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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daniel O'Shields And Roger W. Whitley, A Partnership d/b/a O&W Cars,

Appellants,

v.

Columbia Automotive Company, LLC d/b/a Midlands Honda,

Respondent.

R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5845 (S.C. Ct. App. filed August 11, 2021)

Appellate Case No. 2021-001388

On Writ Of Certiorari To The Court Of Appeals

BRIEF OF PETITIONERS

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I. Did the Court of Appeals err in holding that $46,515 is the maximum punitive award consistent with the Constitution on these facts?

Where Respondent Dealer fraudulently sold at an auction, without disclosure, a Honda "Civic" that was actually two half-Civics poorly welded together, and Respondent's senior management testified they had done nothing wrong, and that it was no concern of Respondent's whether the vehicle would be put on the street, did the panel err in failing to follow the instructions of the United States Supreme Court to consider whether Respondent's actions evinced an indifference to the health and safety of others?

Did the panel err in failing to follow the instructions of the United States Supreme Court to consider the potential harm created by Respondent's acts?

In comparing the punitive award to a thousand dollar penalty and trebled damages, but not to awards in any cases, did the panel contradict the teaching of this Court in *Austin v. Stokes-Craven Holding Corp.* that punitive awards should be compared to awards in factually-similar cases, and/or this Court's holding in *James v. Horace Mann Ins. Co.*, that penalties of $15,000 to $30,000 are too low to be proper comparisons for a punitive award?

Did the panel err in additional aspects of its treatment of the punitive award?

II. Did the Court of Appeals err in holding that Petitioners' rejection of an assumedly unreasonable settlement offer, followed by their declining to make a counter-offer, suffices to end Petitioners' statutory right to attorney fees for their counsels' work after the unreasonable offer?

Did the Court of Appeals err in holding that the United States Supreme Court's opinion in *Hensley v. Eckerhart* might allow the trial court to reduce fees awarded on an unfair trade practices claim on grounds of "limited success," when Petitioners will have attained all actual damages sought, and the maximum punitive damages allowed under law?

Did the panel err in holding, as an additional sustaining ground re Petitioners' final fee request, that fees for work designed to increase the award through amending the judgment are not allowed?

III. Did the Court of Appeals err in holding that offer of judgment benefits were unavailable to Petitioners, when they obtained a verdict at least as favorable as the rejected offer?

OVERVIEW

This brief centrally concerns issues of federal constitutional law on which the panel's opinion conflicts with decisions of the United States Supreme Court and of this Court. It also concerns questions of North Carolina law and an incorporated issue of federal law where the panel's opinion defies North Carolina and federal precedent, and concerns the panel's interpretation of South Carolina's offer of judgment statute.

The case concerns a Honda "Civic" that Respondent, a Honda franchise dealership, purchased from a consumer, inspected, put up on a rack, and certified as a Honda-Certified Used Car. It was actually two half-Civics previously wrecked and poorly welded together.

Respondent fraudulently sold it to its first victim, Charles Ecklund, a consumer, repeatedly representing it was 100% Honda-Certified, and that Respondent had subjected it to a 159-point inspection.

When Mr. Ecklund discovered the fraud and returned it, Respondent shipped it to a North Carolina auction that requires disclosure of structural damage, in a state whose law requires disclosure of structural damage, and failed to disclose the damage.

The questions of federal constitutional law concern whether $46,515 is the maximum punitive award permissible under these facts. The panel declined to consider whether the tortious conduct evinced "an indifference to or a reckless disregard of the health or safety of others," despite instructions from the United States Supreme Court to do so. The panel declined to consider the potential harm caused by Respondent's actions, again despite repeated instructions from that Court to do so. The panel declined to compare the punitive damages awarded here to damages in factually-similar cases, despite this Court's instructions to do so. Instead, it compared the punitive award here to treble damages under the UTPA, thereby conflicting with prior decisions of this Court and the Court of Appeals' own prior decisions.

The panel further found that Respondent may not have known the vehicle was wrecked and may not have known it was violating the law, thereby contradicting the jury's verdict and the trial judge's order, each of which found Respondent's violations to be willful, and the admission of Respondent's own trial counsel before the jury that Respondent knew of the damage when it sold the vehicle to Petitioners.

This appeal also concerns two questions regarding attorney fees under the North Carolina UTPA. In one, the panel relied on its misreading of a federal case to stand for the proposition that UTPA fee awards may be reduced due to the low amounts at stake, thereby contradicting the Supreme Courts of the United States and North Carolina. In another, the panel held that a failure of a plaintiff to respond more than once to an assumedly-unreasonable settlement offer suffices to terminate the accumulation of attorney fees after the date of the offer, which is something no North Carolina appellate court has ever held, and is contrary to North Carolina appellate opinions and to common sense.

This appeal also concerns a question re the offer of judgment statute.

STATEMENT OF THE CASE

Petitioners sued on January 17, 2013, alleging claims under South Carolina law against Respondent, a Richland County automotive dealership, and Nationwide Mutual Insurance Company which arose from the allegedly deceptive sale in April of 2010 by Respondent at an ADESA (Automobile Dealer Exchange Services of America) auction in Charlotte, North Carolina of a previously wrecked automobile. (R. p. 48-59, p. 103). (The insurance company settled and was dismissed from the case. (R. p. 42)). They claimed breach of contract, negligence, negligent misrepresentation, constructive fraud, fraud, violation of the South Carolina Dealers Act, and violation of the UTPA. Respondent moved to dismiss on grounds that North Carolina law rather than South Carolina law applied. (R. pp. 1181-83). Petitioners amended their complaint on May

9, 2013, to allege violations of North Carolina law rather than South Carolina law. (R. pp. 67-77). The amended complaint alleged breach of contract, negligence, negligent misrepresentation, constructive fraud, fraud, and violation of the North Carolina Unfair Trade Practices Act ("UTPA"). (*Id*.) Petitioners amended the complaint again at trial to reflect the removal of Nationwide as a defendant and the withdrawal of a claim for constructive fraud. (R. pp. 41, 92-100, 468:10-18).

Respondent's final answer contained numerous defenses, including a general denial, failure to state a claim, failure to mitigate, the economic loss rule, and election of remedies. (R. pp. 84-91).

Petitioners filed an offer of judgment in February of 2016 for $280,000. (R. pp. 1187-88). Respondent did not accept the offer.

A bifurcated trial was held from April 18 through April 22, 2016, in the Richland County Courthouse, the Honorable R. Ferrell Cothran, Jr., presiding. Plaintiff called an expert to testify about risks the car poses to the public (R. pp. 474-520). Respondent did not call an expert. In addition to live testimony, Petitioners played to the jury video excerpts from the depositions of Mr. Ecklund (R. pp. 102-139; 311, lines 2-3), and of the auction's representative (R. pp. 140-222, 311 lines 25-25).

The trial judge dismissed the claim for simple negligence and sent four causes of action to the jury: breach of contract, negligent misrepresentation, fraud, and violation of the UTPA. The jury awarded the full amount of actual damages requested, $6,645, on each cause of action. (R. pp. 43-44; 764, lines 4-5).

The jury then returned a punitive verdict for $2,381,888.00. (R. p. 47).

After extensive post-trial briefing (R. pp. 1277-2157), the judge issued three post-trial

orders, dated December 2, 2016, March 16, 2017, and August 14, 2017. (R. pp. 1-34).

Collectively, these orders reduced the punitive award to $46,155 on grounds that any larger award would be incompatible with due process (R. p. 23); awarded Petitioners attorney's fees in the amounts of $21,264 for work from June 29, 2011 through July 20, 2016, and $10,140 for work through September 14, 2016 (*id*.); held that no fees would accrue for work after September 14, 2016 (R. pp. 27-28; 30-33); required Petitioners to elect between their statutory fees and their reduced punitive award (R. p. 23); and denied offer of judgment benefits to Petitioners (*id*.). They also awarded pre-judgment interest of $1,993.38 (with an additional $1.46 per day accruing from October 10, 2016, through the December 2, 2016, date of filing of the first order, totaling $2,070.76). (R. p. 28).

The second order's rationale for ending accumulation of fees on September 14, 2016, was that Respondent had made an offer to settle then for either $81,069 or $74,424. (R. pp. 27-28). The final order added rationales that after that date, Petitioners were attempting to increase the judgment and that the trial judge, in his discretion, had determined that fees would not be available for work after that date. (R. pp. 32-33).

Petitioners timely served notice of appeal of the first two post-trial orders on April 11, 2017, and served notice of appeal of the August 14 final order on September 5, 2017. Their appeal asked that the punitive damage award be increased to the $500,000 level set by North Carolina statutory law; that the attorney fees be increased and not be deemed to have ceased on September 14, 2016; that they not be required to elect between statutory fees and punitive damages; and that offer of judgment interest be awarded.

Oral argument was held on March 1, 2021. The panel's opinion issued on August 11, 2021 (Op. No. 5845) (App. pp. 1-20). Petitioners filed a petition for rehearing and suggestion of

rehearing en banc (App. pp. 252-97), which the Court of Appeals denied on October 26, 2021 (App. pp. 20-23). This Court granted the petition for writ of certiorari on September 7, 2022.

STATEMENT OF FACTS

Background Facts and Trial

Petitioners

Petitioners are two elderly gentlemen who operated a small used-car business in Shelby, North Carolina, obtaining cars for friends and people at church, something to keep them occupied and let them feel they are contributing to society. (R p. 583, line 10-p. 589, line 13; p. 595, lines 23-25; p. 651, line 14). They bought the "Civic" with the family of a 16-year-old girl in mind, who had said they wanted something safe and reliable for the girl to drive to school. (R. p. 595, line 25-p. 596, line 2). They sold it to the family. (R. p. 613, line 25-p. 614, line 12). When the fraud was discovered for the second time (R. pp. 614, line 2-p. 619, line 17) (it having previously been discovered by Mr. Ecklund), they immediately refunded all the money the family had paid them (R. p. 633, lines 6-8). They also reimbursed the family for the state registration fee and the like that the family had paid (R. p. 619, lines 4-9). They demanded that Respondent take back the vehicle and refund their money (R. p. 617, line 21-p. 618, line 4).

Respondent's Manager took down their information, including the VIN of the front half of the car, and promised to get back to them. (R. p. 618, lines 11-17). Respondent never got back to them. (*Id*.)

Respondent

Respondent is a major Honda franchise dealership. (R. p. 900, line 22-p. 901, line 3). Respondent was selling 100 vehicles a year at that North Carolina auction (R. p. 360, lines 12-23). It had been doing so for years (R. p. 355, lines 22-25; p. 362, line 11-p. 363, line 1). Respondent's Used Car Manager had been going there once a week. (R. p. 362, line 11-p. 363, line 1).

Respondent was also buying cars through that auction. (R p. 362, lines 11-23; p. 449 line 14–p. 450 line 23). This was the only auction Respondent was dealing with. (R. p. 378, lines 10-15).

