absence of any evidence that the shopkeeper created the alleged hazardous condition, the Court would not infer liability from the circumstances or from past instances in which a similar hazard had occurred on the premises.

[4] The Court of Appeals subsequently affirmed the trial court's ruling in *Lytle*. Because the appellate opinion was unpublished, Walmart does not cite it above pursuant to Rule 268(d), SCACR.

- Wooden pallets contain nails;
- Pallets sometimes break and have broken in Walmart in the past; and
- Mr. Ringer was unsure where the 7/8-inch roofing nail in Ms. Jones' sandal had come from.

See Brief of Respondent at 6–7. That's it. From this, Ms. Jones argues that the jury could infer that Walmart placed the nail on the floor. She is wrong for at least two reasons.

First, her argument rests on precisely the same sort of "evidence" that this Court held could not create a jury question in *Wintersteen*. That case involved a shopper who slipped on a wet patch on the floor not too far from a drink machine. The plaintiff lacked any evidence that the retailer created the hazard or had actual or constructive notice, so she relied instead on a series of propositions startlingly similar to the ones on which Ms. Jones now relies:

- There was a drink machine in the store;
- Drink machines contain ice;
- Ice sometimes falls from a drink machine to the floor and had done so in the past in Food Lion; and
- Food Lion's employees were unsure where the liquid on the floor came from.

Wintersteen, 336 S.C. at 134–35, 518 S.E.2d at 829.[5] The Court held that these bare facts, without more, could not show that Food Lion had created the hazard or had constructive knowledge of it. *Id*. at 136–37, 518 S.E.2d at 830; *see also Simmons v. Winn-Dixie Greenville*, 318 S.C. 310, 457 S.E.2d 608 (1995) (holding that the retailer could not be held liable in a premises liability case

[5] The interesting similarities between this case and *Wintersteen* do not end there. For example, Ms. Jones argues that her expert, Bryan Durig, was prevented from testifying that a roofing nail could hypothetically be used to repair a wooden pallet and that a pallet was the most "probable source" of the nail. *See* Brief of Responded at 7. Likewise, the plaintiff in *Wintersteen* relied on similar testimony from the same expert—Bryan Durig—that ice could spill from a drink machine and that the wet spot on which she slipped was "most likely or most probably" from the store's drink machine. *Wintersteen*, 336 S.C. at 135, 518 S.E.2d at 829. The *Wintersteen* Court concluded that neither Durig's testimony nor any other speculative argument on which the plaintiff relied could establish a basis on which a jury could find liability. This Court should rule likewise.

based on circumstantial evidence showing that it had grapes in stock, that grapes could fall to the floor, and that grapes had in the past fallen and caused accidents in the defendant's stores); *Bessinger v. Bi-Lo, Inc.*, 329 S.C. 617, 496 S.E.2d 33 (Ct. App. 1998) (same); *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969) (rejecting argument that "circumstantial evidence" could provide a basis for the jury to infer or speculate as to the store's liability for spilled rice).[6] Such evidence was insufficient in *Wintersteen*, *Simmons*, *Bessinger*, and *Wimberly*, and it is also insufficient to show that Walmart created or had actual or constructive knowledge of the alleged hazard here.

Second, the record does not bear out the "evidence" on which Ms. Jones relies. For example, she argues it is *possible* that roofing nails could be used to construct or repair a wooden pallet, *see* Brief of Respondent at 7, but the undisputed testimony from multiple witnesses was that this type of nail is *not* used in pallets generally and has *never* been used in pallets on the Walmart sales floor. *See* Trial Tr. at 217:22 to 218:8 (R. 2864 to 2865); *id*. at 306:25 to 307:2 (R. 2953 to 2954). Mere speculation that something *could* be done is not circumstantial evidence on which any reasonable inference can be based. Similarly, she argues that it is possible for pallets to break, but her own testimony establishes that there were no wooden pallets—broken or otherwise—anywhere near the area where she claims she stepped on the nail, and there was no evidence that any pallet had broken in the store anytime recently. *See id*. at 501:17–25 (R. 3155); *id*. at 539:19 to 540:8 (R. 3187 to 3188); *id*. at 224:22 to 225:17 (R. 2871 to 2872); *id*. at 488:23 to 489:2 (R. 3136 to 3137). Again, mere speculation about *possibilities* is not a circumstance from which a reasonable

