THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

Case No. 2014-CP-04-1426 *consolidated with* Case No. 2015-CP-04-2206

Appellate Case No. 2017-000267

Carla Denise Garrison and Clint Garrison.....Appellants/Cross Respondents,

v.

Target Corporation.....Respondent/Cross Appellant.

Cross Respondents'/Appellants' Initial Brief

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INTRODUCTION

An appellate record need only contain "any evidence" to support a jury's verdict. The fact alone that Respondent/Cross Appellant Target Corporation lost what its own Manager admitted was the central piece of evidence in the case satisfies the deferential review standard, but much more than spoliation was presented at trial. Various witnesses testified, without objection, that the syringe had been in Target's parking lot long enough for the store to have found and discarded it. Such direct evidence is dispositive and entirely consistent with mountains of circumstantial evidence showing the aged condition of the syringe and showing that Target shirked its obligation to inspect and clean its premises. The trial court properly determined that Appellants/Cross Respondents Denise and Clint Garrison provided the jury with more than sufficient evidence on the element of constructive notice.

The trial court also properly denied Target's request for a new trial. This Court need not reach that issue through this appeal because Target's whole argument hinges on the trial court's improper grant of judgment as a matter of law on the issue of the jury's punitive damages award. It also is fatal, however, that Target never presented the argument it raises here to the trial court, so it has not properly been preserved for appellate review in any event. But even if error preservation were not an issue, the fact that Target did not request that the punitive damages phase of the case be bifurcated from the liability phase of the case undercuts its claim that a new trial is warranted because of the punitive verdict. There are simply many reasons why Target cannot satisfy the deferential "abuse of

discretion" standard that applies to the trial court's denial its request for a new trial.

By virtue of the Constitution and South Carolina law, cases like this one are placed in the hands of the community. *See* S.C. R. Civ. P. 38(a) ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate."). Twelve Anderson County residents, jointly selected by the parties, heard the testimony of five witnesses and considered numerous pieces of documentary evidence. They made credibility determinations and followed the trial court's instructions. Target invites this Court to usurp the jury's role, but that invitation should be declined.

RESTATEMENT OF THE ISSUES ON APPEAL

1. Should this Court affirm the trial court's denial of Target's request for judgment as a matter of law on the issue of liability? Restated, was the jury presented with "any evidence" in support of the constructive notice element?

2. Should this Court reach Target's challenge to the trial court's denial of its request for a new trial? Restated, does the trial court's improper grant of judgment as a matter of law on the issue of punitive damages dispose of Target's new trial request and, even if it does not, did Target preserve the argument that it now advances on appeal in support of a new trial?

3. If reached, should this Court affirm the trial court's denial of Target's request for a new trial? Restated, did the trial court abuse its discretion in denying Target's motion for a new trial, especially when Target did not seek bifurcation of the punitive phase of the trial?

STATEMENT OF THE CASE[1]

This cross appeal involves the trial court's post-trial ruling on Target's requests for judgment as a matter of law or, alternatively, for a new trial. (1/26/2017 Order) The case was commenced on July 1, 2014, when Denise Garrison filed suit for negligence, recklessness, and unfair trade practices. (7/1/2014 Compl.) Target answered the complaint in August 2014, (8/14/2014 Answer), and refused a $12,000 offer of judgment made by Denise Garrison on February 13, 2015. (Offer of Judgment)

A second action was filed on September 21, 2015 by both Denise and Clint Garrison, which alleged negligence, recklessness, loss of consortium, and lost wages. (9/21/2015 Compl.) Target answered the complaint in November 2015, (11/18/2015 Answer), and the cases were consolidated. (Order Consolidating Cases).

This case was tried to a jury from September 6, 2016 to September 8, 2016. (Transcript of Jury Trial Proceedings) The jury found in favor of Denise Garrison and awarded her $100,000.00 in actual damages and $4,510,000.00 in punitive damages. (Verdict Form) The jury also found in favor of Clint Garrison and awarded him $3,500.00 in lost wages and $5,000.00 in loss of consortium. (*Id.*)

Both parties filed post-trial motions. The Garrisons requested pre-judgment interest, post-judgment interest, and costs on September 15, 2016. (Pl. Motion to Tax Costs and Interest) Among other relief, Target requested, on September 16, 2016, judgment as a matter of law on liability and punitive damages or a new trial

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[1] Because much of this case's procedural history is factually important, there is some overlap between the Garrisons' Statement of the Case and the Garrisons' Statement of the Facts.

in the alternative. (Def. Motion For Judgment As A Matter Of Law, New Trial Absolute, Or New Trial Nisi Remittitur) A hearing was held on November 3, 2016. (Transcript of Hearing on Post-Trial Filings)

The trial court entered an order on the post-trial motions on January 26, 2017. (1/26/2017 Order) It granted Target's requested relief on punitive damages and granted the Garrisons' requested relief only on post-judgment interest. (*Id.*) The Garrisons filed a motion for reconsideration five days later. (Pl. Reconsideration Motion)

The trial court entered an order on the motion for reconsideration on February 9, 2017. (2/19/2017 Order) It granted both Garrisons' requests for costs and granted Denise Garrison pre-judgment interest only on the actual damages awarded by the jury. (*Id.*) The Garrisons filed a notice of appeal on February 10, 2017, and Target filed a notice of cross appeal on February 22, 2017. (Pl. Notice of Appeal, Def. Notice of Cross Appeal)

STATEMENT OF THE FACTS

This case grew out of an incident in Target's parking lot on May 21, 2014. (Trial Tr. 360:14–361:17) Denise Garrison arrived at Target's Clemson Boulevard location, in the evening, with her eight-year-old daughter Kaileigh. (Trial Tr. 140:13-15, 170:11-14, 270:24-25 – 271:1-2) After parking near one of Target's cart returns, Denise and Kaileigh exited the vehicle. (Trial Tr. 113:5-7, 160:6-25 – 161:1-12, 360:20-25 – 361:1-4, Pl. Tr. Ex. 4) Kaileigh, without Denise's knowledge, picked up a syringe containing a hypodermic needle. (Trial Tr.361:4-8) Kaileigh asked Denise, "Mommy, what is this[,]" and Denise "immediately reacted" by

swatting the syringe out of her daughter's hand. (Trial Tr. 361:5-17) The needle punctured Denise's right palm, causing blood to bead out of the wound. (Trial Tr.365:5-22)

Understandably shaken, Denise called her husband Clint Garrison. (Trial Tr. 291:21-25, 292:8-13) Clint suggested she report the incident, so Denise did so after washing her hands. (Trial Tr. 293: 15-25) Target's Manager, Shelby Britnall, apologized to Denise, and photographs were taken of the syringe lying among aged trash and debris. (Trial Tr. 366:12-14, Trial Tr. 158:24-25 – 159:1-25, 412:22-24, Pl. Trial Ex. 3, Pl. Trial Ex. 12) Britnall encouraged Denise to seek treatment and told her to bring Target her medical bills. (Trial Tr. 366:15-19)

