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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 13-CP-40-0319

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

v.

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

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly affirm the trial court's due process analysis and reduction of the jury's punitive damages award to a 7:1 ratio?

2. Did the Court of Appeals correctly determine that the trial court was within its discretion in finding that attorney's fees would no longer accrue after September 14, 2016 for purposes of an award under the North Carolina Unfair Trade Practices Act?

3. Did the Court of Appeals correctly remand the attorney's fees issue to the trial court for additional consideration of the degree of success obtained?

4. Did the Court of Appeals correctly determine that any consideration of entitlement to offer of judgment interest should be based on the amount of the judgment?

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a dispute between two car dealerships relating to a single sale in 2010 of a used car for $5,200 at a North Carolina auction open only to automobile dealers. The trial court understood what was at issue and noted during the trial, "I mean this is a Magistrate Court case you understand. The jurisdiction's under the Six Thousand Dollars." (R. at 695:18-20). The trial court and the Court of Appeals reviewed this case through that lens in performing a due process review of the punitive damages in this case. Both the trial court and the Court of Appeals considered the appropriate factors and determined a 7:1 ratio of punitive to actual damages was appropriate. This result is consistent with the closest analogous South Carolina case, *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010), in which this Court affirmed a ratio of 8.21:1, but noted that this ratio of punitive damages to actual damages was "high."

What is really driving the Petitioner's continued appeal is the desire of O&W Cars[1] ("O&W") to extract a huge attorney's fee award in this case under a North Carolina statute, notwithstanding the repeated efforts to settle by Columbia Automotive Company, LLC d/b/a Midlands Honda ("Midlands"). The trial court saw through this and expressed its frustration with O&W's counsel as follows, "construing [N.C.G.S.] § 75:16-1 to require supplemental awards of attorney's fees in the presence of subsequent reasonable settlement efforts by a defendant would permit a plaintiff who was successful at trial to use post-trial motions and appeals as a veritable attorney's fee printing press." (R. at 31).

[1] O&W is a used car dealership near Shelby, North Carolina owned by Daniel O'Shields and Roger Whitley as a general partnership. (R. at 588:8-23). The contract at issue was between Midlands and O&W. (R. at 1013-14). As reflected in the trial transcript, O&W only sought one recovery in this action. (*See e.g.*, R. at 289:24-290:6, 291:18-292:1; 750:22-23, 753:6-9, 766:19-21). O&W's arguments here that there is more than one plaintiff are directly contrary to the position taken at trial.

As discussed further below, this Court should affirm the appealed rulings of the Court of Appeals and remand this matter for final disposition. This action has been pending long enough.

STATEMENT OF THE CASE

O&W filed this action on January 17, 2013 against Midlands and Nationwide Mutual Insurance Company ("Nationwide"). (R. at 48-59). The original complaint included the following causes of action, all of which stem from the sale of a used car by Midlands to O&W at the ADESA automobile auction in Charlotte, North Carolina: (1) breach of contract; (2) negligence; (3) negligent misrepresentation; (4) constructive fraud; (5) fraud; (6) South Carolina Dealer's Act; and (7) South Carolina Unfair Trade Practices Act ("SCUTPA"). (*Id.*). Midlands moved to dismiss the South Carolina statutory claims. (R. at 1181-83).

In response to the motion to dismiss, O&W amended the complaint on May 9, 2013 to remove the South Carolina statutory causes of action and to add a claim under the North Carolina Unfair Trade Practices Act ("NCUTPA") against both defendants. (R. at 67-77). Nationwide settled with O&W and was dismissed as a party on April 16, 2015. (R. at 42). O&W amended the complaint again at trial to remove Nationwide as a defendant and to remove a claim for constructive fraud, which had been withdrawn in response to Midlands' motion for summary judgment. (R. at 41, 92-100, 468:10-18). Midlands' final answer filed in this case listed numerous defenses, including a general denial, failure to state a claim, failure to mitigate, the economic loss rule, and election of remedies. (R. at 84-91).

This matter was tried before a jury from April 18 to 22, 2016. Midlands admitted liability on the breach of contract claim. (R. at 685:12-14). The trial court found the economic loss rule barred the negligence claim. (R. at 709:11-14). The jury rendered a verdict of $6,650 in actual damages on the following causes of action: (1) breach of contract; (2) negligent misrepresentation; (3) NCUTPA; and (4) fraud. (R. at 43-46). The jury also returned a verdict of $2,381,888.00 in

punitive damages on the fraud cause of action. (R. at 47). The trial court granted the parties ten days to make any post-trial motions. (R. at 935:4-9).

Within that time period, O&W filed a motion to treble the verdict, for attorney's fees for its attorney, Steven Moskos (a later submission was made as to co-counsel, Brooks Fudenberg); for offer of judgment interest, and for prejudgment interest. (R. at 1301-02). Midlands filed motions for judgment notwithstanding the verdict, or, in the alternative, a new trial, or a new trial nisi remittitur, to require election of remedies, to enforce the North Carolina punitive damages cap, and for setoff or recoupment. (R. at 1277-1300).

The trial court heard the motions on July 27, 2016. At the close of that hearing, the trial court gave O&W's counsel leave to submit an affidavit on attorney's fees as to certain factual matters, but cautioned "[d]on't wait too long." (R. at 1179:15-18). The trial court also granted O&W's motion to reconsider, which O&W filed with respect to the Court's earlier direction regarding election of remedies, ruling that O&W could elect once the trial court made its ruling on the post-trial motions. (R. at 1179:19-1180:8).

On August 29, the trial court emailed counsel with an instruction that O&W was to elect between an award of $41,199 under the NCUTPA cause of action (treble damages plus $21,264 in attorney's fees) or an award of $53,160 under the fraud cause of action (damages plus $46,515 in punitive damages). (R. at 1731). Only after that direction, O&W's counsel submitted an additional affidavit relating to the attorney's fee issue on August 30, 2016. (R. at 1732-1851). O&W elected recovery under the NCUTPA on September 8, 2016. (R. at 1854).

The trial court issued a written order addressing the post-trial motions on November 28, 2016.[2] (R. at 1-23). In that order, the trial court provided the basis for the alternative remedies set

[2] The order does not address Midlands' motion for setoff, which was later withdrawn.

forth in the August 29 email, including its due process review of the punitive damages award as required by N.C.G.S. § 1D-50 and its decision on O&W's attorney's fee request. The punitive damages review included a discussion of each of the factors listed in the applicable North Carolina statute, N.C.G.S. § 1D-35, and a due process analysis. With respect to the attorney's fee request, the trial court considered all of the facts before it on each of the elements for an award under the NCUTPA, including the parties' efforts to "fully resolve the matter which constitutes the basis of [this] suit," and determined an award of $21,264 was appropriate.

By motions dated December 15, 2016, O&W moved for supplemental attorney's fees incurred after July 20, 2016 and asked the trial court to reconsider its November 28, 2016 order in the following respects: (1) reference to O&W in the singular; (2) whether Midlands needed to renew a directed verdict motion between the actual and punitive damage phases of the trial; (3) that the trial court was not required to perform a written punitive damage award review; (4) that the trial court's civil penalties analysis was incomplete or inaccurate; (5) that O&W's closing argument was not improper; (6) an allegation that Midlands failed to make any effort to resolve the matter; (7) an allegation that there was no requirement that an affidavit be filed quickly after the hearing on the post-trial motions; (8) that the award of attorney's fees, while analytically correct, was unreasonably low; (9) that the award of attorney's fees did not include co-counsel's time; (10) that the trial court erred in not awarding offer of judgment interest; and (11) that the award of interest was not calculated correctly. (R. at 1884-1992).

