THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

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

Appellate Case No. 2017-000267

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

v.

Target Corporation.....Respondent/Appellant.

Appellants'/Respondents' Final Brief

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INTRODUCTION

This appeal involves a large jury verdict in favor of Appellants/Cross Respondents Denise and Clint Garrison and against Respondent/Cross Appellant Target Corporation. Although the trial court denied Target's directed verdict request on the issue of punitive damages, it reversed course after the jury made a substantial award.

Undoubtedly, $4,510,000.00 dollars is a significant amount of money. But such a large verdict, from what commentators have called one of the most conservative venues in this State,[1] should have underscored the egregious nature of Target's conduct. It is peculiar for the trial court to have vacated the entirety of the jury's punitive damages award on sufficiency of the evidence grounds – especially when the very same court had previously found a sufficient basis for the jury to award punitive damages. If the trial court believed the jury awarded too much, then remittitur – not vacatur – was the answer.

This Court should reverse the trial court's grant of judgment as a matter of law on the issue of punitive damages. In so doing, this Court also should award Denise Garrison the entirety of the pre-judgment interest that she is entitled to for her win. Trials have consequences, and the jury's role in the process should be respected. *See, e.g.,* Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution,* 40 SUFFOLK U.L. REV. 67, 72 (2006) ("The involvement of

[1] In the trial court, the Garrisons attached US Law Network's state judicial profiles survey as an exhibit to their post-trial response. (R. p. 879) It listed Anderson as one of the seven most conservative counties in the State.

ordinary citizens in a majority of a court's tasks provides legitimacy to all court actions.").

STATEMENT OF THE ISSUES ON APPEAL

1. Was it error for the trial court to grant Target's judgment as a matter of law on the issue of punitive damages? Restated, was there "any evidence" to support the jury's punitive damages award in favor of Denise Garrison?

2. In the event that there was "any evidence" to support the jury's punitive damages award in favor of Denise Garrison, was the amount of punitive damages excessive? Restated, should the jury's punitive damages award be reduced under the South Carolina Fairness in Civil Justice Act or the Constitution?

3. Was it error for the trial court to limit Denise Garrison's pre-judgment interest to the amount of her actual damages? Restated, is Rule 68(a)'s prejudgment interest tied to the jury's verdict or to post-trial alteration?

STATEMENT OF THE CASE[2]

This is an appeal from the trial court's post-trial rulings on issues of punitive damages and pre-judgment interest. (R. pp. 5-17; pp. 18-23) The case was commenced on July 1, 2014, when Denise Garrison filed suit for negligence, recklessness, and unfair trade practices. (R. pp. 30-36). Target answered the complaint in August 2014, (R. pp. 37-41), and refused a $12,000 offer of judgment made by Denise Garrison on February 13, 2015. (R. p. 710)

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

A second action was filed on September 21, 2015 by both Denise and Clint Garrison, which alleged negligence, recklessness, loss of consortium, and lost wages. (R. pp. 42-48) Target answered the complaint in November 2015, (R. pp. 49-54), and the cases were consolidated. (R. pp. 3-4).

This case was tried to a jury from September 6, 2016 to September 8, 2016. (R. pp. 64-605) The jury found in favor of Denise Garrison and awarded her $100,000.00 in actual damages and $4,510,000.00 in punitive damages. (R. pp. 731-34) The jury also found in favor of Clint Garrison and awarded him $3,500.00 in lost wages and $5,000.00 in loss of consortium. (R. pp. 731-34)

Both parties filed post-trial motions. The Garrisons requested pre-judgment interest, post-judgment interest, and costs on September 15, 2016. (R. pp. 711-43) Target requested, among other relief, judgment as a matter of law on punitive damages on September 16, 2016. (R. pp. 750-59) A hearing was held on November 3, 2016. (R. pp. 623-709)

The trial court entered an order on the post-trial motions on January 26, 2017. (R. pp. 5-17) It granted Target's requested relief on punitive damages and granted the Garrisons' requested relief only on post-judgment interest. (R. pp. 5-17) The Garrisons filed a motion for reconsideration five days later. (R. pp. 880-921)

The trial court entered an order on the motion for reconsideration on February 9, 2017. (R. pp. 18-23) It granted both Garrisons' requests for costs and granted Denise Garrison pre-judgment interest only on the actual damages awarded by the jury. (R. pp. 18-23) The Garrisons filed a notice of appeal on February 10, 2017, and Target filed a notice of cross appeal on February 22, 2017. (R. pp. 923-51; pp. 952-72)

STATEMENT OF THE FACTS

This case grew out of an incident in Target's parking lot on May 21, 2014. (R. pp. 423-24) Denise Garrison arrived at Target's Clemson Boulevard location, in the evening, with her eight-year-old daughter Kaileigh. (R. p. 203; p. 233; pp. 333-34) After parking near one of Target's cart returns, Denise and Kaileigh exited the vehicle. (R. p. 176; pp. 223-24; pp. 423-24; p. 609) Kaileigh, without Denise's knowledge, picked up a syringe containing a hypodermic needle. (R. p. 424) Kaileigh asked Denise, "Mommy, what is this[,]" and Denise "immediately reacted" by swatting the syringe out of her daughter's hand. (R. p. 424) The needle punctured Denise's right palm, causing blood to bead out of the wound. (R. p. 428)

Understandably shaken, Denise called her husband Clint Garrison. (R. pp. 354-55) Clint suggested she report the incident, so Denise did so after washing her hands. (R. p. 356) Target's manager, Shelby Britnall, apologized to Denise, and photographs were taken of the syringe lying among aged trash and debris. (R. p. 429; pp. 221-22; p.475; p.608; p. 620) Britnall encouraged Denise to seek treatment and told her to bring Target her medical bills. (R. p. 429)

Britnall filled out two documents related to the incident, one while Denise was present and another after Denise's departure. (R. pp. 211-12; p. 217; p. 607; p. 611) Britnall recorded that Denise's right hand had been injured in Target's parking lot by a hypodermic needle, that the area where she was injured was not clean, that the person responsible for the area had not been in the area prior to the injury, and that Denise seemed worried. (R. p. 607; p. 611) Target took possession of the syringe that injured Denise. (R. p. 241)

The day after the incident, Denise called Britnall about medical care. (R. p. 432) Denise asked if there was a specific provider that she needed to visit, but Britnall told her to go wherever she liked. (R. p. 432) Denise was seen at the emergency room but then referred to Dr. Potts, an infectious disease specialist. (R. pp. 432-33) Denise had to undergo blood tests and post-exposure prophylaxis, consisting of antiretroviral medications aimed at preventing HIV and hepatitis. (R. pp. 433-46) Denise also had to undergo HIV tests every three months. (R. p. 366; p. 441) The medical care lasted for more than a year. (R. p. 441; p. 468)

