THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 2017-000267 (S.C. Ct. App. filed January 15, 2020)

CARLA DENISE GARRISON AND CLINT GARRISON,

Respondents,

v.

TARGET CORPORATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

On a visit to Target's Anderson County store, Carla Denise Garrison's daughter picked up a discarded syringe in the parking lot. She showed it to Mrs. Garrison, who then swatted it out of her daughter's hand. Mrs. Garrison testified that she suffered a minor puncture wound in the process. She was treated prophylactically for communicable diseases, but acquired none. She and her husband, Clint, sued Target.

At trial, the Garrisons introduced no evidence showing that anyone was aware of the syringe's presence in the parking lot before their daughter picked it up. They merely observed that the syringe was "weathered" and "gross," and opined that it must have been in the parking lot a while. The trial court allowed the question to go to the jury, who found in favor of the Garrisons, awarding them $108,000 in actual damages and $4.5 million in punitive damages.

Target moved for judgment as a matter of law, asking the court to vacate the jury's liability determination, to vacate the punitive damages award, or in the alternative to remit punitive damages to conform to South Carolina's statutory cap. The trial court upheld the jury's verdict on liability but vacated the award of punitive damages, finding the evidence insufficient to support any such award.

On appeal, the Court of Appeals affirmed the trial court's decision to uphold the liability finding, but it reversed the decision to vacate the award of punitive damages. It then held, in deciding an issue of first impression and over a dissent, that the statutory cap on punitive damages did not apply, because Target failed to invoke the statute as an affirmative defense. The court remanded the case for the

trial court to evaluate whether the award violated due process and instructed it to consider as part of that inquiry how bad things might have been had the syringe been contaminated with disease.

CERTIFICATE OF COUNSEL

Counsel for Petitioner Target Corporation certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on February 20, 2020.

ISSUES FOR WHICH TARGET SEEKS REVIEW

1. For more than sixty years, this Court has articulated clear rules governing premises liability in cases where a plaintiff claims to have suffered injury based on a condition the premises owner did not create. In these "foreign object" cases, the plaintiff must show that the owner knew about the hazard. The plaintiff can meet that burden by proving actual knowledge. Or it can show that the owner had constructive knowledge, because the hazard was present long enough to be apparent to a reasonable proprietor. This Court's precedent, like that of the majority of jurisdictions, imposes strict requirements on plaintiffs choosing the constructive-knowledge path. *See Wintersteen v. Food Lion, Inc. ("Wintersteen II")*, 344 S.C. 32, 542 S.E.2d 728 (2001). Among other things, the plaintiff must prove the object was present on the property at some point in time before the accident. Showing that the object or items around it were weathered is insufficient. *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971).

The Court of Appeals acknowledged this authority but, with no explanation, held it did not apply. The Court should grant certiorari to resolve the conflict between the Court of Appeals' holding and this Court's settled precedent.

2. In 2012, the South Carolina legislature capped punitive damages. The statute itself imposes no burden on defendants to invoke the cap for it to apply. Rather, the duty to impose the cap falls with the trial judge, who must remit any award that exceeds the statutory limit.

In the first appellate decision on this question, the Court of Appeals held that the cap is an affirmative defense, and that defendants must plead that defense in

their answer for the cap to apply. The Court held further that Target waived the "defense" by failing to plead it. The Court should grant certiorari to resolve whether the Court of Appeals usurped the South Carolina legislature by adding an element to the statute—that the punitive damages cap must be pleaded as an affirmative defense—that the legislature did not include.

3. This Court, like the United States Supreme Court, has held that due process limits the amount of punitive damages a jury can impose on defendants. Punitive-damage awards that are more than ten times greater than the plaintiff's actual damages are most suspect. In a narrow category of cases, this Court has recognized that actual damages can be augmented to account for real "potential harm" that the plaintiff might actually have suffered.

Here the Court of Appeals instructed the trial court to evaluate the ways that Mrs. Garrison's injury could have been worse had the facts been contrary to the evidence adduced at trial. The Court should grant certiorari to resolve the novel question of whether such speculation—about damages that theoretically could have occurred but did not—can be used to augment actual damages in evaluating whether a punitive-damage award exceeds the limit imposed by due process.

