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SC Court of Appeals

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.

Appellants'/ Cross Respondents' Initial Reply Brief

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INTRODUCTION

The settled law in this State is that "substantial deference should be given to a jury's determination of damages." *See Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (2005). But the trial court did not follow this rule. Even though the trial court denied Target's request for a directed verdict on the issue of punitive damages, it reversed course after the jury returned its verdict. That is shocking because the jury's award should have confirmed for the trial court that Target's actions were at a minimum reckless.

Target wants very badly to poison the well and make this Court think the verdict was the product of a runaway jury. Not so. Twelve citizens, from one of the most conservative counties in this State, were guided by nothing other than the evidence. The outcome of this jury trial resulted from Target's own conduct and trial strategy.

Indeed, there is little wonder the jury levied such a substantial award. They heard evidence that Target initially told Denise Garrison to bring her medical bills to the company but then refused to pay them after she agreed to be interviewed by the company's investigator while she was recovering from treatment. (Trial Tr. 369:7-17, 369:13-17, 383:7-25 – 385:1-12, 428:3-14, 338:5-13) They heard and saw evidence proving that Target takes no meaningful steps to clean or inspect its parking lot and that dangerous objects remain in Target's parking lot for long periods of time. *See* Garrisons' Initial Br. at 15-26. They saw that Target did not put on a case-in-chief, that the only document Target entered into evidence contained indisputably false information, that Target conveniently lost what was

described as the "central piece of evidence" in the case, and that Target's Manager admitted on the stand to testifying falsely in her prior deposition about the central piece of evidence. *Id.* And if all of this were not enough Target's attorney told the jury during closing arguments that his client was a "$73 billion dollar-a-year corporation" that would not have been affected if it had paid Denise's medical bills. (Trial Tr. 489:8-11, 496:12-17)

It simply is difficult in light of this record on appeal to have sympathy for Target. That is especially so considering that the company rejected the opportunity to end this litigation for $12,000.00 in February 2015, when Denise made an offer of judgment. It is not the job of the courts to second-guess the jury or to save parties from strategic mistakes. *See Gray v. Spillman*, 925 F.2d 90, 95 (4th Cir. 1991) ("It is not our job to weigh the evidence [or even to] disregard stories that seem hard to believe. Those tasks are for the jury."); *Ramirez-Flores v. Houston*, 2009 WL 2351737, *4 (D. Neb. 2009) (quoted case omitted) ("[T]hese decisions clearly involve trial strategy and the case law in this state is well-settled that it is not the job of this Court or appellate courts to second-guess reasonable strategic decisions made by counsel during trial.").

REPLY ARGUMENT

The Garrisons' opening brief explained why the jury's punitive damages award should be reinstated. The Garrisons' opening brief also explained how the trial court misapplied South Carolina's offer-of-judgment rule. This reply brief addresses Target's flawed oppositional arguments.

I. The trial court did not apply the proper legal framework.

The Garrisons' opening brief explained that the trial court conflated evidentiary sufficiency with constitutional excessiveness. Indeed, rather than focusing on whether there was sufficient evidence to support the jury's determination that Target acted recklessly, the trial court focused on whether Target's conduct was reprehensible. "Eligibility" and "excessiveness" are distinct concepts. Reprehensibility only is relevant to the former and not to the latter.

Tellingly, Target does not defend the trial court's flawed analysis. Target instead confesses that the trial court employed the wrong legal standard, as it asks this Court to affirm the trial court's ruling on "alternative grounds." Rule 220(c) permits[1] affirmance on alternative grounds, but the alternative ground sought by Target is suspect. Ordinarily, parties seek alternative-grounds affirmance on an argument that the trial court did not pass judgment upon. Here, though, Target asks this Court to affirm on a ground that the trial court did in fact pass judgment upon – namely, whether there was sufficient evidence to allow the jury to decide the question of punitive damages in the first place.

The problem Target faces is that, at the directed verdict stage, the trial court properly determined that there was sufficient evidence from which the jury could find that Target acted recklessly. (Trial Tr. 457:13-25) The trial court's later grant of judgment as a matter of law can be explained only by its utilization of the wrong

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[1] Just because this Court may consider alternative grounds, does not mean that this Court must consider alternative grounds. *See, e.g., State v. Frey*, 362 S.C. 511, 518-19, 608 S.E.2d 874, 878 (Ct. App. 2005). It would of course be permissible for this Court to clarify the appropriate legal standard and then remand this case to the trial court. As explained in the opening brief, however, this record provides ample evidence for this Court to simply reinstate the jury's verdict.

legal standard. If the trial court believed the jury awarded too much, then remittitur – not vacatur – was the proper remedy. This Court must correct the trial court's flawed analysis.

