THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-000267

CARLA DENISE GARRISON AND CLINT GARRISON,

Appellant-Respondents,

v.

TARGET CORPORATION,

Respondent-Appellant.

INITIAL REPLY BRIEF OF RESPONDENT-APPELLANT

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I. The Jury Could Only Speculate that the Syringe Had Been in Target's Parking Lot Long Enough to Confer Constructive Notice

The evidence adduced at trial showed that Denise Garrison hurt her hand by swatting a dirty and broken syringe away from her daughter in the parking lot of Target's Anderson, South Carolina store. There is only one other fact relevant to this appeal: no one knows, and no evidence shows, that the syringe had been in the parking lot "at any particular time prior to" the injury. *See Wimberly v. Winn-Dixie Greenville*, 252 S.C. 117, 121, 165 S.E.2d 627, 629 (1969). South Carolina law bars judgment in favor of the Garrisons on this record. This Court must reverse the judgment below.

For more than half a century, South Carolina law has required a plaintiff bringing a premises liability claim based on constructive notice to show that the dangerous condition existed "for a *sufficient length of time* that a storekeeper would or should have discovered and removed it had the storekeeper used ordinary care." *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 91, 394 S.E.2d 24, 25 (Ct. App. 1990) (emphasis added); *see Hunter v. Dixie Home Stores*, 232 S.C. 139, 143-44, 101 S.E.2d 262, 264-65 (1957). And throughout those years, courts have reversed verdicts when the jury could do no more than speculate as to how long the hazard might have existed. *See, e.g., Joye v. Great Atl. & Pac. Tea Co.*, 405 F.2d 464 (4th Cir. 1968) (applying

South Carolina law and reversing jury's verdict for insufficient proof of constructive notice); *Milligan v. Winn-Dixie Raleigh, Inc.*, 273 S.C. 118, 254 S.E.2d 798 (1979) (reversing jury's verdict based on insufficient proof of constructive notice); *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 184 S.E.2d 77 (1971) (same); *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969) (same); *Hunter*, 232 S.C. at 143, 101 S.E.2d at 262; *Wintersteen v. Food Lion, Inc. ("Wintersteen I")*, 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999) (same). This Court should not hesitate to apply that principle here and reverse the jury's verdict.

The Garrisons do not object to the long line of cases establishing South Carolina's anti-speculation principle, nor do they question its applicability to a claim like theirs. Instead, they assert that "the jury should decide whether the dangerous condition had been there for a sufficient length of time." (Initial Response Brief of Appellants-Respondents at 17 (internal quotation marks omitted).) In general, Target agrees with that proposition, because whether a particular period of time is long enough to give rise to constructive notice is ultimately a fact question. But the fact question of longevity never arises if the evidence does not suggest any particular period of time. Under those circumstances, South Carolina law bars a finding of constructive notice, because the jury cannot be left to speculate. *See Gillespie*, 302 S.C. at 92, 394 S.E.2d at 25.

Although the Garrisons tout various pieces of evidence as "proof" of a length of time, none of their evidence allowed the jury to reasonably infer any particular timeframe during which the syringe appeared in the parking lot. Instead, the jury could only speculate.

A. Witness Testimony Cannot Cloak Conjecture as Proof of a Period of Time

The Garrisons cite the testimony of Clint, Denise, and Target's manager Shelby Brintnall to establish sufficient proof of constructive notice. Clint posited that, based on his interpretation of photographs, the syringe had to have been in the parking lot for "more than two hours" or "longer than two days" or even "more than two weeks." (Trial Tr. 358:16-359:4.) Denise claimed that she "could tell, obviously it had been there a long time." (Trial Tr. 362:21-23.) And Brintnall testified that the syringe appeared to have had "some wear on it." (Trial Tr. 152:12-13.) This testimony, the Garrisons claim, was "entirely sufficient to permit a valid constructive notice inference." (Initial Response Brief of Appellants-Respondents at 18.) It was not.

