RECEIVED

Jan 17 2023

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,

Petitioners,

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

REPLY BRIEF

Brooks R. Fudenberg
LAW OFFICES OF BROOKS R. FUDENBERG, LLC
14 Ashe Street
Charleston, SC 29403
Tel.: (843) 696-8911
eFax: (910) 401-1242
BRF@Fudenberglaw.com

C. Steven Moskos
C. STEVEN MOSKOS, P.A.
6650 Rivers Ave., Ste 210
N. Charleston, SC 29406
Tel. (843) 763-5297
Steve@moskoslawfirm.com

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. THE COURT SHOULD CORRECT THE PANEL'S ERRONEOUS FEDERAL DUE PROCESS ANALYSIS.[1]

The Brief of Respondent presents a school of red herrings. More generally, Midlands' brief almost gives the impression this case is about deceptively hiding the beaten-up fabric of a car, akin to a Magistrate Court case. However, putting a dangerous vehicle into the stream of commerce while hiding the danger is in a different category altogether, as other courts recognize. E.g., *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 54–55, 691 S.E.2d 135, 152 (2010); *id.* at 54–55, 691 S.E.2d at 152 (citing cases); (*see also* Br. of. Petitioners p. 34 (citing additional cases)).

A. Midlands' Erroneous Analysis

(1) Because Midlands Does Not Dispute that It Knowingly Violated North Carolina Disclosure Law, Its Argument that It Did Not Also Violate Auction Rules Is a Red Herring.

Petitioner's main brief points out that "Respondent knew it was violating North Carolina **law**, and that sufficiently establishes willfulness." (Br. of Petitioners p. 31) (emphasis in original); (*see also* pp. 7 (similar)). Midlands does not dispute this.[2] Nevertheless, Midlands puts much emphasis on its claim that it did not also violate auction rules. That claim fails, as discussed next.

(2) The Auction's Disclosure Requirements Were *Not* New.

Midlands' argument hinges on its assertion that the Auction's disclosure requirements were "new."

---

[1] Midlands contends the Court of Appeals did not reach its argument that Petitioners waived the right to appeal punitive damage issues when they elected the UTPA remedy. (Br. of Resp't pp. 24-25). It errs, as the panel reached Midlands' argument and rejected it as "without merit" (App. p. 4). If anything, it has less merit now that the order to elect has been reversed. Midlands' argument (p. 8 n.7) that the petition for writ of certiorari was "improper" was implicitly rejected by the grant of the writ after Midlands asked that the petition be dismissed on those grounds (Ret. to Pet. p. 6 n.7). If the Court revisits the issue, Petitioners rely on their discussion on page 13 of their reply in support of the petition.

[2] Midlands admits North Carolina statutory law was violated (Br. of Resp't p. 14 & n.12). Nor could Midlands avoid the issue by claiming ignorance of the disclosure laws regulating sales of used cars in a state where it was selling 100 used cars a year; that, too, would be highly reprehensible. (*See also* R. p. 395, line 22-p. 396, line 16 (Midlands' Used Car Manager testifying he has a duty to know and follow the laws of the states where he sells cars)).

Midlands asserts that a "new" set of rules issued three months before this sale; there is no evidence Midlands was mailed a copy of the "new" rules; and therefore Midlands was not bound by the "new" rules. Petitioners agree the rules were modified on January 1, 2010, three months before this sale. But as Petitioner's main brief points out (p. 31), a modification of rules does not mean every rule in it is new. By that reasoning, every time a new baseball rulebook issues, the three-strikes rule would be a new rule.[3] Midlands' line of argument lacks any evidence that the **disclosure requirements** were new. The many references to the record Midlands provides in attempted support of its claim show only that a revised set of rules issued in January 2010. None show the disclosure requirements were "new."[4]

[3] "See this new baseball rulebook. It came out in 2000. It says, 'three strikes and you are out.'" "So?" "So the three-strikes rule was new in 2000." This is obviously absurd, but is where Midlands' logic ends up.

[4] The table below contains a complete list of Midlands' references to the record re its claim that the auction disclosure requirements were new, and summarizes the actual content of those pages and lines.