[6] Ms. Jones concedes that *Wimberly* rejected the argument she depends on here, but argues that the case is "more than fifty years old" (as if that undercuts its binding nature and effect) and that the dissenting opinion was—in her view—the better one. *See* Brief of Respondent at 15. This Court, of course, does not have the same liberty to disregard precedent, even if it is from 1969.

inference can be drawn. Likewise, she argues that Walmart's assistant manager testified about past instances of broken pallets on the sales floor, which (according to her) "was circumstantial evidence . . . that this used and weathered nail came from one of the wooden display pallets." Brief of Respondent at 6–7 (citing Trial Tr. 599:6–15). The testimony she cites, however, says no such thing. Rather, it establishes that even when a pallet breaks, the nails *don't* fall out:

> Q: So when you have seen these broken pallets, have you ever seen the nails that come out of the broken pallets?
>
> A: No, ma'am.
>
> Q: Okay. You don't see nails that usually fall out?
>
> A: No, ma'am.
>
> Q: So I just want to be clear. Have you ever seen a nail like the one Ms. Jones says she stepped on in the store in the front or the back of the store?
>
> A: No, I have not.
>
> Q: Have you ever seen a roofing nail fall out of a pallet in your 21 years at Walmart?
>
> A: No, I have not.

Trial Tr. 599:22 to 600:8 (R. 3247 to 3248).

Ms. Jones takes similar creative license in describing the testimony of the store manager, Mr. Ringer, who (according to her) "conceded that Walmart did not inspect the pallets coming into the store." Brief of Respondent at 6 (citing Trial Tr. 241:10 to 242:17). But that's not what Mr. Ringer said. Rather, he testified that he *does* review pallets coming into the store, sometimes as they enter the store during the overnight stocking period and other times when he arrives in the morning and performs his daily walk-through of the entire store and the back storage area. *See* Trial Tr. 240:25 to 241:19 (R. 2887 to 2888); *see also id*. at 246:7–19 (R. 2893) (stating that while there is no "formal inspection" of pallets, "they're looked at visually to make sure that there's nothing that's going to cause a potential issue when it goes to the sales floor"); *id*. at 216:18 to

217:5 (R. 2863 to 2864) (explaining the routine safety inspections performed on the morning at issue); *id*. at 589:9–16 (R. 3237) (same); *id*. at 188:2–7 (R. 1883) (video footage of Walmart associates inspecting the area as part of regular, routine safety sweeps performed that day); *id*. at 596:8–10 (R. 3244) (testimony that none of the employees who inspected the area that day saw anything amiss).

Ms. Jones' theory of the case is simply *res ipsa loquitur* with a gloss of conjecture: Walmart has pallets; pallets have nails; various kinds of nails, screws, or fasteners could, hypothetically, find their way into a pallet; it's possible for pallets to break; so any nail found in Walmart *must* be from a pallet and *must* be a hazard that Walmart created. That is not the law in South Carolina, and it is no basis on which a jury could find that Walmart created the alleged hazard.

B. There is no evidence from which a jury could find that Walmart had constructive knowledge of the nail, and Ms. Jones' speculation about what the supposedly missing evidence might have shown cannot fill that gap.

Walmart already explained at length that there is no record evidence from which a jury could find that Walmart had actual or constructive notice of the alleged hazard or negligently breached the duty it owed to Ms. Jones. *See* Brief of Appellants at 15–30. In response, Ms. Jones asserts two arguments. First, she argues that despite the admitted lack of any record evidence, perhaps the jury may have inferred negligence from the absence of additional surveillance video footage from the morning of Ms. Jones' injury. *See* Brief of Respondent at 8–14. Second, relying on the Supreme Court's recent decision in *Garrison v. Target Corp*., 435 S.C. 566, 869 S.E.2d 797 (2022), she argues that the absence of written logs to verify the testimony and video evidence that Walmart's associates had performed their regular, period safety sweeps that day is a basis on which a jury could hold Walmart liable. *See* Brief of Respondent at 14–18. Both arguments are incorrect.