The incident took both physical and emotional tolls on Denise and her family. From a physical standpoint, in addition to the puncture on her palm, Denise was bedridden and suffered adverse effects from the antiretroviral medications, including lethargy, dizziness, vertigo, nausea, and an upset stomach. (R. p. 428; pp. 396-400; pp. 433-67) She was described as having been in a "zombie-like state" during treatment. (R. p. 397) From an emotional standpoint, the effects were even worse. Denise cried and worried over the incident and suffered from horrible and

vivid nightmares. (R. p. 431; p. 231; pp. 437-39) The family was deprived of quality time together, Clint missed work, and Clint's mom was forced to assist the family. (R. p. 368; p. 399; p. 486) On one occasion, Clint's mom recalled that Kaileigh burst into tears and ran to hug her mother when the incident was mentioned. (R. p. 485) Denise suffered embarrassment from having to ask for help with private matters, such as using the bathroom. (R. p. 396) Denise and Clint were robbed of intimate and close conversations and had to use protection during intercourse. (R. p. 400) In all, the experience logically was described as "traumatic." (R. p. 471)

The Lawsuit. Following the incident, Target began to worry about liability. A Target investigator sought a statement from Denise, and she complied fully. (R. p. 446) During the phone call, Denise explained that she was sick and told him that, rather than being after money, she simply wanted her medical bills paid. (R. pp. 446-48) At no time during the phone call did Target's investigator tell Denise that Target would not pay for her medical care. Instead, Denise learned after Target obtained her statement that she would be responsible for her own treatment. (R. p. 491) Denise and Clint concluded that their only option was to retain counsel and file suit. (R. p. 401)

The first suit came on July 1, 2014, when Denise filed an action for negligence, recklessness, and unfair trade practices. (R. pp. 30-36) She propounded a $12,000 offer of judgment to Target on February 13, 2015, but Target refused to accept her attempt to end the litigation. (R. p. 710) A second suit was later filed on September 21, 2015, when both Denise and Clint filed an action for negligence,

recklessness, loss of consortium, and lost wages. (R. pp. 42-48) The suits were consolidated, and claims of negligence, loss of consortium, recklessness, and lost wages were tried to a jury from September 6, 2016 to September 8, 2016. (R. pp. 3-4) The jury was instructed on both actual and punitive damages. (R. pp. 565-95)

The Trial Evidence. At trial, the focus was on Target's responsibility for the Garrisons' injuries. The jury heard evidence concerning Target's cleaning practices, the condition of the syringe containing the needle, and Target's loss of the needle.

Cleaning Practices. One defense Target mounted was that it consistently cleans and inspects its parking lot. (R. p. 284) But the jurors did not believe the story Target tried to sell them. Target's failure to support its self-serving testimony with any written confirmation, when combined with the various pieces of documentary and testimonial evidence belying Target's self-serving testimony, shows why the jury rejected Target's defense. The evidence supports the jury's finding that Target acted reckless and with disregard to the safety of its customers.

Britnall, as well as Target's Property Maintenance Technician Jon Jackson, testified that Target utilizes a third party vendor to clean its parking lot with a sweeper truck. (R. p. 201; p. 298) A central problem with this testimony, however, was that Target had nothing to back it up. No records showing that a third party vendor actually comes, no invoices showing how much Target supposedly pays the third party vendor, and, despite the presence of surveillance cameras throughout

Target's premises, no video showing what the third party vendor purportedly cleans. (R. p. 302; p. 342)

In fact, the affirmative evidence offered at trial permitted the jury to believe that there was no third party vendor at all. Jackson – whose job is to maintain Target's premises – could not even recall the name of the mysterious third party vendor. (R. pp. 298-99) And, because Target's deposition testimony was that the third party vendor supposedly cleans the parking lot every Thursday night, Clint camped out at Target on a Thursday night prior to trial. (R. pp. 369-72) He was able to inform the jury that no sweeper truck ever showed up. (R. p. 371) The jury was entitled to disbelieve all of Target's testimony and to credit all of the Garrisons' evidence.

Similar problems of veracity were apparent from Target's testimony that its parking lot is routinely inspected for dangers. Jackson maintained that he regularly conducts "walk the vibe" inspections, but the only evidence offered in support was a suspicious two-page log. (R. pp. 621-22) The log, which supposedly is computer-generated, identifies both April 28, 2014 and April 29, 2014 as a "Monday." (R. pp. 621-22) That of course is untrue, just as it could be untrue that Jackson actually performed two inspections on May 21, 2014 as the log indicates. The jury was entitled to believe that Jackson's testimony, along with the log, was at best unreliable and perhaps even intentionally falsified.

The great weight of the evidence shows that, contrary to what Target claimed, the parking lot was not routinely cleaned. Pictures entered into evidence

show old and weathered trash, in addition to other debris in the parking lot. (R. p. 608; p. 613; p. 620) There also was evidence that Target employees, who supposedly survey the parking lot for dangerous conditions, instead use cell phones and do not pay attention or remove hazards. (R. pp. 311-12; p. 321) Brintnall's documentation following the incident indicated that the parking lot was not clean. (R. p. 607; p. 611) Target employees testified that the company has no policy in place for ensuring that the parking lot is cleaned regularly or for verifying that cleaning actually takes place. (R. p. 233; p. 238) And Denise, Clint, and Clint's mom all observed that they have seen "trash everywhere" in Target's parking lot on different occasions. (R. p. 375; pp. 426-27; p. 490) The jury was entitled to credit all of this evidence showing that Target fails to maintain its parking lot.

Plus, all of this evidence was buttressed by Clint's testimony about dangerous conditions in Target's parking lot after Denise's injury. Jackson was adamant at trial that Target's cleaning practices had not changed from the date of the incident to the date of trial. (R. p. 338) That is significant because Clint testified and provided pictures of a bolt that had fallen from a buggy rack that Target allowed to remain in its parking lot for at least four months. (R. pp. 375-94; p. 609; p. 612) He also testified that a rod and spring remained in Target's parking lot for at least 13 days. (R. pp. 394-95) The jury was entitled to credit the evidence provided by Clint and to reject Target's claim that it routinely cleans its parking lot.

Condition of Syringe. The jury both saw and heard evidence that proved the syringe had been in Target's parking lot for a long time. Photos entered into

evidence showed the syringe's worn and aged condition. (R. p. 608; p. 620) Brintnall, who saw the syringe on the night of the incident, testified that the syringe was "dingy, dirty, and gross[,]" that the plunger was broken, that the syringe did not appear to have been recently dropped, and that the syringe was discolored. (R. pp. 213-15) She further testified to seeing dings, divots, and grime on the syringe. (R. p. 214; pp. 245-46; p. 276) This testimony was consistent with Denise's testimony, who also testified that she could tell the syringe had been in the parking lot for a long time and that it was dirty and nasty. (R. p. 424) Clint further observed for the jury that twine located near the syringe was discolored and appeared to have been run over by vehicles. (R. p. 418) The jury was entitled to credit all of this evidence, and in fact it was unrebutted.

