

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

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

Carla Denise Garrison and Clint Garrison,

Respondents,

v.

Target Corporation,

Petitioner.

APPENDIX VOLUME I

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carla Denise Garrison and Clint Garrison,
Appellants/Respondents,

v.

Target Corporation, Respondent/Appellant.

Appellate Case No. 2017-000267

Appeal From Anderson County
R. Keith Kelly, Circuit Court Judge

Opinion No. 5711
Heard May 15, 2019 – Filed January 15, 2020

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Joshua Thomas Hawkins and Helena LeeAnn Jedziniak,
both of Hawkins & Jedziniak, LLC, of Greenville; and G.
Todd Butler, of Phelps Dunbar LLP, of Jackson,
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Lewis F. Powell, III and George P. Sibley, III, both of
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Respondent/Appellant.

GEATHERS, J.: In this negligence action, Appellants/Respondents, Carla Denise Garrison and Clint Garrison (the Garrisons), challenge the circuit court's order setting aside the jury's \$4.5 million punitive damages award, arguing (1) there was sufficient evidence to support the jury's finding that the conduct of Respondent/Appellant Target Corporation (Target) was reckless, willful, or wanton; (2) the verdict was not excessive; and (3) Target waived the application of the punitive damages caps set forth in section 15-32-530(A) of the South Carolina Code (Supp. 2019). The Garrisons also challenge the circuit court's pre-judgment interest award, arguing the circuit court erred by calculating the interest on compensatory damages only. Target appeals the circuit court's denial of its motion for a judgment notwithstanding the verdict (JNOV) as to liability, arguing there was insufficient evidence of Target's constructive knowledge of a dangerous condition on its premises. Target also appeals the denial of its motion for a new trial absolute, arguing the punitive damages award reflected the jury's passion, caprice, and prejudice. We affirm in part, reverse in part, and remand for a remittitur of the jury's punitive damages award.

FACTS/PROCEDURAL HISTORY

On May 21, 2014, Appellant/Respondent Carla Denise Garrison (Denise) and her eight-year-old daughter (Daughter) visited the Target store in Anderson. After parking her car, Denise retrieved her coupon book and placed it on the hood of the car to examine it. As she was examining the coupon book, Denise heard Daughter ask, "Mommy, what is this?" Denise turned her attention to Daughter and saw her holding a syringe with a needle in it. Denise "immediately reacted" by swatting the syringe out of Daughter's hand, exclaiming, "Don't ever pick anything like that up, that's dirty, that's nasty." When Denise swatted the syringe, the needle punctured her right palm, and she noticed a bead of blood emerge from the puncture site.

Denise went inside the store to wash her hands several times and called her husband, Appellant/Respondent Clint Garrison (Clint). Clint advised Denise to report the incident, so Denise spoke to the store manager, Shelby Brintnall, and they both took photographs of the syringe lying in the parking lot. Brintnall took possession of the syringe and completed a "Guest Incident Report" form, recounting the incident as Denise had relayed it to her.¹ In response to the form's question, "Was the floor/ground clean and dry," Brintnall checked the "No" box. Brintnall also advised Denise to get medical treatment and give the bill to her. After Denise

¹ Brintnall testified she placed the syringe in a bag and placed a label on the bag stating "Do Not Touch" and the syringe later "end[ed] up" in a "hazard box."

left the store, Brintnall completed a second report that was entitled "LOD Investigation Report."² In this report, Brintnall indicated that she did not see a needle in the syringe.

The next day, Denise visited the local hospital emergency room, where a nurse referred Denise to an infectious disease specialist, Dr. Potts,³ at AnMed Health Specialty Clinic. The clinic collected a blood sample to have it tested for HIV and hepatitis, and Dr. Potts prescribed several medications targeted at preventing HIV and hepatitis. The medications caused Denise to feel dizzy and lose her balance. They also upset her stomach, put her into a "zombie-like state," and caused her to have night terrors. Clint testified that Denise was bedridden during this time. Clint had to take unpaid leave from work to care for Denise, and Clint's mother had to help care for the Garrisons' four children. Further, Denise had to have her blood tested every three months for approximately one year.

Soon after Denise started taking the medications, an investigator for Target telephoned Denise and asked her if she thought Target was responsible for her injury. She told the investigator that Target was "supposed to take care of the parking lot" but she was asking only that Target pay her medical bills. Denise eventually filed an action against Target seeking damages for negligence and violation of the South Carolina Unfair Trade Practices Act. Subsequently, Denise submitted to Target a \$12,000 offer of judgment, but Target did not accept the offer. Denise and Clint later filed a second action against Target, asserting causes of action for negligence and loss of consortium. The circuit court consolidated the two actions and conducted a trial on September 5 through 8, 2016.

At trial, Brintnall testified that Target's Anderson store did not have a formal policy for regular "safety sweeps" of the parking lot but there were measures in place to keep the parking lot in order. She stated that the store had cart attendants who retrieved carts from the parking lot and simultaneously checked for debris and picked it up. The attendants also advised the team lead-on-duty of anything they saw that "need[ed] to be noted." However, Brintnall admitted that management did not "have a set time" for the cart attendants to perform these tasks; rather, they did them "every so often." Brintnall added that the store's Property Maintenance Technician, Jonathan Jackson, "walk[ed] the building" in the mornings.

² "LOD" is an acronym for the store's team "lead-on-duty."

³ The record does not indicate a first name for Dr. Potts.

The parties also introduced testimony regarding Target's loss of the syringe and the Garrisons' loss of photographs of the syringe. Brintnall explained that after she took possession of the syringe, she thought that a co-worker disposed of it but later learned that it was still at the store. Subsequently, an employee of the Garrisons' counsel took photographs of the syringe with her cell phone, but those photographs could not be produced for trial. Brintnall then lost track of the syringe once again, and its location at the time of trial was a "great mystery." Moreover, Clint was unable to retrieve from his own cell phone photographs purportedly showing the needle in the syringe. In light of all of this testimony, the circuit court gave a jury instruction on the doctrine of spoliation.⁴

At the conclusion of the trial, the jury returned a verdict for Denise that included \$100,000 in compensatory damages and \$4.5 million in punitive damages. The jury also awarded Clint \$3,500 for lost wages and \$5,000 for loss of consortium. The circuit court granted Target's motion for a JNOV as to punitive damages but denied Target's remaining post-trial motions. The circuit court granted the Garrisons' motion for costs, pre-judgment interest, and post-judgment interest but calculated pre-judgment interest on compensatory damages only. These cross-appeals followed.

ISSUES ON APPEAL

1. Was there sufficient evidence of Target's constructive knowledge of a dangerous condition on its premises to allow the issue of Target's liability to go to the jury?
2. Was there sufficient evidence of Target's recklessness, willfulness, or wantonness to support the jury's punitive damages award?
3. Did the amount of the punitive damages award violate due process?

⁴ The doctrine of spoliation allows the jury to draw an adverse inference against a party who "fails to preserve material evidence for trial." *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006). It is for the jury "to determine whether the party has offered a satisfactory explanation for that failure," and if the jury "find[s] the explanation unsatisfactory, [it is] permitted—but not required—to draw the inference that the evidence would have been unfavorable to the party's claim." *Id.*

4. Did Target waive the application of the punitive damages caps in section 15-32-530?⁵
5. Did the punitive damages award reflect the jury's passion, caprice, and prejudice such that a new trial absolute was required?
6. Did the circuit court err by calculating pre-judgment interest on compensatory damages only?

STANDARD OF REVIEW

JNOV

"When ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party." *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). "This court must follow the same standard." *Id.* "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." *Id.* (quoting *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965)).

"In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). "When considering a JNOV, neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Id.* (alteration in original) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998)). "The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." *Id.*

Punitive Damages

⁵ Because we conclude that Target waived the application of section 15-32-530, we need not address whether the statute is constitutional or whether the cap in subsection (A) applies to the Garrisons. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

An appellate court must review de novo a circuit court's post-trial "due process review" of a punitive damages award. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009).

New Trial Absolute

"[I]f a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration not founded on the evidence[,] then it is the duty of the trial court and the appellate court to set aside the verdict absolutely." *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 33, 410 S.E.2d 21, 25 (Ct. App. 1991). Nonetheless, "the jury's determination of damages is entitled to substantial deference[.]" and the circuit court's decision on whether to grant a new trial based on the amount of the verdict "will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). An exception to this rule is that an appellate court must review de novo a circuit court's post-trial "due process review" of a punitive damages award. *Mitchell*, 385 S.C. at 583, 686 S.E.2d at 183.

LAW/ANALYSIS

I. Constructive Notice

Target maintains the circuit court erred by denying its JNOV motion as to liability because there was insufficient evidence of its constructive knowledge of a dangerous condition on its premises.

To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant [that] created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it.

Wintersteen v. Food Lion, Inc. (Wintersteen II), 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). "Constructive notice is a legal inference, which substitutes for actual notice." *Major v. City of Hartsville*, 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014). "The defendant will be charged with constructive notice whenever it appears that the condition has existed for such length of time prior to the injury that, under existing

circumstances, he should have discovered and remedied it in the exercise of due care" *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77 (1971). Target admits that this "temporal element does not require the plaintiff to precisely measure the lifespan of the hazard."

In denying Target's motion, the circuit court stated

[A]lthough there was no direct evidence as to the exact length of time the syringe had been in the parking lot, witnesses testified the syringe was "dingy, dirty and gross," and bore a "weathered" look similar to other items of trash in the parking lot. That testimony, when viewed in the light most favorable to Plaintiffs, leads to the reasonable inference that the syringe was in Target's parking lot long enough to impute constructive knowledge. Thus, judgment as a matter of law is not appropriate on the constructive knowledge issue.

(emphasis added).

When viewed in the light most favorable to the Garrisons, there was sufficient evidence to support the circuit court's ruling. See *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight."); *Williams Carpet*, 400 S.C. at 325, 734 S.E.2d at 180 ("When ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party."); *id.* ("This court must follow the same standard.").

Denise testified that the syringe was old, dirty, and nasty and that she "could tell [that], obviously[,] it had been there a long time." Further, Shelby Brintnall, the manager on duty at the time Denise was injured, testified that she saw the syringe and admitted that it "look[ed] like it[had] some wear on it." Brintnall stated that the syringe was "dirty and dingy" and one end of it had been broken off. She also affirmed that the photograph taken of the syringe showed "dings" on it as well as grime. Clint testified that from viewing the photograph of the syringe on the ground near the site of the injury, he could tell that the syringe had "been there a[while]" because it, along with surrounding debris, was "weathered." Clint also testified that some discarded twine lying near the syringe was discolored and looked like it had been run over. Admittedly, the photographs depict the location where the syringe

landed after Denise had swatted it away from her daughter's hands. Nonetheless, it is unlikely that the location where the syringe landed was any significant distance from its original location in the parking lot.

Target argues this court should not consider the Garrisons' testimony concerning how long the syringe had been in the parking lot because it was speculative. However, it is 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. *See Williams Carpet*, 400 S.C. at 325, 734 S.E.2d at 180 ("If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." (quoting *Chaney*, 246 S.C. at 266, 143 S.E.2d at 523)); *cf. H. L. Green Co. v. Bowen*, 223 F.2d 523, 525 (4th Cir. 1955) (reversing a judgment for the plaintiff and stating that the only evidence as to the defendant's constructive notice of popcorn on which the plaintiff slipped and fell was the testimony of the plaintiff's witness that she "saw the popcorn on the floor only a few minutes before [the plaintiff] entered the store and fell; that the popcorn *looked fresh, crisp and white; that the popcorn appeared not to have been walked on*, seemed to have been just dropped on the floor and *that the floor around the popcorn was clean and had the semblance of having been very recently swept*" (emphases added)); *id.* ("We cannot attribute constructive notice of the presence of this popcorn to [the defendant] on evidence proving merely that the popcorn had been there a very few minutes.").

Target also argues that the syringe could have already been in its weathered condition when it was first abandoned in the parking lot. While this is possible, there is no evidence indicating this is likely. In contrast, the weathered condition of the debris surrounding the syringe indicates it is likely that the syringe became weathered after it was abandoned in the lot. Therefore, this case is distinguishable from *Wintersteen v. Food Lion, Inc. (Wintersteen I)*, in which two equal possibilities made the determination of how long water had been on a grocery store's floor nothing more than "pure speculation." 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).⁶ Further, while Target

⁶ In *Wintersteen*, the plaintiff slipped on a puddle of clear liquid in a grocery store and fell, injuring her back. 336 S.C. at 134, 518 S.E.2d at 829. Because the plaintiff's own expert testified that ice falling from a drink machine could melt in as fast as one minute, this court concluded, "[W]hile the liquid could have been on the floor for an extended period of time, *it is just as possible* that it had been on the floor for only moments before [the plaintiff] fell" and "[A]ny determination of how long

compares the weathered condition of the syringe to the description of a banana peel as "withered up" and "mushed up" in *Anderson*,⁷ 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.

In light of the foregoing, we conclude there was sufficient evidence of constructive notice to allow the jury to resolve the question of Target's liability.

II. Punitive Damages Award

The Garrisons argue the circuit court erred by setting aside the jury's punitive damages award because (1) there was sufficient evidence of Target's recklessness, willfulness, or wantonness to support the award; (2) the amount of the award was not excessive; and (3) Target waived the application of the punitive damages caps in section 15-32-530. We will address these grounds in turn. But first, we will explain how the circuit court structured its rulings on these questions, given the Garrisons' assertions that (1) the circuit court conflated evidentiary sufficiency with constitutional excessiveness and (2) the circuit court's judgment concerning the sufficiency of the evidence to support the award was clouded by the amount of the award.

In its order addressing the parties' post-trial motions, the circuit court stated, "[F]inding punitive damages unconstitutional in this case, the [c]ourt finds judgment as a matter of law is appropriate as to that aspect of the award alone." The order then discussed the reasons for denying a JNOV as to liability and for granting a JNOV as to the punitive damages award. This discussion included a post-trial review of the constitutionality of the punitive damages award. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 52, 691 S.E.2d 135, 150 (2010) ("Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." (quoting *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006))); *id.* at 52, 691 S.E.2d at 151 ("[A] trial judge shall review the constitutionality of a punitive damages award by determining whether the award was reasonable . . ."); *Mitchell*, 385 S.C. at 584,

the water had been on the floor would be pure speculation." *Id.* at 136, 518 S.E.2d at 830 (emphasis added).

⁷ 257 S.C. at 80, 184 S.E.2d at 79 ("The phrases 'withered up' and 'mushed up', which were applied to the appearance of the small bit of peeling after it has been stepped upon by [the] plaintiff, are . . . insignificant.").

686 S.E.2d at 183 ("To the extent [a punitive damages] award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003))).

Within its discussion of the award's constitutionality, the circuit court found there was no evidence that Target "engaged in a pattern of reckless, willful, or wanton conduct that is sufficiently reprehensible to justify the punitive damages award." The circuit court also found that the ratio between the punitive damages award and the actual damages award was "in excess of 45:1." The circuit court concluded that the award violated Target's due process rights.

A. Supporting Evidence

"In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "A tort is characterized as reckless, willful or wanton 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." *Id.*⁸ "A conscious failure to exercise due care constitutes willfulness." *Id.*

Here, the circuit court set aside the punitive damages award by way of a JNOV. The nature of a JNOV, which is "merely a renewal of [a] directed verdict motion,"⁹ requires the circuit court to determine the existence of evidence to support the award and not its weight. *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274; *cf. Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 101, 727 S.E.2d 407, 413 (2012) (holding the circuit court erred in granting a directed verdict on the issue of punitive damages and stating, "It is not the duty of a trial court to weigh the evidence. Viewing the evidence and its reasonable inferences in the light most favorable to

⁸ See also *Geddings v. Atl. Coast Line R. Co.*, 91 S.C. 477, 75 S.E. 284, 286 (1912) ("Not only is the conscious invasion of the rights of another, in a wanton, willful, and reckless manner, an act of wrong, but [] the same result follows, *when the wrongdoer does not actually realize that he is invading the rights of another*, provided the act is committed in such a manner that a person of ordinary reason and prudence would say that it was a reckless disregard of another's rights." (emphasis added) (quoting *Tolleson v. Southern Ry. Co.*, 88 S.C. 7, 70 S.E. 311, 313 (1911))).

⁹ *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012).

[the nonmoving party], as both the trial court and this [c]ourt 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"). "When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 (alteration in original) (quoting *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154). "The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." *Id.*

Further, both the circuit court and this court are "required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to" the Garrisons, the nonmoving parties. *Williams Carpet*, 400 S.C. at 325, 734 S.E.2d at 180; *cf. Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 393–94, 714 S.E.2d 904, 909–10 (Ct. App. 2011) ("When ruling on a directed verdict motion as to punitive damages, 'the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. In reviewing the denial of a motion for directed verdict . . . , the appellate court applies the same standard as the circuit court.'" (alteration in original) (citation omitted) (quoting *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 200, 621 S.E.2d 363, 366 (Ct. App. 2005), *cert. denied* (Jan. 18, 2007))). "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt," the verdict should be upheld. *Williams Carpet*, 400 S.C. at 325, 734 S.E.2d at 180 (quoting *Chaney*, 246 S.C. at 266, 143 S.E.2d at 523); *cf. Hollis*, 394 S.C. at 394, 714 S.E.2d at 910 ("The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." (quoting *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366)).

In *Mishoe*, the plaintiff injured her left ankle and right knee while walking across the pavement near the emergency room exit of the defendant's hospital and getting her left foot got caught in a hole. 366 S.C. at 199, 621 S.E.2d at 365. Although the hospital's head of maintenance had prepared a written report concerning the hole's existence approximately eleven months before the plaintiff's injury,¹⁰ "[t]he hospital took no action to repair the hole or warn visitors and patients of the hole's existence." *Id.* This court concluded that this evidence was sufficient to submit the issue of the hospital's "willful, wanton, reckless, or malicious conduct to the jury." 366 S.C. at 202, 621 S.E.2d at 366.

¹⁰ The hospital "was required to perform regular, twice-yearly safety inspections of its premises to maintain its accreditation." *Id.*

Notably, the hospital had argued that because there was no clear and convincing evidence that its actions constituted willful, wanton, or reckless conduct, the circuit court erred in denying its JNOV motion.¹¹ 366 S.C. at 200, 621 S.E.2d at 365. In rejecting this argument, then-Chief Judge Hearn summarized the standard of review for a JNOV ruling on punitive damages as follows:

On appeal from the denial of a motion for directed verdict or JNOV, *the appellate court may only reverse if there is no evidence to support the circuit court's ruling*. Neither the circuit court nor the appellate court has the authority to decide credibility issues or resolve conflicts in testimony. In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights.^[12] A conscious failure to exercise due care constitutes willfulness. When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, *sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness*. The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton.

366 S.C. at 200–01, 621 S.E.2d at 366 (emphases added) (citations omitted).¹³

¹¹ The clear and convincing "measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt." *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 265 n.4, 478 S.E.2d 282, 284 n.4 (1996) (quoting *Middleton v. Johnston*, 273 S.E.2d 800, 803 (Va. 1981)).

¹² See S.C. Code Ann. § 15-33-135 (2005).

¹³ *But see Taylor*, 324 S.C. at 221–22, 479 S.E.2d at 46 (holding the circuit court properly denied the defendant's motion for a JNOV on punitive damages because the record contained "clear and convincing evidence that [the defendant] failed to exercise due care in treating [the plaintiff]"); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009) (responding to the defendant's argument that the jury's punitive damages award should be "reversed" by stating that

Here, the Garrisons presented evidence showing that Target's employees were aware of the importance of inspecting and cleaning the parking lot to keep it safe for customers and of keeping good records of these efforts. The Garrisons also presented evidence showing that Target's employees should have been aware of the existence of the syringe and needle in the parking lot. Yet, immediately after Denise reported the injury to Target's manager, the employee assigned to the parking lot could not be located. The Garrisons also highlight the following evidence showing the falsity of Target's claim that it had the parking lot cleaned on a regular basis: Target's manager (Shelby Brintnall) and Property Maintenance Technician (Jonathan Jackson) both testified that a third-party vendor sent a cleaning truck to sweep Target's parking lot once a week, on every Thursday night. Brintnall and Jackson also testified that cart attendants regularly checked the lot for debris. Yet, Clint testified that he camped out in Target's parking lot on a Thursday night, from 11:45 p.m. to 5:30 a.m.,¹⁴ and no one came to clean the lot.

Also belying Target's claim that it cleaned the parking lot on a regular basis were photographs of weathered trash and debris and the testimony of the Garrisons and Clint's mother that they had observed "trash everywhere" and other debris in Target's parking lot on different occasions. The Garrisons also maintain that an inspection log identifying both April 28, 2014, and April 29, 2014, as a Monday

clear and convincing evidence supported the award); *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (responding to the defendant's argument that the jury's punitive damages award should be "reversed" by stating, "Although appellate review of an award of punitive damages is limited to the correction of errors of law, an award of punitive damages must be proven under a significant burden of proof: clear and convincing evidence"); *id.* at 564–65, 619 S.E.2d at 11 (holding the circuit court erred in submitting the issue of punitive damages to the jury because there was "no clear and convincing evidence that [the defendant's] conduct . . . was willful, wanton, or in reckless disregard of the rights of others"); *Welch*, 342 S.C. at 301–02, 536 S.E.2d at 419–20 (holding the circuit court did not err in denying the defendant's motion for a JNOV as to punitive damages because there was clear and convincing evidence of the defendant's reckless culpability).

¹⁴ Clint explained that Target's counsel had previously intimated to him that the cleaning truck regularly arrived at the parking lot after midnight. Clint also listened to Jackson testify in his deposition that the truck arrived "on Thursday night and Friday mornings."

"suggested to the jury" that Jackson's testimony claiming to have conducted regular inspections was false.

When evaluating the above-referenced evidence of Target's failure to regularly inspect and clean its parking lot, the circuit court was charged with determining whether the circumstances were such that "a person of ordinary reason and prudence would have been conscious of [Target's conduct] as an invasion of the plaintiff's rights." *Taylor*, 324 S.C. at 221, 479 S.E.2d at 46. As we previously stated, the Garrisons assert that the circuit court conflated evidentiary sufficiency with constitutional excessiveness.¹⁵ They express the concern that the circuit court failed to articulate the standard for evaluating a motion for a JNOV as to the award of punitive damages because the court's judgment was clouded by the amount of the jury's verdict. They highlight the inconsistency between the circuit court's JNOV and its initial denial of Target's directed verdict motion as to punitive damages, when it found sufficient evidence to support such an award: "[T]he [c]ourt 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." We agree with this initial assessment by the circuit court. We also agree with the Garrisons' assertion that the circuit court lost sight of this principle after being confronted with the enormity of the jury's punitive damages award.

Based on the foregoing, we reverse the circuit court's JNOV as to the punitive damages award.

¹⁵ In *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, this court set forth the following demarcation between evidentiary sufficiency and constitutional excessiveness:

Our appellate decisions have heretofore recognized three stages for a trial court's review of punitive damages. *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 . . . review to evaluate whether the award deprives the defendant of due process. If the court concludes that the defendant's due process rights were violated, a new trial absolute or new trial *nisi remittitur* is required.

339 S.C. 285, 314, 529 S.E.2d 45, 60–61 (Ct. App. 2000) (emphasis added) (citations omitted).

B. Amount of Award

After finding that the ratio between the punitive damages award and the actual damages award was in excess of 45:1, the circuit court stated, "This ratio should not stand in . . . light of the *Campbell* decision[] and cannot stand under the statutory cap placed on punitive damages . . . in [section] 15-32-530." On appeal, the Garrisons argue that the amount of the punitive damages award was not excessive and, therefore, should not be reduced. The Garrisons also argue Target waived the application of the punitive damages caps in section 15-32-530. We will address these grounds in turn.

1. Due Process

"[W]hile states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (quoting *Campbell*, 538 U.S. at 416). In other words, "[b]ecause punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Austin*, 387 S.C. at 52, 691 S.E.2d at 150 (quoting *James*, 371 S.C. at 194, 638 S.E.2d at 670). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (quoting *Campbell*, 538 U.S. at 417). To make this determination, trial courts must conduct a post-trial review of a jury's punitive damages award:

[A] trial judge shall review the constitutionality of a punitive damages award by determining whether the award was reasonable under 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.

Austin, 387 S.C. at 52, 691 S.E.2d at 151 (citing *Mitchell*, 385 S.C. at 587–88, 686 S.E.2d at 185–86).¹⁶ "[A]n appellate court reviews de novo the trial judge's application of these guideposts." *Id.*

In *Mitchell*, our supreme court examined a punitive damages award with a ratio of 13.9 to 1, based on the jury's \$15 million punitive damages award and over \$1 million in potential harm to the plaintiff, and concluded that it was "grossly excessive." 385 S.C. at 592, 686 S.E.2d at 187. The court remitted the award to \$10 million, resulting in a 9.2 to 1 ratio.¹⁷ *Id.* at 594, 686 S.E.2d at 188. We will now apply the three *Gore* guideposts to the present case.

a. Reprehensibility

In terms of reprehensibility, [the court] should consider whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Austin, 387 S.C. at 53, 691 S.E.2d at 151.

Here, the harm to Denise was physical because the needle from the syringe pricked her palm and drew blood, possibly exposing her to a communicable disease and requiring her to undergo difficult medical treatment resulting in physical and emotional suffering for several months. The medications she had to take made her physically ill and caused vivid nightmares. Further, the Garrisons had financial vulnerability because they had only Clint's modest income to support their household and Clint lost part of that income when he had to take time off from work to take care of Denise.¹⁸ As a result, Clint had to borrow money from his mother to pay for school lunches for the children. Moreover, the Garrisons presented evidence

¹⁶ These guideposts were first set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

¹⁷ The *Mitchell* opinion was issued before the punitive damages caps set forth in section 15-32-530 were enacted in 2011.