Midlands submitted a memorandum in response to O&W's motions, which, among other things, provided additional information about its efforts to "fully resolve the matter" following the trial court's August 29 election instructions and argued that there was not an "unwarranted refusal to settle" after September 14, 2016 because Midlands had offered to pay "a sum reflecting actual

damages plus the trial court's award of both punitive damages and attorney's fees for a total of $81,069 ($6,645 in actual damages + $46,515 in punitive damages + $21,264 in attorney's fees)."[3] (R. at 1999-2010).

The trial court resolved both motions by order dated February 27, 2017. (R. at 24-29). In that order, the trial court corrected the interest award, clarified that it had considered all of the previously requested fees in making its earlier rulings, addressed O&W's supplemental attorney's fee motion, and directed that the Clerk of Court enter judgment as set forth in the order. With respect to the supplemental fee request, the trial court broke its ruling down as follows: (1) an additional $7,020 representing 50% of the time claimed between July 21, 2016 through July 27, 2016, (2) an additional $3,120 for the period between July 28, 2016 and September 13, 2016, reflecting the trial court's view that much of that time was spent drafting a largely improper affidavit of counsel, and (3) finding no additional fees were appropriate after September 14, 2016 based on Midlands' settlement efforts.

O&W again moved for supplemental fees on March 30, 2017. (R. at 2058-82). A notice of appeal followed on April 11, 2017. (R. at 2086). After receiving an email from the trial court indicating it intended to deny the motion, O&W submitted an additional memorandum on June 28, 2017. (R. at 2087, 2093-148). It was only there that O&W raised a possible issue as to the trial court's jurisdiction. Midlands responded on July 25, 2017 that it did not object "to delaying a decision on the motion as [O&W] has suggested." (R. at 2149).

[3] Due to a math error, this figure actually represents more than the amount indicated in the trial court's August 29 email.

On August 4, 2017, O&W filed a motion with the Court of Appeals to toll all deadlines until the trial court ruled on its outstanding motion for attorney's fees.[4] After O&W filed its motion, Midlands sent a letter to the trial court asking for a ruling in light of O&W's motion to toll the appeal. (R. at 2150). The trial court issued an order denying the supplemental fee motion on August 10, 2017. (R. at 30-34). In that order, the trial expressed its frustration with O&W's counsel, particularly in light of the trial court's earlier ruling that fees were not recoverable after September 14, 2016 based on Midlands' efforts to settle this matter. As stated by the trial court, "construing [N.C.G.S.] § 75:16-1 to require supplemental awards of attorney's fees in the presence of subsequent reasonable settlement efforts by a defendant would permit a plaintiff who was successful at trial to use post-trial motions and appeals as a veritable attorney's fee printing press." (R. at 31). O&W also appealed this order. (R. at 2158-59).

On appeal, O&W challenged the reduction in punitive damages, the amount of the attorney's fee award, the trial court's decision as to the election of remedies, and the denial of offer of judgment interest. The Court of Appeals issued a published opinion on August 11, 2021 ("Opinion"). (App. at 1-19)

The Court of Appeals affirmed the trial court's reduction of the punitive damages award based on a review of the factors set forth in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). In considering reprehensibility, the Court of Appeals noted that the harm was economic and was directed to "ADESA auction buyers as opposed to the general consumer" and further found that "the record does not bear out a deliberate, willful, or repeated violation of the disclosure requirements." (App. at 6-7). The Court of Appeals then considered ratios from North Carolina cases and found that the conduct in this case did not rise to the same level in terms of either the

[4] The motion to toll was granted by order dated August 25, 2017.

nature of the harm or the degree of willfulness of the cited North Carolina cases, and the Court agreed "with the circuit court that the objectionable conduct in this case is more commensurate with a 7:1 ratio."[5] (App. at 7-8).

With respect to the attorney's fee award, the Court of Appeals made the following rulings and remanded the matter:

1. Reversing and remanding the trial court's apportionment of fees between the NCUTPA claim and the fraud claim;

2. Affirming the trial court's determination that fees accrued after September 14, 2016 be excluded from the calculation of any attorney's fee award on two grounds: (1) that there was no unwarranted refusal to settle after this date for purposes of N.C.G.S. § 75-16.1, and (2) finding that time accrued after this date was not expended to "protect the judgment";

3. Reversing the trial court's exclusion of travel hours from the award; and

4. Affirming the trial court's application of a percentage reduction to effectuate a reasonable attorney's fee award, and remanding the issue for further review by the trial court.

The Court of Appeals also ruled that O&W should not have been required to elect between punitive damages and attorney's fees. Lastly, the Court of Appeals found that the issue of offer of judgment interest should be based on the final post-trial award following remand.[6]

O&W filed an untimely petition for rehearing on August 27, 2021.[7] In that petition, O&W raised the following grounds: (1) that the Opinion erred in not applying the North Carolina cap on

[5] The trial court settled on that ratio based on a detailed analysis of *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). (R. at 7-9).

[6] As part of its continuing efforts to resolve this matter in its entirety, Midlands did not cross-appeal, nor did it file a petition for rehearing or seek certiorari in this matter.

[7] O&W's petition for rehearing was not "actually received" by the Court of Appeals until August 27, 2021, sixteen days after the Court issued the Opinion. As such, it was not timely and the Petition for a Writ of Certiorari was improper. Rules 221(a) & 242, SCACR.

punitive damages; (2) that the Opinion erred in its analysis of "willfulness" for purposes of the punitive damages review; (3) that the Opinion erred in its analysis of "reprehensibility"; (4) that the Panel erred in speculating about the prior condition of the vehicle; (5) that the Opinion failed to consider the potential harm; (6) that the Opinion did not correctly consider penalties in other cases; (7) that the Opinion erred in finding that attorney's fees could be reduced based on lack of success; (8) that the Opinion erred in affirming the trial court's ruling that there is no entitlement to attorney's fees accruing after September 14, 2016 on the grounds that there was only an "unreasonable post-trial offer, rather than a reasonable pre-trial offer;"[8] and (9) that the Opinion erred in directing the trial court to consider the offer of judgment issue on remand based on the final, post-trial judgment rather than the jury's verdict. (App. at 252-84). The Court of Appeals denied the petition without requesting a return. (App. at 20-23). This Court granted O&W's Petition for a Writ of Certiorari.

[8] There is no mention in the petition for rehearing of the Opinion's alternate sustaining ground for this cut-off date for accrual of attorney's fees. O&W later filed an amended petition for rehearing that included a footnote 6 on this point, but it did not seek leave to amend from the Court of Appeals. The order denying the petition for rehearing makes no mention of an amended petition. (App. at 20-21).

COUNTER STATEMENT OF FACTS

This case arises from a business dispute between two car dealerships—Midlands, which wholesaled a trade-in 2003 Honda Civic (the "Civic") through the ADESA automobile auction ("ADESA") in Charlotte, North Carolina, and O&W, which purchased the Civic at the auction under a red warning light for $5,200. (R. at 92-100 (¶¶ 1-6 and 25), 1014). That is the transaction at issue in this case, not the earlier sale of the Civic to Charles Ecklund that is the focus of much of O&W's brief.

As the trial court recognized, Ecklund's involvement with the Civic is largely irrelevant to this case. (R. at 237:14-17, 242:12-14). The alleged misconduct here involved a violation of ADESA's rules and a North Carolina statutory disclosure requirement, which has no South Carolina statutory counterpart. Ecklund's transaction did not involve ADESA or occur in North Carolina, and he is not a party to this case. The only relevance of his testimony was to establish Midlands' prior knowledge of the Civic's condition, a fact that Midlands conceded.