North Carolina law requires disclosure if a car is reconstructed. (R. p. 936). It also requires disclosure when a vehicle has been damaged to an extent of more than 25% of its value. (*Id.*). The auction rules also require disclosure. The auction has various "lights" or categories under which vehicles are brought to the auction block, and they *all* require disclosure of structural damage. (R. p. 1004). It is an obvious inference that a major dealership selling hundreds of used cars in North Carolina and buying others is aware of the law regulating sales of used cars.

The Vehicle's Safety Problems

The vehicle should not be on the road. Petitioners presented Brian Allen, an auto body repair expert. Respondent did not present an expert. Mr. Allen stated, "this vehicle shouldn't be driven. Shouldn't be allowed on the road." (R. p. 513, lines 16-17). First, because manufacturers do not recommend putting two-half cars together. **(**R. p. 495, lines 3-5). A "clipped" vehicle, i.e., one composed of joining two partial vehicles, is "not gonna respond the way it was designed to respond in a subsequent accident." (R. p. 505, lines 18-23).

Second, because the work here was so shoddy.[1] Spot welds should be inches apart so that in a crash they create a crumple zone that absorbs energy. (R. p. 503, lines 16-23). Here, spot welds were welded solid. (*Id.*) Conversely, there were also gaps that should have been fixed but

[1] "[T]hey want their spot welds two inches apart [so] if it gets hit and it collapses between those welds it's a crumple zone. It absorbs energy. Well when one's welded solid like that its not gonna collapse the way it's designed to collapse." (R. p. 503, lines 19-23). Another weld was "just God awful to tell you the truth." (R. p. 502, lines 23-24). "[A]lmost a half to three quarters inch gap between on this structure panel here that's not even welded in this one." (R. p. 489, lines 10-11). "[Y]ou can see where this metal is ripped apart here, and right here, it's not welded back." (R. p. 491, lines 7-9). "It's literally ripped apart." (*Id*., line 22). "It's extremely poor quality work. You see holes in the welds right here." (R. p. 497, lines 20-21).

weren't. "[A]lmost a half to three quarters inch gap between on this structure panel." (R. p. 489, lines 10-11). Places where the metal was "ripped apart," "literally ripped apart." (R. p. 491, lines 7-22). "[E]xtremely poor quality work" (R. p. 497, lines 20-21). "[H]oles in the welds." (*Id.*)

Additionally, the brake lines had been cut and were held together by only a splicer. (R. p. 512, lines 9-14.)

The expert backed up his testimony with photographs he showed to the jury. (R. pp. 1036-1054. (*See also* R. p. 497, line 8-p. 499, line 8 (testimony re photograph at R. p. 1037); p. 500, line 17-501, line 16 (testimony regarding photograph at R. p. 1041); R. p. 512, lines 5-21 (testimony re photographs at R. pp. 1053-54)).

How the Victims Discovered the Problem, What They Did About It, and How Respondent Responded

The Frankencar looked like a normal vehicle with a damaged door. (R. p. 597, lines 8-25). It ran like a normal vehicle. (R. p. 600, lines 11-12). Mr. Ecklund told Respondent he needed something "safe" and "dependable," as he was starting active duty in the Reserve and would be driving back and forth. (R. p. 105, line 21-p. 106, line 15). Respondent sold it to him as a "Honda-Certified Used Car," "100 percent Honda certified," following a 159-point inspection. (R. p. 107, lines 3-19; p. 954; p. 955, p. 957; p. 1024). He had it for two years before learning the vehicle's true nature. Another driver backed into its rear passenger door while the "Civic" was in a parking lot. He brought it to a shop; it was raised on a lift; and massive damage was visible from underneath. (R. p. 120, line 22-p. 130, line 15).

He called Respondent and spoke with a Senior Manager. (R. p. 131, lines 6-12). His wife called Respondent and left a message for that Senior Manager. (R. p. 1034-35). They wanted their money back. (R. p. 133, lines 3-21). Respondent refused. (*Id.*). Instead, Respondent "swapped" him into another vehicle. (R. p. 136, lines 14-18).

Respondent sent the "Civic" to the North Carolina auction. Petitioner Whitley was there the day the vehicle was put on the auction block. It did not sell on the auction block. (R. p. 598, line 10-p. 600, line 21). After it failed to meet the $7,200 minimum bid Respondent required, Petitioners and Respondent indirectly negotiated a price with the auction's employee serving as intermediary. (*Id.*) Petitioners bought it for $5,200 with a 16-year old girl in mind who wanted something to drive to school. (R. p. 595, line 25-p, 596, line 2).

The girl's family then purchased it. (R. p. 609, lines 4-24). As part of their contract, Petitioners were to provide labor free of charge for some maintenance. (R. p. 614, lines 7-21). The family brought the vehicle back for that work to be done. (*Id.*). It was raised on a lift, and massive damage was visible from underneath. (*Id.*, lines 18-21; R. p. 621, lines 11-16).

Petitioners immediately refunded every penny that family had paid them. (R. p. 614, line 24-p. 615, line 9; 633, lines 6-8). They even reimbursed the family for registration fees and the like (R. p. 619, lines 4-9). They called Respondent, spoke to Respondent's Used Car Manager, and told him what they discovered. (R. p. 617, line 13-p. 618, line 17). They wanted their money back. (*Id.*). The Used Car Manager wrote down the VIN of the front half of the car, and promised to get back to Petitioners. (*Id.*)

Respondent never got back to them.

Respondent Knew the Vehicle Was Unsafe.

Respondent raised the vehicle on a rack before selling it the first time. Respondent performed a 159-point inspection of the vehicle and an oil change. (R. p. 1024). A jury is well within its province to conclude that Respondent knew of the damage.

Moreover, Mr. Ecklund told them. "I told him that the vehicle is not safe to drive and I told him why." (R. p. 131, lines 23-24) (recounting conversation with a Senior Manager). The

first victim's wife told them. They took a telephone message: She "called and wants you to call him about the car they got. She said it was 2 cars welded together and it's not safe." (R. p. 1034).

Although Respondent's Used Car Manager told the jury they were unaware of the damage, Respondent's counsel, faced with overwhelming evidence, conceded in his closing that they knew. Respondent's Used Car Manager told the jury, "If we would have had the knowledge of the car had been cut in half and unsafe and unreliable, if we'd have known all that, we would have still took it to a sale and wholesaled it, and disposed of the vehicle" (R. p. 437, line 24-p. 438, line 2). But Respondent's counsel admitted in closing that when Respondent tried to sell it on the auction block, and when Respondent sold it to Petitioners, Respondent knew "this is two cars put together." (R. p. 772, lines 7-8).

Respondent Was Required to Disclose the Damage.

North Carolina statutory law requires the seller of a used vehicle, whether an individual or a dealership, to disclose this sort of damage. North Carolina requires the seller to disclose if the seller has knowledge the vehicle was ever damaged to the extent that "damages exceed 25% of its value at the time" or that the vehicle was "reconstructed." (R. p. 936);[2] *see also* N.C. Gen. Stat. Ann. § 20-71.4(a)(1) and (c). This vehicle was both.

Additionally, as Respondent's counsel conceded (R. p. 716, lines 1-8), North Carolina common law requires a seller with superior knowledge to disclose faults the prospective purchaser could not reasonably discover before the sale; *see also Brooks Equip. & Mfg. Co. v. Taylor*, 55 S.E.2d 311, 315 (N.C. 1949), *Everts v. Parkinson*, 555 S.E.2d 667 (N.C. App. 2001).

[2] The panel's opinion may leave the misimpression that the North Carolina Department of Transportation document, "MVR-181 (Rev. 1/02)" on page 936 of the Record is simply an "auction form."

Respondent's Used Car Manager declared he had "superior knowledge" about the vehicle compared to the bidders at the auction. (R. p. 350, line 25-p. 351, line 3).

Disclosure of structural damage of all vehicles sold at the auction is also required by auction rules. (R. p. 1004). A car can come to the auction block designated as "green" light or "red" light; frame and unibody damage must be disclosed regardless. (*Id*.) If one is selling a reconstructed vehicle, that too must be disclosed. (*Id*.).

Respondent Chose Not to Disclose.

It is undisputed that Respondent did not disclose.

Respondent Denied Any Concern for the People It Put at Risk.

"That's irrelevant." Respondent's 30(b)(6) Corporate Representative testified that Respondent does not care what people do with the vehicles after Respondent sells them at an auction. (R. p. 541, lines 3-22). Respondent does not care if the vehicles are put on the highways. (*Id*.). "[T]hat's irrelevant." (*Id*.)

That testimony was in the liability phase of the trial. It was before Respondent's counsel admitted at the end of the liability phase that Respondent had known the nature of the car. In the subsequent punitive damages phase of the trial, the Corporate Representative (who was also the General Manager at time of trial) testified that they "don't think about the consequences" when they sell these cars, and Respondent "didn't owe any duty" to "anyone" when selling these cars. (R. p. 885, lines 12-20).

It's not just that Respondent showed no concern for the motoring public—it specifically disavowed any care in the world. Which was also clear from its actions in selling this vehicle to unsuspecting customers.

Actual Damages Verdicts

The jury awarded the full amount requested, $6,645, on each of the four causes of action it considered. (R. p. 764, lines 4-5; pp. 43-45).[3] In doing so, it necessarily found Respondents had acted "with the intent to deceive" (R. p. 837, lines 4-6, p. 44). It also answered in Petitioners' favor special interrogatories Respondent had requested (R. p. 732, line 21-p. 733, line 5, p. 45).

The Jury's Punitive Damages Verdict

The jury awarded $2,381,888.00 in punitive damages. (R. p. 47). The jury clearly desired to punish this company as the amount they awarded was one year of its revenue. (R. p. 900, line 13–p. 902, line 1; p. 1061 (financial statement)). This amount is less than 25% of Respondent's net worth of $10,969,318. (R. p. 902, line 2-p. 903, line 9; R. p. 1061 (financial statement)).

Additional facts going to various issues are presented in those discussions.

Post-Trial Proceedings

North Carolina Law

At Respondent's insistence (R. pp. 65, 1181-83), the case was tried under North Carolina rather than South Carolina causes of action and over Petitioners' objection (R. p. 579, line 6-p. 580, line 10), the trial judge similarly applied North Carolina rather than South Carolina law of punitive damages.

Two aspects of North Carolina law are relevant. First, North Carolina, like South Carolina, has a statutory cap on punitive damages. The two laws are similar, yet not identical. The differences are, first, that N.C. G.S. § 1D-25 has a cap of three times the actual damages or $250,000, whichever is greater, and the cap is per plaintiff, *Rhyne v. K-Mart Corp.,* 594 S.E.2d 1, 20 (N.C. 2004), so in this case the combined cap would be $500,000, whereas S.C. Code Ann.

[3] The Panel errs in stating the jury issued verdicts on only two claims (App. p. 2 & n.2).

