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.

RESPONSE BRIEF OF RESPONDENT/APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL[1]

1. Under South Carolina law, a jury may award punitive damages only when the plaintiff proves by clear and convincing evidence that the defendant's conduct evinced the willful, wanton, or reckless disregard for the plaintiff's rights. Should this Court revive the jury's $4.51 million punitive verdict despite the Garrisons' failure to show that Target consciously disregarded Denise Garrison's rights?

2. The Supreme Court of South Carolina has held that when a punitive damages award violates the defendant's due process rights, a new trial absolute or new trial nisi remittitur is required. Even if the Garrisons presented sufficient evidence of misconduct to allow submission of punitive damages to the jury, is Target entitled to a new trial when there was no evidence of reprehensibility and the jury returned a punitive verdict nearly forty-five times greater than the compensatory award?

3. South Carolina Code § 15-32-530(A) limits the award of punitive damages to the greater of $500,000 or three times the amount of actual damages awarded. Assuming the punitive verdict was supported by the evidence and did not violate Target's due process rights, may the Garrisons recover a punitive award in excess of that statutory limitation?

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[1]Target includes its Statement of Issues on Appeal pursuant to Rule 208(b)(2), SCACR.

4. Rule 68 of the South Carolina Rules of Civil Procedure allows the trial court to grant plaintiff prejudgment interest on an award that exceeds the amount she sought in an earlier-rejected offer of judgment. Are the Garrisons entitled to prejudgment interest on the jury's entire $4.61 million verdict, even if this Court deems a lower amount (or none at all) appropriate? May they recover prejudgment interest on a punitive award? And is Clint Garrison entitled to prejudgment interest even though he did not extend an offer of judgment?

STATEMENT OF THE CASE

On May 21, 2014, Appellant/Respondent Carla Denise Garrison stuck her hand on a discarded syringe of unknown origin in the parking lot of Target's Anderson County store. On June 27, 2014, Denise sued Target in the Court of Common Pleas for Anderson County, asserting a claim for negligence and recklessness and a violation of the Unfair Trade Practices Act. (R. pp. 30-36.) Several months later, on February 13, 2014, Denise extended an offer of judgment under Rule 68 of the South Carolina Rules of Civil Procedure, seeking $12,000. (R. p. 710.) Target did not respond to the offer. Several months after that, 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. 597-600; pp. 24-27.) The jury awarded Denise $100,000 in compensatory damages and $4,510,000 in punitive damages. It awarded Clint $8,500 in compensatory damages. (R. pp. 24-27.)

On September 15, 2016, the Garrisons filed a motion seeking prejudgment interest, post-judgment interest, and costs. (R. pp. 711-743.) The next day, Target timely moved for judgment as a matter of law, new trial absolute, new trial nisi remittitur, relief under the Thirteen 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. 750-759.) The trial court heard argument on the motions 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 Target's motion, leaving intact the jury's liability and compensatory damages determinations. (R. pp. 5-6.) With respect to the Garrisons' motion for interest and costs, the court awarded only post-judgment interest drawn on the compensatory awards. (R. p. 15.) The Garrisons subsequently asked the court to amend its judgment as to

interest and costs. (R. pp. 880-921.) On February 9, 2017, the court granted that motion and awarded the Garrisons their costs, prejudgment interest as to Denise's $100,000 compensatory award, and post-judgment interest as to the couple's combined $108,500 compensatory awards. (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.) This Court consolidated the appeals on February 24, 2017.

STATEMENT OF FACTS[2]

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

[2]The facts relevant to the Garrisons' appeal are the same as those relevant to Target's appeal. For that reason, Target incorporates herein the Statement of Facts from its Initial Brief on Appeal filed April 12, 2017.

piece of twine. (R. p. 424, line 9; p. 425, line 25-p. 426, line 3; p. 212, line 22-p. 213, line 6; 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. 429, lines 4-11; p. 193, lines 6-12.) 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. 221, line 24-p. 222, line 9; p. 214, lines 23-25.) 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. p. 433, line 12-15; p. 436, line 11-p. 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-p. 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.)[3]

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.)

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

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. 608; p. 418, line 21-p. 419, line 6.)

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 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.)[4] 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.[5]

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

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[4]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, line 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.)

[5]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.)

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; 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; 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.[6]

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

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

18-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 and its citizens.[7] 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; p. 533, lines 14-15; p. 541, lines 1-2; p. 542, line 10; p. 549,

[7]"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.)

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."

(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.[8] (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 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.)

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[8]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).

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 Court Should Affirm the Elimination of Punitive Damages Because the Garrisons Failed to Present Sufficient Evidence of Willful, Wanton, or Reckless Conduct

Punitive damages are not available in every case. They do not follow as a matter of course whenever the jury assigns liability, nor do they attach

simply because the plaintiff suffered an out-of-the-ordinary harm. Instead, they are reserved only for those cases in which the evidence clearly shows that the defendant consciously or recklessly disregarded the rights of the plaintiff. Only under such circumstances may the jury reprimand the defendant by imposing punitive damages.

There was no such proof in this case. No one knew where the syringe came from or how long it had been in Target's parking lot. And there was no evidence that anyone other than Denise Garrison had ever been injured in the parking lot of Target's Anderson store. Instead, the Garrisons pinned their punitive proof to the ineffectiveness of Target's cleaning procedures. Those arguments were insufficient to establish negligence, let alone recklessness as required to justify an award of punitive damages.

