THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Dec 29 2020
S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

Case No. 2014-CP-04-1426 *consolidated with* Case No. 2015-CP-04-2206

Supreme Court Case No. 2020-000523
Court of Appeals Case No. 2017-000267

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

v.

Target Corporation, ...Respondent/Petitioner.

REPLY BRIEF OF PETITIONERS/RESPONDENTS

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Unlike the factual questions presented in Target's cross-appeal, the issues that are the subject of the Garrisons' appeal are purely legal: (1) whether the offer-of-judgment rule permits pre-judgment interest on a punitive verdict and (2) whether, if this Court disagrees with the Court of Appeals' waiver finding, the punitive-damages caps are constitutional? The answers to these questions are "yes" and "no."

Despite the order of the Garrisons' opening brief, Target addresses the two issues in backwards fashion. In particular, the company first discusses the caps' constitutionality and later moves to Rule 68. Target should have stuck with the Garrisons' organization, since there is no reason for this Court to even address the constitutional analysis. But mistaken chronology aside, Target's position is flawed from all angles. A rebuttal for each issue is provided in turn.

I. Rule 68 does not exempt punitive damages from its reach.

Throughout its response, Target suggests that this Court "should not reach" the pre-judgment-interest issue, in effect re-arguing its liability position. But the Garrisons have explained in their prior briefs why Target's liability argument is meritless. It would be difficult to

imagine a stronger case for constructive notice, and Target does not even contest the jury's "recklessness" finding as it relates to punitive damages. So the Rule 68 question must be reached.

When it is, the "analysis begins and ends with the text." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014); *see also Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d. 675, 677 (2007) (explaining that "[w]e need not go any further than the plain language of" the statute). Target does not, because it cannot, dispute that Rule 68 draws no distinction between different damage categories. Rule 68 instead ties pre-judgment interest to "the amount of the verdict or award[.]"

Target's request for an implied exception is incompatible with this Court's precedent. In *University of South Carolina v. Batson*, 271 S.C. 242, 244, 246 S.E.2d 882, 883 (1978), for example, Target's same argument was rejected. This Court held that, "[i]n the absence of any exceptions . . . , it must be concluded that the General Assembly intended that there be none." *Id.* This holding followed from the rule that "words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or

expand the statute's operation[,]" for "it is beyond this Court's power to effect a change in the statutes enacted by the Legislature." *See Key Corporate Capital, Inc.*, 373 S.C. at 59, 644 S.E.2d. at 677 (emphasis added) (quoted cases omitted).

Asking for an unprovided-for exception also is inconsistent with very recent United States Supreme Court precedent as well as the foremost legal treatise on statutory interpretation. Target fails to grapple with, or even acknowledge, *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1271 (June 8, 2020). There, the Supreme Court refused to carve out an exception for "without prejudice" dismissals when the statutory text used the word "dismissal" without limitation. *Id*. (holding that "this Court may not narrow a provision's reach by inserting words Congress chose to omit"). Nor does Target respond to Justice Scalia's book, READING LAW, which warns that courts should not "elaborate unprovided-for exceptions to a text" because, "[i]f the Congress had intended to provide additional exceptions, it would have done so in clear language." *See* A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 8, p. 93 (2012) (cleaned up). Each omission is telling.

In the Court of Appeals, Target urged the court to focus on supposed purposes instead of text. The company has now abandoned the word "purpose" in its briefing, but the argument is still the same. Rather than pointing to Rule 68's plain language, Target contends that "prejudgment interest serves to compensate the plaintiff[ ] while punitive damages serve to punish the defendant."

Target presumably wants to mask its purpovist approach because jurists across the Nation have pummeled that interpretive theory. Indeed, the authority is so abundant that the Garrisons have to use a footnote to collect examples of it.[1] As Justice Elena Kagan is often

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[1] *E.g., Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (explaining that it is "mistaken" to focus on supposed statutory objectives as opposed to statutory text); *Hewitt v. Helix Energy Solutions Group, Inc.*, __ F.3d __, 2020 WL 7488207, *6 (5th Cir. Dec. 21, 2020) ("[I]t should go without saying that we are governed by the text . . ., not some unenumerated purpose."); *Arangure v. Whitaker*, 911 F.3d 333, 345 (6th Cir. 2018) (Thapar, J.) ("This argument illustrates the problems with purposivism; it suggests courts can simply ignore the enacted text and instead attempt to replace it with an amorphous 'purpose' that happens to match with the outcome one party wants. But that has no limiting principle. . . . [Laws] are motivated by many competing—and often contradictory—purposes. [T]hese purposes [are implemented] by negotiating, crafting, and enacting [a] text. It is that text that controls, not a court's after-the-fact reevaluation of the purposes behind it."); Neil M. Gorsuch, A REPUBLIC, IF YOU CAN KEEP IT 10 (2019) ("[A]n originalist and a textualist will study dictionary definitions, rules of grammar, and the historical context, all to determine what the law meant to the people when their representatives adopted it." They will not, by contrast, "guess about unspoken purposes hidden in the hearts of legislators or rework the law to meet the judge's estimation of what an 'evolving' or 'maturing' society should look like[.]").