¹⁸ Clint testified he was making \$16.80 per hour for sixty-four hours per week at the time of Denise's injury.

showing that Target's parking lot was littered with trash and debris on a regular basis. Therefore, while the existence of the syringe and needle were known to happen on just one occasion, there is the potential for its recurrence or for other dangerous debris to harm customers.

b. Ratio

"The ratio of actual or potential harm to the punitive damages award is 'perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award.'" *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 (quoting *Gore*, 517 U.S. at 580).

Although the [United States] Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "*in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages[] to a significant degree[] will satisfy due process.*" Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and *proportionate to the amount of harm to the plaintiff and the general damages recovered.*" With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: *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. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

Id. at 588, 686 S.E.2d at 185 (emphases added) (citations omitted) (quoting *Campbell*, 538 U.S. at 425–26).

"In reviewing the ratio guidepost, a court need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the *potential* harm suffered by the plaintiff." *Id.* at 590, 686 S.E.2d at 187. In *TXO Production Corporation v. Alliance Resources*, the United States Supreme Court considered not only the potential harm to the plaintiff but also "the possible harm to other victims that might have resulted if similar future behavior were not deterred." 509 U.S. 443, 460 (1993) (quoted in *Mitchell*, 385 S.C. at 591, 686 S.E.2d at 187).

Here, the jury awarded only \$100,000 to Denise to reflect the actual harm she experienced. However, the *potential* harm to Denise involved contracting a communicable disease such as HIV or hepatitis, along with the attendant medical costs and possible death. Further, Jonathan Jackson, Target's Property Maintenance Technician, testified that Target had not increased the frequency of its cleaning since the day of Denise's injury or made any improvements to its "safety scans" or its cleaning methods since the injury. Therefore, consideration should also be given to the possible harm to other customers or their children if Target is not adequately deterred.

The Garrisons point out that the ratio evaluated by our supreme court in *Mitchell* compared the plaintiff's potential harm, rather than the actual harm, to the punitive damages award in that case. In *Mitchell*, the plaintiff was diagnosed as HIV positive after he had purchased a health insurance policy from the defendant. 385 S.C. at 577–78, 686 S.E.2d at 180. After receiving claims for the plaintiff's treatment and testing, the defendant rescinded the policy on the basis that he had misrepresented his HIV positive status on his insurance application. *Id.* at 578–79, 686 S.E.2d at 180–81. When a case manager at the clinic visited by the plaintiff tried to inform the defendant's senior underwriter that the plaintiff did not test positive for HIV until after he purchased the policy, the underwriter "spurned" the case manager's offer to send the supporting records to her and stated "that there was nothing she could do" at that time. *Id.* at 579–80, 686 S.E.2d at 181.

The plaintiff filed an action for breach of contract and bad faith rescission against the defendant, and at trial, the plaintiff presented evidence of his actual and potential harm. *Id.* at 580–82, 686 S.E.2d at 181–82. The plaintiff

presented testimony from a medical expert who testified that without medical treatment, he would contract AIDS in two years and likely die two years after that. [The plaintiff] introduced testimony from a health care expert

who testified to the minimum expected costs that it would take to care for [the plaintiff] throughout his life, not including complications from HIV and AIDS. [The plaintiff] also introduced an economist who relied on the health care expert's figures to project a total present value of \$1,081,189.40 for [the plaintiff's] treatment and costs.

Id. at 581–82, 686 S.E.2d at 182. The jury awarded the plaintiff \$186,000 in actual damages. *Id.* at 577, 686 S.E.2d at 179. While the jury awarded \$15 million in punitive damages, the supreme court remitted this award to \$10 million. *Id.* at 577, 594, 686 S.E.2d at 179, 188.

Although the ratio between the actual damages awarded and the remitted punitive damages award was approximately 54:1, the court determined the plaintiff's potential harm to be \$1,081,189.40, the present value of costs for the evaluation and treatment of HIV over the plaintiff's lifetime, and compared that amount to both the \$15 million award and the remitted \$10 million award. *Id.* at 591–94, 686 S.E.2d at 187–88. The court held that the original 13.9:1 ratio was "grossly excessive" under due process standards but the ratio resulting from the remitted punitive damages award, 9.2 to 1, satisfied due process. *Id.* at 592–94, 686 S.E.2d at 187–88. The court noted that the defendant's conduct was "reprehensible enough to merit an award towards the outer limits of the single-digit ratio." *Id.* at 593, 686 S.E.2d at 188.

Unlike the plaintiff in *Mitchell*, Denise did not test positive for HIV, and the Garrisons did not present the testimony of a health care expert or economist to determine the economic cost to the Garrisons had Denise actually tested positive for HIV or hepatitis. Nonetheless, given the potential harm to Denise and other customers, more than just the \$100,000 awarded in compensatory damages to Denise should be considered in comparison to the amount of punitive damages awarded. Further, the single-digit ratio formulated by the supreme court in *Mitchell* of 9.2 to 1 was based on a remitted award of \$10 million, and the jury in the present case awarded less than half of that amount to Denise. Even after taking into account the greater reprehensibility of the defendant's conduct in *Mitchell* versus Target in the present case, the circuit court was incorrect in placing emphasis on the ratio of punitive damages to mere actual damages awarded (45:1). Therefore, we reverse the circuit court's conclusion stating "This ratio should not stand in . . . light of the *Campbell* decision"

The Garrisons also contend Target's counsel admitted in closing arguments that Target was a \$73 billion dollar-a-year corporation at the time of trial and this wealth requires a punitive damages award to be large enough to have a deterrent effect on Target.¹⁹ *See id.* at 588, 686 S.E.2d at 185 ("[A] court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: 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. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award."). We agree that the deterrent effect of the award is an important consideration. On the other hand, courts must exercise caution when considering the wealth of a defendant as part of a punitive damages review:

trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth.

Id. at 588 n.8, 686 S.E.2d at 185 n.8 (citation omitted).

c. Comparable Cases

"When identifying 'comparable cases' a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant." *Id.* at 588–89, 686 S.E.2d at 186. The Garrisons do not cite any cases that are truly comparable to the present case, and we have found none.

¹⁹ Target's counsel did not exactly admit to the \$73 billion figure. He stated that the Garrisons' counsel had referred to that amount "four or five times." Target's counsel then stated, "That's probably right. I don't know." The Garrisons do not cite to any evidence in the record to back up this figure. And while they also reference a federal opinion's identification of Target's net worth as \$17.633 billion, this reference is not persuasive because the opinion was signed in 2009 and the trial in the present case was conducted in 2016. *Cantrell v. Target Corp.*, No. CV 6:06-2723-BHH, 2009 WL 10678353, at *13 (D.S.C. May 15, 2009). The court's net worth reference was actually \$15.633 billion.

Based on the application of all three *Gore* guideposts to the record in the present case, we are compelled to conclude that the amount of the punitive damages award violates due process. Although the evidence supports moderate reprehensibility on Target's part, it is considerably less than the reprehensibility of the defendant's conduct in *Mitchell*. Further, while the ratio of the punitive damages awarded to the potential harm (versus mere actual harm) is likely much less than 45:1, the evidence does not allow us to precisely determine this ratio. Finally, there is a dearth of comparable cases to support the award in this case.

Therefore, we affirm the circuit court's conclusion that the punitive damages award violated due process but reverse the circuit court's specific conclusion that the ratio of 45:1 "should not stand in the light of the *Campbell* decision" given that the ratio of the punitive damages awarded to the *potential* harm to Denise and other customers is likely much less than 45:1. See *TXO*, 509 U.S. at 460 (considering not only the potential harm to the plaintiff but also "the possible harm to other victims that might have resulted if similar future behavior were not deterred"). We remand for a remittitur of the punitive damages award to an amount reasonably consistent with the circumstances of this case.

2. Statutory Cap

Section 15-32-530 sets forth the following caps on punitive damages. It states, in part:

(A) Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.

(B) The limitation provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A), the trial court should first determine whether:

(1) the wrongful conduct proven under this section was *motivated primarily by unreasonable financial gain* and determines that *the unreasonably*

dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant;
or

(2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages;

If the trial court determines that either item (1) or (2) apply, then punitive damages must not exceed the greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars and, if necessary, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by this subsection. If the trial court determines that neither item (1) or (2) apply, then the award of punitive damages shall be subject to the maximum amount provided by subsection (A) and the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by subsection (A).

(C) However, when the trial court determines one of the following apply, there shall be no cap on punitive damages:

(1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or

(2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff and that act or course of conduct is a proximate cause of the plaintiff's damages; or

(3) the defendant acted or failed to act *while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired.*

(emphases added).

a. Waiver

The Garrisons assert that by failing to raise section 15-32-530 as an affirmative defense in its responsive pleadings, Target waived the application of the punitive damages caps in this statute.²⁰ As set forth above, the statute designates

²⁰ This issue is preserved for review. Counsel extensively argued the issue in the post-trial motions hearing, and the circuit court expressly concluded in its written order that the punitive damages award could not stand under section 15-32-530. *Cf. Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) ("We hold the Court of Appeals erred in finding the issue was not preserved for appeal. The trial judge's order granted respondents' motion for summary judgment on *precisely* the grounds argued by respondents at the summary judgment hearing [that there existed no attorney-client relationship between respondents and petitioner; therefore, respondents owed no duty to petitioner]. While that order did not restate the ground on which petitioner opposed the motion—a duty based on the existence of a prior attorney-client relationship—the order explicitly addresses that argument by ruling respondents 'owed no duty or obligation' to petitioner. This ruling is sufficient to preserve petitioner's argument that respondents owed a duty to petitioner, and petitioner was not required to file a Rule 59(e) motion to alter or amend in order to preserve the issue for appeal."). Even if there is some doubt as to preservation, we note Target has not asserted in its brief that this question is unpreserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012), Toal, C.J. (concurring in result in part and dissenting in part) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation. When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw."). Therefore, we resolve any possible doubt as to preservation in favor of the Garrisons on this important question.

more than one cap based on the circuit court's determination concerning the precise nature of the defendant's conduct and the underlying intent. Because the statute's language as a whole necessarily affects the proof at trial, the Garrisons argue that they would have presented more evidence concerning Target's prioritization of profits over safety had they known Target was going to invoke the punitive damages caps.

Rule 8(c) of the South Carolina Rules of Civil Procedure (SCRPC) provides,

In pleading to a preceding pleading, a party *shall* set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, *plene administravit* or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, *and any other matter constituting an avoidance or affirmative defense.*

(emphases added).²¹ The note to Rule 8(c) states that its aim is "to avoid the 'surprise' defenses permissible under the old general denial answer" and it is the same as Rule

²¹ This court described the nature of an affirmative defense in *O'Neal v. Carolina Farm Supply of Johnston, Inc.*:

An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. In other words, it assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case.

279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983) (citation omitted). Further, an avoidance, which also falls within Rule 8(c)'s pleading requirement, is defined as

8(c) of the Federal Rules of Civil Procedure, with the exception of "some affirmative defenses added to the list as a guide." Rule 8(c), *Note*. Therefore, we find federal cases interpreting the federal rule to be persuasive. See *Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 323–24, 821 S.E.2d 908, 912 (2018) (citing *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561–62 (Ct. App. 2000) for the proposition that when a state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

Similar to the purpose of our Rule 8(c), the purpose of the federal rule "is to inform the court and the parties how the case will be tried." *Simon v. United States*, 891 F.2d 1154, 1158 (5th Cir. 1990) (quoting *Morris v. Homeco International*, 853 F.2d 337, 342 (5th Cir. 1988)). Accordingly, some federal courts treat an issue as an affirmative defense if requiring the defendant to plead the issue is necessary to avoid unfair surprise to the plaintiff. See *In re ZAGG Inc. S'holder Derivative Action*, 826 F.3d 1222, 1231 (10th Cir. 2016) ("[W]e agree with the Third Circuit that in determining whether an issue should be treated as an affirmative defense for purposes of pleading, the critical question (absent a contrary command by statute or rule, such as the list of affirmative defenses in Rule 8(c)) is whether requiring the defendant to plead the matter is necessary 'to avoid surprise and undue prejudice by providing the plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed.'" (quoting *In re Sterten*, 546 F.3d 278, 285 (3d Cir. 2008))).

"Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense." *Ingraham*, 808 F.2d at 1079 (quoting *Bettes v. Stonewall Ins. Co.*, 480 F.2d 92, 94 (5th Cir. 1973)). Although *Bettes* is not a Rule 8(c) case, the court's approach to the concept of unfair surprise is instructive. The Fifth Circuit examined an insured's request to modify a pre-trial order to "include, as a contested issue of law," whether his insurer had complied with a statute requiring insurers who rely on a misrepresentation defense to "show on trial that within 90 days of learning of the falsity of any such representation[,] it notified the insured that it refused to be bound by the policy." 480 F.2d at 93. The court characterized the request as "an eleventh-hour appeal to the district court made only after other trial tactics had failed," noting, "[t]he pleadings had been completed, the

"the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect." *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) (quoting *Black's Law Dictionary* (5th ed. 1979)).

discovery concluded, the pre-trial order entered, the evidence taken, the charge conference held, the arguments to the jury finished, the jury charged, and the objections to the charge made before [the insured] sought this modification of the pre-trial order to show his intent to rely on [the misrepresentation statute]." *Id.* (footnotes omitted). The court took a realistic approach to the concept of unfair surprise:

Although [the insurer] was aware of the existence of [the misrepresentation statute], it was entitled to be surprised, as was the district court, when [the insured] sought to inject it as a legal issue minutes before the case finally went to the jury. Any detriment to [the insured] caused by denying the proposed amendment to the pre-trial order was occasioned by his own actions.

480 F.2d at 94 (emphasis added). The court further stated,

[The insured] was promptly put on notice by [the insurer's] answer that the [insurer] intended to rely on a misrepresentation defense, but at no time subsequently was the issue of notice as an element of that defense clearly drawn. In such a case, even with the ultimate burden of proof potentially on his opponent, a litigant cannot strategically lie behind the log until after the trial and receipt of evidence, argument, and charge to the jury before raising an issue not found in the pleadings nor included in the pre-trial order and then raise it when it is too late for his opponent to do anything about it. The manifest prejudice of such tactics would make a shambles of the efficacy of pre-trial orders and a fair trial.

Id.

Given the concerns over unfair surprise that underlie both the state and federal rules, it logically follows that a defendant's failure to plead an affirmative defense or avoidance as required by Rule 8(c) "is deemed a waiver of the right to assert it." *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224 (2010) (quoting *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002)). We acknowledge that courts may overlook a defendant's failure to plead an affirmative defense when it "is timely raised to the trial court without resulting in

unfair surprise to the opposing party."²² However, courts will enforce the pleading requirement when a statutory liability limit such as section 15-32-530 affects the proof to be presented at trial. *See infra*. A plaintiff lacking notice that a defendant will rely on such a statute is unlikely to conduct the discovery or other investigation necessary to obtain proof overcoming the statutory limit. *Cf. Westfarm Assocs. Ltd. P'ship v. Int'l Fabricare Inst.*, 846 F. Supp. 439, 441 (D. Md. 1993), *aff'd sub nom. Westfarm Assocs. Ltd. P'ship v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669 (4th Cir. 1995) (discussing the plaintiff's and third-party plaintiff's argument that they would be prejudiced if the third-party defendant was allowed to assert the damages cap in the Maryland Local Government Tort Claims Act after judgment was entered on a jury verdict for the plaintiff and noting as "valid considerations" the contentions that had they known the third-party defendant would assert the damages cap, they would have planned their discovery and trial presentations to address the cap). Constraints of time and money may compel the plaintiff to seek out only the information that is relevant to what she knows will be an issue at trial or during post-trial motions. The extra expense for "gunfire" often cannot be justified if lesser means will do. Implicitly recognizing that a plaintiff does not know what she does not know, courts enforcing the pleading requirement quite reasonably treat the defendant's failure to invoke a statutory liability limit in a timely manner as inherently prejudicial. *See infra*.

The Garrisons cite *James v. Lister*, 331 S.C. 277, 284, 500 S.E.2d 198, 202 (Ct. App. 1998), *cert. denied* (Mar. 5, 1999), for the proposition that South Carolina law requires any liability limits affecting the proof at trial to be pled as an affirmative defense. In *James*, this court relied on prior South Carolina opinions requiring matters to be pled when they "may prejudice the opposing party *by introducing issues [that] may affect the proof at trial.*" *Id.* at 283, 500 S.E.2d at 201 (emphasis added). The court referenced *Washington v. Whitaker*, in which our supreme court held that sovereign immunity must be affirmatively pled,²³ and *Niver v. South Carolina Department of Highways and Public Transportation*, in which this court held that, under the South Carolina Tort Claims Act (SCTCA), "[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense."²⁴ *Id.* The court noted that in *Washington*, sovereign immunity was asserted as a defense to punitive damages rather than as a complete bar to the plaintiff's claim. *Id.* at 283, 500 S.E.2d at 201-02. The court also noted, "[t]he cases requiring the SCTCA to be pled as an

²² *Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007).

²³ 317 S.C. 108, 114-15, 451 S.E.2d 894, 898 (1994).

²⁴ 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990).

affirmative defense do not differentiate between claims in which the defense may act as a complete bar and claims in which the defense merely limits liability," citing *Niver and Rakestraw v. South Carolina Department of Highways and Public Transportation*, 323 S.C. 227, 473 S.E.2d 890 (Ct. App. 1996). *Id.* at 283–84, 500 S.E.2d at 202.

The *James* court concluded the view of the majority of other jurisdictions that a statutory recovery limit affecting the proof at trial constitutes an affirmative defense was consistent with South Carolina law:

only a few cases in other jurisdictions hold a statutorily mandated recovery limit [that] requires additional proof at trial does not constitute an affirmative defense. A far greater number of jurisdictions have concluded either that 1) a limit on recovery must be plead as an affirmative defense or 2) a recovery limit could constitute an affirmative defense if the limit affects proof at trial. Given the current holdings in *Washington*, *Niver*, and *Rakestraw*, we believe the view [that] requires the pleading of liability limits that affect proof at trial is consistent with South Carolina law.

331 S.C. at 284, 500 S.E.2d at 202. The court also concluded that the statute imposing a cap on recovery against a charitable organization *did not automatically place the plaintiff on notice* that the defendant would invoke the cap as a defense:

Although charitable status is not a jury issue, the invocation of this protection triggers alternative remedies for the injured plaintiff. Section 33–55–210(A) provides a mechanism for seeking damages in excess of the charitable limitation, through an action against a charitable organization's employees.^[25] In such instances, the statute specifically requires joinder of the employee as a party, and a *special finding by the jury that the employee was proved guilty of gross negligence as a proximate cause of the injury*. Indirectly, then, [the defendant's] failure to raise its charitable status as an affirmative defense affected

²⁵ This provision now appears in section 33-56-180 of the South Carolina Code (2006).

both the parties to the action and the manner in which the case was tried to the jury, including what issues were or were not presented to them for resolution.

331 S.C. at 282, 500 S.E.2d at 201 (emphasis added).²⁶ Likewise, the exceptions to the damages cap Target seeks to apply to the present case, as found in section 15-32-530, require special findings relating to, *inter alia*, unreasonable financial gain as a motivation for the wrongful conduct or the defendant's intent to harm. § 15-32-530(B), (C). Evidence of these facts may or may not be introduced at trial in the absence of the defendant's pre-trial assertion of the punitive damages cap. Therefore, it is unfair and unrealistic to assume that such evidence will always be introduced in any given case even in the absence of a damages cap. It is also unfair to assume in the present case that such evidence would have been introduced had the underlying facts actually existed.

In stark contrast to section 15-32-530, the damages cap in the Tort Claims Act does not require any special findings that would affect the proof at trial. Section 15-78-120 of the South Carolina Code (2005) simply imposes a \$300,000 recovery cap per person and a \$600,000 cap for the total sum recovered arising out of a single occurrence and prohibits the recovery of punitive damages. Hence, it comes as no surprise that this court excused the failure of the defendant in *Parker v. Spartanburg Sanitary Sewer District* to initially plead this cap. 362 S.C. 276, 280–85, 607 S.E.2d

²⁶ In the absence of a statute's creation of an issue that may affect the proof at trial, our appellate courts have not been consistent as to whether a statute's effect on a private lawsuit must be pled as an affirmative defense. Compare *In re Estate of Hover*, 407 S.C. 194, 206–08, 754 S.E.2d 875, 881–82 (2014) (contrasting the Probate Code's nonclaim statute, which eliminates a claimant's right of action against a decedent's estate upon noncompliance and, in turn, deprives the court of the power to adjudicate the claim, with general statutes of limitations, under which a claim is barred only if the statute is raised as an affirmative defense) with *Earthscapes*, 390 S.C. at 615, 703 S.E.2d at 224 (holding that a statutory prohibition against an unlicensed construction contractor bringing an action to enforce a contract was "in the nature of an affirmative defense precluding enforcement of a contract and should be pled"); see also *Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995) (holding that statutorily mandated set-off was not an affirmative defense that had to be pled because, *inter alia*, it "was not a matter properly triable to the jury"); *Parker v. Spartanburg Sanitary Sewer District*, 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005) (holding that the Tort Claims Act's damages cap did not have to be pled as an affirmative defense because it was "self-executing").

711, 713–16 (Ct. App. 2005). Likewise, the statute governing underinsured motorist (UIM) coverage interpreted by our supreme court in *Broome v. Watts*, section 38-77-160 of the South Carolina Code (2015), does not require any special findings that would affect the proof at trial. Rather, the statute simply states that automobile insurance carriers must offer UIM coverage to their insureds "to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." *Id.*

In addition to this court's opinion in *James*, federal opinions interpreting Rule 8(c) of the Federal Rules of Civil Procedure are instructive and persuasive. We rely on not only those federal opinions cited in *James* but also more recent federal opinions explaining when the failure to plead a statutory limit on damages constitutes a waiver of that limit.

First, we further expound the Fifth Circuit Court of Appeals' reasoning in *Ingraham v. United States*. The court gave credence to the same argument that the Garrisons make in the present case, i.e., "had they known the [Texas statutory limit on medical malpractice damages] would be applied, they would have made greater efforts to prove" damages that "were not subject to the statutory limit." 808 F.2d at 1079. The court concluded that the statutory damages limit was an affirmative defense that had to be "pleaded timely" and that the defendant in that case had waived the defense. *Id.* The court explained,

We view the limitation on damages as an "avoidance" within the intendment of the residuary clause of 8(c). Black's Law Dictionary, 5th ed. 1979, defines an avoidance in pleadings as "the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect." Applied to the present discussion, a plaintiff pleads the traditional tort theory of malpractice and seeks full damages. The defendant responds that assuming recovery is in order under the ordinary tort principles, because of the new statutory limitation, the traditional precedents "should not have their ordinary legal effect."

Id.

Three years later, the Fifth Circuit examined a Louisiana statute limiting recovery in medical malpractice actions and held that this statutory recovery limit was an affirmative defense. *Simon*, 891 F.2d at 1157. The court recognized that the statute's applicability "involve[d] more than just a pure issue of law." *Id.* at 1159. In 2001, the Fifth Circuit once again explained the concept of waiving an affirmative defense in terms of preventing unfair surprise to the opposing party:

Although failure to raise an affirmative defense under rule 8(c) in a party's first responsive pleading "generally results in a waiver . . . , [when] the matter is raised in the trial court in a manner that does not result in unfair surprise . . . technical failure to comply precisely with Rule 8(c) is not fatal." Thus, *a defendant does not waive an affirmative defense if he "raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond."*

Giles v. Gen. Elec. Co., 245 F.3d 474, 491–92 (5th Cir. 2001) (emphasis added) (citation omitted) (alterations in original) (quoting *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855–56 (5th Cir. 1983)). In *Lucas v. United States*, the Fifth Circuit held that the defendant raised the Texas statutory cap on malpractice damages at a "pragmatically sufficient time" and the plaintiff was not prejudiced by the defendant's failure to reference the cap in its pleading because the issue was raised at trial "immediately following testimony of the economist regarding the present value of [the plaintiff's] damages" and the statute did not affect the plaintiff's proof of damages. 807 F.2d 414, 418 (5th Cir. 1986). The court noted, "the applicability of the Texas statutory cap on malpractice damages is purely a legal issue [that] *can be resolved without the need for factual proof.*" *Id.* (emphasis added).

In *Jakobsen v. Massachusetts Port Authority*, the First Circuit held the defendant waived the application of a Massachusetts statute limiting the liability of municipal corporations to \$5,000 by waiting to invoke the statute until it made a directed verdict motion at trial. 520 F.2d 810, 813 (1st Cir. 1975). In applying Rule 8(c), FRCP, to the statute, the court stated, "While a statutory limitation on liability is not enumerated among the listed defenses, we think it falls within the Rule's residuary clause." *Id.* The court also explained that while the failure to plead an affirmative defense waives the defense, "when there is no prejudice and when fairness dictates, the strictures of this rule may be relaxed. Under Rule 15[, FRCP,] the district court may and should liberally allow an amendment to the pleadings if

prejudice does not result." *Id.* Nonetheless, the court found the plaintiff would be prejudiced by treating the defendant's late invocation of the statute as a late amendment of its answer in that particular case:

As for treating the untimely defense as a late amendment that should have been allowed, it presented issues of such complexity and fundamental importance to the conduct of the litigation that both plaintiff and the court could not, in fairness, be forced to forego the advance notice they were entitled to under Rule 8(c).

