THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Case No. 2020-000523

CARLA DENISE GARRISON AND CLINT GARRISON,

Petitioners-Respondents,

v.

TARGET CORPORATION,

Respondent-Petitioner.

REPLY BRIEF OF RESPONDENT-PETITIONER

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Under long-settled South Carolina precedent, premises-liability plaintiffs must show that a hazardous foreign object was present for a sufficient period of time in order to prove constructive notice. Evidence regarding the appearance of the object, 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, so Target is entitled to judgment as a matter of law on the Garrisons' negligence claim. *See* Target's Br. at 18–31. That conclusion resolves this case. If the Court proceeds further, however, South Carolina Code § 15-32-530 caps any potential punitive damages award at $500,000, and case law prevents speculative "potential harm" from moving the due-process goalposts.

The Garrisons cannot defeat Target's arguments on their merits. So they turn instead to hyperbole and distraction—dwelling on irrelevant evidence and matters of trial strategy, and invoking uncontroversial litigation principles that have nothing to do with Target's arguments. These tactics fail.

On Target's first issue presented, despite a "mountain" of distracting testimonial and circumstantial evidence, the Garrisons cannot overcome the simple fact that no evidence places the discarded syringe in Target's parking lot at any time prior to the incident. The Garrisons' constant refrain about

the deferential standard of review for factual findings thus rings hollow because the fact question of longevity *never arises* when the evidence does not suggest any particular period of time. The jury could only speculate about whether the syringe had been in the lot long enough to confer constructive notice, contravening settled precedent.

On the second question, the Garrisons fail to even confront the issue presented—whether the damages cap constitutes an affirmative defense. Instead, they tacitly assume that the cap is an affirmative defense and proceed directly to the basic principle that defendants must plead affirmative defenses. That misses the point.

And on the third issue, the Garrisons again fail to confront Target's arguments, repeating the same principles Target outlined in its petition but pointing to no valid evidence of potential harm bringing this case in line with this Court's prior holdings.

In short, the Garrisons offer no reason why this Court should hesitate to reverse the Court of Appeals on each of the three issues that Target presents.

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

The evidence adduced at trial showed that Denise Garrison hurt her hand by swatting a syringe away from her daughter in the parking lot of

Target's Anderson store. Neither party suggests that Target put the syringe there or had actual knowledge of its presence. So to make Target liable, the Garrisons had to show Target had constructive notice of the syringe, and to do that, they had to offer some evidence establishing that the syringe had been in the parking lot "at any particular time prior to" the injury. *See Wimberly v. Winn-Dixie Greenville*, 252 S.C. 117, 121-22, 165 S.E.2d 627, 629 (1969). They offered no *cognizable* evidence to meet that burden, so the jury could only speculate. Settled precedent of this Court bars judgment in favor of the Garrisons on this record. The Court should reverse the Court of Appeals' contrary holding, vacate the jury's verdict, and remand for judgment in favor of Target.

For more than half a century, South Carolina law has required a plaintiff bringing a premises liability claim based on constructive notice to show that the dangerous condition existed "for a *sufficient length of time* that 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); *see Hunter v. Dixie Home Stores*, 232 S.C. 139, 143-44, 101 S.E.2d 262, 264-65 (1957). And throughout those years, this Court has reversed verdicts when the jury could do no more than speculate as to how long the hazard might have existed. *See, e.g.*, *Milligan v. Winn-Dixie Raleigh, Inc.*, 273 S.C. 118, 254 S.E.2d 798

(1979) (reversing jury's verdict based on insufficient proof of constructive notice); *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 184 S.E.2d 77 (1971) (same); *Wimberly*, 252 S.C. at 117, 165 S.E.2d at 627 (same); *see also Wintersteen v. Food Lion, Inc. ("Wintersteen I")*, 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999) (same).

In their Response, the Garrisons do not object to the long line of cases establishing South Carolina's anti-speculation principle, nor do they question its applicability to a claim like theirs. Instead, they assert that "the jury ordinarily decides [the] sufficient-length-of-time question," Garrisons' Response at 8 (quotation omitted), and attempt to hide behind the deferential standard of review for factual findings, *id.* at 1, 7. To be sure, the question of whether a particular period of time is long enough to give rise to constructive notice constitutes a fact question. But the Garrisons miss the point by focusing on the standard of review because the fact question of longevity *never arises* if the evidence does not suggest any particular period of time. Under those circumstances, settled South Carolina law bars a finding of constructive notice, because the jury cannot be left to speculate. *See Gillespie*, 302 S.C. at 92, 394 S.E.2d at 25.