STATEMENT OF THE CASE

On the evening of May 21, 2014, Denise Garrison drove to Target's Anderson County store with her eight-year-old daughter, Kaileigh. (R. p. 423, line 20.) After exiting the car and pausing for a moment, Denise looked up and saw Kaileigh holding a three-inch plastic syringe, which, according to Denise, contained a small needle. (R. p. 424, lines 4–8, 18–19.) She "immediately reacted and swatted" the syringe out of Kaileigh's hand. (R. p. 212, line 22–p. 213, line 6; p. 424, line 9; p. 425, line 25–p. 426, line 3; p. 608.) Denise then looked down at her right palm and saw "a tiny bead of blood and a puncture wound." (R. p. 428, lines 21–22.)

After washing her hands in the store's restroom, Denise located Shelby Brintnall, the lead Target manager that evening. (R. p. 193, lines 6–12; p. 427, lines 18–20; p. 429, lines 4–11.) Brintnall went with Denise to the parking lot and took a photograph of the plastic syringe. (R. p. 214, lines 23–25; p. 221 line 24–p. 222, line 9.) There was no needle on the syringe. (R. p. 459, line 7.) Brintnall filled out a report, and noted that she did not see a needle. (R. p. 217, line 17; p. 611.)

The next day, Denise went to the emergency room, where an infectious disease specialist prescribed her an HIV antiviral medication and antibiotics. (R. pp. 433, lines 12–15; 436, line 11; 437, line 2.) She contracted no disease, but did incur medical bills of approximately $4,000. (R. p. 435, lines 2–3.) Her husband, Clint, took several days off from work and testified that he lost about $2,000 in wages. (R. p. 367, line 4–369, line 5.)

Although the Garrisons testified at trial about Denise's injury and how it affected their family, no one could place the syringe in Target's parking lot before

Kaileigh picked it up. Denise could not explain how the syringe ended up there, and Clint admitted that he did "not know how it got there." (R. p. 418, line 5.) What's more, no evidence showed the syringe's location before Denise saw it in Kaileigh's hand: photographs depicted only where the syringe landed after Denise swatted it, not where Kaileigh picked it up. (R. p. 212, line 22–p. 213, line 6; p. 418, line 21–p. 419, line 6; p. 608.)

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

The testimony from Target employees Shelby Brintnall and Jon Jackson provided no further insight into the origin of the syringe. Jackson explained that, had the syringe been seen by any Target employee, it would have been removed from the parking lot before it caused any harm. (R. p. 344, lines 17–24.) Neither

witness suggested that Target employees would have had any reason to believe a syringe would turn up in the parking lot.

In closing arguments at trial, the Garrisons' counsel implored the jury to treat Target as an enemy of Anderson County and its citizens.[1] To that end, counsel told the jury not fewer than ten times that Target saw $73 billion in revenue in 2014—a fact not offered into evidence during trial. (R. p. 527, line 14; p. 528, line 2; p. 529, lines 11–12; p. 530, lines 1–2; 533, lines 14–15; 541, lines 1–2; p. 542, line 10; p. 549, lines 16–17; p. 550, lines 13–14, 18; p. 563, lines 19–20; p. 564, lines 22–23.) The repeated emphasis on that large figure was particularly striking in light of the precise sum of compensatory damages he suggested would make the Garrisons whole: $11,000 to cover medical bills, Clint's lost wages, and loss of consortium. (R. p. 548, line 15.) In closing, the Garrisons' counsel suggested that Target's "perception of Anderson, South Carolina, is probably worse than their ignorance of where we are on the map." (R. p. 565, lines 4–11.)

The jury listened. Following ninety minutes of deliberations, it returned a verdict awarding the Garrisons compensatory damages of $108,000 and punitive damages of $4.5 million. (R. pp. 24–27.) In post-trial motions, Target sought judgment as a matter of law and a new trial. (R. p. 751.) Among other things, it challenged the sufficiency of the Garrisons' evidence on the underlying question of

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

liability and punitive damages and sought to remit the punitive damages award because it violated Target's constitutional due process rights and exceeded statutory limits. (R. p. 751.) The trial court upheld the jury's liability finding, but struck the punitive damages award in its entirety. (R. pp. 5–6, 11.) The Garrisons appealed, and Target cross-appealed. (R. pp. 923–972.)