Britnall filled out two documents related to the incident, one while Denise was present and another after Denise's departure. (Trial Tr. 148:23-25 – 149:1-17, 154:4-25, Pl. Trial Ex. 2, Pl. Trial Ex. 6) Britnall recorded that Denise's right hand had been injured in Target's parking lot by a hypodermic needle, that the area where she was injured was not clean, that the person responsible for the area had not been in the area prior to the injury, and that Denise seemed worried. (Pl. Trial Ex. 2, Pl. Trial Ex. 6) Target took possession of the syringe that injured Denise. (Trial Tr. 178:6-25)

The day after the incident, Denise called Britnall about medical care. (Trial Tr. 369:7-17) Denise asked if there was a specific provider that she needed to visit, but Britnall told her to go wherever she liked. (Trial Tr. 369:13-17) Denise was seen at the emergency room but then referred to Dr. Potts, an infectious disease

specialist. (Trial Tr. 369:19-25 – 370:1-15) Denise had to undergo blood tests and post-exposure prophylaxis, consisting of antiretroviral medications aimed at preventing HIV and hepatitis. (Trial Tr. 370-383) Denise also had to undergo HIV tests every three months. (Trial Tr. 303:1-6, 378:7-12) The medical care lasted for more than a year. (Trial Tr. 378:10-12, 405:13-19)

The incident took both physical and emotional tolls on Denise and her family. From a physical standpoint, in addition to the puncture on her palm, Denise was bedridden and suffered adverse effects from the antiretroviral medications, including lethargy, dizziness, vertigo, nausea, and an upset stomach. (Trial Tr. 365:17-18, 333-337, 370-404) She was described as having been in a "zombie-like state" during treatment. (Trial Tr. 334:9-14) From an emotional standpoint, the effects were even worse. Denise cried and worried over the incident and suffered from horrible and vivid nightmares. (Trial Tr. 368:8-9, 168:4-7, 374:25 – 376:1-22) The family was deprived of quality time together, Clint missed work, and Clint's mom was forced to assist the family. (Trial Tr. 305:11-25, 336:3-24, 423:8-24) On one occasion, Clint's mom recalled that Kaileigh burst into tears and ran to hug her mother when the incident was mentioned. (Trial Tr. 422:7-25) Denise suffered embarrassment from having to ask for help with private matters, such as using the bathroom. (Trial Tr. 333:22-24) Denise and Clint were robbed of intimate and close conversations and had to use protection during intercourse. (Trial Tr. 337:5-20) In all, the experience logically was described as "traumatic." (Trial Tr. 408:17)

The Lawsuit. Following the incident, Target began to worry about liability. A Target investigator sought a statement from Denise, and she complied fully. (Trial Tr. 383:7-25) During the phone call, Denise explained that she was sick and told him that, rather than being after money, she simply wanted her medical bills paid. (Trial Tr. 383:18-25 -385:1-12) At no time during the phone call did Target's investigator tell Denise that Target would not pay for her medical care. Instead, Denise learned after Target obtained her statement that she would be responsible for her own treatment. (Trial Tr. 428:3-14) Denise and Clint concluded that their only option was to retain counsel and file suit. (Trial Tr. 338:5-13)

The first suit came on July 1, 2014, when Denise filed an action for negligence, recklessness, and unfair trade practices. (7/1/2014 Compl.) She propounded a $12,000 offer of judgment to Target on February 13, 2015, but Target refused to accept her attempt to end the litigation. (Offer of Judgment) A second suit was later filed on September 21, 2015, when both Denise and Clint filed an action for negligence, recklessness, loss of consortium, and lost wages. (9/21/2015 Compl.) The suits were consolidated, and claims of negligence, loss of consortium, recklessness, and lost wages were tried to a jury from September 6, 2016 to September 8, 2016. (Order Consolidating Cases) The jury was instructed on both actual and punitive damages. (Trial Tr. 502-532)

The Trial Evidence. At trial, the focus was on Target's responsibility for the Garrisons' injuries. The jury heard evidence concerning Target's cleaning and

inspection practices, the condition of the syringe containing the needle, and Target's loss of the needle.

Cleaning/Inspection Practices. One defense Target mounted was that it consistently cleans and inspects its parking lot. (Trial Tr. 221:4-13) But the jurors did not believe the story Target tried to sell them. Target's failure to support its self-serving testimony with any written confirmation, when combined with the various pieces of documentary and testimonial evidence belying Target's self-serving testimony, shows why the jury rejected Target's defense. The evidence supports the jury's finding that Target acted reckless and with disregard to the safety of its customers.

Britnall, as well as Target's Property Maintenance Technician Jon Jackson, testified that Target utilizes a third party vendor to clean its parking lot with a sweeper truck. (Trial Tr. 138:4-7, 235:18-22) A central problem with this testimony, however, was that Target had nothing to back it up. No records showing that a third party vendor actually comes, no invoices showing how much Target supposedly pays the third party vendor, and, despite the presence of surveillance cameras throughout Target's premises, no video showing what the third party vendor purportedly cleans. (Trial Tr. 239:17-23, 279:2-8)

In fact, the affirmative evidence offered at trial permitted the jury to believe that there was no third party vendor at all. Jackson – whose job is to maintain Target's premises – could not even recall the name of the mysterious third party vendor. (Trial Tr. 235:8 – 236:22) And, because Target's deposition testimony was

that the third party vendor supposedly cleans the parking lot every Thursday night, Clint camped out at Target on a Thursday night prior to trial. (Trial Tr. 306:6 – 309:18) He was able to inform the jury that no sweeper truck ever showed up. (Trial Tr. 308:4-8) The jury was entitled to disbelieve all of Target's testimony and to credit all of the Garrisons' evidence.

Similar problems of veracity were apparent from Target's testimony that its parking lot is routinely inspected for dangers. Jackson maintained that he regularly conducts "walk the vibe" inspections, but the only evidence offered in support was a suspicious two-page log. (Def. Trial Ex. 1) The log, which supposedly is computer-generated, identifies both April 28, 2014 and April 29, 2014 as a "Monday." (Def. Trial Ex. 1) That of course is untrue, just as it could be untrue that Jackson actually performed two inspections on May 21, 2014 as the log indicates. The jury was entitled to believe that Jackson's testimony, along with the log, was at best unreliable and perhaps even intentionally falsified.