1. Additional video footage is irrelevant, cannot show what Ms. Jones claims it could, and is no basis on which a jury could make a reasonable *inference that Walmart had constructive knowledge of the alleged hazard.*

Walmart produced 17 surveillance camera videos from the morning in question that were introduced into evidence at trial. *See* Trial Tr. 434:17 to 435:20 (R. 3082 to 3083); *id*. at 566:13–22 (R. 3214). In keeping with its normal policy, the video footage Walmart retained and produced included shots of the aisle where Ms. Jones discovered the nail in her sandal and adjacent areas from one hour before she discovered the nail until one hour after she discovered it. *Id*. The videos include continuous footage of Ms. Jones' time in the store, *see id*. at 221:9 to 225:25 (R. 1916 to 1920); *id*. at 386:8 to 443:13 (R. 2082 to 2139); *id*. at 444:13 to 445:11 (R. 2140 to 2141), and were extensive enough that the jury spent "all day" watching them during the trial, *id*. at 568:11–12 (R. 2264); *see also* Trial Tr. 434:17 to 435:20 (R. 2130 to 2131); *id*. at 566:13–22 (R. 2262).

Some weeks after the incident, however, Ms. Jones' counsel sent a letter to Mr. Ringer requesting another five or six hours of video footage from the morning at issue. *See id.* at 566:11 to 567:10 (R. 2262 to 2263). Mr. Ringer does not recall receiving the letter, but he apparently forwarded it to the corporate legal department. *Id*. For an unknown reason, the additional videos were not produced, and Ms. Jones never moved to compel their production. *Id*. at 570:14–18 (R. 2266). After a period of time, that footage was overwritten in Walmart's video recording system and could not be restored. Accordingly, it could not later be located or produced. At trial, the court declined to give a spoliation charge, *id. at* 570:9–10 (R. 2266), and Ms. Jones has not appealed from that ruling. She encouraged the jury, however, to speculate as to what that footage might have shown. *See id*. at 750:16–25 (R. 3398); *id*. at 806:3–6 (R. 3454). Now, she argues that although there is no evidence that Walmart had actual or constructive knowledge of the alleged hazard,

perhaps the jury may have drawn an adverse inference from the "missing" video footage to find Walmart liable. *See* Brief of Respondent at 4, 8–14. Her argument is wrong for at least three reasons.

First, the videos that *were* introduced into evidence already show the floor was clean before Ms. Jones arrived and that safety sweeps had taken place within the hour or two before she arrived. *See* Trial Tr. 188:2–7 (R. 1883); *id*. at 211:22 to 212:6 (R. 1906 to 1907); *id*. at 233:15–22 (R. 1928); *see also id*. at 501:17–25 (R. 2197). (Ms. Jones testifying that she didn't see anything on the floor in the area where she was when she heard the sound of the nail in her sandal and then removed it). So other footage from *earlier* that day could provide no basis on which a jury could reasonably infer liability because the evidence presented to the jury shows that Walmart had taken reasonable care to provide a reasonably safe premises in the time before her arrival. Even assuming that the missing video footage might show a damaged pallet during the overnight stocking activities, that footage ***could not*** support an inference of liability because subsequent footage from closer to the incident—footage that was introduced at trial—shows Walmart had taken and was continually taking reasonable action to keep the store reasonably safe and clean.

Second, the additional video footage simply would not and could not provide the degree of visual clarity that Ms. Jones claims. *Contra* Brief of Respondent at 9, 11–12.[7] Ms. Jones cites the testimony of Virginia Wright about the supposed power and clarity of Walmart's cameras, *id*. at 11, and implies that *that* is the footage that was withheld and which, if produced, might have shown

[7] Ms. Jones' characterization of Mr. Ringer's testimony on this point could lead the reader to misapprehend what Mr. Ringer actually said. According to Ms. Jones, Mr. Ringer "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.'" Brief of Respondent at 9 (citing Trial Tr. 250:9). That's not what Mr. Ringer said. Rather, he said *he did not know* whether the cameras were that sensitive. *See* Trial Tr. 250:19–23 (R. 2897) ("Q: In fact, the PTZ cameras in these stores are so good that you would actually be able to see a nail on the floor potentially; right? A: *I don't know if they're that good* but they're pretty good.") (emphasis added).