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

This Court should reject the Garrisons' "proof" and preserve its long-standing mandate that a jury cannot speculate about how long a hazard may have existed.

A. Witness testimony cannot cloak conjecture as proof of a period of time.

The Garrisons cite the testimony of Clint, Denise, and Target's manager Shelby Brintnall to establish proof of constructive notice. Garrisons' Response at 9–10. This testimony, they claim, "is more than what has been deemed sufficient in prior cases." *Id.* at 10. Not so.

Initially, the Garrisons cite this testimony out of context. Before Clint guessed that the syringe had to have been in the parking lot somewhere between two days and two months, he admitted that he did "not know how it got there." (App. 758, line 5.) And he never testified that he actually observed the syringe in the parking lot before the accident. Moreover, Denise admitted she "could only speculate what happened." (App. 765, lines 19-23.) And Brintnall explicitly disclaimed knowing how old the syringe was, when it had appeared in the parking lot, or how it had arrived there. (*See, e.g.*, App. 555, lines 4-6.)

More importantly, none of that testimony breaks the threshold of speculation. As their own lawyer conceded to the trial court, Clint and Denise Garrison did not know how long the syringe had been there. (*See*

App. 856, lines 3-7 ("The defense keeps getting hung up on 'you don't know where this needle came from.' Of course they don't. *'You don't know how long it's been there.' Of course they don't.*" (emphasis added)).) Guesswork offered as witness testimony is still speculation.

The "recurring condition" cases the Garrisons cite in support of their position—all involving municipal liability for potholes fixed locations—fail to alter that conclusion. For example, the Garrisons isolate one remark from *Fickling v. City of Charleston*, in which a public works director said that a recurring sidewalk "condition 'had probably been that way for a while,'" and analogize that statement to their own vague testimony as sufficient proof of constructive notice. Garrisons' Response at 10 (quoting *Fickling*, 372 S.C. 597, 610 n.34, 643 S.E.2d 110, 117 n.34 (Ct. App. 2007)). But the public works director in *Fickling* had good reason to suspect a hole had been there "for a while," because defects in sidewalks were a recurring problem that the City had faced previously. *See* 372 S.C. at 608, 643 S.E.2d at 116. Similarly, in *Major v. City of Hartsville*, the evidence suggested the defendant was aware of a rut in the road and undertook efforts to prevent it "*prior* to petitioner's injury." 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014) (emphasis added). In contrast, there is no evidence whatsoever suggesting any injuries or recurring hazards in Target's lot before Denise's injury in May 2014—let alone Target's awareness of such hazards.

The Garrisons also rely on the Court of Appeals' recent decision in *LeFont v. City of Myrtle Beach*, 430 S.C. 534, 545, 846 S.E.2d 355, 360 (Ct. App. 2020), reh'g denied (Aug. 24, 2020). Garrisons' Response at 8–9. But like the recurring hazards in *Fickling* and *Major*, *LeFont* considered a pothole in a fixed location on the defendant's premises rather than a foreign object like the one at issue here. That distinction is important because this Court treats foreign substance cases differently—and has consistently applied its foreign substance analysis to reject constructive notice evidence like the Garrisons'. *See Wintersteen v. Food Lion, Inc. ("Wintersteen II")*, 344 S.C. 32, 35, 542 S.E.2d 728, 730–31 (2001) (collecting cases and discussing proof "[i]n the case of a foreign substance"). Moreover, the Garrisons neglect to mention that the testimony discussed in *LeFont* came almost exclusively from a qualified "expert in the field of mechanical engineering." 430 S.C. at 545, 846 S.E.2d at 360. The Garrisons presented nothing of the sort here, relying only on their own speculative lay testimony, and that of Ms. Brintnall.

B. "Appearance" evidence does not suggest any particular length of time.

The Garrisons also rely on evidence that the syringe was "dirty," suggesting that such an appearance proves that the syringe had been in the parking lot long enough to confer constructive notice. There is no dispute about the syringe's appearance. (*See, e.g.*, App. 554, line 24.) But, as Target

emphasized in its petition, there is no evidence that links that trait to any period of time in Target's lot.