The great weight of the evidence shows that, contrary to what Target claimed, the parking lot was not routinely cleaned. Pictures entered into evidence show old and weathered trash, in addition to other debris in the parking lot. (Pl. Trial Ex. 3, Pl. Trial Ex. 8, Pl. Trial Ex. 12) There also was evidence that Target employees, who supposedly survey the parking lot for dangerous conditions, instead use cell phones and do not pay attention or remove hazards. (Trial Tr. 248:2 – 249:6, 258:11-24) Brintnall's documentation following the incident indicated that the parking lot was not clean. (Pl. Trial Ex. 2, Pl. Trial Ex. 6) Target employees

testified that the company has no policy in place for ensuring that the parking lot is cleaned regularly or for verifying that cleaning actually takes place. (Trial Tr. 170:15-18, 175:15-20) And Denise, Clint, and Clint's mom all observed that they have seen "trash everywhere" in Target's parking lot on different occasions. (Trial Tr. 312:2-3, 363:21 – 364:15, 427:5-7) The jury was entitled to credit all of this evidence showing that Target fails to maintain its parking lot.

Plus, all of this evidence was buttressed by Clint's testimony about dangerous conditions in Target's parking lot after Denise's injury. Jackson was adamant at trial that Target's cleaning practices had not changed from the date of the incident to the date of trial. (Trial Tr. 275:10-16) That is significant because Clint testified and provided pictures of a bolt that had fallen from a buggy rack that Target allowed to remain in its parking lot for at least four months.[2] (Trial Tr. 312:7 – 331:18, Pl. Trial Ex. 4, Pl. Trial Ex. 7) He also testified that a rod and spring remained in Target's parking lot for at least 13 days. (Trial Tr. 331:19 – 332:13) The jury was entitled to credit the evidence provided by Clint and to reject Target's claim that it routinely cleans and inspects its parking lot.

Condition of Syringe. The jury both saw and heard evidence that proved the syringe had been in Target's parking lot for a long time. Photos entered into evidence showed the syringe's worn and aged condition. (Pl. Trial Ex. 3, Pl. Trial Ex. 12) Brintnall, who saw the syringe on the night of the incident, testified that the syringe was "dingy, dirty, and gross[,]" that the plunger was broken, that the

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[2] It is apparent that, during the time period between the two photos, Target allowed the buggy rack to become partially collapsed.

syringe did not appear to have been recently dropped, and that the syringe was discolored. (Trial Tr. 151:22-25, 151:6-9, 152:10-13, 150:21-23) She further testified to seeing dings, divots, and grime on the syringe. (Trial Tr. 151:10-16, 182:22 – 183:4, 213:10-14) This testimony was consistent with Denise's testimony, who also testified that she could tell the syringe had been in the parking lot for a long time and that it was dirty and nasty. (Trial Tr. 361:16) Clint further observed for the jury that twine located near the syringe was discolored and appeared to have been run over by vehicles. (Trial Tr. 355:17-20) The jury was entitled to credit all of this evidence, and in fact it was unrebutted.

Loss of the Syringe. Unfortunately, the jury did not have an opportunity to view the actual syringe that injured Denise because Target lost it not only once but twice. (Trial Tr. 183:11 - 189:17) Target took possession of the syringe the night of the incident, with Britnall testifying that she placed it in a container marked "Do Not Touch." (Trial Tr.178:20 – 179:9) Britnall testified during her deposition that the syringe was later destroyed by Target employee Michelle Carroll, but Britnall was forced to admit at trial that her deposition testimony was false. (Trial Tr. 183:11 – 184:25) Britnall confessed that the syringe turned up after her deposition; she told the jury, however, that it subsequently was lost again. (Trial Tr. 185:5 – 188:10) Britnall had no explanation for what happened to the syringe on the second occasion, other than to call it "a great mystery." (Trial Tr. 188:7)

A spoliation instruction was given to the jury. (Trial Tr. 505:21 – 506:1) It was not, however, aimed solely at Target. (Trial Tr. 505:21 – 506:1) An agent of the

Garrisons' attorney had taken pictures of the syringe after Britnall's deposition, but the pictures were irretrievable from the photographer's cell phone. (Trial Tr. 185:10-11) The jury was told they could apply an adverse inference to whichever party was to blame for lost or destroyed evidence, and the evidence supports the blame the jury placed on Target. (Trial Tr. 505:21 – 506:1)

The Verdict. At the close of the evidence, both parties moved for directed verdict. (Trial Tr. 432 – 458) The trial court denied the Garrisons' motion but granted Target's motion in part. (Trial Tr. 438:21-25, 443:3-7) In particular, the trial court dismissed the Garrisons' unfair trade practices claim and determined that sufficient evidence had been presented for the jury to decide the remaining claims, along with the question of punitive damages. (Trial Tr. 443:3-7, 457:10 -25) Closing arguments were presented by counsel, with no objections lodged by either party, and the jury retired to deliberate. (Trial Tr. 463 – 502)

The jury returned a verdict form with the following findings: (1) a negligence finding against Target, with no apportionment of fault to Denise, in the amount of $100,000.00 in actual damages and $4,510,000.00 in punitive damages; (2) a liability finding against Target on Clint's lost wages claim in the amount of $3,500.00; and (3) a liability finding against Target on Clint's loss of consortium claim in the amount of $5,000.00. (Verdict Form) The trial court polled the jury, and all confirmed their unanimous verdict. (Trial Tr. 537:8-24)

Post-Trial Proceedings. The Garrisons timely filed a motion for costs and interests following the trial. (Pl. Motion to Tax Costs and Interest) Target

responded by calling the motion "premature," and the Garrisons' filed a rebuttal. (Reply to Plaintiffs' Motion To Tax Costs And Interest, Plaintiffs' Rebuttal In Support Of Motion To Tax Costs And Interest)

Target likewise requested post-trial relief. (Def. Motion For Judgment As A Matter Of Law, New Trial Absolute, Or New Trial Nisi Remittitur) It requested judgment as a matter of law on both liability and punitive damages, and, in the alternative, requested a new trial or a remittitur. The motion was a conclusory, two-page filing that included no substantive argument. Nonetheless, the Garrisons filed a response in opposition. (Pl. Response In Opposition To Defendant's Motion For Judgment As A Matter Of Law, New Trial Absolute, Or New Trial Nisi Remittitur)

Later, Target supplemented its bare-bones motion with an extensive memorandum. (Def. Memorandum of Law In Support Of Motion For Judgment As A Matter Of Law, New Trial Absolute, Or New Trial Nisi Remittitur) The Garrisons responded to that filing as well with a memorandum in opposition. (Pl. Response To Def. Memorandum of Law In Support Of Motion For Judgment As A Matter Of Law, New Trial Absolute, Or New Trial Nisi Remittitur) The trial court held a hearing on all of the pending post-trial motions on November 3, 2016. (1/26/2017 Hearing Tr.)