I. Prior History of the Civic.

A. Before reaching Midlands, the Civic was wrecked, sold with no indication it was a salvaged vehicle on its title, and repaired.

Long before Midlands ever saw the Civic, it was involved in an accident and declared a total loss by its owner's insurer, Nationwide. (R. at 299:3-300:4). Nationwide sold the Civic through a salvage auction, but did not cause the Civic's title to be marked as a salvage title. (R. at 300:20-301:5, 382:10-14). The Civic was purchased by a third party and repaired by an unknown third party. (R. at 485:9-17).[9]

[9] Brian Allen, O&W's expert mechanic, inspected the Civic. When he removed the rear seats, he noticed that the structural panel had been cut in half and welded back together. (R. at 488:7-10). He then removed other sections of the interior, and discovered that the vehicle was a "clipped car", or a car in which two sections of different vehicles have been welded together. (R. at 512:22-

B. Midlands acquired the Civic in June 2008.

When Midlands acquired the Civic in June of 2008, the title was clean. (R. at 382:10-14). The Civic underwent a standard inspection for certification at Midlands Honda. (R. at 393:10-21). Midlands did not discover the prior damage in this process as far as it could ascertain from its records. (*Id.;* R. at 1024-25).[10]

Midlands' used car manager, Brent Ferrell, was responsible for valuing the Civic when it was sold to the dealership. (R. at 347:25-348:3). It was his practice to conduct a visual inspection of the interior and exterior and test-drive a car to make sure there were no transmission issues. (R. at 348:4-19). He would then put a value on a car. (*Id.*). He did not send cars to the service department or put them on a lift as part of this process. (R. at 348:5-349:4). Based on this normal practice, Farrell did not discover the Civic's prior damage. (R. at 358:20-24, 369:8-24).

C. Midlands sold the Civic to an individual.

Midlands later sold the Civic to Charles Ecklund. (R. at 312:10-13). Ecklund thought it was a good car and drove it for some time with no problems. (R. at 312:10-313:10). Ecklund only discovered that the Civic was a clipped car after he was involved in an accident and took it in for repairs. (R. at 116:17-117:3, 120:7-123:23). Ecklund informed Midlands about what he had discovered, and Midlands traded him out of the Civic. (R. at 131:2-20, 136:2-5).

513:2). In the 70s and 80s, it was common practice to repair a car in this manner, but such repairs have since fallen out of favor. (R. at 499:4-16).

[10] Terry Smith, the mechanic who performed the inspection, died in 2011, before notice of any dispute with O&W. (R. at 409:18-25, 554:24-555:16).

D. Midlands sends the car to ADESA to be sold as a red light sale.

1. Buying and selling at ADESA.

Only dealerships may buy or sell through ADESA, and they must register to do so. (R. at 145:2-19). In the ordinary course, a dealer must fill out and sign several ADESA forms to register, including a power of attorney, personal guaranty, and a Dealer Acknowledgement Form documenting the dealer's receipt of ADESA's rules. (R. at 145:2-146:1, 146:18-150:8). Midlands registered in 2007, and the only Dealer Acknowledgement Form signed by Midlands is dated January 9, 2007. (R. at 1033). A review of ADESA's Midlands file did not show a personal guaranty signed by Midlands. (R. at 145:2-146:1, 146:18-150:8, 990).

ADESA adopted a new set of rules in January 2010, four months before the sale of the Civic. (R. at 996-1010, 408:24-409:3, 635:6-21). The pre-2010 rules did not require disclosure of wreck damage if a vehicle was sold under a red light.[11] (R. at 996-1010). The 2010 rules, however, added a new requirement that unibody damage be disclosed even if a vehicle was sold under a red light. (R. at 162:7-10, 293:20-294:2, 996-1010).

Midlands did not receive written notice that the rules changed in 2010, as required by ADESA's Terms and Conditions, which provide in pertinent part:

> 20. Changes to Auction Terms and Conditions These Auction Terms and Conditions are subject to change *upon written notice to Dealer*. Use of the ADESA Card or completion of other business transactions through ADESA *subsequent to delivery by mail to Dealer's place of business* shall be evidence of Dealer's acceptance of changes to these Auction Terms and Conditions. Further, Dealer is subject to all other terms and conditions communicated in writing to Dealer, including, without limitation, terms and conditions posted conspicuously on bulletin boards or other signs located on the Auction premises.

[11] In the automobile industry, sale under a red light is a warning that something is wrong with the vehicle and that the buyer should beware when purchasing it. (R. at 355:10-15).

(R. at 994-95) (emphasis added). No evidence was introduced at trial that ADESA mailed or emailed the 2010 rules to Midlands, O&W, or any other dealer, or that ADESA posted any notices of the rule change at the auction premises or on its website**.** As a result, Midlands was unaware ADESA had changed the rules to include a unibody disclosure requirement for red light sales. (R. at 397:8-22, 408:13-409:16, 434:3-16).

2. The sale of the Civic to O&W.

Ferrell testified that he was never personally informed that the Civic was a clipped car and that he did not know the Civic was a clipped car when he sent it to ADESA. (R. at 369:22-370:3, 404:20-405:11). He was instructed to wholesale the Civic "under a red light." (R. at 377:19-378:6, 404:20-405:11). The Civic had visible wreck damage at that time that was not corrected before it was sent to ADESA. (R. at 557:2-10). Ferrell testified that he did not know about the then-recent change to the ADESA rules and thought he was following the rules by selling the Civic under a red warning light. (R. at 395:16-19; 397:8-22; 409:6-16).

A red light sale is an "as-is" sale. (R. at 397:15-22, 1014). An auction red light generally means that the seller is relinquishing all liability. (*Id.*; R. at 434:7-435:1). Joe Guyer, ADESA's general manager, testified that it is common knowledge that if a car goes through auction on a red light that means something is wrong with it. (R. at 142:1-13, 339:9-17). In addition, ADESA's rules required a buyer to inspect a vehicle before purchasing it. (R. at 630:13-631:9, 996-1010 (¶¶ 3(d) and 9(b))).

The Civic was not sold during the auction. (R. at 598:10-14). Instead, Whitley approached ADESA about the Civic after it failed to sell. (R. at 598:10-600:7). Whitley had noticed the vehicle was damaged. (R. at 597:14-16). ADESA contacted Midlands, and the parties ultimately agreed on a price of $5,200. (R. at 599:16-23).

Whitley, as the "Buying Representative" for O&W, and ADESA filled out the contract of sale for the Civic. (R. at 1013-14). Midlands was not involved in this process and did not sign the contract. (*Id.*). As part of that contract, the Civic was sold under a red light. (*Id.*; R. at 1012). An ADESA representative then completed and signed the North Carolina damage disclosure form without consulting Midlands. (R. at 313:5-13, 411:8-18, 936-37). Most of the representations made on the disclosure were not required because the Civic was more than five years old[12], but the disclosure completed by ADESA did not disclose that the Civic was a clipped or reconstructed car. (R. at 936-37).

[12] Per N.C.G.S. § 20-71.4, written disclosure is required "when the transferor has knowledge that the vehicle is, or was, a flood vehicle, a reconstructed vehicle, or a salvage motor vehicle." In addition, written disclosure is required for vehicles less than five years old "when the transferor has knowledge that the vehicle has been involved in a collision or other occurrence to the extent that the cost of repairing that vehicle, excluding the cost to replace the air bag restraint system, exceeds twenty-five percent (25%) of its fair market retail value at the time of the collision or other occurrence." *Id.*

ARGUMENT

As discussed above, this case involves a contractual dispute between two car dealers relating to a single transaction to sell a car. There is no prohibition on buying or selling clipped cars.[13] The issues here relate to disclosure of that damage.

