

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,
Petitioners-Respondents,

v.

TARGET CORPORATION,
Respondent-Petitioner.

**RESPONSE TO PETITIONERS-RESPONDENTS' PETITION FOR A WRIT
OF CERTIORARI**

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ISSUES FOR WHICH THE GARRISONS SEEK REVIEW

1. Rule 68 of the South Carolina Rules of Civil Procedure allows the trial court to grant plaintiffs prejudgment interest on an award that exceeds the amount she sought in an earlier-rejected offer of judgment. The purpose of Rule 68, read in conjunction with related South Carolina cases, demonstrates that prejudgment interest under the rule applies only to compensatory damage awards. Are the Garrisons entitled to prejudgment interest on the jury's punitive award, even though the retributive purpose of punitive awards conflicts with the compensatory function of prejudgment interest?

2. The Garrisons waived consideration of their constitutional attack on Section 15-32-530 of the South Carolina Code by omitting that question in their petition for rehearing before the Court of Appeals. Rule 242(d)(2), SCACR. Moreover, thirty years ago, this Court rejected the Garrisons' precise argument in the context of the South Carolina Tort Claims Act. *See Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990). Should this Court overlook the Garrisons' waiver to revisit a question this court resolved three decades ago?

STATEMENT OF THE CASE

I. Statement of the Facts

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

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

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

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. About a year after the offer of judgment, Denise, this time joined by Clint, 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.)

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

Nevertheless, Clint and Denise each speculated that the syringe had been in the parking lot for a lengthy period of time. Clint testified that he thought the syringe “had been there a while.” (R. p. 418, line 11.) He did not explain how long “a while” might be, although he theorized that the syringe might have been there for as long as two weeks. (R. p. 418, lines 12–20; p. 421, line 16–p. 422, line 4.) Clint’s vague hypothesis was not based on personal knowledge of the syringe, but

instead on the syringe’s “weathered,” “dirty, dingy, and gross” appearance and a photograph showing the syringe’s landing spot near a cigarette butt and a piece of twine. (R. p. 421, line 6–p. 422, line 4; p. 418, lines 12–20.) Similarly, Denise claimed that she “could tell, obviously [the syringe] had been there a long time,” but did not explain how she “could tell” that. (R. p. 425, lines 22–23.)

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

In closing arguments at trial, the Garrisons’ counsel implored the jury to treat Target as an enemy of Anderson County and its citizens.¹ To that end, counsel told the jury not fewer than ten times that Target saw \$73 billion in revenue in 2014—a fact not offered into evidence during trial. (R. p. 527, line 14; p. 528, line 2; p. 529, lines 11–12; p. 530, lines 1–2; 533, lines 14–15; 541, lines 1–2; p. 542, line 10; p. 549, lines 16–17; p. 550, lines 13–14, 18; p. 563, lines 19–20; p. 564, lines 22–23.) The repeated emphasis on that large figure was particularly striking in light of the precise sum of compensatory damages he suggested would make the Garrisons

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

whole: \$11,000 to cover medical bills, Clint’s lost wages, and loss of consortium. (R. p. 548, line 15.) In closing, the Garrisons’ counsel suggested that Target’s “perception of Anderson, South Carolina, is probably worse than their ignorance of where we are on the map.” (R. p. 565, lines 4–11.)

The jury listened. Following ninety minutes of deliberations, it returned a verdict awarding the Garrisons compensatory damages of \$108,000 and punitive damages of \$4.5 million. (R. pp. 24–27.)

II. Procedural History

After trial, the Garrisons filed a motion seeking prejudgment interest, post-judgment interest, and costs. (R. pp. 711–743.) A day later, Target sought judgment as a matter of law and a new trial. (R. p. 751.) In its motion, Target challenged, among other things, 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 Target’s constitutional due process rights and exceeded statutory limits. (R. p. 751.) The trial court upheld the jury’s liability finding, but struck the punitive damages award in its entirety. (R. pp. 5–6, 11.) With respect to the Garrisons’ motion for interest and costs, the court allowed only post-judgment interest drawn on the compensatory awards. (R. p. 15.) On February 9, 2017, it 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.) The Garrisons appealed, and Target cross-appealed. (R. pp. 923–972.)

On January 15, 2020, the Court of Appeals issued an opinion affirming the circuit court's denial of Target's request for judgment as a matter of law as to liability, reversing the trial court's vacatur of the jury's punitive damages award, reversing the circuit court's conclusion that the punitive damages award exceeded the cap in South Carolina Code section 15-32-530, affirming the circuit court's conclusion that the punitive damages award violated due process, remanding for remittitur of the award, and affirming denial of Target's new trial motion and the Garrisons' prejudgment interest arguments. *Garrison v. Target Corp.*, 838 S.E.2d 18, 47 (S.C. Ct. App. 2020). Because the Court of Appeals held that the punitive damages cap constitutes an affirmative defense that Target waived, it never considered the Garrisons' argument that the cap violates a plaintiff's constitutional right to a jury trial.

