THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2020-000523

Case No. 2014-CP-04-01426

Carla Denis Garrison and Clint Garrison,..... Petitioners/Respondents,

v.

Target Corporation,.....Respondent/Petitioner,

BRIEF OF *AMICI CURIAE* CHAMBERS OF COMMERCE AND INDUSTRY GROUPS IN SUPPORT OF TARGET CORPORATION'S PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI

Chambers of commerce serve as a unified voice for the business community to create and promote environments in which business can flourish. They provide networking and learning opportunities to build stronger and healthier communities. The South Carolina Chamber of Commerce does this for the State, and the Anderson Area, Charleston Metro, Columbia, Greenville, Kershaw County, Lexington, and Simpsonville Area Chambers of Commerce and the Charlotte Regional Business Alliance serve this role in their respective communities.

The South Carolina Manufacturers Alliance, established more than a century ago, represents all manufacturers to advance policies and provide services that help manufacturers create economic strength and jobs.

The South Carolina Retail Association represents retail entities as diverse as apparel, automotive, boutique, chain restaurant, convenience, department, electronics, grocery, hardware, and pharmacy stores. It works to improve the public image, effectiveness, and profitability of the retail industry across the State.

Representing small, family-owned businesses with only a few vehicles to large, national companies with major terminal facilities throughout South Carolina, the southeast, and the nation, the South Carolina Trucking Association has, since 1933, served as the voice of the State's trucking industry and worked to strengthen the industry and the economy for future generations.

The Forestry Association of South Carolina, founded in 1968, supports the landowners, professionals, and companies that make up the State's $21 billion forest

industry by promoting sustainable forestry, use of wood products, and working forests. The Association advocates for a business-friendly climate for landowners and the forest industry while promoting conservation and sustainability of South Carolina's forests.

The Palmetto AgriBusiness Council was formed in 1999 to create an environment in which agribusiness could grow, prosper, and compete in the marketplace of the future. Through legislative, regulatory, and economic-development initiatives, the Council represents forestry, row crops, finance, insurance, poultry, livestock, nursery and landscape, utilities, and more to bring a unified voice to address issues that impact all segments of agribusiness.

The Carolinas Association of General Contractors is a construction trade association made up of contractors and construction-related firms that perform work in South Carolina and North Carolina. Its members are both small and large general contractors, specialty contractors, material and equipment suppliers, and service providers. The Association works to ensure a fair and equitable work business environment for the construction industry.

The South Carolina Insurance Association provide insurance information to consumers, companies, and the media. It is primarily concerned with insurance issues affecting the people of South Carolina.

STATEMENT OF THE ISSUE ON APPEAL

Two critical facts govern any analysis of punitive damages. *First*, the United States Constitution prohibits the award of grossly excessive punitive damages. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). *Second*, our General Assembly has abrogated the common law of punitive damages and codified the amount of punitive damages that courts in this State may impose, along with procedures for imposing them. *See* S.C. Code §§ 15-32-520, 15-32-530.

The Court of Appeals ignored how section 15-32-530 limits the judicial power a court may exercise, and its study of that statutory language was cursory, coming only at the end of its analysis. Focused instead on the supposedly unfair surprise to a plaintiff and other statutory damages caps that do not have constitutional underpinnings, the Court of Appeals held that the statutory cap on punitive damages is an affirmative defense that is waived if not pled. (App. 37.)

The question presented is:

Whether the Court of Appeals erred in holding that section 15-32-530 is an affirmative defense that a defendant waives by not pleading.

INTRODUCTION

For decades, appellate courts have been "concern[ed] about punitive damages that 'run wild.'" *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). So has our General Assembly. As part of its concern, the General Assembly abrogated the common law of punitive damages and imposed statutory limits on punitive damages in the South Carolina Fairness in Civil Justice Act of 2011. *See* 2011 S.C. Acts No. 52, § 2 (codified at S.C. Code § 15-32-530). This case presents the Court with the opportunity to address for the first time section 15-32-530's cap on punitive damages.

The Court should take this opportunity. The Court of Appeals held that this statutory cap is an affirmative defense that is waived if not pled. That is wrong. It disregards that section 15-32-530 changed the common law and limits the power of courts to award punitive damages that exceed the statutory limits. And it misreads the plain language of the statute, which (in contrast with other provisions of the Fairness in Civil Justice Act) does not require anyone to plead anything for the cap to apply.

