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,

Appellants/Respondents,

v.

TARGET CORPORATION,

Respondent/Appellant.

BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The Supreme Court of South Carolina has emphasized that a plaintiff seeking to hold a merchant liable for an injury caused by a dangerous condition that the merchant neither created nor knew about can only prevail if she proves that the condition existed for a sufficient length of time that the merchant would or should have discovered it in the exercise of reasonable care. Can the jury's decision to punish Target for an injury caused by a discarded syringe in its parking lot be allowed to stand when there was *no evidence* suggesting how long the syringe might have been there?

2. The Supreme Court of South Carolina has held that a trial court must grant a new trial absolute or new trial nisi remittitur when a punitive damages award violates the defendant's constitutional right to due process. Did the trial court abuse its discretion by denying Target's request for a new trial absolute despite its conclusion that the award of *any* punitive damages, much less the jury's $4.51 million punitive verdict, violated Target's due process rights?

STATEMENT OF THE CASE

This premises liability case arises from an incident that occurred in the parking lot of Target's Anderson County store on May 21, 2014, when Appellant/Respondent Carla Denise Garrison stuck her hand on a discarded syringe of unknown origin. On June 27, 2014, Denise sued Target in the

Court of Common Pleas for Anderson County. (R. pp. 30-36.) More than a year later, on September 17, 2015, Denise and her husband, Appellant/Respondent Clint Garrison, filed a second complaint against Target, incorporating the same claims as the 2014 lawsuit and adding claims on behalf of Clint. (R. pp. 42-48.)

On September 6, 2016, the two actions were jointly tried to a jury. At the conclusion of the three-day trial, the jury found for the Garrisons. (R. pp. 24-27, 597-600.) The jury awarded Denise $100,000 in actual damages and $4,510,000 in punitive damages, plus $8,500 in actual damages for Clint. (R. pp. 24-27.)

On September 16, 2016, Target timely moved for judgment as a matter of law, new trial absolute, new trial nisi remittitur, relief under the Thirteenth Juror Doctrine, and, in the alternative, reduction of the punitive damages award pursuant to the statutory cap imposed by S.C. Code Ann. § 15-32-530(A) (2012). (R. pp. 751.) The trial court heard argument on the motion on November 3, 2016. (R. p. 623.) On January 26, 2017, the trial court granted in part Target's motion for judgment as a matter of law by concluding that the award of punitive damages violated Target's constitutional due process rights. (R. p. 11.) The court denied the remainder of the motion, leaving intact the jury's liability and compensatory damages determinations. (R. p. 5-6.)

On February 10, 2017, the Garrisons served their Notice of Appeal on Target. (R. pp. 923-951.) On February 22, 2017, Target served its Notice of Appeal on the Garrisons. (R. pp. 952-972.)

STATEMENT OF FACTS

I. May 21, 2014

On the evening of May 21, 2014, Denise Garrison drove to the Target store in Anderson, South Carolina, with her eight-year-old daughter Kaileigh. (R. p. 423, line 20.) After exiting the car and stopping a moment to set her coupon book on the hood, Denise heard her daughter ask, "Mommy, what is this?" (R. p. 424, line 5.) Denise looked up and saw her daughter holding a three-inch-long plastic syringe with a small needle "pointing out." (R. p. 424, lines 4-8, 18-19.) Denise "immediately reacted and swatted" the syringe, which flew down to the pavement and landed near a cigarette butt and a piece of twine. (R. p. 212, line 22–p. 213, line 6; p. 424, line 9; p. 425, line 25–p. 426, line 3; p. 608.)

Denise then looked down at her right palm and saw "a tiny bead of blood and a puncture wound." (R. p. 428, lines 21-22.) She quickly went to the store's restroom, where she washed her hands several times. (R. p. 427, lines 18-20.) Denise then called her husband Clint to tell him about the accident, and Clint suggested that she speak with a Target employee. (R. p. 427, lines 20-24.) So Denise located and spoke with Shelby Brintnall, the Target

manager serving as the "lead-on-duty" that evening. (R. p. 193, lines 6-12; p. 429, lines 4-11.) Brintnall went with Denise out to the parking lot and took a photograph of the plastic syringe, which was "dirty, dingy, and gross." (R. p. 214, lines 23-25; p. 221 line 24-p. 222, line 9.) But the needle that Denise had seen in the syringe was nowhere to be found. (R. p. 459, line 7.) Brintnall brought the syringe back into the store. (R. p. 273, lines 19-25.)

While Denise was still at the store, Brintnall interviewed her and filled out a guest incident report. (R. p. 211, line 23-p. 212, line 17.) Brintnall wrote: "Guest's daughter picked up needle. [Denise's] first reaction [was] to smack the needle out of her hand. When she did, it stuck her in the right hand." (R. p. 607.) Later that evening, after Denise left, Brintnall filled out a report that included Brintnall's notes regarding the investigation and personal impressions about the incident. (R. p. 217, lines 4-25; p. 227, line 10-p. 231, line 16.) In that report, Brintnall noted that she did not see a needle. (R. p. 217, line 17; p. 611.)

II. Denise Seeks Medical Treatment

The next day, Denise went to the emergency room, where she was treated for a needle stick. (R. p. 432, line 5-p. 433, line 2.) A nurse at the emergency room referred Denise to an infectious disease specialist, who prescribed her an HIV antiviral medication and antibiotics. (R. pp. 433, lines 12-15; 436, line 11-437, line 2.) The combination of medicines led to side

effects including vertigo, dizziness, loss of balance, and vivid nightmares. (R. p. 437, line 3-p. 438, line 14.) Clint, the family's sole breadwinner, took several days off from work and was unable to work overtime shifts, which cost him about $2000 in lost wages. (R. p. 367, line 4-369, line 5.) Denise inhabited a "zombie-like state" during that period, which affected her marital relationship with Clint. (R. p. 397, lines 4-14; p. 400, lines 8-20.)