II. Under the proper legal standard, Denise Garrison was eligible for punitive damages.

Given that Target recognizes the trial court utilized the wrong legal standard, it is forced to defend the result reached by the trial court through a revisionist account of the evidence. Target attempts to bury the governing standard of review in a footnote, but it cannot hide from the rule that all reasonable inferences must be drawn in the Garrisons' favor and that, where there are competing inferences, the jury's determination must control. *See* Target's Initial Response Br. at 18 n.9 (citing *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 394, 714 S.E.2d 904, 910 (Ct. App. 2011)). Twelve Anderson County jurors flatly rejected the one-sided version of the facts that Target touts in its oppositional brief.

In truth, the evidence presented at trial was not close. The Garrisons called five witnesses and had 12 exhibits entered into evidence while Target rested without putting on a case-in-chief. (Trial Tr. 2 – 5) The only exhibit Target entered into evidence during the Garrisons' case-in-chief was a two-page log that contained false information, and Target's Manager was forced to admit on the stand that Target spoiled the "central piece of evidence in the case" and that she gave materially false testimony during her deposition about the spoliation. (Def. Trial Ex. 1, Trial Tr. 183:11 – 184:25) The version of events Target describes on appeal cannot be squared with what the jury actually heard and saw.

A perfect example of Target's mischaracterization of the evidence is its claim that Denise Garrison suffered only a "minor" injury. The Garrisons' opening brief recounted Denise's injuries in detail:

> 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)

All of this evidence, which is conspicuously absent from the oppositional brief, refutes Target's depiction of Denise's injury as a "minor" one.

In a similar fashion, Target misconstrues the record evidence regarding its own actions and omissions. For Target to be eligible for a punitive verdict, there need only be evidence (1) that Target was aware that dangerous conditions could

make their way into its parking lot if it did not properly clean and inspect and (2) that Target recklessly shirked its obligation to clean and inspect. *See Graham v. Whitaker*, 282 S.C. 393, 400, 321 S.E.2d 40, 44 (1984) (explaining that reckless conduct warrants punitive damages and that it is for a jury to determine whether a premises owner has "recklessly breached the active, affirmative duty to make [its] premises reasonably safe to all invitees."). This record contains plenty of evidence of both (1) and (2).

With respect to knowledge, Target attempts to distort the governing legal standard. Nothing in the law requires, as Target suggests on pages 21 and 22 of its oppositional brief, needles to have been found in the parking lot on previous occasions. All that is required is that Target be aware that dangerous conditions could make their way into the parking lot if it does not reasonably clean and inspect. *See Graham*, 282 S.C. at 400, 321 S.E.2d at 44. It would impose an impossible burden for a court to hold that punitive damages are off limits simply because there is a single incident of harm. The very case Target relies on in its brief, *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 482 (Ct. App. 2011), makes clear that whether a defendant has engaged in "repeated actions" speaks to the excessiveness of punitive damages, not to a defendant's eligibility for punitive damages.

There is no question here that Target knew it had a duty to clean and inspect. The Garrisons' opening brief details the testimony of Target's Manager, where she expressly acknowledged Target's duty to keep the premises safe. *See*

Garrisons' Initial Br. at 20. The Garrisons' opening brief also details the measures Target claimed it used to clean and inspect – all of which show that it was aware of its legal obligation to keep its premises safe. *Id.* at 20-24. Target's oppositional brief even concedes on page 21 that it has an "obligation[ ] to maintain a safe premises."

Nonetheless, even if the Garrisons needed to show other instances of harmful conditions, there is plenty of that type of evidence in any event. Target cryptically states that there is no evidence of dangerous conditions "before May 21, 2014[,]" but it ignores Jon Jackson's testimony that Target's practices did not change from the date of the incident to the date of trial. (Trial Tr. 275:10-16) The jury was presented with evidence of a bolt that had fallen from a buggy rack that Target allowed to remain in its parking lot for at least four months and a rod and spring that Target allowed to remain in its parking lot for at least 13 days. (Trial Tr. 312:7 – 331:18, 331:19 – 332:13, Pl. Trial Ex. 4, Pl. trial Ex. 7). The jury also saw a picture of a buggy rack in Target's parking lot that was falling down and heard testimony about "trash everywhere" on different occasions. (Pl. Trial Ex. 7, Trial Tr. 312:2-3, 363:21 – 364:15, 427:5-7) All of this evidence was admitted without objection and allowed the jury to conclude that Target knew it was not doing what it needed to do to keep its parking lot safe. *See Tucker v. Doe*, 413 S.C. 389, 405, 776 S.E.2d 121, 130 (Ct. App. 2015) (explaining that evidence "received without objection becomes competent and its sufficiency is for the jury").

