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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Hon. Michael G. Nettles, Circuit Court Judge

Court of Appeals Case No: 2022-000303
Opinion No. 6125 (Ct. App. filed Nov. 26, 2025)
Appellate Case No. 2026-000717

April Jones, ...Petitioner,

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 .....Respondents.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Respondent Walmart's Return misses the mark in several important particulars. Walmart is a master of the proverbial "straw-man" technique, attributing arguments and even concessions to Petitioner Jones that she has not raised and then proceeding to dismiss them. Walmart misunderstands preservation principles and misconstrues the rule concerning additional sustaining grounds. Walmart still cannot or will not identify the photos that were the subject of its objection and takes the untenable position that it was not required to do so in order to establish reversible error. On the merits, it continues to be unable to demonstrate prejudice from the brief display of the photos, and because of its misunderstanding of preservation of error, it fails to meaningfully respond to Jones' argument concerning the two-issue rule.

I. The Court of Appeals erred in finding prejudicial error in the brief display of an unknown number of photographs during Jones' opening statement.

a. Whether reversible error occurred must be based on what was presented to the jury and not information that the jury never heard.

Regarding the photos which served as the basis for the Court of Appeals' reversal of a lengthy trial and substantial verdict, Walmart persists in complaining about the events which prompted it to file a pre-trial motion *in limine*. Despite denominating the event "remarkable" and using the term "confederates" as though a crime had been committed, there was nothing nefarious about Petitioner's attorneys visiting the Walmart in question to determine whether in fact wooden pallets were in use. Even the trial court opined "in theory, I think that it might be acceptable for a person to go into a publicly accessible place of business and simply take a video or take pictures." (R. p. 2604, lines 10-13).[1]

[1] As Jones' counsel noted during the hearing, Jones cited numerous cases in her memorandum in opposition to Walmart's motion *in limine* where courts in other jurisdictions have concluded that

However, the point is not to quarrel with whether there was an improper inspection but rather the focus must be on what was actually presented to the jury.[2] It is the jury's verdict that is subject to review, not the events that transpired before trial. While this principle seems obvious, Walmart spends considerable ink in complaining about the pre-trial conduct of plaintiff's counsel when that conduct—other than the brief display of an unknown number of photographs that were not excluded during the *in limine* hearing—was never presented to the jury. In other contexts, our appellate courts have rejected new trials when the challenged conduct occurred outside the presence of the jury. *See, e.g.*, *State v. Cooper*, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999) (holding "there is generally no prejudice when the trial court's hostile comments are made outside the jury's presence"); *Graves v. State*, 309 S.C. 307, 311, 422 S.E.2d 125, 127 (1992) (finding no prejudice and holding the purportedly improper "events and comments could not have influenced the jury because the jury was not present"). Because the jury never was informed about the pre-trial "inspections," what Walmart complains about is legally irrelevant to the sole issue decided by the Court of Appeals: whether the trial court's decision not to give a curative instruction following the brief display of an unknown number of photographs during opening statement constituted reversible error.[3]

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a party does not need permission via Rule 34 to inspect property that is open to the public. (R. pp. 1132-33); *see, e.g.*, *Kamal v. Kohl's Corp.*, No. 18-CV-25-JDP, 2019 WL 1051007, at *4 (W.D. Wis. Mar. 5, 2019) ("Kohl's cites no authority for the proposition that a party needs permission to inspect property that is open to the public.").

[2] Indeed, Walmart filed a motion for sanctions seeking the exclusion of "any photographs or videos taken by Plaintiff or Plaintiff's counsel after the date of the subject incident." (R. p. 929). The trial court clearly rejected Walmart's position because it excluded only a single photograph, ruling "[w]ith regard to sanctions, I think excluding the photograph in question that shows a damaged pallet is sanction to some extent[.]" (R. p. 2609, lines 13-15) (cleaned up).