After about a week, Denise was able to change her prescriptions to stop most of the side effects, although she still experienced nausea. (R. p. 439, line 5-p. 440, line 5.) Over the following year, Denise received four HIV blood tests. (R. p. 441, lines 7-9.) The last time she received medical care related to the needle stick was about September 2015. (R. p. 468, lines 13-16.) There is no evidence that Denise contracted any infectious diseases as a result of the incident with the syringe. Denise's medical bills during the relevant time period amounted to approximately $4000. (R. p. 435, lines 2-3.)

III. The Garrisons Sue Target

On June 27, 2014, Denise alone filed a lawsuit against Target in the Court of Common Pleas for Anderson County, alleging negligence and unfair trade practices. (R. pp. 30-36.) On February 13, 2015, Denise made an offer of judgment for $12,000 under Rule 68 of the South Carolina Rules of Civil Procedure. (R. p. 710.) Target did not respond to the offer. Several months later, Denise and Clint filed a second lawsuit against Target, which

incorporated the same claims as the 2014 suit plus claims on behalf of Clint for lost wages and loss of consortium. (R. pp. 42-48.)[1]

The two actions came before the Court for a consolidated jury trial on September 6, 2016. During the three-day trial, the jury heard testimony from Denise, Clint, and Clint's mother, as well as from Shelby Brintnall and Target's property maintenance technician Jon Jackson. (R. pp. 192, 294, 352, 422, 482.)

IV. The Garrisons Speculate About How Long the Syringe Had Been in Target's Parking Lot

Although the Garrisons testified about Denise's injury and how it affected their family, no one could place the syringe in Target's parking lot before Kaileigh picked it up. Denise could not explain how the syringe ended up there. Clint admitted that he did "not know how it got there." (R. p. 418, line 5.) What's more, no evidence showed the syringe's location before Denise saw it in Kaileigh's hand: photographs showed only where the syringe had landed *after* Denise swatted it, not where it had been picked up. (R. p. 212, line 22-p. 213, line 6; p. 418, line 21-p. 419, line 6; p. 608.)

Nevertheless, Clint and Denise each speculated that the syringe had been in the parking lot for a lengthy period of time. Clint testified that he

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[1] Denise abandoned her unfair trade practices claim at trial. (R. p. 504, line 4-p. 506, line 7.)

thought the syringe "had been there a while." (R. p. 418, line 11.) He did not explain how long "a while" might be, although he theorized that the syringe might have been there for as long as two weeks. (R. p. 418, lines 12-20; p. 421, line 16-p. 422, line 4.) Clint's vague hypothesis was not based on personal knowledge of the syringe, but instead on the syringe's "weathered," "dirty, dingy, and gross" appearance and a photograph showing the syringe's landing spot near the cigarette butt and piece of twine. (R. p. 421, line 6-p. 422, line 4; p. 418, lines 12-20.)[2] Similarly, Denise claimed that she "could tell, obviously [the syringe] had been there a long time," but did not explain how she "could tell" that. (R. p. 425, lines 22-23.) Indeed, the Garrisons simply did not know how long the syringe had been in the parking lot.[3]

The testimony from Target's employees Shelby Brintnall and Jon Jackson provided no further insight into the origin of the syringe. Brintnall

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[2] The syringe itself was not presented as evidence, because it had been misplaced, reappeared briefly (during which time the Garrisons' counsel photographed it), then lost again before the September 2016 trial. (R. p. 246, line 11-p. 251, line 16.) The photographs taken by the Garrisons' counsel could not be produced for trial. (R. p. 250, lines 12-15.) And although the Garrisons claimed to have taken additional photographs of the syringe, those photographs were apparently lost. (R. p. 408, line 18-p. 409, line 12.) In light of the references to evidence and photographs that had been lost, the trial court gave the jury a spoliation instruction. (R. p. 568, line 21-p. 569, line 1.)

[3] The Garrisons' counsel conceded as much during arguments on Target's motion for a directed verdict: "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." (R. p. 512, lines 3-7.)

could not offer any guess as to how the syringe ended up in Target's parking lot, much less how long it might have been there before Kaileigh picked it up. (R. p. 280, lines 1-7.) And Jackson explained that, had the syringe been seen by any Target employee, it would have been removed from the parking lot before it caused any harm. (R. p. 344, lines 17-24.) Neither witness suggested that Target employees would have had any reason to believe a syringe would turn up in the parking lot.

V. Target's Routine Cleaning and Inspection Procedures

Without any evidence about the syringe itself, the Garrisons focused much of their case on Target's cleaning and inspection procedures. On that topic, Brintnall and Jackson explained that Target takes many steps to maintain a clean and safe parking lot.

For example, Target had its parking lot cleaned at least five times each week. Once a week, during the overnight hours between Thursday and Friday, a third-party vendor used a street-sweeping truck to vacuum the lot. (R. p. 301, lines 3-6; p. 341, lines 14-24.) Every Friday morning, Jackson would verify that the truck had come the night before by visually inspecting the parking lot, and he would take note in his daily inspection report if the parking lot appeared dirty. (R. p. 300, lines 9-12; p. 301, lines 7-18; p. 342, line 12-p. 343, line 8.) Jackson's testimony and records showed that the lot had been cleaned by the truck in the weeks before and after Denise's injury.

(R. p. 343, line 8; p. 345, line 11-p. 346, line 13; R. pp. 621-622.) And four times weekly during daylight hours, the housekeeping staff cleaned the lot of trash and debris, picking up "anything larger than a golf ball." (R. p. 304, line 17-p. 305, line 5.) Again, Jackson would have noted any deficiencies in the housekeeping staff's cleaning, and his records revealed no cleaning issues during the pertinent time period. (R. p. 345, line 11-p. 346, line 13; R. pp. 621-622.)