With respect to recklessness, Target tries to paint itself as a responsible department store that goes above and beyond to eliminate dangers that could injure patrons. The actual evidence considered by the jury, however, refutes this inaccurate depiction. One need only look to the jury's ultimate verdict to conclude that the evidence presented at trial does not match Target's false portrayal.

The record does not support Target's claim that it cleaned its parking lot with a sweeper truck from a third party once per week. No employee of the alleged third party vendor testified at trial, and Target presented no records showing that a third party vendor ever came, no invoices showing that a third party vendor was ever paid, and, despite the presence of surveillance cameras throughout Target's premises, no video showing that the third party vendor ever cleaned anything at all. (Trial Tr. 239:17-23, 279:2-8) Jackson could not even recall the name of the alleged third party vendor, and Clint testified that, when he camped out at Target on a Thursday night prior to trial to see if there really was a sweeper truck, no such truck ever showed up. (Trial Tr. 235:8 – 236:22, 306:6 – 309:18) All of this more than justified the jury's "reasonable" rejection of Target's sweeper truck defense, especially when considered alongside the mountain of evidence showing that various dangerous objects remained in Target's parking lot for long periods of time and that multiple witnesses testified about Target's parking lot being filthy on different occasions.

The record also does not support Target's claim that it cleaned its parking lot with housekeeping staff four times per week. No housekeeping employee testified at trial, Target presented no records related to housekeeping, and, despite the presence of surveillance cameras throughout Target's premises, no video was shown of any housekeeping cleaning at all. (Trial Tr. 239:17-23, 279:2-8) All of this justified the jury's "reasonable" rejection of Target's housekeeping defense, especially when considered alongside the mountain of evidence showing that various dangerous objects remained in Target's parking lot for long periods of time and that multiple witnesses testified about Target's parking lot being filthy on different occasions.

The record further does not support Target's claim that its cart attendants routinely inspected its parking lot for dangers. No cart attendant employee testified at trial, Target presented no records related to cart attendant inspections, and, despite the presence of surveillance cameras throughout Target's premises, no video was shown of any cart attendant inspecting anything but a cell phone. Jackson testified that cart attendants should not use their cell phones in the parking lot, but, when confronted with a picture of a distracted cart attendant, he admitted that the cart attendant was "looking [down] at something." (Trial Tr. 248:2-7, 258:11-14, 248:22 – 249:5). Unlike the picture Target references in its brief, Jackson's oral testimony was not objected to and thus became sufficient for the jury to consider. *See Tucker*, 413 S.C. at 405, 776 S.E.2d at 130. All of this justified the jury's "reasonable" rejection of Target's cart attendant defense, especially when considered

alongside the mountain of evidence showing that various dangerous objects remained in Target's parking lot for long periods of time and that multiple witnesses testified about Target's parking lot being filthy on different occasions.

Target's cleaning and inspection evidence hinged on the testimony of Jackson. It was his job to maintain the parking lot, but the jury had good reason to reject his testimony. (Trial Tr. 235:8 – 236:22) Jackson testified about conducting "walk the vibe" inspections, which he claimed he documented through a computer-generated log. (Trial Tr. 279:25 – 280:8) The two-page log, however, contained false information. (Def. Trial Ex. 1) The log identified both April 28, 2014 and April 29, 2014 as a "Monday." (*Id.*)

Without analysis, Target boldly claims that the false log did not permit the jury to infer that Jackson falsified evidence or to infer that Jackson's testimony was untrue. That contention is mind-blowing. A reasonable inference is simply a conclusion that common sense would lead a juror to deduce from the evidence. Jackson presented no explanation for why the log was inaccurate, so the jury certainly was entitled to conclude that Jackson was responsible for a document he admitted preparing. Similarly, because there is voluminous evidence in the record showing that Target's parking lot was unkempt for long periods of time on different occasions, the jury certainly was entitled to conclude that Jackson was not telling the truth about Target's cleaning and inspection practices. The law is clear that inferences must be "liberally construed[,]" and an inference is "reasonable" so long as "there is good reason for questioning the credibility of the witness[.]" *See Repko*

v. County of Georgetown, 416 S.C. 22, 33-34, 785 S.E.2d 376, 381-83 (Ct. App. 2016) (explaining that inferences must be "liberally construed"); *Page v. Crisp*, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct. App. 1990) (discussing when a witness' testimony may be rejected).