§ 15-32-530(A) allows for a $500,000 award for a single plaintiff; and the South Carolina statute allows for two million dollar awards under the circumstances here, *id.*, ¶ (B). Importantly, North Carolina's law sets both a ceiling and a floor. "If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court *shall* reduce the award and *enter judgment for punitive damages in the maximum amount*." N.C. G.S. § 1D-25 (emphasis added).[4]

Second, North Carolina, like South Carolina, has an Unfair Trade Practices Act. The difference is that under South Carolina's UTPA, an award of attorney's fees is mandatory, and treble damages apply only if the plaintiff proves the violation was willful or knowing, while under North Carolina's law, it is reversed: treble damages apply automatically, and attorney fees are to be awarded only if the plaintiff proves the violation was willful. *Compare* S.C. Code Ann. § 39-5-140(a) *with* N.C. G.S. § 75-16 (treble damages) and N.C. G.S. § 75-16.1 (attorney fees). Additionally, to be awarded attorney fees under North Carolina's statutes, a plaintiff must prove "there was an unwarranted refusal by [the non-prevailing] party to fully resolve the matter which constitutes the basis of such suit." N.C. G.S. § 75-16.1.

The Trial Court's Rulings

The Trial Court Reduced the Punitive Damages Award by 98 Percent. The trial court held that on these facts, the maximum punitive damages award consistent with due process was $46,515. (R. pp. 6-9, 23). This overrode the legislative mandate to enter awards in the amount of the cap. The trial court reduced the jury's verdict by 98%. The statute would have reduced the verdict by 79%. Put another way, the trial court left Petitioners with 1.95% of what the jury

[4] *Compare* S.C. Code Ann. § 15-32-530 ¶ (A) (an award of punitive damages "may not exceed" the greater of two limits *with id*. ¶ (B) (stating that if the conditions for increasing the award under (B) are not met, the trial court shall enter judgment for punitive damages "in the maximum amount" allowed by subsection (A)).

intended. The legislature contemplated that Petitioners receive 21%.

The Trial Court Reduced the Hours Requested for the First Five Years of Attorney Work by 92%, and then Terminated Fees. The trial court found Respondent's acts were willful and there had been an unwarranted refusal to settle the matter before trial. "[T]he Court finds the prevailing party and willfulness elements are met." (R. p. 12.) "[T]he Court finds there was an unwarranted refusal to settle the entire claim prior to trial." (*Id*.) Yet the trial court awarded fees for only 54.525 hours (R. p. 17) for a case spanning five years, requiring travel to Illinois to depose Respondent's first victim, travel to Charlotte to depose the auction, involving multiple pre-trial hearings, and a five-day trial, as well as extensive work on multiple post-trial motions from both sides, and a trip to Manning for a motions hearing. This was a 92% reduction from the requested hours.[5] (The agreed-upon hourly rate was $390; the trial court awarded $21,264 in fees.) The stated reason for the vast majority of the 92% reduction from the request was that only UTPA-related work should be compensated. (R. pp. 16-17).[6]

The trial court later awarded another $10,140 for work performed after that hearing, and then terminated the accrual of fees, as described below.

Election of Remedies. The trial court ordered Petitioners to elect between their UTPA verdict, with its trebled damages and attorney's fees, totaling $41,199, or the fraud verdict, with its associated punitive damages, totaling $53,160. (R. pp. 20, 1731).

The Trial Court Denied Offer of Judgment Benefits. The trial judge declined to award

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[5] The order did not state the number of hours requested, but Petitioners had delineated 452.1 hours for five years of work by Mr. Moskos from June of 2011 through May 1 of 2016 (R. p. 1356); 153.8 for his work from May 2 through July 20, 2106 (R. p. 1535 ¶ 27), and 56.1 for the work of Mr. Fudenberg from May through July 20, 2016 (R. p. 1548). This totaled 662.

[6] The order first reduced the compensable hours from the 662 requested to 218, a 67% cut, solely on grounds of apportioning (R. p. 16), and then reduced the remaining hours by *another* 75%, again largely on grounds of apportioning (R. pp. 16-17).

Petitioners offer of judgment interest, on grounds the judgment entered by the court was less than Petitioners' offer of judgment for $280,000, even if the jury's $2.38 million verdict was not. (R. p. 21).

The trial court also denied Respondent's motions for Judgment Notwithstanding the Verdict, for a New Trial, and for a New Trial Nisi Remittitur. (R. p. 23).

Later Orders

The trial court issued two additional orders. In March of 2017, it ruled on Petitioners' motion to reconsider and for supplemental fees. (R. pp. 24-29, pp. 1884-97). The motion asked the court to reconsider its rulings on the election of remedies issue, the amount of punitive damages, offer of judgment interest, pre-judgment interest, and the amount of attorney fees earned through July 20, 2016. It also requested an award of attorney fees for work performed after July 20. The order denied reconsideration of the issues ruled on in its prior order, other than pre-judgment interest, which it adjusted in Petitioners' favor.

It provided a fee award of $10,140 for work performed between July 21 and September 14, 2016. It reasoned that Mr. Moskos had spent excessive time in August on a counter-affidavit responding to an affidavit that Respondent had filed after its due date (R. pp. 26-27), and that much of the time was spent on claims other than the UTPA claim (*id*.).

It then terminated fees as of September 14, 2016, the date Respondent made a post-trial offer to Petitioners to settle for the amount the lower court had awarded plus three percent of the amount in dispute. (R. pp. 27-28). It reasoned there was no longer an "unwarranted refusal" to resolve the entire matter by Respondent once that offer was made.

The lower court had stated in August 2016 that Petitioners could choose an award of $53,160. (R. p. 1731). Respondent made its offer the next month, on September 14, 2016. (App. p. 2007). Respondent's offer was for either $81,069 or $74,424 (the offer contained conflicting

figures). (*Id*). Taking the higher of the offer's figures, Respondent was offering only $27,909 above the amount the lower court had stated. ($81,069 minus $53,160).

In exchange for that $27,909, Respondent would escape potential liability of more than a million dollars. ($1,003,446.39, consisting of $500,000 in punitive damages at $250,000 per plaintiff, $236,628.01 in offer of judgment interest, $6,645 in actual damages, $1,993.38 in pre-judgment interest, and $258,180.00 in unmultiplied fees for the first five years of work through July 20, 2016, in addition to fees incurred between July 20 and September 14, 2016, and pre-judgment interest). That is an offer of less than 3% of the amount then in dispute.[7] In more common-sense terms that is less than three cents on the dollar.

The final order issued on August 17, 2017. (R. pp. 30-34). Petitioners had moved for supplemental fees for work performed between December 2016 and March 2017 (R. pp. 2058-64), and then served notice of appeal (R. pp. 2158-59). Petitioners expected any substantive ruling on that motion to wait until after remand. They reasoned that by timely filing the motion, they would avoid any argument on remand that they had waited too long to seek these additional fees. Yet even after Petitioners informed the trial court of their view that the trial court lacked jurisdiction, given that the matter was under appeal, and that the motion's purpose was simply to avoid any argument on remand that these fees were not timely requested (R. pp. 2093-94), the trial court issued an order stating it was "perplexed" as to why this motion was filed, given the previous ruling that fees stopped accruing on September 14, 2016 (R. pp. 31).

[7] (1,003,446.39 - 53,160) = 950,286.39. (81,069 - 53,160) = 27,909. (27,909/950,286.39) = **2.94** percent.

THE OPINION OF THE COURT OF APPEALS

The Court of Appeals' opinion issued on August 11, 2021. (Op. No. 5845, 435 S.C. 319, 867 S.E.2d 446). It agreed with Petitioners that election between the punitive damages verdict and the attorney's fees should not be required. It disagreed with Petitioners regarding the amount of punitive damages and whether offer of judgment interest should be awarded. It agreed partially with Petitioners regarding attorney fees.

Punitive Damages

The panel began its discussion of punitive damages by setting forth the three-factor test established by *BMW of N. Am., Inc. v. Gore.* Op. at 5 (citing *Gore*, 517 U.S. 559, 568, 574-75, (1996)). (App. p. 5). These are the degree of reprehensibility, the disparity between the punitive award and the actual or potential harm, and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. (*Id.*)

Reprehensibility

The panel began its discussion of the reprehensibility factor by stating the law governing this factor. "'We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; *the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others*. . .'" (*Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419 (2003)) (emphasis added)).

However, the panel's analysis of reprehensibility did not address whether selling an unsafe car without disclosure, and claiming to have "no concern" about the impact on the public, amounts to an indifference to the health or safety of others. The opinion was silent on the question.

The panel next suggested that Respondent had not known the vehicle was wrecked and that there was not a "deliberate or willful" violation. (App. pp. 6-7).

Disparity Between the Harm or Potential Harm and the Punitive Damages Award

In setting forth the governing law on this factor, the panel quoted *Gore*: courts are to consider "'the disparity between the harm *or potential harm* suffered by [the plaintiff] and his punitive damages award.'" (App. p. 5) (emphasis added) (alteration in original). However, its discussion of this factor neither analyzed nor mentioned the potential harm. (App. pp. 7-8). (Its section heading makes this clear: "B. Amount of Actual Harm v. Punitive Damages Amount." (App. p. 7).)

Comparable Cases

While the panel quoted *Gore* for the proposition that courts are to consider "'the difference between this remedy and the civil penalties authorized or imposed in comparable cases'" (App. p. 5) (quoting *Gore* at 574-75), the panel's analysis of this prong cited not a single case (App. pp. 8-9). Rather, the panel compared the punitive award to penalties peaking at trebled damages under the unfair trade practices act. (*Id*.)

Attorney Fees

The panel, reversing the trial court, agreed with Petitioners that North Carolina law does not allow "apportioning" fees among causes of action that stem from a common nucleus of operative fact. (*Id*. at 9-10).

The panel also reversed the trial court's holding that attorney travel time is not compensable. (App. p. 12). It did so because "The purpose of the fee award is to encourage private enforcement of the NCUTPA. . . . to encourage individuals to bring valid actions to enforce the statute by making such actions economically feasible." (*Id.*) (cleaned).

It remanded for a re-determination of fees based on these holdings.

However, its discussion of other issues neither mentioned nor applied this statutory purpose. Those are the holdings challenged here. First, the panel affirmed the lower court's

holding that fees stopped accruing on September 14, 2016 because of an offer Respondent made on that date. (App. p. 11). The Court of Appeals did *not* find Respondent's offer to be reasonable. Relying on a federal court decision that had appeared after the briefs in the appeal were filed, *DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020), the panel held that courts may evaluate both parties' conduct during post-trial settlement negotiations when determining whether the defendant unreasonably refused to resolve the matter. (*Id.*) It held that Petitioners' disinclination to make a counter-offer doomed their entitlement to any award of fees beyond the date of Respondent's offer. (*Id*.)

Second, in a footnote, the panel held, as an additional sustaining ground, that fees sought in Petitioners' final request could be denied because Petitioners were attempting to increase the judgment, not to protect the judgment. (*Id.* n.11.)

Third, the panel held *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to be the touchstone for all fee awards under North Carolina law. "In North Carolina cases discussing reasonable attorney's fees, no matter the outcome, the touchstone is *Hensley*." (App. p. 12.) It read *Hensley* as authorizing reduction in fee awards based on the degree of success enjoyed by the plaintiff (App. pp. 12-14), and stated, "the circuit court retains discretion—after making a decision about apportionment—to reduce the amount of fees based on the partial or limited success of the litigation" (App. p. 14), and that on remand, "the circuit court may—or may not—reduce the remaining amount of requested fees by a percentage it finds is appropriate to reflect reasonable attorney's fees based on the success of the litigation" (*id.*).

