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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Case No. 2020-000523

CARLA DENISE GARRISON AND CLINT GARRISON,

Petitioners-Respondents,

v.

TARGET CORPORATION,

Respondent-Petitioner.

BRIEF OF RESPONDENT-PETITIONER

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INTRODUCTION

On a visit to Target's Anderson County store in 2014, Carla Denise Garrison's daughter picked up a discarded syringe in the parking lot. She showed it to her mother, who then swatted it away, allegedly suffering a minor puncture wound in the process. She sought prophylactic treatment for communicable diseases, but acquired none. She and her husband, Clint, sued Target for negligence.

The Garrisons needed to show that Target knew the syringe was present in the parking lot to prove Target liable. At trial, the Garrisons introduced no evidence showing that Target actually knew the syringe was there. They instead tried to show that the syringe was there long enough to allow the jury to conclude that Target had "constructive knowledge" of its presence. But on that score, the Garrisons' evidence was the mere speculation that the syringe must have been in the parking lot a while, because it looked "weathered" and "gross." Under decades-settled precedent of this Court, that type of evidence is insufficient to show constructive knowledge, so Target moved for a directed verdict. But the trial court denied the motion and allowed the question to go to the jury, who found in favor of the Garrisons, awarding them $108,000 in actual damages and $4.51 million in punitive damages.

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

On appeal, the Court of Appeals affirmed the trial court's decision to uphold the liability finding, but it reversed the decision to vacate the award of punitive damages. It then held that the statutory cap on punitive damages did not apply because Target did not invoke the cap as an affirmative defense, even though the statute imposes no such requirement. The court remanded the case for the trial court to evaluate whether the punitive-damages award, which was 44 times greater than the actual-damages award, exceeded the amount due process tolerates. And on that question, it instructed the court to consider when assessing actual damages how bad things might have been had the syringe been contaminated with disease.

STATEMENT OF ISSUES ON APPEAL

1. **Whether the jury's verdict must be reversed, because the Garrisons failed to present evidence sufficient to establish constructive notice.**

For more than sixty years, this Court has articulated clear rules governing premises liability in cases where a plaintiff claims to have suffered

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

The Court of Appeals acknowledged this authority but, with no explanation, held it did not apply. This Court should reverse that holding, vacate the jury's verdict, and remand for judgment in favor of Target. Any other result would dilute South Carolina's settled law on foreign-substance premises liability.

2. If the Court sustains the liability finding, whether the jury's punitive damages award must be remitted to conform to South Carolina's statutory cap, which does not require defendants to assert the cap as an affirmative defense.

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

The Court of Appeals held that the cap is an affirmative defense, and that defendants must plead that defense in their answer for the cap to apply. The Court held further that Target waived the "defense" by failing to plead it.

Because the Garrisons produced insufficient evidence to support a liability finding, the Court need not reach this question. But if it does, it should reverse the Court of Appeals' holding that the punitive damages cap must be asserted as an affirmative defense and remand the case to the trial court to remit the punitive damages award consistent with the statutory cap.

3. If the Court sustains the liability finding and concludes the statutory cap on punitive damages does not apply, whether speculative "potential harm" from circumstances different from those shown at trial can augment actual damages when evaluating the constitutionality of a punitive damages award.

This Court, like the United States Supreme Court, has held that due process limits the amount of punitive damages juries can impose on

defendants. Punitive-damage awards that are more than ten times greater than the plaintiff's actual damages are most suspect. In a narrow category of cases, this Court has recognized that actual damages can be augmented to account for real "potential harm" that the plaintiff might actually have suffered.

Here the Court of Appeals instructed the trial court to evaluate the ways that Mrs. Garrison's injury could have been worse had the facts been contrary to the evidence adduced at trial. The Court need not reach this question because the Garrisons' evidence cannot sustain a liability finding. But if the Court disagrees, it should reverse the Court of Appeals' holding that such speculation—about damages that theoretically could have occurred but did not—can be used to augment actual damages in evaluating whether a punitive-damage award exceeds the limit imposed by due process.

STATEMENT OF FACTS & PROCEDURAL HISTORY

I. May 21, 2014

On the evening of May 21, 2014, Denise Garrison drove to Target's Anderson County store with her eight-year-old daughter. (App. 763, 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. (App. 764, lines 4-8, 18-19.) She "immediately reacted and swatted" the syringe, which flew down to the pavement and

landed near a cigarette butt and a piece of twine. (App. 552, line 22–553, line 6; App. 764, line 9; App. 765, line 25–766, line 3; App. 952.) Denise then looked down at her right palm and saw "a tiny bead of blood and a puncture wound." (App. 768, lines 21-22.)

After washing her hands in the store's restroom, Denise located Shelby Brintnall, the lead Target manager that evening. (App. 533, lines 6-12; App. 767, lines 18-20; App. 769, lines 4-11.) Brintnall went with Denise out to the parking lot and took a photograph of the plastic syringe. (App. 554, lines 23-25; App. 561, line 24–562, line 9.) But there was no needle in the syringe. (App. 799, line 7.)

Brintnall then interviewed Denise and filled out a guest incident report. (App. 551, line 23–552, line 17.) Later that evening, Brintnall filled out another report that included Brintnall's notes regarding the investigation and personal impressions about the incident. (App. 557, lines 4-25; App. 567, line 10–571, line 16.) In that report, Brintnall noted that she did not see a needle. (App. 557, line 17; App. 955.)