[3] Walmart contends that Jones does not dispute "the Court of Appeals' disapproving description of her trial counsel's behavior or intentions" as if to concede that the inspection was improper. (Return, p. 14). Not so. Rather, Jones' Petition and this Reply focus on the actual issue before

Additionally, rather than excluding a number of photos as Walmart implies, the trial judge excluded only one photo which arguably showed circumstantial evidence of destructive testing, i.e., a damaged wooden pallet. (R. p. 2604, lines 18-19; 2606, lines 18-19). The judge stated at the pre-trial hearing that "if there's clearly no destructive testing that's been performed, I'm gonna allow…those to be referred to but there's gonna be a limiting instruction that …this was taken four years after the accident." (R. p. 2606, line 22-p. 2607, line 6) (cleaned up).

b. Walmart still has not identified the specific photographs shown to the jury despite it having the burden to provide a sufficient record for review.

Despite the clear fact that only one photo was excluded *in limine*, Walmart continues to claim that Jones' counsel showed numerous photos of damaged pallets to the jury that had previously been excluded. And neither at trial nor now does Walmart delineate which specific photos were displayed.[4] In a stunning twist on settled preservation law, Walmart responds to

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the Court, as opposed to Walmart, which weaves a story of misconduct that even if true (which it is not) has no bearing on the legal issue before the Court because the jury never heard any evidence of purported misconduct. Any concern with trial counsel's conduct could have served as the basis of a motion for sanctions, which Walmart filed and the trial court largely denied. *See* n.2, *supra*. It is impossible for the jury's verdict to be tainted by conduct that it never knew occurred.

[4] Walmart boldly argues on page 15 of its Return that it was not required to identify the specific photos it was objecting to. General objections have never been sufficient to preserve an issue for appeal, and it is equally well-settled that the Appellant bears the burden of presenting a sufficient record for review to the appellate court. *Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 132, 470 S.E.2d 373, 376 (1996) (declining to address an issue where "[n]owhere in the record on appeal, or in anything submitted to this court, is there information regarding exactly what she was indicted and tried for. It is impossible to decide this issue without such information"); *Hamilton v. Greyhound Lines E.*, 281 S.C. 442, 444, 316 S.E.2d 368, 369 (1984) ("The appealing party has the burden of furnishing a sufficient record from which this court can make an intelligent review."); *Moore v. Moore (In re Est. of Moore)*, 435 S.C. 706, 715, 869 S.E.2d 868, 872-73 (Ct. App. 2022) ("The Appellant has not included a copy of the Will or the separate document in the record on appeal. The Appellant bears the burden of providing a sufficient record on appeal from which this court can make an intelligent review."); *Abel v. Lack's Beach Serv.*, 446 S.C. 434, 474 n.10, 920 S.E.2d 283, 304 n.10 (Ct. App. 2025) (finding an issue unpreserved where the appellant did not provide the necessary

Jones' challenge to identify what photos were the subject of its objection by asserting that Jones did not raise this argument in her brief to the Court of Appeals, and it is therefore unpreserved.

To be clear, Walmart was the appellant before the Court of Appeals and therefore bore the burden of preserving the issues it raised. As the respondent below, Jones had no obligation to assist Walmart in this endeavor. When the Court of Appeals found reversible error in the display of the unspecified photos, Jones filed a Petition for Rehearing that argued that Walmart had never identified which photos were shown to the jury and formed the basis for its objection. Under settled principles, the Court of Appeals could and should have found the issue unpreserved even without any prompting from Jones. It has long been the rule that it is not necessary for a respondent to raise error preservation in order for an appellate court to find an issue unpreserved. *See, e.g.*, *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329-30, 730 S.E.2d 282, 285 (2012) ("We therefore agree that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation.")