Election of Remedies

Citing *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 691 S.E.2d 135 (2010), and *United Laboratories, Inc. v. Kuykendall,* 437 S.E.2d 374 (N.C. 1993), in which the Supreme Courts of South Carolina and North Carolina, respectively, held that a plaintiff need not elect between

punitive damages for fraud and statutory fees from another cause of action, the panel reversed the lower court and held that Petitioners need not elect. (App. pp. 15-17).

Offer of Judgment

The Court of Appeals affirmed the trial court's holding that Petitioners were not entitled to offer of judgment benefits. (App. pp. 18-19). In so holding, it relied on its own opinion in *Garrison v. Target Corp*., 429 S.C. 324, 377, 838 S.E.2d 18, 46 (2020), which this Court has since reversed on this issue, 435 S.C. 566, 585–87, 869 S.E.2d 797, 808–09 (2022).

The panel instructed the lower court to reconsider on remand whether offer of judgment interest is to be awarded, reasoning that the final judgment amount, after the attorney fees award is adjusted, might be larger than the amount in Petitioners' offer of judgment. (App. p. 19).

THE PETITION FOR REHEARING

Punitive Damages. Petitioners argued, among other things, that *Gore* required consideration of "whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others'" (App. 267-68) (Am. Pet. Reh'g & Suggest. of Reh'g en banc pp. 16-17); and that the panel erred in failing to consider the potential harm created by Respondent's acts (App. 269-70).

Petitioners further argued that in considering no comparable cases, the opinion contradicted the holding of *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 54, 691 S.E.2d 135, 152 (2004) that a court considering a punitive damages claim against a dealership for deceptively selling a wrecked vehicle is "compelled to review factually-similar cases," and the related holding that the proper comparison group for cases involving a deceptive sale by a dealership of a previously-wrecked vehicle are cases imposing punitive awards of $500,000 to one million dollars. (App. 272-73).

Petitioners additionally argued that in comparing the punitive award here to a penalty of

$1,000 and to treble damages, the opinion conflicted with this Court's holding in *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006) (internal quotation marks omitted) that penalties of $15,000 to $30,000 "are set at such a low level, there is little basis for comparing it with any meaningful punitive damage award," and with the Court of Appeals' own similar holdings in *Duncan v. Ford Motor Co*., 385 S.C. 119, 147-48, 682 S.E.2d 877, 892 (Ct. App. 2009) and in *Collins Entm't. Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 141, 584 S.E.2d 120, 129 (Ct. App. 2003), and with the *Collins* court's holding that trebled UTPA damages are not an appropriate comparison to a punitive damages award. (App. 271-272).

Petitioners also asked the Court of Appeals to reconsider its holdings that there was no evidence that Respondent knew of the damage to the car or of willful or intentional conduct, because the jury found intentional wrongdoing, the judge found willful wrongdoing, Defense counsel conceded to the jury that Respondent had known of the damage, because the evidence was massive (App. pp. 260-66, 268), and to acknowledge that Respondent had violated North Carolina law, not merely the auction's rules (App. pp. 262-263). They also asked that not much weight be placed on the panel's statement that "no direct evidence established the harm . . . was intentional," as intent to defraud is rarely shown by direct evidence. (App. p. 266).

Attorney's Fees. Petitioners asked the Court of Appeals to look more closely at *DENC, LLC v. Phila. Indem. Ins. Co*., 454 F. Supp. 3d 552 (M.D.N.C. 2020), the federal case on which the panel based its decision that fees stopped accruing on September 14, 2016. Petitioners pointed out that *DENC* requires a settlement offer from a defendant be reasonable if it is to impact plaintiff's entitlement to fees, and the offer here was not reasonable; that *DENC* deals with *pre*-trial offers, and lends no support to the strange contention that a *post*-trial offer can terminate the opposing party's claim to fees, a proposition for which neither Respondent nor the panel cited a

single case. Petitioners also asked that because the panel based its decision on *DENC*, it follow *DENC's* explanation that the reasonableness of a settlement offer must be determined in light of "what was ultimately awarded," 454 F. Supp. 3d at 562, and, at a minimum, direct the lower court to evaluate Respondent's offer in light of what is ultimately awarded. (App. pp. 280-82).[8]

Regarding the panel's discussion of the United States Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, Petitioners pointed out both that *Hensley* is not the "touchstone" for North Carolina attorney fees determinations, and that *Hensley* does not stand for the proposition that the small amounts at stake in consumer litigation justify a reduction in fees. Rather, Petitioners argued, as the North Carolina Supreme Court made clear in *Marshall v. Miller*, 276 S.E.2d 397, 403-04 (N.C. 1981), the North Carolina unfair trade practices act anticipates "small dollar amounts" to be at stake, and awards fees nevertheless. (App. p. 278).

Offer of Judgment. Petitioners pointed out that *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020), on which the panel based its decision on the offer-of-judgment issue, was pending in the Supreme Court on petition for writ of certiorari. Petitioners asked that, were this Court to rule in *Garrison* during the pendency of the petition for rehearing, the Court of Appeals revise its ruling accordingly. (App. p. 283). Petitioners asserted the panel had misapprehended or overlooked their argument that the plain meaning of the offer of judgment statute, Section 15-35- 400(B) of the South Carolina Code (Supp. 2020) ("If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover") entitled them to recover offer of judgment benefits. (*Id*.)

[8] In a footnote, Petitioners also asked the panel to reconsider the additional sustaining ground that fees after September 14, 2016, be denied because Petitioners were attempting to increase the judgment, not to protect the judgment. (App. p. 282 n.6).

The Court of Appeals denied the Petition for Rehearing by order dated October 26, 2021 and notified counsel on the same date that the request for en banc review was rejected.

ARGUMENT

I. PUNITIVE DAMAGE AWARDS AT THE STATUTORY AMOUNT DO NOT VIOLATE DUE PROCESS.

Standard of Review

The standard of review of **the lower courts' decisions** is *de novo*. The standard of review of the **jury's determinations** is not.

Review of the lower courts' decisions is de novo. "Whether a punitive damages award is unconstitutionally excessive is a question of law reviewed de novo on appeal." *Everhart v. O'Charley's, Inc.,* 683 S.E.2d 728, 740 (N.C. Ct. App. 2009). *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 436 (2001) (similar); *Mitchell v. Fortis Ins. Co.,* 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) (similar). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Lacey v. Kirk,* 767 S.E.2d 632, 638 (N.C. Ct. App. 2014) (emphasis added) (internal quotation marks omitted); *Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (similar).

Review of the jury's determinations is not. "It is [the judiciary's] duty to enforce a verdict, not to make it." *Joiner v. Bevier*, 155 S.C. 340, 355, 152 S.E.2d 652, 657 (1930). "We do not conduct a de novo review of the jury's determination of the proper amount to award as punitive damages." *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 405, 714 S.E.2d 904, 915 (Ct. App. 2011). "[W]e are not permitted to make the determination independent of the jury of what we think the appropriate amount of punitive damages should be." *Id*. at 904, 714 S.E.2d at 915.

"Rather, in deference to the jury, we may do no more than determine the upper limit of the range of punitive damages awards consistent with due process," and "may reduce it only to the upper limit of what would be acceptable under due process." *Id*. at 904-05, 714 S.E.2d at 915-16; *Everhart*, 683 S.E.2d at 740 (similar).

A. The Question Is Whether Awards at the Statutory Amount Violate Due Process.

Here, the Court need not determine the maximum due process allows if it holds that awards at the statutorily-mandated amount do not offend the Constitution. The real question concerns not the constitutionality of the initial punitive verdict, but rather of awards at the North Carolina statutory amount. That amount is far below the amount the jury awarded. North Carolina law requires the punitive award be reduced to a statutory amount of $250,000 per plaintiff. The North Carolina legislature did not simply limit the awards to that figure; the legislature precluded courts from awarding less when the punitive verdict is $250,000 or more.

> Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, **the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.**

N.C. Gen. Stat. § 1D-25(b) (emphasis added). The amount is per plaintiff, *Rhyne v. K-Mart Corp.,* 594 S.E.2d 1, 20 (N.C. 2004), so in this case the combined amount would be $500,000. Petitioners do not claim they are entitled to anything more. Nor are they entitled to anything less.

B. Awards at the Statutory Amount Are Proper Under Binding Precedent.

No North Carolina appellate court has ever held that punitive awards reduced to the statutory amount are unconstitutional. None. Rather, awards are routinely reduced to the statutory amount and those amounts are routinely found proper. *E.g., Rhyne v. K-Mart Corp.,* 594 S.E.2d 1 (2004) (punitive damage awards properly reduced to the statutory amount of $250,000

for each Plaintiff); *Lacey v. Kirk,* 767 S.E.2d 632, 646-47 (N.C. Ct. App. 2014) (punitive damage awards properly reduced to the statutory amount of $250,000 for each Plaintiff); *Mace v. Pyatt,* 691 S.E.2d 81, 84 (N.C. Ct. App. 2010) (punitive damages award properly reduced to the statutory amount of $250,000). A substantial reason for setting these amounts in lD-25 is "to provide clear notice of possible penalty to defendants" of the potential punitive damage liability. *Rhyne*, 594 S.E.2d at 16.[9]

Each *Gore* guidepost supports awards at the statutory amount. *BMW of N. Am., Inc. v. Gore.*, 517 U.S. 559, 568, 574-75 (1996) set forth three guideposts to consider in evaluating whether the due process clause requires a reduction in a punitive award. Each supports awards at the amount mandated by North Carolina's legislature.

(1) Ample Evidence Existed from which the Jury Could Conclude that Respondent's Acts Were Highly Reprehensible.

In determining reprehensibility, five elements are considered: whether

[a] the harm caused was physical as opposed to economic;

[b] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

[c] the target of the conduct had financial vulnerability;

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[9] The North Carolina legislature thus addressed the concern about the absence of "legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion," *BMW v. Gore*, 517 U.S. 559, 595 (1996) (Breyer, J. concurring); and achieved the goals the United States Supreme Court stated in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424 (2001) (cleaned), "to unify precedent and stabilize the law" regarding punitive damages. Courts are required to "'accord "substantial deference" to legislative judgments'" concerning punitive damages. *Collins Ent. Corp. v. Coats & Coats Rental Amusement,* 355 S.C. 125, 142, 584 S.E.2d 120, 129 (Ct. App. 2003), *aff'd*, 368 S.C. 410, 629 S.E.2d 635 (2006) (quoting *Gore*, 517 U.S. at 583); *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 94 (N.C. App. 2002), *aff'd*, 594 S.E.2d 1 (2004) (similar).

[d] the conduct involved repeated actions or was an isolated incident; and

[e] the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419. These are addressed below in order of importance.