Target's response to the jury's spoliation finding likewise falls flat. It claims that its loss of the "central piece of evidence" in the case does not create an independent basis for punitive damages because it was not intentionally lost. The obvious problem with that assertion, however, is that the jury was entitled to conclude that Target's conduct was in fact intentional. *See Gilbert v. Duke Power Co.*, 255 S.C. 495, 179 S.E.2d 720 (1971) (explaining that the jury is entitled to draw any reasonable inferences from the evidence). Just because Target alleges that its actions were negligent does not make them so. The jury was presented with evidence that Target could not produce the syringe on two separate occasions and that Target's Manager testified falsely in a deposition about what happened to the syringe. (Trial Tr. 178 – 189) Again, Target's position is premised on a clouded view of what constitutes a "reasonable" inference.

Regardless, even if Target's spoliation is not accepted as an independent basis for punitive damages, it certainly must be considered as part of the overall calculus. It is axiomatic that appellate courts must consider "the record as a whole" when evaluating questions of evidentiary sufficiency. *See Beard v. Cabaniss*, 166 S.C. 173, 164 S.E. 441, 443 (1932). Target's flawed appellate strategy is to attack

discrete pieces of evidence, without acknowledgment of the surrounding context in which the jury considered the case.

As detailed in the opening brief, there is voluminous evidence supporting the jury's determination that Target acted recklessly. Among the evidence are testimony and documents showing that dangerous objects remained in Target's parking lot for long periods of time, testimony showing that Target's parking lot was consistently dirty, testimony and documents showing that Target did nothing to ensure that its parking lot was consistently cleaned or inspected, testimony showing that Target violated its own policies, and testimony about Target spoiling the "central piece of evidence" in the case. *See* Garrisons' Initial Br. at 15-26. All of this provides far more evidence than is required to support a reasonable inference of recklessness. *Compare Solanki v. Wal-Mart*, 410 S.C. 229, 237, 763 S.E. 2d 615, 619 (Ct. App. 2014) (affirming denial of motion for judgment as a matter of law on punitive damages in a gross negligence case) *with* this case.

The bottom line is that the Supreme Court has unequivocally stated that punitive damages are "a factually controlled concept whose determination best rests with the jury." *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 144, 638 S.E.2d 650, 661 (2006). And this Court has been adamant that credibility determinations and the drawing of legitimate inferences are not functions for the court. *See, e.g., Anderson v. The Augusta Chronicle*, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App. 2003). If punitive damages are deemed unavailable in a case where the jury saw witnesses impeached, false documentation presented, and

spoliation of evidence, it is hard to imagine when a punitive damages verdict might ever be permissible. This Court must reverse the trial court's decision to usurp the jury's findings.

III. The entirety of the jury's punitive damages verdict should be reinstated or, at a minimum, it should be remitted to $2 million.

After this Court concludes that the trial court wrongly deemed Denise ineligible for punitive damages, the question then becomes: how much she is entitled to? Target wants this Court to apply a $500,000.00 cap, but Denise believes she is entitled to the $4,510,000.00 the jury said she deserved. The analytical path for addressing the competing positions follows.

A. The jury's punitive damages award is constitutional.

The Garrisons' opening brief explained why all three constitutional factors – reprehensibility, ratio, and comparative cases – support the jury's punitive damages award. Only by ignoring pertinent facts and distorting the law can Target suggest otherwise.

It is clear that, in discussing reprehensibility, Target wants this Court to focus on "injuries" rather than "conduct." Target falsely characterizes Denise's injury as a "minor" one and states that, "[f]or all the jury knew, Denise Garrison was the only person ever injured at the Anderson store." This is a smoke screen because "reprehensibility" turns, primarily, on the egregiousness of Target's conduct, not on Denise's or anyone else's injuries.

Again, each of the considerations underlying the reprehensibility factor favor Denise. The evidence recounted above shows that Denise suffered physical injuries. The evidence shows that Target was aware of its obligation to maintain a safe parking lot yet the jury and the trial court found that Denise's injuries "resulted from [Target's] failure to make the parking lot safe[.]" (1/26/2017 Order, p.7) The evidence shows that Denise was financially vulnerable yet Target failed to pay her medical expenses. *See* Garrisons' Initial Br. at 32 n.8. The evidence recounted above shows that Target's parking lot was filthy on many different occasions, thus demonstrating "repeated" inaction on Target's part. The evidence recounted above shows that Target's inaction was not a "mere accident" because it consistently refused to clean and inspect, even though it knew that its parking lot was unkempt. Target blatantly ignores all of the record evidence on each of these reprehensibility considerations.