Although the trial court refused Target's motion for a directed verdict on punitive damages, this Court should affirm the trial court's elimination of the $4.51 million punitive award on that basis. *See* Rule 220(c), SCACR (allowing the appellate court to "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").[9]

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[9]This Court reviews the denial of a motion for a directed verdict using "the same standard as the circuit court." *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 394, 714 S.E.2d 904, 910 (Ct. App. 2011). "When ruling on a directed verdict motion as to punitive damages, 'the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.'" *Id* at 393, 714 S.E.2d 909.

A. South Carolina Law Imposes the Most Demanding Burden in Civil Law on Plaintiffs Seeking Punitive Damages

Punitive damages are an extraordinary remedy imposed to punish egregious misconduct and deter future wrongdoing. *See Nesbitt v. Lewis*, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999). In light of that retributive purpose, South Carolina conditions the award of punitive damages on the plaintiff's ability to meet "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). Specifically, the plaintiff must prove "by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Martasin v. Hilton Head Health Sys.*, 364 S.C. 430, 443, 613 S.E.2d 795, 802 (Ct. App. 2005) (citing *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996)); *see also* S.C. Code Ann. § 15-33-135 (1988) (requiring that, "in any action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

Evidence that suggests mere negligence cannot support an award of punitive damages. Instead, the plaintiff must show conduct that could "be

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(quoting *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005)). If "more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton," then the issue may be submitted to the jury. *Id.* (internal quotation marks omitted).

characterized as reckless, willful or wanton." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). And negligent conduct reaches that level only if it "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*, 324 S.C. at 221, 479 S.E.2d at 46. As South Carolina courts have long recognized, "'[i]t is this present consciousness of wrongdoing that justifies the assessment of punitive damages.'" *Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480 (quoting *Rogers v. Florence Printing Co.*, 233 S.C. 567, 578, 106 S.E.2d 258, 264 (1958)).

Thus, the plaintiff must offer evidence that the defendant was "conscious, or chargeable with consciousness, of his wrongdoing." *Id.* As pertinent here, in a premises liability case, that standard requires evidence that "suggests a defendant is *aware of a dangerous condition* and does not take action to minimize or avoid the danger." *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (emphasis added). But barring such proof, "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).

B. The Garrisons Did Not Meet Their Burden to Warrant the Imposition of Punitive Damages

To warrant punitive damages in this case, the Garrisons were required to present evidence showing that Target knew about the syringe in its parking lot and failed to minimize the danger to its customers. They plainly failed to meet that evidentiary threshold, because there was no evidence that suggested Target knew or should have known about the syringe before Denise's injury.[10] Yet even if Target could have been charged with knowledge of the syringe or any other hazard in its parking lot, the evidence presented at trial suggested Target made good-faith attempts to keep its premises safe and clean. Although the jury could have disbelieved the testimony from Target's employees regarding those practices, there was no reasonable basis to conclude that Target consciously disregarded its obligations to maintain a safe premises. The Garrisons' best attempts to meet that threshold on appeal require contorting the evidence, stretching inferences, and calling out for facts not in the record.

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[10]As explained in Target's opening brief in support of its own appeal, the absence of evidence regarding how long the syringe might have been in the parking lot constitutes a fatal failure of proof to the Garrisons' overall theory of liability. If this Court agrees with that contention, the Garrisons' pleas for punitive damages and prejudgment interest are irrelevant.

1. There Was No Evidence that Target Knew of Hazards In Its Parking Lot Yet Failed to Take Action

The Garrisons did not offer any proof sufficient to show that Target consciously disregarded Denise Garrison's rights. No evidence showed Target was aware of the syringe, much less that Target failed to take any action to minimize or avoid known dangers on the premises. For that matter, there was no evidence that medical waste (or any other hazard) had been in Target's parking lot before May 21, 2014. Indeed, there was no evidence that Target should have expected any dangerous objects to appear on the premises.

In fact, there was no evidence at trial that anyone other than Denise Garrison had ever sustained an injury—of any kind, from any cause—in Target's parking lot. Indeed, as far as the record shows, Denise's injury was the only one that had ever occurred in that parking lot, and no one could do anything but speculate as to how the injury could have been prevented. In short, before the night of Denise's injury, Target had no reason to believe that anyone would be injured by a discarded syringe in its parking lot. Accordingly, to the extent that Target can be held responsible for that injury, the record does not support the conclusion that Target was "conscious, or chargeable with consciousness, of [its] wrongdoing." *Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480. For that reason, no reasonable juror could have concluded

Target's conduct evinced the standard necessary for the imposition of punitive damages.

2. The Evidence Presented at Trial Reflected Target's Good-Faith Efforts to Maintain a Safe and Clean Premises

Contrary to the bleak portrayal offered by the Garrisons, the evidence presented at trial demonstrated that Target took many steps to maintain its 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. 341, lines 14-24.) Every Friday morning, property maintenance technician Jon Jackson verified that the truck had come the night before by visually inspecting the parking lot. (R. p. 342, lines 12-19.) If the truck did not come or the parking lot appeared dirty, Jackson would take note during his daily inspection of the premises. (R. p. 343, line 8; p. 346, lines 6-13.) Moreover, four times weekly during daylight hours, housekeeping staff cleaned the parking lot of trash and debris, picking up "anything larger than a golf ball." (R. p. 304, line 22; p. 305, lines 4-5.) 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. 346, lines 6-13.)