relevant information. Ms. Jones is incorrect. The additional footage would not and could not have been the high-resolution, zoom-capable footage that Ms. Jones touts. Walmart's zoom-capable cameras depend on a human operator monitoring and controlling the camera *live* in real time; it does not work on the "recorded feed," and it was not used on a "regular, continuous basis." *See* Trial Tr. 275:10–15 (R. 1970); *id*. at 287:7–24 (R 1982); *id*. at 276:25 to 277:5 (R. 1971 to 1972). In contrast, the archived video footage that Walmart typically saved for 30 to 90 days during which it could be retrieved and reviewed was *not* high-resolution and could *not* zoom in on specific items. *See* Trial Tr. 510:2–17 (R. 2206) (Ms. Jones testifying that the surveillance video footage was somewhat "blurry" and it could be hard to tell what individuals shown in the video were holding); see also *id*. at 511:22–23 (R. 2207) (noting that the video footage "is not super clear"); *id*. at 517:23–24 (R. 2213) (similar). Ms. Jones argues on appeal that the existing video evidence "clearly depict[s] the moment when Jones stepped on the nail." Brief of Respondent at 13 (citing Trial Tr. 394:5–11). There is, however, no nail visible in the video. *See* Trial Video Clip No. 2 (R. 3479). If the existing video footage is insufficiently crisp to show the nail in the location that Ms. Jones argues it "clearly" was located, then it is unreasonable to believe that additional hours of earlier footage of similar quality would show the nail and could prove liability.

Third, even if (as Ms. Jones argues) the jury could and did draw an adverse inference from the supposedly missing video evidence, that inference was an *unreasonable* one because it rests on speculation and (as noted above) false assumptions. Although a finding of premises liability can in some instances rest on inference, the inference must be *reasonable*. *See Wimberly v. Winn-Dixie Greenville, Inc*., 252 S.C. 117, 165 S.E.2d 627 (1969) (holding that the trial court should have directed a verdict because there was no testimony from which a "*reasonable inference"* could be drawn of any negligence by the defendant) (emphasis added); *Pringle v. SLR, Inc. of*

Summerton, 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009) (affirming summary judgment for defendant and noting that the party seeking the inference must be prepared to make a showing that the document or evidence might have reasonably supported whatever presumption is being requested of the fact finder, and holding that any inference that a jury could have made from the absence of the chair would not have changed the fact that there was no indication the chair was dangerous or unfit for use).

Furthermore, the fact that Walmart *could* surveil its floors with live, continuous camera operators 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). The alleged absence of additional video evidence does not and cannot supply the basis on which the jury could have reasonably inferred liability.

2. The absence of cleaning logs memorializing Walmart's cleaning and safety practices is no basis on which the jury could have found liability.

Testimony and evidence at trial showed that Walmart 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 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, however, require employees to log these sweeps. As a result, Ms. Jones argues that the absence of such logs could lead a jury to infer that the sweeps didn't happen. *See* Brief of Respondent at 8–9, 16–18.

Ms. Jones' argument is incorrect. Our Supreme Court has held that a log book is *not* required to confirm testimony that safety procedures were followed, and a store's policy of not

logging its procedures *cannot* give rise to an inference of a negligent omission. *See 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). Indeed, 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 about 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 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.

Ms. Jones mistakenly argues that the Supreme Court's recent opinion in *Garrison v. Target Corp*., 435 S.C. 566, 869 S.E.2d 797 (2022), stands for a different proposition. *See* Brief of Respondent at 15–18. Specifically, she argues that *Garrison* is factually analogous to this case and thus "disagrees with Walmart's . . . characterization that Target had no policy for regular cleaning or maintenance of its parking lot." *Id*. at 16 n.11. She is plainly incorrect. *Garrison* turned 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[.]") (emphasis added); *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*[.]") (emphasis added); *id*. (noting that the witnesses testified that Target did not inspect for hazards "on any regular or routine basis").

Garrison does not hold or even suggest that a log memorializing cleaning practices is required or that the absence of a log is evidence of negligence. Indeed, it wasn't the meagerness of the log (which "contained noticeable errors," *id*. at 573, 869 S.E.2d at 801) in *Garrison* that influenced the Court's decision, but the absence of any policy or practice at all. That Target "d[id] not keep any records indicating that maintenance has been performed" merely reflected the lack of any policy or practice of requiring regular, formal, and systematic cleaning. *See id*. at 578, 869 S.E.2d at 804.