For one, the foregoing snippets from the trial transcript do not present the full context of the witnesses' testimony. Before Clint guessed that the syringe had to have been in the parking lot somewhere between two days and two months, he admitted that he did "not know how it got there." (Trial Tr. 355:5.) And when pressed how he could know that the syringe had not

turned up five minutes before the incident, Clint responded, "*I think I think I know*" by looking at the pictures in evidence. (Trial Tr. 357:3 (emphasis added).) Denise admitted she "could only speculate what happened." (Trial Tr. 362:19-23.) And Brintnall's testimony shows that she explicitly disclaimed knowing how old the syringe was, when it had appeared in the parking lot, or how it had arrived there. (*See, e.g.*, Trial Tr. 152:4-5 ("I can't say for sure whether it has been dropped out. I don't know when it was dropped, unfortunately.").)

Fickling v. City of Charleston, on which the Garrisons chiefly rely, does not affect this appeal because that case involved recurring conditions. The plaintiff in *Fickling* had stepped into a hole in the sidewalk and sustained severe injuries. *See* 372 S.C. 597, 601, 643 S.E.2d 110, 113 (Ct. App. 2007). The case thus focused primarily on whether the City of Charleston had a common-law duty to maintain its sidewalks. *See id.* at 604-611, 643 S.E.2d at 114-18. In concluding that questions of material fact remained as to whether the City had voluntarily undertaken maintenance of its sidewalks, this Court also noted that "there was conflicting evidence presented as to whether the City had constructive notice of the defect." *Id.* at 609, 643 S.E.2d at 116-17. In particular, the evidence suggested "there were numerous City personnel within the area of the defect who could have seen and reported the problem," "the condition had existed for a while," and the City had policies in place to

repair sidewalks because "problems with the sidewalks were an expected and 'recurrent' or 'continual' condition of which it had notice." *Id.* at 609-10, 643 S.E.2d at 117.

The Garrisons isolate one remark from the City's public works director, who said that "the condition 'had probably been that way for a while,'" and analogize that statement to their own vague testimony as sufficient proof of constructive notice. (*See* Initial Response Brief of Appellants-Respondents at 18 (quoting *Fickling*, 372 S.C. at 610 n.34, 643 S.E.2d at 117 n.34).) But the public works director in *Fickling* would have strong reason to suspect a hole in the sidewalk had been there "for a while," because defects in sidewalks were a recurring problem that the City had faced previously, enough so that it maintained a log of complaints, noted repair calls, and had a policy for how to handle repairs to sidewalks. *See Fickling*, 372 S.C. at 608, 643 S.E.2d at 116. In contrast, there is no evidence whatsoever suggesting any injuries or recurring hazards in Target's parking lot before Denise's injury in May 2014. The facts in *Fickling* evinced proof of prior knowledge; the Garrisons' testimony show baseless guesswork.

More importantly, despite the Garrisons' efforts to spin the testimony of Clint, Denise, and Brintnall as providing credible evidence of how long the syringe had been in the parking lot, none of it breaks the threshold of speculation. As their own lawyer conceded to the trial court, Clint and

Denise Garrison did not know how long the syringe had been there. (*See* Trial Tr. 449:3-7 ("The defense keeps getting hung up on 'you don't know where this needle came from.' Of course they don't. *'You don't know how long it's been there.' Of course they don't.*" (emphasis added)).) And Brintnall disclaimed any knowledge of how long the syringe might have been in the parking lot.

Thus, all Clint or Denise could do at trial was guess that the syringe had been in the parking lot for some uncertain—yet conveniently long enough—period of time. Guesswork offered as witness testimony is still speculation. And as a matter of South Carolina law, plaintiffs must present more than rank speculation to prove constructive notice. The Garrisons would have this Court break from that rule simply because they cloaked their speculation in witness testimony. The Court should reject that request.

B. "Appearance" Evidence Does Not Suggest Any Particular Length of Time

The Garrisons also rely on evidence that the syringe was dirty, dingy, weathered, and gross, suggesting that such an appearance proves that the syringe had been in the parking lot long enough to confer constructive notice. To be clear, there is no dispute that the syringe looked dirty, dingy, weathered, or gross. (*See, e.g.*, Trial Tr. 151:24.) But there is no evidence that links those traits to any period of time in Target's parking lot.