II. Denise seeks medical treatment.

The next day, Denise went to the emergency room, where an infectious disease specialist prescribed her an HIV antiviral medication and antibiotics. (App. 773, lines 12-15; App. 776, line 11–437, line 2.) The combination of medicines caused side effects—vertigo, dizziness, loss of balance, and

nightmares—that affected her marital relationship. (App. 777, line 3–778, line 14; App. 737, lines 4-14; App. 740, lines 8-20.)

Denise soon was able to change her prescriptions to stop most of the side effects. (App. 779, line 5–780, line 5.) Over the following year, doctors tested Denise for HIV four times. (App. 781, lines 7-9.) The last time she received medical care related to the incident was about September 2015. (App. 808, lines 13-16.) Denise contracted no disease, but did incur medical bills of approximately $4,000. (App. 775, lines 2-3.) Clint took several days off from work and testified that he lost about $2,000 in wages. (App. 707, line 4–709, line 5.)

III. The Garrisons sue Target.

On June 27, 2014, Denise alone sued Target in the Court of Common Pleas for Anderson County, for negligence.[1] (App. 370–376.) Several months later, on February 13, 2015, Denise extended an offer of judgment under Rule 68 of the South Carolina Rules of Civil Procedure, seeking $12,000. (App. 1054.) 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 suit and adding claims on

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[1] Denise also alleged unfair trade practices, but she abandoned that claim at trial. (App. 848, line 4–850, line 7.)

behalf of Clint. (App. 382–388.) The two actions came before the Court of Common Pleas for a consolidated jury trial on September 6, 2016.

IV. The Garrisons speculate about how long the syringe had been in Target's parking lot.

During the three-day 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." (App. 758, 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 had landed *after* Denise swatted it, not where her daughter picked it up. (App. 552, line 22–553, line 6; App. 758, line 21–759, line 6; App. 952.)

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." (App. 758, 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. (App. 758, lines 12-20; App. 761, line 16–762, line 4.) Clint's vague hypothesis was not based on personal knowledge of the syringe, but instead on the syringe's "weathered," "dingy, dirty, and gross" appearance and a photograph showing the syringe's landing

spot near the cigarette butt and piece of twine. (App. 761, line 6–762, line 4; App. 758, lines 12-20.)[2] Similarly, Denise claimed that she "could tell, obviously [the syringe] had been there a long time," but did not explain how she "could tell" that. (App. 765, lines 22-23.) Indeed, the Garrisons simply did not know how long the syringe had been in the parking lot.[3]

The testimony from Target's employees Shelby Brintnall and Jon Jackson provided no further insight into the origin of the syringe. Brintnall could not offer any guess as to how the syringe ended up in Target's parking lot, much less how long it might have been there before the Garrisons' daughter picked it up. (App. 620, lines 1-7.) And Jackson explained that, had the syringe been seen by any Target employee, it would have been removed from the parking lot before it caused any harm. (App. 684, lines 17-

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[2] The syringe itself was not presented as evidence, because it had been misplaced, reappeared briefly (during which time the Garrisons' counsel photographed it), then lost again before the September 2016 trial. (App. 586, line 11–591, line 16.) The photographs taken by the Garrisons' counsel could not be produced for trial. (App. 500, lines 12-15.) And although the Garrisons claimed to have taken additional photographs of the syringe, those photographs were apparently lost. (App. 748, line 18–749, line 12.) In light of the references to evidence and photographs that had been lost, the trial court gave the jury a spoliation instruction. (App. 912, line 21–913, line 1.)

[3] The Garrisons' counsel conceded as much during arguments on Target's motion for a directed verdict: "The defense keeps getting hung up on 'you don't know where this needle came from.' Of course they don't. 'You don't know how long it's been there.' Of course they don't." (App. 856, lines 3-7.)

24.) Neither witness suggested that Target employees would have had any reason to believe a syringe would turn up in the parking lot.

V. Target explains its routine cleaning and inspection procedures.

Lacking any evidence about the syringe itself, the Garrisons focused much of their case on Target's cleaning and inspection procedures. On that topic, Brintnall and Jackson explained that Target takes many steps to maintain a clean and safe parking lot.

For example, Target cleaned its parking lot at least five times each week. Once a week, during the overnight hours between Thursday and Friday, a third-party vendor used a street-sweeping truck to vacuum the lot. (App. 641, lines 3-6; App. 681, lines 14-24.) And four times weekly during daylight hours, the housekeeping staff cleaned the lot of trash and debris, picking up "anything larger than a golf ball." (App. 644, line 17–645, line 5.) Jackson's testimony and records showed that the lot had been cleaned by the truck in the weeks before and after Denise's injury, and his records revealed no cleaning issues during the pertinent time period. (App. 683, line 8; App. 685, line 11–686, line 13; App. 965-966.)

In addition to the five weekly cleanings, Target employees inspected the parking lot multiple times each day. Jackson's daily premises inspection took him throughout "different parts of the store, interior and exterior,"

including the parking lot. (App. 668, lines 6-10.) He conducted his daily inspections without incident in the weeks before and after Denise's injury. (App. 685, line 11–686, line 13.) And on top of Jackson's formal inspections, Target employees engaged in ad hoc inspections of the parking lot. Brintnall explained that the store's cart attendants "are told to look for any major debris or anything like that, that would be in the way of a guest." (App. 535, line 14–536, line 17.) Had a cart attendant relayed anything to Brintnall about a syringe in Target's parking lot, "it would be [her] duty to pick that up." (App. 542, lines 18-20.)