The Garrisons never address this subtle-but-important distinction, assuming that because the syringe was dirty, it must have been in the parking lot that night long enough to be found. But they did not offer evidence at trial that would prove that point—they presented no evidence suggesting how long it might take an object to attain such appearance or, for that matter, why the syringe must have taken on that appearance in Target's parking lot as opposed to a different location. Indeed, the Garrisons' discussion of the pothole in *LeFont* actually illustrates this failure of proof. *See* Garrisons' Response at 8–9 (discussing 430 S.C. at 545, 846 S.E.2d at 360). In contrast to the "dirt and debris" discussed in *LeFont*, which must have collected in the defendant's lot because the pothole occupied a fixed spot in that location, nothing tied the portable syringe to Target's lot—it could have taken on its appearance anywhere. Standing alone, the Garrisons' appearance evidence is insufficient to establish any particular length of time.[1]

As Target explained in its opening brief, *Anderson*—a premises liability case that applies with full force here—bolsters that conclusion. *See* Target's

[1] Relatedly, there is no basis in the trial record to relate the appearance of the syringe to the appearance of items where the syringe landed *after* Denise swatted it out of her daughter's hand.

Br. at 26–27; *Anderson*, 257 S.C. at 80, 184 S.E.2d at 79. In fact, the Fourth Circuit employed the same logic in an application of South Carolina law three years before *Anderson*. *See Joye v. Great Atl. & Pac. Tea Co.*, 405 F.2d 464 (4th Cir. 1968). In *Joye*, the Fourth Circuit reversed the jury's verdict for a plaintiff who slipped on a banana peel in a supermarket. *Id.* at 464. The court characterized the plaintiff's proof of constructive notice as follows:

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

Id. at 465 (emphasis added). Such evidence could not allow the jury to determine "how long (even [in] the broadest range of approximation) the banana may have been on the floor," thus requiring reversal. *Id.* at 466.

The Garrisons' case fares no better. They offered no direct evidence placing the syringe in Target's parking lot for any length of time before the incident.[2] At best, their circumstantial evidence suggested that the syringe was dirty, but that trait supports no reasonable inference as to how, when, or

[2] This remains true despite the misleading labels the Garrisons use in their Response. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000) (defining direct and circumstantial evidence).

where that wear-and-tear occurred. The jury could not tell whether the syringe had been in Target's parking lot for two minutes or two weeks. That is not enough to give rise to constructive notice in South Carolina. *See Wintersteen I*, 336 S.C. at 136, 518 S.E.2d at 830.[3]

C. The Garrisons' spoliation argument is irrelevant.

Because the syringe's presence at trial would have established only that the syringe looked dirty—a point not in dispute—the Garrisons' focus on spoliation likewise misses the point. Thus, this case is not like a medical malpractice case where the defendant hospital lost critical records cataloging the decedent's vital signs, *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 521, 629 S.E.2d 675, 678-79 (Ct. App. 2006), or a slip-and-fall case where the defendant intentionally failed to gather witness statements and destroyed written notes related to the incident, *Schweikert v. Franciscan Health Sys.-W.*, No. 36806-6-II, 2009 WL 826227, at *1 (Wash. Ct. App. 2009)

[3] *Wintersteen I* refutes the Garrisons' claim that none of the cases cited in Target's petition had any "evidence at all about timing," Garrisons' Response at 11. *See also Anderson*, 257 S.C. at 78-79, 184 S.E.2d at 78 (rejecting an inference of constructive notice from employee's statement that "we should have had this place cleaned up but we just hadn't got around to it yet"); *Hurst v. Home Depot U.S.A.*, No. CA-99-1334-11, 2000 WL 33222911, at *3 (D.S.C. June 20, 2000) (rejecting an inference of constructive notice when testimony established that a foreign object "could not have been in the aisle for longer than 10-15 minutes, but it [was] just as likely that [it] had only been in the aisle a few moments prior to the accident").

(unpublished) (applying foreseeability standard for constructive notice not recognized in South Carolina).

Under South Carolina law, the plaintiff "must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009). The Garrisons failed to make that showing, either at trial or on appeal. And for good reason—the physical syringe would have offered nothing the photographs or witness testimony left out. The trial record shows that the syringe was dirty and weathered. Those traits say nothing about where that weathering occurred or how long the syringe had been in Target's parking lot.