quoted as saying, "We are all texualists now." *See* Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, (Nov. 25, 2015), available at https://youtu.be/dpEtszFT0Tg.

Target argues that this Court can look beyond the text because Rule 68 does not expressly say that pre-judgment interest applies to punitive damages. But this argument is a classic red herring, for silence does not create an ambiguity. *See, e.g., United States v. Geiser*, 527 F.3d 288, 294 (3d Cir.2008). ("[S]tatutory silence does not prove that a term is ambiguous."); *see also Davis v. Orangeburg–Calhoun Law Enforcement Com'n*, 344 S.C. 240, 248, 542 S.E.2d 755, 759 (Ct. App. 2001) ("Silence on the issue does not create ambiguity."). When there is no ambiguity, the words of a text must be applied as written. *See Commissioners of Public Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 214, 833 S.E. 2d 834, 836 (2019).

Rule 68 simply is not susceptible to multiple meanings. It means exactly what it says: a plaintiff is entitled to prejudgment interest on "the verdict or award." Just as in *Batson* and *Lomax*, there is no basis for limiting the phrase.

Nonetheless, even if the supposed "goals" of Rule 68 were an appropriate consideration, Target loses on that score as well. Every other court to address the question confronting this Court has held that, in the offer of judgment context, pre-judgment interest advances the goal of punishing a defendant who has refused to settle. *See Boulevard Associates v. Sovereign Hotels, Inc.*, 861 F.Supp. 1132, 1141 (D. Conn. 1994) (explaining that Connecticut's offer-of-judgment statute was "punitive in nature"); *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472, 481 (Wis. Ct. App. 1997) (explaining that Wisconsin's offer-of-judgment statute was a necessary penalty "to encourage pretrial settlement and avoid delays").

Target disputes that Connecticut and Wisconsin are the only other states to have addressed the precise question presented here, instead claiming that California went its way in *Lakin v. Watkins Associated Industries*, 863 P.2d 179 (Cal. 1993). That characterization of *Lakin* is misplaced. Unlike the Connecticut and Wisconsin statutes, California's offer-of-judgment rule did not apply to all civil actions. The court did not award pre-judgment interest in *Lakin* because the statute specifically limited prejudgment interest to "damages for personal

injury[,]" and "[p]unitive damages are not damages 'for' personal injury[.]" *Id*. at 664.

Lakin, then, actually supports the Garrisons' position because there is no such limiting language in Rule 68. South Carolina's rule applies to all "verdicts" or "awards," not a specific category of cases or type of damages like in California.

The other out-of-jurisdiction cases that Target relies on have no application, since they are not offer-of-judgment cases at all. But Target is still wrong to suggest that pre-judgment interest is not permitted on punitive damages in other contexts. Courts specifically have held otherwise. *E.g., Latham Seed Co. v. Nickerson Am. Plant Breeders*, 978 F.2d 1493, 1502 (8th Cir. 1992) (holding that Michigan Supreme Court would treat an award of exemplary damages as a "money judgment" on which a plaintiff could recover prejudgment interest); *Demarest v. Progressive American Ins. Co.*, 552 So.2d 1329, 1337-39 (La. App. 5 Cir. 1989) (holding that prejudgment interest is recoverable on an award of exemplary damages). This Court should follow cases in the specific context of offers-of-judgment, but Target's logic is flawed as a general matter.

The overarching point is that Target's anti-textual position must be rejected. It raises serious separation of powers concerns and actually contradicts the company's position on the waiver issue raised in the cross appeal. *See* Target's Cross-Appeal Brief at p.32 (arguing there that "Section 15-32-530 nowhere requires either party to plead the damages cap"). Rule 68's plain language should be this Court's only guide, and it leads to a reversal of the Court of Appeals on this issue.