In an effort to impeach testimony about Target's cleaning procedures, Clint offered a sort of do-it-yourself science experiment involving a four-inch bolt. According to Clint, he noticed a bolt "laying in the grass" near Target's parking lot in April 2016. (App. 715, lines 7-18; App. 953.) He claimed that the bolt was still there four months later. (App. 716, lines 14-22.) But Clint did not explain how an errant bolt observed in 2016 might shed light on the effectiveness of Target's cleaning and inspection practices in 2014. Nor did he explain why, even if an employee had seen the bolt in 2016, its presence would merit the same response as an abandoned syringe.[4]

[4] The trial court recognized the irrelevance of Clint's testimony about the bolt during arguments on Target's motion for a directed verdict. (App. 861, lines 4-13 ("The Court: I'll stop you there. I am not going to pay

At the close of the evidence, Target moved for a directed verdict based, among other things, on the Garrisons' failure to introduce any evidence showing how long the syringe had been in Target's parking lot. (App. 846, line 7–847, line 25.) The trial court denied the motion. (App. 864, lines 10-25.)

VI. The Garrisons resort to passion and prejudice.

The jury then heard closing arguments from counsel. Target's lawyer focused the jury on "the crux of the lawsuit": "Was [the syringe] there long enough where Target should have known about it?" (App. 900, lines 15-17.) Based on the evidence presented, Target's counsel explained to the jury that the Garrisons had fallen short of their "burden to prove, not to speculate, but to prove" not simply that the syringe had been in Target's parking lot, but "that it had been there long enough where Target should have seen it and taken care of it." (App. 901, lines 17-24.)

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

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attention to that. . . . I don't care about what happened afterwards. I want to know about—I'm focusing on during and immediately before the accident. . . . I don't care about them not picking up that bolt.").) In fact, the court explained the purpose of the bolt photographs during the charge conference: "I allowed those pictures in not for the uncleanliness of the parking lot, but I allowed them in for impeachment purposes. It just happened to be in those pictures." (App. 866, line 22–867, line 1.)

and its citizens.[5] To that end, counsel told the jury not fewer than ten times that Target saw $73 billion in revenue in 2014—a fact not offered into evidence during trial. (App. 871, line 14; App. 872, line 2; App. 873, lines 11-12; App. 874, lines 1-2; App. 877, lines 14-15; App. 885, lines 1-2; App. 886, line 10; App. 893, lines 16-17; App. 894, lines 13-14, 18; App. 907, lines 19-20; App. 908, lines 22-23.) The repeated emphasis on that large figure was particularly striking in light of the precise sum of compensatory damages he suggested would make the Garrisons whole: $11,000 to cover medical bills, Clint's lost wages, and loss of consortium. (App. 892, 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." (App. 909, lines 4-11.)

The jury listened. After ninety minutes of deliberations, it returned a verdict awarding the Garrisons compensatory damages of $108,000 and punitive damages of $4.51 million. (App. 364–367.)

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[5] "The caption of this case is Denise and Clint Garrison versus Target. That's what's on the paperwork. But what this case boils down to, what we showed you through the course of introduction of evidence is that the case is really about the safety of the Anderson County community versus the danger presented by Target." (App. 870, lines 14-22.)

VII. Target seeks judgment as a matter of law.

On September 15, 2016, the Garrisons moved for interest and costs. (App. 1055–1087.) The next day, Target timely filed a motion seeking judgment as a matter of law and, in the alternative, reduction of the jury's punitive damages award under S.C. Code Ann. § 15-32-530(A) (2012).[6] (App. 1094–1103.) Regarding judgment as a matter of law, Target argued that the Garrisons failed to satisfy their burden of proof for constructive notice, because they offered nothing more than their own speculation that the syringe had been in the parking lot long enough for Target to find it. Similarly, the Garrisons failed to show through clear and convincing evidence that Target's cleaning and inspection practices demonstrated a conscious disregard for customer safety.

VIII. The trial court throws out the punitive damages award.

On January 26, 2017, the trial court issued an order partially granting Target's motion for judgment as a matter of law with respect to the award of punitive damages. Specifically, the court concluded that "[t]here is no evidence that [Target] engaged in a pattern of reckless, willful, or wanton conduct that is sufficiently reprehensible to justify the punitive damages

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[6] Target's September 16, 2016 motion also requested that the trial court grant judgment as a matter of law based on Denise's comparative negligence, a new trial absolute under Rule 59, a new trial nisi remittitur, and relief under the Thirteenth Juror Doctrine.

award here." (App. 351.) The court thus eliminated the $4.51 million punitive award in its entirety. But the court denied the rest of Target's post-trial motions. (App. 345–346.) As relevant here, the court brushed aside Target's constructive notice argument with two sentences of analysis:

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

(App. 349.)

Finally, the trial court granted the Garrisons' motion for costs and interest only as to interest drawn on the actual damages award starting on the day the jury returned its verdict. (App. 355.) The Garrisons subsequently asked the court to amend its judgment, suggesting that the court had overlooked affidavits submitted in support of their costs and the Rule 68 offer of judgment made by Denise in February 2015. (App. 1224–1265.) On February 9, 2017, the court granted the Rule 59 motion, concluding that the Garrisons were entitled to their costs, prejudgment interest for Denise's $100,000 damages award, and post-judgment interest as to all of their actual damages. (App. 358–363.)

Both parties appealed. (App. 1267–1295, 1296–1316.)