The Garrisons assume that, because the syringe was dirty, it must have been in the parking lot long enough to be found. The implication in their logic is that, to take on that appearance, the syringe had to have been in the parking lot for *some* length of time. But there was no evidence presented at trial suggesting how long it might take an object to attain such appearance or why the syringe had to have taken on that appearance in Target's parking lot as opposed to a different locale. Thus, although appearance evidence may be relevant in some circumstances, that evidence is not sufficient here to establish any particular length of time.[1]

Anderson bolsters that conclusion. Just as there was no basis to conclude that a "'withered up' and 'mushed up'" banana peel "had been on the floor for a considerable time," there is no reason to presume that the dirty and weathered syringe had been in the parking lot for any period of time based on its appearance. *See Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 80, 184 S.E.2d 77, 79 (1971). The Garrisons contend that "Target overstates the proposition for which [*Anderson*] stands," but they are silent as to what that "proposition" is or how Target "overstates" it. (*See* Initial Response Brief of Appellant-Respondents at 22.) *Anderson* was a premises

[1] Relatedly, there is no basis in the trial record to relate the appearance of the syringe to the appearance of items where the syringe landed *after* Kaileigh picked it up and Denise swatted it away.

liability case in which the South Carolina Supreme Court held that the appearance of the hazard was insufficient to prove it had existed long enough to confer constructive notice. It applies with full force here.

In fact, the same logic was employed by the Fourth Circuit in an application of South Carolina law three years before *Anderson*. *See Joye v. Great Atl. & Pac. Tea Co.*, 405 F.2d 464 (1968). In *Joye*, the Fourth Circuit reversed the jury's verdict for a plaintiff who slipped on a banana peel in a supermarket. *Id.* at 464. The court characterized the plaintiff's proof of constructive notice as follows:

> Plaintiff offered no direct evidence below as to how long the banana had been in the floor before the accident. The circumstantial evidence taken most favorably to the plaintiff shows that the floor may not have been swept for as long as 35 minutes. No one saw the banana until after Joye fell on it. It was then described as dark brown in color, having dirt and sand on it. There was dirt on the floor near the banana, and the banana was sticky around the edges. *From this evidence we think the jury could not tell whether the banana had been on defendant's floor for 30 seconds or 3 days.*

Id. at 465 (emphasis added). Such evidence could not allow the jury to determine "how long (even [in] the broadest range of approximation) the banana may have been on the floor," thus requiring reversal. *Id.* at 466.[2]

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[2] *See also, e.g.*, *Reid v. Kohl's Dep't Stores, Inc.*, 545 F.3d 479, 482 (7th Cir. 2008) (rejecting as "far too speculative" the plaintiff's argument "that a fact-finder could infer from the texture of the melted beverage that it had been on the floor for an extended period of time"); *Rodriguez v. Kravco Simon Co.*, 111 A.3d 1191, 1194 (Pa. Super. Ct. 2015) ("Without evidence of how long it takes the liquid in question to become sticky or dry, the jury would be

The Garrisons' case is no better than Joye's. They offered no direct evidence placing the syringe in Target's parking lot before the incident.[3] At best, their circumstantial evidence suggested that the syringe was dirty and weathered, but those traits offered no reasonable inference as to how, when, or where that wear-and-tear occurred. The jury could not tell whether the syringe had been in Target's parking lot for two minutes, two hours, two days, or two weeks. That is not enough to give rise to constructive notice. *See Wintersteen I*, 336 S.C. at 136, 518 S.E.2d at 830 (rejecting constructive notice based on evidence that "the liquid could have been on the floor for an extended period of time," because "it is just as possible that it had been on the floor for only moments before [the plaintiff] fell").[4]

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unable to determine whether the spill was present for a sufficiently long time to warrant a finding of constructive notice.").