Target similarly is silent on all of the evidence supporting this case's 45:1 ratio. Target does not, because it cannot, dispute this Court's prior acknowledgement that a single digit ratio is not mandatory. *See Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 315, 529 S.E.2d 45, 62 (Ct. App. 2000). The purposes underlying punitive damages are to punish and deter, and these purposes would not be realized if a mere single digit ratio were applied to an admitted "$73 billion dollar-a-year corporation." (Trial Tr. 489:8-11) Target characterizes what happened to Denise as a freak accident, but the evidence does

not support that view. The jury rightly determined that Target was well aware that it was shirking its cleaning and inspection obligations yet did nothing about it.

Target accuses Denise of fuzzy math when discussing *Mitchell*, but Denise's opening brief readily acknowledged that *Mitchell*'s ratio was comprised of both "actual" and "potential" damages. The actual to punitive ratio was around 54:1 while the combined actual/potential to punitive ratio was 9.2:1. The point is that, just like in *Mitchell*, this Court should consider the potential harm that Target's conduct could have caused in addition to the harm that it actually caused. Target cites no case holding that potential harm must be "expert endorsed."

No meaningful response is provided by Target to the comparative cases offered by Denise either. True, neither party cites to a case that is factually on all fours with this one, but that is because Target's conduct was beyond the pale. If this Court was willing to uphold a multi-digit ratio in a case involving a rental car company's unauthorized credit card charge, then certainly the jury's multi-digit ratio in this case is permissible. *Compare Lister v. NationsBank of Delaware, N.A.*, 331 S.C. 277, 94 S.E.2d 449, 458-59 (Ct. App. 1997) *with* this case. Rather than involving a monetary exchange, this case dealt with infectious disease treatment because one of the nation's largest retailers consciously flouted its obligation to reasonably clean and inspect.

This Court should follow the lead of the South Carolina federal court that previously rejected all of the same arguments Target repeats in this case. *See Cantrell v. Target Corp.*, Civil Action No. 6:06-2723-BHH, Docket No. 125 (D. S.C.

2008). *Cantrell* upheld a three-million-dollar punitive damages award against Target in a case where there was only $100,000.00 in actual damages, i.e. a 30:1 ratio. *Id.* at 1. Significantly, *Cantrell* recognized that a single digit multiplier would do nothing to punish and deter a company that "makes $2,293,493 of gross profit *per hour*." *Id.* at 38. (emphasis in original).

On a final note, Target misapplies the law in its discussion of remedies. The Garrisons have addressed in their respondent's brief to Target's cross appeal why a new trial is not warranted, but, even if this Court were to determine that the jury's punitive damages verdict was excessive, a new trial is not automatic. Denise should be given the option of a new trial or a remittitur, if this Court were to find the jury's verdict to be excessive. *See, e.g., Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 493, 361 S.E.2d 775, 776 (Ct. App. 1987).

B. Target waived application of the Civil Justice Act caps.

This Court already has rejected the very argument Target advances in hopes of avoiding its failure to plead the Civil Justice Act caps in its answers or during trial. *James v. Lister*, 331 S.C. 277, 283, 284, 500 S.E.2d 198, 201 (Ct. App. 1998) holds that defendants are required to plead "liability limits that affect proof at trial[.]" The Civil Justice Act caps plainly "affect proof at trial" because which cap applies – the $5,000,000.00 cap, the $2,000,000.00 cap, or the unlimited cap – depends on what proof is offered regarding the defendant's conduct. The Civil Justice Act caps also plainly serve as "liability limitations" because they affect how much money a defendant ultimately has to pay. None of Target's belated attacks cure its pleading error.

The oppositional brief begins with a discussion of *James*, but it is unclear how the discussion benefits Target. The company notes that the statute at issue in *James* "required the plaintiff to prove *to the jury* 'a greater degree of negligence in order to recover damages in excess of $200,000[.]'" *See* Target's Initial Response Br. at 39 (emphasis in original). That is exactly the same thing the Civil Justice Act does. Denise was required to prove a different degree of misconduct on Target's part to reach the unlimited cap or the $2,000,000.00 cap as opposed to the $500,000.00 cap. The distinction Target offers between this case and *James* is no distinction at all.