This was not a face-to-face interaction. Instead, O&W dealt exclusively with ADESA. ADESA filled out the sale paperwork, including the sale contract and the North Carolina damage disclosure form. Neither O&W nor Midlands were aware of the recent ADESA rules change relating to disclosure of unibody damage for red light sales.

I. The Court of Appeals appropriately considered the applicable factors, especially in light of the trial court's order. The trial court conducted a complete and thorough review of the punitive damages award as required under state and federal law. The reduced award of $46,515 comports with the law and due process.

This is a commercial case, not a personal injury action. It is a dispute between two car dealers over the sale of a $5,200 used car.

Pursuant to N.C.G.S. § 1D-15,

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.
>
> (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.
>
> (c) *Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another.* Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in

[13] O&W's expert, after acknowledging his safety concerns, testified that vehicles like this "[s]houldn't be allowed on the road. Vehicles like this—It's going to take some sort of government regulations or something to keep this from happening." (R. at 513:16-19). There is no evidence or argument indicating that the sale or operation of a clipped car is illegal.

> or condoned the conduct constituting the aggravating factor giving rise to punitive damages.
> (d) *Punitive damages shall not be awarded against a person solely for breach of contract.*

(emphasis added). Given this statute, punitive damages would not be available in this case for any breach of contract or any failure by ADESA in completing the damage disclosure form. The only conduct that could give rise to a punitive damages award would be Midlands' failure to disclose unibody damage as required under the newly amended ADESA rules.

After hearing the evidence, the jury determined that O&W's actual damages totaled $6,650 and then awarded $2,381,888.00 in punitive damages on the fraud cause of action. *This award is 358 times the actual damages award.* A punitive damages award of this size does not comport with due process, and the trial court was correct in reducing the award to $46,515, a 7:1 ratio. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor.").

The trial court and the Court of Appeals correctly considered the *Gore* factors in the context of the transaction at issue: the sale of the Civic by Midlands to O&W at ADESA. (R. at 11-19; App. at 1-19). It is those facts that govern this analysis, not any previous sale, and O&W's repeated attempts to justify the punitive damages award by reference to Ecklund, who was neither a party to this action nor a resident of North Carolina or South Carolina at the time of the sale to O&W, are improper. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."); *Branham v. Ford Motor Co.*, 390 S.C. 203, 238, 701 S.E.2d 5, 23–24 (2010); *Durham v. Vinson*, 360 S.C. 639, 652-53, 602

S.E.2d 760, 767 (2004); *GE Betz, Inc. v. Conrad*, 752 S.E.2d 634, 653–54 (N.C. Ct. App. 2013) (citing *Philip Morris* and noting "the Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts on nonparties" and "as a general rule, a [s]tate [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the [s]tate's jurisdiction").

A. Standard of Review.

The standard of review of the trial court's determination of the constitutionality of a punitive damages award is *de novo*. *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009). In this role, courts may reduce excessive punitive damage verdicts to the upper limit of what would be acceptable under due process. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 405, 714 S.E.2d 904, 916 (Ct. App. 2011) (reducing jury award from 8.5:1 to 5:1 ratio of punitive to actual damages).

B. The jury's punitive damages award was excessive as a matter of due process.

There are constitutional limits on the amount of punitive damage awards. Punitive damages must bear a reasonable relationship to compensatory damages. *Gore*, 517 U.S. at 562 ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."). In *Gore*, the Supreme Court set forth guideposts for determining the constitutionality of a punitive damages award: (1) reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Id.* at 575; *see also Mitchell*, 385 S.C. at 587-89, 686 S.E.2d at 185-86. Each of the *Gore* guideposts is discussed below:

1. Reprehensibility.

O&W again seeks to focus this analysis away from the transaction between O&W and Midlands. This was not a consumer sale. This case involves the sale of one car "as is" with visible wreck damage under a red light. The issue is not the sale of clipped car (which is not prohibited), but rather a failure to make certain disclosures in connection with that sale. It was undisputed at trial that a sale under red light at an auction is a warning to the buyer that something is wrong with the vehicle. The presence of an actual warning by Midlands to O&W distinguishes this case from every case cited by O&W.

Midlands, recognizing that this was a damaged vehicle, chose to wholesale it without further inspection. Midlands thought it was following the ADESA rules in selling the Civic under a red light. (R. at 173:19, 175:8-25). And there are many reasons why a dealer might purchase a vehicle. O&W's counsel asked the former general manager at Midlands the following question, "But you don't assume any responsibility for making sure that know that they're buying an unsafe vehicle." (R. at 218:1-2). The former manager responded:

> On a wholesale unit, sell it to a wholeseller that plans to turn it around and sell it himself, and service it properly, and get it conditioned and sell it as a retail unit, no, I do not assume any responsibility on that because it is a wholesale unit, as-is, buyer beware, red light. So no, I don't feel like we should have serviced that car and did a full inspection on a wholesale unit. No, sir, I don't feel like that.

(R. at 440:3-10; *see also* R. at 444:6-445:14). This wholesale versus consumer distinction was meaningful to Midlands. (R. at 444:11-13 ("When you go to a wholesale auction, it's wholesale, and it's stamped buyer beware, red light, to me that is different than a consumer coming in and trading a car in.")).

Moreover, ADESA's rules required O&W to carefully inspect the Civic. (R. at 996-1010 (¶¶ 3(d) ("Buyers are cautioned to inspect lot vehicles very carefully and verify announced conditions before purchasing.") and 9(b) ("Buyers should thoroughly check and, if possible, test

drive every vehicle[.]")). Finally, as a motor vehicle dealer that made repairs to the Civic, O&W was required by North Carolina law to inspect the Civic for safety defects and correct any deficiencies. *Stilley v. Auto. Enters. of High Point, Inc.*, 284 S.E.2d 684, 688 (N.C. Ct. App. 1981) ("To exercise reasonable care a retail dealer who undertakes to repair and recondition a used vehicle for use upon the public highways must inspect the vehicle to detect defects which would make it a menace to those who might use it or come in contact with it, and must make repairs necessary to render the vehicle reasonably safe for such use."). Had O&W conducted its own inspection of the Civic, as it was required to do, the prior repairs to the Civic would have been discovered. As a result, there was little risk of serious harm to O&W.

This is not a case of a deliberate false statement, but rather a non-disclosure. The United States Supreme Court has stated that while suppression of a material fact can support tort liability and even a modest punitive damages award, this conduct is less reprehensible than a deliberate false statement, particularly where, as here, there is a good-faith basis for believing that no duty to disclose existed, and that at least some wreck damage to the vehicle was visible and known to O&W at the time of purchase. *Gore*, 517 U.S. at 580. O&W argued that ADESA's rules required Midlands to disclose unibody damage and it failed to do so. However, O&W presented no evidence that Midlands was aware that ADESA had changed its rules to require disclosure of unibody damage even when a vehicle was sold under a red light.[14]

[14] To the extent O&W argues that ADESA's clerk made an affirmative representation on the North Carolina damage disclosure form and that Midlands is liable for this representation because Midlands had appointed ADESA as its agent under a power of attorney, it is sufficient to note that N.C.G.S. § 1D-15(c) provides that "[p]unitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another." Thus, the representations made by ADESA's clerk on the damage disclosure form cannot support a punitive damages award under North Carolina law.