[3] Despite their delineation between "direct" and "circumstantial" evidence of the syringe's longevity, the Garrisons offered no direct evidence on that point. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000) (defining direct and circumstantial evidence). In any event, the distinction is irrelevant here. *See id.*

[4] *Wintersteen I* refutes the Garrisons' claim that none of the cases cited in Target's opening brief had any "evidence at all about timing," (Initial Response Brief of Appellant-Respondents at 19.). *See also Anderson*, 257 S.C. at 78-79, 184 S.E.2d at 78 (rejecting an inference of constructive notice from employee's statement that "we should have had this place cleaned up but we just hadn't got around to it yet"); *Hurst v. Home Depot U.S.A.*, No. CA-99-1334-11, 2000 WL 33222911, at *3 (D.S.C. June 20, 2000) (rejecting inference of constructive notice when "the linoleum could not have been in the aisle for

For that same reason, the Garrisons' focus on spoliation misses the point, because the syringe's presence at trial would only have established that the syringe looked dirty and weathered, a point not in dispute. For that reason, this case is unlike a medical malpractice case where the defendant hospital lost critical records cataloging the decedent's vital signs, *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 521, 628 S.E.2d 675, 678-79 (Ct. App. 2006), or a slip-and-fall case where the defendant intentionally failed to gather witness statements and destroyed written notes related to the incident, *Schweikert v. Franciscan Health Sys.-W.*, No. 36806-6-II, 2009 WL 826227, at *1 (Wash. Ct. App. 2009) (unpublished).[5] Under South Carolina law, the plaintiff "must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009).

The Garrisons failed to make that showing, either at trial or in this appeal. And for good reason—the physical syringe would not have offered

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longer than 10-15 minutes, but it is just as likely that the linoleum had only been in the aisle a few moments prior to the accident").

[5] The Garrisons' reliance on *Schweikert* not only misapprehends the distinction between the spoliated evidence there and here, but also ignores that Washington premises liability law allows the jury to infer constructive notice based on foreseeability. *See Schweikert*, 2009 WL 826227, at *1 & n.4. South Carolina law does not. *See infra* at Part I.C.

something the photographs or witness testimony left out. The trial record shows that the syringe was dirty, dingy, weathered, and gross. Those traits say nothing about where that weathering occurred or how long the syringe had been in Target's parking lot.

C. The Remaining Evidence Invokes the Rejected "Foreseeability" Standard for Constructive Notice

The Garrisons' remaining arguments for constructive notice focus on Target's cleaning practices and, in particular, its alleged inability to find and remove other "dangerous objects" in its parking lot two years later. That evidence is beside the point in this case, because it does not show how long the syringe was in the parking lot.

South Carolina courts have rejected evidence of ineffective cleaning and prevention measures as proof of constructive notice of a specific hazard. *See Anderson*, 257 S.C. at 80, 184 S.E.2d at 79; *Wimberly*, 252 S.C. at 122, 165 S.E.2d at 629. Whether Target employed best practices in cleaning and maintaining its parking lot does not suggest how long the syringe was actually in Target's parking lot. Moreover, evidence of inadequate procedures begs the question of longevity: to accept it as proof that the syringe had been in the parking lot long enough to be discovered, one must assume that the syringe existed long enough that it would have been discovered by better

cleaning practices. That circular logic does not square the issue of constructive notice.

What's more, the Garrisons' discussion of cleaning practices and other "dangerous objects" in the parking lot invokes a foreseeability principle that has been rejected in South Carolina. According to the Garrisons, the cleaning and inspection evidence goes to "whether Target knew that dangerous objects might find their way into the parking lot if it did not inspect and clean." (*See* Initial Response Brief of Appellants-Respondents at 25.) But there was no evidence that syringes or any other hazard had ever been discovered in Target's parking lot before Denise's injury. Thus, the Garrisons' argument can only be interpreted as contending that Target ought to have been generally aware that nonspecific, unidentified hazards *might* appear in the parking lot if it did not employ efficient practices. In other words, Target should have foreseen that an injury would occur if it did not take better care of its parking lot. [6]