IX. The Court of Appeals affirms the trial court's liability finding, but revives the punitive damages award.

On January 15, 2020, the Court of Appeals issued an opinion affirming the trial court's denial of Target's request for judgment as a matter of law as to liability and reversing the trial court's vacatur of the jury's punitive damages award. (App. 44.) The panel then concluded that South Carolina Code section 15-32-530 constituted an affirmative defense that Target waived by not pleading, affirmed the circuit court's conclusion that the punitive damages award violated due process, remanded for remittitur of the award, and affirmed denial of Target's new trial motion and the Garrisons' prejudgment interest arguments. (App. 44.)

On the question of liability, the Court of Appeals accepted the speculative lay testimony of Denise, Clint, and Shelby Brintnall as sufficient to support the trial court's denial of Target's motion for judgment as a matter of law. (App. 7–8.) In doing so, it failed to engage a deep reservoir of South Carolina cases holding that courts must reject the exact type of speculation and conjecture that the Garrisons presented to support constructive notice. Without explanation, the Court of Appeals also contradicted this Court's decisions by crediting evidence about the appearance of the syringe and other objects found in its vicinity after Mrs. Garrison swatted it away. (App. 7–9.) It then compounded these errors by suggesting that Target bore some burden

of proof on the liability question. (App. 8 (considering the possibility that the syringe arrived in the parking lot in its "weathered" condition, and stating that "no evidence indicat[es] this is likely").)

After reviving the punitive damages verdict, the Court of Appeals held, over a dissent, that the statutory cap on punitive damages did not apply, because Target failed to invoke the statute as an affirmative defense. (App. 37–38). The court remanded the case for the trial court to evaluate whether the award violated due process and instructed it to consider as part of that inquiry how bad things might have been had the syringe been contaminated with disease, even though it is undisputed that it was not. (App. 19.)

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. (App. 41.) It also rejected the Garrisons' argument that punitive damages awards should factor into prejudgment interest calculations. (App. 43–44.) To reach that conclusion, the Court of Appeals specifically distinguished a decision from the Connecticut Court of Appeals. (App. 43–44 (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. (App. 43.)

After the Court of Appeals denied rehearing, (App. 49), both parties timely petitioned for a writ of certiorari. This Court granted both petitions on October 19, 2020.

ARGUMENTS

I. The jury's verdict must be reversed because the Garrisons failed to present sufficient evidence of constructive notice.

No one knows how long the syringe had been there, and no one knows where it came from. Maybe the syringe fell from a diabetic customer's car the day before. Or perhaps it rolled out of the bed of a pickup truck only minutes before the Garrisons arrived. It is even possible, given the layout of the lot, that the wind blew it over—or someone kicked it over—from an adjacent store's lot the day the Garrisons visited. The jury could only speculate. Although much is known about what happened after the Garrisons' daughter picked up the syringe on the evening of May 21, 2014, everything before that moment remains a mystery.

Under long-settled South Carolina law, businesses cannot be held liable for unexplained mysteries like this. Instead, merchants are liable only for injuries caused by hazards that the merchant created, knew about, or should have known about. This case focuses on that third possibility—the "should have known" kind of knowledge, also called "constructive notice." To prevail on a theory of constructive notice, a plaintiff must *prove* that the dangerous

condition existed long enough for a reasonable merchant to have found it before it caused an injury.

South Carolina courts have rejected the kinds of "proof" the Garrisons offered to show Target's constructive notice of the syringe. Although they claimed that the syringe must have been in the parking lot for "a while" because it was "weathered" and "dirty," the Garrisons failed to tether those traits to any particular period of time or even plausibly define how long "a while" might be. Similarly, their comparison of the syringe to nearby debris meant little without an estimate for how long the debris had been there. And their emphasis on Target's cleaning procedures obscured the issue of constructive notice, which focuses on the hazard, not preventative measures.

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

Any other result would broaden the scope of evidence available to prove constructive notice, putting South Carolina out of step with the majority of jurisdictions on this question. *See* D. Maurice Moore, *Watch Your Step: An Analysis of Premises Liability in the Wake of* Lanier v. Wal-Mart Stores, Inc., 43 BRANDEIS L.J. 283, 286 (2004). Time and again, this Court has refused

pleas to relax the traditional constructive notice standard. *See, e.g.*, *Wintersteen II*, 344 S.C. at 39, 542 S.E.2d at 731–32 ("We decline to depart from traditional foreign substance analysis: a storekeeper is only liable if it places the substance on the floor, or if it has actual or constructive notice thereof."); *Simmons v. Winn–Dixie Greenville, Inc.*, 318 S.C. 310, 457 S.E.2d 608 (1995) ("We decline to expand the established standard requiring notice, either actual or constructive, by a store owner in slip and fall cases."). It should not hesitate to reject once again the invitation to dilute South Carolina's settled law on foreign-substance premises liability.

A. Standard of review

"When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Wintersteen II*, 344 S.C. at 35, 542 S.E.2d at 729 (citation omitted). "However, where the only reasonable inference from the evidence is that there has been a failure of proof as to a material element of plaintiff's cause of action, it becomes the duty of the court to resolve the issue against the party having the burden of proof by directing a verdict." *Horton v. Greyhound Corp.*, 241 S.C. 430, 438, 128 S.E.2d 776, 781 (1962). *See also Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 178–79, 648

S.E.2d 585, 589 (2007); *Pye v. Estate of Fox*, 369 S.C. 555, 569, 633 S.E.2d 505, 512 (2006).

B. Constructive notice requires proof beyond speculation that a dangerous condition existed long enough for the merchant to discover and remedy it.