Any doubt about what *Garrison* requires is laid to rest by the fact that *Garrison* did not overrule long-standing precedent holding (i) that a log book is *not* required to confirm testimony that safety procedures were followed, (ii) that a store's policy of not logging its procedures *cannot* give rise to an inference of a negligent omission, and (iii) that oral testimony regarding a store's safety efforts and activities can establish the store's entitlement to judgment as a matter of law in premises liability cases. *See*, *e.g*., *Anderson*, 257 S.C. at 80, 184 S.E.2d at 79; *Legette*, 368 S.C. at 580, 629 S.E.2d at 377; *Wimberly*, 252 S.C. at 122, 165 S.E.2d at 629. Those cases are still binding and good law, and *Garrison* did not hold, and does not stand for the proposition, that a retailer's efforts can be considered "reasonable care" to keep the premises in safe condition only if those efforts are established both by testimony *and* log books.

II. The trial and the verdict were tainted by material, prejudicial errors.

A. The trial court erred by refusing to grant a new trial after Ms. Jones abruptly and improperly testified about a made-up settlement offer.

As explained in Walmart's primary brief, Walmart *and Ms. Jones* ***both*** moved for a mistrial after she unexpectedly (and improperly) testified at trial that, three days after the incident, Walmart supposedly offered her $50,000 for her alleged injuries. *See* Brief of Appellants at 30–34. In response, Ms. Jones argues that the issue is not preserved and that Walmart cannot prove it was prejudiced by the denial of a mistrial. *See* Brief of Respondent at 18–23. Both arguments are incorrect.

Ms. Jones argues the issue is not preserved because Walmart "agreed with the trial court's curative instruction" and did not renew its mistrial motion immediately after the curative instruction was given. *See id*. at 20 (citing *State v. McEachern*, 399 S.C. 125, 146–47, 731 S.E.2d 604, 614–15 (Ct. App. 2012)). She is incorrect. Walmart's motion, Ms. Jones' motion, the parties' arguments, the trial court's ruling, and the curative instruction all took place in a single, continuous discussion on the record lasting less than six minutes. *See* Trial Tr. 455:21 to 459:7 (R. 3103 to 3107). During that colloquy, Walmart's counsel clearly moved for a mistrial and clearly stated that a curative instruction would be insufficient, and the trial court clearly denied the motion and expressly noted that "we're going to revisit these issues at the conclusion of the trial." Trial Tr. 456:1–15 (R. 3104). And Walmart did, in fact, renew its motion later that day, and the trial court again denied the motion. *See id*. at 565:6 –9 (R. 3213).[8] The issue is preserved.

[8] Even if Walmart hadn't renewed its motion after the curative instruction, the issue would still be preserved given Walmart's (and the trial court's) reservation of the issue. *See State v. Patterson*, 337 S.C. 215, 225–27, 522 S.E.2d 845, 850–51 (Ct. App. 1999) (holding that because the defendant had clearly reserved his mistrial motion, it was preserved for appellate review even though he did not renew it following the court's curative instruction).

Nor can Ms. Jones avoid the issue by arguing her testimony about the supposed settlement offer was not prejudicial. *See* Brief of Respondent at 22–23. It is almost too obvious to need explanation that, in a case where Walmart denies liability and in which Ms. Jones admits there is no affirmative evidence of any wrongdoing, Walmart was prejudiced by testimony about an alleged settlement offer of $50,000 made a mere three days after the incident and before any of the subsequent complications and procedures. Even the trial court noted that it "puts the defense in a bad spot" and "does put the defense in a terrible situation" for the jury to have heard that Walmart supposedly offered $50,000 for what, at the time, was a small puncture to Ms. Jones' foot. Trial Tr. at 451:15–18 (R. 3099); *id*. at 452:17–18 (R. 3100). The trial court was right. And while it is impossible for Walmart (like any litigant in this situation) to *prove* that inadmissible testimony swayed the jury, prejudice can be assumed from the egregious violation of Rule 408, SCRE. *See*, *e.g*., *In re Buckmaster*, 755 N.W.2d 570, 580 (Minn. Ct. App. 2008) ("[S]ettlement evidence is 'inherently prejudicial notwithstanding an instruction . . . limiting its purpose and effect.'" (quoting *Esser v. Brophey*, 3 N.W.2d 3, 6 (Minn. 1942)) (alteration in original); *Georgia Ry. & Elec. Co. v. Wallace & Co*., 50 S.E. 478, 480 (Ga. 1905) ("The rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful, for the jury will draw conclusions therefrom in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence.").