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[6] The absence of proof that hazards appeared in Target's parking lot *before* Denise's injury differentiates this case from *Major*, *Campbell*, and *Ford*, which the Garrisons claim in support of their arguments. *See Major v. City of Hartsville*, 410 S.C. 1, 2, 763 S.E.2d 348, 350 (2014) (reversing summary judgment when evidence suggested the defendant was aware of the hazard and undertook efforts to prevent it "*prior* to petitioner's injury" (emphasis added)); *Campbell v. S.C. State Highway Dep't*, 244 S.C. 186, 191, 135 S.E.2d 838, 840 (1964) (holding that constructive notice was shown in a case related to road maintenance where the evidence showed "there had been *previous* washouts" and that the State was aware *before* the incident that

Foreseeability does not establish constructive notice. *See Wintersteen v. Food Lion, Inc. ("Wintersteen II")*, 344 S.C. 32, 35, 542 S.E.2d 728, 730 (2001). As the Supreme Court explained in rejecting a rule of foreseeability,

> We find a very legitimate basis for adherence to our traditional slip and fall analysis. In such cases, although there may be a foreseeable risk that substances will wind up on the floor, there is no specific act of the defendant which causes the substance to arrive there, i.e., it generally arrives there through the handling of a third party. To require shopkeepers to anticipate and prevent the acts of third parties is, in effect, to render them insurers of their customers' safety. This is simply not the law of this state.

Id. at 37, 542 S.E.2d at 731 (citing *Hunter*, 232 S.C. at 145, 101 S.E.2d at 265, and *Milligan*, 273 S.C. at 120, 254 S.E.2d at 799).

The Garrisons did not show that any injuries occurred in Target's parking lot before Denise's, which might suggest recurring hazards in the parking lot.[7] Instead, they suppose that Target ought to have been on notice that its poor cleaning practices would lead to trouble, and they point to a bolt,

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"during periods of heavy rain the drainage system was insufficient to take care of the excess water" (emphasis added)), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); *Ford v. S.C. Dep't of Transp.*, 328 S.C. 481, 489, 492 S.E.2d 811, 815 (Ct. App. 1997) (recognizing that testimony from an individual who warned a "road crew of the general problems of falling trees in the vicinity" *before* a tree fell was "competent evidence of constructive notice to the Department that the tree in question could pose a danger").

[7] *Cf. Major*, 410 S.C. at 4, 763 S.E.2d at 350 ("Where a recurring condition is of such a nature as to amount to a continual condition, when coupled with other factors, the recurring condition may be sufficient to create a jury issue as to constructive notice.").

spring, and rod found in the parking lot (two years after the incident with the syringe) to prove their point. But after-the-fact foreseeability is not the rule for constructive notice. The Garrisons' insistence that Target did not employ adequate cleaning or maintenance practices distracts from their critical failure to show that the syringe had been in the parking lot long enough to be discovered in the use of ordinary care.

D. Target Preserved Its Constructive Notice Argument

The Garrisons cannot prevail on appeal, so they bluster about procedural waiver for each piece of evidence that they say supports their proof of constructive notice. They claim that "Target did not give the trial court an opportunity to consider its speculation argument during trial," and warn that "[i]t is impermissible for Target to invoke its newly minted 'anti-speculation principle' when it never did so at trial." (Initial Response Brief of Appellants-Respondents at 17, 20.) Candidly, the suggestion of waiver as to the constructive notice issue is baffling, because Target repeatedly raised the contention below and preserved it for appeal.

At the close of the Garrisons' case, both sides moved for a directed verdict. During those arguments, Target emphasized that the Garrisons had failed to prove constructive notice because their evidence did not place the syringe in the parking lot at any particular time before the incident. (*See*

Trial Tr. 434:14-437:7; 439:23-440:25; 451:12-453:11.) In fact, Target's argument for a directed verdict mirrors its argument in this appeal:

> There is simply no evidence beyond rank speculation as to how long [the syringe] had been there. We all agree that it is dingy. We all agree that the plunger that your thumb goes on is broken off. It could have fallen out of a car five minutes before this lady's daughter encountered it, been run over. Now we've got a dingy hypodermic that is partially broken. That doesn't establish their burden, which is to prove that Target had constructive notice. They've got to prove that it had been there for a sufficient length of time for Target to have notice, 'you should have found it and done something.' There just isn't any evidence of that.