D. The Garrisons' remaining evidence invokes the rejected "foreseeability" standard for constructive notice.

The Garrisons' remaining arguments for constructive notice focus on Target's cleaning practices and, in particular, its alleged inability to find and remove other "dangerous objects" in its parking lot *two years after* the incident. That evidence does not speak to the issue presented, because it does not show how long the syringe was in the lot.

This Court has rejected evidence of ineffective cleaning and prevention measures as proof of constructive notice of a specific hazard. *See Anderson*, 257 S.C. at 80, 184 S.E.2d at 79; *Wimberly*, 252 S.C. at 122, 165 S.E.2d at

629. Whether Target employed best practices in cleaning and maintaining its parking lot does not suggest how long the syringe was actually in Target's lot. Instead, the Garrisons' arguments regarding cleaning practices boil down to the contention that Target should have *foreseen* that an injury would occur if it did not take better care of its lot.[4]

But South Carolina cases stress that foreseeability does not establish constructive notice. *See Wintersteen II*, 344 S.C. at 35–36, 542 S.E.2d at 730; *Simmons v. Winn–Dixie Greenville, Inc.*, 318 S.C. 310, 457 S.E.2d 608 (1995). As this Court explained in rejecting the rule of foreseeability: "To require shopkeepers to anticipate and prevent the acts of third parties is, in effect, to render them insurers of their customers' safety. This is simply not the law of this state." *Wintersteen II*, 344 S.C. at 37, 542 S.E.2d at 731 (citation omitted).

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[4] As discussed above, the absence of proof that hazards appeared in Target's parking lot *before* Denise's injury differentiates this case from *Major*, *Campbell*, and *Ford*, which the Garrisons cite in support of their arguments. *See Major*, 410 S.C. at 3, 763 S.E.2d at 350; *Campbell v. S.C. State Highway Dep't*, 244 S.C. 186, 191, 135 S.E.2d 838, 840 (1964) (considering evidence that showed "there had been *previous* washouts" and that the State was aware *before* the incident that "during periods of heavy rain the drainage system was insufficient to take care of the excess water" (emphasis added)), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); *Ford v. S.C. Dep't of Transp.*, 328 S.C. 481, 489, 492 S.E.2d 811, 815 (Ct. App. 1997) (recognizing that testimony from an individual who warned a "road crew of the general problems of falling trees in the vicinity" *before* a tree fell was competent evidence).

The Garrisons did not show that any injuries occurred in Target's parking lot before Denise's, which might suggest recurring hazards in the parking lot.[5] Instead, they suppose that Target ought to have been on notice that its poor cleaning practices would lead to trouble, pointing only to a bolt, spring, and rod found in the parking lot two years after the incident to prove their point. But after-the-fact foreseeability is not the rule for constructive notice. *See Wintersteen II*, 344 S.C. at 37, 542 S.E.2d at 731. The Garrisons' insistence that Target did not employ adequate cleaning or maintenance practices distracts from their critical failure to show that the syringe had been in the parking lot long enough to be discovered in the use of ordinary care.

E. Target properly objected to the Garrisons' constructive notice evidence at trial.

Because the Garrisons cannot point to any valid evidence addressing the syringe's temporal duration in the lot, they resort to arguments about

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[5] *Cf. Major*, 410 S.C. at 4, 763 S.E.2d at 350 ("Where a recurring condition is of such a nature as to amount to a continual condition, when coupled with other factors, the recurring condition may be sufficient to create a jury issue as to constructive notice."). The Garrisons' own discussion of *Major* illustrates how that case diverges from this one. Garrisons' Response at 17–18. In *Major*, the defendant knew about problematic ruts in their parking lot and abandoned efforts to fix them. 410 S.C. at 3-4, 763 S.E.2d at 350. Here, the Garrisons presented no evidence that any injuries or recurring hazards occurred in Target's parking lot before Denise's injury in May 2014.

procedural waiver. They claim that "Target failed to lodge objections in the trial court to the mountain of evidence presented on constructive notice." Garrisons' Response at 20. But the trial record contradicts that statement.

