THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

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S.C. SUPREME COURT

Appellate Case No. 2020-000523
Op. No. 5711 (S.C. Ct. App. filed Jan. 15, 2020)

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

v.

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

RETURN TO RESPONDENT/PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Target's certiorari petition does not apprise this Court of many salient facts. Like in the Court of Appeals, Target attempts to paint a picture of a runaway jury, omitting both the details of its egregious conduct and the substantial harm the Garrisons suffered. The Court of Appeals saw through the facade, and this Court should too. To borrow the late Paul Harvey's tagline, the Garrisons will provide "the rest of the story."

Most telling is Target's failure to call its lead argument what it actually is: a sufficiency of the evidence challenge. The phrase presumably is never used because this Court "only has the authority to correct errors of law[,]" not disturb a jury's factual findings. *See* Jean Hoefer Toal et al., APPELLATE PRACTICE IN SOUTH CAROLINA 227 (3d ed. 2016). Because this record contains far more evidence than necessary to meet the deferential any-evidence standard, this Court should decline Target's first issue, i.e. sufficiency of the evidence on the constructive-notice element.

This Court also should decline Target's second issue, i.e. waiver of the punitive-damages caps. Although Target calls the issue one of first impression, the rule that affirmative defenses must be pled has been around for at least a century. *E.g., Hopkinson v. Mason & Hanger Contracting Co.*, 114 S.C. 297, 103 S.E. 534, 542 (1920). The application of an established rule to a particular set of facts does not warrant discretionary review, but the Court of Appeals reached the correct result in any event.

Target's third issue – whether potential harm is an appropriate punitive consideration – stands on the same footing. This Court specifically said in *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 590-92, 686 S.E.2d 176, 187 (2009) that potential harm is relevant and then reiterated the point in cases like *Austin v. Stokes-Cravin Holding Corp.*, 387 S.C. 22, 52-55, 691 S.E. 135,

150-52 (2010) and *Fairchild v. South Carolina Dept. of Transp.*, 398 S.C. 90, 102, 727 S.E.2d 407, 413 (2012). Target offers no compelling reason to re-think settled law.

At the end of the day, none of Target's issues are cert worthy. This Court may accept certain issues and decline others, *see, e.g., Food Mart v. South Carolina Dep't of Health and Envtl. Control*, 322 S.C. 232, 234 n.1, 471 S.E.2d 68, 689 n.1 (1996), but only the issues raised in the Garrisons' cross-petition are novel ones. When it comes to Target's petition, the waiver issue is the only one for which this Court's narrow review is even remotely plausible, and that is just because there was a dissent in the Court of Appeals on that single issue.

COUNTER-STATEMENT OF ISSUES FOR WHICH TARGET SEEKS REVIEW

1. Should this Court review the sufficiency of the evidence supporting constructive notice, where (1) a unanimous Anderson County jury found the constructive-notice element to be satisfied; (2) the trial court rejected Target's post-trial challenge to the sufficiency of the evidence; (3) no member of the Court of Appeals dissented on the constructive-notice issue; (4) the highly deferential any-evidence standard controls this Court's review; (5) there was direct evidence concerning how long the syringe had been in Target's parking lot in the form of un-objected to testimony; (6) there was circumstantial evidence concerning how long the syringe had been in Target's parking lot in the form of un-objected to (a) testimony and pictures concerning the worn appearance of the syringe, (b) testimony and pictures concerning the presence of other dangerous objects that remained in Target's parking lot for long periods of time, and (c) testimony and exhibits concerning Target's failure to inspect and clean its parking lot; and (7) the trial court gave an un-objected to spoliation instruction concerning Target's loss of what its Manager called the "central piece of evidence" in the case?

2. Should this Court review the Court of Appeals' determination that Target waived the punitive-damages caps, where (1) Target did not plead the statutory caps in its answer, even though it pled the due-process clause's limitation on punitive damages; (2) Target did not raise the statutory caps at any point before the jury returned its verdict; (3) there are three potential caps that impact what evidence must be presented at trial; (4) the Court of Appeals' ruling is consistent with rulings across the Nation; and (5) the doctrine of constitutional avoidance counsels in favor of affirming the Court of Appeals?