Id. at 813–14. The court explained,

While the Federal Rules reflect a universal trend away from stereotyped pleading, they do not presage abandonment of the requirements that parties be given reasonable advance notice of the major issues to be raised. Issues of this magnitude are not to be tossed at one's opponent in a jury trial just before the charge

. . .

The delay undercut plaintiff's ability to develop facts and fashion his case in a manner relevant to this defense. It also prejudiced the judge's ability to focus on the facts as they unfolded so as to rule properly on the claim

Id. at 815–16.

Almost twenty years later, the First Circuit held that a defendant waived the application of a Massachusetts statute allowing for contractual limitations of remedies under the state's commercial code by failing to timely invoke the statute. *See Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1226 (1st Cir. 1994). The court cited *Jakobsen* when it noted, "We have previously held that a statutory provision limiting damages to a fixed sum constituted an affirmative defense for purposes of Rule 8(c)." *Id.* The court also explained, "The reason why affirmative defenses under Rule 8(c) must be pled in the answer is to give the opposing party notice of the defense and a chance to develop evidence and offer arguments to controvert the defense." *Id.* The court noted that in the case before it, "the limitation of remedies issue was not raised until virtually the end of the liability

trial, *after discovery and the submission of all of the evidence on liability.*" *Id.* at 1226–27 (emphasis added).

Moreover, the United States District Court for the District of Maryland relied on *Jakobsen* in holding that the Maryland Local Government Tort Claims Act was an avoidance that the defendant "was required to plead affirmatively." *Westfarm*, 846 F. Supp. at 440. Likewise, the Tenth Circuit has treated the failure to plead a statutory damages limit as a waiver. In *Bentley v. Cleveland Cty. Bd. of Cty. Comm'rs*, the court characterized the damages cap in the Oklahoma Governmental Tort Claims Act as an affirmative defense and held that the defendant waived the cap because it first invoked it in a motion to alter or amend the judgment. 41 F.3d 600, 604 (10th Cir. 1994). The court explained,

Permitting the [defendant] to raise this issue at this stage of the proceedings would be extremely unfair to [the plaintiff], who may have been able to prove some exception to the damage cap at trial if he had notice of the defense. Thus, assuming the [Oklahoma Governmental Tort Claims Act] applied to this action, counsel for the [defendant] waived any limit on its liability afforded by that statute by failing to raise the issue in its answer, the Pre-Trial Order, or at trial.

41 F.3d at 605.

In *Taylor v. United States*, the Ninth Circuit held that a statutory limit on noneconomic damages in medical malpractice cases was not an affirmative defense. 821 F.2d 1428, 1433 (9th Cir. 1987). Yet, the court acknowledged that application of the statute "may in some instances require resolution of factual issues" and that in such a case, a plaintiff could be prejudiced if the defendant does not invoke the statutory limitation prior to judgment.²⁷ *Id.* The court concluded that in the case before it, application of the statute required no additional factual inquiry. *Id.* The

²⁷ In *Hernandez v. Cty. of Monterey*, the United States District Court for the Northern District of California stated, in dicta, that a defense "targeting the amount of the recovery is a limitation rather than an affirmative defense," relying on the Ninth Circuit's opinion in *Taylor* as authority without recognizing the Ninth Circuit's acknowledgement of the obligation to invoke a statutory limitation prior to judgment when application of the limitation requires resolution of factual issues. 306 F.R.D. 279, 285 (N.D. Cal. 2015).

United States Supreme Court denied certiorari in this case, but Justice White wrote a brief dissent highlighting *Taylor's* conflict with the First Circuit's decision in *Jakobsen* and the Fifth Circuit's decision in *Ingraham*. 485 U.S. 992, 992–93 (1988) (White, J., dissenting).

State court opinions have likewise acknowledged that a defendant can waive the application of a statutory limitation on damages when the defendant fails to invoke the limitation in time for the plaintiff to present proof in opposition to the limitation. In *Keene v. Brigham & Women's Hosp., Inc.*, the Supreme Judicial Court of Massachusetts stated that a statutory damages cap for charitable corporations was "treated as an affirmative defense that must be pleaded" although it was "technically a limitation on liability." 786 N.E.2d 824, 836 (Mass. 2003). The court explained, "Factual matters related to the cap may need to be determined by the fact finder, with the burden on the defendant to prove both that it is a charitable organization and that the tort complained of fell within the range of activities covered by the cap." *Id.* The court further stated, "The requirement that it be raised as an affirmative defense in such circumstances prevents unfair surprise, a key focus of the requirement of pleading affirmative defenses, and resulting prejudice to the plaintiff." *Id.* The court concluded that the defendant in that case raised the statutory cap "in a timely manner" and the plaintiff made no claim of surprise. *Id.* at 837; *see also Pressler v. Irvine Drugs, Inc.*, 169 Cal. App. 3d 1244, 1248, 215 Cal. Rptr. 807, 809 (Ct. App. 1985) (referring to California's statutory cap on noneconomic damages in medical malpractice cases as an affirmative defense and holding the defendant did not waive the defense by failing to request special interrogatories).

Target cites *Zorrilla v. Aypco Construction II, LLC*, in which the Supreme Court of Texas held that the state's single statutory cap on punitive damages did not "bear the characteristics of an affirmative defense or avoidance" because it did not "require proof of any additional fact to establish its applicability." 469 S.W.3d 143, 157 (Tex. 2015). The court emphasized that the statute applied automatically unless a case fell within the statute's exclusions for conduct described as a felony in certain sections of the state's penal code *if* the conduct was committed knowingly or intentionally. *Id.* (citing Tex. Civil Practice & Remedies Code Ann. § 41.008(c)). Although the statute was silent as to the burden of proof, the court interpreted the statute to place the burden on the plaintiff to show that a case fell within one of the exclusions. *Id.* The court concluded that because the statute did not place the burden of proof on the defendant, it was not an affirmative defense or avoidance that the defendant was required to plead. *Id.* The court also stated that because the statutory cap automatically applied, there was "little concern that plaintiffs will be genuinely surprised by its application." *Id.*

While *Zorrilla* may have logical appeal, our own precedent in *James* and the above-referenced persuasive federal court opinions disregard the fiction that a plaintiff is automatically on notice that a defendant will invoke a statutory damages cap to limit a jury's award.²⁸ These opinions focus on whether a statutory damages cap affects the proof at trial rather than which party has the burden of proof under the statute—no matter who has the burden, the plaintiff must be prepared for the defendant to place the issue before the finder of fact. In fact, the *James* court acknowledged that the plaintiffs in that case would carry the burden of proving gross negligence in order to recover damages in excess of the statutory cap: "The [plaintiffs] had no notice that another party was necessary and that they would be required to prove a greater degree of negligence in order to recover damages in excess of \$200,000." 331 S.C. at 282, 500 S.E.2d at 201. To adopt the reasoning of *Zorrilla* would require us to contradict *James*, which we are unwilling to do, especially given its more realistic approach to the application of Rule 8(c).

With these considerations in mind, we return to South Carolina's statute, which begins with a reference to circumstances supporting either a two million dollar cap or no cap at all: "*Except as provided in subsections (B) and (C)*, an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars." (emphasis added). Two successive events trigger the application of a higher cap set forth in subsection (B), i.e., "the greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars": (1) the jury returns a verdict exceeding the maximum amount specified in subsection (A) and (2) the trial court determines that one of the following two set of circumstances existed:

- (1) the wrongful conduct . . . was motivated primarily by unreasonable financial gain and . . . the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person

²⁸ One exception is the Fifth Circuit's recognition that when a damages cap is an integral part of a statutory scheme under which the plaintiff seeks relief, the plaintiff cannot claim unfair surprise by the defendant's failure to plead the statutory cap. See *Giles*, 245 F.3d at 491 n.32 (citing *Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 111–12 (D. Conn. 2000)).

responsible for making policy decisions on behalf of the defendant; or

(2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages.

§ 15-32-530(B).

However, subsection (C) provides "there shall be no cap on punitive damages" when the trial court determines that one of the following three sets of circumstances applies to the case: (1) "the defendant had an intent to harm and . . . the defendant's conduct did in fact harm" the plaintiff; (2) the defendant was convicted of a felony arising out of the same act and the act proximately caused the plaintiff's damages; or (3) the defendant was "substantially impaired" by a substance "other than lawfully prescribed drugs administered in accordance with a prescription." § 15-32-530(C). In the absence of a requirement for a separate post-trial evidentiary hearing to submit this proof, we interpret the statute's plain language to require the trial court to make these special findings based on the proof presented to the jury at trial. *See State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit *or expand* the statute." (emphasis added)).

Similar to the *Zorrilla* court's analysis of the Texas statutory cap on punitive damages, Target argues South Carolina's \$500,000 punitive damages cap applies automatically unless the circuit court makes the above-referenced determinations required by subsection (B) or subsection (C). However, unlike the structure of the Texas statute, Tex. Civil Practice & Remedies Code Ann. § 41.008, which sets forth one absolute cap in subsection (b) and separately addresses exclusions from the statute's application in subsection (c), the structure of South Carolina's statute denotes from the outset the fact that the \$500,000 cap does not automatically apply: "*Except as provided in subsections (B) and (C)*, an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars." § 15-32-530(A) (emphasis added). By beginning the statute with a reference to circumstances supporting either a \$2 million cap or no cap at all, the legislature made it clear that it did not intend to make the \$500,000 cap automatically applicable. *See Fox v. Moultrie*, 379 S.C. 609, 614, 666 S.E.2d 915, 917 (2008) ("In determining the

plain meaning of a statute, the courts must look at the particular statutory language at issue and the language and design of the statute as a whole.").

In sum, the criteria of section 15-32-530 undoubtedly "affect [the] proof at trial,"²⁹ thus distinguishing section 15-32-530 from other South Carolina statutes that do not invoke the functions of a fact finder or affect the proof at trial.³⁰ Like the Louisiana statute examined in *Simon*, section 15-32-530 involves "more than just a pure issue of law." 891 F.2d at 1159. To develop the evidence necessary to invoke one of the two alternatives to the \$500,000 cap, a plaintiff must first obtain the evidence through extra discovery or other investigative measures—measures that are less likely to unfold without prior notice that the defendant will raise the cap as an issue before the circuit court. Again, we note section 15-32-530 does not provide for a separate post-trial evidentiary hearing to submit evidence pertaining to the factors set forth in subsections (B) and (C). We interpret section 15-32-530 to require the circuit court to make a determination under subsections (B) or (C) based on the evidence presented to the jury at trial.

Therefore, we conclude that Target was required to plead the recovery limits in section 15-32-530 or, at the very least, raise the defense prior to the conclusion of discovery so that the Garrisons would have had prior notice of the additional evidence they needed to lift the punitive damages limit.³¹ Because Target failed to do so, fairness dictates that we deem the application of the statutory damages limit to this case waived. *See James*, 331 S.C. at 286, 500 S.E.2d at 203 (holding that the trial court did not abuse its discretion in denying the defendant's motion to amend its

²⁹ *James*, 331 S.C. at 284, 500 S.E.2d at 202.

³⁰ *See supra* n. 26; *cf. Parker*, 362 S.C. at 285, 607 S.E.2d at 716 (holding that the Tort Claims Act's damages cap did not have to be pled as an affirmative defense because it was "self-executing"); S.C. Code Ann. § 15-78-120(a)(1) (2005) (providing only that a person's recovery of damages in an action brought under the Tort Claims Act is limited to \$300,000 "because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved"); S.C. Code Ann. § 15-78-30(g) (2005) (defining "occurrence" as "an unfolding sequence of events [that] proximately flow from a single act of negligence").

³¹ *See James*, 331 S.C. at 282–83, 500 S.E.2d at 201 (holding that the defendant's "failure to raise its charitable status as an affirmative defense affected both the parties to the action and the manner in which the case was tried to the jury, including what issues were or were not presented to them for resolution," and therefore, the statute limiting damages against a charitable organization constituted an affirmative defense that had to "be pled or waived," as required by Rule 8(c)).

answer to assert a statutory damages limit because "allowing the amendment would have prejudiced the [plaintiffs]").

Based on the foregoing, we reverse the circuit court's conclusion that the punitive damages award could not stand under section 15-32-530.

III. New Trial Absolute

Target contends the circuit court should have granted it a new trial absolute because the punitive damages award reflected the jury's passion, caprice, and prejudice. We disagree.³²

³² Target also contends the circuit court's conclusion that the punitive damages award violated Target's due process rights required the circuit court to order a new trial absolute or new trial nisi remittitur rather than simply setting aside the award. However, this argument is unpreserved. Target filed a post-trial "Motion for Judgment as a Matter of Law, New Trial Absolute, or New Trial Nisi Remittitur" indicating the primary relief sought was a JNOV as to liability and punitive damages. In this motion, Target expressed a preference for obtaining a JNOV as to liability and punitive damages on the grounds that there was insufficient evidence of constructive notice or proximate causation and there was no evidence showing that Target was willful, wanton, or reckless. Target sought *as alternative relief* either a new trial absolute or new trial nisi remittitur. The asserted ground for a new trial absolute was that the awards of compensatory and punitive damages demonstrated "the jury's decision was actuated by passion, prejudice[,] or caprice." The asserted grounds for a new trial nisi remittitur were (1) the evidence did not support the amount of actual damages awarded, and (2) the evidence did not support the amount of punitive damages awarded; this amount exceeded the cap in section 15-32-530; and the award violated due process.

In addressing this post-trial motion, the circuit court granted Target's preferred relief, a JNOV, as to punitive damages and set aside that award. In ruling on Target's alternative request for a new trial absolute or nisi, the circuit court addressed primarily the compensatory damages award. The court noted that the punitive damages award violated due process but concluded that the court had "substantially altered the overall verdict by eliminating the punitive damages award," and did not "find compelling reasons to invade the province of the jury by granting a new trial *nisi*." Because Target gave the circuit court the impression that it sought a new trial absolute or nisi only in the event the circuit court did not grant a JNOV, Target was required to file a Rule 59(e), SCRCp, motion upon receiving the circuit court's post-

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). Likewise, the circuit court must avoid conflating the constitutionality of a damages award with an award motivated by passion or prejudice. *Cf. Mitchell*, 385 S.C. at 592, 596, 686 S.E.2d at 187, 190 (finding a \$15 million punitive damages award to be "grossly excessive" such that it rose to the level of a due process violation but finding "no credible evidence anywhere in the record" to support the defendant's contention that the compensatory or punitive damages award resulted from passion, caprice, or prejudice).

When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to reduce the verdict by the granting of a new trial *nisi*.^[33] However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations *not found in the*

trial order to preserve its argument that the only correct relief for the due process violation was either a new trial absolute or a new trial nisi. *See Parker v. Shecut*, 340 S.C. 460, 480, 531 S.E.2d 546, 557 (Ct. App. 2000), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002) ("When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review."); *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187, 189 (1939) ("[A]ll that this [c]ourt has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower [c]ourt and passed upon by that [c]ourt.").

³³ The principle underlying a new trial nisi remittitur or additur is that the circuit court "may not impose a substitute for the jury verdict on an unwilling plaintiff" or defendant, and thus, the court may give to the opposing party a new trial unless the plaintiff agrees to remit a part of the verdict or the defendant agrees to add a sum to the verdict. *See Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984) ("[J]udges have the authority to grant to a defendant a new trial nisi remittitur. In such cases, the judge may not impose a substitute for the jury verdict on an unwilling plaintiff. He may give to the defendant the right to a new trial unless the plaintiff agrees to remit a portion of the verdict.").

evidence, it becomes the duty of the trial judge and this [c]ourt to set aside the verdict absolutely.

Durham, 314 S.C. at 531, 431 S.E.2d at 558 (second emphasis added) (citation omitted). Further, the amount of unliquidated damages that "a jury might properly award . . . is largely a matter of judgment based upon the facts and circumstances of each case." *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). "In determining the question, the facts must be viewed in the light most favorable to the plaintiff[,] and[] whe[n] the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive." *Id.* Moreover, "the jury's determination of damages is entitled to substantial deference[,] and the circuit court's decision on whether to grant a new trial based on the amount of the verdict "will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law." *Welch*, 342 S.C. at 303, 536 S.E.2d at 420.

Here, the jury likely considered the potential harm to Denise, which involved possibly contracting a communicable disease such as HIV or hepatitis, along with the attendant medical costs and possible death. *Cf. Mitchell*, 385 S.C. at 590–92, 686 S.E.2d at 187 (comparing the punitive damages award to the potential harm to the plaintiff). Further, the evidence shows that despite Target employees' awareness of the importance of keeping the parking lot safe for customers, they did not increase the frequency of cleaning the lot after Denise's injury or do anything to improve "safety scans" or cleaning methods after the injury. Therefore, the jury likely considered the possible harm to other customers or their children if Target is not adequately deterred. *Cf. TXO*, 509 U.S. at 460 (considering "the possible harm to other victims that might have resulted if similar future behavior were not deterred"). Because these considerations are rational inferences from the evidence presented at trial, we conclude that the punitive damages award did not result from passion, caprice, or prejudice. Therefore, the circuit court properly denied Target's motion for a new trial absolute.

IV. Prejudgment Interest

The Garrisons contend the circuit court should have awarded them prejudgment interest on the full amount of compensatory and punitive damages awarded by the jury rather than merely compensatory damages. We disagree.

Rule 68(a), SCRPC, provides, in pertinent part,

Any party in a civil action, except a domestic relations action, may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror *for a sum stated therein, or to the effect specified in the offer.*

(emphasis added). In the present case, Denise made an offer of judgment in the amount of \$12,000 on February 13, 2015.

Further, Rule 68(b) states, in pertinent part,

If an offer of judgment is not accepted and the offeror obtains a verdict *or determination* at least as favorable as the rejected offer, the offeror shall recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until the entry of the judgment; (2) if the offeror is a plaintiff, eight percent interest *computed on the amount of the verdict or award* from the date of the offer to the entry of judgment[.]

(emphases added). Because the circuit court granted a JNOV to Target as to the punitive damages award, the circuit court computed interest on the \$100,000 compensatory damages award only.

The Garrisons maintain that the plain language of Rule 68(a) ties pre-judgment interest to the amount of the verdict or award and not to "any alteration of the jury's verdict post-judgment." However, Target contends that the use of the term "determination" in the first sentence of Rule 68(b) indicates that the final amount may be settled by the presiding judge rather than the jury. We agree. When this term is considered in combination with the last phrase of Rule 68(b), "eight percent interest computed on the amount of the verdict or award from the date of the offer *to the entry of judgment*,"³⁴ the plain language of the rule contemplates that interest is to be computed on the final judgment after all post-trial motions have been resolved. See *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[The court] should not concentrate on isolated phrases within the statute."); *id.* ("Instead, [the court reads] the statute as a whole and in a manner

³⁴ (emphasis added).

consonant and in harmony with its purpose."); *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the [c]ourt applies the same rules of construction used to interpret statutes."); *Johnson*, 396 S.C. at 188, 720 S.E.2d at 520 ("In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit or expand the statute."); *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994) ("The intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context.").

Target also argues that pre-judgment interest should not apply to punitive damages awards because the interest is meant to compensate the offering party rather than to punish the party who rejected an offer of judgment. Target acknowledges this is a novel issue in South Carolina and cites opinions from other jurisdictions in support of this argument. In *Haskins v. Sheldon*, the Supreme Court of Alaska held that pre-judgment interest should not apply to punitive damages. 558 P.2d 487, 495 (Alaska 1976). The court based its decision on the risk of a double recovery, explaining,

In making its determination of the appropriate penalty for [the defendant's] actions, the jury probably assessed the penalty it wished [the defendant] to presently pay without discounting for prejudgment interest. In addition, [the plaintiff] was not deprived of the use of money which she expected to have available during the years of litigation.

Id.

Also, in *Ramada Inns, Inc. v. Sharp*, 711 P.2d 1, 2 (Nev. 1985), the Supreme Court of Nevada interpreted Nev. Rev. Stat. Ann. § 17.130, which allowed prejudgment interest "[i]n all judgments and decrees, rendered by any court of justice, for any debt, damages or costs."³⁵ The court held, "Because the amount of punitive damages to be awarded is not known until the judgment is rendered, . . . prejudgment interest may not be granted by a trial court on punitive damage awards," explaining,

³⁵ The statute merely provided, in pertinent part, "the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages." Nev. Rev. Stat. Ann. § 17.130.

Prejudgment interest is viewed as compensation for use by defendant of money to which plaintiff is entitled from the time the cause of action accrues until the time of judgment; it is not designed as a penalty. A plaintiff is never entitled to punitive damages as a matter of right; their allowance or denial rests entirely in the discretion of the trier of fact. Therefore, the amount of punitive damages to be awarded cannot be ascertained until the trier of fact has heard all the evidence.

711 P.2d at 2 (citations omitted).

On the other hand, the Garrisons assert that the statutes interpreted in the opinions cited by Target are not offer-of-judgment statutes and, thus, do not have persuasive value. The Garrisons cite a Connecticut opinion interpreting that state's offer-of-judgment statute to allow punitive damages to be included in the computation of pre-judgment interest. In *Kregos v. Stone*, 872 A.2d 901, 906 (Conn. App. Ct. 2005), the Appellate Court of Connecticut highlighted the pertinent language of the statute as it was worded when the opinion was issued: "[i]f the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain stated in the plaintiff's 'offer of judgment,' the court shall add to the amount so recovered twelve per cent annual interest on said amount." Conn. Gen. Stat. Ann. § 52-192a.³⁶ The court held that the word "recovered" in the statute included the entire verdict, both punitive and compensatory damages. 872 A.2d at 906. Notably, Connecticut has a separate pre-judgment interest statute in addition to the offer-of-judgment statute. See *Boulevard Assocs. v. Sovereign Hotels, Inc.*, 861 F. Supp. 1132, 1141 (D. Conn. 1994), *supplemented on other grounds by* 868 F. Supp. 70 (S.D.N.Y. 1994) ("Unlike § 37-3a (prejudgment interest), an award of interest under § 52-192a(b) [the offer-of-judgment statute] is punitive in nature, and is meant to serve the purpose of promoting 'fair and reasonable compromise of litigation without trial.'" (quoting *Crowther v. Gerber Garment Tech., Inc.*, 513 A.2d 144, 151 (Conn. App. Ct. 1986))).

We do not interpret Rule 68 as liberally as the Appellate Court of Connecticut has interpreted that state's offer-of-judgment statute. Rather, we find persuasive the above-quoted reasoning from the opinions in *Haskins* and *Sharp*. Therefore, we

³⁶ The statute was amended after the Appellate Court of Connecticut issued its opinion in *Kregos*.

reject the Garrisons' argument that prejudgment interest calculations should include the amount of a punitive damages award.

CONCLUSION

We affirm the circuit court's denial of Target's JNOV motion as to liability. We reverse the circuit court's setting aside of the punitive damages award because we find there was sufficient evidence of Target's recklessness. Further, because Target waived the application of the punitive damages caps in section 15-32-530, we reverse the circuit court's conclusion that the punitive damages award cannot stand under section 15-32-530. Nonetheless, we affirm the circuit court's conclusion that the punitive damages award violated due process, and we remand for a remittitur of the award to an amount reasonably consistent with the circumstances of this case. Finally, we affirm the denial of Target's new trial motion and the calculation of prejudgment interest.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, J., concurs.

HILL, J., concurring in part and dissenting in part:

I concur in Parts I, III, and IV of the well-crafted majority opinion. I also concur in Part II insofar as it concludes the issue of punitive damages was properly submitted to the jury. I cannot, however, join my good colleagues in the rest of their punitive damages ruling as I believe the punitive damages cap of S.C. Code Ann. § 15-32-530 (Supp. 2019) applies to Garrison's award. I would therefore remand to the circuit court for a hearing on this issue. This would also entail a remand for a hearing on Garrison's argument that the cap is unconstitutional, which the Attorney General must be notified of pursuant to Rule 24(c), SCRCP.

The majority holds the cap put in place by the legislature is an affirmative defense that disappears if not pled. There is an equally reasonable view that the cap is not an affirmative defense, and the circuit court must apply it to all punitive damages verdicts. This view is more consistent with legislative intent and more persuasive for several reasons.

First, nothing in the Act that created the cap requires it be pled at all, much less as an affirmative defense. 2011 Act No. 52. This could be shrugged off as an oversight, but the legislature had pleadings in mind, as the very first sentence of the Act as

codified directs that "[a] claim for punitive damages must be specially prayed for in the complaint." § 15-32-510(A).

Second, whether a matter is an affirmative defense is controlled by Rule 8(c), SCRPC, which lists twenty-two specific defenses. Damages caps are not listed, but the list is not exclusive, so the question becomes whether the cap is "any other matter constituting an avoidance or affirmative defense." Rule 8(c), SCRPC. This question is one of interpretation and, as in interpreting statutes, our role is to discern legislative intent.

A cap is not a defense to a cause of action. All of the specific affirmative defenses listed in Rule 8(c), SCRPC, share a defining characteristic: they bar liability for the cause of action. If the affirmative defense is proven, the defendant is not liable at all, even though the facts the plaintiff has alleged might otherwise entitle the plaintiff to judgment on the cause of action. See *O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983). The listed affirmative defenses have another common characteristic: not one of them relates to a bar or limitation on damages for the cause of action, or any other post-verdict matter.