There is no evidence in the record that the facts relating to the sale of the Civic to O&W were anything other than an isolated incident. The prior sale of the Civic to Eckland did not involve ADESA, auction rules, or North Carolina statutory disclosure forms. There is also no evidence Midlands knew of the prior damage to the Civic in the earlier sale. There has been no judicial determination of wrongdoing of any kind in connection with the earlier sale of the Civic. As the United States Supreme Court cautioned, "[a] defendant should be punished for the conduct that harmed the plaintiff[.]" *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 423 (2003)**.** O&W's attempts to reframe the argument away from the transaction and conduct at issue are in direct contravention of these directives from the United States Supreme Court.

In discussing reprehensibility, the trial court included a detailed discussion of *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). *Austin* involved claims for fraud and unfair trade practices based upon a car dealer's misrepresentations about wreck damage on a vehicle it sold to a consumer. *Id.* at 31, 691 S.E.2d at 139. This Court stated that the car dealer's conduct in that case exhibited an extremely high degree of reprehensibility and affirmed a ratio of punitive damages to actual damages of 8.21:1. *Id.* at 53, 691 S.E.2d at 151. Despite this "extremely high degree of reprehensibility," this Court noted that the 8.21:1 ratio of punitive damages to actual damages was "high." *Id.*

As discussed by the trial court in noting similarities between this case and *Austin*, "[b]oth involve alleged fraud or unfair trade practices against a car dealer with respect to prior wreck damage. In addition, the plaintiff in both cases was represented by the same attorney." However, the trial court, wary of United States Supreme Court guidance, also reasoned as follows:

> Yet, there are key differences. For example, in *Austin*, the sale was to a consumer who intended to use the vehicle as his primary means of transportation. The sale here was between two car dealerships and the car was sold "as is" with obvious wreck damage. In addition, *Austin* included evidence that the dealer forged the

> plaintiff's signature on a buyer's guide. *Id*. There is no similar evidence of additional fraudulent or reprehensible conduct here. Given these differences, while the Court concludes the conduct in this case is somewhat reprehensible, it also concludes that the degree of reprehensibility exhibited here does not rise to the level exhibited in *Austin*.

(R. at 7). Although the Court of Appeals did not include the same analysis of *Austin*, it affirmed the trial court's ruling that "the reprehensibility of Midlands' conduct is less than that required for such a large punitive award." (App. at 7). The Court of Appeals reviewed the trial court's order and correctly considered the transaction at issue in affirming the trial court's due process analysis.

2. Ratio.

The United States Supreme Court has stated that, while there is no bright-line rule, an award of "more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Campbell,* 538 U.S. at 425. In most cases then, an award more than four to five times the compensatory damages is unconstitutional. For the rare case in which a greater ratio is appropriate, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*. Here, the jury's verdict results in a ratio of 358:1 and therefore fails any ratio test.

By way of analogy to *Austin*, if an 8.21:1 ratio is "high" in a case which involved worse conduct in a consumer transaction as discussed above, then a similar ratio would be "high" in a transaction between sophisticated parties, particularly where the purchasing dealer chose not to inspect a vehicle being sold under a red light warning. The trial court therefore found a ratio of 7:1 represented the outside limits of due process in this case. The Court Appeals agreed with the trial court's assessment after distinguishing numerous North Carolina cases with more egregious facts for which higher ratios were approved. (App. at 7-8).

With respect to the consideration of actual or potential harm, both the trial court and the Court of Appeals looked to the underlying conduct giving rise to the punitive damages award: the

failure to disclose unibody damage as required by the newly-amended ADESA auction rules. The trial court and the Court of Appeals considered this as a case of economic damage in a transaction between two car dealers where the buyer was aware of damage to the vehicle and had an independent duty to inspect before putting the vehicle into commerce. (R. at 4-5; App. at 6-8). The trial court expressly considered potential harm. (R. at 4-5). The Court of Appeals affirmed the trial court's analysis.

O&W again seeks to reframe the argument away from the transaction at issue and the parties to this dispute, contrary to the law of this state. *See Branham*, 390 S.C. at 238, 701 S.E.2d at 23–24. O&W does not reference any potential harm to itself, but rather looks to potential third parties and hypotheticals in the event the vehicle was in certain types of accidents. These arguments, however, disregard the fact that there is no prohibition on clipped vehicles being on the road. The conduct here relates to the disclosure of damage, not the vehicle's presence on the road. As such, potential harm in the event the vehicle was in an accident is not the potential harm stemming from the nondisclosure. Instead, and as found by the lower courts, the potential harm is the economic harm stemming from the reduced value of the car without the disclosure versus with it. (*See* R. at 4).

3. Civil Penalties.

The trial court and the Court of Appeals considered other cases in addressing the maximum allowable ratio of actual to punitive damages in this case. (R. at 7-8, App. at 7-8). Both courts then considered comparable civil and criminal penalties. (R. at 8-9; App. at 8-9). O&W does not make any specific arguments as to the civil penalties considered by the trial court or the Court of Appeals. Instead, it cites to other statutes and cases. The trial court's references related to the specific conduct at issue in this case, and are, therefore, the appropriate statutes to guide this analysis. The Court of Appeals followed the trial court's lead.

As both the trial court and Court of Appeals note, the comparable civil or criminal penalties under North Carolina law inform the ratio comparison here. North Carolina's damage disclosure statute requires that a transferor of a motor vehicle disclose whether the vehicle has been reconstructed. N.C.G.S. § 20-71.4(a). It also provides that a violation may be redressed by a civil action under N.C.G.S. § 20-348. *See* N.C.G.S. § 20-71.4(a1). Section 20-348 authorizes recovery of "[t]hree times the amount of actual damages sustained or one thousand five hundred dollars ($1,500), whichever is the greater."[15] *See* N.C.G.S. § 20-348(a)(1). The maximum recovery for a violation of the NCUTPA is treble damages. N.C.G.S. § 75-16.

Here, the jury's punitive damages award vastly exceeded any comparable civil penalty, and the trial court was correct in finding that this factor supported a lower limit for purposes of the due process analysis. As discussed above, the trial court performed a detailed review of the analysis in *Austin* and set a ratio consistent with that ruling and its full *Gore* review. The Court of Appeals affirmed that assessment and included a discussion of other North Carolina cases. Nothing about these rulings evidences an abuse of discretion or an error of law.

C. The constitutional review is separate and distinct from the statutory punitive damages cap imposed by N.C.G.S. § 1D-25.

O&W places great weight on N.C.G.S. § 1D-25, which caps punitive damages in North Carolina at three times actual damages or $250,000, whichever is greater. N.C.G.S. § 1D-25(b). O&W argues that the existence of the punitive damages cap somehow satisfies the constitutional due process analysis presented above. This argument improperly conflates the constitutionality of the punitive damages cap with the due process review of a punitive damages award. The

[15] Violation of the damage disclosure statute is also a class 2 misdemeanor. N.C.G.S. § 20-71.4(d). To the extent criminal penalties are relevant in this analysis, a class 2 misdemeanor carries a maximum fine of $1,000. N.C.G.S. § 15A-1340.23(b).

application of the cap is separate and apart from the due process analysis presented above. *See Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 93-94 (N.C. Ct. App. 2002), *aff'd*, 594 S.E.2d 1 (N.C. 2004) (applying statute to reduce punitive award and then conducting the due process analysis required by *Gore*); *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 740-41 (N.C. Ct. App. 2009) (considering whether punitive award satisfied due process even after reduction to statutory limit).