3. Should this Court review the Court of Appeals' determination that potential harm is an appropriate punitive-damages consideration, where (1) no member of the Court of Appeals dissented on the potential-harm issue; (2) this Court explicitly held it to be a relevant consideration in very recent decisions; (3) the purpose of punitive damages is to punish and deter, not merely to compensate a plaintiff for actual damages as suggested on page four of Target's petition; and (4) there is concrete evidence, in the form of medical treatment, concerning the potential harm?

COUNTER-STATEMENT OF THE CASE

Denise Garrison was stuck by a "dingy, dirty, and gross" needle in Target's parking lot. (R. pp. 213-15, 424-28) She immediately reported it to Target's Manager and was told to bring the company her medical bills. (R. p. 429) That never happened. Target instead sent an investigator to badger her during the course of her treatment and later lost the syringe that injured her. (R. pp. 446-48, 246-52)

In its petition, Target claims that Denise "suffered a minor puncture wound." Such an attempt to downplay the harm it caused is unfortunate. After discussing the blood that emerged

from Denise's hand on the night of the incident, the Court of Appeals more appropriately detailed her injuries as follows:

> The next day, Denise visited the local hospital emergency room, where a nurse referred Denise to an infectious disease specialist, Dr. Potts, 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.

Garrison v. Target Corp., 838 S.E.2d 18, 24 (Ct. App. Jan. 15, 2020).

The Garrisons had no choice but to file a lawsuit. (R. p. 401) It was filed in the Anderson County Court of Common Pleas, a venue commentators have deemed one of the most conservative in the entire State.[2] The Garrisons requested punitive damages in their pleadings, and Target pled the due-process clause's limitation on punitive damages as an affirmative defense in its answer. (R. pp. 30-54) No mention was made of the statutory caps found in the South Carolina Fairness and Justice Act.

At trial, Target tried to convince the jury that Denise had not been stuck at all and that, even if she had, it was her own fault. (R. pp. 427-28, 781-85) The jury was not impressed by Target's blame-the-victim approach. Nor did the jury find the parties' evidentiary presentations comparable. On the one hand, the Garrisons called five witnesses and entered 12 exhibits into evidence. (R. pp. 65-68) On the other hand, Target did not even put on a case-in-chief, and the only exhibit it entered into evidence during the Garrisons' case-in-chief was a two-page log that contained false information about the company's inspection practices. (R. pp. 65-68, 178) Plus,

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[2] US Law Network lists Anderson as one of the seven most conservative counties. (R. p. 879) The Garrisons make this observation only because of the misguided runaway-jury theme that Target has pressed throughout the appellate proceedings.

Target's Manager admitted on the stand to testifying falsely at a prior deposition. (R. pp. 246-47)

During closing arguments, both sides discussed Target's financial status. (R. pp. 526-65) Target complains in its petition about the Garrisons' "repeated emphasis" on the subject, but it neglects to mention that it never objected to anything the jury was told.[3] Target also does not disclose that its own counsel referred to his client as a "giant company" that would not have been impacted by paying Denise's medical bills and reiterated five times that Target is worth billions of dollars.[4] (R. pp. 551-60, 559) Target's reference to closing – which appears only within its Statement of the Case – is nothing more than diversion, since the jury was instructed that statements by lawyers do not constitute evidence.[5] (R. p. 167)

When the jury returned, it was clear what they thought of Target's conduct. The Garrisons were awarded $108,500.00 in actual damages and $4.5 million in punitive damages. (R. pp. 731-34) Target could have had the punitive-damages question bifurcated from the liability phase of the case but chose not to do so. *See* S.C. Code § 15-32-520(A) (providing that 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") (emphasis added).

Post-trial, Target requested judgment as a matter of law on both liability and punitive damages, and, in the alternative, requested a new trial or a remittitur. (R. pp. 750-59) The trial judge refused to disturb the jury's liability determination but oddly held that any amount of punitive damages against Target would violate the Constitution. (R. pp. 5-17)

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3 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 (2001) (finding issue of improper comments during closing arguments was not preserved absent a contemporaneous objection).

4 There can be no cause to complain when counsel engages in the very battle he insists is improper. *See, e.g., 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").