Initially, the "procedural problem" that the Garrisons perceive conflates admissibility of evidence with its sufficiency. But Target does not contend that the Garrisons' testimony or evidence was inadmissible.[6] Rather, even accepting the Garrisons' proof, the whole evidentiary record remained legally deficient as to constructive notice because it never crossed the threshold beyond speculation and conjecture. *See Milligan*, 273 S.C. at 121, 254 S.E.2d at 800 (reversing jury's verdict when the conclusion that the merchant had constructive notice "would be pure speculation").

When the proper time came to object to the Garrisons' constructive notice evidence at trial, Target repeatedly did so. For example, mirroring the argument in its opening brief, Target's motion for a directed verdict emphasized that the Garrisons failed to prove constructive notice because their evidence did not place the syringe in the parking lot at any particular time before the incident. (*See* App. 841, line 14-App. 844, line 7; App. 846, line 23-App. 847, line 25; App. 858, line 12-App. 860, line 11.) As Target's counsel explained, "To let the jury go decide based on the evidence that the

[6] The Garrisons' citation to *Tucker v. Doe*, 413 S.C. 389, 405, 776 S.E.2d 121, 130 (Ct. App. 2015), therefore holds no water. *See* Garrisons' Response at 10.

plaintiffs have presented is rank speculation." (App. 860, lines 4-6.) Then, after the jury returned its verdict in favor of the Garrisons, Target reasserted the constructive notice argument in its post-trial motion for judgment as a matter of law. (*See* App. 1094-1103; 1156-1158.) The cases the Garrisons cite on this point simply fail to apply. *See* Garrisons' Response at 10–11.

In sum, 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. As it has routinely done in similar circumstances over the years, *see, e.g.*, *Milligan*, 273 S.C. 118, 254 S.E.2d 798; *Anderson*, 257 S.C. 75, 184 S.E.2d 77; *Wimberly*, 252 S.C. at 117, 165 S.E.2d at 627, the Court should vacate the jury's verdict.

II. South Carolina Code § 15-32-530(A) limits the jury's punitive damages verdict.

If the Court concludes that this case warranted a punitive damages award, it should reduce that award to comply with South Carolina law. The Court of Appeals majority erred in concluding that section 15-32-530 constitutes an affirmative defense that Target waived. The statutory cap is not an affirmative defense, and the Garrisons hardly even dispute the sound reasons Target offers for that conclusion. *See* Garrisons' Response at 20–25.

Instead of confronting the question that Target presents, the Garrisons stress that "affirmative defenses are forfeited if not timely asserted." *Id.* at 20. Target, of course, agrees with that basic litigation principle—but it fails to advance the Garrisons' argument because the cap is not an affirmative defense. Had the legislature intended to require defendants to plead the punitive damages cap as an affirmative defense, it would have said so. Instead, it explicitly directed trial judges to apply the cap after the jury renders its verdict. *See* S.C. Code § 15-32-530(B).

Citing a solo dissent from a 1988 United States Supreme Court certiorari denial, the Garrisons urge the Court to ignore section 15-32-530 and engage with Rule 8(c) of the South Carolina Rules of Civil Procedure. Garrisons' Response at 23. But the Garrisons muster no explanation for why a Rule 8(c) analysis might transform the cap into an affirmative defense.[7] In any event, as Target observed previously, Rule 8(c) does not specifically list the statutory punitive damages cap as an affirmative defense, and none of the defenses it does list share anything in common with the cap. *See* Target's

[7] The Garrisons also suggest the legislature's silence on this question somehow supports their argument. *See* Garrisons' Response at 23. That position is directly at odds with the plain-language argument in their cross-petition, *see* Garrisons' Opening Br. at 6–7, and it gets them nowhere here, because unlike the consistent body of law holding that prejudgment interest does not run on punitive awards (*see* Target's Response Br. at 13–16), nothing in the "existing common law" treats punitive damages caps as affirmative defenses.

Br. at 34 n.10. Moreover, nothing in logic—or South Carolina law—supports reading the cap into Rule 8(c)'s catchall provision. Unlike affirmative defenses, which address liability, the punitive damages cap leaves the plaintiff's cause of action unaffected and merely limits the amount of damages a plaintiff may recover. 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. Indeed, the Garrisons admit as much when they describe the cap as a "reduction mechanism[]." Garrisons' Response at 20.