An order was entered by the trial court on January 26, 2017. (1/26/2017 Order) First, it denied Target's motion for judgment as a matter of law on the issue of liability, finding that Denise Garrison's injury "resulted from [Target]'s failure to

make the parking lot safe[.]" (*Id.*, p.7) Second, it denied Target's alternative requests for a new trial or for a remittitur. (*Id.*, p.9-11) Third, it granted Target's request for judgment as a matter of law on the issue of punitive damages. (*Id.*, p.6-9) Fourth, it denied the Garrisons request for costs and prejudgment interest, apparently believing that the Garrisons had not submitted affidavits along with their motion. (*Id.*, p.11) The trial court's 11-page order said that the case had "required the upmost thought and consideration." (*Id.*, p.3)

Five days after receiving the trial court's order, the Garrisons filed a motion for reconsideration under Rule 59(e). (Pl. Reconsideration Motion) It pointed out that affidavits had in fact been filed in support of the request for interest and costs and that ample evidence supported the jury's punitive damages award. Target filed a response, and the Garrisons filed a rebuttal. (Def. Response to Pl. Reconsideration Motion, Pl. Rebuttal in Support Of Reconsideration Motion)

The trial court granted in part the Garrisons' motion for reconsideration on February 9, 2017. (2/19/2017 Order) It was held that both Garrisons were entitled to costs and post-judgment interest and that Denise Garrison was entitled to eight percent prejudgment interest, beginning from the offer of judgment on February 13, 2015. (*Id.*) The trial court, however, limited Denise Garrisons' prejudgment interest to eight percent of the actual damages award rather than assessing it upon the jury's $4,610,000.00 verdict in her favor. (*Id.*)

The Garrisons filed a notice of appeal on February 10, 2017, and Target filed a notice of cross appeal on February 22, 2017. (Pl. Notice of Appeal, Def. Notice of Cross Appeal) This case is now ripe for appellate review.

ARGUMENT

The trial court properly denied Target's request for judgment as a matter of law on the issue of liability and properly denied Target's alternative request for a new trial. Target's challenges to these rulings should be rejected.

I. The trial court properly denied Target's request for judgment as a matter of law on the issue of liability.

In the trial court, Target challenged the jury's liability determination on two grounds: constructive notice and causation. (Def. Memorandum of Law In Support Of Motion For Judgment As A Matter Of Law, New Trial Absolute, Or New Trial Nisi Remittitur) On appeal, Target has abandoned its causation argument. *See generally* Target Br. Target should have abandoned its constructive notice argument as well, for the trial court's denial of Target's motion for judgment as a matter of law must be affirmed unless "no reasonable jury could have reached the challenged verdict." *See Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) (quoting *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000)).

It is telling, as an initial matter, that Target does not repeat its causation argument on appeal. The argument was premised on Target's plea to the jury that it should be absolved of all fault because it was Denise Garrison who knocked the syringe out of her young daughter's hand in an effort to protect her. (Def.

Memorandum of Law In Support Of Motion For Judgment As A Matter Of Law, New Trial Absolute, Or New Trial Nisi Remittitur) The Garrisons explained in the trial court why the jury was unimpressed with Target's "blame the victim" approach. (Pl. Response To Def. Memorandum of Law In Support Of Motion For Judgment As A Matter Of Law, New Trial Absolute, Or New Trial Nisi Remittitur) This Court has made clear that it is unwilling to save parties from their own strategic mistakes. *Cf. Valentine v. Davis*, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995) ("We are unwilling to torture the rules in such a way to correct possible mistakes in the filing of motions or misjudgments in strategic procedural decisions.").

So it is on the issue of constructive notice as well. To uphold the trial court's determination, there need be only a "scintilla" of evidence to support an inference that the syringe was in Target's parking lot for such a period of time that Target should have discovered it through the use of reasonable care. *See Plowden v. Wilson*, 186 S.C. 285, 195 S.E. 847, 848 (1938) ("[I]f there be a scintilla of competent and relevant testimony upon the issue, it is the duty of the court to submit that issue to the jury."); *Major v. City of Hartsville*, 410 S.C. 1, 3-4, 763 S.E.2d 348, 350 (S.C. 2014) (reversing grant of summary judgment after "find[ing] a genuine issue of material fact [ ] as to whether respondent should be charged with constructive notice"). Target never objected to countless pieces of evidence that allowed the jury to make a constructive notice finding, including testimony about how long the syringe was in the parking lot, the condition of the syringe, Target's

inspection/cleaning practices, and spoliation. *See Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal."). It is impermissible for Target to invoke its newly minted "anti-speculation principle" when it never did so at trial.

A. The jury was presented with direct evidence that the syringe had been in Target's parking lot for a sufficient length of time.

Target admits that the constructive notice requirement did not require the jury to know precisely how long the syringe had been in the parking lot. Rather, there need only be evidence providing an inference that it had been there "for a sufficient length of time that [Target] would or should have discovered and removed it [through the use of] ordinary care." *See* Target Br. at 19. The law in South Carolina and elsewhere is that the jury should decide whether the dangerous condition had been there for a "sufficient length of time." *See, e.g., Fickling v. City of Charleston*, 372 S.C. 597, 609-10 n. 34, 643 S.E.2d 110, 117 n. 34 (Ct. App. 2007) (holding that the jury was entitled to decide the question of constructive notice); *see also Lussier v. Sun Valley Camping Co-op., Inc.*, 2014 WL 2255578, *3 (Conn. 2014) ("It is settled [ ] that what constitutes a reasonable length of time is usually a question of fact to be determined in light of the particular circumstances of a case.").

It is simply false for Target to claim that the jury did not hear any evidence about how long the syringe had been in the parking lot. After viewing pictures of the syringe, Clint Garrison specifically testified that the syringe had been in the parking lot for more than two hours, more than two days, and even more than two

weeks. (Trial Tr. 358:16 – 359:4) He had good reason to hold this opinion, for he testified and provided pictures of a bolt that had fallen from a buggy rack that Target allowed to remain in its parking lot for at least four months. (Trial Tr. 312:7 – 331:18, Pl. Trial Ex. 4, Pl. Trial Ex. 7) He also testified about a rod and spring that remained in Target's parking lot for at least 13 days. (Trial Tr. 331:19 – 332:13) And Target admitted that its cleaning practices had not changed from the date of the incident to the date of trial. (Trial Tr. 275:10-16) All of this evidence more than satisfies the "scintilla" standard required to demonstrate constructive notice.

Then there is Denise Garrisons' testimony as well as Target's Manager, Shelby Brintnall's, testimony. Denise Garrison specifically testified that "[i]t had been there - - I could tell, obviously it had been there a long time." (Trial Tr. 362:21-23). Similarly, when asked whether the syringe looked like it had "been laying on the ground a while[,]" Brintnall testified that "[i]t look[ed] like it[ ] [had] some wear on it." (Trial Tr. 152:10-13)

Under this Court's precedent in *Fickling*, such testimony from Denise Garrison and Target's own Manager is entirely sufficient to permit a valid constructive notice inference. *See* 372 S.C. at 609-10, 643 S.E.2d at 116-17 (holding that evidence was sufficient to permit a constructive notice finding). Like here, *Fickling* involved lay testimony in which a City Director provided his opinion that the dangerous condition "had probably been that way for a while[.]" *Id.* at n.34.