5 The law presumes that jurors follow a court's instructions. *See, e.g., 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).

On appeal, punitive damages were reinstated. *Garrison*, 838 S.E.2d at 28-31. It was so obvious that the trial court's analysis was flawed that Target did not attempt to defend it. Instead, the company asked for affirmance on an alternative ground, specifically that there was insufficient evidence to support the jury's finding of recklessness. The Court of Appeals unanimously rejected Target's position, *id.*, and Target does not re-urge its sufficiency argument in the certiorari petition.

In light of the evidence supporting Target's recklessness, the Court of Appeals remanded the case to the trial court for consideration of Target's constitutional challenge to the punitive award under the correct due-process standard. *Id.* at 47. In particular, the Court of Appeals instructed the trial court to consider both the actual and potential harm that Target caused, consistent with this Court's decision in *Mitchell*. *Id.* at 32-35. The Court of Appeals refused to apply the punitive-damage caps under Section 15-32-530, since Target failed to plead the caps or raise them at any point before trial. *Id.* at 35-44.

ARGUMENTS

This Court has discretion to accept some, all, or none of the issues Target raises in its petition. *See Food Mart*, 322 S.C. at 234 n.1. A sufficiency of the evidence challenge does not justify discretionary review, but neither do Target's challenges to the Court of Appeals' waiver determination or remand instructions. Each issue is addressed in turn.

I. This Court should not grant certiorari on the sufficiency of the evidence challenge, especially where there is every type of evidence imaginable to support the jury's constructive notice finding.

It is a fundamental rule of appellate procedure "that the weight or sufficiency of the evidence on which the lower tribunal's decision or finding was based will not ordinarily be reviewed on certiorari[.]" 14 AM. JUR. 2D CERTIORARI § 98. In fact, even the Court of Appeals

regularly disposes of such challenges summarily under Rule 220(b). *E.g., Breland v. South Carolina Dep't of Transp.*, 2016 WL 757496, *1 (Ct. App. 2016) (affirming on the issue of constructive notice). This Court is not in the business of re-weighing evidence for a simple but important reason: "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." *See* S.C. R. CIV. P. 38(a) (emphasis added).

In its petition, Target ignores the "highly deferential" review standard that applies to the first issue. *See Gooldy v. Storage Center-Platt Springs, LLC*, 422 S.C. 332, 343, 811 S.E.2d 779, 784 (2018). Under the any-evidence standard, every reasonable inference must be drawn in the Garrisons' favor, and "[t]he jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." *See Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (emphasis added). There of course is no constructive-notice exception to this demanding standard, for this Court has held constructive notice to be a jury question. *See, e.g., Major v. City of Hartsville*, 410 S.C. 1, 3-4, 763 S.E.2d 348, 350 (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").

As the Court of Appeals pointed out, "Target admits that th[e] 'temporal element does not require the plaintiff to precisely measure the lifespan of the hazard.'" *See Garrison*, 838 S.E.2d at 26-27. That would be a nearly impossible task on a subject that is within the control of the premise's owner. *See, e.g., Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315, 325 (Fla. 2001).[6] Instead, there need only be evidence that the syringe was present "for a sufficient length

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[6] *See also Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431, 434-35 (Ky. 2003) (explaining that placing a virtually insurmountable burden on customers to show how long a dangerous condition remained on the premises is inconsistent with proposition that a business owner has duty to keep premises in reasonably safe condition for use of customers).

of time[,]" such that Target should have discovered it prior to Denise's injury. *See* Target's Pet. at p.10 (quoted case omitted). The law in South Carolina and elsewhere is that the jury ordinarily decides this "sufficient-length-of-time" question. *E.g., Major,* 763 S.E.2d at 350 (reversing grant of summary judgment on constructive notice); *Fickling v. City of Charleston,* 372 S.C. 597, 609-10 n. 34, 643 S.E.2d 110, 117 n. 34 (Ct. App. 2007) (reversing grant of directed verdict on constructive notice); *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.").

The standard of review does not permit disturbing the jury's findings and the conclusions of the trial judge and the Court of Appeals as to whether the syringe was in the parking lot long enough. And Target's position is all the more meritless since there is every type of evidence imaginable in this case – namely, direct evidence, circumstantial evidence, and spoliation.