Midlands' references to Record	**Content of Record material to which Midlands refers**
162:7-10	Simply establishes that frame or unibody damage must be disclosed. Nothing about whether the requirement was new.
293:20-294:2	Opening statement to jury by Midlands' counsel. Statements of counsel are not evidence. Further, on those pages and lines, counsel simply stated (a) there was a new set of rules and (b) Midlands could not find the new set of Rules. Counsel said nothing about disclosure being a new requirement.
395:16-19	Establishes that Used Car Manager Ferrell was unaware of the rules. Nothing about disclosure requirements being new.
397:8-22	Used Car Manager Ferrell implying he did not know the rules.
408:13-409:16	Midlands' counsel states the rules require disclosure of frame/unibody damage. Midlands' Used Car Manager agrees and states these rules issued in January 2010. **Midlands' Used Car Manager testifies he never learned either set of rules.**
408:24-409:3	Included in 408:13-409:16 immediately above.
409:6-16	Included in 408:13-409:16.
434:3-16	Midlands' General Manager admits he was "responsible for the whole dealership" at the time in question, and denies much knowledge of the auction rules.
635:6-21	Date of current set of rules.

Rather, the Record establishes the required disclosures ("announcements," in auction parlance) had been unchanged since at least 2005. (R. p. 594, lines 2-12; *see also* pp. 1013-14 (Buyer's and Seller's copy of the sales contract with tabs for "announcements" grayed out because Midlands made no disclosures.)) Petitioners presented to the jury the rules Petitioners believed governed the transaction. The jury was entitled to believe the side that said, in effect, "Here are the rules we believe governed the transaction" over the side that said, in effect, "we believe other rules applied, and we believe those rules did not require disclosure, but we're not going to show them to you." Midlands should not be heard to complain about jurors not appreciating rules that Midlands did not present.

The more likely reason for any unfamiliarity with the rules is that Midlands chose not to read them. Midlands' Used Car Manager, who was in charge of its dealings with the auction (R. p. 386, line 18-p. 387, line 8), and sent to the auction a hundred cars a year (R p. 360, lines 14-18), testified, "I didn't, you know, ever learn the -- or know the rules." (R. p. 409, lines 11-12). "I didn't read 'em." (R. p. 356, line 24).

That itself is a "reckless disregard" for the safety of others, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); an ongoing disregard, not a one-time action; it "posed a substantial risk of harm to the general public [and so is] particularly reprehensible," *Philip Morris, USA v. Williams*, 549 U.S. 346, 355 (2007).[5]

996-1010	Current set of rules -- no indication of what has changed.

Nor does anything else in the Record support a claim that the disclosure requirements were "new."

[5] Midlands similarly claims on page 11 of its brief that it cannot determine whether its 159-point, up-on-the-rack, inspection revealed prior damage. It argues it did not ask the mechanic who performed the inspection, because he died in **2011**, before suit was filed. But Mr. Ecklund, his wife, and the Petitioners had told Midlands' Senior Managers the "car" was two half-cars in **2010**. It took a lawsuit to make Midlands want to find out why it was repeatedly putting a dangerous vehicle on the street. Otherwise, Midlands had no interest in discovering why it was endangering the public.

(3) ADESA Is Not to Blame. Midlands Is.

Midlands quotes extensively from N.C.G.S. § 1D-15, emphasizing language in paragraph (c), "*Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another*" (Brief of Resp't, pp. 15-16).[6] Midlands argues this language lets it escape liability for the affirmative misrepresentations "made by ADESA's clerk"[7] as Midlands' agent "under a power of attorney." (*Id*. p. 19). Not so. First, paragraph (c) distinguishes a "person" from a "corporation." Immediately after the language Midlands emphasizes, paragraph (c) states (emphasis added), "**Punitive damages may be awarded** . . . **if, in the case of a corporation**, the officers, directors, or **managers** of the corporation **participated in** or condoned the conduct constituting the aggravating factor giving rise to punitive damages," as Midlands' managers did. The language Midlands relies on does not apply to corporations. The language that applies makes Midlands liable.

Perhaps more importantly, the language forbidding punitive damages against a person solely "on the basis of vicarious liability" would not apply even were Midlands a person. The claim here is not based solely—or even partly—on vicarious liability. ADESA did nothing wrong. Midlands withheld information. Its sales manager even testified it was his choice to withhold the information. (R. p. 386, lines 13-15).[8] ADESA is not at fault. Midlands is.

As for the auction rules, Midlands "didn't read 'em." As for the mechanic, Midlands didn't ask him. "Didn't read 'em" and "didn't ask him" further evince reckless disregard for the safety of others.

[6] Midlands also emphasizes language in paragraph (d), "*Punitive damages shall not be awarded against a person solely for breach of contract.*" The paragraph is irrelevant for reasons stated in text, and because the punitive verdict here is for fraud, not "solely" for breach of contract.

[7] The seller is obligated to inform the auction of anything that must be disclosed before the sale. (App. p. 3). The auction does not call each seller about each vehicle and say, "You wouldn't be selling a car with frame damage, would you?" "How about unibody damage?" "Not two half-cars welded together?"