Fickling disposes of Target's suggestion that lay opinion cannot support the constructive notice requirement.

What's more, though, is that Target's characterization of the Garrisons' evidence as speculation suffers from a fatal procedural problem. Crucially, Target did not object to Clint Garrison's opinion testimony about how long the syringe had been in the parking lot, did not object to Clint Garrison's testimony about the bolt, did not object to Clint Garrison's testimony about the rod and spring, did not object to Denise Garrison's testimony about how long the syringe had been in the parking lot, and did not object to Shelby Brintnall's testimony about how long the syringe had been in the parking lot. (Trial Tr. 358:16 – 359:7, 331:19 – 332:13, 362:21-23) This Court has made clear that "testimony received without objection becomes competent and its sufficiency is for the jury[.]" *See Tucker v. Doe*, 413 S.C. 389, 405, 776 S.E.2d 121, 130 (Ct. App. 2015) (citing *Cantrell v. Carruth*, 250 S.C. 415, 421, 158 S.E.2d 208, 211 (1967)).

The failure to object creates a gulf between this case and all of the cases Target relies upon in its brief. In those cases, there was no evidence at all about timing. In this case, by contrast, there was evidence about timing – Target just now claims that the timing evidence is not good enough. But if Target believed that the Garrisons' timing evidence was inappropriate for the jury to consider on the issue of constructive notice, it had an obligation to say so during the trial. *See Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of

the right to have the issue considered on appeal."). Target may not now, for the first time on appeal, object to the Garrisons' evidence as "speculation." *Id.*

A case in point is this Court's recent decision in *Tucker*. On appeal, the defendant waged a sufficiency of the evidence challenge on the ground that certain trial testimony was not probative on the issue of causation. *See Tucker*, 413 S.C. at 130, 776 S.E.2d at 406. That challenge was rejected, with this Court explaining that the objection was "not preserved for review because [the defendant] never made that contention at trial." *Id.* Likewise, in this case, Target may not object to the Garrisons' evidence as speculative when it never made that objection at trial.

The reason for this rule sounds in notions of judicial economy and fairness. For one thing, a contemporaneous objection conserves court resources by giving the trial judge an opportunity to correct the alleged error at the time it occurs. *See, e.g., State v. Torrence*, 305 S.C. 45, 67, 406 S.E.2d 315, 327 (1991). Moreover, a contemporaneous objection prevents one party from gaining a tactical advantage over the other party through sandbagging. *See, e.g., Holley v. State*, 523 So. 2d 688, 689 (Fla. 1988).

Both of these twin evils are apparent on this record. Target did not give the trial court an opportunity to consider its speculation argument during trial. Had it done so, the trial court could have determined in the first instance whether it was appropriate for the jury to base its verdict on witness testimony about how long the syringe had been in the parking lot. *See State v. Staten*, 2005 WL 7083835, *2 (Ct. App. 2005) ("Initially, we note that Lucius did not object to the hearsay statements

during Britt's testimony. Thus, the trial court did not have an opportunity to rule upon the objection. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") Nor did Target give the Garrisons an opportunity to provide a different quantum of proof on the issue of constructive notice. Had Target received a sustained objection, the Garrisons could have considered whether it needed to place other evidence before the jury on the issue of how long the syringe was in Target's parking lot. The upshot is that Target cannot call the Garrisons' evidence speculation on appeal when it never called it that at trial. *See, e.g., Grace v. State*, 31 N.E.2d 442, 444 (Ind. 2000) ("Because Defendant's counsel did not object to the proffered testimony on hearsay and speculation grounds, Defendant's claims of hearsay and speculation are not available on appeal.").

B. The jury was presented with circumstantial evidence that the syringe had been in Target's parking lot sufficiently long enough.

In addition to the direct testimony about how long the syringe had been in Target's parking lot, there was plenty of circumstantial evidence to support the jury's determination that it had been there sufficiently long enough. Included among the circumstantial evidence was the condition of the syringe, that the syringe was found around old and weathered trash, that other dangerous objects had remained in the parking lot for long periods of time, and that Target shirked its cleaning and inspection responsibilities. Circumstantial evidence undoubtedly may be used to prove that a dangerous object existed sufficiently long enough. *See*

Major, 410 S.C. at 3, 763 S.E.2d at 350 (explaining that "[c]onstructive notice is a legal inference").[3]

Target is wrong to say that the syringe's condition is not probative of how long it had been in the parking lot. It cites *Anderson v. Winn –Dixie Greenville, Inc.*, 257 S.C. 75, 184 S.E.2d 77 (1971) as support, but Target overstates the proposition for which the case stands. To accept Target's position would be to reject the idea that constructive notice, by definition, "is a legal inference[.]" *See Major*, 410 S.C. at 3, 763 S.E.2d at 350. Neither this Court nor the South Carolina Supreme Court has ever held that the condition and appearance of the dangerous object may not be considered as part of the overall constructive notice calculus.

Target's odd position would put this State in conflict with the rest of the nation. Jurisdictions all throughout the country accept the idea that a dangerous object's condition and appearance provides insight into how long it has been at a given location. *See, e.g., Evans v. Aydha*, 189 So.3d 1225, 1230 (Miss. Ct. App. 2016) (explaining that it was "quite convinced that the length of time the spot had existed c[ould] be reasonably inferred from the daughter's testimony describing it as 'sludge,' 'dirty,' and, in her judgment, at least a few days old"). Even Illinois, which Target admits on page 25 of its brief operates under "analogous . . . premises liability law[,]" acknowledges that an object's appearance can be probative, even if not dispositive. *See, e.g., Canales v. Dominick's Finer Foods, Inc.*, 416 N.E.2d 303,

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[3] This Court recently explained as follows: "When liability of a defendant, if any, is predicated upon constructive notice, . . . the instances are, indeed, rare in which a plaintiff can prove constructive notice by other than circumstantial evidence[.]" *See Breland v. South Carolina Dep't of Transp.*, 2016 WL 757496, *1 (Ct. App. 2016).

306 (Ill. Ct. App. 1981) (characterizing past cases as holding only that "appearance alone was insufficient to establish constructive notice"). The South Carolina Supreme Court has long held that courts "must consider all of the evidence in deciding whether the case[ ] w[as] properly submitted to the jury." *See, e.g., Guthke v. Morris*, 242 S.C. 56, 62, 129 S.E.2d 732, 735 (1963) (emphasis added).