Direct Evidence. To say the jury did not hear any evidence about how long the syringe had been in the parking lot is not accurate. 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, since 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 four months. (R. pp. 375-94, 609, 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) This evidence alone satisfies the any-evidence standard.

But there also is Denise Garrison's testimony as well as the testimony of Target's Manager, Shelby Brintnall. Denise 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)

Such testimony from the Garrisons and Target's own Manager is more than what has been deemed sufficient in prior cases. In *Major*, for example, this Court held constructive notice to be a jury question where a city employee provided "appearance" testimony. *See* 410 S.C. at 3, 763 S.E.2d at 350 ("find[ing] a genuine issue of material fact [ ] as to whether respondent should be charged with constructive notice"). Likewise, in *Fickling*, the Court of Appeals relied on testimony of a City Director who opined that the dangerous condition "had probably been that way for a while[.]" See 372 S.C. at 609-10 n. 34, 643 S.E.2d at 117 n.34. Each case disposes of Target's suggestion that lay opinion cannot support the constructive-notice requirement.

What's more is that Target's characterization of the Garrisons' evidence as speculation suffers from a 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 his testimony about the bolt, did not object to his testimony about the rod and spring, did not object to Denise'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. 394-95, 421-22, 425) It is settled law 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)[7] (citing *Cantrell v. Carruth*, 250 S.C. 415, 421, 158 S.E.2d 208, 211 (1967)).

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[7] In *Tucker*, the defendant waged a sufficiency of the evidence challenge on the ground that certain trial testimony was not probative of causation. *See* 413 S.C. at 130, 776 S.E.2d at 406. That challenge was rejected, since it had "not [been] preserved for review because [the defendant] never made that contention at trial." *Id.* Similarly here, Target may not object to the Garrisons' evidence as speculative when it never made that objection at trial.

Target ignores the material distinction between this case and cases cited in its petition. 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."). It does not work for Target, after-the-fact, to characterize the Garrisons' evidence as "speculative."[8]

Circumstantial Evidence. 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 long enough to put Target on notice. Among the circumstantial evidence introduced was the condition of the syringe, that the syringe was found around old and weathered trash, that other dangerous objects remained in the parking lot for long periods of time, and that Target shirked its cleaning and inspection responsibilities.

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[8] The reasons for this rule include 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 evils are apparent on this record. Target did not give the trial court an opportunity to consider its speculation argument during the 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.").

Circumstantial evidence undoubtedly may be used to prove that a dangerous object was present 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").[9]

It is fallacious for Target 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) for that proposition, but Target alters *Anderson*'s holding beyond recognition. To accept that 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. This Court has never held that the condition and appearance of the dangerous object may not be considered as part of the overall constructive-notice calculus.[10] *See Guthke v. Morris*, 242 S.C. 56, 62, 129 S.E.2d 732, 735 (1963) (emphasis added) (explaining that courts "must consider all of the evidence in deciding whether the case[ ] w[as] properly submitted to the jury").

Such a reading of *Anderson* would put South Carolina in conflict with the rest of the Nation. Jurisdictions throughout the country accept the idea that a dangerous object's condition and appearance provide insight into how long it has been at a given location. *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 previously admitted operates under similar premises-liability principles,

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[9] *See also Breland v. South Carolina Dep't of Transp.*, 2016 WL 757496, *1 (Ct. App. 2016) ("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[.]").

[10] But even accepting the expansive reach Target tries to give *Anderson*, there is an obvious distinction between a banana and a syringe. By its nature, a banana would eventually take on a "withered" and "mushy" appearance over time, regardless of whether it ended up on the floor. Not so with a syringe. Unlike a banana, a syringe does not become "dirty, dingy, and gross" over time, meaning that a perfectly reasonable inference could be drawn that it became that way by being in the parking lot long enough to acquire that appearance. Target would have this Court do away with constructive notice altogether and make actual notice the standard. That of course is not the 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"). Again, courts "must consider all of the evidence in deciding whether the case[ ] w[as] properly submitted to the jury." *See Guthke*, 242 S.C. at 62, 129 S.E.2d at 735 (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, 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, 276) This testimony was consistent with Denise's testimony who testified that it was dirty and nasty. (R. p. 424) Target did not object to any 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. 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) (cited case omitted). 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 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 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, 609, 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 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'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 is wrong for Target to claim in the Court of Appeals 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. Target's duty of ordinary care encompasses an obligation to both clean and inspect. *Id.*