Loss of the Syringe. Unfortunately, the jury did not have an opportunity to view the actual syringe that injured Denise because Target lost it not only once but twice. (R. pp. 246-52) Target took possession of the syringe the night of the incident, with Britnall testifying that she placed it in a container marked "Do Not Touch." (R. pp. 241-42) Britnall testified during her deposition that the syringe was later destroyed by Target employee Michelle Carroll, but Britnall was forced to admit at trial that her deposition testimony was false. (R. pp. 246-47) Britnall confessed that the syringe turned up after her deposition; she told the jury, however, that it subsequently was lost again. (R. pp. 248-51) Britnall had no explanation for what happened to the syringe on the second occasion, other than to call it "a great mystery." (R. p. 251)

A spoliation instruction was given to the jury. (R. pp. 568-69) It was not, however, aimed solely at Target. (R. pp. 568-69) An agent of the Garrisons' attorney had taken pictures of the syringe after Britnall's deposition, but the pictures were irretrievable from the photographer's cell phone. (R. p. 248) The jury was told they could apply an adverse inference to whichever party was to blame for lost or destroyed evidence, and the evidence supports the blame the jury placed on Target. (R. pp. 568-69)

The Verdict. At the close of the evidence, both parties moved for directed verdict. (R. pp. 495-521) The trial court denied the Garrisons' motion but granted Target's motion in part. (R. p. 501; p. 506) In particular, the trial court dismissed the Garrisons' unfair trade practices claim and determined that sufficient evidence had been presented for the jury to decide the remaining claims, along with the question of punitive damages. (R. p. 506; p. 520) Closing arguments were presented by counsel, with no objections lodged by either party, and the jury retired to deliberate. (R. pp. 526-65)

The jury returned a verdict form with the following findings: (1) a negligence finding against Target, with no apportionment of fault to Denise, in the amount of $100,000.00 in actual damages and $4,510,000.00 in punitive damages; (2) a liability finding against Target on Clint's lost wages claim in the amount of $3,500.00; and (3) a liability finding against Target on Clint's loss of consortium claim in the amount of $5,000.00. (R. pp. 731-34) The trial court polled the jury, and all confirmed their unanimous verdict. (R. p. 600)

Post-Trial Proceedings. The Garrisons timely filed a motion for costs and interests following the trial. (R. pp. 711-43) Target responded by calling the motion "premature," and the Garrisons' filed a rebuttal. (R. pp. 744-47; pp. 748-49)

Target likewise requested post-trial relief. (R. pp. 450-59) It requested judgment as a matter of law on both liability and punitive damages, and, in the alternative, requested a new trial or a remittitur. The motion was a conclusory, two-page filing that included no substantive argument. Nonetheless, the Garrisons filed a response in opposition. (R. pp. 760-63)

Later, Target supplemented its bare-bones motion with an extensive memorandum. (R. pp. 764-99) The Garrisons responded to that filing as well with a memorandum in opposition. (R. pp. 800-79) The trial court held a hearing on all of the pending post-trial motions on November 3, 2016. (R. pp. 623-709)

An order was entered by the trial court on January 26, 2017. (R. pp. 5-17) First, it denied Target's motion for judgment as a matter of law on the issue of liability, finding that Denise Garrison's injury "resulted from [Target]'s failure to make the parking lot safe[.]" (R. p. 11) Second, it denied Target's alternative requests for a new trial or for a remittitur. (R. pp. 13-151) Third, it granted Target's request for judgment as a matter of law on the issue of punitive damages. (R. pp. 10-13) Fourth, it denied the Garrisons request for costs and prejudgment interest, apparently believing that the Garrisons had not submitted affidavits along with their motion. (R. p. 15) The trial court's 11-page order said that the case had "required the upmost thought and consideration." (R. p. 7)

Five days after receiving the trial court's order, the Garrisons filed a motion for reconsideration under Rule 59(e). (R. pp. 880-921) It pointed out that affidavits had in fact been filed in support of the request for interest and costs and that ample evidence supported the jury's punitive damages award. Target filed a response, and the Garrisons did not file a rebuttal. (R. p. 922)

The trial court granted in part the Garrisons' motion for reconsideration on February 9, 2017. (R. pp. 18-23) It was held that both Garrisons were entitled to costs and post-judgment interest and that Denise Garrison was entitled to eight percent prejudgment interest, beginning from the offer of judgment on February 13, 2015. (R. pp. 18-23) The trial court, however, limited Denise Garrisons' prejudgment interest to eight percent of the actual damages award rather than tying it to the jury's $4,610,000.00 verdict in her favor. (R. pp. 18-23)

Both parties filed notices of appeal. In particular, the Garrisons filed a notice of appeal on February 10, 2017, and Target filed a notice of cross appeal on February 22, 2017. (R. pp. 923-51; pp. 952-72) This case is now ripe for appellate review.

ARGUMENT

The trial court improperly granted Target's judgment as a matter of law on the issue of punitive damages and improperly limited Denise Garrison's pre-judgment interest award. Each error is addressed in turn.

I. The trial court improperly vacated the jury's punitive damages award.

Despite denying Target's directed verdict motion on the issue of punitive damages before the case was submitted to the jury, the trial court granted Target's motion for judgment as a matter of law on the issue of punitive damages after the jury returned its verdict. The trial court, in doing so, came to a conclusion that is divorced from governing precedent. This Court should hold that there was sufficient evidence to support the jury's punitive damages award and then hold that the amount of punitive damages awarded comports with South Carolina law and the Constitution.

A. There was sufficient evidence to support the jury's finding that Target's conduct was reckless, wilfull, or wanton.

The trial court's ruling hinges on a faulty premise: it equates whether a plaintiff qualifies for punitive damages with whether the amount of punitive damages awarded is excessive. By doing so, the trial court invaded the province of the jury and violated Denise Garrison's constitutional rights. This Court should reverse.

It is well established that, when a defendant challenges the jury's award of punitive damages through a post-trial motion, courts must conduct a two-step analysis. First, the trial court must analyze whether there was sufficient evidence to support punitive damages. Second, the trial court must analyze whether the amount of punitive damages awarded was excessive. This two-step analysis has been the law in South Carolina and the rest of the country for many years. *See, e.g., Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 314, 529 S.E.2d 45,

62 (Ct. App. 2000) ("First, the court must determine whether the defendant's conduct rises to a sufficient level of culpability to submit the issue to the jury. . . . Second, the court must conduct a post trial *Gamble* review to evaluate whether the award deprives the defendant of due process."); *Alkire v. First Nat'l Bank of Parsons*, 197 W.Va. 122, 131, 475 S.E.2d 122, 131 (W.Va. 1996) ("[O]ur punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award [and] second, if a punitive damage award is justified, then a review is mandated . . . to determine if the punitive damage award is excessive.").

There can be no doubt that the trial court conflated evidentiary sufficiency with constitutional excessiveness. The trial court's order does not articulate the governing standard for determining whether the jury's punitive damages award was supportable – namely, whether there was "any evidence" that would permit a reasonable inference that Target's conduct was, at a minimum, reckless. *See Graham v. Whitaker*, 282 S.C. 393, 400, 321 S.E.2d 40, 44 (1984). Instead, the trial court's order skips straight to the *Gamble* factors, which are used to determine whether the amount of punitive damages awarded comports with due process. *See, e.g., James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194 638 S.E.2d 667, 670 (2006) ("In *Gamble*, this Court developed an eight factor post-verdict review that trial courts are required to conduct to determine if a punitive damages award comports with due process.").