Nor is the cap an "avoidance." At first glance, an avoidance and an affirmative defense appear to be identical twins. But a closer look reveals the distinguishing characteristic of an avoidance is that it depends upon the introduction of new facts to defeat a cause of action, whereas an affirmative defense relies on the plaintiff's own facts. This court has observed:

At common law, a pleading of confession and avoidance is the introduction of new or special matter which admits the factual premises of the opposing party's pleading but avoids or repels his conclusions. New matter involves of necessity a new issue, or the introduction of a new ingredient as the basis of one which operates as a defense. A plea by way of confession and avoidance admits that the cause of action alleged did once exist, but avers subsequent facts which operate to destroy the cause of action and defeat a recovery. Thus, an avoidance is a defense which goes beyond the basic elements of the opposing party's cause and depends upon additional facts to defeat the claim.

Oyler v. Oyler, 293 S.C. 4, 6–7, 358 S.E.2d 170, 172 (Ct. App. 1987) (internal citations omitted). In my view, the plain reading of Rule 8(c), SCRCP, results in the conclusion that the punitive damages cap is neither an avoidance nor an affirmative defense, for it does not affect the defendant's liability on the cause of action (only the damages), and it depends upon the straightforward application of a statute, not new facts (other than the return of the triggering punitive damages verdict).

The majority is quite correct that *James v. Lister* held a damages cap on recovery against charitable organizations was an affirmative defense that was waived if not pled. 331 S.C. 277, 282–83, 500 S.E.2d 198, 201 (Ct. App. 1998). One difference between *James* and our facts is, as the majority points out, the statutory caps there specifically required the joinder of another party (the employee of the charity) and a special verdict of the jury that the employee's gross negligence proximately caused the injury. These procedural requirements fundamentally affected both the parties and the proof at trial. By contrast, the punitive damages cap here is not an issue for the jury and does not require adding a new party.

This contrast aligns our facts more with *Parker v. Spartanburg Sanitary Sewer Dist.*, which was decided after *Lister* and held the statutory damages cap codified in the Tort Claims Act was "self-executing" and not an affirmative defense that had to be pled. 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005); *see also Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995) (statutory right to setoff not an affirmative defense falling within residuary clause of Rule 8(c), SCRCP, because setoff was required by statute and not issue for jury).

The majority's thorough opinion acknowledges that the question of whether statutory damages caps are affirmative defenses has split the federal circuits. No circuit has provided any useful analytical model. In addition to *Zorilla*, the Texas supreme court decision the majority cites, several other states have decided caps are not affirmative defenses. *McGinnes v. Wesley Med. Ctr.*, 224 P.3d 581, 591 (Kan. Ct. App. 2010); *Anderson v. City of Milwaukee*, 559 N.W.2d 563, 569 (Wis. 1997); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989).

Frustrated in their search for a coherent approach to deciding what counts as an affirmative defense under the residuary clause of Rule 8(c), the leading commentators on the federal rules have thrown up their hands and acknowledged they can find no objective waypoint, noting "resort must often be had to considerations of policy, fairness, and, in some cases, probability." C. Wright & A. Miller, *Federal Practice and Procedure: Federal Rules of Civil Procedure* § 1271 (3rd Ed.). Their attempt to reconcile these three broad subjective criteria with the

rule and what happens in courtrooms fares no better, for there are only two practical, interlocking questions: whether the matter claimed to be an affirmative defense unfairly surprised the other party, and whether the party asserting the matter has unique access or control to the facts comprising the defense. Looking at Target's assertion of the cap, the answer to both questions is no.

Which leads to my next point: even if the cap is an affirmative defense that must be pled, I would not find waiver here because Garrison has not demonstrated unfair surprise or other prejudice. *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (holding because the goal of Rule 8(c), SCRPC, is to avoid surprise, technical failure to plead immunity as an affirmative defense did not waive it where defendant timely raised it to trial court and plaintiff was not prejudiced or unfairly surprised). The cap is a matter for the court, not the jury. It would be remarkable for Garrison to claim she was blindsided by the cap because she was unaware of basic statutes governing punitive damages, and she does not make such a claim. Her prejudice argument is had she known Target would rely on the cap, she would have focused her evidence more on the financial motivations for Target's conduct. This alludes to an exception to the cap relevant here, which raises the cap to either four times the compensatory damages award or two million dollars if the circuit court determines (1) Target's wrongful conduct was motivated primarily by unreasonable financial gain, and (2) Target's managing agent, director, officer, or the person responsible for making Target's policy decisions knew or approved of the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct. *See* S.C. Code Ann. § 15-32-530(B)(1) (Supp. 2019).

If Garrison had additional evidence meeting this criteria, it is doubtful the only thing holding her back from presenting it to the jury was Target's failure to allege the cap as an affirmative defense. Lawyers who have smoking guns use them.

Calling a matter an affirmative defense has an important consequence: it shifts the burden of proof to the defendant. *O'Neal*, 279 S.C. at 494, 309 S.E.2d at 779 (describing that upon assertion of affirmative defense, "the burden of proof shifts to the defendant to show he is not liable"). Yet, the legislature did not assign the burden of proving the cap to any party. It simply directed the trial judge to determine which level of the cap applies. The practical effect of the majority opinion will be to place the burden on a defendant to prove the cap (and which level) applies. The awkwardness of trying to fit the concept of burden-shifting—a concept designed for determining liability—onto a damages cap is a good clue the cap does not resemble an affirmative defense. One is reminded of Abraham Lincoln's story about how many legs a sheep would have if you counted the tail a leg. When told the answer

was five, the response was that calling the tail a leg did not make it one. See Rice, ed., *Reminiscences of Abraham Lincoln by Distinguished Men of his Time* at 241-42 (Harper & Bros., 1909).

There is yet another reason to conclude the legislature intended the cap procedure to be self-executing, one that promotes symmetry and predictability in the law's design. Public policy debate has swirled around punitive damages for decades, with some claiming the awards are arbitrary. As the legislature well knew when it passed the cap, ever since *Gamble v. Stevenson* circuit courts in our state have had the mandatory duty to conduct post-trial review of a punitive damages award to ensure it comports with due process. 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991). This duty does not depend on a party's pleading or request. *Id.* To hold the statutory cap on punitive damages lives or dies by the whims of pleading creates an unwarranted dichotomy in the judicial treatment of punitive damages awards. Some may now claim the caps are as arbitrary as the awards they are designed to control.

With great respect for the majority, I respectfully dissent.

The South Carolina Court of Appeals

Carla Denise Garrison and Clint Garrison,
Appellants/Respondents,

v.

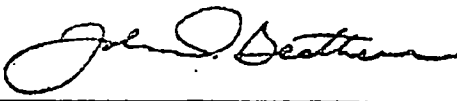
Target Corporation, Respondent/Appellant.

Appellate Case No. 2017-000267

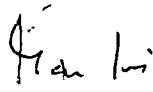
ORDER

Appellants/Respondents and Respondent/Appellant have filed petitions for rehearing. After careful consideration of these petitions, the Court has discovered no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both petitions are denied.


_____ J.


_____ J.

For the reasons set forth in my dissent, I would grant in part the petition of Respondent/Appellant.


_____ J.

Columbia, South Carolina

FILED

February 20, 2020

cc:

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The Honorable R. Keith Kelly

92032

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.

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Dated January 29, 2020

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JAN 30 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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RESPONDENT-APPELLANT'S MEMORANDUM IN SUPPORT OF
REHEARING

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JAN 30 2017

SC Court of Appeals

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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.

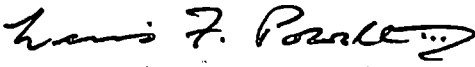
More generally, the Court should not allow speculative considerations outside of the record to justify excessive punitive damages awards. Otherwise, only a given judge’s imagination would constrain punitive damages awards, eviscerating the due-process limiting principles imposed by the South Carolina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



January 29, 2020

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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.

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.

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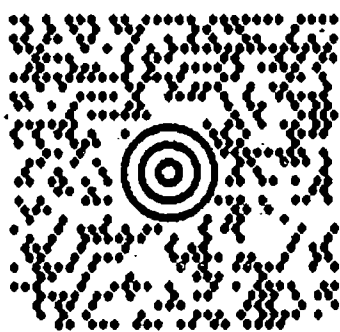
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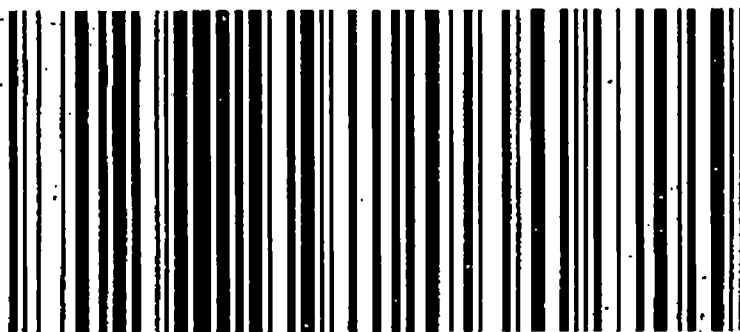
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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.

RECEIVED
JAN 28 2020
SC Court of Appeals

Memorandum in Support of Petition for Rehearing

Anticipating that Respondent/Appellant Target Corporation ("Target") intends to petition this Court for rehearing, Appellants/Respondents Carla Denise Garrison and Clint Garrison ("the Garrisons") petition this Court for rehearing as well, but **only** as to the prejudgment interest portion of this Court's decision. The Garrisons respectfully submit that the following points may have been overlooked or misapprehended:

In the opinion, this Court correctly held that Target's sufficiency of the evidence challenges as to liability and punitive damages were without merit. This Court also correctly held that Target waived application of the punitive damages cap by never raising the cap until

after the jury returned its verdict,¹ that the jury's punitive damages award is subject only to a constitutional analysis, and that Target is not entitled to a new trial. The Garrisons file this rehearing petition only as to the holding that the February 2015 offer of judgment entitled the Garrisons to prejudgment interest on the compensatory damages alone and not on the whole award, including punitive damages.

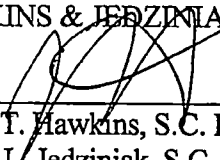
Respectfully, South Carolina's offer of judgment rule is punitive in nature, seeking to punish litigants who prolong litigation unreasonably. Unlike the non-offer of judgment cases relied on in the decision, Target was aware that it could be subject to punitive damages because the Garrisons requested punitive damages in their pleadings. There is nothing in Rule 68 that limits pre-judgment interest to compensatory damages, and the only other state to have addressed the issue held that pre-judgment interest applies to a punitive damages award. The Garrisons respectfully submit that they are entitled to 8% pre-judgment interest on the entirety of their ultimate award, including punitive damages, consistent with the plain language of the rule and with rulings by other courts.

For the reasons explained herein and in the prior briefs, the Garrisons respectfully request that this Court amend its opinion with respect to the offer of judgment analysis only.

¹ Because this Court held that Target waived the cap, there was no need to address the Garrisons' argument that the caps are unconstitutional. The Garrisons of course preserve their right to make that argument should it ever become necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Monica Brody, certify that I filed this memorandum with the Clerk of the Court and sent a copy to the following by certified mail:

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Monica Brody *as* on behalf of
Paralegal for Joshua T. Hawkins and Helena
Jedziniak

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2017-000267

CARLA DENISE GARRISON AND CLINT GARRISON,

Appellants/Respondents,

v.

TARGET CORPORATION,

Respondent/Appellant.

BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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

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

STATEMENT OF THE CASE

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

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

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

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

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

STATEMENT OF FACTS

I. May 21, 2014

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

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

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

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

II. Denise Seeks Medical Treatment

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

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

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

III. The Garrisons Sue Target

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

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

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

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

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

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

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

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

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

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

³ The Garrisons’ counsel conceded as much during arguments on Target’s motion for a directed verdict: “The defense keeps getting hung up on ‘you don’t know where this needle came from.’ Of course they don’t. ‘You don’t know how long it’s been there.’ Of course they don’t.” (R. p. 512, lines 3-7.)

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

V. Target's Routine Cleaning and Inspection Procedures

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

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

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

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

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

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

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

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

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

VI. The Garrisons Resort to Passion and Prejudice

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

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

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

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

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

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

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

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

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

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

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

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

VIII. The Trial Court Throws Out the Punitive Damages Award

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

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

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

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

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

ARGUMENTS

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

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

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

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

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

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

A. Standard of Review

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

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

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

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

To prevail under the constructive notice theory of premises liability, a plaintiff must show that the dangerous condition preexisted her injury long enough for the merchant to “have discovered and remedied it.” *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971).⁷ That temporal element does not require the plaintiff to precisely measure the lifespan of the hazard, but it does oblige her to show that the dangerous condition has existed “for a sufficient length of time that the storekeeper would or should have discovered and removed it had the storekeeper used ordinary care.” *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 91, 394 S.E.2d 24, 25 (Ct. App. 1990) (emphasis added). And that length of time cannot be left to speculation. See *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122, 165 S.E.2d 627, 629 (1969).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

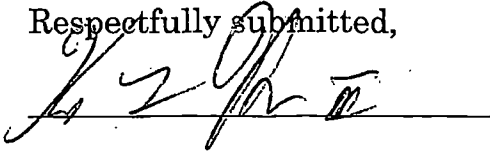
court,” then it is difficult to imagine what could satisfy that standard. See *McCourt ex rel. McCourt*, 318 S.C. at 308, 457 S.E.2d at 607. The trial court abused its discretion in holding otherwise. Target is entitled to a new trial absolute.

CONCLUSION

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

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

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellant Case No. 2017-000267

CARLA DENISE GARRISON AND CLINT GARRISON,

Appellants/Respondents,

v.

TARGET CORPORATION,

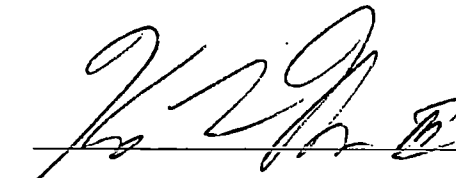
Respondent/Appellant.

CERTIFICATE OF COUNSEL

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

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SC Court of Appeals

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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SC Court of Appeals

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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 CASE²

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)

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

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

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)

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 in 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.

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

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 statute'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.

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.

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.

* * * *

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.

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”).

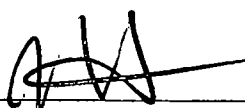
Also central to this appeal is the trial court’s failure to apply the plain language of Rule 68(a). That rule mandates that prejudgment interest flow from the jury’s verdict yet the trial court again substituted its own judgment into the equation. The resulting error runs counter to settled principles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

Dated: August 25, 2017.

Respectfully submitted,

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AUG 31 2017

SC Court of Appeals

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,

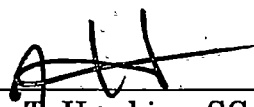
v.

Target Corporation.....Respondent/Appellant.

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The undersigned certified that this Appellants'/Respondents' Final Brief
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AUG 31 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM ANDERSON COUNTY
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R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-000267

CARLA DENISE GARRISON AND CLINT GARRISON,

Appellants / Respondents,

v.

TARGET CORPORATION,

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STATEMENT OF ISSUES ON APPEAL¹

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

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

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

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

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

STATEMENT OF THE CASE

On May 21, 2014, Appellant/Respondent Carla Denise Garrison stuck her hand on a discarded syringe of unknown origin in the parking lot of Target's Anderson County store. On June 27, 2014, Denise sued Target in the Court of Common Pleas for Anderson County, asserting a claim for negligence and recklessness and a violation of the Unfair Trade Practices Act. (R. pp. 30-36.) Several months later, on February 13, 2014, Denise extended an offer of judgment under Rule 68 of the South Carolina Rules of Civil Procedure, seeking \$12,000. (R. p. 710.) Target did not respond to the offer. Several months after that, on September 17, 2015, Denise and her husband, Appellant/Respondent Clint Garrison, filed a second complaint against Target, incorporating the same claims as the 2014 lawsuit and adding claims on behalf of Clint. (R. pp. 42-48.)

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

On September 15, 2016, the Garrisons filed a motion seeking prejudgment interest, post-judgment interest, and costs. (R. pp. 711-743.) The next day, Target timely moved for judgment as a matter of law, new trial absolute, new trial nisi remittitur, relief under the Thirteen Juror Doctrine, and, in the alternative, reduction of the punitive damages award pursuant to the statutory cap imposed by S.C. Code Ann. § 15-32-530(A) (2012). (R. pp. 750-759.) The trial court heard argument on the motions on November 3, 2016. (R. p. 623.)

On January 26, 2017, the trial court granted in part Target's motion for judgment as a matter of law by concluding that the award of punitive damages violated Target's constitutional due process rights. (R. p. 11.) The court denied the remainder of Target's motion, leaving intact the jury's liability and compensatory damages determinations. (R. pp. 5-6.) With respect to the Garrisons' motion for interest and costs, the court awarded only post-judgment interest drawn on the compensatory awards. (R. p. 15.) The Garrisons subsequently asked the court to amend its judgment as to

interest and costs. (R. pp. 880-921.) On February 9, 2017, the court granted that motion and awarded the Garrisons their costs, prejudgment interest as to Denise's \$100,000 compensatory award, and post-judgment interest as to the couple's combined \$108,500 compensatory awards. (R. pp. 18-23.)

On February 10, 2017, the Garrisons served their Notice of Appeal on Target. (R. pp. 923-951.) On February 22, 2017, Target served its Notice of Appeal on the Garrisons. (R. pp. 952-972.) This Court consolidated the appeals on February 24, 2017.

STATEMENT OF FACTS²

I. May 21, 2014

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

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

piece of twine. (R. p. 424, line 9; p. 425, line 25-p. 426, line 3; p. 212, line 22-p. 213, line 6; p. 608.)

Denise then looked down at her right palm and saw "a tiny bead of blood and a puncture wound." (R. p. 428, lines 21-22.) She quickly went to the store's restroom, where she washed her hands several times. (R. p. 427, lines 18-20.) Denise then called her husband Clint to tell him about the accident, and Clint suggested that she speak with a Target employee. (R. p. 427, lines 20-24.) So Denise located and spoke with Shelby Brintnall, the Target manager serving as the "lead-on-duty" that evening. (R. p. 429, lines 4-11; p. 193, lines 6-12.) Brintnall went with Denise out to the parking lot and took a photograph of the plastic syringe, which was "dirty, dingy, and gross." (R. p. 221, line 24-p. 222, line 9; p. 214, lines 23-25.) But the needle that Denise had seen in the syringe was nowhere to be found. (R. p. 459, line 7.) Brintnall brought the syringe back into the store. (R. p. 273, lines 19-25.)

While Denise was still at the store, Brintnall interviewed her and filled out a guest incident report. (R. p. 211, line 23-p. 212, line 17.) Brintnall wrote: "Guest's daughter picked up needle. [Denise's] first reaction [was] to smack the needle out of her hand. When she did, it stuck her in the right hand." (R. p. 607.) Later that evening, after Denise left, Brintnall filled out a report that included Brintnall's notes regarding the investigation and personal impressions about the incident. (R. p. 217, lines 4-25; p. 227, line 10-

p. 231, line 16.) In that report, Brintnall noted that she did not see a needle. (R. p. 217, line 17; p. 611.)

II. Denise Seeks Medical Treatment

The next day, Denise went to the emergency room, where she was treated for a needle stick. (R. p. 432, line 5-p. 433, line 2.) A nurse at the emergency room referred Denise to an infectious disease specialist, who prescribed her an HIV antiviral medication and antibiotics. (R. p. 433, line 12-15; p. 436, line 11-p. 437, line 2.) The combination of medicines led to side effects including vertigo, dizziness, loss of balance, and vivid nightmares. (R. p. 437, line 3-p. 438, line 14.) Clint, the family's sole breadwinner, took several days off from work and was unable to work overtime shifts, which cost him about \$2000 in lost wages. (R. p. 367, line 4-p. 369, line 5.) Denise inhabited a "zombie-like state" during that period, which affected her marital relationship with Clint. (R. p. 397, lines 4-14; p. 400, lines 8-20.)

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

incident with the syringe. Denise's medical bills during the relevant time period amounted to approximately \$4000. (R. p. 435, lines 2-3.)

III. The Garrisons Sue Target

On June 27, 2014, Denise alone filed a lawsuit against Target in the Court of Common Pleas for Anderson County, alleging negligence and unfair trade practices. (R. pp. 30-36.) On February 13, 2015, Denise made an offer of judgment for \$12,000 under Rule 68 of the South Carolina Rules of Civil Procedure. (R. p. 710.) Target did not respond to the offer. Several months later, Denise and Clint filed a second lawsuit against Target, which incorporated the same claims as the 2014 suit plus claims on behalf of Clint for lost wages and loss of consortium. (R. pp. 42-48.)³

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

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

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

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

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

422, line 4; p. 418, lines 12-20.)⁴ Similarly, Denise claimed that she “could tell, obviously [the syringe] had been there a long time,” but did not explain how she “could tell” that. (R. p. 425, lines 22-23.) Indeed, the Garrisons simply did not know how long the syringe had been in the parking lot.⁵

The testimony from Target’s employees Shelby Brintnall and Jon Jackson provided no further insight into the origin of the syringe. Brintnall could not offer any guess as to how the syringe ended up in Target’s parking lot, much less how long it might have been there before Kaileigh picked it up. (R. p. 280, lines 1-7.) And Jackson explained that, had the syringe been seen by any Target employee, it would have been removed from the parking lot before it caused any harm. (R. p. 344, lines 17-24.) Neither witness suggested that Target employees would have had any reason to believe a syringe would turn up in the parking lot.

⁴The syringe itself was not presented as evidence, because it had been misplaced, reappeared briefly (during which time the Garrisons’ counsel photographed it), then lost again before the September 2016 trial. (R. p. 246, line 11-p. 251, line 16.) The photographs taken by the Garrisons’ counsel could not be produced for trial. (R. p. 250, line 12-15.) And although the Garrisons claimed to have taken additional photographs of the syringe, those photographs were apparently lost. (R. p. 408, line 18-p. 409, line 12.) In light of the references to evidence and photographs that had been lost, the trial court gave the jury a spoliation instruction. (R. p. 568, line 21-p. 569, line 1.)

⁵The Garrisons’ counsel conceded as much during arguments on Target’s motion for a directed verdict: “The defense keeps getting hung up on ‘you don’t know where this needle came from.’ Of course they don’t. ‘You don’t know how long it’s been there.’ Of course they don’t.” (R. p. 512, lines 3-7.)

V. Target's Routine Cleaning and Inspection Procedures

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

For example, Target had its parking lot cleaned at least five times each week. Once a week, during the overnight hours between Thursday and Friday, a third-party vendor used a street-sweeping truck to vacuum the lot. (R. p. 301, lines 3-6; p. 341, lines 14-24.) Every Friday morning, Jackson would verify that the truck had come the night before by visually inspecting the parking lot, and he would take note in his daily inspection report if the parking lot appeared dirty. (R. p. 300, lines 9-12; p. 301, lines 7-18; p. 342, line 12-p. 343, line 8.) Jackson's testimony and records showed that the lot had been cleaned by the truck in the weeks before and after Denise's injury. (R. p. 343, line 8; p. 345, line 11-p. 346, line 13; pp. 621-622.) And four times weekly during daylight hours, the housekeeping staff cleaned the lot of trash and debris, picking up "anything larger than a golf ball." (R. p. 304, line 17-p. 305, line 5.) Again, Jackson would have noted any deficiencies in the housekeeping staff's cleaning, and his records revealed no cleaning issues during the pertinent time period. (R. p. 345, line 11-p. 346, line 13; pp. 621-622.)

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

On top of Jackson's formal inspections, Target employees engaged in ad hoc inspections of the parking lot throughout the day. Brintnall explained that the store's cart attendants "are told to look for any major debris or anything like that, that would be in the way of a guest." (R. p. 195, line 14-p. 196, line 17.) Although attendants had no set schedule for retrieving cards, Brintnall estimated that there was "somebody outside at least an hour, every two hours, depending on how busy" the store might be. (R. p. 197, lines 16-18.) Attendants were expected to tell a manager if they encountered "something that may cause harm." (R. p. 196, line 18-p. 197, line 2.) Had Brintnall been told about a needle or syringe in Target's parking lot, "it would be [her] duty to pick that up." (R. p. 202, lines 18-20.)

In an effort to impeach testimony about Target's cleaning procedures, Clint offered a sort of do-it-yourself science experiment involving a four-inch bolt. According to Clint, he noticed a bolt "laying in the grass" near Target's parking lot in April 2016. (R. p. 375, lines 7-18; p. 609.) He claimed that the bolt was still there four months later. (R. p. 376, lines 14-22.) But Clint did not explain how an errant bolt observed in 2016 might shed light on the effectiveness of Target's cleaning and inspection practices in 2014. Nor did he explain why, even if an employee had seen the bolt during 2016, its presence would merit the same response as an abandoned syringe.⁶

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

⁶The trial court recognized the irrelevance of Clint's testimony about the bolt during arguments on Target's motion for a directed verdict. (R. p. 517, lines 4-13 ("The Court: I'll stop you there. I am not going to pay attention to that ... I don't care about what happened afterwards. I want to know about—I'm focusing on during and immediately before the accident ... I don't care about them not picking up that bolt.")) In fact, the court explained the purpose of the bolt photographs during the charge conference: "I allowed those pictures in not for the uncleanness of the parking lot, but I allowed them in for impeachment purposes. It just happened to be in those pictures." (R. p. 522, line 22-p. 523, line 1.)