In addition to those five weekly cleanings, the parking lot was inspected by Target employees 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. 319, lines 7-10.) 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 inspections without incident in the weeks before and after Denise's injury. (R. p. 345, line 21-p. 346, line 13.) Had he seen the syringe in Target's parking lot, he would have removed it. (R. p. 343, line 20.)

Target employees also engaged in ad hoc inspections of the parking lot throughout the day. Shelby 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. 196, lines 11-13.) Although attendants did not have a set schedule for retrieving carts, 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. 197, lines 1-2.) Had Brintnall seen or been told about a needle in Target's parking lot, "it would be [her] duty to pick that up." (R. p. 202, lines 18-20.)

In short, the evidence presented to the jury did not suggest that Target consciously disregarded its duty to maintain a safe parking lot. Instead, the facts presented told a story of an isolated, unforeseeable accident that happened despite well-intentioned cleaning and maintenance procedures. The fact that those efforts did not detect the three-inch syringe before Kaileigh Garrison picked it up does not prove recklessness.

3. The Garrisons' Argument for Punitive Damages Depends on Contorted Evidence, Stretched Inferences, and Facts Outside the Trial Record

The Garrisons are entitled to have the evidence construed in the light most favorable to them, along with the *reasonable* inferences that derive from that evidence. *See Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). Even so, in their attempt to resuscitate the $4.51 million punitive award, the Garrisons go far beyond the evidence and reasonable inferences. Indeed, they contort the record to suggest that the jury was entitled not only to disbelieve the foregoing evidence, but also to conclude that the opposite was true at every turn.

For example, the Garrisons attack the log Jackson maintained of his daily premises inspections because two consecutive dates about a month before Denise's injury were listed as Mondays. (Initial Brief of Appellants/Respondents at 23.) Although they did not object to the authenticity of the log or to its introduction as evidence at trial, they now

label that typo as "clearly false information" that allowed the jury to conclude that "Jackson's inspection testimony was false." (*Id.*) And, according to the Garrisons, that false testimony is doubly bad for Target, because it proves that Target intentionally disregarded its duty to maintain the parking lot *and* demonstrates efforts to obscure the truth.

But even accounting for the jury's discretion to disbelieve Jackson's testimony or question the veracity of the inspection log's contents, there was no actual evidence that would support the further inferences that the document was intentionally falsified, that Jackson's inspections never took place, or that Jackson's use of the log was a charade. Moreover, the typo is beside the point for purposes of punitive damages, because it offers nothing about whether Target consciously disregarded its obligation to maintain its premises. The Garrisons' contention otherwise projects a "speculative, theoretical and hypothetical" view that cannot provide the basis for a jury question. *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 429, 635 S.E.2d 562, 565 (Ct. App. 2006) (internal quotation marks omitted).

The rest of the Garrisons' evidence follows the same pattern. For example, they argue that, because Target's employees could not provide specifics about the third-party vendor that provided the street-sweeping truck—and because Clint camped out one night two years *after* the incident and did not see such a truck—that the truck "did not regularly clean Target's

premises." (Initial Brief of Appellants/Respondents at 21.) But, again, even if the jury concluded that the truck never came, they could only speculate that Target was *aware* the truck did not regularly clean its parking lot.

Similarly, the Garrisons point to photographs showing trash in Target's parking lot and emphasize that, just prior to trial, Clint had observed a bolt remain in Target's parking lot "for at least four months without being removed." (*Id.* at 22.) But that evidence gets them only as far as a dirty parking lot. And a dirty parking lot does not show—by any evidentiary standard, much less clear and convincing evidence—that Target *consciously disregarded* its duty to maintain a safe premises. Concluding otherwise would blur the distinction between negligence and recklessness and substantially lower the hurdle for receiving punitive damages.

The Garrisons also contend that "Target's loss of the syringe provides its own independent basis to support punitive damages." (Initial Brief of Appellants/Respondents at 24.) That proposition finds no support under South Carolina law. For that reason, the Garrisons cite a medical malpractice case from Ohio, where the court concluded that there was *actual evidence* to suggest medical records had been *intentionally* "altered, destroyed or concealed" in order to avoid liability. *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343-44 (Ohio 1994). There is no analogous evidence here regarding the syringe's disappearance. The trial court's spoliation instruction

allowed the jury to assume that the syringe, if presented at trial, would have been adverse for Target. But there is no basis to further contend that the syringe's physical appearance would somehow indicate Target knew the syringe was in the parking lot at the time of Denise's injury.

Finally, the Garrisons resort to reliance on facts not in the record. Specifically, they contend that, "[e]ven though Target's Manager acknowledged the importance of cart attendants inspecting the parking lot, the evidence showed that cart attendants were distracted by cell phones while retrieving carts." (*Id.* at 23 (citing R. p. 196, lines 4-7; p. 311, line 2-p. 312, line 6; p. 321, lines 11-24).) Not so. Although they attempted to introduce a photograph purporting to show a Target employee on a cell phone, the trial court sustained Target's objection to its introduction. (*See* R. p. 319, line 2-p. 320, line 16.)