[8] Midlands was involved in the negotiations with Petitioners with the auction as intermediary under a power of attorney. (R. p. 598, line 10-p. 600, line 21). Midlands' assertion on page 14 that "Midlands was not involved in this process and did not sign the contract" is misleading.

(4) Midlands Confirms Its Disregard of the Safety of Others.

Midlands presents a question to its General Manager at the time of the sale: "**But you don't assume any responsibility for making sure that they know that they're buying an unsafe vehicle?**," and his response, "I do not assume any responsibility on that . . . . **No, sir,** I don't feel like that." (Br. of Resp't p. 18) (emphasis added). Thus both parties represent that Midlands intentionally disregarded the safety of others.

(5) The Sale to Mr. Ecklund Counts. It Is Relevant Under Both *State Farm* and *Philip Morris*.

The sale to Mr. Ecklund is relevant under *State Farm's* directive to consider whether the wrongful act was "an isolated incident," 538 U.S. at 419, 123 S. Ct. at 1521. It is also relevant under *Philip Morris*' holdings, "harm to others shows more reprehensible conduct," 549 U.S. at 355, and "**[C]onduct that risks harm to many is likely more reprehensible** than conduct that risks harm to only a few. And **a jury consequently may take this fact into account** in determining reprehensibility," *id.* at 357 (emphasis added).[9] The jury was entitled to take this into account.

---

[9] Midlands thus has *Philip Morris* backwards in arguing the opinion forbids consideration of harm to others, as *Philip Morris* explicitly and repeatedly endorses considering that harm.

Philip Morris holds a jury may not "directly" award punitive damages to a plaintiff for harms a defendant inflicted on other persons, who are not parties in the case. 549 U.S. at 355-57. Under its holding, a jury may not decide a million dollars is a proper punitive damage amount for the act that injured a plaintiff, and decide proper punitive damages for wrongs to three others who are not parties to the suit are a million dollars each, and so award that plaintiff four million dollars. A defendant concerned the jury might do that is entitled to an instruction to the jury to consider the other acts only as evidence of the reprehensibility of the act that injured the plaintiff, not as justifying punitive awards in their own right. *Id. Philip Morris* provides defendants no more protection than that. And to have even that protection, the defendant must request it. *Id.* at 357. Midlands made no such request, and so is not entitled to any protection under *Philip Morris. Id.*; *see also Tucker v. Doe,* 413 S.C. 389, 408-09, 776 S.E.2d 121, 132 (Ct. App. 2015) (failure to object to jury charge waives any alleged error in the charge) (punitive damages issue).

The cases following *Philip Morris* Midlands cites supports Petitioners' argument. *Branham v. Ford Motor Co.*, 390 S.C. 203, 238, 701 S.E.2d 5, 23 (2010), found impermissible a "counsel's request that the jury punish Ford for harming others." No such request was made here. Rather, here, Petitioners' counsel told the jury, "[W]e're not asking you to find damages on behalf of Mr. Ecklund." (R. p. 743, lines 18-10)). *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004) concerned a doctor who, among other things, caused the plaintiff's esophagus to be punctured. The Court held the doctor's alleged prescribing of valium to one of the plaintiff's daughters and instructions to share it with her sisters was too "dissimilar" to the

Midlands' attempt to distinguish its sale to Mr. Ecklund on grounds that "[t]he alleged misconduct here [also] involved a violation of ADESA's rules and a North Carolina statutory disclosure requirement" (Br. of Resp't p. 10) is like a bank robber claiming this is a first offense, because the prior robbery involved only a gun, while this robbery allegedly involves both a gun and a knife. Midlands' argument misses the point. Both the sale to Mr. Ecklund and the sale to Petitioners were deceptive.[10]

(6) Midlands' Argument Re A Supposed Failure by Petitioners to Adequately Inspect the Vehicle is Both Waived and Erroneous.[11]

Midlands makes much of a supposed failure of Petitioners to properly inspect the vehicle. However, at trial, Midlands asserted that whether Petitioners properly inspected was a jury issue. (R. p. 681 lines 6-14). Now that the jury has emphatically rejected Midlands' argument that Petitioners did not properly inspect,[12] Midlands seeks to reverse its position. But "An issue

puncturing of the esophagus to be considered. *Id.* at 653, 602 S.E.2d at 767. Here, the other deceptive sale of the same dangerous vehicle is not too dissimilar to consider.