Indeed, Target's Manager 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 also 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. pp. 194, 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. pp. 194, 210)

Further underscoring Target's awareness was the company's 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. pp. 201, 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) But the problem with these claims was that the jury did not believe that the company cleaned and inspected, despite the company being 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); *LeFont v. City of Myrtle Beach*, __ S.E.2d __, 2020 WL 1164292, *4 (Ct. App. Mar. 11, 2020) (reversing grant of directed verdict on constructive notice where "the record contain[ed] testimony that . . . employees were regularly in the parking lot and could have detected the hole and that the City had procedures in place for fixing holes").

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. pp. 302, 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 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 conducted "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 was 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 the Technician 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. pp. 233, 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. pp. 196, 311-12, 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. pp. 608, 613, 620) The Manager's own documentation following the incident indicated that the parking lot was not clean. (R. pp. 607, 611) Denise, Clint, and Clint's mom all observed that they had seen "trash everywhere" in Target's parking lot on different occasions. (R. pp. 375, 426-27, 490) Clint 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.

pp. 338, 375-96, 609, 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").

Again, this Court's decision in *Major* illustrates the type of constructive-notice evidence that suffices. Target tried to characterize *Major* solely as a "continual condition" case in the Court of Appeals, but that characterization is inaccurate. *Major* reversed the Court of Appeals' 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.

To be sure, Target has ignored 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.[11] *Id.*

Target simply ignores much of the evidence in this case, and, for the evidence it addresses, it wrongly calls it "speculation." This is not a new strategy, but it is one that courts consistently reject. *See Baruch v. Starwood Hotels & Resorts Worldwide, Inc.*, 773 Fed. App'x 158, 159 (4th Cir. 2019) (reversing grant of summary judgment where trial court improperly found the plaintiff's evidence to be "speculative" as opposed to valid "circumstantial evidence").

Spoliation. 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 that allows a jury to draw a negative inference against the party responsible for losing or destroying evidence. *See 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 Brintnall later testified in a deposition that the syringe was destroyed by another Target employee. (R. pp. 241-42, 246-47) At trial, Brintnall was forced to admit that her deposition testimony was false. (R. pp. 246-47) Brintnall confessed that the syringe turned up after her deposition but that it subsequently was lost again. (R. pp. 248-51) Brintnall 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

[11] Notably, Target does not challenge sufficiency of the evidence on the issue of punitive damages, which means that it is now conclusively established, by clear and convincing evidence, that its conduct was reckless.

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. It has been 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"). So too here.[12]

* * * *

Target failed to lodge objections in the trial court to the mountain of evidence presented on 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. Any of the categories of evidence discussed above alone satisfies the standard, so it certainly suffices cumulatively. There are no "special and important reasons" justifying review of the Court of Appeals' liability affirmance. *See* Rule 242(b), SCACR.

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[12] In the Court of Appeals, Target tried to combat its spoliation with the case of *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009), which 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[.]" Specifically, the *Pringle* court reasoned that "there was no indication the chair was wobbly, weak, unstable, or otherwise defective immediately prior to its collapse." Unlike in *Pringle*, 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 as well as 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.

II. This Court should not grant certiorari on Target's waiver of the punitive-damages caps.

Target's certiorari petition does not challenge Denise's entitlement to punitive damages. Rather, the company seeks a reduction of the jury's $4.5 million award. Both the due-process clause and the statutory caps under Section 15-32-530 are reduction mechanisms, but the Court of Appeals correctly determined that only the due-process clause was a possibility in this case.

This Court should not review the Court of Appeals' waiver holding. For at least 100 years, this State has adhered to the uncontroversial rule that affirmative defenses are forfeited if not timely asserted. *E.g., Hopkinson*, 103 S.E. at 542. Target failed to raise the punitive-damages caps in its answer or at any point before the trial concluded. Such conduct violates Rule 8(c), which requires a defendant to plead "any [ ] matter constituting an avoidance or affirmative defense."