The need to rectify the Court of Appeals' erroneous conclusion is reason enough to issue a writ of certiorari. But that need is even more urgent given the sweeping impact of this conclusion. How section 15-32-530 is interpreted will affect every case in this State that involves a claim for punitive damages, as well as cases in other jurisdictions in which South Carolina law applies.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals erred in holding that section 15-32-530 is an affirmative defense that is waived if not pled.

Punitive damages "deter the wrongdoer and others from committing like offenses in the future." *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009). Yet these damages can be so extreme that they violate due process, and both this Court and the U.S. Supreme Court have developed rules limiting punitive damages. *See id.* at 584–86, 686 S.E.2d at 183–85.

Along with these judicial decisions, punitive damages are subject to legislative limitations, including, most importantly, the Fairness in Civil Justice Act. *See* 2011 S.C. Acts No. 52. Generally, punitive damages are statutorily capped at the greater of three times compensatory damages or $500,000. S.C. Code § 15-32-530(A).

This cap can increase or go away entirely in limited circumstances. If the wrongful conduct was "motived primarily by financial gain," unreasonably dangerous, and known by the defendant's decisionmaker or if the wrongful conduct could have resulted in a felony, then the cap goes up to the greater of four times compensatory damages or $2 million. *Id.* § 15-32-530(B). And the cap is removed if the defendant intended to harm the plaintiff, was convicted of a felony based on the conduct that harmed the plaintiff, or was impaired by drugs or alcohol. *Id.* § 15-32-530(C).

According to the Court of Appeals, section 15-32-530 is an "avoidance or affirmative defense" under Rule 8(c), SCRCP, that a defendant must plead, or else it is waived. (App. 37.) The Court of Appeals reached this conclusion based on two lines of reasoning. *First*, the purpose of Rule 8(c), the Court of Appeals said, is to prevent

surprise to the plaintiff, who would not otherwise know that the punitive damages cap was an issue in the litigation. (App. 24–25.) *Second*, the Court of Appeals observed that other statutory caps are also waived unless a defendant pleads them. (App. 27–34.)

On both points, the Court of Appeals was incorrect. A plaintiff actually has every incentive to discover the motivations of a defendant's wrongful act, regardless of whether a defendant pleads section 15-32-530. And unlike the other cases, the cap on punitive damages has due process foundations that are not so easily waived.

But before getting to these flaws, two other issues—which the Court of Appeals did not address—warrant attention. The first is the fact that courts have no power to enter an award of punitive damages greater than the statutory cap. The second is that the plain language of section 15-32-530, in addition to other tools of statutory construction, shows that the cap is not an affirmative defense.

A. Courts have no power to enter a punitive damages award in excess of section 15-32-530's cap.

As a threshold matter, the Court of Appeals ignored courts' lack of power to enter an award of punitive damages that exceeds the statutory cap. On this point, due process is irrelevant. What matters is the power that courts have under our constitution.

The South Carolina Constitution vests the "judicial power . . . in a unified judicial system." S.C. Const. art. V, § 1. The judicial power has long been understood to include "the application of the definitions and principles and rules of the common law." *Fenn v. Holme*, 62 U.S. 481, 484 (1858). Punitive damages originated from the common law. *See Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183; *see also Pac. Mut. Life Ins. Co.*, 499 U.S. at 15–16 (discussing punitive damages awards under the common law). Imposing these

damages is therefore part of the judicial power given to our courts by the people of this State. *See* S.C. Const. art. I, § 1 ("All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government.").

The right to change the common law, however, is not the exclusive province of the courts. The legislature may change it too. *State v. Isaac*, 405 S.C. 177, 188, 747 S.E.2d 677, 682 (2013) (noting the General Assembly's "prerogative" to modify the common law). When it comes to this legislative prerogative, common-law rules remain in effect "until there has been some repeal or modification" of them by the General Assembly. *O'Hagan v. Fraternal Aid Union*, 144 S.C. 84, 141 S.E. 893, 894 (1928).