(Trial Tr. 436:4-19.) As Target's counsel explained, "To let the jury go decide based on the evidence that the plaintiffs have presented is rank speculation." (Trial Tr. 453:4-6.) Nevertheless, the trial court denied Target's motion for a directed verdict. (*See* Trial Tr. 457:20-25.)

After the jury returned its verdict in favor of the Garrisons, Target reasserted the constructive notice argument in its post-trial motion for judgment as a matter of law. (*See* Sept. 16, 2016 Motion; Oct. 17, 2016 Memorandum of Law at 6-10.) And constructive notice was a central issue during the trial court's hearing on post-trial motions. (*See* Motion Hrg. Tr. 6:14-25:16; 69:15-72:16.) And, again, the trial court denied judgment as a matter of law on that issue. (*See* Order at 1-2.) Without question, Target preserved the constructive notice argument for appeal.

The Garrisons' waiver argument appears to conflate admissibility of evidence with its sufficiency. But Target does not contend that the Garrisons' testimony or evidence was inadmissible. Rather, even taking the Garrisons at their word that they believed the syringe had likely been in the parking lot long enough that Target ought to have found it, the whole evidentiary record remained legally deficient as to constructive notice because it never crossed the threshold beyond speculation and conjecture. *See Milligan*, 273 S.C. at 121, 254 S.E.2d at 800 (reversing jury's verdict when the conclusion that the merchant had constructive notice "would be pure speculation").

To take the Garrisons' waiver argument seriously would require a defendant to object to every word of witness testimony or piece of evidence as insufficient for purposes of constructive notice. But directed verdict motions based on insufficiency grounds must be raised "at the close of evidence." Rule 50(a), SCRCP. And the denial of a Rule 50(a) motion is preserved for appeal by timely raising a post-trial motion under Rule 50(b). *See Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 498 (Ct. App. 2006). Target timely moved for a directed verdict based on the Garrisons' failure to adequately show constructive notice, and it renewed that motion after the verdict. The trial court denied Target's request both times. The matter is fully preserved for this Court's review, and it requires reversal.

II. Even if Constructive Notice was Proven at Trial, the Jury's Unwarranted and Unconstitutional $4.51 Million Punitive Award Requires a New Trial Absolute

Punitive damages may be awarded in a negligence action only when the plaintiff shows by clear and convincing evidence that the conduct causing her harm was committed "in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). Here, the Garrisons complain that Target's inadequate parking lot maintenance caused Denise's injury. But they failed to prove through clear and convincing evidence that Target consciously disregarded any duty to maintain its premises. On that basis, the punitive award was both unwarranted and unconstitutional. The trial court got that conclusion half-right by concluding that the imposition of punitive damages would violate Target's due process rights, but it got the remedy wrong by declining Target's request for a new trial.

Without question, if the imposition of *any* punitive damages would have been unconstitutional, then a $4.51 million punitive award must be "so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993). Under such circumstances, the trial court was

required "to set aside the verdict absolutely." *Id.*; *see also S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996) (holding that "the trial court must either grant a new trial absolute, or a new trial nisi remittitur" when it concludes that a punitive award "violate[s] the defendant's due process rights"). Thus, barring the reversal of the underlying liability determination, this Court should vacate the judgment and remand for a new trial.

A. Target Preserved Its New Trial Absolute Argument

Again, the Garrisons raise procedural waiver to avoid the substantive defect in the judgment below. And once again, they are wrong. Target timely raised its argument for new trial absolute in a post-trial motion under Rule 50, SCRCP. (*See* Sept. 16, 2016 Motion; Oct. 17 2016 Memorandum of Law at 19-26.) The trial court denied that request. (*See* Order at 9.) That is all that was required for Target to preserve the contention for appeal. *See Stevens v. Allen*, 336 S.C. 439, 454, 520 S.E.2d 625, 632 (Ct. App. 1999).