The trial court's analysis is remarkable because, at the directed verdict stage, the trial court articulated the proper standard. (R. p. 520) Indeed, prior to submitting the case to the jury, the trial court employed the following reasoning in denying Target's request for a directed verdict on the issue of punitive damages:

> In ruling on a directed verdict [m]otion, the trial court is required to view the evidence and all inferences that can reasonably be drawn therefrom in the light most favorable to the party proposing [sic] the [m]otion. This Court must deny the [m]otion when the evidence yields more than one inference or inferences are in doubt. In this case, the Court finds that there is at least evidence that when viewed in the light most favorable to the nonmoving party could lead to more than one inference or at least cause an inference that is in doubt.

(R. p. 520) This is the standard the trial court should have, but did not, utilize to decide Target's post-judgment motion. *See Graham*, 282 S.C. at 400, 321 S.E.2d at 44.

One can only be left with the thought that the trial court's judgment was clouded by the amount of the jury's verdict. That gets it backwards, however, because the jury's substantial punitive damages award should have had the opposite effect on the trial court. It should have provided confirmation that Target's behavior was egregious.

Had the trial court properly analyzed Target's request for judgment as a matter of law, it would have – as it did at the directed verdict stage – denied Target's motion. Retailers like Target owe patrons a "duty of exercising ordinary care to keep the premises in reasonably safe condition[,]" and they are subject to punitive damages "for negligence so gross or reckless of consequences as to imply or

to assume the nature of wantonness, willfulness or recklessness[.]" *See Solanki v. Wal-Mart*, 410 S.C. 229, 237, 763 S.E. 2d 615, 619 (Ct. App. 2014) (quoted cases omitted) (affirming trial court's denial of defendant's motion for judgment as a matter of law on punitive damages in a gross negligence case). The Supreme Court has made clear that punitive damages are "a factually controlled concept whose determination best rests with the jury." *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 144, 638 S.E.2d 650, 661 (2006).

This record contains plenty of evidence to support the jury's determination that Target's "behavior was reckless, wilfull, or wanton[.]" *See Graham*, 282 S.C. at 398, 321 S.E.2d at 43. All that is required to satisfy this standard is "any evidence" of Target's "conscious failure to exercise due care[.]" *See McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). The Garrisons proved, and the jury found, that Target disregarded the safety of its customers by failing to keep its parking lot safe.

A red herring in the trial court's analysis is its apparent belief that punitive damages could not be awarded because there was no evidence of other patrons having been injured in Target's parking lot. The trial court readily acknowledged that Denise Garrison's injury "resulted from [Target]'s failure to make the parking lot safe" yet inexplicably found punitive damages to be inappropriate because it believed that Denise Garrison's injury was "an isolated incident[.]"[3] (R. p. 11) It is

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[3] Whether the defendant's conduct involved an "isolated incident" as opposed to "repeated actions" is a component of the analysis for determining whether the amount of punitive damages is excessive. It is not, however, a component of the analysis for determining whether any punitive damages are appropriate. This Court has made that point clear in cases like *Cody P. v. Bank of Am.*,

black letter law that there need not be evidence of previous injuries to support a finding that the defendant acted in a reckless manner. *See Graham*, 282 S.C. at 398, 321 S.E.2d at 43. What matters for purposes of evidentiary sufficiency is Target's conduct, not Denise Garrison's injury. *See, e.g., Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1279 (Fla. 2006) ("In awarding punitive damages, the focus is on the defendant's conduct, not on the conduct of the plaintiff or the extent of the injury to be compensated.").

The facts of the Supreme Court's decision in *Graham* provide a perfect example. There, a doctor left an elderly patient with blurred vision in the care of an unskilled medical assistant, and the patient suffered injuries as the result of a fall. *See Graham*, 282 S.C. at 400-04, 321 S.E.2d at 42-46. The doctor challenged the jury's award of punitive damages on appeal, but the Supreme Court affirmed. *Id.* Even though there was no evidence that other patients had been injured at the doctor's clinic, it was explained that this single incident was sufficient to "constitute reckless behavior." *Id.*

The point is bolstered by *Hicks v. McCandlish*, 221 S.C. 410, 415-16, 70 S.E.2d 629, 631 (1952). In *Hicks*, the notion that punitive damages are available only in cases where a defendant intends to harm a particular plaintiff was flatly rejected. *See* 221 S.C. at 415-16, 70 S.E.2d at 631. The Supreme Court acknowledged that the defendant's conduct is the focal point, explaining that punitive damages are available even "when the wrongdoer does not actually realize

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N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 482 (Ct. App. 2011), which evaluate whether the amount of punitive damages awarded was excessive.

that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights." *Id.* (emphasis added and quotations omitted).

In this case, there certainly is a factual predicate to support the jury's determination that Target engaged in reckless behavior. The jury was provided evidence that Target was aware that it had a duty to clean its parking lot, and, if it did not, patrons could be injured. The jury also was provided evidence that Target disregarded its duty in a reckless manner, such as by failing to clean, failing to inspect, failing to keep records, falsifying records, and violating its own policies.

With respect to knowledge, there can be no doubt that Target was aware of its legal obligation to keep its parking lot safe. Target's Manager expressly testified that it was important for "Target to keep its premises clean" and that she was "familiar with Target's responsibility to keep its premises reasonably clean." (R. p. 193; *see also* p. 199 (It "is our duty to keep it clean.")) Target's Manager testified that "Target regularly advertises and encourages mothers to come to the store" and that it is "important for the safety of children to make sure the parking lot is clean and debris [is] removed from it[.]" (R. p. 194; pp. 209-10) "[I]f debris, needles, pins, anything's left in the parking lot for an unreasonably long period of time," testified Target's Manager, it "puts the community in danger." (R. p. 194; p. 210)

With respect to wantonness, willfulness, or recklessness, there similarly can be no doubt that the record evidence supports the jury's conclusion. To reiterate, it is clear that Target's parking lot was unsafe, for the trial court's order expressly

acknowledged that Denise Garrison's injuries "resulted from [Target]'s failure to make the parking lot safe[.]" (R. p. 11) The central inquiry for this Court, then, involves the evidence supporting Target's conduct in allowing it to become unsafe. The jury was provided evidence of Target, at a minimum, recklessly shirking its obligation to keep its parking lot safe by failing to clean it, by failing to inspect it, by failing to keep records, by falsifying records, and by violating its own internal policies.