In the event the Court determines that the statutory cap found in N.C.G.S. § 1D-25 applies notwithstanding the due process analysis, O&W's recovery would be limited to one cap ($250,000). O&W concedes that the statutory cap applies; however, it argues that there are two plaintiffs and, as a result, the punitive award should have been reduced to $500,000. This argument lacks merit for several reasons. First, an award of $500,000 is unconstitutionally excessive, as discussed above. Second, there is only one real plaintiff. Daniel O'Shields and Roger Whitley are partners in O&W, the buyer of the Civic. O&W repeatedly admitted at trial that it was only seeking one recovery. (*See e.g.*, R. at 289:24-290:6, 291:18-292:1 (Plaintiff's Opening); 750:22-23, 753:6-9, 766:19-21 (Plaintiff's Closing)). Based on this argument and the fact that the contract at issue was between Midlands and O&W, the trial court correctly ruled "[t]here was one buyer here, and thus, there is one recovery and one punitive damages analysis whether the buyer is described as 'plaintiff' or 'plaintiffs.'" (R. at 24-25). As such, the punitive damages award is limited to an outside maximum of $250,000.

D. O&W waived any right to complain about the trial court's punitive damages review.

In addition, O&W did not elect punitive damages. (R. at 1854). Therefore, O&W should not be able to complain about the trial court's review of the punitive damages award. Although the Court of Appeals determined that election was not required between attorney's fees under the NCUTPA and punitive damages, it did not reach O&W's argument that O&W was required to

elect punitive damages in order to appeal this issue. Nor did it need to based on its affirmance of the trial court's punitive damages review. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("In light of our disposition of the case, it is not necessary to address Futch's remaining issues.").

By statute and at common law in North Carolina, a plaintiff who obtains both a common law punitive damages award and a statutory treble damages award must elect between them. *Ellis v. N. Star Co.*, 388 S.E.2d 127, 132 (N.C. 1990); *Mapp v. Toyota World, Inc.*, 344 S.E.2d 297, 301 (N.C. Ct. App. 1986); N.C.G.S. § 1D-20 ("A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages."). The same is true in South Carolina. *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990); *Smith v. Strickland*, 314 S.C. 192, 197-98, 442 S.E.2d 207, 210 (Ct. App. 1994) ("As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages, where their recovery concerns a single wrong.").

Because O&W elected recovery under the NCUTPA, it may not recover punitive damages. Therefore, its arguments regarding the propriety of the trial court's review of the punitive damages award are moot. *See Compton v. Kirby*, 577 S.E.2d 905, 918 (N.C. Ct. App. 2003) ("Plaintiffs were required to elect between the treble damages and the $90,000.00 punitive damages award, and chose treble damages. Defendant's arguments regarding punitive damages are therefore moot . . . ."). Had O&W wished to preserve its right to recover a punitive damages award, the proper course of conduct would have been to elect recovery of the fraud verdict, including punitive damages, and then to appeal the trial court's presumed denial of attorney's fees. O&W initially took this position, but then changed its stance. (R. at 1435-37, 1854). This stands as an

independent basis to affirm the rulings of the trial court consistent with Rule 220, SCACR.

II. The Court of Appeals correctly affirmed portions of the trial court's attorney's fee award as within the trial court's discretion.

A. Standard of Review.

The South Carolina standard of review applies to the consideration of the attorney's fee award because it is a procedural matter rather than a substantive one for purposes of the conflict of laws analysis. *See, e.g., Boswell v. RFD-TV the Theater, LLC*, 498 S.W.3d 550, 557 (Tenn. Ct. App. 2016) (standard of review is procedural and will be governed by forum law); *Moore v. Bi-State Dev. Agency*, 87 S.W.3d 279, 285 (Mo. Ct. App. 2002) (the standard of review is a procedural issue and forum law governs the standard of review for uses raised on appeal). Under South Carolina law, the determination of the amount of attorney's fees awarded pursuant to a statute is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). "[A]n appellate court will not reverse an award [of attorney's fees] unless it is based on an error of law or is without *any evidentiary support.*" *Williamson v. Middleton*, 374 S.C. 419, 427, 649 S.E.2d 57, 61 (Ct. App. 2008) (emphasis in original), *rev'd on other grounds*, 383 S.C. 490, 681 S.E.2d. 867 (2009). [16] Moreover, "[b]ecause a [trial court] has close and intimate knowledge of the efforts expended and the value of the services rendered, the fee

[16] North Carolina has a similarly deferential standard of review for attorney's fee awards. As set forth by the North Carolina Court of Appeals, "our review [of an order awarding attorneys' fees] is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *Lacey v. Kirk*, 767 S.E.2d 632, 648 (N.C. Ct. App. 2014).

award must not be overturned unless it is clearly wrong." *Harwood v. Am. Airlines, Inc.*, 37 F.4th 954, 960 (4th Cir. 2022) (quoting *Plyler v. Evatt*, 902 F.2d 273, 278 (4th Cir. 1990) (cleaned up)).

The Court of Appeals remanded the attorney's fee determination in this matter with the following instructions:

> To summarize, we remand the issue of attorney's fees to the circuit court. (1) On remand, the circuit court should not seek to apportion requested fees between the fraud and the NCUTPA claims. (2) The circuit court may exclude fees incurred after the date of the September 2016 settlement offer. (3) The circuit court should eliminate any redundant fees, improper cost[17], and paralegal fees as it had in the previous award. However, the court should not exclude fees for travel. (4) Finally, 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. This percentage may be impacted by the decision of the court regarding the election of remedies, which will be addressed in the next section.

(App. at 14-15) (numbering and footnote added). O&W's brief is limited to items 2 and 4.[18]

B. Attorney's fees under the NCUTPA.

Under the NCUTPA, attorney's fees may be awarded under the following conditions:

> 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:

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[17] By way of example, the trial court denied fees beyond two hours for the preparation of a generally improper affidavit because the remaining 63.2 hours claimed by O&W's counsel were "not reasonably expended." (R. at 26-27). O&W essentially conceded the time spent on the affidavit was properly excluded before the Court of Appeals, arguing it was "not all that concerned with that." (Oral Argument beginning at approx. 28:20).

[18] Certain of the trial court's rulings in the pre-September 14, 2016 period will remain in place on remand. For example, O&W did not appeal the trial court's ruling that its request for additional fees. from May 2, 2016-July 20, 2016 made by way of Plaintiff's Motion Pursuant to Rule 59 and Motion for Supplemental Attorney's Fees filed on December 20, 2016, was not timely. (R. at 25). As a result, that portion of the trial court's order is law of the case. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding unappealed ruling is law of the case).

> (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 (emphasis added). The plain wording of the statute confirms that: (1) attorney's fees may not be awarded unless there was an unwarranted refusal to settle; and (2) even if such a refusal is present, an award of fees rests in the discretion of the Court and is reserved for "extreme cases." *See Evans v. Full Circle Prods., Inc.*, 443 S.E.2d 108, 110 (N.C. Ct. App. 1994). As acknowledged by O&W in its oral argument before the Court of Appeals, "the amount of fees in a case like this are determined by one thing: how strongly the defendant fights." (Oral Argument beginning at approx. 4:57).

The purpose of the fee award "is to encourage private enforcement" of the NCUTPA. *See Shepard v. Bonita Vista Properties, L.P.*, 664 S.E.2d 388, 396 (N.C. Ct. App. 2008). To this end, a plaintiff has the burden of establishing that there has been an unwarranted refusal to settle before any fee award can issue. *Llera v. Sec. Credit Sys., Inc.*, 93 F. Supp. 2d 674, 680 (W.D.N.C. 2000). In addition, trial courts retain the discretion to deny attorney's fees even if the elements of § 75-16.1 are met. *Id.* at 681. As found by the North Carolina Court of Appeals in direct contravention to O&W's arguments that this is a plaintiff friendly statute, "we also recognize that the statute apparently has been designed to award attorney's fees in extreme cases, since even when the statutory requirements are met, an award of attorney's fees is within the trial court's discretion." *Evans,* 443 S.E.2d at 110.