The jury both saw and heard evidence in this case about the appearance of the syringe that supports the finding that it had been in Target's parking lot for a sufficient length of time. Photos entered into evidence show the syringe's worn and aged condition. (Pl. Trial Ex. 3, Pl. Trial Ex. 12) Manager Brintnall, who saw the syringe on the night of the incident, testified that the syringe was "dingy, dirty, and gross[,]" that the plunger was broken, and that the syringe was discolored. (Trial Tr. 151:22-25, 151:6-9, 152:10-13, 150:21-23) She further testified to seeing dings, divots, and grime on the syringe. (Trial Tr. 151:10-16, 182:22 – 183:4, 213:10-14) This testimony was consistent with Denise Garrison's testimony who also testified that it was dirty and nasty. (Trial Tr. 361:16) Target objected to none of this evidence. *See Tucker*, 413 S.C. at 405, 776 S.E.2d at 130 (explaining that evidence "received without objection becomes competent and its sufficiency is for the jury").

The syringe's condition and appearance also must be considered in conjunction with other items that provide a basis for comparison. This Court specifically has explained that other items in the general vicinity have "probative value on the issue of notice[.]" *See Ford v. South Carolina Dep't of Transp.*, 328 S.C. 481, 488-89, 492 S.E.2d 811, 815 (Ct. App. 1997) (citing *City of Phoenix v. Whiting*,

10 Ariz. App. 189, 457 P.2d 729 (1969)). Such relevant items in this case include trash and debris located near the syringe, the bolt, and the rod and spring.

Trial Exhibits P-3 and P-12 show the old and weathered trash. Clint Garrison observed for the jury that twine located near the syringe was discolored and appeared to have been run over by vehicles. (Trial Tr. 355:17-20). There was no testimony from anyone that it had been raining on the day of the incident, and the reports from Target's Manager do not mention anything about recent precipitation. It was reasonable for the jury to infer that the syringe, like the trash and debris, had been in Target's parking lot long enough to become aged and weathered.

Even more telling are the items for which there was a specific time frame for comparison. Clint Garrison testified and provided pictures of a bolt that had fallen from a buggy rack that Target allowed to remain in its parking lot for at least four months. (Trial Tr. 312:7 – 331:18, Pl. Trial Ex. 4, Pl. trial Ex. 7) Clint Garrison also testified that a rod and spring remained in Target's parking lot for at least 13 days. (Trial Tr. 331:19 – 332:13). The jury was entitled to infer that Target allowed the syringe to lay in its parking lot for a lengthy amount of time, just like it allowed the bolt, the rod, and the spring to remain there. Clint Garrison's testimony about the bolt, rod, and spring was admitted without objection from Target. *See Tucker*, 413 S.C. at 405, 776 S.E.2d at 130 (explaining that evidence "received without objection becomes competent and its sufficiency is for the jury").

More circumstantial evidence exists in the form of Target's failure to inspect and clean its parking lot. It simply is false for Target to claim, as it does on page 26 of its brief, that its own inspection and cleaning practices are "irrelevant[.]" Retailers like Target owe patrons a "duty of exercising ordinary care to keep the premises in reasonably safe condition." *See Solanki v. Wal-Mart*, 410 S.C. 229, 237, 763 S.E. 2d 615, 619 (Ct. App. 2014). If Target's cleaning and inspection practices were "irrelevant," then there would be no duty at all. The law is well established that Target's "duty of ordinary care" encompasses an obligation to both clean and inspect.

A red-herring is Target's claim that there is no evidence "that syringes were a recurring problem in the parking lot of Target's Anderson store." *See* Target Br. at 19 n.7. The question is not whether syringes, in particular, had been in the parking lot in the past; the question is whether Target knew that dangerous objects might find their way into the parking lot if it did not inspect and clean. *See Ford*, 328 S.C. 481, 489, 492 S.E.2d 811, 815 (explaining that the defendant need only be aware of "general problems of falling trees").[4] There is no doubt that the answer to this latter question is "yes."

Target's Manager expressly testified that it was important for "Target to keep its premises clean" and that she was "familiar with Target's responsibility to keep its premises reasonably clean." (Trial Tr. 130:13-16; *see also* Trial Tr. 136:17-

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[4] *See also Uhlich v. Canada Dry Bottling Co. of New York*, 305 A.D.2d 107 (N.Y. App. Div. 2003) (holding that there was sufficient evidence on the issue of constructive notice where there were recurring instances of "garbage, debris, potholes, broken asphalt and obstructive vehicles in the parking lot").

18 (It "is our duty to keep it clean.")) Target's Manager further testified that "Target regularly advertises and encourages mothers to come to the store" and that it is "important for the safety of children to make sure the parking lot is clean and debris [is] removed from it[.]" (Trial Tr. 131:5-7, 146:23 – 147:1) "[I]f debris, needles, pins, anything's left in the parking lot for an unreasonably long period of time," testified Target's Manager, it "puts the community in danger." (Trial Tr. 131:9-14, 147:6-11)

Further buttressing Target's awareness was the claim that it regularly cleans and inspects its parking lot. Target testified to utilizing a third party vendor who allegedly used a sweeper truck on its parking lot every Thursday night. (Trial Tr. 138:4-7, 235:18-22) Target also testified to inspecting the parking lot through its Property Maintenance Technician's "walk the vibes" and through its cart attendants. (Def. Trial Ex. 1) The problem with these claims, however, is that the jury did not believe that the company cleaned and inspected – even though the company was aware of the risks of dangerous objects ending up in the parking lot. *See Campbell v. South Carolina State Highway Dep't.*, 244 S.C. 186, 135 S.E.2d 838 (1964) (overruled on other grounds) (holding that it was enough to establish constructive notice that the defendant knew a drainage system was inadequate to take care of the excess water).

Among the evidence supporting the jury's disbelief was the following:

- Target had no records showing that a third party vendor actually comes, no invoices showing how much Target supposedly pays the third party vendor, and, despite the presence of surveillance cameras throughout Target's premises, no video showing what the

third party vendor purportedly cleans. (Trial Tr. 239:17-23, 279:2-8)

- Target's Property Maintenance Technician – whose job is to maintain Target's premises – could not even recall the name of the mysterious third party vendor. (Trial Tr. 235:8 – 236:22)

- Because of deposition testimony from Target that the third party vendor supposedly cleans the parking lot every Thursday night, Clint Garrison camped out at Target on a Thursday night prior to trial. (Trial Tr. 306:6 – 309:18) He was able to inform the jury that no sweeper truck ever showed up. (Trial Tr. 308:4-8)

- Target's Property Maintenance Technician maintained that he regularly conducts "walk the vibe" inspections, but the only evidence offered in support was a suspicious two-page log. (Def. Trial Ex. 1) The log, which supposedly is computer-generated, identifies both April 28, 2014 and April 29, 2014 as a "Monday." (Def. Trial Ex. 1) That of course is untrue, just as the jury was entitled to believe that Jackson did not actually perform two inspections on May 21, 2014 as the log indicates.