Although the trial court properly granted Target's motion for judgment notwithstanding the verdict as to the issue of punitive damages, it should have granted that relief on Target's motion for a directed verdict. There was no evidence—much less clear and convincing evidence—that Target consciously disregarded the safety of its customers. At best, taking the evidence in the light most favorable to the Garrisons and extending them the *reasonable* inferences therefrom, the facts suggested that Target's many methods of keeping its parking lot clean and safe were simply ineffective in

detecting a syringe that may not have arrived there until moments before Denise's injury. In this premises liability case, evidence of ineffective cleaning does not equate to negligence, much less recklessness. Put succinctly, Target's inability to locate the three-inch syringe—a near-literal needle in a haystack—does not constitute clear and convincing evidence of willful, wanton, or reckless conduct evincing a conscious disregard for Denise's rights. On that basis, this Court should affirm the elimination of the punitive damages verdict. *See, e.g.*, *Martin v. Martin*, 262 S.C. 168, 174-75, 203 S.E.2d 385, 387-88 (1974) (reversing judgment and award of punitive damages when evidence did not suggest the defendant "was conscious of any conduct ... which was an invasion of the rights of the [plaintiff]").

II. In The Alternative to Affirmance, the Jury's $4.51 Million Punitive Damages Award Requires a New Trial

Even if this Court concludes that there was sufficient evidence to allow the jury to undertake a punitive-damages determination, the resulting $4.51 million verdict violates Target's constitutional right to due process. And under South Carolina law, the remedy for an unconstitutional punitive verdict is a new trial. On that basis, the Court must vacate the judgment below and remand for a new trial absolute.

A. A New Trial is Required When the Jury Returns an Unconstitutional Punitive Damages Award.

Due to the "quasi-criminal" nature of punitive damages, their imposition "is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). Thus, whenever a jury awards punitive damages, a trial court must review that decision "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. This Court reviews de novo the trial court's conclusions regarding the constitutionality of a punitive damages award. *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 185-86 (2009).

The Supreme Court of South Carolina has explained that the punitive damages due process review consists of three factors. First, the reviewing court must consider "the degree of reprehensibility of the defendant's conduct." *Mitchell*, 385 S.C. at 585, 686 S.E.2d at 184. Reprehensibility can be shown by the nature of the plaintiff's injury, the defendant's indifference or reckless disregard "for the health or safety of others," the targeting of a financially vulnerable plaintiff, the defendant's repetitive conduct, or an injury that results from "intentional malice, trickery, or deceit, rather than mere accident." *Id* at 587, 686 S.E.2d at 185. Second, the court should

consider "the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award." *Id.* This factor involves reviewing the ratio between actual and punitive damages and consideration of "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Id* at 588, 686 S.E.2d at 185. Finally, the court should evaluate "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 585, 686 S.E.2d at 184. Ultimately, if the court determines that the punitive damages award violates the defendant's due process rights, then the court "must either grant a new trial absolute, or a new trial nisi remittitur." *Id* at 582, 686 S.E.2d at 182.

B. Target is Entitled to a New Trial, Because the Jury's $4.51 Million Punitive Damages Award Violated Target's Due Process Rights.

The evidence presented at trial did not support the imposition of a $4.51 million punitive damages award. Under each of the three relevant factors, considered individually and in the aggregate, that verdict violated Target's due process rights.

First, Target's conduct was not reprehensible. Denise's minor injury resulted from the volitional act of swatting at a syringe that had never been seen in Target's parking lot. There was no evidence that Target knew (or

should have known) dangerous objects might turn up in its parking lot. And because the jury could do no more than speculate as to how long the syringe had been in Target's parking lot or how it got there, the same guesswork would be required to conclude that Target's supposed indifference or recklessness led to the injury. And there can be no doubt that Denise's injury was the result of a one-time accident, not intentional bad-faith conduct.

The Garrisons contend that "Target loses on each and every factor" probative of reprehensibility. (Initial Brief of Appellants/Respondents at 32.) But the evidence presented at trial belies that bold contention. Despite Denise's injury, there was simply no basis for the jury to conclude that Target intentionally failed to clean its parking lot, much less that such irresponsible conduct was aimed at its customers. And, as discussed above, the record does not show any injuries in the parking lot before (or after) the incident with the syringe. For all the jury knew, Denise Garrison was the only person ever injured at the Anderson store. At most, therefore, the evidence suggests that Target's cleaning and inspection practices were ineffective at preventing a one-time injury from an unforeseeable hazard. That simply does not show that Target's conduct was reprehensible.

Second, the jury's punitive damages award—nearly forty-five times larger than the compensatory award—was grossly disproportionate to the harm suffered by Denise. As the United States Supreme Court has

recognized, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Without a doubt, the 45 to 1 ratio here cried out for judicial intervention.

What's more, behind the staggering ratio reached in this case, none of the considerations that might support a large punitive verdict were present here. Specifically, without any evidence showing that Target ought to have found the syringe before Denise's injury, there is no basis to conclude that a hefty punitive award could achieve adequate deterrence. Any contention otherwise simply layers conjecture on top of speculation. Moreover, because of the uncertainty regarding the origin and longevity of the hazard, the gap between what Target actually did and what it should do in the future remains so theoretical that the jury could not have concluded that $4.51 million was appropriately tailored to address Target's conduct. Similarly, the sheer happenstance of the incident underscores the improbability that the injury will recur absent a punitive award. And, although the Court can consider Target's ability to pay the punitive damages award, that ability "cannot justify an otherwise unconstitutional punitive damages award." *Mitchell* at 588, 686 S.E.2d at 185 (citing *State Farm*, 538 U.S. at 427).