In addition to the five weekly cleanings, Target employees inspected the parking lot multiple times each day. Jackson's daily premises inspection took him throughout "different parts of the store, interior and exterior," including the parking lot. (R. p. 328, lines 6-10.) While outside, Jackson would "look through the property" to find dangerous conditions, including "big, large debris" or "trip hazards." (R. p. 297, lines 1-4.) Jackson conducted his daily inspections without incident in the weeks before and after Denise's injury. (R. p. 345, line 11-p. 346, line 13.) Had he seen the syringe in Target's parking lot, he would have removed it. (R. p. 343, lines 14-20.)

On top of Jackson's formal inspections, Target employees engaged in ad hoc inspections of the parking lot throughout the day. Brintnall explained that the store's cart attendants "are told to look for any major debris or anything like that, that would be in the way of a guest." (R. p. 195, line 14-p. 196, line 17.) Although attendants had no set schedule for retrieving cards,

Brintnall estimated that there was "somebody outside at least an hour, every two hours, depending on how busy" the store might be. (R. p. 197, lines 16-18.) Attendants were expected to tell a manager if they encountered "something that may cause harm." (R. p. 196, line 18-p. 197, line 2.) Had Brintnall been told about a needle or syringe in Target's parking lot, "it would be [her] duty to pick that up." (R. p. 202, lines 18-20.)

In an effort to impeach testimony about Target's cleaning procedures, Clint offered a sort of do-it-yourself science experiment involving a four-inch bolt. According to Clint, he noticed a bolt "laying in the grass" near Target's parking lot in April 2016. (R. p. 375, lines 7-18; p. 609.) He claimed that the bolt was still there four months later. (R. p. 376, lines 14-22.) But Clint did not explain how an errant bolt observed in 2016 might shed light on the effectiveness of Target's cleaning and inspection practices in 2014. Nor did he explain why, even if an employee had seen the bolt during 2016, its presence would merit the same response as an abandoned syringe.[4]

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[4] The trial court recognized the irrelevance of Clint's testimony about the bolt during arguments on Target's motion for a directed verdict. (R. p. 517, lines 4-13 ("The Court: I'll stop you there. I am not going to pay attention to that. . . . I don't care about what happened afterwards. I want to know about—I'm focusing on during and immediately before the accident. . . . I don't care about them not picking up that bolt.").) In fact, the court explained the purpose of the bolt photographs during the charge conference: "I allowed those pictures in not for the uncleanliness of the parking lot, but I allowed

At the close of the evidence, Target moved for a directed verdict based on *inter alia* the Garrisons' failure to introduce any evidence showing how long the syringe had been in Target's parking lot or demonstrating that Target's conduct was sufficiently willful, wanton, or reckless to warrant the imposition of punitive damages. (R. p. 502, line 7-p. 503, line 25; p. 508, line 8-p. 509, line 12.) The trial court denied Target's motion. (R. p. 520, lines 10-25.)

VI. The Garrisons Resort to Passion and Prejudice

The jury then heard closing arguments from counsel. Target's lawyer focused the jury on "the crux of the lawsuit": "Was [the syringe] there long enough where Target should have known about it?" (R. p. 556, lines 15-17.) Based on the evidence presented, Target's counsel explained to the jury that the Garrisons had fallen short of their "burden to prove, not to speculate, but to prove" not simply that the syringe had been in Target's parking lot, but "that it had been there long enough where Target should have seen it and taken care of it." (R. p. 557, lines 17-24.)

In contrast, from start to finish of his closing argument, the Garrisons' counsel implored the jury to treat Target as an enemy of Anderson County

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them in for impeachment purposes. It just happened to be in those pictures." (R. p. 522, line 22-p. 523, line 1.)

and its citizens.[5] To that end, counsel told the jury not fewer than ten times that Target saw $73 billion in revenue in 2014—a fact not offered into evidence during trial. (R. p. 527, line 14; p. 528, line 2; p. 529, lines 11-12; p. 530, lines 1-2; 533, lines 14-15; 541, lines 1-2; p. 542, line 10; p. 549, lines 16-17; p. 550, lines 13-14, 18; p. 563, lines 19-20; p. 564, lines 22-23.) The repeated emphasis on that large figure was particularly striking in light of the precise sum of compensatory damages he suggested would make the Garrisons whole: $11,000 to cover medical bills, Clint's lost wages, and loss of consortium. (R. p. 548, line 15.) He also warned the jury that if it did not punish Target for the bizarre circumstances surrounding Denise' injury, then "[m]aybe next time a little girl gets stuck and she dies of AIDS before she's 21." (R. p. 539, lines 2-4.) And, in his parting words to the jury, the Garrisons' lawyer argued that the Minneapolis-based company was bigoted against the people of Anderson, South Carolina:

> [I]n Minneapolis they don't know where Anderson is on a map. And their perception of Anderson, South Carolina, is probably worse than their ignorance of where we are on the map. But I want your verdict to make them say the words in Minneapolis, "Anderson County."

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[5] "The caption of this case is Denise and Clint Garrison versus Target. That's what's on the paperwork. But what this case boils down to, what we showed you through the course of introduction of evidence is that the case is really about the safety of the Anderson County community versus the danger presented by Target." (R. p. 526, lines 14-22.)

(R. p. 565, lines 4-11.)

The jury obliged. After ninety minutes of deliberations, the jury returned a verdict in favor of Denise and Clint. (R. p. 596, line 17-p. 600, line 7.) The jury awarded Denise $100,000 in actual damages and $4,510,000 in punitive damages, and awarded Clint $3,500 for lost wages and $5,000 for loss of consortium. (R. pp. 24-27.)

