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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2017-000267

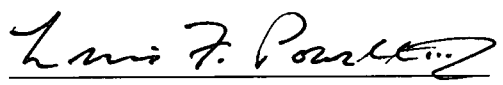
CARLA DENISE GARRISON AND CLINT GARRISON,
Appellant-Respondents,

v.

TARGET CORPORATION,
Respondent-Appellant.

RESPONDENT-APPELLANT'S MOTION FOR REHEARING

The Respondent-Appellant, Target Corporation, pursuant to Rule 221, SCACR, moves the Court to reconsider its January 15, 2020, opinion and rule in favor of Target. In support of the motion, Target submits the accompanying memorandum.



Dated January 29, 2020

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I. INTRODUCTION

Respondent-Appellant Target respectfully asks this Court to rehear this case to correct several overlooked and misapprehended points of law. First, the panel's decision that the Garrisons' evidence was sufficient to support a finding of constructive notice contradicts a long, unbroken line of South Carolina Supreme Court decisions, which consistently reject the proposition that a jury can speculate that a foreign object has been present long enough to prove constructive notice. Second, the panel mistakenly reversed the circuit court's judgment notwithstanding the verdict ("JNOV") as to punitive damages because the Garrisons presented no evidence showing that Target consciously disregarded customer safety. Third, the panel majority misapprehended several points of law in its punitive damages analysis—incorrectly deciding that South Carolina's statutory punitive damages cap is an affirmative defense on its way to concluding that Target waived its ability to rely on the punitive damages cap. Finally, the panel misapplied *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), incorrectly concluding that speculative "potential harm" could augment the Garrisons' actual damages when evaluating the ratio of punitive damages in its due process analysis. These errors warrant rehearing.

II. BACKGROUND

The facts of this case are by now familiar to the Court. This appeal arises from a May 2014 incident in which Appellant-Respondent Carla Denise Garrison swatted a discarded syringe of unknown origin out of her daughter Kaileigh's hand in the parking lot of Target's Anderson County store.

After a trial in 2016, an Anderson County jury returned a verdict awarding Mrs. Garrison and her husband, Clint, compensatory damages of \$108,000 and punitive damages of \$4.5 million. In post-trial motions, Target sought judgment as a matter of law and a new trial. Among other things, it challenged the sufficiency of the Garrisons' evidence on the underlying question of liability and punitive damages, and sought to remit the punitive damages award because it violated due process and exceeded statutory limits. The trial court upheld the jury's liability finding, but struck the punitive damages award in its entirety. The Garrisons appealed, and Target cross-appealed.

On January 15, 2020, the Court issued an opinion affirming the circuit court's denial of Target's request for judgment as a matter of law as to liability, reversing the trial court's vacatur of the jury's punitive damages award, reversing the circuit court's conclusion that the punitive damages award exceeded the cap in South Carolina Code section 15-32-510, affirming

the circuit court's conclusion that the punitive damages award violated due process, remanding for remittitur of the award, and affirming denial of Target's new trial motion and the Garrisons' prejudgment interest arguments. *Garrison v. Target Corp.*, No. 2017-000267, 2020 WL 216297, at *25 (S.C. Ct. App. Jan. 15, 2020).

III. ARGUMENT

Target respectfully submits that the Court overlooked and misapprehended the following points, which merit rehearing. *See* Rule 221(a), SCACR.

A. Consistent Supreme Court precedent holds that evidence like that presented by the Garrisons cannot justify a jury inference that a foreign object had been present long enough to show constructive notice.

Prevailing under a constructive notice theory of premises liability is no easy task. Because constructive notice stands in for actual notice, a plaintiff must show that the dangerous condition preexisted her injury long enough for the merchant to "have discovered and remedied it." *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971).¹ That temporal element obliges the plaintiff to show that the dangerous condition

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

existed “for *a sufficient length of time* that the storekeeper would or should have discovered and removed it had the storekeeper used ordinary care.” *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 91, 394 S.E.2d 24, 25 (Ct. App. 1990) (emphasis added). Critically, that length of time cannot be left to speculation. See *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122, 165 S.E.2d 627, 629 (1969).

The panel accepted the speculative lay testimony of Denise, Clint, and Shelby Brintnall as sufficient to support the circuit court’s denial of Target’s motion for judgment as a matter of law. *Garrison*, 2020 WL 216297, at *4. In doing so, it overlooked—and failed to engage—a deep reservoir of South Carolina cases standing for the proposition that courts must reject the precise kind of speculation and conjecture that the Garrisons presented to support constructive notice.

1. The panel’s decision ignores half a century of South Carolina tort law applying the anti-speculation principle in constructive notice cases.