In defense of the outsized punitive award, the Garrisons incorrectly suggest that South Carolina law supports a 45 to 1 ratio. They point to the

Mitchell case and claim that the Supreme Court of South Carolina there upheld a ratio of 54 to 1. (Initial Brief of Appellants/Respondents at 33.) At best, the Garrisons misunderstand the simple facts of *Mitchell*. At worst, they are substituting their own numbers for the Supreme Court's in the hope that this Court won't check their math.

In *Mitchell*, the plaintiff sued his health insurance company for rescinding his policy in bad faith after he tested positive for HIV. *See* 385 S.C. at 580-82, 686 S.E.2d at 182-83. At trial, he introduced evidence of both actual and potential harm, the latter showing the costs he would likely incur in treatment throughout his life absent health insurance, which one expert calculated to be over $1 million. *Id.* at 581, 686 S.E.2d at 182. The jury then returned a verdict consisting of $186,000 in actual damages plus $15 million in punitive damages. *Id.* In its due-process review of the punitive award, the Supreme Court considered the $15 million figure in comparison to the combined actual and potential harm (*i.e.*, $186,000 in actual damages plus the $1 million "potential harm" damages). *See id.* at 592, 686 S.E.2d at 187. The Court concluded "that a 13.9 to 1 ratio, in this particular case, exceed[ed] due process limits." *Id.* Ultimately, the Court reduced the punitive award to $10 million to meet "the outer limits of the single-digit ratio," "resulting in a ratio of 9.2 to 1." *Id.* at 593-94, 686 S.E.2d at 188.

The Garrisons contend that the approved ratio in *Mitchell* was 54 to 1 because $10 million is fifty-four times greater than $186,000. Yet they also recognize that the *Mitchell* Court included "potential harm" damages in its consideration of the appropriate ratio. (*See* Initial Brief of Appellants/Respondents at 33.) It is thus puzzling why the Garrisons' math omits the expert-endorsed $1 million "potential harm" calculation that the Supreme Court considered as compensatory for purposes of the ratio. In any event, nowhere in its *Mitchell* decision did the Supreme Court suggest that it was approving a 54 to 1 ratio. Indeed, the Court rejected a 13.9 to 1 ratio, and even concluded that *any* double digit ratio would be unconstitutional.

And to the extent the Garrisons suggest that "potential harm" to Denise could support a higher award, those alternative facts do not exist. The potential harm in *Mitchell* was backed up by expert opinion and predicted the very real costs that an HIV patient would incur in the future. Here, the Garrisons play on imaginary consequences, based on the harm that Denise *might* have faced *if* the syringe actually infected her with some disease. But Denise did not contract any infectious diseases, and she presented no evidence suggesting that she might experience future harm. The 45 to 1 ratio found in the jury's punitive verdict finds no support under South Carolina law, and it violates Target's due process rights.

Third, research reveals no "comparable cases" or civil penalties involving the liability of a merchant for a syringe or other medical waste found in its parking lot, let alone one that might be used to gauge the appropriate level of punitive damages. *See id.* at 588, 686 S.E.2d at 186. Even if the court broadens focus to the universe of traditional slip-and-fall cases, it will be hard-pressed to find useful comparators. *See, e.g.*, *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 34, 542 S.E.2d 728, 729 (2001) (affirming reversal of judgment for plaintiff, including $500,000 punitive damages award, when merchant was entitled to directed verdict); *Howard v. K-Mart Discount Stores*, 293 S.C. 134, 135, 359 S.E.2d 81, 82 (Ct. App. 1987) (reversing judgment for plaintiff, including $1,000 punitive damages award, when plaintiff failed to present sufficient evidence of merchant's negligence). And South Carolina does not impose civil penalties on merchants for failing to maintain parking lot safety or cleanliness. In short, any award of punitive damages in this context would be above and beyond the sanctions a South Carolina merchant might expect if a customer were injured by a syringe found in the store's parking lot.

The Garrisons muster cases that they claim as "pertinent authorities" but none offer any meaningful comparison to this case. (*See* Initial Brief of Appellants/Respondents at 34-36.) Those cases are either factually distinguishable, involve a punitive-to-actual-damages ratio far lower than 45

to 1, or both. There is no reasonable basis to characterize any of those cases as "much more excessive than the punitive award in this case" (*Id.* at 36.) In truth, there are no useful comparators to the Garrisons' lawsuit, because never before has a South Carolina court upheld a punitive damages award of any size in a premises liability case like this one, in which the plaintiffs failed to meet their burden of proof to show negligence, much less willful, wanton, or reckless conduct.

In short, the $4.51 million punitive award violated Target's due process rights. If the Court concludes that the Garrisons presented sufficient evidence to support sending the punitive damages question to the jury, then Target is yet entitled to a new trial absolute.

III. The Jury's Punitive Damages Verdict Cannot Exceed $500,000 Pursuant to South Carolina Code § 15-32-530(A).

If the Court gets as far as concluding that punitive damages were warranted in this case and that the $4.51 million award did not violate Target's constitutional rights, then the Court must still reduce the punitive verdict to comply with South Carolina law.