II. If this Court reverses the waiver holding, the caps are unconstitutional in any event.

Two constitutional concerns are raised on this issue: the question of constitutional avoidance and the question of the right to trial by jury. This Court does not have to consider the second concern because affirming the Court of Appeals' waiver finding would allow this Court to steer clear of Section 15-32-530's constitutional problem. *See State v. Whitesides*, 397 S.C. 313, 725 S.E. 2d 487 (2012) (interpreting statute in a manner that avoided constitutional inquiry); *see also* Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at § 38, p.247 ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt."). But if the second concern is addressed, this Court should hold that the Legislature exceeded its authority.

Target cannot dispute that South Carolina's Constitution contains the same provision the Missouri Supreme Court relied on to strike its punitive damages cap, both declaring that "[t]he right of trial by jury shall be preserved inviolate." Accordingly, the company resorts to a subjective, second-guessing of another state's highest court: "[I]n Target's opinion, [*Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) is] flawed[.]"

But Target's opinion has not been accepted elsewhere. In *Lindenberg v. Jackson National Life Insurance Company*, 912 F.3d 348, 363-70 (6th Cir. 2018), the Sixth Circuit relied on *Lewellen* and struck down Tennessee's punitive damages cap. Tennessee's Constitution, like South Carolina's and Missouri's, says that "the right of trial by jury shall remain inviolate[.]" *Id.* at 364 (quoting TENN. CONST. ART. I, § 6).

Although Target does not cite *Lindenberg*, the Sixth Circuit addresses every counter argument Target raises in its brief as well as others not advanced. Specifically, the court rejected older cases that uphold damage caps, rejected the Legislature's absolute right to alter the common law, and rejected the notion that punitive damages only speak to legal consequences, not fact finding. *Id.* at 363-70. *Lindenberg*

reasons that the Legislature is not permitted to "revers[e] a jury's assessment of the amount of damages necessary to deter a defendant from future wrongful conduct." *Id*. at 369-70.

Lindenberg and *Lewellen* are the most recent decisions addressing punitive damages caps, and they represent a trend in favor of courts pushing back against the "vanishing jury trial." While the due process clause provides a backstop against excessive punitive damages, the Legislature is not permitted to lower the ceiling in violation of a plaintiff's right to have his or her peers decide how much is enough within constitutional limits.

It is wrong for Target to accuse the Garrisons of making a "conclusory argument" and to say that the couple does not "marshal . . . historical evidence[.]" Simply put, the analysis on this issue is not complicated. The Garrisons have provided this Court with case law from other jurisdictions addressing precisely the same language contained in the South Carolina Constitution. Page length is not the constitutional test, for *Lindenberg*'s analysis is highly persuasive and was done over the course of only six pages. *See Lindenberg*, 912 F.3d at 363-70.

Nonetheless, to the extent Target seeks "historical evidence" regarding punitive damages, such evidence is not hard to find. As far back as 1784, before the current South Carolina Constitution was even adopted in 1895, this State approved exemplary damages after a defendant put a fly in a plaintiff's drink and caused the plaintiff two weeks of extreme pain. *See Genay v. Norris*, 1 S. C. 3, 1 Bay 6 (1784). Commentators have called *Genay* "[t]he first reported case in this country in which punitive damages were allowed[.]" *See* Eric James Hertz & Mark D. Link, GA. PUNITIVE DAMAGES § 1-3, *American common law history* (2d ed.).

The Garrisons' argument, then, is even stronger than the arguments accepted in other jurisdictions. *Lindenberg* explained that, because "juries were awarding punitive damages at the time the Tennessee Constitution was drafted and [because] the practice continued uninterrupted in Tennessee thereafter[,]" "'the right to trial by jury as it existed at common law' in 1796 would have included the right to have the jury award punitive damages in appropriate cases." So too here – as *Genay* is said to have been the first case anywhere.

Target's lone remaining argument is *Wright v. Colleton County School District,* 301 S.C. 282, 391 S.E.2d 564 (1990), but the Garrisons' opening brief explains why *Wright* is different. A tort claims statute that abrogates the sovereign immunity all governmental entities possess unless waived is not the same as a cap applicable to ordinary citizens. No one has the right to sue the government in state court unless the government itself allows it; the Garrisons, by contrast, have never waived their "right of trial by jury[,]" as the Constitution preserves it "inviolate."

In sum, the Garrisons reiterate that there is no reason for this Court to reach the continued viability of the caps. But if this Court does, then the reasoning of recent decisions by other courts offer a far more persuasive guide than Target's brief. Nothing less than safeguarding the Constitution is at stake.

CONCLUSION

The Court of Appeals' offer-of-judgment holding should be reversed, and the Court of Appeals' waiver holding should be affirmed. In the alternative only, this Court should strike the punitive damages caps as unconstitutional.

Dated: December 28, 2020.

Respectfully submitted,

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