The panel ignored the vast majority of constructive notice cases that Target cited throughout its briefs. Most strikingly, the panel failed to consider *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969), which Target cited and discussed extensively. In *Wimberly*, the Supreme Court reversed a plaintiff’s jury verdict in a slip-and-fall case involving loose grains of rice because the plaintiff failed to introduce “any

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

The panel also overlooked numerous cases disclaiming speculation and conjecture as proof of constructive notice, which stretch back at least as far as *Gilliland v. Pierce Motor Co.*, 235 S.C. 268, 111 S.E.2d 521 (1959). In *Gilliland*, the Supreme Court held that a plaintiff could not prevail against a merchant under a theory of constructive notice when—as in this case—the evidence did “not prove that the [dangerous condition] was there for any appreciable time and [left] the length of time [it] was there speculative and conjectural.” *Id.* at 235 S.C. 274, 111 S.E.2d 523.

A steady stream of cases following *Gilliland*, which Target cited in its briefs, support the anti-speculation principle in constructive notice cases, and provide ample support for Target’s position. *See, e.g., Milligan v. Winn-Dixie*

Raleigh, Inc., 273 S.C. 118, 121, 254 S.E.2d 798, 800 (1979) (reversing jury verdict when conclusion that oil had been on sidewalk long enough to be discovered “would be pure speculation”); *Pennington v. Zayre Corp.*, 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969) (affirming grant of involuntary nonsuit in slip-and-fall case where conclusion that plastic bags had been on store’s floor long enough to be “discovered by the merchant would be pure speculation”); *Gillespie*, 302 S.C. at 92, 394 S.E.2d at 25 (affirming grant of summary judgment to merchant and emphasizing that question of how long puddle of water had been on floor “is not one that can be left to speculation”); *see also Wilson v. Wal-Mart, Inc.*, No. 3:15-1157, 2016 WL 3086929, at *4 (D.S.C. June 2, 2016) (applying South Carolina law and granting summary judgment to store when plaintiff “provided no evidence whatsoever regarding the length of time that the substance was on the floor”); *Norris v. Wal-Mart Stores East, L.P.*, No. 1:12-02592, 2014 WL 496010, at *4 (D.S.C. Feb. 6, 2014) (applying South Carolina law and recognizing that “the length of time that the foreign substance has been on the floor is not a determination that can be left to speculation”); *Hurst v. Home Depot U.S.A.*, No. CA-99-1334-11, 2000 WL 33222911, at *3 (D.S.C. June 20, 2000) (applying South Carolina law and granting summary judgment to merchant because “any determination of how long the linoleum had been in the aisle would be pure speculation”).

The panel's failure to engage with *any* of these factually-analogous cases—indeed, its failure to cite a single one of them—places its analysis in doubt and warrants rehearing.

2. The panel misapprehended *Anderson* and *Wintersteen I* in finding the appearance of the syringe and its proximity to other items sufficient to support constructive notice.

Rejecting Target's speculation argument without citation to any of the above cases, the panel found it "reasonable to infer from witness descriptions of the syringe's weathered appearance that it had been lying in the parking lot long enough for Target's employees to have discovered it." *Garrison*, 2020 WL 216297, at *5. This conclusion misapprehends *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 184 S.E.2d 77 (1971), which directly held the appearance of a hazard insufficient to prove that it had been on the premises long enough to confer constructive notice. *See also Joye v. Great Atl. & Pac. Tea Co.*, 405 F.2d 464, 465 (4th Cir. 1968) (applying South Carolina law); *Norris v. Wal-Mart Stores East, L.P.*, No. 1:12-02592, 2014 WL 496010, at *4 (D.S.C. Feb. 6, 2014) (same).

In *Anderson*, the Court reversed a plaintiff's slip-and-fall verdict because she could not prove that the grocery store had constructive knowledge of a banana peel on its floor. In so holding, the Court stated that the "'withered up' and 'mushed up'" appearance of the banana peel was "insignificant" with respect to whether it "had been on the floor a

considerable time,” because the peel could have taken on that appearance without being on the grocery store’s floor at all. *Anderson*, 257 S.C. at 75, 184 S.E.2d at 177. The same is true for the syringe in this case. The syringe may have taken on its “dirty” appearance, as the Garrisons put it, in Target’s parking lot, but it also may have fallen from a car in the condition Kaileigh Garrison found it. Or the wind may have blown it over from an adjacent store’s lot just before the Garrisons arrived. The Garrisons offered no proof either way. And even assuming that the syringe was brand new when it arrived in Target’s parking lot, the jury could not reasonably determine whether it had been damaged five minutes—or hours or days or months—before Kaileigh picked it up. These *equally unsupported* suppositions do not present factual questions for the jury to resolve—the factfinder can draw no *reasonable* inferences about temporal duration in the lot from them whatsoever. See *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012).