On January 15, 2020, the Court of Appeals 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 15-32-530, 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.*, 838 S.E.2d 18, 47 (S.C. Ct. App. 2020). Just over a month later, the Court of Appeals denied rehearing.

ARGUMENTS

This case presents several important issues warranting review. *See* Rule 242(b), SCACR.

The Garrisons failed to present evidence showing that the syringe had been in Target's parking lot for any period of time before the accident. They could offer only speculation based on the syringe's post-accident appearance. Six decades of this Court's precedent clearly establishes that such speculation cannot suffice to

prove constructive notice. The Court of Appeals' decision contradicts that precedent and the clarity it offers.

The Court of Appeals also undermined the legislature's decision to cap punitive damages. Over Judge Hill's dissenting opinion, the panel majority incorrectly concluded that South Carolina's statutory damages cap constituted an affirmative defense that Target waived, because it did not invoke it in its answer.

Finally, the Court of Appeals subverted the clear due-process limitations on punitive damages by holding that speculative harm—that did not occur—could augment the Garrisons' actual damages and thereby justify an otherwise excessive award of punitive damages.

The Court should grant certiorari on each of these issues.

I. This Court should review the Court of Appeals' decision because it expands South Carolina's well-settled limits on premises liability.

Under South Carolina law, a merchant cannot be held liable simply because a customer injures herself while at its store. *See Hunter v. Dixie Home Stores*, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957). Instead, the customer must prove either (1) that her injury was the result of a dangerous condition specifically created by the merchant; or (2) that the merchant "had actual or constructive knowledge of the dangerous condition and failed to remedy it." *Wintersteen II*, 344 S.C. at 35, 542 S.E.2d at 729.

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*, 257 S.C. at 77, 184 S.E.2d at 77. That temporal element obliges the plaintiff to show that the dangerous condition existed "for *a sufficient length of time* that the storekeeper would or should have discovered and removed it had the storekeeper used ordinary care." *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 91, 394 S.E.2d 24, 25 (Ct. App. 1990) (emphasis added). And, 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).

Ignoring these settled principles, the Court of Appeals 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*, 838 S.E.2d at 27. In doing so, it failed to engage a deep reservoir of South Carolina cases that hold that courts must reject the precise kind of speculation and conjecture that the Garrisons presented to support constructive notice. And by broadening the scope of evidence available to prove constructive notice, the Court of Appeals decision puts South Carolina out of step with the majority of jurisdictions on this question, a move this Court has rejected time and again. *Cf., e.g.*, *Wintersteen II*, 344 S.C. at 39, 542 S.E.2d at 731–32 ("We decline to depart from traditional foreign substance analysis: a storekeeper is only liable if it places the substance on the floor, or if it has actual or constructive notice thereof."); *Simmons v. Winn–Dixie Greenville, Inc.*, 318 S.C. 310, 457 S.E.2d 608 (1995) ("We decline to expand the established standard requiring notice, either actual or constructive, by a

store owner in slip and fall cases."). The Court should grant certiorari to once again reject the dilution of South Carolina's settled law on foreign-substance premises liability.

Since the late 1950s, this Court has held consistently that juries cannot be left to speculate about the length of time an injury-causing foreign object was present on a premises. In *Gilliland v. Pierce Motor Co.*, this Court established the basic rule: 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." 235 S.C. 268, 111 S.E.2d 521 (1959).

Ten years later, this Court reaffirmed that principle. *Wimberly v. Winn-Dixie Greenville*, 252 S.C. 117, 165 S.E.2d 627 (1969). In *Wimberly*, the 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." The *Wimberly* Court rejected the plaintiff's 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.*

In the fifty years since *Wimberly*, this Court and other courts applying South Carolina law have routinely rejected attempts to use speculation in lieu of actual proof in constructive notice cases. *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").