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

To prevail under the constructive notice theory of premises liability, a plaintiff must show that the dangerous condition preexisted her injury long enough for the merchant to "have discovered and remedied it." *Anderson*, 257

S.C. at 77, 184 S.E.2d at 77.[7] That temporal element does not require the plaintiff to precisely measure the lifespan of the hazard, but it does oblige her to show that the dangerous condition existed "for *a sufficient length of time* that the storekeeper would or should have discovered and removed it had the storekeeper used ordinary care." *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 91, 394 S.E.2d 24, 25 (Ct. App. 1990) (emphasis added). And courts cannot leave that length of time to speculation. *See Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 122, 165 S.E.2d 627, 629 (1969).

South Carolina courts have applied the anti-speculation principle of constructive notice for decades. For example, in *Wimberly*, this Court reversed a plaintiff's jury verdict in a slip-and-fall case involving loose grains of rice, because the plaintiff failed to introduce "any evidence showing how long the rice had been on the floor." *Id.* The Court rejected the plaintiff's alternative proof—which included evidence suggesting the store had been understaffed, used inadequate inspection practices, and failed to properly maintain its floor—because those facts overlooked "the necessity of proof of actual or constructive notice." *Id.* And without any evidence showing "that

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

the rice was on the floor at any particular time prior to the actual fall," the jury was wrongly "permitted to speculate that it was on the floor long enough to infer that [the] defendant was negligent in failing to detect and remove it." *Id.*

South Carolina law's aversion to speculation as proof of constructive notice is as old as it is consistent. More than half a century ago, this Court held that a plaintiff could not prevail against a merchant under a theory of constructive notice when the evidence did "not prove that the [dangerous condition] was there for any appreciable time and [left] the length of time [it] was there speculative and conjectural." *Gilliland v. Pierce Motor Co.*, 235 S.C. 268, 274, 111 S.E.2d 521, 523 (1959). The same is true today. *See, e.g.*, *Milligan v. Winn-Dixie Raleigh, Inc.*, 273 S.C. 118, 121, 254 S.E.2d 798, 800 (1979) (reversing jury verdict when conclusion that oil had been on sidewalk long enough to be discovered "would be pure speculation"); *Pennington v. Zayre Corp.*, 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969) (affirming grant of involuntary nonsuit in slip-and-fall case where conclusion that plastic bags had been on store's floor long enough to be "discovered by the merchant would be pure speculation"); *Gillespie*, 302 S.C. at 92, 394 S.E.2d at 25 (affirming grant of summary judgment to merchant and emphasizing that question of how long puddle of water had been on floor "is not one that can be left to speculation"); *Wintersteen v. Food Lion, Inc. ("Wintersteen I")*, 336 S.C.

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

The requirement that a plaintiff prove that the dangerous condition existed long enough for the merchant to discover it before the injury derives from well-established tort principles. Specifically, a landowner cannot be held liable for injuries caused by conditions "which [he] neither knew about nor could have discovered with reasonable care." *See* W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 61, at 426 (5th ed. 1984). As Dean

Keeton explained, "[t]he mere existence of a defect or danger is generally insufficient to establish liability, unless it is shown to be of such a character or *of such duration* that the jury may reasonably conclude that due care would have discovered it." *Id.* (emphasis added).

South Carolina law reflects those principles, as a merchant's duty to maintain a safe premises is predicated on its "superior knowledge of the danger" that might befall customers. *See Larimore v. Carolina Power & Light*, 340 S.C. 438, 448, 531 S.E.2d 535, 540 (Ct. App. 2000). "If that superior knowledge is lacking," the merchant "cannot be held liable." *See id.* Thus, the lengthy duration of a hazard's existence allows the jury to infer that, had the merchant been acting reasonably, it would have discovered the condition and assumed the corresponding obligation to remove it or warn customers. Such proof is crucial, because holding a merchant liable for the injury without it would transform the customer's theory of negligence into res ipsa loquitor—a doctrine not recognized under South Carolina law. *See Hunter*, 232 S.C. at 144, 101 S.E.2d at 265.

C. The Garrisons offered only speculation as proof of how long the syringe may have been in Target's parking lot.

In this case, the Garrisons failed to prove Target's constructive knowledge, because none of the evidence suggested how long the syringe had been in Target's parking lot. No witness saw the syringe before the

Garrisons' daughter picked it up. No photographs showed the syringe's location before Denise swatted it with her hand. Indeed, no witness suggested that a syringe had ever been found in Target's parking lot before this incident.

Instead of introducing evidence that showed the syringe had been in Target's parking lot for any particular length of time, the Garrisons presented conjecture. They argued, for instance, that the syringe's "weathered" and "dirty" appearance proved that it had been in the parking lot for some time. (App. 349.) Similarly, they claimed that they "could tell" the syringe "had been there a while" because it was near other debris in the parking lot. (App. 349; App. 758, line 11; App. 765, lines 21-23.) And they repeatedly suggested that Target's cleaning and inspection practices were inadequate. (App. 715, lines 2-3; App. 767, lines 4-15; App. 830, lines 5-7.) But none of those contentions allow anything more than speculation as to how long the syringe might have been in Target's lot.