The panel dismissed *Anderson*, reasoning only that “the nature of a banana peel inside a grocery store does not lend itself to a valid comparison with a syringe in an outdoor parking lot.” *Garrison*, 2020 WL 216297, at *5. But this invites the obvious question: Why not? Just as in this case, the *Anderson* Court assessed whether the appearance of a hazard was sufficient to prove it had been on the floor long enough to provide the store with

constructive notice. Does the hazard's location outdoors alter the calculus? Does its potential for harm matter? Do non-food items receive different treatment? The cases Target cited in its briefs draw no such distinctions.

The panel also suggested that Clint's testimony describing other debris near the syringe "indicates it is likely" that the syringe "became weathered" in Target's parking lot. *Garrison*, 2020 WL 216297, at *5. On that basis, the panel found *Wintersteen v. Food Lion, Inc.* ("*Wintersteen I*"), 336 S.C. 132, 136, 518 S.E.2d 828, 830 (Ct. App. 1999), *aff'd*, 344 S.C. 32, 542 S.E.2d 728 (2001), distinguishable. But the panel misapprehended the law in this regard, again substituting conjecture for a reasonable inference.

Beyond the problem, acknowledged by the Court, that the debris Clint described referenced the landing point of the syringe rather than its original location, the proximity to other debris fails to impact the analysis without some measure of *how long* the other trash had been in the lot. In other words—as with the appearance of the syringe—the condition of the debris cannot speak for itself. And the Garrisons never offered any evidence time-stamping the arrival of the surrounding debris. As Target pointed out in its opening brief, the Garrisons could have introduced expert testimony connecting the appearance of the debris to certain weather conditions or temporal indicators. *Cf. Reid v. Kohl's Dep't Stores, Inc.*, 545 F.3d 479, 482 (7th Cir. 2008) (suggesting that expert evidence might be used to link the

melted state of a milkshake to its longevity on the ground). Likewise, the Garrisons could have introduced additional evidence tying the surrounding debris to some event in the past, like a recent paint job. But they did not. In the absence of valid circumstantial evidence or expert testimony, the jury—and the Court—could only speculate about how long the debris had been there. Thus, no valid evidence distinguishes this case from *Wintersteen I*, and while the syringe and other debris could have been in the parking lot for an extended period of time, “it is just as possible” that it arrived only minutes before the Garrisons. See 336 S.C. at 134, 518 S.E.2d at 829.

Moreover, in distinguishing *Wintersteen I* and commenting on the possibility that the syringe arrived in the parking lot in its “weathered” condition, the panel remarked that “no evidence indicat[es] this is likely.” *Garrison*, 2020 WL 216297, at *5. But no evidence indicates it is unlikely, either. And the Garrisons bore the burden of proof on this critical question. None of the numerous South Carolina Supreme Court cases addressing constructive notice carve out the remarkable proposition that a defendant bears *any* burden of proof on the critical elements of constructive notice. The panel appears to have mistakenly imposed such a burden. It should rehear the case to correct this error.

Because none of the Garrisons’ evidence suffices to show Target’s constructive notice of the syringe, the Court should grant rehearing, take

account of these controlling cases, and reverse the trial court's denial of Target's motion for judgment as a matter of law.

B. The panel mistakenly reversed the circuit court's judgment notwithstanding the verdict as to punitive damages.

The panel reversed the circuit court's punitive damages JNOV, concluding that sufficient evidence supported a punitive damages award. *Garrison*, 2020 WL 216297, at *8. But a careful review of the evidence the Garrisons adduced at trial to support punitive damages contradicts this finding. The panel should grant rehearing to correct this error.

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 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 v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) (emphasis added). 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).

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. As outlined above, the Garrisons plainly failed to meet that evidentiary threshold, because they presented no evidence that suggested Target knew or should have known about the syringe before Denise’s injury. Yet *even if* Target could have been charged with knowledge of the syringe or any other hazard in its parking lot, and granting the jury the right to disbelieved the ample testimony from Target’s employees about its good-faith attempts to keep its premises safe and clean, 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 contorted the evidence and stretched inferences.

The panel cited to this flawed evidence in reversing the circuit court’s punitive damages portion of Target’s motion for judgment as a matter of law—the employee assigned to the parking lot could not be found after the incident, Clint camped out one night in 2016 and did not see a cleaning truck, Clint’s mother observed trash in the parking lot, and an inspection log contained a typo. *Garrison*, 2020 WL 216297, at *8. But, crucially, none of

this 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 any hazard had been in Target's parking lot before May 21, 2014.