Nor is it helpful for Target to suggest that Texas[2] adheres to a different rule. This Court in *James* surveyed cases from all across the country, acknowledging that some states require liability limits to be pled and other states do not. *See* 331 S.C. at 284, 500 S.E.2d at 202. After conducting that survey, this Court placed South Carolina in the category of states that require liability limits affecting proof at trial to be pled. *Id.* Target implicitly is asking this Court to overrule *James* without providing any persuasive justification for doing so.

In fact, Target's reasoning is inconsistent with its own conduct. The company characterizes the Civil Justice Act caps as "appl[ying] to all civil actions[,]" but the same can be said for the due process clause's constitutional check on excessive

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[2] Target's reliance on *Zorilla v. Aypoco Constr. II, LLC*, 469 S.W.3d 143 (Tex. 2015) is entirely unfounded in any event. Texas, unlike South Carolina, has a single cap that applies to all cases. *See Zorilla*, 469 S.W.3d at 155. The Texas Supreme Court specifically held that the cap need not be pled as an affirmative defense because "it does not require proof of any additional fact to establish its applicability[.]" *Id.* at 157. As explained in the opening brief and above, South Carolina's caps conversely require proof of certain facts in order for them to apply. The reasoning from *Zorilla* therefore cuts in favor of the Garrisons' argument and against Target's.

punitive damages. Even though no one "can reasonably claim surprise" by the due process clause, Target nonetheless invoked the Constitution as an affirmative defense in both of its answers. (8/14/2014 Answer, 11/18/2015 Answer) The fact that everyone knows a certain affirmative defense exists does not alleviate a defendant's obligation to plead it any more than the rule that plaintiffs must plead all of the causes of action upon which they seek to recover. Knowledge is not an excuse for inaction.[3]

Perhaps most ironic, though, is Target's harsh suggestion that Denise's conduct somehow demonstrates an "ignorance of the law[.]" To hear Target tell it, one would think that it was Denise who failed to plead something she was supposed to plead. Target is the party that did not satisfy the governing pleading requirement, and the company's rhetoric[4] does not save the day.

C. In the alternative, the Civil Justice Act caps are unconstitutional.

Even if Target had not waived application of the caps, they still would be inapplicable in this case. That is so because the caps are incompatible with the Constitution. Target acknowledges that this is an issue of first impression in South Carolina and that other states are split on the issue.

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[3] This Court should take judicial notice of the fact that it is common practice in South Carolina for defendants to plead the punitive damages caps as an affirmative defense. *See, e.g., Hunter v. Eliowen*, Case No. 2016-CP-23-0290 (Greenville County Court of Common Pleas April 8, 2016) (raising, as an affirmative defense, the following: "The Defendant does plead the limitations on damage awards found in S.C. Code Ann. § 15-32-510 et. seq., and requests bifurcation in accordance with these code sections."), *available at* https://www2.greenvillecounty.org/SCJD/PublicIndex/PIImageDisplay.aspx?ctagency=23002&doctype=D&docid=1460140392014-981&HKey=1111125678871135269665076678871116111110796853100896510774102705285122109751047648794955995612010956

[4] Target similarly suggests there was a "deficiency" in Denise's case, but a jury of 12 obviously did not agree.

Target points to *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990) as persuasive authority but discounts a fundamental distinction: *Wright* involved a liability limitation applicable to governmental entities under the Tort Claims Act while this case involves private parties. Significantly, governmental entities are protected by the doctrine of sovereign immunity, except to the extent that the Legislature has waived that immunity through the Tort Claims Act. *See, e.g., Hawkins v. City of Greenville*, 358 S.C. 280, 292-93, 594 S.E.2d 557, 563-64 (Ct. App. 2004). It makes perfect sense, then, that the Legislature possesses the constitutional authority to protect governmental entities with damage limitations when governmental entities are only subject to suit to begin with because the Legislature has waived their sovereign immunity. *Id.* The statute at issue in *Wright* and the statute at issue here are apples and oranges.

What's more is that *Wright* was decided in 1990 and contained only three paragraphs of analysis. Since 1990, the law regarding the constitutionality of punitive damages caps has developed dramatically. The most recent case cited by either party is the Missouri Supreme Court's decision in *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) (en banc), which struck down a punitive damages cap that is nearly identical to South Carolina's cap. The reasoning of *Lewellen* should control.