For punitive damages, that legislative modification came in the Fairness in Civil Justice Act. There, the General Assembly not only imposed express limits on the amount of punitive damages that may be awarded, *see* S.C. Code § 15-32-530, but also adopted specific procedures for bifurcated trials, evidentiary standards, and factors to consider for awards of punitive damages, *see id.* § 15-32-520. Although statutes abrogating the common law are strictly construed, *see Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 308, 831 S.E.2d 429, 430 (2019), the General Assembly has spoken clearly here. Thus, the common law has been changed.

Courts must apply section 15-32-530 to every award of punitive damages in this State. They no longer have any power under the common law to award punitive damages in excess of what section 15-32-530 permits, now that the General Assembly has exercised its prerogative to change the common law of punitive damages. *See Smith*

v. United States, 30 U.S. 292, 300 (1831) (when the legislature changes the common law, "the judicial power is limited to the rule laid down"). Without the power to enter such an award, any such award is void, and it violates the principles of democratic self-government enshrined in our constitution. *See Williams v. United States*, 289 U.S. 553, 579 (1933) (an act of judicial power by someone who lacks it is void); *cf. Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) ("A judgment of a court without subject-matter jurisdiction is void.").

B. All tools of statutory construction contradict the Court of Appeals' conclusion.

Even if courts had the power to award punitive damages in excess of the cap in section 15-32-530, the cap is still not an affirmative defense. The analysis of whether section 15-32-530 is an affirmative defense "must begin with the language of the statute" itself. *Jennings v. Jennings*, 401 S.C. 1, 4, 736 S.E.2d 242, 243 (2012). The Court of Appeals examined the language only at the end of its analysis, and then only to contrast section 15-32-530 with a Texas punitive damages statute. Had the Court of Appeals studied the statutory language up front instead of jumping directly to Rule 8(c), it might have avoided its errant conclusion.

First, start with the plain language rule. *See State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (the plain language of a statute must be given effect). Section 15-32-530 provides a blanket rule that applies to *all* cases involving a claim for punitive damages. It says nothing about the cap applying only if the cap is pled as an affirmative defense. *See Rowe v. Hyatt*, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) ("words must be given their plain and ordinary meaning without resorting to subtle or forced

construction to limit or expand the statute's operation"). The statute's plain language should "end[] the inquiry." *Hampton Friends of Arts v. S.C. Dep't of Revenue*, 401 S.C. 372, 375, 737 S.E.2d 628, 630 (2013).

This plain language also undercuts any claim of unfair surprise. In light of this statute that applies to any claim for punitive damages, no plaintiff can credibly claim to be "unaware of" it, as Judge Hill's dissent below observed. (App. 47.) A plaintiff seeking punitive damages in this State is like a plaintiff bringing an employment-discrimination case under federal law. That federal plaintiff cannot be surprised by the caps in 42 U.S.C. § 1981a(b)(3) because those limits "are part of the statutory scheme a plaintiff uses to bring his or her claim." *Sheriff v. Midwest Health Partners, P.C.*, 619 F.3d 923, 933–34 (8th Cir. 2010). A plaintiff in this State similarly cannot be surprised by a cap in a statute that governs all claims for punitive damages.

Second, and if somehow the plain language was not clear, consider the rule that a court should "read the statute as a whole." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Here, section 15-32-530 contains no pleading requirement. Yet another section of the Fairness in Civil Justice Act does: Section 15-32-510 requires that a "claim for punitive damages . . . be specifically prayed for in the complaint." S.C. Code § 15-32-510(A). When one section of an act expressly requires something to be pled, it makes no sense to imply a pleading requirement in another section that lacks such an explicit mandate.

Third, and relatedly, recall that the "cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79,

85, 533 S.E.2d 578, 581 (2000). In looking at sections 15-32-530 and 15-32-510(A) again, the General Assembly knew how to make a party plead something, but it did not do that with the cap. If it had wanted to make the cap something a defendant had to plead, the General Assembly could have done so. That the General Assembly did not do so indicates it did not intend for the cap to be an affirmative defense that had to be pled.

C. The lower court's unfair-surprise analysis ignores the realities of litigation.

The statute's text should be enough to reverse. Yet if more were needed, the weakness of the Court of Appeals' reasoning also supports reversal. Section 15-32-530(A) caps punitive damages at the greater of three times compensatory damages or $500,000, unless certain conduct by the defendant increases or removes the cap. These exceptions, the Court of Appeals contended, "affect the proof at trial," (App. 37 (internal alteration omitted)), yet without notice that the cap is an issue, the plaintiff "is unlikely to conduct the discovery or other investigation necessary to obtain proof" to overcome that cap, (App. 27). That court justified its conclusion based on "[c]onstraints of time and money." (App. 27.)