The erroneous and inadmissible testimony tainted the jury's consideration of liability and damages. The trial court erred by denying Walmart's motion for a mistrial and, later, by denying Walmart's motion for new trial.

B. The trial court erred by refusing to grant a new trial after Ms. Jones used inadmissible photographs in opening statements and the trial court declined to give a curative instruction.

As explained in Walmart's primary brief, Walmart moved for a new trial because Ms. Jones improperly used inadmissible photographs in opening statements, and the court refused to offer a curative instruction. *See* Brief of Appellants at 34–36. In response, Ms. Jones argues that the inadmissible photograph had not itself been specifically excluded by the court's pretrial ruling and that because the trial court sustained Walmart's objection, Walmart can show no prejudice. *See* Brief of Respondent at 23–25.

The error and the prejudice are plain. The photographs were taken during a 2019 improper inspection of the Walmart store (years *after* Ms. Jones injury) when her counsel entered Walmart without giving notice or seeking leave to conduct an inspection, intentionally damaged pallets, and then took photographs to use as "evidence" in the case. The trial court excluded some of them in a pretrial ruling, but deferred ruling on others.

When Ms. Jones displayed those photos in her opening, Walmart's counsel promptly objected to the use of the photographs, and the trial court sustained the objection, ruling that all the disputed photographs were excluded from evidence based on the improper inspection by Plaintiff's counsel. *See* Trial Tr. 66:24 to 67:2 (R. 1761 to 1762); *id*. at 178:1–9 (R. 1873). The trial court refused, however, to offer a curative instruction. *See id*. at 67:3–11 (R. 1762). Rather, the trial court only asked that Ms. Jones remove them from her opening presentation, with no instruction to the jury that they should disregard the photographs that they 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 a curative instruction is reversible error. *See State v. Wiley*, 387 S.C. 490, 498, 692 S.E.2d 560, 564 (Ct. App. 2010) (citation omitted). And, as explained in Walmart's primary brief, it was prejudicial. *See* Brief of Appellants at 34–35.[9] Ms. Jones' counsel relied on the photographs in opening statements expressly to show Walmart's supposed violations of internal policy. *See* Trial Tr. at 62:10 to 63:18 (R. 1757 to 1758). Ms. Jones presented no other evidence of an alleged policy violation by Walmart (and has identified none on appeal), yet her counsel repeatedly stated in his closing arguments that the jury could find Walmart negligent by finding that it violated its own internal policies. *Id*. at 749:22 to 750:1 (R. 2445 to 2446); *id*. at 762:20 to 763:1 (R. 2458 to 2459); *id*. at 763:19–23 (R. 2459).

That the jury found Walmart negligent, despite an admitted lack of any direct evidence on which liability could be found suggests that the jury's finding rests on an improper (and incorrect) bases, including 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 is reversible error, and Walmart is entitled to a new trial.

C. The trial court erred by refusing to grant a new trial in light of the insufficiency of the evidence.

As explained in Walmart's primary brief, the trial court erred by denying Walmart's Motion for New Trial because the evidence was insufficient to support the verdict. *See* Brief of Appellants at 36–38. In response, Ms. Jones argues that the cases Walmart cited are distinguishable because they involved appellate review of an order *granting* a new trial, whereas this appeal

[9] Ms. Jones' argument to the contrary shows remarkable dexterity. When it suits her, she argues that Walmart can't show prejudice because there *was* a curative instruction. *See*, *e.g*., Brief of Respondent at 21–22. On this issue, however, she argues that Walmart can't show prejudice when there *wasn't* a curative instruction. *See id*. at 23–24.