Failure to Clean. The jury disbelieved Target's claim that it cleaned its parking lot by way of a third party vendor. Although Target's Manager and Property Maintenance Technician both testified that a sweeper truck cleans the parking every Thursday night, (R. p. 201; p. 298), no evidence was presented to the jury to back such self-serving testimony up. There was no evidence of a contract between Target and the third party, no invoices showing that Target ever paid the third party any money, and no evidence from anyone claiming they consistently had seen a sweeper truck on Thursday nights.[4] In fact, despite admitting that there were surveillance cameras throughout Target's premises, no video evidence was provided showing that a sweeper truck had ever been used in Target's parking lot at all. (R. p. 236) Target's Property Maintenance Technician curiously was not even certain about the name of the alleged third party vendor who supposedly sweeps the parking lot. (R. pp. 298-99)

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[4] The only evidence from anyone claiming to have ever seen the alleged sweeper was from Target's Manager, who speculated that she had "only seen it maybe once" during her employment. (R. p. 206)

What the jury alternatively heard was affirmative evidence that the alleged sweeper in fact did not regularly clean Target's premises. After hearing deposition testimony from Target during this litigation about the alleged Thursday night sweeps, Clint Garrison camped out in Target's parking lot prior to trial to see if the sweeper truck was a reality. (R. pp. 369-72) Without objection from Target, Clint Garrison informed the jury that he waited for the sweeper truck all night on a Thursday but that it never came. (R. p. 371)

Other evidence similarly belied Target's claim that it cleans regularly. Pictures entered into evidence showed old and weathered trash, in addition to other debris, in the parking lot. (R. p. 608; p. 613; p. 620) And documentation from Target's own Manager following the incident indicates that the parking lot was not clean at the time of Denise Garrison's injury and that the lead parking lot attendant was nowhere to be found. (R. p. 607; p. 611; pp. 231-32; pp. 232-33) Plus, Denise Garrison, Clint Garrison, and Clint Garrison's mom all observed that they had seen, for example, "trash everywhere" in Target's parking lot on different occasions. (R. p. 375; pp. 426-27; p. 490)

There is even evidence showing that Target refused to clean its parking lot after Denise Garrison suffered her needle-stick injury. A bolt fell from one of Target's buggy racks, and Clint Garrison provided testimonial and documentary evidence of it remaining in Target's parking lot for at least four months without being removed. (R. pp. 375-94; p. 609; p. 612) He also testified that a rod and spring remained in Target's parking lot for at least 13 days without being removed.

(R. pp. 394-95) The jury saw a picture of a buggy rack in Target's parking lot falling down. (R. p. 612) Target's Property Maintenance Technician was adamant at trial that Target's cleaning practices had not changed from the date of the incident to the date of trial. (R. p. 338) The so-called cleaning by Target was, at a minimum, reckless both before and after May 2014.

Failure to Inspect. Although the Supreme Court has acknowledged that the duty to maintain a safe premises naturally encompasses the duty to inspect those same premises, *see Baker v. Clark*, 233 S.C. 20, 24, 103 S.E.2d 395, 396 (1958), Target recklessly flouted its inspection obligation. Target claimed that its Property Maintenance Technician and cart attendants inspected the parking lot for dangers, but the jury was provided ample evidence to support their disbelief of Target's claim.

The only documentary evidence presented to the jury in support of Target's Property Maintenance Technician inspecting the parking lot was a sham. (R. pp. 621-22) Jackson maintained that he regularly conducts "walk the vibe" inspections and that he documents the inspections through a computer-generated log. (R. pp. 342-43) The two-page log offered to prop up Jackson's testimony at trial, however, contained clearly false information. (R. pp. 621-22) The log identified both April 28, 2014 and April 29, 2014 as a "Monday," which of course is theoretically impossible. (R. pp. 621-22) This evidence suggested to the jury that Jackson's inspection testimony was false.

The jury similarly rejected Target's claim that its cart attendants inspected the parking lot for dangers. Even 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. (R. p. 196; pp. 311-12; p. 321) This was in violation of Target's own policies yet there was no evidence of cart attendants ever having been disciplined and no records documenting any alleged inspections by cart attendants. (R. p. 321)

Spoliation. What's more is that Target's loss of the syringe provides its own independent basis to support punitive damages. (R. pp. 246-52) The trial court, in its jury instructions, applied the settled rule that an adverse inference is permitted upon the loss or destruction of evidence. *See Wisconsin Motor Corp. v. Green*, 224 S.C. 460, 464-67, 79 S.E.2d 718, 720-21 (1954). Such loss or destruction includes the inference of reckless conduct, which triggers the imposition of punitive damages. *See, e.g., Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 651, 635 N.E.2d 331 (Ohio App. 1994) ("If the act of altering and destroying records to avoid liability is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available in this case. We believe that such conduct is particularly deserving of punishment in the form of punitive damages and that a civilized society governed by rules of law can require no less."). The jury was entitled to punish Target for losing the syringe, especially since Target's recklessness in losing the syringe was consistent with its recklessness in preventing the syringe from injuring Denise Garrison in the first place.

* * * *

All of the evidence the jury heard in this case far exceeds what is necessary to support the jury's award of punitive damages. The requirement is simply that there be "any evidence" that reasonably supports the jury's determination that Target recklessly kept its parking lot in an unsafe condition. *See, e.g., Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d. 773, 776 (1976) (explaining the "any evidence" standard). The record evidence here comports with this highly "deferential" standard. *See, e.g., Miller Construction Co., LLC v. PC Construction of Greenwood, Inc.*, 418 S.C. 186, 202, 791 S.E.2d 321, 330 (Ct. App. 2016).

On the one hand, the Garrisons presented both testimonial and documentary evidence showing that Target's parking lot was unkempt and dangerous. The Garrisons called five witnesses and had 12 exhibits entered into evidence. (R. pp. 65-68) On the other hand, Target did not even put on a case-in-chief. (R. pp. 65-68) The company called zero witnesses, and the only exhibit it entered into evidence during the Garrisons' case-in-chief was a two-page log that contained indisputably false information. (R. pp. 65-68) It is no wonder the jury levied such a substantial award against Target.

It was a clear violation of Denise Garrison's constitutional rights for the trial court to snatch all of the punitive damages award away from her. Article 1, Section 14, of the South Carolina Constitution expressly provides that "[t]he right of trial by jury shall be preserved inviolate." The trial court breached this mandate by substituting its own judgment for that of the 12 jurors jointly chosen by the parties.

In past cases the Supreme Court has made clear that, although the Legislature and courts may have authority to circumscribe the amount of damages awarded in a particular case, "a party has the right to have a jury assess his damages[.]" *See Wright v. Colleton Cnty. Sch. Dist.*, 301 S.C. 282, 290-91, 391 S.E.2d 564, 569-70 (1990).

In the end, the trial court's grant of Target's judgment as a matter of law on the issue of punitive damages should be corrected. Appellate courts in this State have not hesitated to reverse where, as here, a trial court has ignored its obligation to view all facts is the light most favorable to the plaintiff. *See, e.g., Fairchild v. South Carolina Dept. of Transp.*, 398 S.C. 90, 101 727 S.E.2d. 407, 413 (2012) ("Viewing the evidence and its reasonable inferences in the light most favorable to [the plaintiff], as both the trial court and this Court are required to do, we hold there is evidence to create a jury question as to whether or not [the defendant] acted with recklessness, thus requiring submission of the issue of punitive damages to the jury."). This record contains plenty of evidence from which the jury could have – and did – infer wantonness, willfulness, or recklessness on the part of Target.