Of course time and money drive decisions in litigation. But time and money drive decisions about everything. What matters is whether time and money would actually cause a plaintiff not to look for evidence that would increase or remove the punitive damages cap under sections 15-32-530(B) and (C). Litigation experience and common sense both point to the same conclusion: Time and money do not stop plaintiffs from searching for this evidence.

Trial lawyers routinely seek evidence that goes to punitive damages. As just two examples, interrogatories or document requests ask about a defendant's wealth, and deposition questions focus on what decisionmakers knew before the incident giving rise to the lawsuit occurred. Indeed, courts have expressly allowed discovery on such topics, at least if a plaintiff makes a "prima facie showing of his entitlement to punitive damages." *Kappel v. Garris*, No. 2:19-CV-498-DCN, 2020 WL 707123, at *3 (D.S.C. Feb. 12, 2020); *see also, e.g.*, *Holliman v. Redman Dev. Corp.*, 61 F.R.D. 488, 491 (D.S.C. 1973). That plaintiffs conduct such discovery on issues related to punitive damages should be no surprise, given that "the scope of discovery is broad" (though, to be sure, it has limits). *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010) (quoting *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003)).

Common sense reinforces this conclusion. A plaintiff will always want to put the most damaging evidence in front of a jury if punitive damages are a possibility. After all, the more heinous a defendant's actions appear to have been, the greater likelihood a jury will award punitive damages (and award more of them). A plaintiff therefore has every incentive to discover in litigation and offer at trial evidence that a defendant's actions were malicious instead of willful or willful instead of reckless. In other words, no reasonable plaintiff would decide not to seek and offer evidence of the types of actions that raise or remove the cap when punitive damages are truly on the proverbial table. As Judge Hill aptly put it in his dissent, "[l]awyers who have smoking guns use them." (App. 47.) And as a corollary, lawyers always look for smoking guns.

Plaintiffs are thus going to conduct the same discovery and try the same case, regardless of whether a defendant has pled section 15-32-530. Application of the cap involves no surprise, much less unfair surprise.

D. The Court of Appeals untethered section 15-32-530 from its due process moorings.

The Court of Appeals' second line of reasoning fares no better. The Court of Appeals wrongly treated the punitive damages cap like other damages caps. Equating these caps ignores the constitutional issues implicated by punitive damages.

As the U.S. Supreme Court has repeatedly held, punitive damages are limited by the Due Process Clause. *See, e.g., Philip Morris USA*, 549 U.S. at 353. Without limits on when and how these damages may be imposed, unacceptable "risks of arbitrariness, uncertainty, and lack of notice" arise. *Id.* at 354; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) ("This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion."). A defendant therefore has a constitutional right to be free from a grossly excessive punitive damages award.

Our appellate courts have recognized that a party may waive at least some of its due process rights.* *See State v. Brannon*, 407 S.C. 293, 295, 755 S.E.2d 117, 118 (Ct. App. 2014). That waiver, however, must be voluntary, knowing, and intelligent. *See*

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* Amici assume for purposes of this argument that the punitive damages cap may be waived. Given the limitations on judicial power discussed in Part I.A., this waiver question is actually irrelevant.

Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999); *cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (observing that punitive damages "serve the same purposes as criminal penalties," even if they do not come with all of the same protections). Implied waivers of constitutional rights are strongly disfavored. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . . ."). Thus, finding a waiver of a defendant's due process right against unreasonable punitive damages awards solely from not pleading that right as a defense does not comport with constitutional jurisprudence.