Without citing *any* of the cases discussed above, the Court of Appeals 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*, 838 S.E.2d at 27. In other words, the Court found that evidence regarding the appearance of the object sufficiently

bolstered speculation about the duration of the syringe's presence in Target's parking lot. But this Court has spoken on that question, too, and it has repeatedly held that testimony about the appearance of the foreign object is inherently speculative and cannot support a finding of constructive notice. *See Anderson*, 257 S.C. at 75, 184 S.E.2d at 77. *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*, this 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. The "'withered up' and 'mushed up'" appearance of the banana peel, the Court explained, 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 is equally plausible that it fell from a customer's car (or the back of a truck) in the condition Kaileigh Garrison found it, or that the wind blew it over from an adjacent store's lot just before the Garrisons arrived. Critically, 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 (by being run over, kicked, or wind-blown)—or five months—before Kaileigh picked it up. These

equally unsupported suppositions do not present factual questions for the jury to resolve because 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 Court of Appeals acknowledged *Anderson*, but offered no basis for distinguishing it. All the Court of Appeals could say was 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*, 838 S.E.2d at 28. The Court of Appeals' analysis ends there. We are left to guess why the court considered a banana peel inside a grocery store to be different from a syringe in an outdoor parking lot. This Court's decisions suggest no meaningful distinction.

The Court of Appeals also ran afoul of this Court's precedent by crediting evidence about the appearance of other objects found in the vicinity of the syringe after Mrs. Garrison swatted it away. Specifically, the court 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*, 838 S.E.2d at 27 (distinguishing *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)). This analysis is just as flawed as the court's treatment of *Anderson*.

Beyond the problem, acknowledged by the panel, that the debris Clint described referenced the landing point of the syringe rather than its original location, the proximity to other debris proves nothing without some measure of how

long it had been in the lot. 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, let alone its pre-accident proximity to the syringe. Perhaps the Garrisons could have proffered 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). Or the Garrisons could have introduced additional evidence that connected the surrounding debris to a discernible event in the past. They did none of these. So the jury—and the panel—could only speculate about how long the debris had been there. No record evidence distinguishes this case from *Wintersteen I.* 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.

The Court of Appeals then compounded that error by suggesting that Target bore some burden of proof on this question. 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*, 838 S.E.2d at 27. But, again, no evidence indicates it is unlikely, either. And the Garrisons bore the burden of proof on this critical question. None of this Court's several 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.

To further illustrate how far the Court of Appeals' analysis departs from settled South Carolina law, the Garrisons' proof here would not even satisfy the more lenient general-foreseeability standard the plaintiffs unsuccessfully urged this Court to adopt in *Wintersteen II*. In that case, the plaintiffs argued that the foreseeability that ice from a drink dispenser would occasionally tumble onto the floor was sufficient to establish constructive notice. *Wintersteen II*, 344 S.C. at 35, 542 S.E.2d at 730. This Court rejected that standard, because it would make shop owners insurers against the acts of third parties. *Id.* at 37, 542 S.E.2d at 731. But at least there, the shop owner actually put the drink dispenser on the premises and arguably could foresee that ice would spill out of it onto the floor. Nothing here remotely suggests that Target should have foreseen that a syringe would alight on its parking lot.

Because none of the Garrisons' evidence suffices to show Target's constructive notice of the syringe, the Court of Appeals should have vacated the jury's verdict. The Court should grant certiorari to address the conflict with long-standing Supreme Court precedent on constructive notice the Court of Appeals' decision creates.

II. This Court should grant certiorari to resolve the novel question of whether the statutory cap on punitive damages is an affirmative defense.

Two members of the Court of Appeals panel, over a dissent, misapprehended several points of law in concluding that South Carolina's statutory damages cap

constitutes an affirmative defense, and that Target waived the cap's application by failing to invoke it as an affirmative defense. This case warrants review to correct these errors on this novel question of law that stands to impact hundreds of litigants every year. The Court should grant certiorari to clarify that defendants need not plead the punitive damages cap as an affirmative defense because, like other background rules impacting recovery, it applies automatically.