Most important for present purposes is element [b]. *Gore* instructed courts considering a due process challenge to an award of punitive damages to consider "indifference to or reckless disregard of the health and safety of others" as an "aggravating factor" that raises the constitutional cap on the amount of an award. 517 U.S. at 576.[10] Yet despite the massive evidence and Respondent's admission it knew the car was two half-cars welded together, and the obvious indifference to the health and safety of others in selling this car without disclosure, and even explicit testimony from Respondent's top managers that the company was indifferent to the risk (e.g., R. p. 541, lines 3-22), the Panel simply refused to consider that risk. It never concludes that Respondent evinced a reckless indifference. It never concludes Respondent did not. It never even mentions Respondent's explicit disclaimer of any regard for the health and safety of others.

The panel suggests Respondent did not know it was violating the auction rules when it sold the vehicle to Petitioners. Even were that true,[11] it would not contradict the explicit statements from Respondent that it disregards the health and safety of others.

Nor would the panel's similar suggestion that the nature of the vehicle was unknown to

[10] The Supreme Court reiterated, in S*tate Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585, "We have instructed courts to determine the reprehensibility of a defendant by considering whether: . . . the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others."

[11] The argument that the auction's disclosure requirement was new is addressed below in footnote 16.

Respondent when Respondent sold the "car" to its first victim, even were that true,[12] contradict the explicit disavowals of concern for the public nor even address the reckless disregard shown by the sale to Petitioners.

None of the panel's observations change the obvious fact that Respondent recklessly disregarded the risk to others when it sold the vehicle to Petitioners. "[T]he law says [a] person is reckless or willful and wanton," *Kennedy v. Richland Cnty. Sch. Dist. Two*, 428 S.C. 98, 120, 833 S.E.2d 414, 426 (Ct. App. 2019), if "a person of ordinary reason and prudence"—let alone a major automobile dealership—would have been aware of the risk. Here, not only **should** the dealer have been aware of the risk, it **was** aware of the risk. Mr. Ecklund told them. "I told him [Respondent's General Manager] that the vehicle is not safe to drive and I told him why." (R. p. 131, lines 23-24).

> I told him that because of the weld in the back, that **anybody who were to hit you** in the rear end, whether it be from the sides or the back, the car would just -- you know, **probably the back end would come off and it was not safe.**

(*Id*., lines 7-11) (emphasis added). His wife told them. Respondent's General Manager received a telephone message: "[Mr. Ecklund's] wife called and wants you to call him about the car they got. She said it was 2 cars welded together and it's not safe." (R. p. 1034). "[P]artly welded/glued[,] Back end[,] can't be repaired." (R. p. 1035).

By knowingly selling a dangerous car without disclosure, after having been informed of the risk, and stating it had no regard for the health and safety of others, Respondent showed an indifference to **and** a reckless disregard of the health or safety of others virtually as clearly as any defendant could.

[12] The argument that Respondent was unaware the vehicle unsafe when Respondent sold it to Respondent's first victim is discussed in footnote 15 and accompanying text.

At the next level of importance are that the conduct involved repeated actions [d], and was intentional [e].

Element [d] asks whether the conduct involved repeated actions. Here, it did. Respondent deceptively sold the exact same vehicle with the exact same flaws twice, and it tried to do so three times. Having been caught by the first victim, it simply tried twice again. It sent the vehicle to the auction without disclosure before the vehicle was put on the block, tried to sell it there and failed, and decided again not to disclose during the negotiations with Petitioners after the vehicle failed to sell on the auction block.[13]

The panel improperly ignores that there were **repeated** attempts by Respondent to sell the vehicle **via the auction** without disclosure.

It also erroneously holds the sale to Ecklund does not count. The panel begins its discussion of the sale to Ecklund by discussing something on which Petitioners never relied. Petitioners never asserted that the vehicle had a salvage title. (App. p. 6) (discussing the fact that the vehicle did not have a salvage title).[14]

The panel then suggested, sua sponte, and without any supporting evidence, that although the damage may have been obvious when Petitioners sent it for repair, the damage would not have been obvious during the 159-point inspection Respondent made prior to selling the vehicle to Ecklund as Honda-Certified. The opinion stated, "O&A asserts the damage to the car would have been obvious. However, O&A's examination of the vehicle was two years and approximately

[13] It then promised to get back to Petitioners, and violated its promise.

[14] The opinion is confused on this point. It complains that this car, wrecked in **South** Carolina, retitled in **South** Carolina, did not have the salvage title that **North** Carolina law requires. **South** Carolina requires salvage titles only if the vehicle had been damaged 75% of its value or more; the vehicle here had been damaged 73%. (R. p. 1840 ($14,100.00 valuation pre-wreck, estimated repairs $10,388.10, which equals 73.67%); S.C. Code Ann. § 56-19-480 (75% damage to trigger statute)).

30,000 miles after Midlands' original inspection." (App. p. 6). The panel implied the damage would not have been obvious during that original inspection. The panel's conclusion contradicted Respondent's representations to the jury. It represented to the jury in closing,"[W]e had it in the service department and this guy name Terry Smith looked at it. **How the heck he missed it I don't have a clue**." (R. p. 771, lines 7-9) (emphasis added).

The panel's rationale is contrary to the representations of both parties to the jury. It may be rejected for that reason (and for others, as described in the attached footnote).[15]

[15] First, this rationale was not raised to nor ruled on by the court below, nor argued to the jury, nor raised in the parties' briefs to the Court of Appeals. Under principles similar to those discussed in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("[T]he appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal"), the Court should consider it unfair or unwise to resolve the issue on an unraised ground, especially one contrary to the representations that were made to the jury.

Second, even were it true that the damage was substantially less visible during the initial inspection, when the damage was fresher, and substantially more visible after 30,000 miles and two years—it is not true, but if it were—it would not benefit Respondent. One would reasonably ask why the damage became more obvious over time. The only likely candidates would be that gaps between welds that were supposed to touch became larger with each passing mile, holes in welds that were not supposed to have holes became larger, and the like. An argument that the highly dangerous car was becoming more dangerous all the time would not have benefitted Respondent.

Third, in addition to its initial inspection of the vehicle, Respondent had an expert inspect the vehicle after suit was filed. (R. p. 519, line 10-p. 520, line 4). Had Respondent's expert found anything credible on which to base a claim that the damage was not obvious during Respondent's initial inspection—indeed, had he found anything at all to credibly cast doubt on the conclusions of Petitioners' expert—he presumably would have been called to so testify. Respondent's decision not to call him properly forecloses the panel's speculation about the visibility of the damage.

Finally, the panel's holding is contrary to North Carolina and South Carolina law.

> It may be inferred from the evidence that the crack in the engine block which caused the exhaust to spout water as soon as it was put to work in Virginia, existed before it left plaintiff's possession; and that the defect in the cylinders . . . did not suddenly develop en route from plaintiff's machine shops in Knoxville to Virginia. There is a reasonable inference that they existed as material facts at the time of plaintiff's examination in its shops at Knoxville, and that plaintiff's agent knew of this condition

Because Respondent put the "Civic" on its lot to sell, twice sold the vehicle without disclosure, and tried to sell it a third time, and promised to get back to Petitioners and then broke its promise, Respondent's wrongs involved repeated actions.

Also important for present purposes is [e], whether the harm was the result of intentional malice, trickery, or deceit, as distinct from mere accident. This was no accident. The jury found fraud. (R. p. 44). They were entitled to do so. The judge found it willful. (R. p. 12).

The panel disagreed. It did so on erroneous grounds. First, the panel wrote, "no direct evidence established the harm to O&W was intentional" (App. p. 6). However, fraud is rarely proven by direct evidence. Rather, fraud "usually must be proved circumstantially." *Mylin v. Allen-White Pontiac, Inc.,* 314 S.E.2d 354, 356-57, 281 S.C. 174, 179 (Ct. App. 1984) (fraud in the sale of a previously-wrecked automobile). Moreover, this is the rare case where there ***is*** direct evidence that the harm was intentional. Respondent's counsel admitted to the jury that Respondent knew the car was a Frankencar when Respondent sold it, and Respondent's Used Car Manager testified it was his decision not to disclose. Respondent knowingly and intentionally sold a Frankencar without disclosure. It did so to make Petitioners pay more money than any buyer who knew it was a Frankencar would pay. What more evidence of intent to "harm" could be needed?

> when he advised the defendant that the tractor was 'o. k.' and ready to go; and, therefore, it was his duty to disclose these defects to the defendant buyer.
>
> . . . . [I]t makes no difference whether he was consciously misrepresenting the fact, or was merely recklessly reporting something to be true of which he had no knowledge.

Brooks Equip. & Mfg. Co. v. Taylor, 55 S.E.2d 311, 315 (N.C. 1949). So too here. Cracks in the body of the "Civic" existed at the time of Respondent's examination in its workshop, yet Respondent advised Ecklund that the vehicle was 'o. k.' and ready to go. It was fraud regardless of "whether [Respondent] was consciously misrepresenting the fact, or was merely recklessly reporting something to be true of which [it] had no knowledge." *See also Lawson v. Citizens & S. Nat. Bank of S. C.*, 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1972) (following *Brooks Equip.*).

The panel erroneously engaged in sua sponte speculation contrary to the evidence, contrary to law, and contrary to the positions of both sides.

Similarly, the panel's conclusion that there was not a "deliberate [or] willful . . . violation of the disclosure requirements" (App. p. 7) appears to be based on the proposition, mentioned above, that Respondent did not know it was violating the auction rules.[16] But Respondent knew it was violating North Carolina **law,** and that sufficiently establishes willfulness. The panel erred in invading the province of the jury, contradicting the judge, and mis-stating facts in concluding the Respondent did not act willfully.

The final two elements of reprehensibility are of lesser importance. Element [c], whether the target of the conduct had financial vulnerability, was implicitly conceded by Respondent at trial. Respondent's Used Car Manager testified that Respondent's targets at the auction were what he condescendingly described as "Mom-and-pop," "gravel lot" dealers. (R. p. 384, lines 1-20). The panel accurately stated that "The 'target of the conduct was ADESA auction buyers as opposed to the general consumer" (App. p. 6), but overlooks that Respondent specifically targeted the Mom-and-pop, gravel lot dealers, and not the franchise dealers like itself that move hundreds of cars.

The only remaining element, element [a], asks whether "the [actual] harm caused was

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[16] The panel wrote, "While [Respondent] failed to disclose the damage, such disclosure requirement had only been added at the auction several months prior without notice to Midlands of the change in terms." (Op. pp. 7-8).

The statement rests on illogic. It implicitly concludes that because a revised set of rules was issued four months before the sale at issue here, and the revised set required disclosure, that therefore the previous rules must **not** have required disclosure. But that is no more true than saying baseball's "three strikes and you're out rule" must not have been in the prior rules each time a revised rulebook issues.

It is undisputed that a new set of auction rules were issued. But the panel points to nothing to establish that the requirement to disclose damage in conformity with the law was new.

Moreover, it was undisputed at trial that the auction had, for years, been announcing when a vehicle had structural damage. (R. p. 594, lines 2-3, 10-12). Whether this was an informal requirement or a written rule, the panel errs in stating that the requirement to disclose was new.

physical as opposed to economic." The **actual** harm here was economic. This is the only factor that does not enhance the reprehensibility, and is dwarfed by the *potential* harm, which is part of the next guidepost, and which the panel declined to consider under that guidepost.