- Target employees testified that the company has no policy in place for ensuring that the parking lot is cleaned regularly or for verifying that cleaning actually takes place. (Trial Tr. 170:15-18, 175:15-20)

- Even though Target's Manager acknowledged the importance of cart attendants inspecting the parking lot, there was evidence that Target employees instead use cell phones and do not pay attention or remove hazards. (Trial Tr. 133:4-7, 248:2 – 249:6, 258:11-24) This was in violation of Target's own policies yet there was no evidence of cart attendants ever having been disciplined and no records documenting any alleged inspections by cart attendants. (Trial Tr. 258:11-14)

The jury then considered voluminous evidence regarding the consequences of Target's deficient practices. Pictures entered into evidence show old and weathered trash, in addition to other debris, in the parking lot. (Pl. Trial Ex. 3, Pl. Trial Ex. 8, Pl. Trial Ex. 12) Target's Manager's own documentation following the incident

indicated that the parking lot was not clean. (Pl. Trial Ex. 2, Pl. Trial Ex. 6) Denise Garrison, Clint Garrison, and Clint's mom all observed that they had seen "trash everywhere" in Target's parking lot on different occasions. (Trial Tr. 312:2-3, 363:21 – 364:15, 427:5-7) Clint Garrison presented the jury with evidence about the bolt remaining in the parking lot for at least four months and the rod and spring remaining in the parking lot for at 13 days, and Target's Property Maintenance Technician was adamant at trial that Target's practices had not changed from the date of the incident to the date of trial. (Trial Tr. 275:10-16, 312:7 – 333:13, Pl. Trial Ex. 4, Pl. Trial Ex. 7) All of this evidence was admitted without objection from Target. *See Tucker*, 413 S.C. at 405, 776 S.E.2d at 130 (explaining that evidence "received without objection becomes competent and its sufficiency is for the jury").

The South Carolina Supreme Court's recent decision in *Major* underscores the type of constructive notice evidence that will suffice. Target attempts to characterize *Major* solely as a "continual condition" case, but that is inaccurate. *Major* reversed this Court's determination that the defendant was entitled to judgment as a matter of law, holding both that "a genuine issue of material fact exists as to whether [the defendant] should be charged with constructive notice on the basis that the [dangerous condition] existed for such a period of time that [defendant], in the use of reasonable care, should have discovered it" and "that a genuine issue of material fact exists as to whether the recurring nature of the defect created a continual condition[.]" *See* 410 S.C. at 3-4, 763 S.E.2d at 350. Nothing about *Major* limits its rationale to a certain category of cases.

Target ignores that the facts of this case are strikingly similar to *Major*. There, the plaintiff "presented testimony that [the defendant] was aware drivers often cut the corner at the intersection where the unpaved area was located, leaving ruts[,]" and that the defendant "had a procedure for correcting the issue by filling the ruts with sand or clay." *Id.* at 3-4, 350. Likewise, in this case, the Garrisons presented evidence that Target knew that dangerous conditions could end up in the parking lot and that they accordingly purported to take actions regarding cleaning and inspection. The kicker in *Major* that satisfied the constructive notice inquiry was that the defendant "ceased efforts to correct the issue" prior to the plaintiff's injury; that is the kicker in this case as well, for the jury was shown that Target shirked its cleaning and inspection obligations. *Id.* If the evidence in *Major* was sufficient, then so is the evidence in this case.

C. The jury was presented with evidence that Target spoliated evidence and thus was entitled to infer that the syringe had been in Target's parking lot sufficiently long enough.

In addition to the direct testimony about how long the syringe had been in Target's parking lot, and in addition to all of the circumstantial evidence supporting the jury's determination that it had been there sufficiently long enough, this case has the added component of spoliation. Spoliation is the doctrine which allows a jury to draw a negative inference against the party responsible for losing or destroying evidence. *See, e.g., Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 521, 629 S.E.2d 675, 679 (Ct. App. 2006).

The jury was unable to see the actual syringe that injured Denise because Target lost it on two separate occasions. (Trial Tr. 183:11 - 189:17) Target took

possession of the syringe the night of the incident, but Britnall later testified in a deposition that the syringe was destroyed by another Target employee. (Trial Tr.178:20 – 179:9, 183:11 – 184:25). At trial, however, Britnall was forced to admit that her deposition testimony was false. (Trial Tr. 183:11 – 184:25) Britnall confessed that the syringe turned up after her deposition, but she testified that it subsequently was lost again. (Trial Tr. 185:5 – 188:10) Britnall had no explanation for what happened to the syringe other than to call it "a great mystery." (Trial Tr. 188:7)

The trial court instructed the jury as follows on the issue of spoliation: "I charge you that when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence was lost or destroyed by the party would have been adverse to that party." (Trial Tr. 505:21 – 506:1) Target did not object to the trial court's instruction.

Given Target's loss of the syringe, the jury was entitled to infer that the constructive notice element was satisfied. This Court has held, as general matter, that elements of a cause of action may be satisfied through spoliation. *See, e.g., Stokes v. Spartanburg Regional Medical Ctr.*, 368 S.C. 515, 629 S .E.2d 675 (Ct. App. 2006). And courts across the country have held, in particular, that the constructive notice element may be satisfied through spoliation. *See, e.g., Schweikart v. Franciscan Health Sys.-W.*, 149 Wash.App. 1038 (Wash. Ct. App. 2009) (explaining, in a premises liability case, that "the fact finder may infer

constructive notice if it determines that [the defendant was] responsible for the spoliation of evidence").

Target points to the case of *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009), but *Pringle* is no obstacle. It affirmed a grant of summary judgment because there was no evidence that the chair in question "might reasonably have supported [the] presumption [ ] being requested of the fact finder[.]" *See* 382 S.C. at 787, 675 S.E.2d at 405. Specifically, the *Pringle* court reasoned that "there was no indication the chair was wobbly, weak, unstable, or otherwise defective immediately prior to its collapse." *Id.* Unlike in *Pringle*, however, this is an appeal from the trial court's grant of a spoliation instruction that Target did not object to, as opposed to a denial of summary judgment. This also is an appeal from a record full of evidence regarding the syringe's worn condition and testimony from Target's Manager that the syringe was the "central piece of evidence" in the case. (Trial Tr. 185:1-4) *Pringle* and this case are worlds apart.

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Target failed to lodge any objections in the trial court to all of the evidence presented on the issue of constructive notice. Combine that with the fact that the "any evidence" standard is one of the most deferential standards in all of the law, and Target's burden is insurmountable.