D. Even if Target had not waived the Civil Justice Act caps, and even if the Civil Justice Act caps are constitutional, the $2 million cap – as opposed to the $500,000.00 cap – is the appropriate liability limitation.

Target pays short shrift to Denise's position that the $2 million cap is the appropriate cap. In conclusory fashion, Target simply maintains that Section 15-

32-530(B)(1)'s requirements are not met. That contention is at odds with the record evidence.

There certainly was testimony from which the jury could reasonably infer that Target's failure to clean and inspect was motivated by financial gain and that Target's management employees approved the company's unlawful practices. Target's Manager specifically testified that, although Target maintained video footage of all of its cash registers, it did not do so with its parking lot. (Trial Tr. 195:1-24) Target's Property Maintenance Technician additionally testified that cart attendants, the individuals Target claimed had responsibility for inspecting the parking lot for dangerous conditions, were allowed to leave early to save on payroll. (Trial Tr. 269:10-14) This testimony, when considered alongside the previously discussed evidence proving Target's recklessness, is sufficient to trigger the $2 million cap.

Target's argument on the $2 million cap underscores the unreasonableness of its pleading argument. On the one hand, Target maintains that it was not required to put Denise on notice of the Civil Justice Act caps within its answers. On the other hand, Target maintains that Denise did not offer sufficient proof for purposes of the $2 million cap. Target cannot have it both ways.

IV. Denise is entitled to 8% pre-judgment interest on the entirety of the jury's verdict.

Target acknowledges two of the underlying purposes behind Rule 68: to encourage settlements and to avoid protracted litigation. *See* Target's Initial Response Br. at 44 (citing *Black v. Roche Biochemical Labs*, 315 S.C. 223, 227, 433

S.E.2d 21, 41 (Ct. App. 1993)). But Target fails to acknowledge an important third purpose underlying Rule 68: to penalize parties that fail to terminate the litigation when a reasonable settlement offer is made. *See, e.g., Paine Webber Jackson and Curtis, Inc. v. Winters*, 579 A.2d 545, 552 (App. Ct. Conn. 1990). The idea behind this third purpose is that, when a party rejects a reasonable offer to resolve the case, the rejecting party must be penalized for the subsequent waste of litigation resources. *See, e.g., DiLieto v. County Obstetrics and Gynecology Group, P.C.*, 998 A.2d 730 (Conn. 2010).[5]

As an initial matter, nothing in the plain language of Rule 68 ties prejudgment interest to a trial court's post-trial alteration of a verdict rather than to the verdict itself. It is unclear why Target thinks Rule 68's "a verdict or determination" phrase advances the company's position. It is true that "use of the term 'determination' indicates that the final amount may be settled by the judge rather than the jury[,]" but that just suggests that damages may be levied through a bench trial or even a dispositive motion. Target cites no authority for the very different proposition that it means a trial court can override a verdict when damages are set by the jury. For Target's position to have any merit, Rule 68 would have to include language like its federal counterpart: "judgment finally obtained by the offeree[.]" *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981). South Carolina's rule has no such language, instead tying prejudgment interest to "the

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[5] Target's citation to this Court's decision in *Black* as authority for the "two purposes" it claims underlie Rule 68 is telling. Significantly, *Black* was decided in 1993 – prior to the current version of Rule 68 that allows plaintiffs to obtain prejudgment interest. (The current rule was enacted in 2005.) *Black* of course did not take into account the added purpose of penalizing defendants who do not accept reasonable offers of compromise.

amount of the verdict or award" rather than to what is "finally obtained[.]" The South Carolina Supreme Court has been adamant that the plain language must be followed. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Regardless, this Court need not reach the question of post-verdict alteration because the jury's verdict must be reinstated. Once the verdict is reinstated, Target is left only with its argument that prejudgment interest should not apply to the punitive damages portion of the verdict. That position is untenable.

The primary case Target relies upon – a California Supreme Court case – involves a completely different factual scenario. *Lakin v. Watkins Associated Indus.*, 863 P.2d 179, 191-92 (1993) refused to award pre-judgment interest to the punitive damages portion of an award, but it reached that conclusion because the statute at issue applied only to a specific category of cases – personal injury cases. Relying on "the operative language of the first paragraph" of the statute, the court held that the text of the statute limited prejudgment interest to "damages for personal injury," and punitive damages are not "damages for personal injury[.]" *See Lakin*, 863 P.2d at 191.[6] *Lakin* was not a case, like this one, that dealt with an offer of judgment rule applicable to civil litigation generally.