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

The Garrisons' attack on the inspection log proves nothing. Even accounting for the jury's discretion to 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 Maintenance

Technician Jon 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 Clint camped out one night two years *after* the incident and did not see a street-sweeping truck, the truck did not regularly clean Target's premises. 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' evidence of trash 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.

Because no evidence supports the proposition that Target consciously disregarded a duty to maintain its premises, the Court should grant rehearing to affirm the circuit court's JNOV as to the punitive damages award.

C. The panel incorrectly concluded that Target waived the punitive damages cap, because it mistakenly categorized statutory punitive damages caps as affirmative defenses.

The panel majority misapprehended several points of law in concluding that the statutory damages cap constitutes an affirmative defense, and that Target waived the cap's application. The panel should grant rehearing to correct these errors.

First, beginning with the act itself, section 15-32-530 nowhere requires either party to plead the damages cap—as an affirmative defense or otherwise. As Judge Hill noted in dissent, the South Carolina legislature elsewhere specified pleading requirements under the act, *see* S.C. Code § 15-32-510(A) (2012), showing they knew how to spell out what the parties must plead. Had the legislature intended to require defendants to plead the punitive damages cap as an affirmative defense, it would have said so. Likewise, the legislature assigned neither party the burden of proving that the cap applies, instead leaving that task to the trial judge. *See* § 15-32-530(B). The majority's classification of the damages cap as an affirmative defense therefore further contradicts the legislature's design by effectively

shifting the burden of proof to defendants. *See O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983) (noting that following the assertion of an affirmative defense, “the burden of proof shifts to the defendant to show he is not liable”).

Second, several factors distinguish a punitive damages cap from an affirmative defense. 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). Unlike an affirmative defense, a punitive damages cap requires no additional showing in order to apply. Moreover, when proven, an affirmative defense defeats the plaintiff’s entire cause of action. *See O'Neal*, 279 S.C. at 494, 309 S.E.2d at 779. In contrast, a punitive damages cap leaves the cause of action unaffected and merely limits the amount of damages a plaintiff may recover. In other words, while affirmative defenses address liability, punitive damages caps address damages. It makes sense, then, that the legislature never addressed burden shifting in section 15-32-530—burden-shifting provides no help where liability is not at issue. These distinctions make the damages cap different in kind than affirmative defenses generally, and those specifically listed by Rule 8(c), SCRCP. Moreover, because the parties cannot know at the pleading stage whether the jury will award damages exceeding the punitive damages

cap, the cap has much more in common with concepts like reduction and remittitur—which parties need not plead before trial.

Third, the panel majority overstates the reach of *James v. Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998). Unlike section 15-32-530, the statutory cap at issue in *James* imposed procedural requirements that substantially impacted the proof at trial. *Id.* at 282, 500 S.E.2d at 201. Specifically, to avoid the cap in *James*, the plaintiff needed to join another party to the action and present a special verdict form to the jury. *Id.* These additional burdens rightly triggered concern over unfair surprise when the defendants raised the cap after trial. But these unique procedural requirements are absent here—the punitive damages cap requires no joinder of additional parties and presents an issue for the judge rather than the jury.

This case thus falls more in line with *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005), which refused to classify the statutory damages cap in the Tort Claims Act as an affirmative defense and held the cap to be “self-executing,” *id.*; *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”).

Fourth, the panel majority overstates the Garrisons’ unfair surprise following Target’s post-trial assertion of the cap. In contrast to the cap in

James, for example, 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 section 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* § 15-32-530(B). 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 the cap—the Garrisons included.

Instead of claiming complete ignorance of the punitive damages cap, the Garrisons argued that Target’s failure to assert the cap before trial prevented them from seeking to satisfy an exception to the cap. But in addition to seeming questionable in light of the ubiquitous nature of the punitive damages cap, this argument holds no water in practice. As the dissent puts it, “[l]awyers who have smoking guns use them.” *Garrison*, 2020 WL 216297, at *27. While “[c]onstraints of time and money may compel the plaintiff to seek out” only strictly relevant information, *id.* at *15, if even a hint of evidence suggested that Target was motivated by unfair financial gain

or that its corporate officers approved unreasonably dangerous conduct, no reasonable attorney would fail to investigate further.