B. The amount of punitive damages awarded by the jury was not excessive.

After determining that there was sufficient evidence to satisfy the "any evidence" standard, the analysis then shifts to the amount of punitive damages

awarded by the jury. The jury's award here was consistent with both the South Carolina Fairness in Civil Justice Act and the Constitution.[5]

Fairness in Civil Justice Act. Governor Haley, in June 2011, signed the South Carolina Fairness in Civil Justice Act. *See* S.C. Code § 15-32-510 *et seq.* Under the statute, there are three levels of punitive damages: a level of no more than the greater of three times the amount of compensatory damages or five hundred thousand dollars, a level of no more than the greater of four times the amount of compensatory damages or two million dollars, and no punitive damages cap at all. *Id.* at § 15-32-530. The level that applies in any given case depends on the severity of the conduct leading to the harm. *Id.*

This Court need not reach whether either of the caps apply in this case because Target waived any application of them. While Target raised a constitutional challenge to punitive damages in its answers, (R. pp. 37-41; pp. 49-54), it did not raise any defenses under the Fairness in Civil Justice Act. Failure to raise an affirmative defense in a responsive pleading results in waiver. *See, e.g., Garner v. Houck*, 312 S.C. 481, 487, 435 S.E.2d 847, 850 (1993).

It was in the post-trial motions that Target for the first time argued that the punitive damages caps under the Fairness in Civil Justice Act were not affirmative defenses that must be pled. (R. pp. 750-59) That argument, however, contradicts South Carolina precedent. In *James v. Lister*, 331 S.C. 277, 284 500 S.E.2d 198 (Ct.

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[5] Given the substantial record in this case, a remand is unnecessary. This Court may itself decide whether the jury's punitive damages verdict comports with statutory and constitutional principles. *See, e.g., CarMax Auto Superstores West Coast, Inc. v. South Carolina Department of Revenue)*, 411 S.C. 79, 90 n.10, 767 S.E.2d 195, 200 n.10 (2014) (deciding the question in the first instance "as a matter of judicial economy").

App. 1998), this Court conducted a survey of cases from across the country and ultimately held as follows: "[W]e believe the view which requires the pleading of liability limits that affect proof at trial is consistent with South Carolina law."

The reason such a rule was adopted sounds in the concept of fair notice. Because there are three different levels of punitive damages under the Fairness in Civil Justice Act, and because each level triggers a different quantum of proof, it would be patently unfair for a defendant to not put a plaintiff on notice as to what must be proven at trial and then invoke the caps after the trial is over. This Court's decision in *James* is entirely consistent with a long line of cases holding that damage limitations are affirmative defenses that are forfeited if not pled. *See, e.g., Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990); *Jakobsen v. Massachusetts Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975).

What's more is that, not only did Target not plead the punitive damages caps in its answers, it did not raise the issue at any point during trial either. That provides an additional basis for forfeiture under *Washington v. Whitaker*, 317 S.C. 108, 115, 451 S.E.2d 894, 898 (1994), which held that a municipality waived a sovereign immunity argument against punitive damages by asserting the argument for the first time post-trial. Decisions from other courts similarly are in accord. *See, e.g., Interclaim Holdings, Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 298 F.Supp.2d 746 (N.D. Ill. 2004) (explaining that "an argument can be made that [the defendant] waived its objection" to the punitive damages bar because it was not

asserted until the jury began deliberating). Target doubly waived any application of the Fairness in Civil Justice Act caps.[6]

Nonetheless, even if Target had raised the issue, South Carolina's punitive damages cap would be unconstitutional as applied to Denise Garrison. Target relied on various cases from outside of South Carolina in the trial court, but better-reasoned authorities hold that punitive damages caps can be unconstitutional. States such as Missouri have correctly held that punitive damages caps violate a plaintiff's constitutional right to a jury trial. *See Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) (en banc); *see also State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999) (holding that a statute that established limits on punitive damages in tort actions to the lesser of $250,000 or three times the amount of the compensatory damages awarded violated the right to jury trial).

Similar to Section 15-32-530(A) of the South Carolina Code, Missouri's Legislature capped punitive damages "at $500,000 or five times the judgment

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[6] Plus, Target attempted to utilize the wrong cap in the trial court. The relevant cap, even if not waived and even if constitutional, is the $2,000,000.00 cap found in Section 15-32-530(B)(1). There is no case law analyzing the cap, but the statue's plain language makes clear that it applies where a defendant's conduct was "motivated primarily by unreasonable financial gain" and was known or approved by "the person responsible for making policy decisions on behalf of the defendant[.]" *See* S.C. Code § 15-32-530(B)(1). This was precisely Denise Garrison's theory of the case, precisely what the evidence showed at trial, and precisely what the jury accepted. From the very start, the Garrisons contended that Target put profits before safety. The testimony from Target's own witnesses proved this theory, as they testified that cart attendants charged with inspecting the parking lot were sometimes sent home early to save money and that the company's review of surveillance video was limited to cash registers and did not include injuries in the parking lot. Target's Manager, as well as its Property Maintenance Technician charged with ensuring the safety of the premises, were the policymakers providing the testimony. The jury plainly accepted the Garrisons' theory, and their evidence, since a punitive damages award was returned in excess of the $2,000,000.00 cap.

amount[.]" *See Lewellen*, 441 S.W.3d at 144 The problem with the cap, reasoned the court, was that it failed to take into account "the facts and circumstances of the particular case." *Id.* Just as the Constitution obligates this Court to ensure that the punitive damages award does not violate Target's right to due process, it similarly obligates this Court to consider the fairness to Denise Garrison on the specific facts of this case.

To summarize, no caps are applicable because Target waived any possible application of the caps and because the caps are constitutionality infirm. This Court need only determine whether the jury's punitive damages award comports with the Constitution.

The Constitution. The seminal South Carolina case on punitive damages is *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). In *Mitchell*, a jury found that an insurance company unlawfully cancelled the health insurance policy of an insured after the insured was diagnosed with HIV. *See* 385 S.C. at 579-80, 686 S.E.2d at 180-81. After a jury awarded the insured $186,000 in actual damages and $15,000,000.00 in punitive damages, the insurance company lodged a constitutional challenge to the punitive damages award. *Id.* at 577-93, 179-88. On appeal to the Supreme Court, it was held that, in reviewing the constitutionality of punitives, courts must consider the following guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by

the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 585-86, 185-86. The Supreme Court ultimately applied these guideposts and remitted the punitive damages award to $10 million. *Id.* at 594, 188.