18-p. 509, line 12.) The trial court denied Target's motion. (R. p. 520, lines 10-25.)

VI. The Garrisons Resort to Passion and Prejudice

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

In contrast, from start to finish of his closing argument, the Garrisons' counsel implored the jury to treat Target as an enemy of Anderson County and its citizens.⁷ To that end, counsel told the jury not fewer than ten times that Target saw \$73 billion in revenue in 2014—a fact not offered into evidence during trial. (R. p. 527, line 14; p. 528, line 2; p. 529, lines 11-12; p. 530, lines 1-2; p. 533, lines 14-15; p. 541, lines 1-2; p. 542, line 10; p. 549,

⁷"The caption of this case is Denise and Clint Garrison versus Target. That's what's on the paperwork. But what this case boils down to, what we showed you through the course of introduction of evidence is that the case is really about the safety of the Anderson County community versus the danger presented by Target." (R. p. 526, lines 14-22.)

lines 16-17; p. 550, lines 13-14, 18; p. 563, lines 19-20; p. 564, lines 22-23.)

The repeated emphasis on that large figure was particularly striking in light of the precise sum of compensatory damages he suggested would make the Garrisons whole: \$11,000 to cover medical bills, Clint's lost wages, and loss of consortium. (R. p. 548, line 15.) He also warned the jury that if it did not punish Target for the bizarre circumstances surrounding Denise's injury, then "[m]aybe next time a little girl gets stuck and she dies of AIDS before she's 21." (R. p. 539, lines 2-4.) And, in his parting words to the jury, the Garrisons' lawyer argued that the Minneapolis-based company was bigoted against the people of Anderson, South Carolina:

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

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

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

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

On September 15, 2016, the Garrisons moved for interest and costs. (R. pp. 711-743.) The next day, Target timely filed a motion seeking *inter alia* judgment as a matter of law and a new trial absolute, under Rules 50 and 59 of the South Carolina Rules of Civil Procedure.⁸ (R. pp. 750-759.) Regarding judgment as a matter of law, Target argued that the Garrisons had failed to satisfy their burden of proof for constructive notice, because they offered nothing more than their own speculation that the syringe had been in the parking lot long enough for Target to find it. Similarly, the Garrisons had failed to show through clear and convincing evidence that Target's cleaning and inspection practices demonstrated a conscious disregard for customer safety. As an alternative to judgment as a matter of law, Target contended that it was entitled to a new trial absolute, because the jury's exorbitant \$4,618,500 betrayed that the jury was driven by caprice, passion, or prejudice rather than a fair and impartial consideration of the evidence. The trial court heard arguments on the parties' post-trial motions on November 3, 2016. (R. p. 623.)

⁸Target's September 16, 2016 motion also requested that the trial court grant judgment as a matter of law based on Denise's comparative negligence, a new trial nisi remittitur, relief under the Thirteenth Juror Doctrine, or, in the alternative, reduction of the jury's punitive damages award under the statutory cap imposed by S.C. Code Ann. § 15-32-530(A) (2012).

VIII. The Trial Court Throws Out the Punitive Damages Award

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

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

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

the elimination of the \$4.51 million punitive verdict—the court rejected the contention that the jury’s verdict was shockingly disproportionate in view of the evidence. (R. p. 13.)

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

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

ARGUMENTS

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

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

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

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

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

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

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

Punitive damages are an extraordinary remedy imposed to punish egregious misconduct and deter future wrongdoing. *See Nesbitt v. Lewis*, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999). In light of that retributive purpose, South Carolina conditions the award of punitive damages on the plaintiff's ability to meet "the highest burden of proof known to the civil law." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). Specifically, the plaintiff must prove "by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Martasin v. Hilton Head Health Sys.*, 364 S.C. 430, 443, 613 S.E.2d 795, 802 (Ct. App. 2005) (citing *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996)); *see also* S.C. Code Ann. § 15-33-135 (1988) (requiring that, "in any action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

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

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

characterized as reckless, willful or wanton.” *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). And negligent conduct reaches that level only if it “was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff’s rights.” *Taylor*, 324 S.C. at 221, 479 S.E.2d at 46. As South Carolina courts have long recognized, “[i]t is this present consciousness of wrongdoing that justifies the assessment of punitive damages.” *Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480 (quoting *Rogers v. Florence Printing Co.*, 233 S.C. 567, 578, 106 S.E.2d 258, 264 (1958)).

Thus, the plaintiff must offer evidence that the defendant was “conscious, or chargeable with consciousness, of his wrongdoing.” *Id.* As pertinent here, in a premises liability case, that standard requires evidence that “suggests a defendant is *aware of a dangerous condition* and does not take action to minimize or avoid the danger.” *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (emphasis added). But barring such proof, “the issue of punitive damages may not be submitted to the jury.” *S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996).

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

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

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

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

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

In fact, there was no evidence at trial that anyone other than Denise Garrison had ever sustained an injury—of any kind, from any cause—in Target's parking lot. Indeed, as far as the record shows, Denise's injury was the only one that had ever occurred in that parking lot, and no one could do anything but speculate as to how the injury could have been prevented. In short, before the night of Denise's injury, Target had no reason to believe that anyone would be injured by a discarded syringe in its parking lot.

Accordingly, to the extent that Target can be held responsible for that injury, the record does not support the conclusion that Target was "conscious, or chargeable with consciousness, of [its] wrongdoing." *Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480. For that reason, no reasonable juror could have concluded

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

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

Contrary to the bleak portrayal offered by the Garrisons, the evidence presented at trial demonstrated that Target took many steps to maintain its parking lot. For example, Target had its parking lot cleaned at least five times each week. Once a week, during the overnight hours between Thursday and Friday, a third-party vendor used a street-sweeping truck to vacuum the lot. (R. p. 341, lines 14-24.) Every Friday morning, property maintenance technician Jon Jackson verified that the truck had come the night before by visually inspecting the parking lot. (R. p. 342, lines 12-19.) If the truck did not come or the parking lot appeared dirty, Jackson would take note during his daily inspection of the premises. (R. p. 343, line 8; p. 346, lines 6-13.) Moreover, four times weekly during daylight hours, housekeeping staff cleaned the parking lot of trash and debris, picking up "anything larger than a golf ball." (R. p. 304, line 22; p. 305, lines 4-5.) Again, Jackson would have noted any deficiencies in the housekeeping staff's cleaning, and his records revealed no cleaning issues during the pertinent time period. (R. p. 346, lines 6-13.)

In addition to those five weekly cleanings, the parking lot was inspected by Target employees multiple times each day. Jackson's daily premises inspection took him throughout "different parts of the store, interior and exterior," including the parking lot. (R. p. 319, lines 7-10.) While outside, Jackson would "look through the property" to find dangerous conditions, including "big, large debris" or "trip hazards." (R. p. 297, lines 1-4.) Jackson conducted his inspections without incident in the weeks before and after Denise's injury. (R. p. 345, line 21-p. 346, line 13.) Had he seen the syringe in Target's parking lot, he would have removed it. (R. p. 343, line 20.)

Target employees also engaged in ad hoc inspections of the parking lot throughout the day. Shelby Brintnall explained that the store's cart attendants "are told to look for any major debris or anything like that, that would be in the way of a guest." (R. p. 196, lines 11-13.) Although attendants did not have a set schedule for retrieving carts, Brintnall estimated that there was "somebody outside at least an hour, every two hours, depending on how busy" the store might be. (R. p. 197, lines 16-18.) Attendants were expected to tell a manager if they encountered "something that may cause harm." (R. p. 197, lines 1-2.) Had Brintnall seen or been told about a needle in Target's parking lot, "it would be [her] duty to pick that up." (R. p. 202, lines 18-20.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Due to the “quasi-criminal” nature of punitive damages, their imposition “is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.” *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). Thus, whenever a jury awards punitive damages, a trial court must review that decision “to ensure that the award does not deprive the defendant of due process.” *Love Chevrolet*, 324 S.C. at 154, 478 S.E.2d at 59. This Court reviews de novo the trial court’s conclusions regarding the constitutionality of a punitive damages award. See *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 185-86 (2009).

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

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

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

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

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

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

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

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

recognized, “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

Without a doubt, the 45 to 1 ratio here cried out for judicial intervention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The Statutory Cap is Not an Affirmative Defense.

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

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

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

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

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

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

B. The Statutory Cap is Not Unconstitutional.

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

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

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

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

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

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

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

C. The \$500,000 Cap Applies Here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

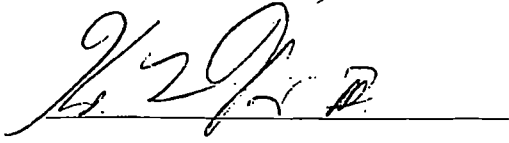
For one, they seek reinstatement of the unwarranted \$4.51 million punitive verdict eliminated by the trial court. But the facts marshalled by the Garrisons on appeal do not show that Target consciously disregarded Denise Garrison's rights, and the evidence presented at trial fell far short of showing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

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

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

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

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellant Case No. 2017-000267

CARLA DENISE GARRISON AND CLINT GARRISON,

Appellants/Respondents,

v.

TARGET CORPORATION,

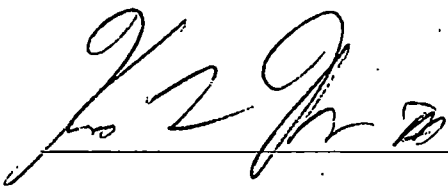
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AUG 21 2017

SC Court of Appeals

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 Response Brief

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SC Court of Appeals

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INTRODUCTION

An appellate record need only contain “any evidence” to support a jury’s verdict. The fact alone that Respondent/Cross Appellant Target Corporation lost what its own Manager admitted was the central piece of evidence in the case satisfies the deferential review standard, but much more than spoliation was presented at trial. Various witnesses testified, without objection, that the syringe had been in Target’s parking lot long enough for the store to have found and discarded it. Such direct evidence is dispositive and entirely consistent with mountains of circumstantial evidence showing the aged condition of the syringe and showing that Target shirked its obligation to inspect and clean its premises. The trial court properly determined that Appellants/Cross Respondents Denise and Clint Garrison provided the jury with more than sufficient evidence on the element of constructive notice.

The trial court also properly denied Target’s request for a new trial. This Court need not reach that issue through this appeal because Target’s whole argument hinges on the trial court’s improper grant of judgment as a matter of law on the issue of the jury’s punitive damages award. It also is fatal, however, that Target never presented the argument it raises here to the trial court, so it has not properly been preserved for appellate review in any event. But even if error preservation were not an issue, the fact that Target did not request that the punitive damages phase of the case be bifurcated from the liability phase of the case undercuts its claim that a new trial is warranted because of the punitive verdict. There are simply many reasons why Target cannot satisfy the deferential “abuse of

discretion” standard that applies to the trial court’s denial its request for a new trial.

By virtue of the Constitution and South Carolina law, cases like this one are placed in the hands of the community. *See* S.C. R. Civ. P. 38(a) (“The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.”). Twelve Anderson County residents, jointly selected by the parties, heard the testimony of five witnesses and considered numerous pieces of documentary evidence. They made credibility determinations and followed the trial court’s instructions. Target invites this Court to usurp the jury’s role, but that invitation should be declined.

RESTATEMENT OF THE ISSUES ON APPEAL

1. Should this Court affirm the trial court’s denial of Target’s request for judgment as a matter of law on the issue of liability? Restated, was the jury presented with “any evidence” in support of the constructive notice element?

2. Should this Court reach Target’s challenge to the trial court’s denial of its request for a new trial? Restated, does the trial court’s improper grant of judgment as a matter of law on the issue of punitive damages dispose of Target’s new trial request and, even if it does not, did Target preserve the argument that it now advances on appeal in support of a new trial?

3. If reached, should this Court affirm the trial court’s denial of Target’s request for a new trial? Restated, did the trial court abuse its discretion in denying Target’s motion for a new trial, especially when Target did not seek bifurcation of the punitive phase of the trial?

STATEMENT OF THE CASE¹

This cross appeal involves the trial court's post-trial ruling on Target's requests for judgment as a matter of law or, alternatively, for a new trial. (R. pp. 5-17) 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)

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) Among other relief, Target requested, on September 16, 2016, judgment as a matter of law on liability and punitive damages or a new trial in the alternative. (R. pp. 750-59) A hearing was held on November 3, 2016. (R. pp. 623-709)

¹ 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.

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. 923-951; 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. 433-36) 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 and inspection practices, the condition of the syringe containing the needle, and Target's loss of the needle.

Cleaning/Inspection 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.² (R. pp. 375-94; p. 609; p. 612)

² It is apparent that, during the time period between the two photos, Target allowed the buggy rack to become partially collapsed.

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 and inspects 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. 750-59) 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. 13-15) 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 assessing it upon the jury's \$4,610,000.00 verdict in her favor. (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) This case is now ripe for appellate review.

ARGUMENT

The trial court properly denied Target's request for judgment as a matter of law on the issue of liability and properly denied Target's alternative request for a new trial. Target's challenges to these rulings should be rejected.

I. The trial court properly denied Target's request for judgment as a matter of law on the issue of liability.

In the trial court, Target challenged the jury's liability determination on two grounds: constructive notice and causation. (R. pp. 764-99) On appeal, Target has abandoned its causation argument. *See generally* Target Br. Target should have abandoned its constructive notice argument as well, for the trial court's denial of Target's motion for judgment as a matter of law must be affirmed unless "no reasonable jury could have reached the challenged verdict." *See Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) (quoting *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000)).

It is telling, as an initial matter, that Target does not repeat its causation argument on appeal. The argument was premised on Target's plea to the jury that it should be absolved of all fault because it was Denise Garrison who knocked the syringe out of her young daughter's hand in an effort to protect her. (R. pp. 781-85)

The Garrisons explained in the trial court why the jury was unimpressed with Target's "blame the victim" approach. (R. pp. 819-20) This Court has made clear that it is unwilling to save parties from their own strategic mistakes. *Cf. Valentine v. Davis*, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995) ("We are unwilling to torture the rules in such a way to correct possible mistakes in the filing of motions or misjudgments in strategic procedural decisions.").

So it is on the issue of constructive notice as well. To uphold the trial court's determination, there need be only a "scintilla" of evidence to support an inference that the syringe was in Target's parking lot for such a period of time that Target should have discovered it through the use of reasonable care. *See Plowden v. Wilson*, 186 S.C. 285, 195 S.E. 847, 848 (1938) ("[I]f there be a scintilla of competent and relevant testimony upon the issue, it is the duty of the court to submit that issue to the jury."); *Major v. City of Hartsville*, 410 S.C. 1, 3-4, 763 S.E.2d 348, 350 (S.C. 2014) (reversing grant of summary judgment after "find[ing] a genuine issue of material fact [] as to whether respondent should be charged with constructive notice"). Target never objected to countless pieces of evidence that allowed the jury to make a constructive notice finding, including testimony about how long the syringe was in the parking lot, the condition of the syringe, Target's inspection/cleaning practices, and spoliation. *See Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have

the issue considered on appeal.”). It is impermissible for Target to invoke its newly minted “anti-speculation principle” when it never did so at trial.

A. The jury was presented with direct evidence that the syringe had been in Target’s parking lot for a sufficient length of time.

Target admits that the constructive notice requirement did not require the jury to know precisely how long the syringe had been in the parking lot. Rather, there need only be evidence providing an inference that it had been there “for a sufficient length of time that [Target] would or should have discovered and removed it [through the use of] ordinary care.” See Target Br. at 19. The law in South Carolina and elsewhere is that the jury should decide whether the dangerous condition had been there for a “sufficient length of time.” See, e.g., *Fickling v. City of Charleston*, 372 S.C. 597, 609-10 n. 34, 643 S.E.2d 110, 117 n. 34 (Ct. App. 2007) (holding that the jury was entitled to decide the question of constructive notice); see also *Lussier v. Sun Valley Camping Co-op., Inc.*, 2014 WL 2255578, *3 (Conn. 2014) (“It is settled [] that what constitutes a reasonable length of time is usually a question of fact to be determined in light of the particular circumstances of a case.”).

It is simply false for Target to claim that the jury did not hear any evidence about how long the syringe had been in the parking lot. After viewing pictures of the syringe, Clint Garrison specifically testified that the syringe had been in the parking lot for more than two hours, more than two days, and even more than two weeks. (R. pp. 421-22) He had good reason to hold this opinion, for he 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 about a rod and spring that remained in Target's parking lot for at least 13 days. (R. pp. 394-95) And Target admitted that its cleaning practices had not changed from the date of the incident to the date of trial. (R. p. 338) All of this evidence more than satisfies the "scintilla" standard required to demonstrate constructive notice.

Then there is Denise Garrisons' testimony as well as Target's Manager, Shelby Brintnall's, testimony. Denise Garrison specifically testified that "[i]t had been there - - I could tell, obviously it had been there a long time." (R. p. 425). Similarly, when asked whether the syringe looked like it had "been laying on the ground a while[.]" Brintnall testified that "[i]t look[ed] like it[] [had] some wear on it." (R. p. 215)

Under this Court's precedent in *Fickling*, such testimony from Denise Garrison and Target's own Manager is entirely sufficient to permit a valid constructive notice inference. See 372 S.C. at 609-10, 643 S.E.2d at 116-17 (holding that evidence was sufficient to permit a constructive notice finding). Like here, *Fickling* involved lay testimony in which a City Director provided his opinion that the dangerous condition "had probably been that way for a while[.]" *Id.* at n.34. *Fickling* disposes of Target's suggestion that lay opinion cannot support the constructive notice requirement.

What's more, though, is that Target's characterization of the Garrisons' evidence as speculation suffers from a fatal procedural problem. Crucially, Target did not object to Clint Garrison's opinion testimony about how long the syringe had

been in the parking lot, did not object to Clint Garrison's testimony about the bolt, did not object to Clint Garrison's testimony about the rod and spring, did not object to Denise Garrison's testimony about how long the syringe had been in the parking lot, and did not object to Shelby Brintnall's testimony about how long the syringe had been in the parking lot. (R. pp. 421-22; pp. 394-95; p. 425) This Court has made clear that "testimony received without objection becomes competent and its sufficiency is for the jury[.]" See *Tucker v. Doe*, 413 S.C. 389, 405, 776 S.E.2d 121, 130 (Ct. App. 2015) (citing *Cantrell v. Carruth*, 250 S.C. 415, 421, 158 S.E.2d 208, 211 (1967)).

The failure to object creates a gulf between this case and all of the cases Target relies upon in its brief. In those cases, there was no evidence at all about timing. In this case, by contrast, there was evidence about timing – Target just now claims that the timing evidence is not good enough. But if Target believed that the Garrisons' timing evidence was inappropriate for the jury to consider on the issue of constructive notice, it had an obligation to say so during the trial. See *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal."). Target may not now, for the first time on appeal, object to the Garrisons' evidence as "speculation." *Id.*

A case in point is this Court's recent decision in *Tucker*. On appeal, the defendant waged a sufficiency of the evidence challenge on the ground that certain trial testimony was not probative on the issue of causation. See *Tucker*, 413 S.C. at

130, 776 S.E.2d at 406. That challenge was rejected, with this Court explaining that the objection was “not preserved for review because [the defendant] never made that contention at trial.” *Id.* Likewise, in this case, Target may not object to the Garrisons’ evidence as speculative when it never made that objection at trial.

The reason for this rule sounds in notions of judicial economy and fairness. For one thing, a contemporaneous objection conserves court resources by giving the trial judge an opportunity to correct the alleged error at the time it occurs. *See, e.g., State v. Torrence*, 305 S.C. 45, 67, 406 S.E.2d 315, 327 (1991). Moreover, a contemporaneous objection prevents one party from gaining a tactical advantage over the other party through sandbagging. *See, e.g., Holley v. State*, 523 So. 2d 688, 689 (Fla. 1988).

Both of these twin evils are apparent on this record. Target did not give the trial court an opportunity to consider its speculation argument during trial. Had it done so, the trial court could have determined in the first instance whether it was appropriate for the jury to base its verdict on witness testimony about how long the syringe had been in the parking lot. *See State v. Staten*, 2005 WL 7083835, *2 (Ct. App. 2005) (“Initially, we note that Lucius did not object to the hearsay statements during Britt’s testimony. Thus, the trial court did not have an opportunity to rule upon the objection. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”) Nor did Target give the Garrisons an opportunity to provide a different quantum of proof on the issue of constructive notice. Had

Target received a sustained objection, the Garrisons could have considered whether it needed to place other evidence before the jury on the issue of how long the syringe was in Target's parking lot. The upshot is that Target cannot call the Garrisons' evidence speculation on appeal when it never called it that at trial. *See, e.g., Grace v. State*, 31 N.E.2d 442, 444 (Ind. 2000) ("Because Defendant's counsel did not object to the proffered testimony on hearsay and speculation grounds, Defendant's claims of hearsay and speculation are not available on appeal.").

B. The jury was presented with circumstantial evidence that the syringe had been in Target's parking lot sufficiently long enough.

In addition to the direct testimony about how long the syringe had been in Target's parking lot, there was plenty of circumstantial evidence to support the jury's determination that it had been there sufficiently long enough. Included among the circumstantial evidence was the condition of the syringe, that the syringe was found around old and weathered trash, that other dangerous objects had remained in the parking lot for long periods of time, and that Target shirked its cleaning and inspection responsibilities. Circumstantial evidence undoubtedly may be used to prove that a dangerous object existed sufficiently long enough. *See Major*, 410 S.C. at 3, 763 S.E.2d at 350 (explaining that "[c]onstructive notice is a legal inference").³

³ This Court recently explained as follows: "When liability of a defendant, if any, is predicated upon constructive notice, . . . the instances are, indeed, rare in which a plaintiff can prove constructive notice by other than circumstantial evidence[.]" *See Breland v. South Carolina Dep't of Transp.*, 2016 WL 757496, *1 (Ct. App. 2016).

Target is wrong to say that the syringe's condition is not probative of how long it had been in the parking lot. It cites *Anderson v. Winn –Dixie Greenville, Inc.*, 257 S.C. 75, 184 S.E.2d 77 (1971) as support, but Target overstates the proposition for which the case stands. To accept Target's position would be to reject the idea that constructive notice, by definition, "is a legal inference[.]" See *Major*, 410 S.C. at 3, 763 S.E.2d at 350. Neither this Court nor the South Carolina Supreme Court has ever held that the condition and appearance of the dangerous object may not be considered as part of the overall constructive notice calculus.

Target's odd position would put this State in conflict with the rest of the nation. Jurisdictions all throughout the country accept the idea that a dangerous object's condition and appearance provides insight into how long it has been at a given location. See, e.g., *Evans v. Aydha*, 189 So.3d 1225, 1230 (Miss. Ct. App. 2016) (explaining that it was "quite convinced that the length of time the spot had existed c[ould] be reasonably inferred from the daughter's testimony describing it as 'sludge,' 'dirty,' and, in her judgment, at least a few days old"). Even Illinois, which Target admits on page 25 of its brief operates under "analogous . . . premises liability law[.]" acknowledges that an object's appearance can be probative, even if not dispositive. See, e.g., *Canales v. Dominick's Finer Foods, Inc.*, 416 N.E.2d 303, 306 (Ill. Ct. App. 1981) (characterizing past cases as holding only that "appearance alone was insufficient to establish constructive notice"). The South Carolina Supreme Court has long held that courts "must consider all of the evidence in

deciding whether the case[] w[as] properly submitted to the jury.” *See, e.g., Guthke v. Morris*, 242 S.C. 56, 62, 129 S.E.2d 732, 735 (1963) (emphasis added).

The jury both saw and heard evidence in this case about the appearance of the syringe that supports the finding that it had been in Target’s parking lot for a sufficient length of time. Photos entered into evidence show the syringe’s worn and aged condition. (R. p. 608; p. 620) Manager 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, 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 Garrison’s testimony who also testified that it was dirty and nasty. (R. p. 424) Target objected to none of this evidence. *See Tucker*, 413 S.C. at 405, 776 S.E.2d at 130 (explaining that evidence “received without objection becomes competent and its sufficiency is for the jury”).

The syringe’s condition and appearance also must be considered in conjunction with other items that provide a basis for comparison. This Court specifically has explained that other items in the general vicinity have “probative value on the issue of notice[.]” *See Ford v. South Carolina Dep’t of Transp.*, 328 S.C. 481, 488-89, 492 S.E.2d 811, 815 (Ct. App. 1997) (citing *City of Phoenix v. Whiting*, 10 Ariz. App. 189, 457 P.2d 729 (1969)). Such relevant items in this case include trash and debris located near the syringe, the bolt, and the rod and spring.

Trial Exhibits P-3 (R. p. 608) and P-12 (R. p. 620) show the old and weathered trash. Clint Garrison observed for the jury that twine located near the syringe was discolored and appeared to have been run over by vehicles. (R. p. 418). There was no testimony from anyone that it had been raining on the day of the incident, and the reports from Target's Manager do not mention anything about recent precipitation. It was reasonable for the jury to infer that the syringe, like the trash and debris, had been in Target's parking lot long enough to become aged and weathered.

Even more telling are the items for which there was a specific time frame for comparison. Clint Garrison 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) Clint Garrison 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 infer that Target allowed the syringe to lay in its parking lot for a lengthy amount of time, just like it allowed the bolt, the rod, and the spring to remain there. Clint Garrison's testimony about the bolt, rod, and spring was admitted without objection from Target. *See Tucker*, 413 S.C. at 405, 776 S.E.2d at 130 (explaining that evidence "received without objection becomes competent and its sufficiency is for the jury").