Importantly, Section 15-32-530 contemplates three punitive scenarios: a $500,000.00 cap, a $2 million-dollar cap, or no cap whatsoever. If there is felonious conduct or conduct motivated by unreasonable financial gain, for example, then there could be either a $2 million limitation or no limitation at all. Otherwise the limit is $500,000.00. The scenario that applies in any given case will depend on the evidence.

When, as here, a liability limitation is tied to the evidence, a defendant must put the plaintiff on notice before the case is tried. The Court of Appeals correctly reasoned that a contrary conclusion would lead to prejudice and unfair surprise. *See Garrison*, 838 S.E.2d at 36-44. When a statutory cap depends on the proof, notice is essential to provide plaintiffs with an opportunity to develop necessary facts – whether by pre-trial investigation, discovery, or making sure all needed witnesses are available at trial. *Id.* at 41-44. A defendant cannot wait until after the trial is over and shout "gotcha."

Cases throughout the Nation fall in line with the Court of Appeals' decision. *E.g., Jakobsen v. Mass. Port Auth.*, 520 F.2d 810 (1st Cir. 1975); *Ingraham v. United States*, 808 F.2d 1075 (5th Cir. 1987); *Knapp Shoes, Inc. v. Sylvania Manufacturing Corp.*, 15 F.3d 1222 (1st Cir. 1994); *Bentley v. Cleveland Cnty. Bd. of Cnty. Commissioners*, 41 F.3d 600 (10th Cir. 1994); *Simon v. United States*, 891 F.2d 1154 (5th Cir. 1990); *Westfarm v Assoc. v. Int'l Fabricare Institute*, 846 F.Supp. 439 (D. Md. 1993), *aff'd*, 66 F.3d 669 (4th Cir. 1995).

Target barely mentions the proof-at-trial rationale that animates these cases, instead claiming that the caps apply "automatically." But taking that argument to its logical conclusion, a defendant could wait until after a case was closed, and at a time when the court no longer even has jurisdiction, to take advantage of the caps. Such delay is neither practical nor in line with ordinary litigation practice, for courts are supposed to act on requests from parties. This Court has made clear that it is "unwilling to torture the rules in such a way to correct possible mistakes in the filing of motions or misjudgments in strategic procedural decisions" because, "[t]o do so[,] would jeopardize the continuity and uniformity that is essential to the orderly administration of the legal system." *Valentine v. Davis*, 319 S.C. 169, 173, 460 S.E. 2d 218, 220 (1995).[13]

To the extent Target means to equate "automatically" with the idea that a trial judge is supposed to apply the caps even if a defendant waits to raise them via post-trial motion, then that argument fares no better on the facts of this case. Such a procedure might make sense, as other courts have explained, when there is a single cap that applies no matter what. *See, e.g., Carter v. United States*, 333 F.3d 791, 797 (7th Cir. 2003) (explaining, through Judge Posner, that there were "[n]o facts that might have emerged had the [defendant] flagged its reliance on the cap

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[13] *See also TransAm Trucking v. Administrative Review Bd.*, 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting) ("We don't normally make arguments for litigants[.]").

earlier").[14] But that is not how South Carolina's statute is structured. In South Carolina, there are different caps that are dependent upon on the evidence.

Nor does it change the result to say that the statute is silent on whether the caps are an affirmative defense. Target pled the due-process clause's limitation on punitive damages in its answers, (R. pp. 40, 53-54), even though no one would seriously contend that the Constitution speaks directly to pleading. It is Rule 8 that dictates when a liability limitation must be pled affirmatively, not the Constitution or the South Carolina Code.