VII. Target Seeks Judgment as a Matter of Law or a New Trial

On September 15, 2016, the Garrisons moved for interest and costs. (R. pp. 711-743.) The next day, Target timely filed a motion seeking *inter alia* judgment as a matter of law and a new trial absolute, under Rules 50 and 59 of the South Carolina Rules of Civil Procedure.[6] (R. pp. 750-759.) Regarding judgment as a matter of law, Target argued that the Garrisons had failed to satisfy their burden of proof for constructive notice, because they offered nothing more than their own speculation that the syringe had been in the parking lot long enough for Target to find it. Similarly, the Garrisons had failed to show through clear and convincing evidence that Target's cleaning and inspection practices demonstrated a conscious disregard for customer

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[6] Target's September 16, 2016 motion also requested that the trial court grant judgment as a matter of law based on Denise's comparative negligence, a new trial nisi remittitur, relief under the Thirteenth Juror Doctrine, or, in the alternative, reduction of the jury's punitive damages award under the statutory cap imposed by S.C. Code Ann. § 15-32-530(A) (2012).

safety. As an alternative to judgment as a matter of law, Target contended that it was entitled to a new trial absolute, because the jury's exorbitant $4,618,500 betrayed that the jury was driven by caprice, passion, or prejudice rather than a fair and impartial consideration of the evidence. The trial court heard arguments on the parties' post-trial motions on November 3, 2016. (R. p. 623.)

VIII. The Trial Court Throws Out the Punitive Damages Award

On January 26, 2017, the trial court issued an order partially granting Target's motion for judgment as a matter of law with respect to the award of punitive damages. Specifically, the court concluded that "[t]here is no evidence that [Target] engaged in a pattern of reckless, willful, or wanton conduct that is sufficiently reprehensible to justify the punitive damages award here." (R. p. 11.) The court thus eliminated the $4.51 million punitive award in its entirety. But aside from eliminating punitive damages from the case, the court denied the rest of Target's post-trial motions. (R. pp. 5-6.) As relevant here, the court brushed aside Target's constructive notice argument with two sentences of analysis:

> Here, although there was no direct evidence as to the exact length of time the syringe had been in the parking lot, witnesses testified the syringe was "dingy, dirty and gross," and bore a "weathered" look similar to other items of trash in the parking lot. That testimony, when viewed in the light most favorable to Plaintiffs, leads to the reasonable inference that the syringe was in Target's parking lot long enough to impute constructive notice.

(R. p. 9.) The court also denied Target's request for a new trial absolute based on the jury's excessive verdict, but did so by weighing only the jury's compensatory award of $108,500 against the evidence presented. (R. p. 13-14.) That is, although the court had just concluded that there was no evidence that could support the imposition of *any* punitive damages—thus justifying the elimination of the $4.51 million punitive verdict—the court rejected the contention that the jury's verdict was shockingly disproportionate in view of the evidence. (R. p. 13.)

Finally, the trial court granted the Garrisons' motion for costs and interest only as to interest drawn on the actual damages award starting on the day the jury returned its verdict. (R. p. 15.) The Garrisons subsequently asked the court to amend its judgment, suggesting that the court had overlooked affidavits submitted in support of their costs and the Rule 68 offer of judgment made by Denise in February 2015. (R. pp. 880-921.) On February 9, 2017, the court granted the Rule 59 motion, concluding that the Garrisons were entitled to their costs, prejudgment interest for Denise's $100,000 damages award, and post-judgment interest as to all of their actual damages. (R. pp. 18-23.)

On February 10, 2017, the Garrisons served their Notice of Appeal on Target. (R. pp. 923-951.) On February 22, 2017, Target served its Notice of Appeal on the Garrisons (R. pp. 952-972.)

ARGUMENTS

I. The Jury's Verdict Must Be Reversed Because the Garrisons Failed to Present Sufficient Evidence of Constructive Notice

No one knows how long the syringe had been there, and no one knows where it came from. Maybe a diabetic customer dropped the syringe in Target's parking lot the week before. Or perhaps a drug addict threw it out of his car window that afternoon. The jury could only speculate. Although much is known about what happened after young Kaileigh Garrison picked up the syringe on the evening of May 21, 2014, everything before that moment remains a mystery.

Under long-established South Carolina law, merchants cannot be held liable for unexplained mysteries like this. Instead, merchants are liable only for injuries caused by hazards that the merchant created, knew about, or should have known about. This case focuses on that third possibility—the "should have known" kind of knowledge, also called "constructive notice." To prevail on a theory of constructive notice, a plaintiff must prove that the dangerous condition existed long enough for a reasonable merchant to have found it before it caused an injury.

South Carolina courts have rejected the kinds of "proof" the Garrisons offered to show Target's constructive notice of the syringe. Although they claimed that the syringe must have been in the parking lot for "a while"

because it was "weathered" and "dirty, dingy, and gross," the Garrisons failed to tether those traits to any particular period of time or even plausibly define how long "a while" might be. Similarly, their comparison of the syringe to nearby pieces of trash meant little without an estimate for how long the litter had been there. And their emphasis on Target's cleaning procedures obscured the issue of constructive notice, which focuses on the hazard, not preventative measures.

The jury heard no proof that the syringe had been in Target's parking lot long enough for Target to have found it before the incident. Instead, the Garrisons relied on their own rank speculation. That fatal failure of proof entitled Target to judgment as a matter of law. On that basis, the jury's verdict must be reversed.