[10] It is enough that the sale to Mr. Ecklund was deceptive. But in fact, the sale to Ecklund was common-law fraud regardless of whether Midlands knew the vehicle was clipped, or whether, after Mr. Ecklund had told Midlands he needed something "safe" and "dependable" (R. p. 105, line 21-p. 106, line 15), Midlands told him this car met his needs; that they had given it a "159-point inspection" and this car had all its original parts (although in fact the rear half was not original); that it was "100% Honda-Certified" when Honda would never knowingly agree to certify this car. Midlands repeatedly put this in writing. (R. pp. 954 (Window Sticker stressing "Certified"), 955 (Buyers Order with handwritten and double-underlined word "certified"), 957 ("CERTIFIED PRE-OWNED VEHICLE ADD-WRAP")). "It is precisely this type of reckless overstatement that is condemned in the common law civil fraud cases, on an equal basis with statements actually known by the declarant to be false when made." *Carroll Motors, Inc. v. Purcell*, 273 S.C. 745, 747, 259 S.E.2d 604, 605 (1979) (quoting *Jones v. Fenton Ford, Inc*., 427 F. Supp. 1328, 1135 (D. Conn. 1977)) (fraud in sale of motor vehicle). *Brooks Equip. & Mfg. Co. v. Taylor,* 55 S.E.2d 311, 315 (N.C. 1949) (similarly holding).

[11] Even had Petitioners failed to properly inspect, that would not cancel the reckless indifference to safety evinced by Midlands.

[12] The jury was instructed that Petitioners could not obtain a verdict for fraud if Petitioners had not properly inspected. (R. p. 855, lines 8-15) (fraud). The jury was instructed in a largely similar fashion re the claimed UTPA violation. (R. p. 859, lines 2-4). The jury was similarly instructed re the claim for negligent misrepresentation. (R. p. 858, line 19-p. 859 line 14). The jury found for Petitioners on each. (R. p. 43-44). The jury issue was decided in Petitioners' favor in three ways.

conceded in a lower court may not be argued on appeal," *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 46, 691 S.E.2d 135, 147 (2010) (quoting *TNS Mills, Inc. v. South Carolina Dep't of Revenue,* 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998)). Midlands should not be allowed to take from the jury an issue Midlands argued belonged to them.[13]

Moreover, given the conditions at the auction, where there were no lifts (R. p. 394, lines 13-16),[14] nor any other way to raise a vehicle to examine its underside (p. 201, line 25-p. 202, line 9), the law requiring disclosure, the auction practice of announcing disclosures ("announcements") when a car goes across the auction block, the absence of any such announcements, the affirmative representations that there were no announcements, and the affirmative representations that the vehicle had not been damaged to more than 25% of its value, and was not reconstructed, Petitioners' inspection was more than was required.[15]

(7) Midlands' Argument about Clipped Cars Is an Unpreserved Red Herring.

Midlands' argument that "There is no evidence or argument indicating that the sale or operation of a clipped car is illegal" (Br. of Resp't p. p. 15 n.13; *see also id*. pp. 15, 18, 22) is unpreserved. There is no evidence or argument because Midlands never raised its claim until its most recent brief. The Court should, under *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 421, 526 S.E.2d

---

In fact, Midlands requested the jury instructions (R. p. 930, line 17-p. 931, line 7). It should not be heard to complain that the jury, following instructions it provided, decided against it.

[13] Even more so because Midlands' Used Car Manager admitted that Petitioners "didn't do anything wrong." (R. p. 391, lines 15-18).

[14] Midlands' victims all learned the car was heavily damaged only when it was lifted. (Br. of Petitioners pp. 8-9).

[15] Since the jury found Petitioners' inspection to be proper, and since Midlands had superior knowledge about the vehicle (R. p. 350, line 25-p. 351, line 3, p. 772, lines 7-8) (Midlands Used Car Manager so stating), (p. 772, lines 7-8) (Midlands' attorney similarly conceding), Midlands cannot escape its common-law duty to disclose (R. p. 716, lines 1-8) (Midlands' counsel conceding this would create a duty to disclose). *See also Brooks Equip. & Mfg. Co. v. Taylor*, 55 S.E.2d 311, 315 (N.C. 1949) (similarly holding); (Br. of Petitioners pp. 10-11) (discussing the issue).

716, 724 (2000), decline to reach it. It is a red herring because Midlands does not and could not credibly claim it is legal to operate **unsafe** vehicles on North Carolina highways, *see, e.g.*, N.C. G.S. 20-54(2); nor does it nor could it credibly claim this car was safe. This was not simply a clipped car; it was an extremely poorly reconstructed car. The welding was atrocious (Br. of Petitioners pp. 7-8). Its brake and fuel lines were cut (R. p. 512, lines 8-21). Expert testimony established the car is "unsafe to drive." (R. p. 515, line 5).