Interestingly, this is not the first time that a South Carolina court has had to consider a large punitive damage verdict against Target. *See Cantrell v. Target Corp.*, Civil Action No. 6:06-2723-BHH, Docket No. 125 (D. S.C. 2008).[7] In October 2008, a Greenville jury returned a $3.1 million dollar verdict against Target. *Id.* at 1. Similar to Denise Garrison in this case, the *Cantrell* plaintiff was awarded $100,000.00 in actual damages and $3,000,000.00 in punitive damages. *Id.* Target responded by filing the very same motions it filed in the trial court here, including a motion for judgment as a matter of law on the issue of punitive damages. *Id.*

Target's argument in the *Cantrell* case was rejected. *Id.* at 42. Judge Hendricks stressed, in rejecting Target's arguments, that the court was cognizant of the "substantial amount of money, reputation, and public goodwill at stake" because of the sizeable amount of the jury's verdict. *Id.* at 4. Nonetheless, Judge Hendricks explained that "[t]he jury's sanctity [w]as paramount to the [c]ourt[.]" *Id.* at 4. Like here, "[t]he jurors were attentive and the litigants, witnesses, and attorneys conducted themselves with notable aplomb." *Id.* at 5. The punitive damages verdict of the 12 jurors who decided this case, just like the verdict of the jurors from the *Cantrell* case, should be respected.

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[7] The *Cantrell* decision was included as Exhibit 1 to the Garrisons' memorandum in opposition to Target's post-trial motions. (R. pp. 837-78)

Reprehensibility. Like the defendant in *Mitchell*, the jury here was permitted to infer that Target's conduct was reprehensible. *Mitchell* counsels that reprehensibility turns on five factors, particularly "(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." *See* 385 S.C. at 587, 686 S.E.2d at 185. Application of these factors supports the jury's punitive damages award in this case.

Indeed, Target loses on each and every factor, even though they need only be balanced. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010) (acknowledging that a plaintiff need not win on every reprehensibility factor). Denise Garrison suffered physical injury that required significant medical treatment. (R. p. 428; pp. 396-400; pp. 433-67) As explained previously, Target's conduct was intentional or, at a minimum, reckless. Denise Garrison was a financially vulnerable plaintiff, as acknowledged by Target's own counsel during closing arguments and as demonstrated by the testimony of both Clint and Denise Garrison.[8] The evidence at trial revealed a pattern of Target failing to clean its parking lot both before and after Denise Garrison's injury. And

[8] The record contains substantial evidence about Denise's financial vulnerability. For example, she had to get her medical care from a free clinic because there was "no way [she] could afford it" otherwise. (R. p. 363) Her family relies on her husband's ability to work overtime because he is the sole breadwinner, making only $17.80 per hour. (R. pp. 366-69; p. 491) The family had to borrow money from Clint's mother just to pay for the daughter's lunches. (R. p. 492) And Target's counsel confirmed that Denise was "less fortunate" during his closing argument. (R. p. 559)

Denise Garrison's harm resulted from Target's conscious decision to allow its parking lot to become dangerous, not a mere accident or one-time mistake. All of these factors weigh in Denise's favor, and, at a minimum, they do on balance.

Ratio. The jury found, and the trial court agreed, that Denise Garrison was entitled to $100,000 in actual damages – consisting of physical harm, medical bills, lost wages, and extreme emotional distress. Thus, the ratio of punitive damages to actual damages is approximately 45:1. Single digit ratios, such as 9:1, most often comport with the Constitution, but this Court has acknowledged that "the ratio of punitive damages to actual damages" is not "a dispositive factor[.]" *See, e.g., Hundley*, 339 S.C. at 315, 529 S.E.2d at 62.

This point also was made in *Mitchell*, which explained that the applicable ratio is not based upon actual damages alone. Instead, the ratio also includes any "potential harm." *See Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. Like the insured in *Mitchell*, Target's conduct could have resulted in far greater harm to Denise Garrison and others. Thankfully, Denise Garrison did not contract an infectious disease, but the point of *Mitchell* is that she or her daughter could have.[9] Many other patrons are potentially at risk as well because, by its own admission, Target has continued to maintain the same dangerous practices that were in place prior to Denise's injury. (R. p. 338)

In *Mitchell*, there was a ratio of approximately 54:1 between the $186,000 actual damages award and the remitted $10,000,000.00 punitive damages award.

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[9] In this vein, the "potential harm" would be expensive medical treatment and even possibly death.

In this case, again, the ratio is less, resulting in approximately a 45:1 ratio. Given that both cases involve potential harm from infectious diseases, both ratios are constitutionally permissible. *See also Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 923 P.2d 456 (Idaho 1996) (approving a 26:1 ratio, where the plaintiff had been unlawfully refused coverage under his cancer insurance policy).

The ratio in question is compatible with other important considerations too, such as "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." *See Mitchell*, 385 S.C. at 586-87, 686 S.E.2d at 184-85. Notably, Target's counsel conceded during closing argument that Target probably was "a $73 [b]illion dollar-a-year corporation." (R. p. 552) And it is a matter of public record that Target's net worth is many billions of dollars. *See, e.g., Cantrell*, Civil Action No. 6:06-2723-BHH, Docket No. 125 at 22 (identifying Target's net worth as $17.633 billion, with a projected $20.91 billion in gross profits during 2007). Just as in the *Cantrell* case, the punitive damages award here is a small fraction of Target's worth. Anything less than what has been awarded cannot possibly deter Target in future cases because, just as Target's counsel conceded at trial, Target is a "giant company" who will not be impacted by anything other than a significant award. (R. p. 559)

Comparative Penalty Awards. A survey of cases from South Carolina, and from jurisdictions across the country, underscore the reasonableness of the jury's punitive damages award. What follows are pertinent authorities:

- *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000) (affirming award of $20,000 in actual damages and $1,000,000 in punitive damages—a 50:1 ratio—for plaintiff-parents of seven-year-old who suffered brain damage after being given a prescription incorrectly filled by defendant reasoning that "the amount of punitive damages awarded [was] reflective of the potential harm in this case and in future cases involving similar conduct" and the "ratio of the actual damage award to the punitive damage award, when considered in light of the potential harm, is not grossly excessive such as to offend due process");

- *Lister v. NationsBank of Delaware, N.A.*, 331 S.C. 277, 94 S.E.2d 449, 458-59 (Ct. App. 1997) (affirming punitive damage award of $200,000 and compensatory damage award of only $8,605.08—a 23.24:1 ratio—arising from rental car company's unauthorized charge of plaintiffs' credit card finding that the "award [was] reasonably related to the harm likely to result from this conduct if [the rental car company] were not deterred from making unauthorized credit card charges" and that the need for such deterrence, combined with the need for protection of South Carolinians, justified the award);

- *Cantrell v. Target Corp.*, Civil Action No. 6:06-2723-BHH, Docket No. 125 (D. S.C. 2008) (denying post-trial motions challenging $100,000 actual damages award and $3,000,000 punitive damages award —a 30:1 ratio—after noting that "the deterrence value of the punitive award [ ] is necessarily its traditional purpose" and that "[a] rote comparison of actual to punitive damages [ ] fails to account for what it takes to influence the behavior of a large corporation[ ] through money");

- *Rhyne v. K-Mart Corp.*, 358 S.C. 160, 594 S.E.2d 1 (N.C. 2004) (affirming jury award of punitive damages in favor of husband and wife on their premises liability claims stemming from their being assaulted by K-Mart security staff while they walked in store parking lot where jury awarded compensatory damages for husband in the amount of $8,255.00 and for wife in the amount of $10,730 but remitting the awards of punitive damages totaling $11,500,000 for each spouse to $250,000 for each spouse based on applicable statutory cap); and

- *Shiv-Ram, Inc. v. McCaleb*, 892 So.2d 299 (Ala. 2003), as clarified on denial of reh'g (Apr. 2, 2004) (affirming award of punitive damages totaling $500,000.00 as compared to award of compensatory damages totaling $176,572.82 where plaintiff motel guest injured her leg when she struck a three-inch long sharp metal object protruding from motel room bed as she walked by the bed).