This Court's ordinary practice is to summarily affirm sufficiency of the evidence challenges like this one pursuant to Rule 220(b). *See, e.g., Breland*, 2016

WL 757496 at *1 (affirming on the issue of constructive notice). That same approach may be utilized here. Any of the evidence discussed above alone satisfies the standard, and it certainly suffices cumulatively.

II. The trial court properly denied Target's request for a new trial.

Target's alternative request for a new trial underscores precisely what the Garrisons highlight in their principal appeal: that the trial court confused the concept of what it means to qualify for punitive damages with the concept of what it means for a punitive damages award to be excessive. Nowhere in the trial court's order is there a finding that the jury's verdict "was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives." *Compare* Target Br. at 31 *with* (1/26/2017 Order). The trial court, quite differently, acknowledged that the jury was justified in ruling in the Garrisons' favor because Denise Garrison's injuries "resulted from [Target]'s failure to make the parking lot safe[.]"[5] (1/26/2017 Order, p.7) This Court need not reach Target's request for a new trial because the jury's punitive damages award should be reinstated.

What's more is that Target's argument is not even properly before this Court. Target claims that, because the trial court vacated the jury's punitive damages award, the trial court necessarily was required to grant its request for a new trial. *See* Target Br. at 33. If Target actually believed that were true, however, Target

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[5] As explained in the principal appeal, the trial court's ruling was premised on the unwarranted belief that prior injuries in Target's parking lot were necessary to sustain the punitive damages award. (1/26/2017 Order, p.7) It is black letter law, however, that there need not be evidence of previous injuries to support a finding that the defendant acted in a reckless manner. *See Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). "Repeated" conduct is a factor for considering whether a punitive damages award is too much, but it is not a factor for determining whether any punitive damages at all are appropriate. *See, e.g., Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 482 (Ct. App. 2011).

was required to file a Rule 59(e) motion after the trial court issued its January 26, 2017 order. It is well settled that, "[w]hen an order is internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review." *See* Jean Hoefer Toal, et al., APPELLATE PRACTICE IN SOUTH CAROLINA 188 (3d ed. 2016) (citing *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002)).

Target, in reality, understands that the trial court did not abuse its discretion in denying its request for a new trial. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004) (explaining that the decision to deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal). A new trial constitutes an extraordinary remedy, which is available only when "the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." *See, e.g., Graham v. Town of Latta*, 417 S.C. 164, 182-83, 789 S.E.2d 71, 80 (Ct. App. 2016) (emphasis added). Again, the trial court did not indicate that the jury's verdict shocked its conscious or that it believed the jury's verdict was colored by an improper motive. (1/26/2017 Order, p.7) It is clear, especially in light of the trial court's denial of Target's directed verdict motion on the issue of punitive damages, that the trial court merely confused the difference between eligibility and excessiveness.

Target's suggestion that the jury's punitive damages award improperly infected the whole trial is especially curious, since Target never even requested that the punitive damages phase of the case be bifurcated. Under Section 15-32-520(A) of the South Carolina Code, the punitive damages phase of a jury trial "must be conducted in a bifurcated manner[,]" "if requested by any defendant against whom punitive damages are sought[.]" The whole purpose of bifurcation is to avoid potential prejudice. *Cf.* FED. R. CIV. P. 42(b) (providing that, "to avoid prejudice," a "court may order a separate trial of one or more separate issues [or] claims"). Target may not, for the first time on appeal, complain of prejudice when it failed to take advantage of the bifurcation procedure available under the rules.

Nor is there is any merit to Target's far-fetched suggestion that the jury was prejudiced against the company because of the Garrisons' closing argument. Beyond being entirely speculative, there is a more straightforward reason why Target relegates its argument to a footnote: Target did not object to anything said during closing argument. (Trial Tr. 463-502) It is beyond well settled that a failure to contemporaneously object results in waiver. *See, e.g., In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238-39 (S.C. 2001) (finding issue of improper comments during closing arguments was not preserved absent a contemporaneous objection). Target's reference to the Garrisons' closing argument is, to use Target's own words, "a thinly veiled" attempt to misdirect attention from its own egregious conduct. *See* Target Br. at 32 n.10.

In fact, not only did Target not object during closing, Target's counsel facilitated the very discussion the company now complains about. Target objects to what it characterizes as a "repeated emphasis" on its revenue, *see* Target Br. at 12, but it fails to mention that its own counsel reiterated that Target is worth billions of dollars five times himself. (Trial Tr. 488-97). Target's counsel then went further by admitting that Target was a "giant company" who would not have been impacted by paying Denise's medical bill. (Trial Tr. 496:10-21). There can be no cause to complain when counsel engages in the very battle he insists is improper. *See State v. Maurer*, 1996 WL 745217, *4 (Minn. Ct. App. 1996) (rejecting closing argument challenge, where "defense counsel did not object and in fact responded in his closing argument"). Again, this Court has made clear that its job is not to save litigants from their strategic trial mistakes. *Cf. Valentine*, 319 S.C. at 173, 460 S.E.2d at 220.

Regardless of what was said during closing, though, the jury was warned that neither Target's lawyer's comments nor the Garrisons' lawyer's comments were to be considered "evidence" in the case. (Trial Tr. 104:20-21). Jurors are presumed to follow a court's instructions. *See State v. Ard*, 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998), *rev'd on other grounds*, 340 S.C. 291, 531 S.E.2d 524 (2000). Any problem with the remarks, therefore, "was cured by the judge in his instructions to the jury that closing arguments by counsel are not evidence." *See, e.g., Commonwealth v. Burns*, 455 N.E.2d 449, 450 (Mass. App. Ct. 1983).

The bottom line is that Target cannot satisfy the high standard for obtaining a new trial. The Garrisons' separate appeal explains why the jury's punitive damages verdict was entirely justified, but there certainly is no evidence that the jury's verdict was the result of improper motives. Target advances a *per se* rule that necessarily would require a new trial anytime judgment as a matter of law is granted on the issue of punitive damages. Not only is such a rule inefficient as a practical matter, it is not the law either.

CONCLUSION

This record contains far more evidence than is necessary to support the jury's liability determination and to support the trial court's denial of Target's request for judgment as a matter of law on the constructive notice element. In fact, this record contains virtually every type of evidence possible to support a claim – direct evidence, circumstantial evidence, and spoliation. Target did not object to any of the evidence presented to the jury, and there is no reason whatsoever to overturn the trial court's affirmance of the jury's liability finding.

Equally unmeritorious is Target's request for a new trial. The company points to no evidence demonstrating that the jury decided this case based on improper motives, instead hanging its hat on the trial court's mistaken grant of judgment as a matter of law on the issue of punitive damages post-trial. This latter argument was not preserved in the trial court and fails on the merits in any event. Target is not entitled to a re-do of the jury trial it lost.

Dated: June 12, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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