More circumstantial evidence exists in the form of Target's failure to inspect and clean its parking lot. It simply is false for Target to claim, as it does on page 26 of its brief, that its own inspection and cleaning practices are "irrelevant[.]"

Retailers like Target owe patrons a “duty of exercising ordinary care to keep the premises in reasonably safe condition.” *See Solanki v. Wal-Mart*, 410 S.C. 229, 237, 763 S.E. 2d 615, 619 (Ct. App. 2014). If Target’s cleaning and inspection practices were “irrelevant,” then there would be no duty at all. The law is well established that Target’s “duty of ordinary care” encompasses an obligation to both clean and inspect.

A red-herring is Target’s claim that there is no evidence “that syringes were a recurring problem in the parking lot of Target’s Anderson store.” *See Target Br.* at 19 n.7. The question is not whether syringes, in particular, had been in the parking lot in the past; the question is whether Target knew that dangerous objects might find their way into the parking lot if it did not inspect and clean. *See Ford*, 328 S.C. 481, 489, 492 S.E.2d 811, 815 (explaining that the defendant need only be aware of “general problems of falling trees”).⁴ There is no doubt that the answer to this latter question is “yes.”

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* R. p. 199 (It “is our duty to keep it clean.”)) Target’s Manager further 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]

⁴ *See also Uhlich v. Canada Dry Bottling Co. of New York*, 305 A.D.2d 107 (N.Y. App. Div. 2003) (holding that there was sufficient evidence on the issue of constructive notice where there were recurring instances of “garbage, debris, potholes, broken asphalt and obstructive vehicles in the parking lot”).

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)

Further buttressing Target’s awareness was the claim that it regularly cleans and inspects its parking lot. Target testified to utilizing a third party vendor who allegedly used a sweeper truck on its parking lot every Thursday night. (R. p. 201; p. 298) Target also testified to inspecting the parking lot through its Property Maintenance Technician’s “walk the vibes” and through its cart attendants. (R. pp. 621-22) The problem with these claims, however, is that the jury did not believe that the company cleaned and inspected – even though the company was aware of the risks of dangerous objects ending up in the parking lot. *See Campbell v. South Carolina State Highway Dep’t.*, 244 S.C. 186, 135 S.E.2d 838 (1964) (overruled on other grounds) (holding that it was enough to establish constructive notice that the defendant knew a drainage system was inadequate to take care of the excess water).

Among the evidence supporting the jury’s disbelief was the following:

- Target had 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)
- Target’s Property Maintenance Technician – whose job is to maintain Target’s premises – could not even recall the name of the mysterious third party vendor. (R. pp. 298-99)
- Because of deposition testimony from Target that the third party vendor supposedly cleans the parking lot every Thursday night, Clint Garrison 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)

- Target's Property Maintenance Technician maintained that he regularly conducts "walk the vibe" inspections, but the only evidence offered in support was a suspicious two-page log. (R. p. 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 the jury was entitled to believe that Jackson did not actually perform two inspections on May 21, 2014 as the log indicates.
- 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)
- Even though Target's Manager acknowledged the importance of cart attendants inspecting the parking lot, there was evidence that Target employees instead use cell phones and do not pay attention or remove hazards. (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)

The jury then considered voluminous evidence regarding the consequences of Target's deficient practices. 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) Target's Manager's own documentation following the incident indicated that the parking lot was not clean. (R. p. 607; p. 611) Denise Garrison, Clint Garrison, and Clint's mom all observed that they had seen "trash everywhere" in Target's parking lot on different occasions. (R. p. 375; pp. 426-27; p. 490) Clint Garrison presented the jury with evidence about the bolt remaining in the parking lot for at least four months and the rod and spring remaining in the parking lot for at 13 days, and Target's Property Maintenance Technician was adamant at trial that Target's

practices had not changed from the date of the incident to the date of trial. (R. p. 338; pp. 375-96; p. 609; p. 612) All of this evidence was admitted without objection from Target. See *Tucker*, 413 S.C. at 405, 776 S.E.2d at 130 (explaining that evidence “received without objection becomes competent and its sufficiency is for the jury”).

The South Carolina Supreme Court’s recent decision in *Major* underscores the type of constructive notice evidence that will suffice. Target attempts to characterize *Major* solely as a “continual condition” case, but that is inaccurate. *Major* reversed this Court’s determination that the defendant was entitled to judgment as a matter of law, holding both that “a genuine issue of material fact exists as to whether [the defendant] should be charged with constructive notice on the basis that the [dangerous condition] existed for such a period of time that [defendant], in the use of reasonable care, should have discovered it” and “that a genuine issue of material fact exists as to whether the recurring nature of the defect created a continual condition[.]” See 410 S.C. at 3-4, 763 S.E.2d at 350. Nothing about *Major* limits its rationale to a certain category of cases.

Target ignores that the facts of this case are strikingly similar to *Major*. There, the plaintiff “presented testimony that [the defendant] was aware drivers often cut the corner at the intersection where the unpaved area was located, leaving ruts[.]” and that the defendant “had a procedure for correcting the issue by filling the ruts with sand or clay.” *Id.* at 3-4, 350. Likewise, in this case, the Garrisons presented evidence that Target knew that dangerous conditions could end up in the

parking lot and that they accordingly purported to take actions regarding cleaning and inspection. The kicker in *Major* that satisfied the constructive notice inquiry was that the defendant "ceased efforts to correct the issue" prior to the plaintiff's injury; that is the kicker in this case as well, for the jury was shown that Target shirked its cleaning and inspection obligations. *Id.* If the evidence in *Major* was sufficient, then so is the evidence in this case.

C. The jury was presented with evidence that Target spoliated evidence and thus was entitled to infer that the syringe had been in Target's parking lot sufficiently long enough.

In addition to the direct testimony about how long the syringe had been in Target's parking lot, and in addition to all of the circumstantial evidence supporting the jury's determination that it had been there sufficiently long enough, this case has the added component of spoliation. Spoliation is the doctrine which allows a jury to draw a negative inference against the party responsible for losing or destroying evidence. *See, e.g., Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 521, 629 S.E.2d 675, 679 (Ct. App. 2006).

The jury was unable to see the actual syringe that injured Denise because Target lost it on two separate occasions. (R. pp. 246-52) Target took possession of the syringe the night of the incident, but Britnall later testified in a deposition that the syringe was destroyed by another Target employee. (R. pp. 241-42; pp. 246-47). At trial, however, Britnall was forced to admit that her deposition testimony was false. (R. pp. 246-47) Britnall confessed that the syringe turned up after her deposition, but she testified that it subsequently was lost again. (R. pp. 248-51)

Britnall had no explanation for what happened to the syringe other than to call it “a great mystery.” (R. p. 251)

The trial court instructed the jury as follows on the issue of spoliation: “I charge you that when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence was lost or destroyed by the party would have been adverse to that party.” (R. pp. 568-69) Target did not object to the trial court’s instruction.

Given Target’s loss of the syringe, the jury was entitled to infer that the constructive notice element was satisfied. This Court has held, as general matter, that elements of a cause of action may be satisfied through spoliation. *See, e.g., Stokes v. Spartanburg Regional Medical Ctr.*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006). And courts across the country have held, in particular, that the constructive notice element may be satisfied through spoliation. *See, e.g., Schweikart v. Franciscan Health Sys.-W.*, 149 Wash.App. 1038 (Wash. Ct. App. 2009) (explaining, in a premises liability case, that “the fact finder may infer constructive notice if it determines that [the defendant was] responsible for the spoliation of evidence”).

Target points to the case of *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009), but *Pringle* is no obstacle. It affirmed a grant of summary judgment because there was no evidence that the chair in question “might reasonably have supported [the] presumption [] being requested of the fact finder[.]” *See* 382 S.C. at 787, 675 S.E.2d at 405. Specifically, the *Pringle* court

reasoned that “there was no indication the chair was wobbly, weak, unstable, or otherwise defective immediately prior to its collapse.” *Id.* Unlike in *Pringle*, however, this is an appeal from the trial court’s grant of a spoliation instruction that Target did not object to, as opposed to a denial of summary judgment. This also is an appeal from a record full of evidence regarding the syringe’s worn condition and testimony from Target’s Manager that the syringe was the “central piece of evidence” in the case. (R. p. 248) *Pringle* and this case are worlds apart.

* * * *

Target failed to lodge any objections in the trial court to all of the evidence presented on the issue of constructive notice. Combine that with the fact that the “any evidence” standard is one of the most deferential standards in all of the law, and Target’s burden is insurmountable.

This Court’s ordinary practice is to summarily affirm sufficiency of the evidence challenges like this one pursuant to Rule 220(b). *See, e.g., Breland*, 2016 WL 757496 at *1 (affirming on the issue of constructive notice). That same approach may be utilized here. Any of the evidence discussed above alone satisfies the standard, and it certainly suffices cumulatively.

II. The trial court properly denied Target’s request for a new trial.

Target’s alternative request for a new trial underscores precisely what the Garrisons highlight in their principal appeal: that the trial court confused the concept of what it means to qualify for punitive damages with the concept of what it means for a punitive damages award to be excessive. Nowhere in the trial court’s order is there a finding that the jury’s verdict “was the result of caprice, passion,

prejudice, partiality, corruption, or other improper motives.” *Compare* Target Br. at 31 *with* (R. pp. 5-16). The trial court, quite differently, acknowledged that the jury was justified in ruling in the Garrisons’ favor because Denise Garrison’s injuries “resulted from [Target]’s failure to make the parking lot safe[.]”⁵ (R. p. 11) This Court need not reach Target’s request for a new trial because the jury’s punitive damages award should be reinstated.

What’s more is that Target’s argument is not even properly before this Court. Target claims that, because the trial court vacated the jury’s punitive damages award, the trial court necessarily was required to grant its request for a new trial. *See* Target Br. at 33. If Target actually believed that were true, however, Target was required to file a Rule 59(e) motion after the trial court issued its January 26, 2017 order. It is well settled that, “[w]hen an order is internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review.” *See* Jean Hoefer Toal, et al., *APPELLATE PRACTICE IN SOUTH CAROLINA* 188 (3d ed. 2016) (citing *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), *rev’d on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002)).

Target, in reality, understands that the trial court did not abuse its discretion in denying its request for a new trial. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9,

⁵ As explained in the principal appeal, the trial court’s ruling was premised on the unwarranted belief that prior injuries in Target’s parking lot were necessary to sustain the punitive damages award. (R. p. 11) It is black letter law, however, that there need not be evidence of previous injuries to support a finding that the defendant acted in a reckless manner. *See Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). “Repeated” conduct is a factor for considering whether a punitive damages award is too much, but it is not a factor for determining whether any punitive damages at all are appropriate. *See, e.g., Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 482 (Ct. App. 2011).

27, 602 S.E.2d 772, 781 (2004) (explaining that the decision to deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal). A new trial constitutes an extraordinary remedy, which is available only when “the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.” See, e.g., *Graham v. Town of Latta*, 417 S.C. 164, 182-83, 789 S.E.2d 71, 80 (Ct. App. 2016) (emphasis added). Again, the trial court did not indicate that the jury’s verdict shocked its conscious or that it believed the jury’s verdict was colored by an improper motive. (R. p. 11) It is clear, especially in light of the trial court’s denial of Target’s directed verdict motion on the issue of punitive damages, that the trial court merely confused the difference between eligibility and excessiveness.

Target’s suggestion that the jury’s punitive damages award improperly infected the whole trial is especially curious, since Target never even requested that the punitive damages phase of the case be bifurcated. Under Section 15-32-520(A) of the South Carolina Code, the punitive damages phase of a jury trial “must be conducted in a bifurcated manner[,]” “if requested by any defendant against whom punitive damages are sought[.]” The whole purpose of bifurcation is to avoid potential prejudice. Cf. FED. R. CIV. P. 42(b) (providing that, “to avoid prejudice,” a “court may order a separate trial of one or more separate issues [or] claims”).

Target may not, for the first time on appeal, complain of prejudice when it failed to take advantage of the bifurcation procedure available under the rules.

Nor is there is any merit to Target's far-fetched suggestion that the jury was prejudiced against the company because of the Garrisons' closing argument. Beyond being entirely speculative, there is a more straightforward reason why Target relegates its argument to a footnote: Target did not object to anything said during closing argument. (R. pp. 526-65) It is beyond well settled that a failure to contemporaneously object results in waiver. *See, e.g., In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238-39 (S.C. 2001) (finding issue of improper comments during closing arguments was not preserved absent a contemporaneous objection). Target's reference to the Garrisons' closing argument is, to use Target's own words, "a thinly veiled" attempt to misdirect attention from its own egregious conduct. *See Target Br. at 32 n.10.*

In fact, not only did Target not object during closing, Target's counsel facilitated the very discussion the company now complains about. Target objects to what it characterizes as a "repeated emphasis" on its revenue, *see Target Br. at 12*, but it fails to mention that its own counsel reiterated that Target is worth billions of dollars five times himself. (R. pp. 551-60). Target's counsel then went further by admitting that Target was a "giant company" who would not have been impacted by paying Denise's medical bill. (R. p. 559). There can be no cause to complain when counsel engages in the very battle he insists is improper. *See State v. Maurer*, 1996 WL 745217, *4 (Minn. Ct. App. 1996) (rejecting closing argument challenge, where

“defense counsel did not object and in fact responded in his closing argument”). Again, this Court has made clear that its job is not to save litigants from their strategic trial mistakes. *Cf. Valentine*, 319 S.C. at 173, 460 S.E.2d at 220.

Regardless of what was said during closing, though, the jury was warned that neither Target’s lawyer’s comments nor the Garrisons’ lawyer’s comments were to be considered “evidence” in the case. (R. p. 167). Jurors are presumed to follow a court’s instructions. *See State v. Ard*, 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998), *rev’d on other grounds*, 340 S.C. 291, 531 S.E.2d 524 (2000). Any problem with the remarks, therefore, “was cured by the judge in his instructions to the jury that closing arguments by counsel are not evidence.” *See, e.g., Commonwealth v. Burns*, 455 N.E.2d 449, 450 (Mass. App. Ct. 1983).

The bottom line is that Target cannot satisfy the high standard for obtaining a new trial. The Garrisons’ separate appeal explains why the jury’s punitive damages verdict was entirely justified, but there certainly is no evidence that the jury’s verdict was the result of improper motives. Target advances a *per se* rule that necessarily would require a new trial anytime judgment as a matter of law is granted on the issue of punitive damages. Not only is such a rule inefficient as a practical matter, it is not the law either.

CONCLUSION

This record contains far more evidence than is necessary to support the jury’s liability determination and to support the trial court’s denial of Target’s request for judgment as a matter of law on the constructive notice element. In fact, this record contains virtually every type of evidence possible to support a claim – direct

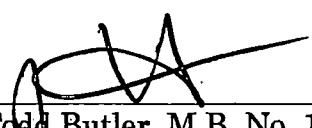
evidence, circumstantial evidence, and spoliation. Target did not object to any of the evidence presented to the jury, and there is no reason whatsoever to overturn the trial court's affirmance of the jury's liability finding.

Equally unmeritorious is Target's request for a new trial. The company points to no evidence demonstrating that the jury decided this case based on improper motives, instead hanging its hat on the trial court's mistaken grant of judgment as a matter of law on the issue of punitive damages post-trial. This latter argument was not preserved in the trial court and fails on the merits in any event. Target is not entitled to a re-do of the jury trial it lost.

Dated: August 25, 2017.

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THIS, the 29 day of August, 2017.



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AUG 31 2017

SC Court of Appeals

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 Response
Brief complies with Rule 211(b), SCACR.

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AUG 31 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2017-000267

CARLA DENISE GARRISON AND CLINT GARRISON,

Appellants / Respondents,

v.

TARGET CORPORATION,

Respondent / Appellant.

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AUG 21 2017

SC Court of Appeals

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ARGUMENTS

I. The Jury Could Only Speculate that the Syringe Had Been in Target's Parking Lot Long Enough to Confer Constructive Notice

The evidence adduced at trial showed that Denise Garrison hurt her hand by swatting a dirty and broken syringe away from her daughter in the parking lot of Target's Anderson, South Carolina store. There is only one other fact relevant to this appeal: no one knows, and no evidence shows, that the syringe had been in the parking lot "at any particular time prior to" the injury. See *Wimberly v. Winn-Dixie Greenville*, 252 S.C. 117, 121, 165 S.E.2d 627, 629 (1969). South Carolina law bars judgment in favor of the Garrisons on this record. This Court must reverse the judgment below.

For more than half a century, South Carolina law has required a plaintiff bringing a premises liability claim based on constructive notice to show that the dangerous condition existed "for a *sufficient length of time* that a 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); see *Hunter v. Dixie Home Stores*, 232 S.C. 139, 143-44, 101 S.E.2d 262, 264-65 (1957). And throughout those years, courts have reversed verdicts when the jury could do no more than speculate as to how long the hazard might have existed. See, e.g., *Joye v. Great Atl. & Pac. Tea Co.*, 405 F.2d 464 (4th Cir. 1968) (applying

South Carolina law and reversing jury's verdict for insufficient proof of constructive notice); *Milligan v. Winn-Dixie Raleigh, Inc.*, 273 S.C. 118, 254 S.E.2d 798 (1979) (reversing jury's verdict based on insufficient proof of constructive notice); *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 184 S.E.2d 77 (1971) (same); *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969) (same); *Hunter*, 232 S.C. at 143, 101 S.E.2d at 262; *Wintersteen v. Food Lion, Inc.* ("*Wintersteen I*"), 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999) (same). This Court should not hesitate to apply that principle here and reverse the jury's verdict.

The Garrisons do not object to the long line of cases establishing South Carolina's anti-speculation principle, nor do they question its applicability to a claim like theirs. Instead, they assert that "the jury should decide whether the dangerous condition had been there for a sufficient length of time." (Initial Response Brief of Appellants/Respondents at 17 (internal quotation marks omitted).) In general, Target agrees with that proposition, because whether a particular period of time is long enough to give rise to constructive notice is ultimately a fact question. But the fact question of longevity never arises if the evidence does not suggest any particular period of time. Under those circumstances, South Carolina law bars a finding of constructive notice, because the jury cannot be left to speculate. See *Gillespie*, 302 S.C. at 92, 394 S.E.2d at 25.

Although the Garrisons tout various pieces of evidence as “proof” of a length of time, none of their evidence allowed the jury to reasonably infer any particular timeframe during which the syringe appeared in the parking lot. Instead, the jury could only speculate.

A. Witness Testimony Cannot Cloak Conjecture as Proof of a Period of Time

The Garrisons cite the testimony of Clint, Denise, and Target’s manager Shelby Brintnall to establish sufficient proof of constructive notice. Clint posited that, based on his interpretation of photographs, the syringe had to have been in the parking lot for “more than two hours” or “longer than two days” or even “more than two weeks.” (R. p. 421, line 16-p. 422, line 4.) Denise claimed that she “could tell, obviously it had been there a long time.” (R. p. 425, lines 21-23 .) And Brintnall testified that the syringe appeared to have had “some wear on it.” (R. p. 215, lines 12-13.) This testimony, the Garrisons claim, was “entirely sufficient to permit a valid constructive notice inference.” (Initial Response Brief of Appellants/Respondents at 18.) It was not.

For one, the foregoing snippets from the trial transcript do not present the full context of the witnesses’ testimony. Before Clint guessed that the syringe had to have been in the parking lot somewhere between two days and two months, he admitted that he did “not know how it got there.” (R. p. 418,

line 5.) And when pressed how he could know that the syringe had not turned up five minutes before the incident, Clint responded, “*I think I think I know*” by looking at the pictures in evidence. (R. p. 420, line 3 (emphasis added).) Denise admitted she “could only speculate what happened.” (R. p. 425, lines 19-23.) And Brintnall’s testimony shows that she explicitly disclaimed knowing how old the syringe was, when it had appeared in the parking lot, or how it had arrived there. (See, e.g., R. p. 215, lines 4-5 (“I can’t say for sure whether it has been dropped out. I don’t know when it was dropped, unfortunately.”).)

Fickling v. City of Charleston, on which the Garrisons chiefly rely, does not affect this appeal because that case involved recurring conditions. The plaintiff in *Fickling* had stepped into a hole in the sidewalk and sustained severe injuries. See 372 S.C. 597, 601, 643 S.E.2d 110, 113 (Ct. App. 2007). The case thus focused primarily on whether the City of Charleston had a common-law duty to maintain its sidewalks. See *id.* at 604-611, 643 S.E.2d at 114-18. In concluding that questions of material fact remained as to whether the City had voluntarily undertaken maintenance of its sidewalks, this Court also noted that “there was conflicting evidence presented as to whether the City had constructive notice of the defect.” *Id.* at 609, 643 S.E.2d at 116-17. In particular, the evidence suggested “there were numerous City personnel within the area of the defect who could have seen and reported the problem,”

“the condition had existed for a while,” and the City had policies in place to repair sidewalks because “problems with the sidewalks were an expected and ‘recurrent’ or ‘continual’ condition of which it had notice.” *Id.* at 609-10, 643 S.E.2d at 117.

The Garrisons isolate one remark from the City’s public works director, who said that “the condition ‘had probably been that way for a while,’” and analogize that statement to their own vague testimony as sufficient proof of constructive notice. (See Initial Response Brief of Appellants/Respondents at 18 (quoting *Fickling*, 372 S.C. at 610 n.34, 643 S.E.2d at 117 n.34).) But the public works director in *Fickling* would have strong reason to suspect a hole in the sidewalk had been there “for a while,” because defects in sidewalks were a recurring problem that the City had faced previously, enough so that it maintained a log of complaints, noted repair calls, and had a policy for how to handle repairs to sidewalks. See *Fickling*, 372 S.C. at 608, 643 S.E.2d at 116. In contrast, there is no evidence whatsoever suggesting any injuries or recurring hazards in Target’s parking lot before Denise’s injury in May 2014. The facts in *Fickling* evinced proof of prior knowledge; the Garrisons’ testimony show baseless guesswork.

More importantly, despite the Garrisons’ efforts to spin the testimony of Clint, Denise, and Brintnall as providing credible evidence of how long the syringe had been in the parking lot, none of it breaks the threshold of

speculation. As their own lawyer conceded to the trial court, Clint and Denise Garrison did not know how long the syringe had been there. (*See R.* p. 512, lines 3-7 (“The defense keeps getting hung up on ‘you don’t know where this needle came from.’ Of course they don’t. *‘You don’t know how long it’s been there.’ Of course they don’t.*” (emphasis added)).) And Brintnall disclaimed any knowledge of how long the syringe might have been in the parking lot.

Thus, all Clint or Denise could do at trial was guess that the syringe had been in the parking lot for some uncertain—yet conveniently long enough—period of time. Guesswork offered as witness testimony is still speculation. And as a matter of South Carolina law, plaintiffs must present more than rank speculation to prove constructive notice. The Garrisons would have this Court break from that rule simply because they cloaked their speculation in witness testimony. The Court should reject that request.

B. “Appearance” Evidence Does Not Suggest Any Particular Length of Time

The Garrisons also rely on evidence that the syringe was dirty, dingy, weathered, and gross, suggesting that such an appearance proves that the syringe had been in the parking lot long enough to confer constructive notice. To be clear, there is no dispute that the syringe looked dirty, dingy,

weathered, or gross. (See, e.g., R. p. 214, line 24.) But there is no evidence that links those traits to any period of time in Target's parking lot.

The Garrisons assume that, because the syringe was dirty, it must have been in the parking lot long enough to be found. The implication in their logic is that, to take on that appearance, the syringe had to have been in the parking lot for *some* length of time. But there was no evidence presented at trial suggesting how long it might take an object to attain such appearance or why the syringe had to have taken on that appearance in Target's parking lot as opposed to a different locale. Thus, although appearance evidence may be relevant in some circumstances, that evidence is not sufficient here to establish any particular length of time.¹

Anderson bolsters that conclusion. Just as there was no basis to conclude that a "withered up' and 'mushed up'" banana peel "had been on the floor for a considerable time," there is no reason to presume that the dirty and weathered syringe had been in the parking lot for any period of time based on its appearance. See *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 80, 184 S.E.2d 77, 79 (1971). The Garrisons contend that "Target overstates the proposition for which [*Anderson*] stands," but they are silent as

¹ Relatedly, there is no basis in the trial record to relate the appearance of the syringe to the appearance of items where the syringe landed *after* Kaileigh picked it up and Denise swatted it away.

to what that “proposition” is or how Target “overstates” it. (See Initial Response Brief of Appellants/Respondents at 22.) *Anderson* was a premises liability case in which the South Carolina Supreme Court held that the appearance of the hazard was insufficient to prove it had existed long enough to confer constructive notice. It applies with full force here.