A. Standard of Review

A motion for judgment as a matter of law—also called judgment notwithstanding the verdict—"is a renewal of a directed verdict motion." *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 179-80 (Ct. App. 2012). When considering a motion for judgment as a matter of law, "the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party." *Id.* at 325, 734 S.E.2d at 180. The motion must be granted "[i]f the evidence as a whole is susceptible of only one

reasonable inference" so that "no jury issue is created." *Wintersteen v. Food Lion, Inc. ("Wintersteen II")*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). This Court applies the same standard of review in an appeal from the denial of a motion for judgment as a matter of law. *See Williams Carpet Contractors*, 400 S.C. at 325, 734 S.E.2d at 180.

B. Constructive Notice Requires Proof Beyond Speculation That a Dangerous Condition Existed Long Enough for the Merchant to Discover and Remedy It

Under South Carolina law, a merchant cannot be held liable simply because a customer injures herself while at its store. *See Hunter v. Dixie Home Stores*, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957). Instead, the customer must prove either that (1) her injury was the result of a dangerous condition specifically created by the merchant; or (2) that the merchant "had actual or constructive knowledge of the dangerous condition and failed to remedy it." *Wintersteen II*, 344 S.C. at 35, 542 S.E.2d at 729. Thus, the law does not impose a duty on the merchant to ensure an accident-free premises. *See Denton v. Winn-Dixie Greenville, Inc.*, 312 S.C. 119, 120, 439 S.E.2d 292, 293 (Ct. App. 1993). Nor is the merchant obliged to "continuously inspect" the premises for dangerous conditions. *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 579, 629 S.E.2d 375, 377 (Ct. App. 2006). Instead, the merchant must exercise reasonable care to prevent known or knowable hazards.

To prevail under the constructive notice theory of premises liability, a plaintiff must show that the dangerous condition preexisted her injury long enough for the merchant to "have discovered and remedied it." *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971).[7] That temporal element does not require the plaintiff to precisely measure the lifespan of the hazard, but it does oblige her to show that the dangerous condition has existed "for *a sufficient length of time* that the 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). And that length of time cannot be left to speculation. *See Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122, 165 S.E.2d 627, 629 (1969).

South Carolina courts have applied the anti-speculation principle of constructive notice for decades. For example, in *Wimberly*, the Supreme Court reversed a plaintiff's jury verdict in a slip-and-fall case involving loose grains of rice, because the plaintiff had failed to introduce "any evidence

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[7] Constructive knowledge may also be imputed when a hazard recurs often enough to be deemed a "continual condition" that should be discovered by a merchant exercising due care. *Major v. City of Hartsville*, 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014). There was no suggestion made at trial that syringes were a recurring problem in the parking lot of Target's Anderson store.

showing how long the rice had been on the floor." *Id.* The Court rejected the plaintiff's alternative proof—which included evidence suggesting the store had been understaffed, used inadequate inspection practices, and failed to properly maintain its floor—because those facts overlooked "the necessity of proof of actual or constructive notice." *Id.* And without any evidence showing "that the rice was on the floor at any particular time prior to the actual fall," the jury was wrongly "permitted to speculate that it was on the floor long enough to infer that [the] defendant was negligent in failing to detect and remove it." *Id.*

South Carolina law's aversion to speculation as proof of constructive notice is as old as it is consistent. More than half a century ago, the Supreme Court held that a plaintiff could not prevail against a merchant under a theory of constructive notice when the evidence did "not prove that the [dangerous condition] was there for any appreciable time and [left] the length of time [it] was there speculative and conjectural." *Gilliland v. Pierce Motor Co.*, 235 S.C. 268, 274, 111 S.E.2d 521, 523 (1959). The same is true today. *See, e.g. Milligan v. Winn-Dixie Raleigh, Inc.*, 273 S.C. 118, 121, 254 S.E.2d 798, 800 (1979) (reversing jury verdict when conclusion that oil had been on sidewalk long enough to be discovered "would be pure speculation"); *Pennington v. Zayre Corp.*, 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969) (affirming grant of involuntary nonsuit in slip-and-fall case where conclusion

that plastic bags had been on store's floor long enough to be "discovered by the merchant would be pure speculation"); *Gillespie*, 302 S.C. at 92, 394 S.E.2d at 25 (affirming grant of summary judgment to merchant and emphasizing that question of how long puddle of water had been on floor "is not one that can be left to speculation"); *Wintersteen v. Food Lion, Inc. ("Wintersteen I")*, 336 S.C. 132, 136, 518 S.E.2d 828, 830 (Ct. App. 1999), *aff'd*, 344 S.C. 32, 542 S.E.2d 728 (2001) (reversing jury verdict in slip-and-fall case where "any determination of how long the water had been on the floor would be pure speculation"). The federal courts have also regularly applied the anti-speculation principle in premises liability cases arising under South Carolina law. *See e.g.*, *Wilson v. Wal-Mart, Inc.*, No. 3:15-1157, 2016 WL 3086929, at *4 (D.S.C. June 2, 2016) (granting summary judgment to store when plaintiff "provided no evidence whatsoever regarding the length of time that the substance was on the floor"); *Norris v. Wal-Mart Stores East, L.P.*, No. 1:12-02592, 2014 WL 496010, at *4 (D.S.C. Feb. 6, 2014) (recognizing that "the length of time that the foreign substance has been on the floor is not a determination that can be left to speculation"); *Hurst v. Home Depot U.S.A.*, No. CA-99-1334-11, 2000 WL 33222911, at *3 (D.S.C. June 20, 2000) (granting summary judgment to merchant because "any determination how the linoleum had been in the aisle would be pure speculation").

The requirement that a plaintiff prove that the dangerous condition existed long enough for the merchant to discover it before the injury derives from well-established tort principles. Specifically, a landowner cannot be held liable for injuries caused by conditions "which [he] neither knew about nor could have discovered with reasonable care." *See* W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 61, at 426 (5th ed. 1984). As Dean Keeton explained, "The mere existence of a defect or danger is generally insufficient to establish liability, unless it is shown to be of such a character or *of such duration* that the jury may reasonably conclude that due care would have discovered it." *Id.* (emphasis added).