Because Respondent declared an intentional disregard for the safety of others, repeatedly tried to sell the Frankencar without disclosure, intended to do so in order that it might obtain more money at the expense of its victims, and targeted those with financial vulnerabilities, the reprehensibility is very high.

(2) It Is Undisputed that the Potential Harm Was Enormous.

The United States Supreme Court, in *Gore*, 517 U.S. at 575, instructed courts considering the constitutionality of a punitive damages award to consider not merely the actual harm, but the "potential harm." It reiterated this, too, in *State Farm*: "[W]e instructed courts reviewing punitive damages to consider . . . (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." 538 U.S. at 418. This Court has emphasized the point more than once. *See Garrison v. Target Corp.*, 435 S.C. 566, 584-86, 869 S.E.2d 797, 807-08 (2022) and cases cited there. The panel did not agree. Its discussion of the second guidepost (Opp. pp. 7-8) simply did not mention potential harm. It erred.[17]

Putting this monstrosity on the road risks extreme harm to its driver, her passengers, drivers and passengers in other vehicles, and bystanders who could be injured if pieces of this vehicle become shrapnel in a collision. Petitioners presented an expert who told the jury so. (R. pp. 474-520). Respondent offered no counter-evidence. Respondent had engaged an expert, who

[17] This is clear even in the section headings. *Compare* this Court's heading "C" regarding punitive damages in *Garrison*, 435 S.C. at 584, 869 S.E.2d at 807 ("Consideration of *Potential Harm* in Reviewing the Constitutionality of a Punitive Damages Award") *with* the panel's heading "B" (App. p. 7) "*Amount of Actual Harm* v. Punitive Damages Amount") (emphasis added).

examined the vehicle, but whom was not called to testify. (R. p. 519, line 10-p. 520, line 4). The obvious implication is he found nothing to credibly challenge Petitioners' expert's conclusions.

And it does not take an expert to recognize that this vehicle is dangerous. Once one knows what this car is, the danger is obvious to non-experts. (R. p. 131, lines 7-24; pp. 1034-5).

While it may be difficult to put a dollar value on a person's death, valuing it above $500,000 is not constitutionally excessive. The ratio of punitive damages to the actual and potential harm is less than 1 to 1. This factor, too, weighs in favor of awards at the legislatively-mandated amount.

But even comparing the awards here only to the actual damages, and excluding the potential harm, the amounts mandated by the legislature are not unconstitutional. Five hundred thousand dollars in punitive damages compared to actual damages of $6,645 is a ratio of 75.24 to 1. Courts uphold much larger ratios where, as here, actual damages are relatively small and purely economic.[18] *See, e.g., TXO,* 509 U.S. at 446 ($19,000 compensatory, $10 million punitive, 526:1); *Saunders v. Branch Banking & Tr. Co*., 526 F.3d 142, 154 (4th Cir. 2008) ($1,000 compensatory, $80,000 punitive, 80:1); *Kemp v. Am. Tel. & Tel. Co.,* 393 F.3d 1354 (11th Cir. 2004) ($115 compensatory, $250,000 punitive, 2,172:1); *Abner v. Kan. City S. R.R.,* 513 F.3d 154, 165 (5th Cir. 2008) ($1 compensatory, $125,000 punitive, 125,000:1).[19]

[18] This may be because awards for non-economic damages, such as for mental suffering, may contain a component that is "duplicated in the punitive award," *State Farm*, 538 U.S. at 426, and so do not support as high ratios.

[19] To the extent, if any, that the Court wishes to consider unpublished *federal* cases, Petitioners would bring to its attention *Daugherty v. Ocwen Loan Servicing, LLC*, No. 16-2243, 701 F. App'x 246, 249, 2017 WL 3172422 (4th Cir. 2017) (finding, on a compensatory award slightly smaller than the award here, $6,128.39, and a slightly larger punitive verdict, $2.5 million, with no intentional wrongdoing, no potential profit for the wrongdoer, and no significant threat to health or safety, that $600,000 is the proper punitive damage award).

This is especially so for cases involving deceptions related to automotive sales. *E.g.*, *Parrott v Carr,* 17 P.3d 473 (Or. 2001) ($11,496 compensatory, $1 million punitive, 87:1) (deceptive sale of previously-wrecked vehicle); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N. LLC.,* 361 S.W. 3d 364 (Mo. 2012) ($4,500 compensatory, $500,000 punitive, 111:1) (deceptive financial acts in automobile sale) (reduced from $1 million due to state statutory cap); *Grabinski v. Blue Springs Ford Sales, Inc.,* 203 F.3d 1024, 1026 (8th Cir. 2000) (after dividing actual damage awards pro-rata among defendants, affirming $100,000 punitive award against retailer, 55:1, and $50,000 award against wholesaler, 99:1) (deceptive sale of previously-wrecked vehicle).

The awards sought here are "reasonably related to the harm likely to result from such conduct;" *Kennedy,* 428 S.C. at 126, 833 S.E.2d at 429 (quoting *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185); are well within "the defendant's ability to pay," *id.,* at 4.6% of Respondent's net worth (2.3% each); and are obviously likely to "deter the wrongdoer and others from engaging in similar conduct," *id* at 120, 833 S.E.2d at 426; to "deter the defendant and others from committing similar wrongful acts," *Rhyne* v. K-Mart Corp., 594 S.E.2d 1, 7 (N.C. 2004).

(3) Comparable Cases Affirm Punitive Damages Above the Amounts Prescribed by NC Statutory Law.

This Court has held that comparable punitive awards for a case involving the deceptive sale, by a dealer, of a previously-wrecked vehicle are in the range of $500,000 to $1 million. *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 54–55, 691 S.E.2d 135, 152 (2010) (citing *Krysa v. Payne*, 176 S.W.3d 150 (Mo. Ct. App. 2005) ($500,000 punitive award); *Parrott v. Carr Chevrolet, Inc.,* 331 Or. 537, 17 P.3d 473 (2001) ($1 million punitive award)). The awards sought by Petitioners would total $500,000, at the bottom of that range. On this basis alone, the panel should have restored the punitive award to the $500,000 mandated by North Carolina law.

And although this Court wrote in *Austin*, *id*. at 54, 691 S.E.2d at 152 (emphasis added), "Because the jury awarded punitive damages pursuant to Austin's fraud cause of action, **we are compelled to review factually-similar cases**," the panel disagrees. Its discussion of this guidepost (Op. pp. 8-9) did not review any award in any case.

Instead, it compared the punitive award here to penalties ranging from a low of a $1,000 fine to a maximum of three times the actual damages under the relevant Unfair Trade Practices Act (Op. at 8-9), contradicting this Court's holding in *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006) (internal quotation marks omitted) that fines of $15,000 to $30,000 are too low to serve as comparisons for punitive awards ("statutory penalties [set] at such a low level [provide] little basis for comparing it with any meaningful punitive damage award.").

The panel's holding also contradicted the Court of Appeals' own opinions in *Duncan v. Ford Motor Co*., 385 S.C. 119, 147-48, 682 S.E.2d 877, 892 (Ct. App. 2009) (following *James*) and *Collins Entm't. Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 142-43, 584 S.E.2d 120, 129–30 (Ct. App. 2003) *aff'd*, 368 S.C. 410, 629 S.E.2d 635 (2006) (holding that trebled damages under a UTPA claim are inappropriate as a comparison to punitive damages[20]).

The panel erred in declining to compare the award here to punitive awards in comparable cases, as this Court has held it is compelled to do, and in comparing the award here to trebled

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[20] *Collin*s held,

> Moreover, we reject ABG's argument that the sanctions provided in the South Carolina Antitrust Act and the South Carolina Unfair Trade Practices Act are for "comparable misconduct." Historically, the availability of these sanctions has not precluded punitive damages awards for related causes of action even when the plaintiff has also recovered under one of these acts in the same lawsuit. In our view, then, these statutory penalties are not necessarily for "similar misconduct" to the extent that they would restrict the right of a finder of fact to determine an aggrieved litigant's entitlement to a well-established form of redress.

355 S.C. at 142-43, 584 S.E.2d at 129-30 (footnotes omitted).

damages, as that Court has held it is improper to do.

Punitive awards here at the amount mandated by the North Carolina Legislature are well within the comparable range. This factor weighs heavily in favor of awards at that amount.

Conclusion re Punitive Damages

Petitioner knowingly put a dangerous vehicle on the road. When it got caught, it did it again and declared it had no concern for the motoring public. Awards totaling $500,000, less than one-half of one percent of Respondent's net worth, do not unconstitutionally exceed the state's legitimate interests in deterrence and retribution. They do not unconstitutionally exceed the state legislature's power to establish penalties for wrongful conduct. The panel's opinion improperly "overrode" the legislature, the jury, the United States Supreme Court, the North Carolina appellate courts, this Court, and the Court of Appeals' prior opinions. This Court should reverse the panel and hold that awards totaling $500,000 be issued.

II. ATTORNEY FEES

Petitioners challenge only the panel's holdings that an unreasonably low post-trial settlement offer by a defendant can terminate a plaintiff's entitlement to attorney fees, which no North Carolina court has ever held; that North Carolina law unreasonably forbids fees for time incurred to increase a judgment, which no North Carolina court has ever held; and that the federal case *Hensley v. Eckerhart* enables a reduction in fees due to "limited success" where a plaintiff has obtained all possible success, a position the federal Supreme Court has rejected, which the panel then applies to the law of North Carolina, whose Supreme Court has also rejected the panel's position.

Petitioners also address a ground the trial court relied on and the Court of Appeals did not mention, a claim that "discretion" allowed for the termination of fees.

Standard of Review

The main issues here are almost entirely matters of law and are to be reviewed de novo. While attorney fees issues are generally reviewed under an abuse of discretion standard, questions of law regarding fee awards are reviewed de novo. The standard of review is thus de novo. *Layman v. State,* 376 S.C. 434, 443-44, 658 S.E.2d 320, 325 (2008) (questions of law regarding fee awards are reviewed de novo); *see also Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012) (abuse of discretion occurs when the conclusions of the circuit court are "controlled by an error of law"); *Bruning & Federle Mfg. Co. v. Mills,* 647 S.E.2d 672, 674 (N.C. Ct. App. 2007) (similar).

One sub-issue may be decided in Petitioners' favor both as a matter of law and under a more deferential standard, and that is pointed out in the discussion of that issue. "The term 'abuse of discretion' has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support." *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000).

A. Governing Law

(1) The Statute

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. G.S. § 75-16.1

(2) Controlling Principles

Plaintiff-friendly fee-shifting provisions like those at issue here "epitomize[] the definition of a remedy." *Austin*, 387 S.C. at 57, 691 S.E.2d 153 (2010). The larger Acts in which they are embedded, such as the South Carolina Dealers Act[21] and the NCUTPA, are obviously designed to remedy problems of businesses treating customers unfairly. They create a right to sue about such acts. Due to the small amounts often at stake in such disputes, however, the right to sue would often be meaningless without fee-shifting, as the expected fees would likely dwarf the recovery, as this case shows. These fee-shifting provisions are thus remedies-within-remedies; they are designed to remedy the problem that the larger remedial act would be largely toothless if plaintiffs had to pay their own attorney.