Fifth, the majority's attempt to distinguish section 15-32-530 from the Texas punitive damages cap examined in *Zorrilla v. Aypoco Constr. II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015), raises a distinction without a difference. *Zorrilla* held 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." *Id.* Although both the Texas and South Carolina statutes include exceptions to a default cap, the majority reasons that because South Carolina's statute references the exceptions *before* the general cap, the cap somehow fails to apply automatically. *Garrison*, 2020 WL 216297, at *20. But the order in which the legislature chooses to announce rules and exceptions cannot determine whether a cap applies automatically or conditionally—and the panel majority cites no tenet of statutory construction supporting such an interpretation.

Sixth, the majority fails to account for the special nature of punitive damages. Nearly all of the cases it relies on deal with damages cap provisions imbedded in comprehensive statutory schemes, rather than stand-alone punitive damages statutes. But punitive damages caps deserve separate consideration. Punitive damages are an extraordinary remedy

imposed to punish egregious misconduct and deter future wrongdoing. *See Nesbitt*, 335 S.C. at 448, 517 S.E.2d at 15. As such, punitive damages awards present unique public policy concerns. Indeed, the South Carolina legislature considered excessive punitive damages awards important enough to independently address with a stand-alone statutory cap. Moreover, as opposed to other types damages awards, South Carolina courts have long policed punitive damages for compliance with due process. Thus, resting the application of the cap on the whims of the parties would displace the court's usual role in reviewing punitive damages awards and frustrate South Carolina's policy goal of eliminating arbitrarily high awards.

Seventh, several states considering the argument that damages caps qualify as affirmative defenses have rejected it. *See, e.g., Zorrilla*, 469 S.W.3d 143, 157 (Tex.); *McGinnes v. Wesley Med. Ctr.*, 43 Kan.App.2d 227, 224 P.3d 581, 591 (2010); *Anderson v. City of Milwaukee*, 208 Wis.2d 18, 559 N.W.2d 563, 569 (1997); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989).

For all these reasons, the panel should grant rehearing and hold that Target never waived section 15-32-530's punitive damages cap because it is not an affirmative defense.

D. The panel incorrectly concluded that speculative “potential harm” could augment the Garrisons’ actual damages when evaluating the ratio of punitive damages under *Mitchell v. Fortis*.

The panel relied on *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), and its discussion of “potential harm,” to reverse the trial court’s “specific conclusion” that the jury’s 45:1 punitive damages award violated due process. *Garrison*, 2020 WL 216297, at *12. But because the Garrisons introduced no evidence at trial to support any potential harm, *Mitchell* fails to impact the analysis. The Court should grant rehearing to correct its due-process holding.

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 the resulting 13.9 to 1 ratio exceeded 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.

Unlike the plaintiff in *Mitchell*, the Garrisons adduced no evidence supporting potential harm. 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 played on imaginary consequences, invoking 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 *presented no evidence* suggesting that she might experience future harm. These important differences make the *Mitchell* Court’s inclusion of potential harm in the due process calculation inappropriate in this case.

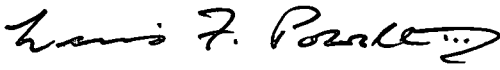
More generally, the Court should not allow speculative considerations outside of the record to justify excessive punitive damages awards. Otherwise, only a given judge’s imagination would constrain punitive damages awards, eviscerating the due-process limiting principles imposed by the South Carolina and United States Supreme Courts.

The Court should grant rehearing to clarify that the 45:1 ratio found in the jury's punitive verdict finds absolutely no support under South Carolina law, and violates Target's due process rights.

IV. CONCLUSION

For the foregoing reasons, Target respectfully asks the panel to rehear this case.

Respectfully submitted,


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January 29, 2020

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In The Court of Appeals

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

Appellate Case No. 2017-000267

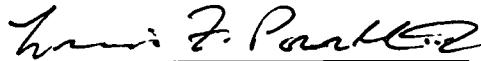
CARLA DENISE GARRISON AND CLINT GARRISON,
Appellant-Respondents,

v.

TARGET CORPORATION,
Respondent-Appellant.

PROOF OF SERVICE

I hereby certify that I served Respondent-Appellant Target Corporation's Motion for Rehearing on Appellant-Respondents by having the same delivered to their counsel of record, Joshua T. Hawkins, at 1225 South Church Street, Greenville, South Carolina 29601, on January 29, 2020.



Dated January 29, 2020

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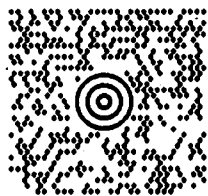
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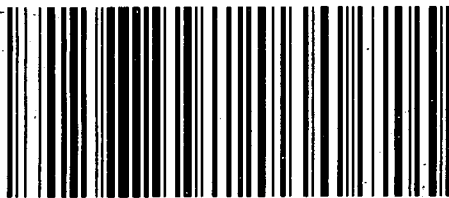
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