South Carolina law reflects those principles, as a merchant's duty to maintain a safe premises is predicated on its "superior knowledge of the danger" that might befall customers. *See Larimore v. Carolina Power & Light*, 340 S.C. 438, 448, 531 S.E.2d 535, 540 (Ct. App. 2000). "If that knowledge is lacking," the merchant "cannot be held liable." *See id.* Thus, the lengthy duration of a hazard's existence allows the jury to infer that, had the merchant been acting reasonably, it would have discovered the condition and assumed the corresponding obligation to remove it or warn customers. Such proof is crucial, because holding a merchant liable for the injury without it would transform the customer's theory of negligence into res ipsa loquitor—a

doctrine not recognized under South Carolina law. *See Hunter*, 232 S.C. at 144, 101 S.E.2d at 265.

C. The Garrisons Offered Only Speculation as Proof of How Long the Syringe May Have Been in Target's Parking Lot

In this case, the Garrisons failed to prove Target's constructive knowledge, because none of the evidence suggested how long the syringe had been in Target's parking lot. No witness saw the syringe before Kaileigh picked it up. No photographs showed the syringe's location before Denise swatted it with her hand. No witness suggested that a syringe had ever been found in Target's parking lot before this incident.

Instead of introducing evidence that showed the syringe had been in Target's parking lot for any particular length of time, the Garrisons presented conjecture. For example, they argued that the syringe's "weathered," "dirty, dingy, and gross" appearance proved that it had been in the parking lot for some time. (R. p. 9.) Similarly, they claimed that they "could tell" the syringe "had been there a while" because it was near other articles of trash in the parking lot. (R. p. 9; p. 418, line 11; p. 425, lines 21-23.) And they repeatedly suggested that Target's cleaning and inspection practices were inadequate. (R. p. 375, lines 2-3; p. 427, lines 4-15; p. 490, lines 5-7.) But none of those contentions allow anything more than

speculation as to how long the syringe might have been in Target's parking lot.

First, the testimony regarding the syringe's appearance slips on, of all things, a banana peel—a "black," "withered up," and "mushed up" banana peel. That was how the Supreme Court described the hazard at the center of *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 79-80, 184 S.E.2d 77, 79 (1971). In that case, the Court reversed a plaintiff's slip-and-fall verdict because she could not prove that the grocery store had constructive knowledge of the banana peel on its floor. *See id.* at 80, 184 S.E.2d at 79. In so holding, the Court recognized that the "'withered up' and 'mushed up'" appearance of the banana peel was "insignificant" with respect to whether it "had been on the floor a considerable time," because the peel could have taken on that appearance without being on the grocery store's floor at all. *Id.*

The same is true for the "dirty, dingy, and gross" syringe here. The syringe may have been weathered in Target's parking lot, but perhaps the wear and tear occurred elsewhere. The Garrisons offered no proof either way. And even assuming that the syringe was brand new when it arrived in Target's parking lot, the jury could not reasonably determine whether it had been damaged five minutes—or hours or days or months—before Kaileigh picked it up. These equally unsupported suppositions do not present factual questions for the jury to resolve. Rather, they demonstrate the baseless

guesswork required to validate the Garrisons' theory of constructive notice. *See, e.g., Wintersteen I*, 336 S.C. at 136, 518 S.E.2d at 830) ("[W]hile the liquid could have been on the floor for an extended period of time, it is just as possible that it had been on the floor for only moments before Wintersteen fell. Based on the evidence presented at trial, it is apparent that any determination of how long the water had been on the floor would be pure speculation."); *cf. Reid v. Kohl's Dep't Stores, Inc.*, 545 F.3d 479, 482 (7th Cir. 2008) (applying analogous Illinois premises liability law and rejecting plaintiff's inference that a partially melted milkshake must have been on the floor long enough to infer constructive knowledge).[8]

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[8] The trial court's spoliation instruction was not a panacea for the Garrisons' failure of proof. To be sure, in some cases of spoliation—such as destroyed video footage that could have proved the length of time a hazard existed, *e.g., Woodard v. Wal-Mart Stores East, LP*, 801 F. Supp. 2d 1363, 1373 (M.D. Ga. 2011); *Robertson v. Frank's Super Value Foods, Inc.*, 7 So. 3d 669, 674-75 (La. Ct. App. 2009)—a jury could make the adverse inference that the merchant had constructive knowledge. But in order to establish that inference under South Carolina law, the Garrisons would have had to show that the physical syringe itself "might reasonably have supported" the missing evidence of longevity. *See Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009). There is no reason to believe that the syringe, if presented at trial, would have proven anything not already supported by the photographs and witness testimony—that it was weathered, dirty, dingy, and gross. And as explained above, that appearance evidence does not prove anything about how long the syringe may have been in Target's parking lot.

Second, the Garrisons' suggestions that the syringe must have been in the parking lot "a while" or "a long time" based on comparisons to a cigarette butt and piece of twine fare no better than the appearance of the syringe, because no one offered how long those articles of trash might have been in the parking lot. And without any plausible estimate of the amount of time the trash had been in the parking lot, the Garrisons layered conjecture on top of speculation. Had photographs shown that the trash and syringe bore flecks of paint, for example, such evidence might support an inference that those items were in the parking lot during a recent repainting. Likewise, an expert witness might have offered testimony connecting the appearances of those items to certain weather conditions, locations, or other temporal indicators. *Cf. Reid*, 545 F.3d at 482 (suggesting that expert evidence might be used to link the melted state of a milkshake to its longevity on the ground). But without any evidence that would allow the jury to estimate how long any of the trash had been in the parking lot, they were left to speculate about Target's constructive knowledge, in contravention of South Carolina law. *See Wimberly*, 252 S.C. at 122, 165 S.E.2d at 629.