First, the testimony regarding the syringe's appearance slips on, of all things, a banana peel—a "black," "withered up," and "mushed up" banana peel. That was how this Court described the hazard at the center of *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. at 79–80, 184 S.E.2d at 79. In that case, the Court reversed a plaintiff's slip-and-fall verdict because she could not prove that the grocery store had constructive knowledge of the

banana peel on its floor. *See id.* at 80, 184 S.E.2d at 79. In so holding, the Court recognized that the "'withered up' and 'mushed up'" appearance of the banana peel was "insignificant" with respect to whether it "had been on the floor for a considerable time," because the peel could have taken on that appearance without being on the grocery store's floor at all. *Id.*

The same is true for the syringe here. It may have taken on its "dirty" appearance, as the Garrisons put it, in Target's parking lot. But it is equally plausible that it fell from a customer's car (or the back of a truck) in the condition young Ms. Garrison found it, or that the wind blew it over from an adjacent store's lot just before the Garrisons arrived. Critically, the Garrisons offered no proof either way. And even assuming that the syringe was brand new when it arrived in Target's parking lot, the jury could not reasonably determine whether it had been damaged five minutes (by being run over, kicked, or wind-blown)—or five months—before Kaileigh picked it up. These *equally unsupported* suppositions do not present factual questions for the jury to resolve because the factfinder can draw no *reasonable* inferences about temporal duration in the lot from them whatsoever. *See Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). Rather, they demonstrate the baseless guesswork required to validate the Garrisons' theory of constructive notice. *See, e.g.*, *Wintersteen I*, 336 S.C. at 136, 518 S.E.2d at 830) ("[W]hile the liquid could

have been on the floor for an extended period of time, it is *just as possible* that it had been on the floor for only moments before Wintersteen fell. Based on the evidence presented at trial, it is apparent that any determination of how long the water had been on the floor would be pure speculation." (emphasis added)); *cf. Reid v. Kohl's Dep't Stores, Inc.*, 545 F.3d 479, 482 (7th Cir. 2008) (applying analogous Illinois premises liability law and rejecting plaintiff's inference that a partially melted milkshake must have been on the floor long enough to infer constructive knowledge).[8]

Second, the Garrisons' suggestions that the syringe must have been in the parking lot "a while" or "a long time" based on comparisons to objects found in the vicinity of the syringe after Mrs. Garrison swatted it away fare

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

no better than the appearance of the syringe. Beyond the problem, acknowledged by the Court of Appeals, that the debris Clint described referenced the landing point of the syringe rather than its original location, the proximity to other debris proves nothing without some measure of how long it had been in the lot. As with the appearance of the syringe, the condition of the debris cannot speak for itself. And the Garrisons never offered any evidence time-stamping the arrival of the surrounding debris, let alone its pre-accident proximity to the syringe. Perhaps the Garrisons could have proffered expert testimony connecting the appearance of the debris to certain weather conditions or temporal indicators. *Cf. Reid*, 545 F.3d at 482 (suggesting that expert evidence might be used to link the melted state of a milkshake to its longevity on the ground). Or the Garrisons could have introduced additional evidence that connected the surrounding debris to a discernible event in the past. They did none of these. So the jury could only speculate about Target's constructive knowledge, in contravention of South Carolina law. *See Wimberly*, 252 S.C. at 122, 165 S.E.2d at 629. No record evidence distinguishes this case from *Wintersteen I*. While the syringe and other debris could have been in the parking lot for an extended period of time, "it is just as possible" that it arrived only minutes before the Garrisons. *See* 336 S.C. at 136, 518 S.E.2d at 830.

Third, South Carolina courts have rejected as proof of constructive notice evidence like the Garrisons' evidence suggesting the ineffectiveness of cleaning and inspection procedures. In *Wimberly*, the plaintiff similarly argued that the store could be held liable based on proof of the store's "insufficient personnel, inadequate inspection, [and] inadequate floor maintenance." 252 S.C. at 122, 165 S.E.2d at 629. This Court deemed that evidence irrelevant because it ignored "the necessity of proof of actual or constructive notice." *Id.* Thus, whether a merchant cleans or inspects its premises effectively does not answer the critical question at the heart of constructive notice: did the hazard exist long enough that the merchant ought to have discovered it? *See, e.g.*, *Bessinger v. Bi-Lo, Inc.*, 329 S.C. 617, 620, 496 S.E.2d 33, 35 (Ct. App. 1998) (affirming award of summary judgment to merchant in absence of "evidence that the grapes were on the floor through an act of Bi-Lo, or that any employee was aware that the grapes were on the floor, or how long the grapes were on the floor before the accident"). The Garrisons' focus on Target's cleaning and inspection procedures provided no insight into how long the syringe might have been in Target's lot.

Further illustrating the deficiency of the Garrisons' proof here, it would not even satisfy the more lenient general-foreseeability standard the plaintiffs unsuccessfully urged this Court to adopt in *Wintersteen II*. In that case, the plaintiffs argued that the foreseeability that ice from a drink

dispenser would occasionally tumble onto the floor was sufficient to establish constructive notice. *Wintersteen II*, 344 S.C. at 35, 542 S.E.2d at 730. This Court rejected that standard, because it would make shop owners insurers against the acts of third parties. *Id.* at 37, 542 S.E.2d at 731. But at least there the shop owner actually put the drink dispenser on the premises and arguably could foresee that ice would spill out of it onto the floor. Nothing here remotely suggests that Target should have foreseen that a syringe would alight on its parking lot.