In this instance, it is abundantly clear that Walmart failed to specify which photos it was objecting to at trial and that it continues to fail to do so, despite Jones' challenge in her Petition for Certiorari for Walmart to delineate the objectionable photos. Indeed, in footnote 3 in its Return, Walmart concedes that "an unknown number of photographs (perhaps all 19) were displayed." (Return, p. 9). This statement reveals that Walmart STILL does not know which photos were displayed to the jury. The photos were not marked for identification at trial nor were they delineated to the Court of Appeals. Without knowing which photos were involved,

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documents in the record on appeal); *Perry v. Perry*, 301 S.C. 147, 151, 390 S.E.2d 480, 482 (Ct. App. 1990) (noting although there was evidence of a payment in the record, "it is impossible to tell from the record before us the portion attributable to support and the portion attributable to the division of property" and therefore the issue could not be addressed on appeal).

their display could not serve as the basis for reversal of this jury verdict. Like the examples discussed in the *Atlantic Coast Builders* decision, this was an issue that was clearly unpreserved. As this Court stated:

> While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it is clearly unpreserved. Here, we do not believe that the existence of this procedural bar is questionable and *would place no weight on the fact that neither of the parties nor the court of appeals raised it.*

Atl. Coast Builders, 398 S.C. at 330, 730 S.E.2d at 285 (emphasis added).[5] Because the photos were never delineated, it is also impossible to discern how Walmart could have been prejudiced by their brief display during opening statements.

c. The two-issue rule mandates upholding the jury's verdict because it is impossible for Walmart to demonstrate prejudice where the jury was presented evidence of two independent bases of Walmart's liability.

Walmart makes a similar, misplaced argument concerning Jones' assertion of the two-issue rule as another basis upon which to grant certiorari. This case was submitted to the jury on two independent theories: (1) that Walmart was responsible for the nail being on the floor through its use of wooden pallets which were frequently damaged in transit, or (2) that regardless of how the nail got on the floor, Walmart was negligent in failing to discover it through its highly touted security cameras and innumerable "store sweeps" by its employees. Obviously, these two

[5] Walmart relies on cases where a party attempted to raise a new substantive argument on the merits at the petition for rehearing stage that was found to be unpreserved. (Return, p. 14) (citing *Duke Energy Carolinas, LLC v. S.C. Office of Regulatory Staff*, 434 S.C. 392, 412 n.19, 864 S.E.2d 873, 884 (2021) (noting Duke Energy raised "for the first time [in a petition for rehearing], that denying Duke its CAMA-related costs would violate the dormant Commerce Clause of the United States Constitution."); *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) (finding "whether the FAA preempted our state's legislative policy as set forth in the Dealers Act" was not preserved for review when it was not raised until the petition for rehearing stage). These cases do not involve the appellant's burden to provide a sufficient record for review, which is a procedural bar that under *Atlantic Coast Builders* would justify an appellate court's review *sua sponte*.

theories constituted two separate and independent bases upon which the jury could find Walmart liable, and the display of the photos regarding the pallets relates only to the first theory. Because this was a general verdict, it is impossible to know on which ground the jury based its verdict, and under settled principles, that verdict should be affirmed. *Goodwin v. Kennedy*, 347 S.C. 30, 47, 552 S.E.2d 319, 328 (Ct. App. 2001) ("Where a case is submitted to the jury on two or more theories and a general verdict is returned, the verdict will be upheld if it is supported by at least one of the theories."). In other words, any display of a photo showing a damaged pallet would not impact the second theory, and "whatever doesn't make any difference, doesn't matter." *Jennings v. Jennings*, 401 S.C. 1, 5, 736 S.E.2d 242, 244 (2012) (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)).

In response to this argument concerning the two-issue rule, Walmart again turns preservation principles on their head by contending the issue is unpreserved because Jones did not argue it to the Court of Appeals. In fact, *Atlantic Coast Builders* involved precisely the same issue—the two-issue rule—and this Court specifically noted that because the existence of the procedural bar was clear, it would place no weight on the fact that it was not raised by the parties or the court of appeals, and that "[t]herefore, the two-issue rule precludes our consideration of Lewis's arguments." *Atl. Coast Builders*, 398 S.C. at 330, 730 S.E.2d at 285.