In place of an affirmative argument for why section 15-32-530's cap on punitive damages should qualify as an affirmative defense, the Garrisons fall back on litigant conduct—specifically, that defendants routinely plead unnecessary defenses. *See* Garrisons' Response at 23. Perhaps. But that does not answer the question presented here. And if anything, that observation underscores why the Court should clarify that defendants need not inefficiently plead the cap as a defense out of a sense of caution.

The Garrisons' fairness arguments also fail to address the affirmative defense question. And, in any case, section 15-32-530 provides clear notice of

its restriction.[8] The 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*—not the jury—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). The Garrisons cannot reasonably claim surprise at the recovery limitation in the cap any more than they might claim surprise at the operation of the South Carolina Rules of Civil Procedure.

The realities of litigation confirm this conclusion. With punitive damages in play, a plaintiff has every incentive to put the most damaging evidence possible in front of the jury. No reasonable plaintiff would decide not to seek and offer evidence of actions that could raise or eliminate the cap. As Judge Hill succinctly summarized in dissent below, "[l]awyers who have smoking guns use them." (App. 47.)

If the Court reaches this issue, it should not hesitate to reduce the punitive verdict consistent with § 15-32-530(A).

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[8] The Garrisons cite cases, mainly from the First and Fifth Federal Circuits, for support. *See* Garrisons' Response at 21. Of course, many other persuasive authorities support Target's position. *See, e.g.*, *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015); *McGinnes v. Wesley Med. Ctr.*, 224 P.3d 581, 591 (Kan. Ct. App. 2010); *Anderson v. City of Milwaukee*, 559 N.W.2d 563, 569 (Wis. 1997); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989).

III. The $500,000 cap applies here.

The Garrisons claim that, if the cap applies, the $2 million exception should be imposed because "the Garrisons contended that Target put profits before safety." Garrisons' Response at 27. In support of that theory, they point out that Target sometimes sent home cart attendants early "to save money" and that Target had not reviewed any video surveillance footage of any injuries in the parking lot. *Id.* They also posit that the jury must have accepted that theory in light of the "large punitive award." *Id.*

The comments about cart attendants and surveillance cameras are non sequiturs. Those contentions do not show Target's purportedly ineffective cleaning and inspection procedures were "motivated primarily by *unreasonable* financial gain," were unreasonably dangerous and created "the high likelihood of injury," or that a Target manager, director, officer, or policymaker knew or approved of those practices with those consequences in mind. *See* S.C. Code § 15-32-530(B)(1) (emphasis added) (outlining such scenarios as bases for imposing $2 million cap). And the circular logic that the jury's verdict proves its own legality defies the trial record (because the jury was never told about the statutory cap) and the law (because § 15-32-530(B) expressly prohibits disclosure of the statutory cap to the jury). The $500,000 cap on punitive damages applies here.

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

The Court of Appeals relied on *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), and its discussion of "potential harm," to reverse the trial court's "specific conclusion" that the jury's 45:1 punitive damages award violated due process. (App. 21.) But, as discussed in Target's opening brief, because the Garrisons introduced no evidence at trial to support any potential harm, *Mitchell* simply fails to impact the analysis. If 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.

The Garrisons fail to refute Target's main argument—that potential harm requires proof. Garrisons' Response at 25–27. Target does not dispute that, as the Garrisons argue, potential harm *may* factor into the calculation of the punitive damages ratio. But 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. 385 S.C. at 581-82, 686 S.E.2d at 182. Similarly, in *Austin v. Stokes-Craven Holding Corp.*, the case the Garrisons discuss to

support their position, 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.

In contrast to the plaintiffs in *Mitchell* and *Austin*, however, the Garrisons produced no evidence showing that Denise might experience future harm. The Garrisons offer up the fact that Denise prophylactically took preventative medications, and that she submitted to periodic blood tests following the incident. Garrisons' Response at 26. But these examples speak to Denise's actual damages assessed at trial—rather than projected future damages. The Garrisons, like the plaintiffs in *Mitchell* and *Austin*, could have introduced expert testimony about the potential harm Denise might face as a result of handling a discarded syringe. They did not. Instead, they play on imaginary consequences unsupported by anything in the record. Thus, the inclusion of potential harm in the due process calculation is inappropriate in this case.

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

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

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. And 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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