The purpose of these fee-shifting provisions, then, is to encourage plaintiffs to sue to enforce the remedial goals of the acts more effectively.[22]

Although Respondent may dispute these propositions, none of this should be controversial. The panel recognizes these principles in **portions** of its opinion. But it did not do so in the portions challenged here.

For example, the panel recognizes that *Austin* held these provisions "epitomize[] the definition of a remedy" (App. p. 17) (quoting *Austin* at 56-57, 691 S.E.2d at 15). But the panel did so only in its discussion of the election of remedies issue, not in its discussion of attorney's fees.

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[21] S.C. Code Ann. § 56-15-10 *et seq*.

[22] They thus differ in purpose from other sources of fee-shifting, such as those in mechanics' liens statutes, which may be intended not to increase litigation but simply to ensure that the party in the right receives the full benefit of its bargain, and from fee-shifting in domestic relations cases, which may be intended to fairly balance the burdens, and not to encourage divorcing parties to litigate further.

The panel also recognizes the purpose of these provisions is to "encourage individuals to bring valid actions to enforce the statute by making such actions economically feasible" (*id*. at 12) (quoting *Cotton v. Stanley,* 380 S.E.2d 419, 421 (N.C. Ct. App. 1989)) (holding attorney travel time is properly compensable); "to 'encourage private enforcement' of Chapter 75" (*id*. at 15) (quoting *United Laboratories, Inc. v. Kuykendall*, 437 S.E.2d 374, 379 (N.C. 1993)) (holding Petitioners need not elect between statutory fees and punitive damages); "to make such claims economically viable for private citizens" (*id*. at 17) (quoting *Austin*, 387 S.C. at 56, 691 S.E.2d at 153) (discussing election issue).

Other jurisdictions agree with these principles. *See, e.g.*, *Miller v. United Automax*, 166 S.W.3d 692, 697 (Tenn. 2005) (cleaned) ("The potential award of attorney's fees under the Tennessee Consumer Protection Act is intended to make prosecution of such claims economically viable to plaintiff"); *Wilkins v. Peninsula Motor Cars, Inc*., 587 S.E.2d 581, 584 (Va. 2003) ("The fee shifting provisions of the [Virginia Consumer Protection Act] are designed to encourage private enforcement of the provisions of the statute"); *Covenant Mut. Ins. Co. v. Young*, 225 Cal. Rptr. 861, 865-67 (Cal. App. 2d Dist. 1986) (broadly surveying the literature and case law, and concluding that "where the Legislature wants to encourage litigation it can intervene to alter the decision-making equation by instituting unilateral fee-shifting," thus, "more injured parties will be able to file more lawsuits and the public policy behind the substantive statute . . . will be enforced more broadly and more effectively").

Petitioners do not challenge the portions of the panel's opinion that recognized and applied these well-established principles. Petitioners challenge only those portions of the panel's opinion where these principles were neither mentioned nor applied.

There are also important principles that do not appear in the opinion. First, the law of both

jurisdictions and of many others requires remedial measures to be broadly construed. *West v. Tilley*, 461 S.E.2d 1, 3 (N.C. Ct. App. 1995); *Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 577, 38 S.E. 274, 276 (1901). The opinion makes no mention of this principle.

Second, in line with the principles above, the North Carolina Supreme Court has specifically instructed that fees provisions such as the one here must be construed liberally to prevent defendants from obtaining an unjustly superior bargaining position. In *Hicks v. Albertson*, that Court observed that an analogous statute is intended to make such suits "economically feasible," and then stated, *id.*, "the Legislature apparently concluded that the defendant, though at fault, would have an **unjustly superior bargaining power** in settlement negotiations," before concluding, "This statute, being remedial, should be construed liberally to accomplish the purpose." 200 S.E. 2d 40, 42 (N.C. 1973) (emphasis added).

Third, the North Carolina Court of Appeals has explicitly stated more than once a principal that may be obvious: once a decision is made to award fees, the fee award must be for a reasonable amount. "Whether to award or deny these fees is within the sound discretion of the trial judge. **Once the court decides to award attorneys' fees, however, it must award reasonable attorneys' fees.**" *Cotton v. Stanley*, 380 S.E.2d 419, 421 (N.C. App. 1989) (emphasis added) (citing *Morris v. Bailey*, 358 S.E. 2d 120, 125 (N.C. App. 1987)).

B. Applications

(1) The September 14 Issue

The panel had two rationales for terminating fees on September 14, 2016. In the first, it relied exclusively on a federal case that the panel's holding contradicted three ways. In the second, it made the amazing holding that North Carolina law does not allow fees for work undertaken to increase a judgment. The trial judge had a third reason, which the panel did not address. These are discussed in turn.

(a) The *DENC* Issue

Under the North Carolina fee-shifting statute, N.C. G.S. 75-16.1, a plaintiff who proves an unfair trade practices claim must also show that "there was an unwarranted refusal by [defendant] to fully resolve the matter" to receive a fee award. Here, the trial court found there *was* such an unwarranted refusal. (R. p. 12). That should have settled the matter.

Instead, the panel affirmed the trial judge's ruling that a post-verdict offer made by Respondent sufficed to terminate the accrual of fees. (Verdicts were issued on April 21 and 22; Respondent's three-percent offer was made five months later, on September 14.) The panel did not rely on the lower court's clearly erroneous conclusion that the offer of three cents on the dollar was reasonable.[23] Despite Petitioners' arguments in their briefs and petition for rehearing that the offer was unreasonable in amount (e.g., App. pp. 151, 280-81), the panel declined to justify the offer on grounds of reasonableness or to find it to be unreasonable. It did not matter whether the offer was reasonable, the panel implicitly held. After Petitioners rejected the offer, Respondent "twice asked" for a counteroffer. Petitioners did not again respond. (Op. at 11). On that basis, the panel affirmed the lower court. (*Id*.) However, there is no duty to respond to an unreasonable offer, and the panel cited no such authority.

No North Carolina appellate case has ever held that a post-verdict offer can cause attorney

[23] Before the offer at issue here was made, the Judge's clerk had emailed that Petitioners could elect an award of $53,160 (R. p. 1731). Using the higher of Respondent's two conflicting figures, Respondent was actually offering only $27,909. ($81,069 minus $53,160). In exchange for that $27,909, Respondent would escape potential liability of more than a million dollars. ($500,000 in punitive damages at $250,000 per plaintiff, $236,628.01 in offer of judgment interest, $6,645 in actual damages, $1,993.38 in pre-judgment interest, and $258,180.00 in unmultiplied fees for the first five years of work through July 20, 2016, totaling $1,003,446.39, in addition to fees incurred between July 20 and September 14, 2016, and post-judgment interest.) That is less than three cents on the dollar. A request that Petitioners sacrifice 97% of their reasonably-expected gains is not a reasonable offer.

fees and costs to stop accruing.[24] None. Nor has any North Carolina appellate case ever held that fees may be denied due to an unreasonable offer. None. For all these propositions, the panel relied exclusively on a **federal** case it misread three ways.

That case, *DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020) requires a *pre*-trial offer, which is not present here; a *reasonable* offer, which is not present here; and specifically requires the r*easonableness of the offer be evaluated in light of the ultimate award. DENC* states, "[C]ourts may look to a defendant's efforts to settle a matter *before trial* and the *reasonableness* of those efforts, including *whether any settlement offers made were reasonable relative to what was ultimately awarded* to the prevailing party." 454 F. Supp. 3d at 562 (emphasis added). *DENC* thus requires (a) a **pre-trial** offer, not a post-verdict offer, (b) that is **reasonable**, (c) **in light of the amount ultimately awarded.**

(i) The panel erred in holding *DENC* allowed *post-trial* offers to terminate the accumulation of attorney fees. *DENC* discussed only offers "before trial."

(ii) The panel erred in rejecting *DENC's* requirement that offers be reasonable. *DENC* requires courts to examine the reasonableness of settlement offers. The offer for Petitioners to concede 97-plus percent of the disputed amount was not a reasonable offer and the panel did not find it to be reasonable. If the panel was to hold that North Carolina appellate courts would allow post-verdict offers to terminate fees, it should give deference to North Carolina courts by assuming they would allow only reasonable offers to do so.

[24] Respondent conceded to the Court of Appeals that "Midlands has not located any North Carolina case addressing the issue" (App. p. 116). The trial court had relied on the North Carolina Court of Appeals' decision in *Kuykendall* as allowing post-verdict offers to terminate fees (R. p. 33 (citing *United Laboratories, Inc. v. Kuykendall*, 403 S.E.2d 104 (N.C. App. 1991) *aff'd*, 437 S.E.2d 374 (N.C. 1993)). However, after Petitioners pointed out in their leading brief to our Court of Appeals that *Kuykendall* actually stands for the reverse proposition (App. pp. 73-75), Respondent conceded that no case supports its position.

(iii) The panel erred in rejecting *DENC's* requirement the reasonableness be determined in light of the amount ultimately awarded. In analyzing another issue, i.e., the offer of judgment issue, the panel instructed the lower court to recalculate whether Petitioners are entitled to recover. It reasoned that its reversal of the requirement to elect, and its partial restoration of attorney fees, might result in Petitioners' judgment being larger than their offer, thereby making Petitioners eligible for offer of judgment benefits. (App. p. 19). Yet it did not hold similarly regarding the September 2016 offer, despite the holding of the one case on which the panel relied that that is exactly how one determines reasonableness. Just as the pre-trial offers *DENC* was discussing are evaluated for reasonableness in retrospect, after the final result is determined, so too should the post-verdict offer here be evaluated for reasonableness on remand, after the final result is determined (if the post-verdict offer is to be considered at all).

The panel's holding thus contradicted in three ways the only case on which it relied.

If the Court is going to follow *DENC*, it should neither affirm nor reverse the lower court's holding on this issue, and instead instruct the trial court to evaluate the reasonableness of the offer in light of what is ultimately awarded, that is, after the trial court revises the fee award for the period up to September 14 in light of the directive not to apportion fees, and determines whether offer of judgment interest will be awarded, and adds those amounts to the punitive award, given the reversal of the requirement to elect.

(iv) The panel erred in failing to follow North Carolina precedent.

The panel's holding is contrary not only to *DENC*, but to North Carolina opinions. In providing defendants an unjustly superior bargaining position by requiring plaintiffs to counter-offer unreasonable defense offers, it contradicted the North Carolina Supreme Court's directive in *Hicks*, 200 S.E. 2d at 42, to construe these provisions liberally to prevent that situation. The panel's

holding was contrary to the broader purposes of the fee-shifting provision—to encourage parties such as Petitioners here to bring and fully prosecute these suits, as stated in *Kuykendall*, 437 S.E.2d 379—and the directive to interpret it liberally to achieve its purposes. The panel erred by erroneously reading a federal case to contradict holdings of the North Carolina Supreme Court regarding North Carolina law.