Accordingly, this Court should reject Walmart's misplaced preservation arguments and grant certiorari to determine whether Walmart preserved its objection to the photos and whether the two-issue rule requires reversal of the Court of Appeals' decision and affirmance of the verdict.

II. Walmart was not prejudiced by the failure to give a curative instruction.

Walmart essentially accuses Jones of misrepresenting the Court of Appeals' discussion of prejudice. (Return, pp. 19-20). But what Walmart points to concerns whether it was error to display the photographs and the potential prejudicial nature of the photos, not the actual issue in this case—whether the failure to give a curative instruction resulted in prejudice.[6]

The Court of Appeals cited just two cases dealing with substantive jury charges in its discussion on why the failure to give a curative instruction prejudiced Walmart. And as Jones noted in her Petition, the two cases cited have nothing to do with a curative instruction. *Fairchild* involved a jury charge on the intervening negligence of a third party. *Fairchild v. S.C. DOT*, 398 S.C. 90, 102, 727 S.E.2d 407, 413 (2012) (finding reversible error for declining to give an intervening negligence of a third party charge when there was "an abundance of testimony" supporting inference that some of plaintiff's injuries were caused by a third party). Additionally, *Ross* involved the trial court's decision to charge comparative negligence without including an instruction that the defendant had the burden of proving the negligence of the plaintiff. *Ross v. Paddy*, 340 S.C. 428, 436, 532 S.E.2d 612, 616 (Ct. App. 2000) (reversing where "the trial court did not instruct the jury that the defendant had the burden of proving the

[6] Additionally, Walmart sidesteps Jones' argument that the curative instruction Walmart actually requested was a comment on the facts. Walmart contends that it was not, but then admits, "at most, it's a comment on the purported evidence." (Return, p. 18). Walmart's argument essentially turns on a disagreement over semantics. *State v. Green*, 412 S.C. 65, 78, 770 S.E.2d 424, 431 (Ct. App. 2015) (discussing "an impermissible judicial comment on the evidence"). The point is that Walmart asked the trial court to instruct the jury that "these are photos from 2019 that have simply no connection to Ms. Jones's incident in 2015 *beyond pure speculation from the plaintiff's counsel*." (R. p. 2714, lines 3-6) (emphasis added). It is readily obvious that a trial court should never instruct the jury that a photograph has no relevance beyond the "pure speculation" of a party.

negligence of the plaintiff. The charge does not explicitly state this, and taken as a whole, does not convey this message to the jury").

Walmart expressly concedes that there are "significant differences between a jury instruction and a curative instruction." (Return, p. 18). This concession seriously undermines the Court of Appeals' discussion of prejudice, which relies solely on cases involving jury charges. It simply defies logic that the failure to give a curative instruction resulted in prejudice when the jury only briefly saw an unknown number of photographs during Jones' opening statement.

Moreover, the longstanding principle that a jury is presumed to follow a judge's instruction should not be ignored. Importantly, the experienced trial judge instructed the jury: "You are to consider only the testimony which has been presented from this witness stand, any exhibits which have been made a part of the record, and any stipulations of counsel." (R p. 3457, lines 12-15). It has long been a bedrock principle of our jurisprudence that jurors are presumed to follow the law as instructed to them. *See, e.g.*, *State v. Reyes*, 432 S.C. 394, 409, 853 S.E.2d 334, 342 (2020); *State v. Pierce*, 289 S.C. 430, 433, 346 S.E.2d 707, 710 (1986), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991). The Court of Appeals ignored this fundamental principle in claiming that the jury had unfettered discretion "to consider the photographs with whatever weight they deemed necessary."[7]