Finally, the Garrisons' evidence suggesting the ineffectiveness of Target's cleaning and inspection procedures has been rejected as proof of constructive notice. In *Wimberly*, the plaintiff similarly argued that the store could be held liable based on proof of the store's "insufficient personnel,

inadequate inspection, [and] inadequate floor maintenance." 252 S.C. at 122, 165 S.E.2d at 629. The Supreme Court deemed that evidence irrelevant because it ignored "the necessity of proof of actual or constructive notice." *Id.* Thus, whether a merchant cleans or inspects its premises effectively does not answer the critical question at the heart of constructive notice: did the hazard exist long enough that the merchant ought to have discovered it? *See, e.g.*, *Bessinger v. Bi-Lo, Inc.*, 329 S.C. 617, 620, 496 S.E.2d 33, 35 (Ct. App. 1998) (affirming award of summary judgment to merchant in absence of "evidence that the grapes were on the floor through an act of Bi-Lo, or that any employee was aware that the grapes were on the floor, or how long the grapes were on the floor before the accident"). The Garrisons' focus on Target's cleaning and inspection procedures failed to give any insight into how long the syringe might have been in Target's parking lot.

At bottom, there is no evidence "which reasonably tends to prove" that the syringe was in the parking lot "at any *particular* time" prior to Denise's injury. *See Wimberly*, 252 S.C. at 122, 165 S.E.2d at 629 (emphasis added). That critical failure of proof undermines the Garrisons' case. On that basis, the Court should reverse the jury's verdict.[9]

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[9] As recognized by the trial court's jury instructions, Clint's claims for loss of consortium and lost wages cannot survive without his wife's underlying negligence claim. (R. p. 587, lines 11-21); *see also Lee v. Bunch*,

II. Target is Entitled to a New Trial Absolute Because the Jury's Unconstitutional $4.51 Million Punitive Damages Verdict Reflected the Jury's Passion, Caprice, and Prejudice

Even assuming that the Garrisons provided sufficient proof of constructive notice to allow their case to be submitted to the jury, Target is entitled to a new trial absolute based on the jury's unconstitutional award of $4,510,000 in punitive damages. The Supreme Court of South Carolina has instructed that when a trial court concludes that the jury rendered an unconstitutional punitive damages award, a new trial is required. Here, although the trial court correctly recognized that the award of any punitive damages would violate Target's due process rights, it overlooked Target's concomitant right to a new trial and instead analyzed whether the compensatory award, standing alone, was excessive. That analysis bypassed the command of the Supreme Court and mistakenly assumed that the jury's prejudice and caprice could infect some but not all of its conclusions. The jury's lawless verdict is not severable in that manner. Target is entitled to a new trial.

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373 S.C. 654, 663, 647 S.E.2d 197, 202 (2007) (recognizing that "a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails" (internal quotation marks omitted)).

A. Standard of Review

New trial absolute is required if the jury's verdict "is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence." *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). Although a trial court's review of the jury's verdict entails discretion, "[t]he failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion" that requires this Court to "grant a new trial absolute." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

B. A New Trial is Required When the Jury Renders an Unconstitutional and Shocking Punitive Damages Verdict

The jury does not get a blank check to set punitive damages. Instead, the trial court has the duty to ensure that the imposition of punitive damages is both warranted and constitutional. As relevant to this case, two procedural safeguards exist to prevent the jury from exceeding the lawful bounds on their discretion.

First, as a threshold matter, a trial court may not submit the question of punitive damages to the jury unless the plaintiff presents "evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). By law, the plaintiff must prove "such damages by clear and

convincing evidence." S.C. Code Ann. § 15-33-135 (1988). That standard imposes "the highest burden of proof known to the civil law." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). If the plaintiff does not present evidence sufficient to meet her burden, then "the issue of punitive damages may not be submitted to the jury." *S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996).

Second, even when the court allows a jury to decide the question of punitive damages, that determination "is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Horace Mann Ins. Co.*, 371 S.C. at 194, 638 S.E.2d at 670. Accordingly, whenever a jury awards punitive damages, the trial court must review that determination "to ensure that the award does not deprive the defendant of due process." *Love Chevrolet*, 324 S.C. at 154, 478 S.E.2d at 59. That assessment requires the trial court to consider the reprehensibility of the defendant's conduct, the disparity between the plaintiff's injury and the punitive damages award, and the relationship between the award and civil penalties allowed or imposed in similar cases. *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 585-89, 686 S.E.2d 176, 185-86 (2009). At the end of the analysis, "'[i]f the award is determined to violate the defendant's due process rights, then the trial court *must* either grant a new trial absolute, or a new

trial nisi remittitur.'" *Solanki v. Wal-Mart Store No. 2806*, 410 S.C. 229, 237, 763 S.E.2d 615, 618-19 (Ct. App. 2014) (quoting *Love Chevrolet*, 324 S.C. at 154, 478 S.E.2d at 59) (emphasis added).

The grant of a new trial absolute signifies that the jury's verdict was "so grossly excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives." *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). In contrast, a new trial nisi remittitur is appropriate for "awards that are merely unduly liberal." *Howard v. Roberson*, 376 S.C. 143, 154, 654 S.E.2d 877, 883 (Ct. App. 2007). New trial nisi remittitur may be appropriate when a punitive damages verdict is unconstitutionally excessive but the evidence at trial suggests that some level of punitive damages may be appropriate. Under such circumstances, the trial court should remit the verdict and offer the plaintiff the opportunity to accept the reduced amount. *See id.* "If the plaintiff chooses not to remit, a new trial is essential." *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984).