The Court can reject the panel's holding here by various means. It can hold that because no North Carolina opinion has ever held that post-verdict offers suffice to terminate fees, it will not so hold. It can hold that *if* North Carolina law allows post-verdict offers to terminate fees, it requires the offers to be reasonable (a holding of law) and that the three-percent offer was unreasonable when it was made (an abuse of discretion, particularly where the decision was controlled by an error of law). It can follow *DENC*, and hold that the reasonableness of the offer must be determined "in light of what is ultimately awarded," and remand for redetermination of whether the offer was reasonable. It can hold that without fees after September 14, 2016, the fee award will be unreasonable in amount, following *Cotton* and *Morris v. Bailey*. It can hold the panel improperly contradicted the North Carolina Supreme Court decision in *Hicks,* and/or the holdings in *Kuykendall* and *Cotton* that the statute is designed to make these suits economically feasible.

For all these reasons, the Court should reverse the holding that fees stopped accumulating on the date of the three-percent offer, and remand with instructions to award reasonable fees for the ensuing period.

(b) Additional matters

(i) No Fees for Increasing a Judgment? In a footnote (App. p. 11 n.11), as an additional sustaining ground, the panel makes the incredible holding that North Carolina's UTPA does not allow attorney fees for time spent increasing a judgment. No North Carolina case has

ever so held, and Petitioners are unaware of any appellate decision anywhere that has so limited a statutory fee provision. The panel appears to reach its conclusion by improperly inserting the word "only" into two statements of the North Carolina Court of Appeals.[25] But it makes no sense to say a party is entitled to fees for obtaining a bare judgment, but not to fees for increasing it. Increasing a judgment obviously benefits plaintiffs. The holding is contrary to the purpose of fee-shifting provisions and to the rule that they are to be interpreted broadly to achieve their aims. *See* cases discussed on pages 37-40 above.[26] *Also cf. Austin v. Stokes-Craven Holding Corp*., 406 S.C. 187, 201,750 S.E.2d 78, 85 (2013) (*Austin II*) (directing that "appellate and post-appellate fees should be awarded" under an analogous statute).

The panel's footnote would make North Carolina the outlier, the state that goes against this obvious proposition. The holding should be reversed.

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[25] The North Carolina Court of Appeals stated in *Cotton v. Stanley*, 380 S.E.2d 419, 422 (N.C. App. 1989), "Fees are authorized for the prevailing party and may be awarded for all time, including appeal, reasonably expended in obtaining or sustaining the status of prevailing party." The panel implicitly rewrote it to state, "Fees are authorized for the prevailing party and may **only** be awarded for all time, including appeal, reasonably expended in obtaining or sustaining the status of prevailing party."

The panel similarly paraphrased *Faucette v. 6303 Carmel Road, LLC*, 775 S.E.2d 316, 326 (N.C. App. 2015) as standing for the proposition that "a trial court may award attorney's fees for posttrial or appellate work by a prevailing party on an unfair trade practices claim when such work is expended in an effort to protect the judgment," and mistakenly read it to state, "a trial court may award attorney's fees for posttrial or appellate work by a prevailing party on an unfair trade practices claim **only** when such work is expended in an effort to protect the judgment."

In slightly more formal and abstract terms, the panel read a statement in the form of, "If X, then Y" as "ONLY if X, then Y."

In much less formal terms, if one states, "If I buy my child a bicycle, she will thank me," and another responds, "You're wrong, she will thank you if you buy her a pony instead," the first speaker would likely and properly retort, "I didn't say she would thank me ONLY if I bought her a bicycle."

[26] As also noted above, the panel recognizes these purposes in *other* portions of its opinion, but omits that analysis from its consideration of this issue.

(ii) "Discretion." An additional rationale found by the trial judge, and urged by Respondent to the Court of Appeals, but on which the panel did not rely, is that the lower court stated in its final order that it was denying attorney's fees "for activity following September 14, 2016" as a matter of "discretion." (R. p. 33). But for all the reasons discussed above, the trial court abused its discretion.

The Court should reverse the determination that the entitlement to fees ended on the date Respondent made an unreasonable post-verdict offer or automatically terminated under North Carolina law when Petitioners' counsel began working to correct the trial court's errors, and the lower court's determination that in its discretion it terminated fees on the date of the unreasonable offer. It should remand with instructions to consider the amount of fees to award for the post-offer period, or in the alternative, to reconsider the reasonableness of the offer in light of what is otherwise ultimately awarded, under *DENC.*

(2) The Panel's Holding re *Hensley* Contradicted Holdings of the Supreme Courts of the United States and North Carolina.

"In North Carolina cases discussing reasonable attorney's fees," the panel wrote (App. p. 9), "no matter the outcome, the touchstone is *Hensley*." This is not so, if Casetext and FastCase are to be trusted. These services agree that *Hensley* has been cited only four times in North Carolina appellate cases in the almost four decades since it was decided.[27]

Having erroneously determined that *Hensley* is the touchstone for North Carolina cases, the panel then misread *Hensley*. It stated that "based on the partial or limited success of the litigation" (App. p. 14), "the circuit court may—or may not—reduce the remaining amount of

[27] The panel bases its statement on another misreading of *DENC*. (App. p. 12 &n.12). But *DENC* actually stated that **federal** courts "routinely" cite *Hensley*, while **North Carolina** courts have merely applied *Hensley* "in a number of cases." 454 F. Supp. 3d at 563. *DENC* then listed the four cases, which are the same four cases found by counsel's citators.

requested fees by a percentage it finds is appropriate to reflect reasonable attorney's fees based on the success of the litigation" (*id*.).

Petitioners here requested $6,645 in actual damages, and were awarded all of what they asked. They asked for punitive damages, the jury assessed them against Respondent, and—whether this Court reverses or affirms on that issue—will receive the maximum award allowed by the Constitution or the North Carolina statute. They achieved all potential success. It makes no sense to suggest that their fee award should be reduced for "limited success."

Hensley did state that the degree of success is important. But *Hensley* was talking about a plaintiff who brings several *unrelated* claims, and succeeds on only one claim; or who brings a claim for both injunctive and monetary relief, and gains only one or the other; or who seeks actual damages of a million dollars, and receives only a thousand. *Hensley* was not talking about parties who ask for a small amount, and receive 100% of their request.

The Court can correct this error without analyzing *Hensley*, because the United States Supreme Court has rejected this reading of *Hensley*. *Riverside v. Rivera*, 477 U.S. 561, 573-75 (1986) (plurality) (rejecting the argument that "attorney's fees in such cases should be proportionate to the amount of damages a plaintiff recovers"); *id*. at 585 (Powell, J., concurring) (same). Instead, "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so," *id*. at 577 (plurality); "Section § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers," *id.* at 586 (Powell, J., concurring).[28]

[28] Nor does the Fourth Circuit case the panel cites support the panel's point. *Johnson v. City of Aiken,* 278 F.3d 333 (4th Cir. 2002), concerned plaintiffs who were almost entirely unsuccessful in their claim that allowed fee-shifting. They obtained only **35 cents each** on that claim. 278

By incorporating its misreading of *Hensley* into North Carolina law, the panel also contradicts the North Carolina Supreme Court, which has also held that the purpose of fee-shifting provisions like the provision here is to encourage plaintiffs to litigate these cases precisely when the fees are out of proportion to the stakes. *Marshall v. Miller,* 276 S.E.2d 397, 403 (N.C. 1981) (emphasis added),

> In an area of law such as this, we would be remiss if we failed to consider also the *overall purpose* for which this statute was enacted. . . . *so that local business interests could not proceed with impunity, . . . [g]iven the small dollar amounts often involved in such suits[.]*

It also contradicts this Court. "[A]ttorney's fees are intended to make such claims economically viable for private citizens," *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 56, 691 S.E.2d 135, 153 (2010); "Because costly attorney fees may deter private citizens from bringing a claim under the Dealer's Act," *id*. at 57, 691 S.E.2d at 153.

Because the panel's holding contradicted the Supreme Court of the United States on a matter of federal law, and contradicted the Supreme Court of North Carolina on a matter of North Carolina law, the Court should reverse. As the panel accurately stated, *Hensley* allows "the district court to adjust the fee upward or downward, including the important factor of the results obtained." (App. p. 12) (cleaned) (quoting *Hensley* at 433-37). The panel's directive to the lower court mentioned only a downward adjustment. The Court should reverse, with directions to consider only an upward adjustment.

III. OFFER OF JUDGMENT

Petitioners made an offer to resolve the case for $280,000 (R. pp. 1187-88); it was not accepted; they obtained a verdict of $2,381,888.00. (R. p. 47). They are entitled to eight percent

F.3d at 338. They had virtually no "success" in their statutory claim.

interest on the entire amount of the verdict, including punitive damages.

Standard of Review

Because the issue here is the interpretation of a statute, the standard of review is de novo. *Brock v. Town of Mount Pleasan*t, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016).

Argument

The Court decided this issue during the pendency of the petition.[29] "We find the language of both the rule and the statute clearly and unambiguously provides that Denise is entitled to eight percent interest on the entire amount of the verdict, including punitive damages." *Garrison v. Target Corp*., 435 S.C. 566, 586, 869 S.E.2d 797, 808 (2022) (citing South Carolina code section 15-35-400 (Supp. 2020).[30] "[I]t is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Because they made an unaccepted offer and obtained a more favorable verdict, Petitioners are clearly and unambiguously entitled to eight percent interest. The lower courts' holdings to the contrary should be reversed.[31]

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[29] *See also* Respondent's Return to Petition for Certiorari, p. 21 ("As an initial matter, this Court has already granted certiorari to address this issue in another case. *Garrison v. Target Corp.*, 429 S.C. 324, 377, 838 S.E.2d 18, 46 (Ct. App. 2020) (cert. granted October 19, 2020).").

[30] The section provides, in pertinent part,

> "If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: . . . (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer . . . ."

Garrison at 585-86, 869 S.E.2d at 808 (quoting S.C. Code. Ann. § 15-35-400(b)) (Supp. 2020).

[31] The Court of Appeals' directive to the lower court "to reevaluate its decision as to the offer of judgment interest" because "we reverse[d] the circuit court's decision as to the election of remedies and remand[ed] the issue of attorney's fees" (App. p. 19) did not cure the error.

Conclusion

On a substantial question of federal constitutional law, the panel's opinion contradicted the directives of the North Carolina legislature, of the United States Supreme Court in *Gore* and *State Farm,* and of this Court in *Austin*. It then again overrode the North Carolina Legislature and that state's appellate courts on a matter of state law, based on a federal decision, *DENC*, that the panel misread. On the basis of that misread federal decision, the panel applied the United States Supreme Court's decision in *Hensley*, which it then misread, and applied in a manner that conflicts with the opinions of the Supreme Court of the United States on a matter of federal law and the Supreme Court of North Carolina on a matter of state law. It also misread the offer of judgment statute. For the reasons discussed above, and others such as may be apparent to the Court, Petitioners request that the Court reverse the panel's holdings on these issues.

Respectfully submitted,

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