Tellingly, none of the damage-cap-waiver cases on which the Court of Appeals relied involved a cap that had constitutional roots. *See Giles v. Gen. Elec. Co.*, 245 F.3d 474 (5th Cir. 2001) (42 U.S.C. § 1981a(b)(3) cap); *Bentley v. Cleveland Cty. Bd. of Cty. Comm'rs*, 41 F.3d 600 (10th Cir. 1994) (tort claims act cap); *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222 (1st Cir. 1994) (uniform commercial code cap); *Simon v. United States*, 891 F.2d 1154 (5th Cir. 1990) (medical malpractice cap); *Ingraham v. United States*, 808 F.2d 1075 (5th Cir. 1987) (medical malpractice cap); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (medical malpractice cap); *Jakobsen v. Mass. Port Auth.*, 520 F.2d 810 (1st Cir. 1975) (municipal liability cap); *Westfarm Assocs. Ltd. P'ship v. Int'l Fabricare Inst.*, 846 F. Supp. 439 (D. Md. 1993) (tort claims act cap); *Pressler v. Irvine Drugs, Inc.*, 215 Cal. Rptr. 807 (Ct. App. 1985) (medical malpractice cap); *Keene v. Brigham & Women's Hosp., Inc.*, 786 N.E.2d 824 (Mass. 2003)

(charitable organization cap); *James v. Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998) (charitable organization cap).

The only case the Court of Appeals cited involving a punitive damages cap was *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143 (Tex. 2015). Notably, that court reached the opposite conclusion of the Court of Appeals. It held that the punitive damages cap is not an affirmative defense because "it does not require proof of any additional fact to establish its applicability" and "it applies automatically to claims not expressly excepted." *Id.* at 157. Ultimately, the Court of Appeals' failure to cite a single case holding that a punitive damages cap is waived if not pled as an affirmative defense makes its decision an outlier that should not stand.

II. The punitive damages question here has a broad impact, so it warrants this Court's attention.

A writ of certiorari is appropriate in this case for multiple reasons. For one, it involves three of the considerations in Rule 242(b), SCACR. *First*, there was a dissent in the Court of Appeals. *See* Rule 242(b)(2), SCACR; (App. 44). *Second*, this case involves a novel question of law, as this is the first case in which our appellate courts have considered whether section 15-32-530 is an affirmative defense. *See* Rule 242(b)(1), SCACR. *Third*, it involves substantial constitutional questions, both on the scope of judicial power to award punitive damages beyond the statutory cap and the due process right of defendants to be free from excessive punitive damages awards. *See* Rule 242(b)(4), SCACR.

For another, this Court should take up this case because of the broad impact of the question on punitive damages. The answer to this question impacts every tort case

that includes a prayer for punitive damages filed not only in our State courts but also in federal courts and other state courts in which South Carolina law applies. *See, e.g.*, *Arismendez v. Nightingale Home Health Care, Inc.*, 493 F.3d 602, 610 (5th Cir. 2007) ("In a diversity action such as this, substantive state law determines what constitutes an affirmative defense."); *Wausau Bus. Ins. Co. v. Horizon Admin. Servs. LLC*, 803 F. Supp. 2d 209, 214 (E.D.N.Y. 2011) (treating whether an affirmative defense applies as controlled by the state whose law governed the claim). In light of the reach that a decision on this question will have, the answer should come from this State's highest court.

CONCLUSION

Target's petition for a writ of certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This Brief of *Amici Curiae* complies with Rules 208(b) and 211, SCACR, as required by Rule 213, SCACR.

s/ Wm. Grayson Lambert
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CERTIFICATE OF SERVICE

I certify that this BRIEF OF *AMICI CURIAE* was served on all counsel of record via electronic mail, pursuant to Supreme Court Order 2020-03-20-01, § (g)(3), on April 10, 2020, and a copy of that electronic mail is attached to this certificate:

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As allowed by the Supreme Court's order of March 20, I am serving via email the motion for leave to file an *amici curiae* brief and the conditionally filed brief of the South Carolina Chamber of Commerce, Anderson Area Chamber of Commerce, Charleston Metro Chamber of Commerce, Columbia Chamber of Commerce, Greenville Chamber, Kershaw County Chamber of Commerce, Greater Lexington Chamber and Visitors Center, Simpsonville Area Chamber of Commerce, Charlotte Regional Business Alliance, South Carolina Manufacturers Alliance, South Carolina Retail Association, South Carolina Trucking Association, Forestry Association of South Carolina, Palmetto AgriBusiness Council, Carolinas Association of General Contractors, and South Carolina Insurance Association.

We will file this by fax, as allowed by that same order, and attach this email to the certificate of service.

I trust you are all staying safe and healthy.

Regards,
Grayson Lambert

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