Nor does Target provide any other persuasive authority in support of its position. After its citation to *Lakin*, Target provides a string cite of "see also" cases that have no applicability in the offer of judgment context. Target wants this Court to believe that its position is consistent with the majority rule, but that is fiction.

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[6] Other courts have acknowledged the limited nature of *Lakin*'s holding. *See Bosack v. Soward*, 2008 WL 725184, *1 (W.D. Wash. 2008); *Hoskins v. Business Men's Assurance*, 116 S.W.3d 557, 581 (Mo. Ct. App. 2003).

In truth, the only other jurisdiction that appears to have addressed the precise argument Target advances has flatly rejected Target's argument. Connecticut's offer of judgment rule is nearly identical to South Carolina's offer of judgment rule, both providing that a plaintiff shall be awarded eight percent prejudgment interest if he or she obtains an amount at trial that is at least as much as the rejected offer. *Compare* Conn. General Statutes § 52-192a *with* S.C. Code § 15-35-400. Connecticut's offer of judgment rule has been in place longer than South Carolina's offer of judgment rule, and its courts (both state and federal) have repeatedly held that the prejudgment interest penalty applies to both actual and punitive damages. *See, e.g., Kregos v. Stone*, 872 A.2d 901, 906-07 (App. Ct. Conn. 2005); *Boulevard Associates v. Sovereign Hotels, Inc.*, 861 F.Supp. 1132 (D. Conn. 1994).

The rationale utilized for this conclusion is equally applicable here. First, there is no textual basis for distinguishing between compensatory and punitive damages. *See Kregos*, 872 A.2d at 906. Connecticut's rule uses the word "recovered," and South Carolina's rule uses the phrase "obtains a verdict[.]" Neither limits the recovery or verdict to a specific category of damages. Second, the offer of judgment rule necessarily is "punitive in nature[.]" *See Boulevard Associates*, 861 F.Supp. at 1141. The logic behind the rule is that a party unwilling to accept a reasonable settlement offer must be punished for requiring the other party and the court to proceed with the time and expense associated with litigation.

Target maintains that prejudgment interest and punitive damages serve different goals, but courts have long rejected such a distinction in the offer of judgment context. *See, e.g., Crowther v. Gerber Garment Technology, Inc.*, 513 A.2d 144, 152-53 (App. Ct. Conn. 1986). By "authoriz[ing] [ ] legislation enacted to promote fair and reasonable compromise of litigation without trial," the Legislature intended to both compensate parties who act reasonably and punish parties who do not. *Id.* at 151. If the Legislature would have intended to only punish unreasonable parties with prejudgment interest on compensatory damages, it would have included such a limitation in the rule. Courts are without authority to read in language that is just not there.[7]

Ultimately, there could not be a more perfect case to highlight the rationale behind South Carolina's offer of judgment rule. Denise was willing to end this litigation for far less than she deserved when she made a $12,000.00 offer of judgment. (Offer of Judgement) Target acted unreasonably by rejecting the offer and extending this litigation for what is now more than two years later. The jury's substantial verdict underscores Target's unreasonableness, and this Court should execute the penalty the Legislature mandated via Section 15-35-400 and Rule 68.

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[7] The newest member of the United States Supreme Court recently made this same point: "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation." *See Perry v. Merit Sys. Protection Bd.*, 582 U.S. ___ (2017) (Gorsuch, J., dissenting).

CONCLUSION

In February 2015, Denise Garrison invoked Rule 68 to try and resolve this case for much less than it was worth. She did so because she wanted to avoid protracted litigation and because she simply wanted Target to pay for her medical expenses. (Trial Tr. 338:5-9) Target said "no" and proceeded to trial.

When it got there, Target told 12 jurors that Denise had not really been stuck by a needle at all and that, even if she had, she acted unreasonably in trying to protect her eight-year-old daughter. (Trial Tr. 125:24-25 – 126:1-5, 127:21-25 – 128:1-11, 495:3-13) Target called no witnesses, presented a false document to the jury, admitted to spoiling the central piece of evidence in the case, and produced a Manager who confessed on the stand that she had been untruthful in a prior deposition. *See* Garrisons' Initial Br. at 15-26. Suffice it to say that the jury was not impressed with Target's litigation strategy.

By constitutional design, cases like this one are placed in the hands of the community. This Court repeatedly has said that weighing the credibility of witnesses and evaluating evidentiary sufficiency are quintessential jury functions. This Court should reinstate the jury's verdict in its totality and award the Garrisons the entirety of the pre-judgment interest required by law.

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Respectfully submitted,

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