In fact, the same logic was employed by the Fourth Circuit in an application of South Carolina law three years before *Anderson*. See *Joye v. Great Atl. & Pac. Tea Co.*, 405 F.2d 464 (1968). In *Joye*, the Fourth Circuit reversed the jury’s verdict for a plaintiff who slipped on a banana peel in a supermarket. *Id.* at 464. The court characterized the plaintiff’s proof of constructive notice as follows:

Plaintiff offered no direct evidence below as to how long the banana had been in the floor before the accident. The circumstantial evidence taken most favorably to the plaintiff shows that the floor may not have been swept for as long as 35 minutes. No one saw the banana until after Joye fell on it. It was then described as dark brown in color, having dirt and sand on it. There was dirt on the floor near the banana, and the banana was sticky around the edges. *From this evidence we think the jury could not tell whether the banana had been on defendant’s floor for 30 seconds or 3 days.*

Id. at 465 (emphasis added). Such evidence could not allow the jury to determine “how long (even [in] the broadest range of approximation) the banana may have been on the floor,” thus requiring reversal. *Id.* at 466.²

² See also, e.g., *Reid v. Kohl’s Dep’t Stores, Inc.*, 545 F.3d 479, 482 (7th Cir. 2008) (rejecting as “far too speculative” the plaintiff’s argument “that a

The Garrisons' case is no better than Joye's. They offered no direct evidence placing the syringe in Target's parking lot before the incident.³ At best, their circumstantial evidence suggested that the syringe was dirty and weathered, but those traits offered no reasonable inference as to how, when, or where that wear-and-tear occurred. The jury could not tell whether the syringe had been in Target's parking lot for two minutes, two hours, two days, or two weeks. That is not enough to give rise to constructive notice. See *Wintersteen I*, 336 S.C. at 136, 518 S.E.2d at 830 (rejecting constructive notice based on evidence that "the liquid could have been on the floor for an extended period of time," because "it is just as possible that it had been on the floor for only moments before [the plaintiff] fell").⁴

fact-finder could infer from the texture of the melted beverage that it had been on the floor for an extended period of time"); *Rodriguez v. Kravco Simon Co.*, 111 A.3d 1191, 1194 (Pa. Super. Ct. 2015) ("Without evidence of how long it takes the liquid in question to become sticky or dry, the jury would be unable to determine whether the spill was present for a sufficiently long time to warrant a finding of constructive notice.").

³ Despite their delineation between "direct" and "circumstantial" evidence of the syringe's longevity, the Garrisons offered no direct evidence on that point. See *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000) (defining direct and circumstantial evidence). In any event, the distinction is irrelevant here. See *id.*

⁴ *Wintersteen I* refutes the Garrisons' claim that none of the cases cited in Target's opening brief had any "evidence at all about timing," (Initial Response Brief of Appellants/Respondents at 19.). See also *Anderson*, 257 S.C. at 78-79, 184 S.E.2d at 78 (rejecting an inference of constructive notice from employee's statement that "we should have had this place cleaned up

For that same reason, the Garrisons' focus on spoliation misses the point, because the syringe's presence at trial would only have established that the syringe looked dirty and weathered, a point not in dispute. For that reason, this case is unlike a medical malpractice case where the defendant hospital lost critical records cataloging the decedent's vital signs, *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 521, 628 S.E.2d 675, 678-79 (Ct. App. 2006), or a slip-and-fall case where the defendant intentionally failed to gather witness statements and destroyed written notes related to the incident, *Schweikert v. Franciscan Health Sys.-W.*, No. 36806-6-II, 2009 WL 826227, at *1 (Wash. Ct. App. 2009) (unpublished).⁵ Under South Carolina law, the plaintiff "must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009).

but we just hadn't got around to it yet"); *Hurst v. Home Depot U.S.A.*, No. CA-99-1334-11, 2000 WL 33222911, at *3 (D.S.C. June 20, 2000) (rejecting inference of constructive notice when "the linoleum could not have been in the aisle for longer than 10-15 minutes, but it is just as likely that the linoleum had only been in the aisle a few moments prior to the accident").

⁵ The Garrisons' reliance on *Schweikert* not only misapprehends the distinction between the spoliated evidence there and here, but also ignores that Washington premises liability law allows the jury to infer constructive notice based on foreseeability. See *Schweikert*, 2009 WL 826227, at *1 & n.4. South Carolina law does not. See *infra* at Part I.C.

The Garrisons failed to make that showing, either at trial or in this appeal. And for good reason—the physical syringe would not have offered something the photographs or witness testimony left out. The trial record shows that the syringe was dirty, dingy, weathered, and gross. Those traits say nothing about where that weathering occurred or how long the syringe had been in Target’s parking lot.

**C. The Remaining Evidence Invokes the Rejected
“Foreseeability” Standard for Constructive Notice**

The Garrisons’ remaining arguments for constructive notice focus on Target’s cleaning practices and, in particular, its alleged inability to find and remove other “dangerous objects” in its parking lot two years later. That evidence is beside the point in this case, because it does not show how long the syringe was in the parking lot.

South Carolina courts have rejected evidence of ineffective cleaning and prevention measures as proof of constructive notice of a specific hazard. See *Anderson*, 257 S.C. at 80, 184 S.E.2d at 79; *Wimberly*, 252 S.C. at 122, 165 S.E.2d at 629. Whether Target employed best practices in cleaning and maintaining its parking lot does not suggest how long the syringe was actually in Target’s parking lot. Moreover, evidence of inadequate procedures begs the question of longevity: to accept it as proof that the syringe had been in the parking lot long enough to be discovered, one must assume that the

syringe existed long enough that it would have been discovered by better cleaning practices. That circular logic does not square the issue of constructive notice.

What's more, the Garrisons' discussion of cleaning practices and other "dangerous objects" in the parking lot invokes a foreseeability principle that has been rejected in South Carolina. According to the Garrisons, the cleaning and inspection evidence goes to "whether Target knew that dangerous objects might find their way into the parking lot if it did not inspect and clean." (See Initial Response Brief of Appellants/Respondents at 25.) But there was no evidence that syringes or any other hazard had ever been discovered in Target's parking lot before Denise's injury. Thus, the Garrisons' argument can only be interpreted as contending that Target ought to have been generally aware that nonspecific, unidentified hazards *might* appear in the parking lot if it did not employ efficient practices. In other words, Target should have foreseen that an injury would occur if it did not take better care of its parking lot.⁶

⁶ The absence of proof that hazards appeared in Target's parking lot before Denise's injury differentiates this case from *Major, Campbell, and Ford*, which the Garrisons claim in support of their arguments. See *Major v. City of Hartsville*, 410 S.C. 1, 2, 763 S.E.2d 348, 350 (2014) (reversing summary judgment when evidence suggested the defendant was aware of the hazard and undertook efforts to prevent it "prior to petitioner's injury" (emphasis added)); *Campbell v. S.C. State Highway Dep't*, 244 S.C. 186, 191, 135 S.E.2d 838, 840 (1964) (holding that constructive notice was shown in a

Foreseeability does not establish constructive notice. See *Wintersteen v. Food Lion, Inc.* (“*Wintersteen II*”), 344 S.C. 32, 35, 542 S.E.2d 728, 730 (2001).

As the Supreme Court explained in rejecting a rule of foreseeability,

We find a very legitimate basis for adherence to our traditional slip and fall analysis. In such cases, although there may be a foreseeable risk that substances will wind up on the floor, there is no specific act of the defendant which causes the substance to arrive there, i.e., it generally arrives there through the handling of a third party. To require shopkeepers to anticipate and prevent the acts of third parties is, in effect, to render them insurers of their customers’ safety. This is simply not the law of this state.

Id. at 37, 542 S.E.2d at 731 (citing *Hunter*, 232 S.C. at 145, 101 S.E.2d at 265, and *Milligan*, 273 S.C. at 120, 254 S.E.2d at 799).

The Garrisons did not show that any injuries occurred in Target’s parking lot before Denise’s, which might suggest recurring hazards in the parking lot.⁷ Instead, they suppose that Target ought to have been on notice

case related to road maintenance where the evidence showed “there had been *previous* washouts” and that the State was aware *before* the incident that “during periods of heavy rain the drainage system was insufficient to take care of the excess water” (emphasis added)), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); *Ford v. S.C. Dep’t of Transp.*, 328 S.C. 481, 489, 492 S.E.2d 811, 815 (Ct. App. 1997) (recognizing that testimony from an individual who warned a “road crew of the general problems of falling trees in the vicinity” *before* a tree fell was “competent evidence of constructive notice to the Department that the tree in question could pose a danger”).

⁷ Cf. *Major*, 410 S.C. at 4, 763 S.E.2d at 350 (“Where a recurring condition is of such a nature as to amount to a continual condition, when coupled with other factors, the recurring condition may be sufficient to create a jury issue as to constructive notice.”).

that its poor cleaning practices would lead to trouble, and they point to a bolt, spring, and rod found in the parking lot (two years after the incident with the syringe) to prove their point. But after-the-fact foreseeability is not the rule for constructive notice. The Garrisons' insistence that Target did not employ adequate cleaning or maintenance practices distracts from their critical failure to show that the syringe had been in the parking lot long enough to be discovered in the use of ordinary care.

D. Target Preserved Its Constructive Notice Argument

The Garrisons cannot prevail on appeal, so they bluster about procedural waiver for each piece of evidence that they say supports their proof of constructive notice. They claim that "Target did not give the trial court an opportunity to consider its speculation argument during trial," and warn that "[i]t is impermissible for Target to invoke its newly minted 'anti-speculation principle' when it never did so at trial." (Initial Response Brief of Appellants/Respondents at 17, 20.) Candidly, the suggestion of waiver as to the constructive notice issue is baffling, because Target repeatedly raised the contention below and preserved it for appeal.

At the close of the Garrisons' case, both sides moved for a directed verdict. During those arguments, Target emphasized that the Garrisons had failed to prove constructive notice because their evidence did not place the syringe in the parking lot at any particular time before the incident. (See R.

p. 497, line 14-p. 500, line 7; p. 502, line 23-p. 503, line 25; p. 514, line 12-p. 516, line 11.) In fact, Target's argument for a directed verdict mirrors its argument in this appeal:

There is simply no evidence beyond rank speculation as to how long [the syringe] had been there. We all agree that it is dingy. We all agree that the plunger that your thumb goes on is broken off. It could have fallen out of a car five minutes before this lady's daughter encountered it, been run over. Now we've got a dingy hypodermic that is partially broken. That doesn't establish their burden, which is to prove that Target had constructive notice. They've got to prove that it had been there for a sufficient length of time for Target to have notice, 'you should have found it and done something.' There just isn't any evidence of that.

(R. p. 499, lines 4-19.) As Target's counsel explained, "To let the jury go decide based on the evidence that the plaintiffs have presented is rank speculation." (R. p. 516, lines 4-6) Nevertheless, the trial court denied Target's motion for a directed verdict. (See R. p. 520, lines 20-25.)

After the jury returned its verdict in favor of the Garrisons, Target reasserted the constructive notice argument in its post-trial motion for judgment as a matter of law. (See R. p. 750-759; p. 812-816.) And constructive notice was a central issue during the trial court's hearing on post-trial motions. (See R. p. 628, line 14-p. 647, line 16; p. 691, line 15-p. 694, line 16.) And, again, the trial court denied judgment as a matter of law on that issue. (R. pp. 5-6.) Without question, Target preserved the constructive notice argument for appeal.

The Garrisons' waiver argument appears to conflate admissibility of evidence with its sufficiency. But Target does not contend that the Garrisons' testimony or evidence was inadmissible. Rather, even taking the Garrisons at their word that they believed the syringe had likely been in the parking lot long enough that Target ought to have found it, the whole evidentiary record remained legally deficient as to constructive notice because it never crossed the threshold beyond speculation and conjecture. *See Milligan*, 273 S.C. at 121, 254 S.E.2d at 800 (reversing jury's verdict when the conclusion that the merchant had constructive notice "would be pure speculation").

To take the Garrisons' waiver argument seriously would require a defendant to object to every word of witness testimony or piece of evidence as insufficient for purposes of constructive notice. But directed verdict motions based on insufficiency grounds must be raised "at the close of evidence." Rule 50(a), SCRCPP. And the denial of a Rule 50(a) motion is preserved for appeal by timely raising a post-trial motion under Rule 50(b). *See Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 498 (Ct. App. 2006). Target timely moved for a directed verdict based on the Garrisons' failure to adequately show constructive notice, and it renewed that motion after the verdict. The trial court denied Target's request both times. The matter is fully preserved for this Court's review, and it requires reversal.

II. Even if Constructive Notice was Proven at Trial, the Jury's Unwarranted and Unconstitutional \$4.51 Million Punitive Award Requires a New Trial Absolute

Punitive damages may be awarded in a negligence action only when the plaintiff shows by clear and convincing evidence that the conduct causing her harm 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 v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). Here, the Garrisons complain that Target's inadequate parking lot maintenance caused Denise's injury. But they failed to prove through clear and convincing evidence that Target consciously disregarded any duty to maintain its premises. On that basis, the punitive award was both unwarranted and unconstitutional. The trial court got that conclusion half-right by concluding that the imposition of punitive damages would violate Target's due process rights, but it got the remedy wrong by declining Target's request for a new trial.

Without question, if the imposition of *any* punitive damages would have been unconstitutional, then a \$4.51 million punitive award must be "so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993). Under such circumstances, the trial court was

required “to set aside the verdict absolutely.” *Id.*; see also *S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996) (holding that “the trial court must either grant a new trial absolute, or a new trial nisi remittitur” when it concludes that a punitive award “violate[s] the defendant’s due process rights”). Thus, barring the reversal of the underlying liability determination, this Court should vacate the judgment and remand for a new trial.

A. Target Preserved Its New Trial Absolute Argument

Again, the Garrisons raise procedural waiver to avoid the substantive defect in the judgment below. And once again, they are wrong. Target timely raised its argument for new trial absolute in a post-trial motion under Rule 50, SCRPC. (See R. pp. 750-759; pp. 825-832.) The trial court denied that request. (See R. p. 13.) That is all that was required for Target to preserve the contention for appeal. See *Stevens v. Allen*, 336 S.C. 439, 454, 520 S.E.2d 625, 632 (Ct. App. 1999).

The Garrisons argue that Target waived its argument for a new trial absolute because it did not file a Rule 59(e) motion asking the trial court to reconsider its “internally inconsistent” conclusion. (See Initial Response Brief of Appellants/Respondents at 33.) But Rule 59(e) motions are mandatory only when “an issue or argument has been raised, but not ruled on.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Here,

Target raised its entitlement to a new trial absolute based on the punitive verdict, and the trial court rejected that request. The issue is preserved for appellate review.

The Garrisons also curiously suggest that, because Target did not request bifurcation of the liability and damages phases of the trial, it cannot now appeal issues related to the jury's punitive verdict. (*See* Initial Response Brief of Appellants/Respondents at 34 ("Target may not, for the first time on appeal, complain of prejudice when it failed to take advantage of the bifurcation procedure available under the rules.")) They cite no proposition under South Carolina law requiring that procedure to preserve a punitive-damages contention for appeal, because none exists. *Cf. Durham v. Vinson*, 360 S.C. 639, 644 n.2, 602 S.E.2d 760, 762 n.2 (2004) ("Although some states require bifurcation in every case in which the plaintiff seeks punitive damages, we are unwilling to impose such a requirement."). And South Carolina appellate decisions reviewing the legality of punitive verdicts from non-bifurcated trials belie the Garrisons' suggestion of waiver. *See, e.g., Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009).

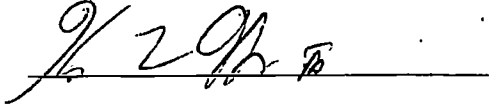
Target preserved its argument in favor of a new trial absolute based on the excessive and unconstitutional punitive award.

CONCLUSION

The Garrisons cannot overcome the longstanding precedent requiring them to establish that the syringe sat in Target's parking lot for some period of time before Denise's injury. Speculation cannot get clear that hurdle. The Garrisons' purported proof simply reinforces the fact that no one knows where the syringe came from or how long it had been in Target's parking lot. The trial court thus erred as a matter of law in failing to grant Target's motions for a directed verdict and judgment as a matter of law. This Court should reverse and remand for the entry of judgment in favor of Target.

Notwithstanding the overarching liability question, the jury's shocking \$4.51 million punitive award demonstrated improper influence or motivations. What's more, that exorbitant figure would violate Target's constitutional due process rights. For those reasons, Target is entitled to a new trial absolute. Thus, if the Court concludes that the Garrisons presented sufficient evidence of constructive notice, it should vacate the judgment below and remand for a new trial.

Respectfully submitted,



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In The Court of Appeals

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

Appellant Case No. 2017-000267

CARLA DENISE GARRISON AND CLINT GARRISON,

Appellants/Respondents,

v.

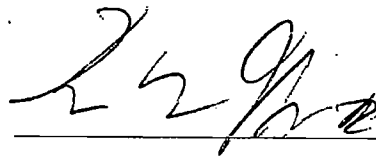
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Respondent/Appellant.

CERTIFICATE OF COUNSEL

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

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SC Court of Appeals

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 Reply Brief

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SC Court of Appeals

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INTRODUCTION

The settled law in this State is that “substantial deference should be given to a jury’s determination of damages.” *See Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (2005). But the trial court did not follow this rule. Even though the trial court denied Target’s request for a directed verdict on the issue of punitive damages, it reversed course after the jury returned its verdict. That is shocking because the jury’s award should have confirmed for the trial court that Target’s actions were at a minimum reckless.

Target wants very badly to poison the well and make this Court think the verdict was the product of a runaway jury. Not so. Twelve citizens, from one of the most conservative counties in this State, were guided by nothing other than the evidence. The outcome of this jury trial resulted from Target’s own conduct and trial strategy.

Indeed, there is little wonder the jury levied such a substantial award. They heard evidence that Target initially told Denise Garrison to bring her medical bills to the company but then refused to pay them after she agreed to be interviewed by the company’s investigator while she was recovering from treatment. (R. p. 432; pp. 446-48; p. 491; p. 401) They heard and saw evidence proving that Target takes no meaningful steps to clean or inspect its parking lot and that dangerous objects remain in Target’s parking lot for long periods of time. *See Garrisons’ Initial Br.* at 15-26. They saw that Target did not put on a case-in-chief, that the only document Target entered into evidence contained indisputably false information, that Target conveniently lost what was described as the “central piece of evidence” in the case,

and that Target's Manager admitted on the stand to testifying falsely in her prior deposition about the central piece of evidence. *Id.* And if all of this were not enough Target's attorney told the jury during closing arguments that his client was a "\$73 billion dollar-a-year corporation" that would not have been affected if it had paid Denise's medical bills. (R. p. 552; p. 559)

It simply is difficult in light of this record on appeal to have sympathy for Target. That is especially so considering that the company rejected the opportunity to end this litigation for \$12,000.00 in February 2015, when Denise made an offer of judgment. It is not the job of the courts to second-guess the jury or to save parties from strategic mistakes. *See Gray v. Spillman*, 925 F.2d 90, 95 (4th Cir. 1991) ("It is not our job to weigh the evidence [or even to] disregard stories that seem hard to believe. Those tasks are for the jury."); *Ramirez-Flores v. Houston*, 2009 WL 2351737, *4 (D. Neb. 2009) (quoted case omitted) ("[T]hese decisions clearly involve trial strategy and the case law in this state is well-settled that it is not the job of this Court or appellate courts to second-guess reasonable strategic decisions made by counsel during trial.").

REPLY ARGUMENT

The Garrisons' opening brief explained why the jury's punitive damages award should be reinstated. The Garrisons' opening brief also explained how the trial court misapplied South Carolina's offer-of-judgment rule. This reply brief addresses Target's flawed oppositional arguments.

I. The trial court did not apply the proper legal framework.

The Garrisons' opening brief explained that the trial court conflated evidentiary sufficiency with constitutional excessiveness. Indeed, rather than focusing on whether there was sufficient evidence to support the jury's determination that Target acted recklessly, the trial court focused on whether Target's conduct was reprehensible. "Eligibility" and "excessiveness" are distinct concepts. Reprehensibility only is relevant to the former and not to the latter.

Tellingly, Target does not defend the trial court's flawed analysis. Target instead confesses that the trial court employed the wrong legal standard, as it asks this Court to affirm the trial court's ruling on "alternative grounds." Rule 220(c) permits¹ affirmance on alternative grounds, but the alternative ground sought by Target is suspect. Ordinarily, parties seek alternative-grounds affirmance on an argument that the trial court did not pass judgment upon. Here, though, Target asks this Court to affirm on a ground that the trial court did in fact pass judgment upon – namely, whether there was sufficient evidence to allow the jury to decide the question of punitive damages in the first place.

The problem Target faces is that, at the directed verdict stage, the trial court properly determined that there was sufficient evidence from which the jury could find that Target acted recklessly. (R. p. 520) The trial court's later grant of judgment as a matter of law can be explained only by its utilization of the wrong

¹ Just because this Court may consider alternative grounds, does not mean that this Court must consider alternative grounds. See, e.g., *State v. Frey*, 362 S.C. 511, 518-19, 608 S.E.2d 874, 878 (Ct. App. 2005). It would of course be permissible for this Court to clarify the appropriate legal standard and then remand this case to the trial court. As explained in the opening brief, however, this record provides ample evidence for this Court to simply reinstate the jury's verdict.

legal standard. If the trial court believed the jury awarded too much, then remittitur – not vacatur – was the proper remedy. This Court must correct the trial court's flawed analysis.

II. Under the proper legal standard, Denise Garrison was eligible for punitive damages.

Given that Target recognizes the trial court utilized the wrong legal standard, it is forced to defend the result reached by the trial court through a revisionist account of the evidence. Target attempts to bury the governing standard of review in a footnote, but it cannot hide from the rule that all reasonable inferences must be drawn in the Garrisons' favor and that, where there are competing inferences, the jury's determination must control. See Target's Initial Response Br. at 18 n.9 (citing *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 394, 714 S.E.2d 904, 910 (Ct. App. 2011)). Twelve Anderson County jurors flatly rejected the one-sided version of the facts that Target touts in its oppositional brief.

In truth, the evidence presented at trial was not close. The Garrisons called five witnesses and had 12 exhibits entered into evidence while Target rested without putting on a case-in-chief. (R. pp. 65-68) The only exhibit Target entered into evidence during the Garrisons' case-in-chief was a two-page log that contained false information, and Target's Manager was forced to admit on the stand that Target spoiled the "central piece of evidence in the case" and that she gave materially false testimony during her deposition about the spoliation. (R. pp. 621-22; pp. 246-47) The version of events Target describes on appeal cannot be squared with what the jury actually heard and saw.

A perfect example of Target's mischaracterization of the evidence is its claim that Denise Garrison suffered only a "minor" injury. The Garrisons' opening brief recounted Denise's injuries in detail:

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. pp. 366-441) 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)

All of this evidence, which is conspicuously absent from the oppositional brief, refutes Target's depiction of Denise's injury as a "minor" one.

In a similar fashion, Target misconstrues the record evidence regarding its own actions and omissions. For Target to be eligible for a punitive verdict, there need only be evidence (1) that Target was aware that dangerous conditions could

make their way into its parking lot if it did not properly clean and inspect and (2) that Target recklessly shirked its obligation to clean and inspect. *See Graham v. Whitaker*, 282 S.C. 393, 400, 321 S.E.2d 40, 44 (1984) (explaining that reckless conduct warrants punitive damages and that it is for a jury to determine whether a premises owner has “recklessly breached the active, affirmative duty to make [its] premises reasonably safe to all invitees.”). This record contains plenty of evidence of both (1) and (2).

With respect to knowledge, Target attempts to distort the governing legal standard. Nothing in the law requires, as Target suggests on pages 21 and 22 of its oppositional brief, needles to have been found in the parking lot on previous occasions. All that is required is that Target be aware that dangerous conditions could make their way into the parking lot if it does not reasonably clean and inspect. *See Graham*, 282 S.C. at 400, 321 S.E.2d at 44. It would impose an impossible burden for a court to hold that punitive damages are off limits simply because there is a single incident of harm. The very case Target relies on in its brief, *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 482 (Ct. App. 2011), makes clear that whether a defendant has engaged in “repeated actions” speaks to the excessiveness of punitive damages, not to a defendant’s eligibility for punitive damages.

There is no question here that Target knew it had a duty to clean and inspect. The Garrisons’ opening brief details the testimony of Target’s Manager, where she expressly acknowledged Target’s duty to keep the premises safe. *See*

Garrisons' Initial Br. at 20. The Garrisons' opening brief also details the measures Target claimed it used to clean and inspect – all of which show that it was aware of its legal obligation to keep its premises safe. *Id.* at 20-24. Target's oppositional brief even concedes on page 21 that it has an "obligation[] to maintain a safe premises."

Nonetheless, even if the Garrisons needed to show other instances of harmful conditions, there is plenty of that type of evidence in any event. Target cryptically states that there is no evidence of dangerous conditions "before May 21, 2014[.]" but it ignores Jon Jackson's testimony that Target's practices did not change from the date of the incident to the date of trial. (R. p. 338) The jury was presented with evidence of a bolt that had fallen from a buggy rack that Target allowed to remain in its parking lot for at least four months and a rod and spring that Target allowed to remain in its parking lot for at least 13 days. (R. pp. 375-94; pp. 394-95; p. 609; p. 612). The jury also saw a picture of a buggy rack in Target's parking lot that was falling down and heard testimony about "trash everywhere" on different occasions. (R. p. 612; p. 375; pp. 426-27; p. 490) All of this evidence was admitted without objection and allowed the jury to conclude that Target knew it was not doing what it needed to do to keep its parking lot safe. *See Tucker v. Doe*, 413 S.C. 389, 405, 776 S.E.2d 121, 130 (Ct. App. 2015) (explaining that evidence "received without objection becomes competent and its sufficiency is for the jury").

With respect to recklessness, Target tries to paint itself as a responsible department store that goes above and beyond to eliminate dangers that could injure

patrons. The actual evidence considered by the jury, however, refutes this inaccurate depiction. One need only look to the jury's ultimate verdict to conclude that the evidence presented at trial does not match Target's false portrayal.