At bottom, there is no evidence "which reasonably tends to prove" that the syringe was in the parking lot "at any *particular* time" prior to Denise's injury. *See Wimberly*, 252 S.C. at 122, 165 S.E.2d at 629 (emphasis added). Under longstanding South Carolina precedent, that critical failure of proof undermines the Garrisons' case. The Court should reverse the jury's verdict.[9]

II. The jury's punitive damages verdict cannot exceed $500,000 pursuant to South Carolina Code § 15-32-530(A).

Because the Garrisons presented insufficient evidence of Target's liability, this Court need not reach any of the remaining issues, or those the

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[9] As recognized by the trial court's jury instructions, Clint's claims for loss of consortium and lost wages cannot survive without his wife's underlying negligence claim. (App. 931, lines 11-21); *see also Lee v. Bunch*, 373 S.C. 654, 663, 647 S.E.2d 197, 202 (2007) (recognizing that "a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails" (internal quotation marks omitted)).

Garrisons raise in their cross-petition. But if this Court disagrees, and gets as far as concluding that this case warranted a punitive damages award, the Court should reduce that award to comply with South Carolina law.

This issue fractured the Court of Appeals panel, with the majority holding that South Carolina's statutory damages cap constitutes an affirmative defense that Target waived. But defendants need not plead the punitive damages cap as an affirmative defense because, like other background rules impacting recovery, it applies automatically.

A. Standard of review

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citing *Catawba Indian Tribe v. State,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)).

B. The statutory cap is not an affirmative defense.

Section 15-32-530 nowhere requires either party to plead the damages cap, as an affirmative defense or otherwise. As Judge Hill noted in his dissent below, the South Carolina legislature elsewhere specified pleading requirements under the act, *see* S.C. Code § 15-32-510(A) (2012), showing that it knew how to spell out what the parties must plead. Had it intended to require defendants to plead the punitive damages cap as an affirmative

defense, the legislature would have said so. It instead directed trial judges to apply the cap after the jury renders its verdict. *See* § 15-32-530(B). The classification of the damages cap as an affirmative defense frustrates the legislature's design by effectively shifting the burden of proof to defendants. *See O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983) (noting that following the assertion of an affirmative defense, "the burden of proof shifts to the defendant to show he is not liable").

Logic supports the legislature's decision not to make the cap an affirmative defense. An affirmative defense "conditionally admits the allegations of the complaint, but asserts new matter to bar the action." *FMI, Inc. v. RMAX, Inc.*, 286 S.C. 343, 347, 333 S.E.2d 360, 363 (Ct. App. 1985) (internal quotation marks omitted). In contrast, a punitive damages cap requires no assertion of "new matter" in order to apply—the defendant need not prove anything. And when proven, an affirmative defense defeats the plaintiff's entire cause of action. *See O'Neal*, 279 S.C. at 494, 309 S.E.2d at 779. A punitive damages cap, on the other hand, leaves the cause of action unaffected and merely limits the amount of damages a plaintiff may recover.

In other words, while affirmative defenses address liability, punitive damages caps address the quantum of damages. It makes sense, then, that the legislature never mentioned burden-shifting in section 15-32-530—

burden-shifting provides no help where liability is not at issue. These distinctions make the punitive damages cap different in kind than affirmative defenses generally, but also different than those specifically listed by South Carolina Rule of Civil Procedure 8(c).[10] Because the parties cannot know at the pleading stage whether the jury will award damages exceeding the punitive damages cap, the cap has much more in common with concepts like reduction and remittitur—which parties need not plead before trial.

To arrive at its conclusion, the Court of Appeals majority overstated the reach of *James v. Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998). Unlike South Carolina's general punitive damages cap, the recovery cap for charitable organizations at issue in *James* imposed procedural requirements that substantially impacted the proof at trial. *Id.* at 282, 500 S.E.2d at 201. Specifically, to avoid the cap in *James*, the plaintiff needed to join another party to the action and present a special verdict form to the jury. *Id.* These additional burdens rightly triggered concern over unfair surprise when the defendants raised the cap after trial. But these unique procedural requirements are absent here—the punitive damages cap requires no joinder of additional parties and presents an issue for the judge rather than the jury.

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

This case is more like *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005), which refused to classify the statutory damages cap in the Tort Claims Act as an affirmative defense and held the cap to be "self-executing." *Cf. Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995) (concluding that "[s]et-off was statutorily mandated, was not a matter properly triable to the jury, and therefore was not a matter constituting an affirmative defense").

Because the statute provides clear notice of its restriction, the Court of Appeals majority also overstated the Garrisons' surprise following Target's post-trial assertion of the cap. In contrast to the cap in *James*, for example, South Carolina's punitive damages cap applies to all civil actions, not just those involving certain defendants under certain factual scenarios. And the language of section 15-32-530 imposes a *mandatory* duty on the *trial court* to ensure enforcement of the cap when the punitive award exceeds the greater of $500,000 or three times the compensatory award—regardless of whether the defendant raises the issue. *See* § 15-32-530(B). As a matter of law, therefore, all punitive damage awards are presumptively limited to "the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars." *See id.* § 15-32-530(A). Thus, as with other background rules that limit recovery, no plaintiff can reasonably claim surprise at the imposition of the cap—the

Garrisons included. *See Zorrilla v. Aypoco Constr. II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015).

The panel majority's attempt to distinguish section 15-32-530 from the Texas punitive damages cap examined in *Zorrilla*, raises a distinction without a difference. *Zorrilla* held that Texas's punitive damages cap is not an affirmative defense that must be pleaded, noting that, because the cap "automatically applies and its scope is delineated by statute, there is little concern that plaintiffs will be genuinely surprised by its application in any given case." *Id.* So too here. But although both the Texas and South Carolina statutes include exceptions to a default cap, the panel majority reasoned that because South Carolina's statute references the exceptions *before* the general cap, the cap somehow fails to apply automatically. (App. 36.) The order in which the legislature chooses to announce rules and exceptions, however, cannot determine whether a cap applies automatically or conditionally—and the panel majority cites no tenet of statutory construction supporting such an interpretation. Thus, as with Texas's cap, South Carolina's cap is "the rule, not the exception." *Zorrilla*, 469 S.W.3d at 157.