C. The Court of Appeals correctly affirmed the trial court's discretionary ruling that there was no further entitlement to an attorney's fee award pursuant to N.C.G.S. § 75-16.1 after September 14, 2016.

The trial court declined to award any fees after September 14, 2016 for three reasons: (1) there was no unwarranted refusal to settle after that date; (2) the trial court in its discretion did not find a fee was appropriate after that date; and (3) attorney's fees incurred after that date were not incurred to protect the judgment. (R. at 30-34).

1. The Court of Appeals correctly ruled that the trial court was within its discretion in finding that there was not an unwarranted refusal by Midlands to fully resolve this matter after September 14, 2016.

O&W's request for fees incurred in this period was a separate and new request. Before making a new fee award, the trial court reviewed the requirements of N.C.G.S. § 75-16.1(1), including its requirement that there be an unwarranted refusal to settle. To use O&W's phrase from the oral argument before the Court of Appeals, the trial court assessed "how strongly the defendant [fought]." In response to O&W's request for additional fees, Midlands submitted evidence that it had made offers to settle the entire case based on the trial court's previous guidance. (R. at 2003-10). It increased its prior offer to $81,069, a sum which provided O&W with: (1) the complete fraud judgment, including punitive damages as reduced by the trial court; and (2) the complete unfair trade practices act judgment, including attorney's fees as awarded by the trial court.

Based on its review of the materials submitted by the parties, the trial court determined that N.C.G.S. § 75-16.1(1) was no longer met because Midlands had made a good faith effort to settle the entire case. (R. at 27-28). The trial court noted "[i]n other words, Midlands Honda offered to pay O&W all of the relief approved by the Court, including alternative relief which would have been foreclosed by O&W's election of remedies. In fact, Midlands Honda made a slight math error in its settlement offer and, as a result, the offer was greater than the total amount of relief

approved by the Court." (R. at 27-28). There is no dispute that the offer was made; thus, there is evidence in the record supporting the trial court's determination that there was no longer "unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit."

In addressing O&W's later request for fees, the trial court reiterated,

> O&W's citation to *Printing Servs. of Greensboro, Inc. v. Capital Group, Inc.*, 637 S.E.2d 230 (N.C.App. 2006) for the proposition that once fees are awarded in a case, fees continue to accumulate for work conducted post-trial does not apply on the facts of this case where the Court has determined that there was no longer an unwarranted refusal to settle after a certain date. *Printing Servs* states only the general principle that that appellate attorney's fees may be included in a fee award under § 75:16-1. Neither *Printing Servs.*, nor any of the cases it cites, addresses the situation present in this case, where a defendant engaged in reasonable settlement activity following a jury verdict, and the plaintiff refused to negotiate. In the Court's view, construing § 75:16-1 to require supplemental awards of attorney's fees in the presence of subsequent reasonable settlement efforts by a defendant would permit a plaintiff who was successful at trial to use post-trial motions and appeals as a veritable attorney's fee printing press. Such a result is patently inconsistent with the statute.
>
> Settlement negotiations can occur at any stage of litigation, and, should be considered when awarding attorney's fees under North Carolina law. . . . In this case, the Court finds Plaintiff is not entitled to any fees after September 14, 2016 based on O&W's reasonable efforts to settle.

(R. at 31-32).[19] The Court of Appeals affirmed the trial court's ruling as to the settlement negotiations and found that the ruling with respect to protection of the judgment was an alternate sustaining ground in footnote 11 of its Opinion. (App. at 11-12).

Midlands has not located any North Carolina case addressing the issue of whether continued efforts to settle post-trial can cut off a continuing entitlement to fees, nor has O&W.

[19] The record further shows that Midlands continued in its efforts to settle the case after that date and that Midlands did not continue to fight in that it did not pursue a cross appeal or an independent petition for a writ of certiorari. (R. at 31, 2096-97).

Instead, O&W points to cases where additional awards have been made for post-trial activities. Those cases do not, however, consider additional settlement efforts by the parties after trial.

Consideration of post-trial settlement efforts is consistent with the purposes of the statute, which are: (1) to encourage private enforcement; and (2) to increase the prospects for settlement. *Marshall v. Miller*, 276 S.E.2d 397, 403-04 (N.C. 1981). A plaintiff's pre-trial and trial fees are not impacted by consideration of post-trial settlement efforts, and private enforcement is therefore not discouraged. Additionally, prospects for settlement dramatically increase if post-trial settlement offers may be considered in subsequent fee applications. The defendant has an incentive to increase its offer so that it will not be exposed to additional fee requests, and the plaintiff has an incentive to accept a reasonable offer, or risk not recovering fees for post-trial or appellate work. Given the trial court's discretion in these matters and the underlying purpose behind fee awards, this approach is perfectly consistent with North Carolina law and the NCUTPA.

The construction urged by O&W runs counter to these goals and gives a plaintiff a motive to reject settlement. If, as O&W contends, no post-trial settlement activities may be considered, then a plaintiff who obtains an initial award of fees under the NCUTPA may then simply ignore a defendant's settlement offers as was the case here. It would allow a plaintiff to accrue huge additional attorney's fee awards, and would require appellate courts to address disputes that would otherwise be settled. For all of these reasons, the Court of Appeals correctly founds that the trial court was within its discretion in finding that no further fees accrued under N.C.G.S. § 75-16.1(1) after September 14, 2016.

2. The Court of Appeals correctly ruled that the trial court was within its discretion in finding that O&W could not recover fees after September 14, 2016 because those fees were not incurred to protect O&W's status as a prevailing party.

Under the NCUTPA, a trial court may award attorney's fees for post-trial or appellate work by a prevailing party on an unfair trade practices claim where such work is expended in an "effort" to "protect the judgment." *See Faucette v. Carmel Road, LLC,* 775 S.E.2d 316, 326 (N.C. Ct. App. 2015); *Cotton v. Stanley,* 380 S.E.2d 419, 422 (N.C. Ct. 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*.") (emphasis added). After September 14, 2016, there were no pending motions by Midlands and Midlands did not cross-appeal; thus, O&W's prevailing party status for purposes of the NCUTPA claim was not in jeopardy. Thus, the work done after that date was not to protect the judgment under the NCUTPA. As such, the trial court was within its discretion in declining to award attorney's fees after that date and the Court of Appeals correctly found that this ruling presents an alternate sustaining ground.[20]

3. The trial court had the ability, in its discretion, to refuse to award any fees after September 14, 2016.

In addition to its earlier rulings based on the statute and the settlement posture of the case, the trial court included an additional ruling denying fees after September 14, 2016 as a matter of its general discretion. O&W did not include this second basis for the trial court's ruling, discretion, in its petition for rehearing before the Court of Appeals. Nor was it addressed in O&W's brief before the Court of Appeals aside from one conclusory sentence on page 45. As such, Rule 242(d)(2), SCACR bars further consideration of attorney's fees in this period as a matter of procedure, and the two issue rule provides an additional basis for affirming the August 10, 2017 order as a matter of law. *Jones v. Lott,* 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

Moreover, as argued above, the trial court fully recognized that any fee award was within its discretion and declined to exercise that discretion as to any fees incurred after September 14, 2016. (R. at 32-33). As stated by the trial court,

> Additionally and alternatively, an award of attorney's fees under N.C.G.S. § 75-16.1 is always discretionary, even when the factors which would support an award are present. *Basnight v. Diamond Developers, Inc.*, 178 F.Supp.2d 589, 592 (M.D.N.C. 2001) ("[e]ven where the facts of a particular case will support a finding that the requirements of N.C.Gen.Stat. § 75-16.1 have been met and an award of attorney's fees may be warranted, the Court retains the discretion to deny the award"); *Blankenship v. Town & Country Ford, Inc.*, 174 N.C.App. 764, 771, 622 S.E.2d 638, 643 (2005) ("[t]he decision whether or not to award attorney fees under section 75[-]16.1 rests within the sole discretion of the trial [court]. *And if fees are awarded,* the amount also rests within the discretion of the trial court.") (emphasis added); *Evans v. Full Circle Productions, Inc.*, 443 S.E.2d 108, 110 (N.C. App. 1994) ("[W]e also recognize that the statute [apparently] has been designed to award attorney's fees in extreme cases, since even when the statutory requirements are met, an award of attorney's fees is within the trial court's discretion.").