The record does not support Target's claim that it cleaned its parking lot with a sweeper truck from a third party once per week. No employee of the alleged third party vendor testified at trial, and Target presented no records showing that a third party vendor ever came, no invoices showing that a third party vendor was ever paid, and, despite the presence of surveillance cameras throughout Target's premises, no video showing that the third party vendor ever cleaned anything at all. (R. p. 302; p. 342) Jackson could not even recall the name of the alleged third party vendor, and Clint testified that, when he camped out at Target on a Thursday night prior to trial to see if there really was a sweeper truck, no such truck ever showed up. (R. pp. 298-99; pp. 369-72) All of this more than justified the jury's "reasonable" rejection of Target's sweeper truck defense, especially when considered alongside the mountain of evidence showing that various dangerous objects remained in Target's parking lot for long periods of time and that multiple witnesses testified about Target's parking lot being filthy on different occasions.

The record also does not support Target's claim that it cleaned its parking lot with housekeeping staff four times per week. No housekeeping employee testified at trial, Target presented no records related to housekeeping, and, despite the presence of surveillance cameras throughout Target's premises, no video was shown of any housekeeping cleaning at all. (R. p. 302; p. 342) All of this justified the jury's "reasonable" rejection of Target's housekeeping defense, especially when considered alongside the mountain of evidence showing that various dangerous objects remained in Target's parking lot for long periods of time and that multiple witnesses testified about Target's parking lot being filthy on different occasions.

The record further does not support Target's claim that its cart attendants routinely inspected its parking lot for dangers. No cart attendant employee testified at trial, Target presented no records related to cart attendant inspections, and, despite the presence of surveillance cameras throughout Target's premises, no video was shown of any cart attendant inspecting anything but a cell phone. Jackson testified that cart attendants should not use their cell phones in the parking lot, but, when confronted with a picture of a distracted cart attendant, he admitted that the cart attendant was "looking [down] at something." (R. p. 311; p. 321; pp. 311-12). Unlike the picture Target references in its brief, Jackson's oral testimony was not objected to and thus became sufficient for the jury to consider. *See Tucker*, 413 S.C. at 405, 776 S.E.2d at 130. All of this justified the jury's "reasonable" rejection of Target's cart attendant defense, especially when considered alongside the mountain of evidence showing that various dangerous objects remained in Target's

parking lot for long periods of time and that multiple witnesses testified about Target's parking lot being filthy on different occasions.

Target's cleaning and inspection evidence hinged on the testimony of Jackson. It was his job to maintain the parking lot, but the jury had good reason to reject his testimony. (R. pp. 298-99) Jackson testified about conducting "walk the vibe" inspections, which he claimed he documented through a computer-generated log. (R. pp. 342-43) The two-page log, however, contained false information. (R. pp. 621-22) The log identified both April 28, 2014 and April 29, 2014 as a "Monday." (R. pp. 621-22)

Without analysis, Target boldly claims that the false log did not permit the jury to infer that Jackson falsified evidence or to infer that Jackson's testimony was untrue. That contention is mind-blowing. A reasonable inference is simply a conclusion that common sense would lead a juror to deduce from the evidence. Jackson presented no explanation for why the log was inaccurate, so the jury certainly was entitled to conclude that Jackson was responsible for a document he admitted preparing. Similarly, because there is voluminous evidence in the record showing that Target's parking lot was unkempt for long periods of time on different occasions, the jury certainly was entitled to conclude that Jackson was not telling the truth about Target's cleaning and inspection practices. The law is clear that inferences must be "liberally construed[.]" and an inference is "reasonable" so long as "there is good reason for questioning the credibility of the witness[.]" *See Repko v. County of Georgetown*, 416 S.C. 22, 33-34, 785 S.E.2d 376, 381-83 (Ct. App. 2016)

(explaining that inferences must be “liberally construed”); *Page v. Crisp*, 303 S.C. 117, 119; 399 S.E.2d 161, 162 (Ct. App. 1990) (discussing when a witness’ testimony may be rejected).

Target’s response to the jury’s spoliation finding likewise falls flat. It claims that its loss of the “central piece of evidence” in the case does not create an independent basis for punitive damages because it was not intentionally lost. The obvious problem with that assertion, however, is that the jury was entitled to conclude that Target’s conduct was in fact intentional. *See Gilbert v. Duke Power Co.*, 255 S.C. 495, 179 S.E.2d 720 (1971) (explaining that the jury is entitled to draw any reasonable inferences from the evidence). Just because Target alleges that its actions were negligent does not make them so. The jury was presented with evidence that Target could not produce the syringe on two separate occasions and that Target’s Manager testified falsely in a deposition about what happened to the syringe. (R. pp. 241-52) Again, Target’s position is premised on a clouded view of what constitutes a “reasonable” inference.

Regardless, even if Target’s spoliation is not accepted as an independent basis for punitive damages, it certainly must be considered as part of the overall calculus. It is axiomatic that appellate courts must consider “the record as a whole” when evaluating questions of evidentiary sufficiency. *See Beard v. Cabaniss*, 166 S.C. 173, 164 S.E. 441, 443 (1932). Target’s flawed appellate strategy is to attack discrete pieces of evidence, without acknowledgment of the surrounding context in which the jury considered the case.

As detailed in the opening brief, there is voluminous evidence supporting the jury's determination that Target acted recklessly. Among the evidence are testimony and documents showing that dangerous objects remained in Target's parking lot for long periods of time, testimony showing that Target's parking lot was consistently dirty, testimony and documents showing that Target did nothing to ensure that its parking lot was consistently cleaned or inspected, testimony showing that Target violated its own policies, and testimony about Target spoiling the "central piece of evidence" in the case. *See* Garrisons' Initial Br. at 15-26. All of this provides far more evidence than is required to support a reasonable inference of recklessness. *Compare Solanki v. Wal-Mart*, 410 S.C. 229, 237, 763 S.E. 2d 615, 619 (Ct. App. 2014) (affirming denial of motion for judgment as a matter of law on punitive damages in a gross negligence case) *with* this case.

The bottom line is that the Supreme Court has unequivocally stated 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). And this Court has been adamant that credibility determinations and the drawing of legitimate inferences are not functions for the court. *See, e.g., Anderson v. The Augusta Chronicle*, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App. 2003). If punitive damages are deemed unavailable in a case where the jury saw witnesses impeached, false documentation presented, and spoliation of evidence, it is hard to imagine when a punitive damages verdict might

ever be permissible. This Court must reverse the trial court's decision to usurp the jury's findings.

III. The entirety of the jury's punitive damages verdict should be reinstated or, at a minimum, it should be remitted to \$2 million.

After this Court concludes that the trial court wrongly deemed Denise ineligible for punitive damages, the question then becomes: how much she is entitled to? Target wants this Court to apply a \$500,000.00 cap, but Denise believes she is entitled to the \$4,510,000.00 the jury said she deserved. The analytical path for addressing the competing positions follows.

A. The jury's punitive damages award is constitutional.

The Garrisons' opening brief explained why all three constitutional factors – reprehensibility, ratio, and comparative cases – support the jury's punitive damages award. Only by ignoring pertinent facts and distorting the law can Target suggest otherwise.

It is clear that, in discussing reprehensibility, Target wants this Court to focus on "injuries" rather than "conduct." Target falsely characterizes Denise's injury as a "minor" one and states that, "[f]or all the jury knew, Denise Garrison was the only person ever injured at the Anderson store." This is a smoke screen because "reprehensibility" turns, primarily, on the egregiousness of Target's conduct, not on Denise's or anyone else's injuries.

Again, each of the considerations underlying the reprehensibility factor favor Denise. The evidence recounted above shows that Denise suffered physical injuries. The evidence shows that Target was aware of its obligation to maintain a safe parking lot yet the jury and the trial court found that Denise's injuries "resulted from [Target's] failure to make the parking lot safe[.]" (R. p. 11) The evidence shows that Denise was financially vulnerable yet Target failed to pay her medical expenses. See Garrisons' Initial Br. at 32 n.8. The evidence recounted above shows that Target's parking lot was filthy on many different occasions, thus demonstrating "repeated" inaction on Target's part. The evidence recounted above shows that Target's inaction was not a "mere accident" because it consistently refused to clean and inspect, even though it knew that its parking lot was unkempt. Target blatantly ignores all of the record evidence on each of these reprehensibility considerations.

Target similarly is silent on all of the evidence supporting this case's 45:1 ratio. Target does not, because it cannot, dispute this Court's prior acknowledgement that a single digit ratio is not mandatory. See *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 315, 529 S.E.2d 45, 62 (Ct. App. 2000). The purposes underlying punitive damages are to punish and deter, and these purposes would not be realized if a mere single digit ratio were applied to an admitted "\$73 billion dollar-a-year corporation." (R. p. 552) Target characterizes what happened to Denise as a freak accident, but the evidence does not support that

view. The jury rightly determined that Target was well aware that it was shirking its cleaning and inspection obligations yet did nothing about it.

Target accuses Denise of fuzzy math when discussing *Mitchell*, but Denise's opening brief readily acknowledged that *Mitchell's* ratio was comprised of both "actual" and "potential" damages. The actual to punitive ratio was around 54:1 while the combined actual/potential to punitive ratio was 9.2:1. The point is that, just like in *Mitchell*, this Court should consider the potential harm that Target's conduct could have caused in addition to the harm that it actually caused. Target cites no case holding that potential harm must be "expert endorsed."

No meaningful response is provided by Target to the comparative cases offered by Denise either. True, neither party cites to a case that is factually on all fours with this one, but that is because Target's conduct was beyond the pale. If this Court was willing to uphold a multi-digit ratio in a case involving a rental car company's unauthorized credit card charge, then certainly the jury's multi-digit ratio in this case is permissible. Compare *Lister v. NationsBank of Delaware, N.A.*, 331 S.C. 277, 94 S.E.2d 449, 458-59 (Ct. App. 1997) with this case. Rather than involving a monetary exchange, this case dealt with infectious disease treatment because one of the nation's largest retailers consciously flouted its obligation to reasonably clean and inspect.

This Court should follow the lead of the South Carolina federal court that previously rejected all of the same arguments Target repeats in this case. See *Cantrell v. Target Corp.*, Civil Action No. 6:06-2723-BHH, Docket No. 125 (D. S.C.

2008). *Cantrell* upheld a three-million-dollar punitive damages award against Target in a case where there was only \$100,000.00 in actual damages, i.e. a 30:1 ratio. *Id.* at 1. Significantly, *Cantrell* recognized that a single digit multiplier would do nothing to punish and deter a company that “makes \$2,293,493 of gross profit *per hour*.” *Id.* at 38. (emphasis in original).

On a final note, Target misapplies the law in its discussion of remedies. The Garrisons have addressed in their respondent’s brief to Target’s cross appeal why a new trial is not warranted, but, even if this Court were to determine that the jury’s punitive damages verdict was excessive, a new trial is not automatic. Denise should be given the option of a new trial or a remittitur, if this Court were to find the jury’s verdict to be excessive. *See, e.g., Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 493, 361 S.E.2d 775, 776 (Ct. App. 1987).

B. Target waived application of the Civil Justice Act caps.

This Court already has rejected the very argument Target advances in hopes of avoiding its failure to plead the Civil Justice Act caps in its answers or during trial. *James v. Lister*, 331 S.C. 277, 283, 284, 500 S.E.2d 198, 201 (Ct. App. 1998) holds that defendants are required to plead “liability limits that affect proof at trial[.]” The Civil Justice Act caps plainly “affect proof at trial” because which cap applies – the \$5,000,000.00 cap, the \$2,000,000.00 cap, or the unlimited cap – depends on what proof is offered regarding the defendant’s conduct. The Civil Justice Act caps also plainly serve as “liability limitations” because they affect how much money a defendant ultimately has to pay. None of Target’s belated attacks cure its pleading error.

The oppositional brief begins with a discussion of *James*, but it is unclear how the discussion benefits Target. The company notes that the statute at issue in *James* “required the plaintiff to prove *to the jury* ‘a greater degree of negligence in order to recover damages in excess of \$200,000[.]’” See Target’s Initial Response Br. at 39 (emphasis in original). That is exactly the same thing the Civil Justice Act does. Denise was required to prove a different degree of misconduct on Target’s part to reach the unlimited cap or the \$2,000,000.00 cap as opposed to the \$500,000.00 cap. The distinction Target offers between this case and *James* is no distinction at all.

Nor is it helpful for Target to suggest that Texas² adheres to a different rule. This Court in *James* surveyed cases from all across the country, acknowledging that some states require liability limits to be pled and other states do not. See 331 S.C. at 284, 500 S.E.2d at 202. After conducting that survey, this Court placed South Carolina in the category of states that require liability limits affecting proof at trial to be pled. *Id.* Target implicitly is asking this Court to overrule *James* without providing any persuasive justification for doing so.

In fact, Target’s reasoning is inconsistent with its own conduct. The company characterizes the Civil Justice Act caps as “appl[ying] to all civil actions[.]” but the same can be said for the due process clause’s constitutional check on excessive

² Target’s reliance on *Zorilla v. Aypoco Constr. II, LLC*, 469 S.W.3d 143 (Tex. 2015) is entirely unfounded in any event. Texas, unlike South Carolina, has a single cap that applies to all cases. See *Zorilla*, 469 S.W.3d at 155. The Texas Supreme Court specifically held that the cap need not be pled as an affirmative defense because “it does not require proof of any additional fact to establish its applicability[.]” *Id.* at 157. As explained in the opening brief and above, South Carolina’s caps conversely require proof of certain facts in order for them to apply. The reasoning from *Zorilla* therefore cuts in favor of the Garrisons’ argument and against Target’s.

punitive damages. Even though no one “can reasonably claim surprise” by the due process clause, Target nonetheless invoked the Constitution as an affirmative defense in both of its answers. (R. pp. 37-41; pp. 49-54) The fact that everyone knows a certain affirmative defense exists does not alleviate a defendant’s obligation to plead it any more than the rule that plaintiffs must plead all of the causes of action upon which they seek to recover. Knowledge is not an excuse for inaction.³

Perhaps most ironic, though, is Target’s harsh suggestion that Denise’s conduct somehow demonstrates an “ignorance of the law[.]” To hear Target tell it, one would think that it was Denise who failed to plead something she was supposed to plead. Target is the party that did not satisfy the governing pleading requirement, and the company’s rhetoric⁴ does not save the day.

C. In the alternative, the Civil Justice Act caps are unconstitutional.

Even if Target had not waived application of the caps, they still would be inapplicable in this case. That is so because the caps are incompatible with the Constitution. Target acknowledges that this is an issue of first impression in South Carolina and that other states are split on the issue.

³ This Court should take judicial notice of the fact that it is common practice in South Carolina for defendants to plead the punitive damages caps as an affirmative defense. *See, e.g., Hunter v. Eliowen*, Case No. 2016-CP-23-0290 (Greenville County Court of Common Pleas April 8, 2016) (raising, as an affirmative defense, the following: “The Defendant does plead the limitations on damage awards found in S.C. Code Ann. § 15-32-510 et. seq., and requests bifurcation in accordance with these code sections.”), available at <https://www2.greenvillecounty.org/SCJD/PublicIndex/PIIImageDisplay.aspx?ctagency=23002&doctype=D&docid=1460140392014-981&HKey=111112567887113526966507667887111611110796853100896510774102705285122.109751047648794955995612010956>

⁴ Target similarly suggests there was a “deficiency” in Denise’s case, but a jury of 12 obviously did not agree.

Target points to *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990) as persuasive authority but discounts a fundamental distinction: *Wright* involved a liability limitation applicable to governmental entities under the Tort Claims Act while this case involves private parties. Significantly, governmental entities are protected by the doctrine of sovereign immunity, except to the extent that the Legislature has waived that immunity through the Tort Claims Act. See, e.g., *Hawkins v. City of Greenville*, 358 S.C. 280, 292-93, 594 S.E.2d 557, 563-64 (Ct. App. 2004). It makes perfect sense, then, that the Legislature possesses the constitutional authority to protect governmental entities with damage limitations when governmental entities are only subject to suit to begin with because the Legislature has waived their sovereign immunity. *Id.* The statute at issue in *Wright* and the statute at issue here are apples and oranges.

What's more is that *Wright* was decided in 1990 and contained only three paragraphs of analysis. Since 1990, the law regarding the constitutionality of punitive damages caps has developed dramatically. The most recent case cited by either party is the Missouri Supreme Court's decision in *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) (en banc), which struck down a punitive damages cap that is nearly identical to South Carolina's cap. The reasoning of *Lewellen* should control.

D. Even if Target had not waived the Civil Justice Act caps, and even if the Civil Justice Act caps are constitutional, the \$2 million cap – as opposed to the \$500,000.00 cap – is the appropriate liability limitation.

Target pays short shrift to Denise's position that the \$2 million cap is the appropriate cap. In conclusory fashion, Target simply maintains that Section 15-

32-530(B)(1)'s requirements are not met. That contention is at odds with the record evidence.

There certainly was testimony from which the jury could reasonably infer that Target's failure to clean and inspect was motivated by financial gain and that Target's management employees approved the company's unlawful practices. Target's Manager specifically testified that, although Target maintained video footage of all of its cash registers, it did not do so with its parking lot. (R. p. 258) Target's Property Maintenance Technician additionally testified that cart attendants, the individuals Target claimed had responsibility for inspecting the parking lot for dangerous conditions, were allowed to leave early to save on payroll. (R. p. 332) This testimony, when considered alongside the previously discussed evidence proving Target's recklessness, is sufficient to trigger the \$2 million cap.

Target's argument on the \$2 million cap underscores the unreasonableness of its pleading argument. On the one hand, Target maintains that it was not required to put Denise on notice of the Civil Justice Act caps within its answers. On the other hand, Target maintains that Denise did not offer sufficient proof for purposes of the \$2 million cap. Target cannot have it both ways.

IV. Denise is entitled to 8% pre-judgment interest on the entirety of the jury's verdict.

Target acknowledges two of the underlying purposes behind Rule 68: to encourage settlements and to avoid protracted litigation. See Target's Initial Response Br. at 44 (citing *Black v. Roche Biochemical Labs*, 315 S.C. 223, 227, 433 S.E.2d 21, 41 (Ct. App. 1993)). But Target fails to acknowledge an important third

purpose underlying Rule 68: to penalize parties that fail to terminate the litigation when a reasonable settlement offer is made. *See, e.g., Paine Webber Jackson and Curtis, Inc. v. Winters*, 579 A.2d 545, 552 (App. Ct. Conn. 1990). The idea behind this third purpose is that, when a party rejects a reasonable offer to resolve the case, the rejecting party must be penalized for the subsequent waste of litigation resources. *See, e.g., DiLieto v. County Obstetrics and Gynecology Group, P.C.*, 998 A.2d 730 (Conn. 2010).⁵

As an initial matter, nothing in the plain language of Rule 68 ties prejudgment interest to a trial court's post-trial alteration of a verdict rather than to the verdict itself. It is unclear why Target thinks Rule 68's "a verdict or determination" phrase advances the company's position. It is true that "use of the term 'determination' indicates that the final amount may be settled by the judge rather than the jury[.]" but that just suggests that damages may be levied through a bench trial or even a dispositive motion. Target cites no authority for the very different proposition that it means a trial court can override a verdict when damages are set by the jury. For Target's position to have any merit, Rule 68 would have to include language like its federal counterpart: "judgment finally obtained by the offeree[.]" *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981). South Carolina's rule has no such language, instead tying prejudgment interest to "the amount of the verdict or award" rather than to what is "finally obtained[.]" The

⁵ Target's citation to this Court's decision in *Black* as authority for the "two purposes" it claims underlie Rule 68 is telling. Significantly, *Black* was decided in 1993 – prior to the current version of Rule 68 that allows plaintiffs to obtain prejudgment interest. (The current rule was enacted in 2005.) *Black* of course did not take into account the added purpose of penalizing defendants who do not accept reasonable offers of compromise.

South Carolina Supreme Court has been adamant that the plain language must be followed. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Regardless, this Court need not reach the question of post-verdict alteration because the jury's verdict must be reinstated. Once the verdict is reinstated, Target is left only with its argument that prejudgment interest should not apply to the punitive damages portion of the verdict. That position is untenable.

The primary case Target relies upon – a California Supreme Court case – involves a completely different factual scenario. *Lakin v. Watkins Associated Indus.*, 863 P.2d 179, 191-92 (1993) refused to award pre-judgment interest to the punitive damages portion of an award, but it reached that conclusion because the statute at issue applied only to a specific category of cases – personal injury cases. Relying on “the operative language of the first paragraph” of the statute, the court held that the text of the statute limited prejudgment interest to “damages for personal injury,” and punitive damages are not “damages for personal injury[.]” *See Lakin*, 863 P.2d at 191.⁶ *Lakin* was not a case, like this one, that dealt with an offer of judgment rule applicable to civil litigation generally.

Nor does Target provide any other persuasive authority in support of its position. After its citation to *Lakin*, Target provides a string cite of “see also” cases that have no applicability in the offer of judgment context. Target wants this Court to believe that its position is consistent with the majority rule, but that is fiction.

⁶ Other courts have acknowledged the limited nature of *Lakin*'s holding. *See Bosack v. Soward*, 2008 WL 725184, *1 (W.D. Wash. 2008); *Hoskins v. Business Men's Assurance*, 116 S.W.3d 557, 581 (Mo. Ct. App. 2003).

In truth, the only other jurisdiction that appears to have addressed the precise argument Target advances has flatly rejected Target's argument. Connecticut's offer of judgment rule is nearly identical to South Carolina's offer of judgment rule, both providing that a plaintiff shall be awarded eight percent prejudgment interest if he or she obtains an amount at trial that is at least as much as the rejected offer. *Compare* Conn. General Statutes § 52-192a with S.C. Code § 15-35-400. Connecticut's offer of judgment rule has been in place longer than South Carolina's offer of judgment rule, and its courts (both state and federal) have repeatedly held that the prejudgment interest penalty applies to both actual and punitive damages. *See, e.g., Kregos v. Stone*, 872 A.2d 901, 906-07 (App. Ct. Conn. 2005); *Boulevard Associates v. Sovereign Hotels, Inc.*, 861 F.Supp. 1132 (D. Conn. 1994).

The rationale utilized for this conclusion is equally applicable here. First, there is no textual basis for distinguishing between compensatory and punitive damages. *See Kregos*, 872 A.2d at 906. Connecticut's rule uses the word "recovered," and South Carolina's rule uses the phrase "obtains a verdict[.]" Neither limits the recovery or verdict to a specific category of damages. Second, the offer of judgment rule necessarily is "punitive in nature[.]" *See Boulevard Associates*, 861 F.Supp. at 1141. The logic behind the rule is that a party unwilling to accept a reasonable settlement offer must be punished for requiring the other party and the court to proceed with the time and expense associated with litigation.

Target maintains that prejudgment interest and punitive damages serve different goals, but courts have long rejected such a distinction in the offer of judgment context. *See, e.g., Crowther v. Gerber Garment Technology, Inc.*, 513 A.2d 144, 152-53 (App. Ct. Conn. 1986). By “authoriz[ing] [] legislation enacted to promote fair and reasonable compromise of litigation without trial,” the Legislature intended to both compensate parties who act reasonably and punish parties who do not. *Id.* at 151. If the Legislature would have intended to only punish unreasonable parties with prejudgment interest on compensatory damages, it would have included such a limitation in the rule. Courts are without authority to read in language that is just not there.⁷

Ultimately, there could not be a more perfect case to highlight the rationale behind South Carolina’s offer of judgment rule. Denise was willing to end this litigation for far less than she deserved when she made a \$12,000.00 offer of judgment. (R. p. 710) Target acted unreasonably by rejecting the offer and extending this litigation for what is now more than two years later. The jury’s substantial verdict underscores Target’s unreasonableness, and this Court should execute the penalty the Legislature mandated via Section 15-35-400 and Rule 68.

⁷ The newest member of the United States Supreme Court recently made this same point: “If a statute needs repair, there’s a constitutionally prescribed way to do it. It’s called legislation.” *See Perry v. Merit Sys. Protection Bd.*, 582 U.S. ____ (2017) (Gorsuch, J., dissenting).

CONCLUSION

In February 2015, Denise Garrison invoked Rule 68 to try and resolve this case for much less than it was worth. She did so because she wanted to avoid protracted litigation and because she simply wanted Target to pay for her medical expenses. (R. p. 401) Target said “no” and proceeded to trial.

When it got there, Target told 12 jurors that Denise had not really been stuck by a needle at all and that, even if she had, she acted unreasonably in trying to protect her eight-year-old daughter. (R. pp. 188-89; pp. 190-91; p. 558) Target called no witnesses, presented a false document to the jury, admitted to spoiling the central piece of evidence in the case, and produced a Manager who confessed on the stand that she had been untruthful in a prior deposition. See Garrisons’ Initial Br. at 15-26. Suffice it to say that the jury was not impressed with Target’s litigation strategy.

By constitutional design, cases like this one are placed in the hands of the community. This Court repeatedly has said that weighing the credibility of witnesses and evaluating evidentiary sufficiency are quintessential jury functions. This Court should reinstate the jury’s verdict in its totality and award the Garrisons the entirety of the pre-judgment interest required by law.

Dated: August __, 2017.

Respectfully submitted,

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SOUTH CAROLINA ATTORNEY GENERAL

THIS, the 29 day of August, 2017.



JOSHUA T. HAWKINS

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AUG 31 2017

SC Court of Appeals

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,

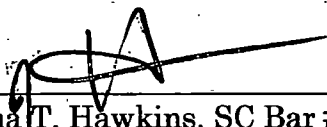
v.

Target Corporation.....Respondent/Appellant.

CERTIFICATE OF COUNSEL

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

August 25, 2017


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SC Court of Appeals