[7] Disregarding the lengthy trial where more than sufficient evidence was presented to justify submission of this case to the jury, Walmart asserts: "That the jury found Walmart negligent—despite a lack of evidence—indicates the jury gave weight to the photographs, to Walmart's great prejudice." (Return, p. 19). Jones has fully set forth the evidence demonstrating Walmart's liability at every stage. *See* Final Br. pp. 6-18; Pet. for Reh'g, pp. 8-10; Pet. for Cert., pp. 14-16. Whether the evidence presented warranted submission of this case to the jury was a decision for the trial judge, and the weight to be given to the evidence was a matter for the jury to determine. Walmart's claim that the jury based its verdict on the brief display of an uncertain number of

III. Walmart's "additional sustaining grounds" represent a misuse of the principle and are not a proper basis to deny certiorari.

Finally, Walmart proposes a novel interpretation of Rule 220(c), SCACR, concerning additional sustaining grounds. That rule, which allows an appellate court to affirm a lower court ruling on any ground appearing in the record, is inapplicable at this juncture. It is normally raised in the respondent's brief to the appellate court and empowers that court to affirm a judgment on any ground appearing in the record. Walmart's attempt to use the doctrine under the present procedural posture of this case is akin to trying to put a round peg in a square hole; it simply does not fit. It would be highly irregular for this Court to resolve this substantial case by relying on Walmart's argument that it should have prevailed on arguments it raised to the circuit court judge that the case should not have been permitted to go to the jury. Petitioner Jones has requested—in the interest of judicial economy as well as closure for these parties—that this Court grant certiorari and review all of Walmart's arguments, but it would be grossly unfair to Jones as well as a perversion of Rule 220(c), SCACR, for this Court to deny certiorari by relying on Walmart's alleged "additional sustaining grounds" that Walmart raised as the appellant below and the court of appeals declined to addressed pursuant to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). And it would be a sea change in appellate practice if this Court were to permit the additional sustaining grounds doctrine to be asserted in this way to short-circuit the certiorari process.[8]

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unknown photographs is a woefully inadequate way to establish the prejudice required for reversal.

[8] Walmart, as the appellant below, raised a total of six issues in its brief to the court of appeals, some of which it alludes to in its request that this Court affirm on what it erroneously refers to as "additional sustaining grounds." To be sure, Jones fully responded to those issues in its brief to the court of appeals and will do so before this Court in the event it grants certiorari and accepts Jones' invitation to resolve all issues in the case rather than remanding to the court of appeals.

Moreover, according to Walmart, Jones "repeatedly criticizes the lower court's alleged delays in this case." (Return, p. 11). This is one of several arguments Walmart attributes to Jones that she has never made. In her Petition for Certiorari, primarily in support of her request that this Court grant certiorari and resolve *all* issues rather than remanding them to the Court of Appeals, Jones noted only the failure of the Court of Appeals to comply with this Court's specific order "to schedule this matter on the next available roster;" inexplicably, the Court of Appeals waited eight months to set this case for oral argument. Jones never raised an argument that the circuit court delayed this case, and it is specious for Walmart to contend otherwise.

CONCLUSION

To summarize, it strains credulity to suggest that after a five-day trial with over a dozen witnesses, over twenty exhibits, and extensive video footage of the store showing Jones on the day she was injured,[9] the jury's verdict was based on the brief display of an unknown number of photographs that neither Walmart nor the Court of Appeals specifically identified in the record. The trial judge's decision not to give a curative instruction was not reversible error because Walmart's suggested instruction constituted a comment on the facts, and Walmart failed to show prejudice. Moreover, even assuming arguendo that the display of photos was improper and that the trial court erred in not giving a curative instruction, that would not impact Petitioner's second basis for recovery—that Walmart failed to comply with its own cleaning procedures in failing to discover and remove the rusty nail—and the jury's general verdict should therefore be upheld. For the foregoing reasons, this Court should grant certiorari and reverse the Court of Appeals.

[9] Jones still contends that it was proper for the jury to consider in its deliberations the missing video footage that Walmart did not provide despite sending multiple written preservation requests.

Respectfully submitted,

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