The Garrisons argue that Target waived its argument for a new trial absolute because it did not file a Rule 59(e) motion asking the trial court to reconsider its "internally inconsistent" conclusion. (*See* Initial Response Brief of Appellants-Respondents at 33.) But Rule 59(e) motions are mandatory only when "an issue or argument has been raised, but not ruled on." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Here,

Target raised its entitlement to a new trial absolute based on the punitive verdict, and the trial court rejected that request. The issue is preserved for appellate review.

The Garrisons also curiously suggest that, because Target did not request bifurcation of the liability and damages phases of the trial, it cannot now appeal issues related to the jury's punitive verdict. (*See* Initial Response Brief of Appellant-Respondents at 34 ("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.").) They cite no proposition under South Carolina law requiring that procedure to preserve a punitive-damages contention for appeal, because none exists. *Cf. Durham v. Vinson*, 360 S.C. 639, 644 n.2, 602 S.E.2d 760, 762 n.2 (2004) ("Although some states require bifurcation in every case in which the plaintiff seeks punitive damages, we are unwilling to impose such a requirement."). And South Carolina appellate decisions reviewing the legality of punitive verdicts from non-bifurcated trials belie the Garrisons' suggestion of waiver. *See, e.g.*, *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009).

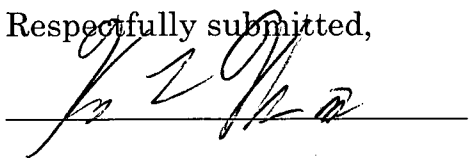
Target preserved its argument in favor of a new trial absolute based on the excessive and unconstitutional punitive award.

CONCLUSION

The Garrisons cannot overcome the longstanding precedent requiring them to establish that the syringe sat in Target's parking lot for some period of time before Denise's injury. Speculation cannot get clear that hurdle. The Garrisons' purported proof simply reinforces the fact that no one knows where the syringe came from or how long it had been in Target's parking lot. The trial court thus erred as a matter of law in failing to grant Target's motions for a directed verdict and judgment as a matter of law. This Court should reverse and remand for the entry of judgment in favor of Target.

Notwithstanding the overarching liability question, the jury's shocking $4.51 million punitive award demonstrated improper influence or motivations. What's more, that exorbitant figure would violate Target's constitutional due process rights. For those reasons, Target is entitled to a new trial absolute. Thus, if the Court concludes that the Garrisons presented sufficient evidence of constructive notice, it should vacate the judgment below and remand for a new trial.

Respectfully submitted,



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Respondent-Appellant.

PROOF OF SERVICE

I hereby certify that I served Respondent-Appellant Target's Initial Reply Brief on Appellant-Respondents by having the same delivered to their counsel of record, Joshua T. Hawkins, at 1225 South Church Street, Greenville, South Carolina 29601, on July 7, 2017. I also served the Initial Reply Brief by sending a copy via United States Mail on July 7, 2017, to their counsel of record, G. Todd Butler, at P.O. Box 16114, Jackson, Mississippi, 29236.

Dated July 7, 2017

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OF COUNSEL
C. Vincent Brown

July 7, 2017

Via Hand Delivery
Joshua T. Hawkins, Esquire
The J.T. Hawkins Law Firm, LLC
1225 South Church Street
Greenville, SC 29605

Re: *Carla Garrison and Clint Garrison vs. Target Corporation*
Appellate Case No. 2017-000267

Dear Josh:

Enclosed for service upon you, please find Respondent-Appellate Target Corporation's Initial Reply Brief as well as Target Corporation's Designation of Matter to be Included in the Record on Appeal. By copy of this letter and as evidenced by the respective certificates of service enclosed, I am providing a copy of the Initial Reply Brief of Respondent-Appellate as well as our Designation of Matter to be Included in the Record on Appeal on your co-counsel, Todd Butler.

With best regards, I remain

Sincerely,

BROWN, MASSEY, EVANS, McLEOD & HAYNSWORTH, LLC

Knox L. Haynsworth, III

KLH/lab
Enclosure
cc: Lewis F. Powell, III, Esquire
George P. Sibley, III, Esquire
Kevin S. Elliker, Esquire
G. Todd Butler, Esquire