This ruling is supported by the law and the evidence in the record as to the parties' conduct and must be affirmed.

D. The Court of Appeals did not err in its citation of *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

O&W also contends that the Court of Appeals gave undue weight to and misread *Hensley v. Eckerhart*, 461 U.S. 424 (1983). However, the Opinion only cites *Hensley* for the unremarkable proposition that in determining attorney's fees, "the most critical factor is the degree of success obtained." *Id.* at 436. In furtherance of that goal and as quoted by the Court of Appeals, a fee award may be adjusted downward in the trial court's discretion based on an analysis of the following: (1) did the plaintiff fail to prevail on other claims and (2) "did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" This is consistent with North Carolina and Fourth Circuit law. *See Okwara v. Dillard Dep't Stores, Inc.*, 525 S.E.2d 481, 486–87 (N.C. Ct. App. 2000) (finding determination as to

whether the fee should be reduced is "largely left to the discretion of the trial judge, who has 'intimate knowledge' of the facts and circumstances of the case"); *Johnson v. City of Aiken*, 278 F.3d 333, 336-37 (4th Cir. 2002).

Stated differently, trial courts retain the authority to adjust attorney's fees awards to ensure that such awards are reasonable in relation to the results obtained. Thus, the Court of Appeals correctly directed the trial court on remand to consider "success of the litigation" in determining a reasonable attorney's fee, and that the trial court "may—or may not—reduce the remaining amount of the requested fees by a percentage it finds appropriate." (App. at 14). This ruling is consistent with state and federal law.[21]

III. Offer of judgment interest should be considered in light of the judgment to be entered on remand.

O&W sought interest and costs under S.C. Code Ann. § 15-35-400. This statute permits a party who makes an unaccepted offer of judgment and obtains a verdict or determination at least as favorable as the rejected offer to recover interest and costs. S.C. Code Ann. § 15-35-400(B). Conversely, a party who does not obtain a verdict or determination at least as favorable as the rejected offer is not entitled to such an award. *See id.*

The trial court here determined that no award could be made because the actual judgment amount of $43,721.45 fell below O&W's $280,000 offer of judgment. (R. at 21). O&W contends that because § 15-35-400(B) uses the term "verdict," the trial court was required to compare the offer of judgment to the initial jury verdict rather than the final judgment amount. (R. at 21). The Court of Appeals found that the actual judgment amount is the proper focus, but remanded the

[21] Moreover, at oral argument before the Court of Appeals, O&W's counsel conceded a 15-20% reduction to the fees claimed by O&W would be appropriate. (Oral Argument beginning at approx. 28:20). Thus, O&W concedes a downward adjustment is appropriate.

question based on its other rulings. (App. at 18-19). O&W seeks review by this Court as to whether the focus is on the verdict or the judgment ultimately entered.

O&W's argument ignores the actual text of § 15-35-400(B), which 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: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of *the verdict or award* from date of the offer; or (3) if the offeror is a defendant, a reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer.

(emphasis added). The statute does not limit comparison of the offer to the "verdict." It contemplates comparison of the offer amount to the "verdict" *or* the "determination." It also uses the terms "verdict" and "award" interchangeably. The statute's use of the terms "determination" and "award" indicates that the offer of judgment amount should be compared to the amount of the final determination or award. As a result, the trial court rejected O&W's claim for interest and costs in connection with its offer of judgment based on the judgment then entered. The Court of Appeals agreed that the actual judgment amount is the proper focus, but remanded the question based on its other rulings. (App. at 18-19).

Excessive jury verdicts and unconstitutional punitive damage awards may of course be reduced by trial courts. Section 15-35-400(B) could not have been intended to impose penalties upon a defendant for failing to accept an offer of judgment where, as here, the offer exceeded the upper limit of constitutionally recoverable damages as determined by the trial court. A defendant should not be bound to accept an offer of judgment that is excessive as a matter of law simply because of the possibility that a jury may render an excessive verdict. O&W's construction provides an incentive for a plaintiff to make an offer of judgment far in excess of what the law

would deem reasonable, an incentive that works counter to the statute's purpose of promoting settlement of claims.

Garrison v. Target Corp., 435 S.C. 566, 869 S.E.2d 797 (2022) does not provide the authority claimed by O&W. In *Garrison*, this Court ruled that punitive damages should be considered in determining whether a plaintiff is entitled to offer of judgment interest. *Id.* at 586-87, 869 S.E.2d at 807-08. This Court makes no mention of the issue presented here, which is whether the verdict or the final award is trigger for the application of § 15-35-400(B). This Court did not overrule or even mention the discussion by the Court of Appeals on this issue—it did not need to based on its ruling that punitive damages must be considered. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

As found by the Court of Appeals in *Garrison*,

> The Garrisons maintain that the plain language of Rule 68(a) ties prejudgment interest to the amount of the verdict or award and not to "any alteration of the jury's verdict post-judgment." However, Target contends that the use of the term "determination" in the first sentence of Rule 68(b) indicates that the final amount may be settled by the presiding judge rather than the jury. We agree. When this term is considered in combination with the last phrase of Rule 68(b), "eight percent interest computed on the amount of the verdict or award from the date of the offer *to the entry of judgment*," the plain language of the rule contemplates that interest is to be computed on the final judgment after all post-trial motions have been resolved. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[The court] should not concentrate on isolated phrases within the statute."); *id.* ("Instead, [the court reads] the statute as a whole and in a manner consonant and in harmony with its purpose."); *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the [c]ourt applies the same rules of construction used to interpret statutes."); *Johnson*, 396 S.C. at 188, 720 S.E.2d at 520 ("In interpreting a statute, the court will give words their plain and ordinary meaning[ ] and will not resort to forced construction that would limit or expand the statute."); *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994) ("The intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context.").

Garrison v. Target Corp., 429 S.C. 324, 377, 838 S.E.2d 18, 46 (Ct. App. 2020) (footnote omitted), *aff'd in part as modified, rev'd in part*, 435 S.C. 566, 869 S.E.2d 797 (2022). Midlands contends this ruling comports with the language and the spirit of the applicable rule and statute.

For these reasons, the Court of Appeals did not err in remanding this issue for further consideration in light of the final award that will ultimately be entered in this case.

CONCLUSION

For all of the reasons discussed above, the trial court and Court of Appeals correctly performed the due process review with respect to the punitive damages to be awarded in this case. In addition, the Court of Appeals correctly found that the trial court did not abuse its discretion in finding no fees would accrue after September 14, 2016 based on the language of N.C.G.S. § 75-16.1(1) and the trial court's independent exercise of discretion, nor did the Court of Appeals err in remanding the fee award to the trial court to consider an appropriate award based on the "success of the litigation." Lastly, the Court of Appeals did not err in remanding the issue of offer of judgment interest "in light of the final award." Midlands would ask that this Court affirm the rulings of the Court of Appeals such that this matter can be remitted to the trial court consistent with the Opinion.

Respectfully submitted,

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