The South Carolina legislature has limited punitive damages to three times the compensatory award or $500,000, whichever is greater. *See* S.C. Code Ann. § 15-32-530(A) (2012). Under certain circumstances that do not apply here, the cap can be increased to the greater of four times the

compensatory award or $2 million. *Id.* § 15-32-530(B) (allowing for such punitive awards when the trial court concludes that the defendant was motivated by unreasonable financial gain or undertook conduct punishable as a felony).[11] And under other inapposite scenarios, the trial court can remove the cap entirely. *See id.* § 15-32-530(C) (removing the cap when the trial court concludes that the defendant intended to harm the plaintiff, has pleaded guilty to or been convicted of a felony for his conduct toward the plaintiff, or harmed the plaintiff while under the influence of alcohol or drugs).

In an attempt to avoid the applicability of the statutory cap, the Garrisons advance two meritless arguments. First, they argue that the cap is an affirmative defense that Target failed to plead in its answer. Second, they suggest that the statutory cap is unconstitutional because it infringes on their right to a jury trial. Neither contention staves off the imposition of the $500,000 cap to this case.

A. The Statutory Cap is Not an Affirmative Defense.

First, the Garrisons suggest that South Carolina's punitive damages cap is an affirmative defense that Target was required to allege in its answer. Although no court has examined § 15-32-530 through that lens, the Garrisons' position is untenable.

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[11]The Garrisons are wrong that the $2 million cap applies here. *See infra* Part III.C.

An affirmative defense "conditionally admits the allegations of the complaint, but asserts new matter to bar the action." *FMI, Inc. v. RMAX, Inc.*, 286 S.C. 343, 347, 333 S.E.2d 360, 363 (Ct. App. 1985) (internal quotation marks omitted). Thus, when properly pleaded, an affirmative defense shifts the burden of proof "to the defendant to show he is not liable." *Id.* "[T]he aim of this pleading requirement is to avoid surprise defenses." *Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007). South Carolina's punitive damages cap does not fit this paradigm, because it does not bar the action brought against the defendant, does not shift the burden of proof to the defendant, and presumptively applies in all civil cases.

Nevertheless, in an effort to label the cap as an affirmative defense, the Garrisons point to this Court's decision in *James v. Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998). That case involved a $200,000 statutory limit on recovery from a charitable organization in a negligence action, which could be circumvented if the jury concluded that the organization's "employee acted in a reckless, willful, or grossly negligent manner." *Id.* at 282, 500 S.E.2d at 201 (quoting S.C. Code Ann. § 33-55-210(A) (1990)). This Court concluded that, because the statute required the plaintiff to prove *to the jury* "a greater degree of negligence in order to recover damages in excess of $200,000," a defendant seeking its protections must assert the limitation as an affirmative defense. *See id.* at 283-85, 500 S.E.2d at 201-03.

Section 15-32-530 is not like the liability limitation at issue in *James*. Unlike that provision, South Carolina's punitive damages cap applies to *all* civil actions, not just those involving certain defendants under certain factual scenarios. And the language of § 15-32-530 imposes a *mandatory* duty on the *trial court* to ensure enforcement of the cap when the punitive award exceeds the greater of $500,000 or three times the compensatory award—regardless of whether the defendant raises the issue. *See* S.C. Code § 15-32-530(B) (2012). As a matter of law, therefore, all punitive damage awards are presumptively limited to "the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars." *See id.* § 15-32-530(A). No plaintiff can reasonably claim surprise at the imposition of that cap any more than they might be surprised by the operation of the South Carolina Rules of Civil Procedure. *See Zorilla v. Aypoco Constr. II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015) (holding that Texas's punitive damages cap is not an affirmative defense that must be pleaded, noting that, because the cap "automatically applies and its scope is delineated by statute, there is little concern that plaintiffs will genuinely be surprised by its application in any given case"); *cf. Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995) (concluding that "[s]et-off was statutorily mandated, was not a matter properly triable to the jury, and therefore was not a matter constituting an affirmative defense").

Here, the Garrisons could have avoided the cap had they put on evidence showing that one of the statute's exceptions applied. Their failure to do so betrays either their ignorance of the law or the deficiency of their case, not legal trickery by Target.

B. The Statutory Cap is Not Unconstitutional.

The Garrisons next argue that South Carolina's statutory cap on punitive damages violates Denise Garrison's constitutional right to a jury trial. (*See* Initial Brief of Appellants/Respondents at 29.) In defense of that position, they ask this Court to adopt the reasoning of decisions from Missouri, Ohio, Alabama, and Georgia, which have reached that conclusion as to those damages caps in those states. Although the constitutionality of § 15-32-530 is a matter of first impression, South Carolina case law has already answered this question in a different context that readily applies here.

In *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990), the Supreme Court of South Carolina addressed a constitutional challenge to the statutory limitation on the amount of damages recoverable under the South Carolina Tort Claims Act. The Court upheld the limitation, rejecting an argument nearly identical to the one raised by the Garrisons here—that "the limitation on damages infringes upon the right to have

damages determined by a jury and therefore, the right of trial by jury." *Id.* at 290, 391 S.E.2d at 569. As the Court explained,

> the limitation on recovery as set forth in the Tort Claims Act does nothing more than establish the outer limits of a remedy provided by the legislature. A remedy is a matter of law, not a matter of fact. Although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award, the legal consequences of its assessments. Accordingly, we find that the fundamental right to a trial by jury has not been infringed upon.

Id. at 290-91, 391 S.E.2d at 569-70.