reviews a ruling *denying* a new trial. *See* Brief of Respondent at 25–27. Her argument relies on a distinction that makes no difference. The cases cited by Walmart accurately state the law and establish that the trial court erred. Precedent need not be procedurally identical to be instructive and controlling. And even if the distinction that Ms. Jones relies on is significant, it is easily rebutted. Our appellate courts have reversed trial courts' denial of motions for new trial in various contexts, including premises liability suits brought against retailers. *See*, *e.g.*, *McIntire v. Winn Dixie Greenville, Inc.*, 275 S.C. 323, 270 S.E.2d 440 (1980) (reversing and remanding for new trial because the trial court's denial of the retailer's motion for new trial); *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (1977) (reversing and remanding for new trial nisi in a premises liability case); *see also Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004) (reversing trial court's denial of motion for new trial); *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983) (same); *Jones v. Garner*, 250 S.C. 479, 489–90, 158 S.E.2d 909, 914 (1968) (same).

Here, the trial court could and should have ordered a new trial because there was no evidence or reasonable inferences to support the jury's verdict. As a result, no reasonably juror could have found Walmart negligent. The trial court should have likewise ordered a new trial because the verdict was not supported by competent evidence and must have resulted from emotion and prejudice.

D. The trial court erred by refusing to grant a new trial *nisi remittitur* because the verdict was excessive.

As explained in Walmart's primary brief, the trial court erred by denying Walmart's Motion for New Trial *Nisi Remittitur* because the damages awarded by the jury were excessive compared to the evidence presented at trial. *See* Brief of Appellants at 38–40. In response, Ms. Jones argues that (1) because this Court once affirmed a *remittitur* order that reduced the plaintiff's damages to an amount that was 17x his medical bills, it is *always* permissible for a verdict to award

damages that are 17x the plaintiff's medical bills, and (2) that even if she didn't include any objective evidence of future damages or the need for additional medical treatment or expenses related to her injury, she presented subjective, emotional evidence of how the injury has changed her life. *See* Brief of Respondent at 27–31 (citing *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 637, 529 S.E.2d 758, 762 (Ct. App. 2000)).

Ms. Jones' argument misapprehends both the point of Walmart's argument and the requirements of the law. The point is not that some arbitrary multiplier, applicable to all cases, marks the line of demarcation between a permissible award and an excessive one, but that the law requires a damages amount to be based on evidence susceptible of calculation, not on emotion, sympathy, or prejudice toward a deep-pocketed defendant. *See*, *e.g.*, *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000) ("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."); *Easler v. Hejaz Temple*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985) (holding that a new trial nisi remittitur is warranted when the verdict amount results from "passion, caprice, prejudice, or other consideration not found on the evidence").

The verdict here was not founded upon the evidence. It was, instead, based on what Ms. Jones frankly admits was the extensive "emotional testimony," *see* Brief of Respondent at 31, supplemented by her counsel's repeated exhortations to the jury to protect their "neighbor" against a distant corporation. Ms. Jones' injuries and amputation are tragic, but the absence of any evidence of wrongdoing, the absence of any evidence of quantifiable future expenses, and the presence of calls for the jury to protect one of their own against a deep-pocketed defendant all lead to a single conclusion: the verdict amount was based not on evidence, but on passion, emotion, caprice, or prejudice. The trial court erred by refusing to grant a new trial *nisi remittitur*.

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*.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
Abigail L. Wood
SC Bar No. 105426
E-Mail: abigail.wood@nelsonmullins.com
2 W. Washington St. / Fourth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

GAFFNEY LEWIS, LLC

Nashiba Boyd
SC Bar No. 78376
E-Mail: nboyd@gaffneylewis.com
Robert C. Blain
E-Mail: rblain@gaffneylewis.com
SC Bar No. 100024
3700 Forest Drive, Suite 400 Columbia, South Carolina 29204
(803) 790-8838

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

November 21 , 2022
Greenville, South Carolina

RECEIVED
Nov 21 2022
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.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____
Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
Abigail L. Wood
SC Bar No. 105426
E-Mail: abigail.wood@nelsonmullins.com
2 W. Washington St. / Fourth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

GAFFNEY LEWIS, LLC

Nashiba Boyd
SC Bar No. 78376
E-Mail: nboyd@gaffneylewis.com
Robert C. Blain
E-Mail: rblain@gaffneylewis.com
SC Bar No. 100024
3700 Forest Drive, Suite 400 Columbia, South Carolina 29204
(803) 790-8838

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

November 21 , 2022
Greenville, South Carolina