The bottom line is that applying the caps would be unfair to both Denise and the jury who saw fit to punish Target. This Court should not go out of its way to decide an issue Target did not bother to raise in a timely fashion, especially when, as explained in the cross-petition, the caps are of questionable constitutional validity to begin with. *See State v. Whitesides*, 397 S.C. 313, 725 S.E. 2d 487 (2012) (interpreting statute in a manner that avoided constitutional inquiry). Although the company speculates that the Court of Appeals' waiver determination "stands to impact hundreds of litigants every year[,]" there is a simple way to avoid Target's unfounded fear, and it is entirely within the control of defendants: just plead the caps or at least raise them at some point before trial.[15] *Cf. Riley v. California*, 573 U.S. 373, 403 (2014) (Roberts, C.J., writing

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[14] *See also Taylor v. United States*, 821 F.2d 1428, 1433 (9th Cir. 1987) ("We recognize, however, that application of § 3333.2 may in some instances require resolution of factual issues. In such cases, plaintiffs may be prejudiced if defendants do not raise § 3333.2 prior to judgment. We need not decide the question in this case because application of § 3333.2 here requires no additional factual inquiry on our part.").

[15] Target has enlisted the help of Amici who seek leave to file a brief supporting the company's certiorari request. Apparently, it is not enough for these organizations that that the caps provide them great protection; they believe that defendants should not even be required to exert the minimal effort of asserting a protection that other States have deemed unconstitutional. Amici's position is flawed for many reasons. Most fundamentally, the entire brief proceeds on the faulty assumption that the Court of Appeals was engaging in an exercise of statutory interpretation. Whether the caps are an affirmative defense is not a question of interpreting Section 15-32-530; it is instead, as members of the Supreme Court have recognized, a question of interpreting Rule 8's catchall provision. *See Taylor v. United States*, 485 U.S. 992, 992-93 (1988) (White, J., dissenting from denial of certiorari) (arguing that the Court should resolve the circuit split over whether "a statutory limitation on liability is an affirmative defense under Rule 8(c)"). Given that the issue is not one of statutory-interpretation, Amici's statements about stepping on the Legislature's toes make little sense. The South Carolina Fairness in Civil Justice Act is completely silent on whether the caps are an affirmative defense, which means that, per the

for a unanimous Supreme Court) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.").

III. This Court should not grant certiorari over the Court of Appeals' remand instructions.

After concluding that Target waived the statutory caps, the Court of Appeals remanded this case to the trial court for consideration of the due-process clause's limitation on punitive damages. *Garrison*, 838 S.E.2d at 32-35. The remand instructions relied on this Court's seminal decision in *Mitchell*, which requires a post-trial review under various factors, including "the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award[.]" Id. at 32 (quoted case omitted). Target wants to evade *Mitchell*'s potential-harm mandate and instead limit the remand inquiry to actual harm.

This Court should decline Target's third issue for the simple reason that it flies in the face of settled law. Post-*Mitchell*, this Court has repeatedly emphasized the importance of considering potential harm. *See Fairchild*, 398 S.C. at 102, 727 S.E.2d at 413; *Austin*, 387 S.C. at 52-55, 691

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usual course, Rule 8(c) provides the rule of decision. The fact that the statute discusses what a plaintiff must plead is actually counter to Amici's position because that just shows that the Legislature could have abrogated the Rule 8(c) analysis for defendants if it had wanted to do so. *See, e.g., State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997) (explaining that "[t]he General Assembly is presumed to be aware of the [existing] common law"). Indeed, it is gravely wrong to suggest that the General Assembly intended to legislate through silence. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXT §8, p.94 (2012) ("The traditional view [is that an] absent provision cannot be supplied by the courts [because t]o supply omissions transcends the judicial function" and equates to "judicial legislation.") (cleaned up); *id.* at §60, pp.349-50 (explaining that modern legal theory rejects the "what-would-the-legislature-have-wanted" approach to judicial decision-making). Nor is it logical to give the waiver analysis a constitutional spin. Target raised the due process clause's limitation on punitive damages in the trial court, and the Court of Appeals issued a remand on that issue. The only constitutional question regarding the caps is whether the Legislature even had authority to enact them to begin with. *See* Garrisons' Cross-Petition. Furthermore, Amici's citation to *Sheriff v. Midwest Health Partners*, 619 F.3d 923, 933-34 (8th Cir. 2010) is particularly misleading because it does not tell this Court that it is citing to a separate opinion that disagreed with the majority's conclusion. Ultimately, to put Amici's position in perspective, consider the following question: What if a plaintiff argued that he had no obligation to put the defendant on notice about what cause of action he was bringing in the case but, instead, it was appropriate for the court to just search the law books after the trial was over and hold the defendant responsible for whatever claim fit the evidence? No one would reasonably contend that such a process comports with how our legal system is supposed to operate.