Just like the statutory limit in *Wright*, § 15-32-530 simply sets the outer limits of the punitive remedy available to all plaintiffs who bring actions in South Carolina. The cap thus reflects the considered judgment of the legislature in defining the legal consequences of facts found by the jury. Accordingly, the imposition of the punitive damages cap does not violate the Garrisons' constitutional right to a jury trial. That conclusion is counseled not only by *Wright*, but also the majority of courts to have considered constitutional challenges to punitive damages caps. *See, e.g.*, *Murphy v. Edmonds*, 601 A.2d 102, 107-18 (Md. 1992) (upholding statutory damages cap under state constitution); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 528-34 (Va. 1989) (upholding statutory damages cap under state and federal constitutions); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877, 886-88 (W. Va. 1991) (upholding statutory damages cap under state

constitution); *see also Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 253 (5th Cir. 2013) (upholding Mississippi damages cap against state constitutional challenge); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519-20 (6th Cir. 2005) (upholding Michigan damages cap against federal constitutional challenge); *Boyd v. Bulala*, 877 F.2d 1191, 1195-97 (4th Cir. 1989) (upholding Virginia damages cap against federal constitutional challenge).

C. The $500,000 Cap Applies Here.

Lastly, the Garrisons claim that, if the cap applies, the $2 million exception should be imposed because "the Garrisons contended that Target put profits before safety." (Initial Brief of Appellants/Respondents at 28 n.5.) In support of that theory, they point out that Target sometimes sent home cart attendants early "to save money" and that Target had not reviewed any video surveillance footage of any injuries in the parking lot. They also posit that the jury must have accepted that theory, because "a punitive damages award was returned in excess of the $2,000,000.00 cap." (*Id.*)

The comments about cart attendants and surveillance cameras are non sequiturs. Those contentions do not show Target's purportedly ineffective cleaning and inspection procedures were "motivated primarily by *unreasonable* financial gain," were unreasonably dangerous and created "the high likelihood of injury," or that a Target manager, director, officer, or

policymaker knew or approved of those practices with those consequences in mind. *See* S.C. Code Ann. § 15-32-530(B)(1) (2012) (emphasis added) (outlining such scenarios as bases for imposing $2 million cap). And the circular logic that the jury's verdict proves its own legality defies the trial record (because the jury was never told about the statutory cap) and the law (because § 15-32-530(B) expressly prohibits disclosure of the statutory cap to the jury). The $500,000 cap on punitive damages applies here.

IV. Rule 68 Prejudgment Interest Applies Only to Denise's Actual Damages Award of $100,000

Finally, in the event this Court upholds any portion of their liability verdict, the Garrisons ask for prejudgment interest to be taxed on the entire $4.61 million verdict returned by the jury at the conclusion of trial. But as the trial court recognized, the prejudgment interest allowed by Rule 68 of the South Carolina Rules of Civil Procedure applies only to Denise's compensatory damages award of $100,000, not the jury's original verdict.

South Carolina's Rule 68 allows either party to file "a written offer of judgment ... offering to take judgment in the offeror's favor ... for a sum stated therein." Rule 68(a), SCRCP. To encourage serious offers and consideration thereof, the Rule imposes consequences if the offer is rejected and the offeror later "obtains a verdict or determination at least as favorable as the rejected offer." Rule 68(b), SCRCP. As relevant here, if the plaintiff's

offer is rejected, then the defendant must compensate the plaintiff in an amount equal to "eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment." *Id.* Although Rule 68 differs from its federal counterpart in some respects—for example, by allowing the plaintiff to extend an offer (the federal rule allows only defense offers) and imposing prejudgment interest (the federal rule imposes the costs incurred after the offer was made)—this Court has recognized that both are "intended to encourage settlements and avoid protracted litigation." *Black v. Roche Biochemical Labs.*, 315 S.C. 223, 227, 433 S.E.2d 21, 24 (Ct. App. 1993) (citing 12 Wright & Miller, Fed. Prac. & Proc. § 3001 (1973)).

The Garrisons contend that prejudgment interest must be based on the monetary amount returned by the jury—$4.61 million—regardless of *any* post-verdict judicial alteration of that figure. (*See* Initial Brief of Appellants/Respondents at 37.) According to the Garrisons, had "the Legislature wanted pre-judgment interest to be calculated from a modified amount after the filing of post-judgment motions, it was required to say so in the rule and statute." (*Id.* at 37-38.) But their theory is wrong for at least three reasons.

First, the Garrisons' interpretation of Rule 68 puts the jury's determination of damages above any court's post-verdict review. That is, they

claim entitlement to prejudgment interest taxed on $4.61 million not only if this Court affirms the trial court's reduction of the verdict to $108,500, but also if the Court sides with Target in its appeal and reverses the jury's verdict entirely. To state the Garrisons' argument is to refute it.

Of course, it is elementary that *prejudgment* interest cannot be entered on an award that has not been set by a final judgment. The interest under Rule 68 is triggered by "a verdict *or determination* at least as favorable as the rejected offer." Rule 68(b), SCRCP (emphasis added). The use of the term "determination" indicates that the final amount may be settled by the judge rather than the jury. That is precisely what happens when a party makes a timely motion for judgment notwithstanding the verdict, as Target did here. *See* Rule 50(b), SCRCP (allowing a party who earlier moved for a directed verdict to "move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict"); *cf.* Rule 54(a), SCRCP (defining "judgment" as "any decree or order which dismisses the action as to any party or finally *determines* the rights of any party" (emphasis added)).