C. The Jury's $4.51 Million Punitive Damages Award Was Unconstitutional and Shocked the Conscience

Despite its obligation to ensure that the jury imposed a fair and lawful verdict, the trial court twice declined to step in when the case cried out for judicial intervention.

First, the trial court wrongly denied Target's motion for a directed verdict on the issue of punitive damages. As the court later recognized in its Order, "There is *no evidence* that [Target] engaged in a pattern of reckless, willful, or wanton conduct that is sufficiently reprehensible to justify the punitive damages award here." (R. p. 11 (emphasis added); *see also* R. p. 12 ("Target's conduct was not sufficiently reprehensibl[e] to justify punitive damages in this case.").) The "isolated incident" that caused Denise's injury "did not involve repeated actions, and was not intentional, malicious, or deceitful." (R. p. 11.) Nor did Target's conduct "evince a reckless disregard for the health or safety of others." (R. p. 11.) Thus, on the record presented at trial, Target was entitled to a directed verdict on the issue of punitive damages.[10]

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[10] The jury's punitive verdict was not justified by the evidence, but it may be explained, in part, by the closing arguments of the Garrisons' counsel. The lawyer's remarks to the jury included repeated references to Target's annual revenue (which was not in evidence), an incendiary comment implying that Target would be responsible for the deaths of young children, and a thinly veiled allegation that Target was bigoted against the people of

Second, although the trial court properly concluded that the award of punitive damages was unconstitutional in this case, it mistakenly assumed that it could salvage the verdict by excising those illegal damages from the judgment. (R. pp. 13-14.) In truth, the unconstitutional $4.51 million punitive award was proof positive that prejudice, caprice, and passion had infected the jury. *See Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 515, 506 S.E.2d 497, 504 (1998) (concluding that new trial absolute must be granted in a case in which "the issue of punitive damages should never have been submitted to the jury" and the jury returned a sizeable punitive verdict).

Upon concluding that the punitive verdict violated Target's due process rights, the trial court was obliged to order a new trial absolute or a new trial nisi remittitur. *See Love Chevrolet*, 324 S.C. at 154, 478 S.E.2d at 59. And, under these circumstances, remittitur would not be appropriate, because this was not a case in which the punitive award was "merely unduly liberal" and could be reduced to a lower amount. *Howard*, 376 S.C. at 154, 654 S.E.2d at 883. That is because *any* award of punitive damages would violate Target's

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Anderson County. *See supra* at 11. It is little wonder that, having been asked to repay prejudice with prejudice, the jury did just that. "The closing argument invited the jury to base its verdict on passion rather than reason." *Branham v. Ford Motor Co.*, 390 S.C. 203, 235, 701 S.E.2d 5, 22 (2010) (holding that closing arguments "calculated to arouse passion" denied the defendant a fair trial).

due process rights. (R. p. 12 ("Target's conduct was not sufficiently reprehensibl[e] to justify punitive damages in this case.").) As a result, the trial court had only one option: order a new trial absolute.

But the trial court did not oblige. Instead, after wiping out the $4.51 million punitive award as unconstitutional, the court apparently assumed that it had never happened. The court thus considered only whether the actual damages award was grossly excessive. That analysis elided the Supreme Court's guidance that the unconstitutional award of punitive damages requires either new trial absolute or new trial nisi remittitur. *See Love Chevrolet*, 324 S.C. at 154, 478 S.E.2d at 59.

More importantly, the trial court's denial of Target's request for new trial absolute overlooked the foundational premise of that remedy: when the jury renders an award that finds no basis in the evidence—suggesting improper motives such as passion, prejudice, or caprice—it calls into question the jury's determination of all the issues. *See, e.g.*, *Sanders v. Prince*, 304 S.C. 236, 239, 403 S.E.2d 640, 642 (1991) (remanding for new trial on all issues based on grossly excessive damages verdict). The trial court erred in its effort to sever the arbitrary and capricious punitive damages from the rest of the judgment. The jury's prejudice tainted the entire verdict.

In all events, if the baseless award of $4.51 million in punitive damages does not qualify as "so grossly excessive so as to shock the conscience of the

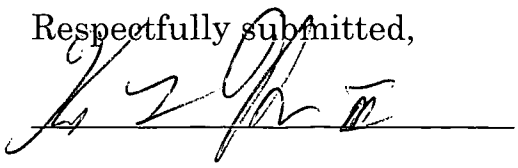
court," then it is difficult to imagine what could satisfy that standard. *See McCourt ex rel. McCourt*, 318 S.C. at 308, 457 S.E.2d at 607. The trial court abused its discretion in holding otherwise. Target is entitled to a new trial absolute.

CONCLUSION

Under long-settled South Carolina precedent, premises-liability plaintiffs must show that a hazardous condition was present for a sufficient period of time in order to prove constructive notice. Evidence regarding the appearance of the hazard, speculation and conjecture about the duration of the hazard, and critiques of the merchant's cleaning practices are not enough. But that was all the Garrisons could offer. They failed to carry their burden. Target is entitled to judgment as a matter of law on the Garrisons' negligence claim.

South Carolina law is similarly clear in its recognition that a jury's punitive damages award that is unsupported by the evidence and thus offends due process is evidence that jury's consideration of *all* the issues was infected by passion, prejudice, or caprice. Having correctly found that the evidence could not support any award of punitive damages, the trial court was obliged to order a new trial absolute. Thus, even if the Court could conclude that the Garrisons carried their burden on constructive notice, it still should vacate the jury's verdict and order a new trial.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellant Case No. 2017-000267

CARLA DENISE GARRISON AND CLINT GARRISON,

Appellants/Respondents,

v.

TARGET CORPORATION,

Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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