Each of these authorities could be characterized as much more excessive than the punitive award in this case. A common theme in all of them is that the acceptability of the award turns on the status of the tortfeasor. *Cantrell* in particular asked the question, "[W]hat sort of award does it take to deter a 15 billion dollar corporation from engaging in mild to moderately reprehensible conduct?" *See* Civil Action No. 6:06-2723-BHH, Docket No. 125 at 38. It then attempted to answer that question by considering that Target "makes $2,293,493 of gross profit per hour." *Id.* (emphasis in original). The $4,510,000.00 that the jury awarded in this case is unlikely to fully deter Target's future conduct, but at least it is a start.

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Each part of the analysis – reprehensibility, ratio, and comparative awards – justifies the jury's verdict. Target is a large national retailer who, by its counsel's own admission, will not be affected by the jury's verdict. (R. p. 559) There is no constitutional justification for reducing Denise Garrison's punitive damages award.

II. The trial court improperly reduced Denise Garrison's prejudgment interest.

Early on in this case, on February 13, 2015, Denise Garrison made a $12,000.000 offer of judgment to Target. (R. p. 710) When Target did not file a

written acceptance to the offer of judgment "[w]ithin twenty days after service of the offer of judgment or at least ten days prior to the trial date," South Carolina Rule of Procedure 68(a) came into play. *See also* S.C. Code § 15-35-400. Both the rule and the statute provide, in pertinent part, that a prevailing plaintiff is entitled to "eight percent interest computed on the amount of the verdict or award from the date of the offer[.]" *Id.* (emphasis added).

Despite the jury's verdict in her favor, the trial court originally did not award Denise Garrison any pre-judgment interest at all. (R. p. 15) The trial court appeared unaware of the contents of Denise Garrison's motion to tax costs and interest, even though Denise Garrison had filed an opening motion supported by exhibits, even though Denise Garrison had filed a reply, and even though the trial court had conducted a hearing on the motion. (R. p. 15) After Denise Garrison filed a motion for reconsideration under Rule 59(e), the trial court granted the motion only to the extent that the eight percent pre-judgment interest was awarded on the jury's actual damages amount. (R. pp. 18-23)

The trial court erred by not awarding pre-judgment interest on the entire amount of the verdict. Target's post-judgment motion on the issue of punitive damages is irrelevant, for the plain language of Rule 68(a) ties pre-judgment interest to "the amount of the verdict or award[.]" It does not, conversely, tie pre-judgment interest to any alteration of the jury's verdict post-judgment.

Since the text of the rule and statute are clear, that should be the end of the matter. It is well established that "the court has no right to impose another

meaning." *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If 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. The late Justice Scalia made this point in the book he co-authored with Bryan Garner, writing that courts should not "elaborate unprovided-for exceptions to a text" because, "'[i]f the Congress had intended to provide additional exceptions, it would have done so in clear language.'" *See* A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 8, p. 93 (2012) (internal quotations and brackets omitted).[10]

In fact, even though this Court should not look beyond the text, there can be confidence that the Legislature meant what it said in the plain language. Section 15-35-400 took effect in 2005, which is approximately seven years before the punitive damages caps found in the South Carolina Fairness in Civil Justice Act were enacted. *Compare* S.C. Code § 15-35-400 *with* S.C. Code § 15-32-510. Thus, the Legislature was aware that there was an alternative avenue to punish reckless defendants, namely – the pre-judgment interest penalty found in Rule 68(a). *See State v. Hood*, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936) (explaining that "[i]t is presumed that the Legislature [is] familiar with prior legislation"). It is possible that tort reform was able to pass in 2011 because of the existence of other laws like Section 15-35-400.

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[10] As of March 22, 2017, a Westlaw search revealed that Scalia's and Garner's textualism treatise had been cited in at least 542 different judicial opinions.

Denise Garrison was a financially vulnerable plaintiff who was willing to accept far less than she deserved to put this case behind her. Indeed, the jury heard evidence that this case would never had been filed at all if Target simply would have paid for Denise Garrison's medical treatment. (R. p. 401; p. 491) Target callously rejected Denise Garrison's more than reasonable offer of judgment and paid the price for it when the jury reviewed evidence of its egregious conduct. This Court should apply the plain language of Rule 68(a) and award Denise Garrison eight percent pre-judgment interest on the entirety of her $4,610,000.00 verdict.

CONCLUSION

Justice Gorsuch's recent confirmation to the United States Supreme Court has brought the role of the judiciary front and center. At his confirmation hearing, he identified Justice Byron White as one of his "legal heroes" because Justice White was said to have "followed the law wherever it took him without fear or favor to anyone." *See Full Text of Supreme Court Nominee Gorsuch's Remarks to Senate Panel*, BLOOMBERG NEWS, https://www.bloomberg.com/politics/articles/2017-03-20/supreme-court-nominee-gorsuch-s-remarks-to-senate-panel-text (last visited March 23, 2017). The settled law that applies to this case leads nowhere but to reversal.

Central to this appeal is whether the jury's verdict satisfies the "any evidence" standard. There are few standards in the law that are more deferential yet the trial court's ruling reads as if it were deciding the case in the first instance. That was error, for punitive damages are "a factually controlled concept whose

determination best rests with the jury." *See Madison ex rel. Bryant*, 371 S.C. at 144, 638 S.E.2d at 661; *see also Gamble v. Stevenson*, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991) (explaining that "[t]he amount of damages, actual and punitive, remains largely within the discretion of the jury").

Also central to this appeal is the trial court's failure to apply the plain language of Rule 68(a). That rule mandates that prejudgment interest flow from the jury's verdict yet the trial court again substituted its own judgment into the equation. The resulting error runs counter to settled principles of statutory construction and separation of powers.

At the end of the day, the trial court's post-judgment rulings were flawed. The jury intended to punish Target, and the law permits such punishment. This Court should reinstate the jury's punitive damages verdict and award Denise Garrison eight percent prejudgment interest on that amount.

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Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

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

Appellate Case No. 2017-000267

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

v.

Target Corporation.....Respondent/Appellant.

CERTIFICATE OF COUNSEL

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

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