Finally, the Court of Appeals majority failed to account for the special nature of punitive damages. Nearly all of the cases it relied on deal with damages cap provisions imbedded in comprehensive statutory schemes,

rather than stand-alone punitive damages statutes. But punitive damages caps deserve separate consideration. Punitive damages are an extraordinary remedy imposed to punish egregious misconduct and deter future wrongdoing. *See Nesbitt v. Lewis*, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999). As such, punitive damages awards present unique public policy concerns. Indeed, the South Carolina legislature—joining several other states—considered excessive punitive damages awards important enough to independently address with a stand-alone cap. Moreover, as opposed to other types of damages awards, South Carolina courts have long policed punitive damages for compliance with due process. Resting the application of the cap on the whims of the parties would thus displace the court's usual role in reviewing punitive damages awards and frustrate South Carolina's policy goal of eliminating arbitrarily high awards.

For all these reasons, if the Court reaches this issue, it should reduce the punitive verdict consistent with § 15-32-530(A), thereby clarifying for South Carolina litigants that they need not plead the section's punitive damages cap as an affirmative defense.

III. Speculative "potential harm" cannot augment actual damages when evaluating the constitutionality of a punitive damages award.

As discussed above, the Garrisons' evidence cannot sustain a negligence finding—let alone a punitive damages award. If, however, following

disposition of the other issues presented in this case, the Court finds punitive damages appropriate, it should constrain those damages to the settled boundary imposed by due process, and reverse the Court of Appeals' contrary holding.

A. Standard of review

"[O]ur appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award." *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 431 (2001)).

B. The Garrisons produced no evidence supporting potential harm.

The Court of Appeals relied on *Mitchell* and its discussion of "potential harm" to reverse the trial court's "specific conclusion" that the jury's 45:1 punitive damages award violated due process. (App. 21.) But because the Garrisons introduced no evidence at trial to support any potential harm, *Mitchell* fails to impact the analysis. The Court should reverse the Court of Appeals' erroneous due-process holding, which, left unchecked, stands to drastically expand existing constitutional limits on punitive damages awards.

In *Mitchell*, the plaintiff sued his health insurance company for rescinding his policy in bad faith after he tested positive for HIV. *See* 385 S.C. at 580–82, 686 S.E.2d at 182–83. At trial, he introduced evidence of both

actual and potential harm, the latter showing the costs he would likely incur in treatment throughout his life absent health insurance—which one expert calculated to be over $1 million. *Id.* at 581, 686 S.E.2d at 182. The jury then returned a verdict consisting of $186,000 in actual damages plus $15 million in punitive damages. *Id.* In its due-process review of the punitive award, this Court considered the $15 million figure in comparison to the combined actual and potential harm (*i.e.*, $186,000 in actual damages plus the $1 million "potential harm" damages). *See id.* at 592, 686 S.E.2d at 187. The Court concluded that the resulting 13.9 to 1 ratio exceeded due process limits. *Id.* Ultimately, the Court reduced the punitive award to $10 million to meet "the outer limits of the single-digit ratio," "resulting in a ratio of 9.2 to 1." *Id.* at 593–94, 686 S.E.2d at 188.

Importantly, plaintiffs must support potential harm with evidence adduced at trial. In *Mitchell*, for example, the plaintiff introduced expert testimony from: a medical professional, who testified to the plaintiff's likely health outcomes; a health care expert, who testified to the future health care costs; *and* an economist, who projected the total present value of treatment. *Id.* at 581–82; 686 S.E.2d at 182. Similarly, in *Austin v. Stokes-Craven Holding Corp.*, another case considering potential harm, multiple experts testified to the potential safety issues posed by a damaged truck. 387 S.C. 22, 38–42, 691 S.E.2d 135, 143–45 (2010). In light of the actual evidence of

potential future harm presented to the juries in those cases, this Court found it appropriate to consider potential harm.

Unlike the plaintiffs in *Mitchell* and *Austin*, the Garrisons adduced absolutely no evidence supporting potential harm. In contrast, the Garrisons played on imaginary consequences—invoking the harm that Denise *might* have faced *if* the syringe actually infected her with some disease. But, thankfully, Denise did not contract any infectious disease, and the Garrisons presented no evidence suggesting that Denise might experience future harm. These important distinctions make the inclusion of potential harm in the due process calculation inappropriate in this case.

Nor can Denise's prophylactic preventative medications and periodic blood tests support potential harm. These examples speak to Denise's actual damages assessed at trial—rather than projected future damages.

The Court should not allow speculative considerations outside of the record to justify excessive punitive damages awards. Otherwise, only a given judge's imagination would constrain punitive awards, eviscerating the due-process limiting principles imposed by this Court and the United States Supreme Court. If it reaches the due process question, the Court should clarify that the 45:1 ratio found in the jury's punitive verdict finds absolutely no support under South Carolina law, and violates Target's due process rights.

CONCLUSION

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

If the Court disagrees and gets so far as concluding that this case warranted a punitive damages award, South Carolina Code § 15-32-530 caps that award at $500,000. That limit is not an affirmative defense.

Finally, if the Court reaches the due process analysis, it should reject the Court of Appeals' instructions to consider "potential harm" founded only on speculative considerations outside of the record.

Respectfully submitted,

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