Second, prejudgment interest should not be awarded for punitive damages, because those concepts have conflicting purposes. Specifically, prejudgment interest is compensatory, making the plaintiff whole for the lost time value of the money to which she was individually entitled. *See Butler*

Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 134, 631 S.E.2d 252, 258 (2006); *see also Ancrum v. Slone*, 29 S.C.L. (2 Speers) 594, 598 (S.C. App. L. 1844) (recognizing prejudgment interest as "a stated compensation for the use of money," which "cannot be separated, even in idea, from debt"). In other words, taxing prejudgment interest on the award of compensatory damages "restore[s] the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred." *Clark v. Cantrell*, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000).

In contrast, punitive damages serve retributive and deterrent purposes. *See id.* at 378-79, 529 S.E.2d at 533; *see also Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 431 (2001) ("Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes."). In fact, the Supreme Court of South Carolina has chastised "attempt[s] to blur all distinctions between actual and punitive damages by unduly emphasizing" the fact that punitive damages go into the pocket of the plaintiff. *Clark*, 339 S.C. at 379, 529 S.E.2d at 533; *see also Harleysville Grp. Ins. v. Heritage Cmtys., Inc.*, --- S.E.2d ----, 2017 WL 105021, at *13-14 (S.C. 2017) (rejecting argument that punitive damages should be treated like compensatory damages in an insurance-coverage dispute).

Although no South Carolina court has considered the issue of Rule 68 prejudgment interest on punitive awards, other courts have concluded that punitive damages should not be included in the calculation of prejudgment interest under applicable statutes. *See, e.g., Lakin v. Watkins Associated Indus.*, 863 P.2d 179, 191 (Cal. 1993) (holding that, under similar offer-of-judgment rule, prejudgment-interest consequence does not apply to punitive damage awards); *see also, e.g., Casto v. Arkansas-Louisiana Gas Co.*, 562 F.2d 622, 625 (10th Cir. 1977) (applying Oklahoma law) (concluding that prejudgment interest may not be assessed against punitive damages awards); *Haskins v. Shelden*, 558 P.2d 487, 495 (Alaska 1976) (same); *Seaward Const. Co. v. Bradley*, 817 P.2d 971, 976 (Colo. 1991) (same); *McEvoy Travel Bureau, Inc. v. Norton Co.*, 563 N.E.2d 188, 196 (Mass. 1990) (same); *Ramada Inns, Inc. v. Sharp*, 711 P.2d 1, 2 (Nev. 1985) (same). This Court should reach the same conclusion and hold that prejudgment interest under Rule 68(b) may not be taxed against punitive damages awards.

Finally, even if prejudgment interest is warranted here, Clint Garrison is not entitled any. Rule 68 speaks in terms of what "the *offeror* shall recover" in the event of non-acceptance. *See* Rule 68(b), SCRCP (emphasis added). Denise's offer of judgment applied only to the claims raised against Target on her own behalf. (*Compare* Offer of Judgment (filed Feb. 13, 2015) (extending offer of judgment on behalf of Denise), *with* Second Complaint (filed Sept. 21,

2015) (adding Clint as a party).) Clint was not an offeror, so he is not entitled to prejudgment interest.

In short, to the extent prejudgment interest under Rule 68 ultimately applies to this case, only Denise's $100,000 actual damages award should receive prejudgment interest.

CONCLUSION

This Court need not reach all (or any) of the issues raised by the Garrisons' appeal. Importantly, because Target has challenged the underlying liability determination in its own appeal from the judgment below, the Garrisons' arguments about punitive damages and prejudgment interest come into focus only if Target's appeal is rejected. But if the Court concludes that there was sufficient evidence to find Target liable for Denise's injury, it should reject the Garrisons' contentions and affirm the judgment below.

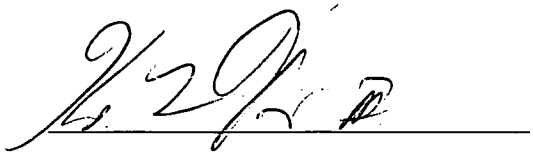
For one, they seek reinstatement of the unwarranted $4.51 million punitive verdict eliminated by the trial court. But the facts marshalled by the Garrisons on appeal do not show that Target consciously disregarded Denise Garrison's rights, and the evidence presented at trial fell far short of showing any reckless conduct. On that basis, the jury should not have been allowed to consider the question of punitive damages, and this Court can affirm the trial court's elimination of the $4.51 million award on that basis.

What's more, there can be no doubt that the $4.51 million punitive award violated Target's due process rights. There was no evidence suggesting Target's conduct was reprehensible so as to merit punishment, and the 45 to 1 ratio between punitive and compensatory damages finds no support or precedent under South Carolina law. Thus, even if the jury could have awarded some measure of punitive damages to the Garrisons, the unconstitutional verdict in this case entitles Target to a new trial.

And even if punitive damages were properly submitted to the jury and the unconstitutional award does not require a new trial, South Carolina Code § 15-32-530 mandates that the award be capped at $500,000. That limit is not an affirmative defense, nor is it unconstitutional. Based on the evidence presented at trial, if the Garrisons are entitled to any punitive damages, that award can be no greater $500,000.

Finally, if the Court gets so far as to consider the issue of prejudgment interest under Rule 68, such interest should be taxed on only Denise's $100,000 compensatory award. The Garrisons' interpretation of Rule 68 is untenable, and imposing such interest on a punitive award would graft a compensatory windfall onto a retributive remedy.

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 Respondent's Brief complies with Rule 211(b), SCACR.

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