S.E. at 150-52. No Judge on the Court of Appeals dissented on this issue, and Target cites no authority supporting the new rule it proffers.

The company's proposal, to be sure, is premised on a fundamental misunderstanding of punitive damages. The purpose of punitives is not just to compensate a plaintiff for the actual harm suffered; the goal is to punish the defendant's wrongdoing and deter the defendant from future misconduct. *See Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). Neither of these latter objectives can be accomplished if actual damages and punitive damages are indistinguishable.

So what Target characterizes as "speculative" is precisely what this Court has called valid "potential harm." In *Austin*, for instance, this Court reviewed the conduct of an automobile dealership that failed to disclose "extensive damage prior to the sale." 387 S.C. at 31, 691 S.E.2d at 139. A jury awarded "$26,371.10 in actual damages and $216,600 in punitive damages." *Id.* In rejecting a due-process challenge to the punitive award, this Court explained that, even though the undisclosed information had not caused any physical injuries to the plaintiff, "there was a potential for [the plaintiff] or his passengers to be subjected to serious injury." *Id.* at 54, 151 (emphasis added). Such potential harm was deemed a permissible punitive consideration there, just as it is a permissible consideration here.[16]

Ultimately, it would be difficult to imagine more concrete evidence than what appears in this record. Denise was "prescribed several medications targeted at preventing HIV and hepatitis" and she "had to have her blood tested every three months for approximately one year" to make sure she did not develop those diseases. *Garrison*, 838 S.E.2d at 24. On these points,

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[16] Of course, the reasoning used in cases like *Mitchell* and *Austin* is consistent with courts across the country. *See, e.g., In re New Orleans Train Car Leakage Fire Litigation*, 795 So.2d 364, 386 (La. Ct. App. 2001) (evaluating punitive damages relative to potential harm, explaining that, had a train car leaking flammable gas exploded, "whole city blocks of a residential area could have been destroyed").

there is both oral testimony and medical documentation. (R. pp. 430-52, 614-19) It was not, therefore, "unprecedented" for the Court of Appeals to acknowledge that "the potential harm to Denise involved contracting a communicable disease such as HIV or hepatitis, along with the attendant medical costs and possible death." *Garrison*, 838 S.E.2d at 33 (emphasis deleted).[17]

CONCLUSION

Although Target has tried to give the impression that it was dealt a bad hand at trial, the full record reveals why the jury levied its substantial award. They heard evidence that Target initially told Denise to bring her medical bills to the company yet later decided that sending an investigator to interview her while she was recovering was a better idea. 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 its parking lot for long periods. They watched Target fail to present a case-in-chief, saw that the only document it entered into evidence contained false information, knew that it lost what it self-described as the "central piece of evidence" in the case, and heard its Manager admit on the stand to testifying untruthfully in her prior deposition about the central piece of evidence. And if all of this were not enough Target tried to blame Denise for her own injury and then stated during closing arguments that it was a "$73 billion dollar-a-year corporation" that would not have been impacted by paying her medical bills. Only through a revisionist approach to the trial has Target concocted its story of outrage.

The elephant in the room is that Target made questionable strategic decision after questionable strategic decision. The company did not raise the statutory caps in its answer or at any point before trial, refused a modest offer of judgment that would have ended this case in its

[17] Plus, there was potential harm that the Court of Appeals did not even acknowledge – namely, the emotional distress that will linger for years due to Denise's traumatic experience. *Compare* this case *with Shannon v. Sasseville*, 684 F.Supp.2d 169, 177-78 (D. Me. 2010) (upholding punitive damages and explaining that the defendant's actions produced "noneconomic damages from psychological trauma likely to persist for years to come").

beginning stages, did not object to the admission of any of the evidence it complains about on appeal, did not request that the liability and punitive phases be bifurcated, agreed to the spoliation instruction that was given to the jury, and did not object – but instead engaged – in the closing argument it complains about in its Statement of the Case. If this Court remains "unwilling" to involve itself in litigation strategy, *see Valentine*, 319 S.C. at 173, 460 S.E. 2d at 220, then Target's petition must be denied.

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Respectfully submitted,

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