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 it knew how to spell out what the parties must plead. Had it intended to require defendants to plead the punitive damages cap as an affirmative defense, the legislature would have said so. The legislature instead directed trial judges to apply the cap after the jury renders its verdict. *See* § 15-32-530(B). The majority's classification of the damages cap as an affirmative defense frustrates 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").

Logic supports the legislature's decision not to make the cap 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). In contrast, a punitive damages cap requires no assertion of "new matter" in order to apply—the defendant need not prove anything. And 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. A punitive damages cap, on the other hand, 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 the quantum of damages. It makes sense, then, that the legislature never mentioned burden-shifting in section 15-32-530—burden-shifting provides no help where liability is not at issue. These distinctions make the punitive damages cap different in kind than affirmative defenses generally, but also different than those specifically listed by Rule 8(c), SCRCP.[2] 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.

The panel majority likewise overstates the reach of *James v. Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998). Unlike South Carolina's general punitive damages cap, the recovery cap for charitable organizations 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

[2] Rule 8(c), of course, fails to list the statutory punitive damages cap as an example of an affirmative defense.

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. 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 is more like *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." *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").

The panel majority also overstates the Garrisons' surprise following Target's post-trial assertion of the cap, because the statute provides clear notice of its restriction. 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). Thus, as with other background rules that limit recovery, no plaintiff can reasonably claim surprise at the imposition of the cap—the Garrisons included.

The panel 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.* So too here. But although both the Texas and South Carolina statutes include exceptions to a default cap, the panel majority reasoned that because South Carolina's statute references the exceptions *before* the general cap, the cap somehow fails to apply automatically. *Garrison*, 838 S.E.2d at 43. 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. Thus, as with Texas's cap, South Carolina's cap is "the rule, not the exception." *Zorrilla*, 469 S.W.3d at 157.

Finally, the Court of Appeals majority failed to account for the special nature of punitive damages. Nearly all of the cases it relied 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 v. Lewis*, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999). As such, punitive damages awards present unique public policy concerns. Indeed, the South Carolina legislature—joining several other states—considered excessive punitive damages awards important enough to independently address with a stand-alone statutory cap. Moreover, as opposed to other types of damages awards, South Carolina courts have long policed punitive damages for compliance with due process. Resting the application of the cap on the whims of the parties would thus displace the court's usual role in reviewing punitive damages awards and frustrate South Carolina's policy goal of eliminating arbitrarily high awards.

For all these reasons, the Court should grant review to correct the Court of Appeals' unsound holding on this novel issue and clarify for South Carolina litigants that section 15-32-530's punitive damages cap is not an affirmative defense.

III. This Court should grant certiorari to clarify that speculative "potential harm" cannot be used to augment actual damages when evaluating the constitutionality of a punitive damages award.

The Court of Appeals 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*, 838 S.E.2d at 35. But because the Garrisons introduced no evidence at trial to support any potential harm, *Mitchell* fails to impact the analysis. The Court should review this issue to correct the Court of Appeals' erroneous due-process holding, which, left unchecked, stands to drastically expand existing constitutional limits on punitive damages awards.

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, this 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. In contrast to the potential harm in *Mitchell*, which was backed up by expert opinion and predicted a HIV patient's very real future costs, the Garrisons played on imaginary consequences—invoking the harm that Denise *might* have faced *if* the syringe actually infected her with some disease. But, thankfully, Denise did not contract any infectious disease, and the Garrisons presented no evidence suggesting that Denise might experience future harm. These important distinctions 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 awards, eviscerating the due-process limiting principles imposed by this Court and the United States Supreme Court.

The Court should grant review 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.

CONCLUSION

This case warrants review because the Court of Appeals' decision substantially departs from several of this Court's prior cases placing clear limits on constructive notice, incorrectly disposes of a novel procedural issue over a dissenting opinion, and, under the circumstances of the case, announces an

unprecedented method for assessing the constitutionality of a punitive damages award. Target asks the Court to grant this petition for a writ of certiorari on each of these important issues.

Respectfully submitted,

s/John C. Moylan, III

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