On the prejudgment interest issue, the Court of Appeals agreed with Target that the plain language of Rule 68(b) directs the trial court to compute prejudgment interest on the final judgment amount—after resolving all post-trial motions—rather than on the verdict amount. *Id.* at 46. It also rejected the Garrisons' argument that punitive damages awards should factor into prejudgment interest calculations. *Id.* To reach that conclusion, the Court of Appeals specifically distinguished a decision from the Connecticut Court of Appeals. *Id.* at 47 (discussing *Kregos v. Stone*, 872 A.2d 901 (Conn. App. Ct. 2005)). It noted, for example, the unique language in Connecticut's offer-of-judgment statute, and that

Connecticut maintains separate prejudgment interest and offer-of-judgment statutes. *Id.*

Both parties petitioned for rehearing. Notably, the Garrisons petitioned for review “with respect to the offer of judgment analysis only.” Garrisons’ Pet. For Rehearing, App. at 84. The Garrisons did not raise the constitutional challenge to section 15-32-530’s punitive damages cap in their petition. *See id.* The Court of Appeals denied rehearing.

ARGUMENTS

This case presents several important issues warranting review—the Court of Appeals decision substantially departs from over six decades of this Court’s prior cases placing clear limits on constructive notice, incorrectly disposes of a novel procedural issue over a dissenting opinion, and, under the circumstances of the case, announces an unprecedented method for assessing the constitutionality of a punitive damages award. *See* Target’s Pet. for a Writ of Certiorari at 9–23; Rule 242(b), SCACR. Indeed, that both parties decided to seek certiorari alone suggests that the Court of Appeals’ decision merits review. But unlike the important issues that Target raises in its petition, the issues the Garrisons raise fall far short of this Court’s standard for granting certiorari. *See* Rule 242(b), SCACR. The Court should thus decline to review the questions the Garrisons present.

I. This Court should deny review of the Court of Appeals’ prejudgment interest decision because the purpose of Rule 68, read in conjunction with relevant case law, confirms that it applies only to compensatory awards.

The Garrisons ask the Court to grant certiorari to consider whether interest allowed under Rule 68 runs on a subsequent award of punitive damages. But that question is not sufficiently important to merit this Court’s review. This issue garnered no dissenting opinion in the Court of Appeals, implicates no substantial constitutional issue, and conflicts with no prior decisions of this Court or the U.S. Supreme Court. *See* Rule 242(b), SCACR. The purpose of Rule 68, read in conjunction with related South Carolina cases, easily demonstrates that prejudgment interest under the rule applies only to Denise’s compensatory damages award. Both the Court of Appeals and the trial court correctly decided this issue.

Rule 68 allows either party to file “a written offer of judgment . . . to take judgment in the offeror’s favor . . . for a sum stated therein.” Rule 68(a), SCRCF. Relevant here, if the plaintiff’s offer is rejected and the plaintiff prevails, 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.” Rule 68(b), SCRCF. Although Rule 68 differs from its federal counterpart in some respects, the Court of Appeals 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 argue that prejudgment interest must be based on the monetary amount returned by the jury, including any punitive damages award. *See* Garrisons’ Pet. for a Writ of Certiorari at 3–6. But their theory is wrong. Prejudgment interest should not be awarded for punitive damages, because prejudgment interest serves to compensate the plaintiff, while punitive damages serve to punish the defendant.

Prejudgment interest is compensatory. It makes 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”). 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, 378, 529 S.E.2d 528, 533 (2000).

In contrast, punitive damages are retributive and deter future bad conduct. *See id.* at 378–79, 529 S.E.2d at 533; *see also Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001) (“Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes.”). In fact, this Court 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 Communities, Inc.*, 420 S.C. 321, 353, 803 S.E.2d 288, 306 (2017) (rejecting argument that punitive damages should be treated like compensatory damages in an insurance-coverage dispute).

Betraying the weakness of their argument, the Garrisons primarily support their reading of Rule 68 with a lone Connecticut intermediate court decision. *See* Petition at 4–5 (citing *Kregos v. Stone*, 872 A.2d 901 (Conn. App. Ct. 2005)). But that decision is an outlier. Consistent with the decisions of both the Court of Appeals and the trial court here, several other states 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, 191–92 (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, 975–76 (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).

The Court of Appeals correctly rejected the Garrisons’ prejudgment interest theory, and this Court need not review that aspect of its decision.

II. This Court should not entertain the Garrisons’ constitutional challenge to South Carolina’s punitive damages cap because the Garrisons waived this question.

The Garrisons waived this Court’s consideration of their constitutional attack on South Carolina’s punitive damages statute. “Only those questions raised in the Court of Appeals *and* in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(2), SCACR (emphasis added). Because the Garrisons failed to raise the constitutional attack in their petition for rehearing before the Court of Appeals, *see* App. at 83–84, the Court can ignore this question. Indeed, the Garrisons themselves acknowledge that this issue is superfluous to their certiorari petition. Garrisons’ Pet. for a Writ of Certiorari at 1 n.1.

But even in response to Target’s petition, this Court need not address the challenge because the broad constitutional attack lacks merit and reaches beyond the issues Target presents. Indeed, this Court has already addressed and rejected the substance of the Garrisons’ arguments. In *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990), the Court considered 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 the Garrisons raise 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 *Wright* 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*, section 15-32-530 simply sets the outer limits of the punitive remedy available to all plaintiffs who bring actions in South Carolina. The cap therefore reflects the considered judgment of the legislature in defining the legal consequences of facts found by the jury. Thus, 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 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).

CONCLUSION

The Court should decline to review the issues raised in the Garrisons' petition.

Respectfully submitted,

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