(8) Actual Harm Is Not Potential Harm.

Midlands effectively concedes the courts below did not consider potential harm. Midlands writes (p. 22), "[A]s found by the lower courts, the potential harm is the economic harm stemming from the reduced value of the car." To state what may be obvious, actual economic harm stemming from the reduced value of the car is exactly that: actual harm, not potential harm.[16]

(9) Potential Harm to Others Counts.

Midlands contradicts this Court and the Supreme Court of the United States by arguing potential harm to others must not be considered. (Br. of Resp't p. 22). "[T]he trial court erred in failing to consider *any* potential harm in the ratio calculation, including the harm likely to result to other customers." *Garrison v. Target Corp.*, 435 S.C. 566, 585, 869 S.E.2d 797, 808 (2022). "[I]t is appropriate to consider . . . the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 584, 869 S.E.2d at 807 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). "[W]e believe there was a potential for Austin or his passengers to be subjected to serious injury." *Austin*, 387 S.C. at 54, 691 S.E.2d at 151. *Cf. Philip Morris,* 549 U.S. at 355 (conduct that "posed a substantial

[16] Midlands also argues that the panel affirmed and thus, Midlands maintains, implicitly adopted the trial court's analysis of potential harm. (Br. of Resp't p. 22) (citing R. at 4-5). But nor did the trial court consider the potential harm to others, which is discussed in the next paragraph of this document.

risk of harm to the general public [is properly considered] particularly reprehensible").

(10) Comparable Cases[17]

Midlands does not dispute that the panel failed to consider comparable cases as this Court has instructed, nor that comparable cases are in the 500,000 to one million dollar range, nor that the panel instead compared the award here only to measures held by this Court and the Court of Appeals to be improper as comparisons to punitive awards.[18] The Court should again hold that comparable cases are in the 500,000 to one million dollar range.

(11) Midlands Misreads *Austin*.

Midlands extensively cites the **trial court's** reading of *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). The Court of Appeals did not join in that reading. Midlands erroneously reads *Austin* as (a) involving facts more reprehensible than the facts here; and (b) therefore setting a limit of an 8.21 ratio between punitive damages and **actual** damages for cases like this. Midlands errs. *Austin* did not concern worse acts than this case does, and *Austin* held the **potential** harm, not the actual damages, controlled the ratio.

Austin did not involve a corporation explicitly stating it had no concern for the people it endangered.[19] *Austin* did not involve multiple sales and attempted sales of a vehicle. Nor, to put it

---

[17] Midlands suggests the panel compared the **ratios** of other cases. Midlands apparently seeks to make the ratio the center of two separate prongs. The current (third) prong concerns the absolute amount of awards, not the ratios, which are the subject of the second prong. Moreover, the ratios the panel compared were of punitive awards to **actual** damages, not to actual and potential harm and thus were insufficient even as comparisons for the ratio prong. Further, none of the cases the panel cited held ratios or awards to be improper. It is too large a stretch to conclude, as the panel does, that because those ratios were proper, this one is not.

[18] Midlands complains that Petitioners did "not make any specific arguments as to the civil penalties considered by the trial court or the Court of Appeals." (p. 22). That is true: Petitioners did not analyze the penalties this Court has instructed are not to be considered—other than to state they are not to be considered.

[19] Nor was the deception in *Austin* by Senior Managers, as in this case. It was by a low-level salesman. 387 S.C. at 33, 691 S.E.2d at 140. Wrongdoing by "low level employees" does not justify awards as large as does wrongdoing by "senior management." *TXO,* 509 U.S. at 469 (Kennedy, J., concurring).

mildly, was there any indication that the pickup truck with a tracking problem there was remotely as dangerous as this cut-in-half, poorly-welded together vehicle, with its solid welds where welds should not be solid, partial welds not touching where they should touch, gaping holes inside the welds, unrepaired frame damage, and the fuel and brake lines cut and simply clipped back together with plastic!

The Court need not decide which case presents more egregious facts, because the *Austin* Court explicitly based its analysis on the ratio of punitive damages to potential harm. The ratio of punitive damages to actual damages was "high," the Court held, but "[G]iven the extent of the wreck damage and the resultant safety issues, we believe there was a potential for Austin or his passengers to be subjected to serious injury." *Id*. at 54, 691 S.E.2d at 151 (emphasis added). It therefore held the award to be proper. It should hold similarly today. *Austin* provided no indication it found the ratio of punitive damages to potential harm to be high.[20]

(12) The Legislative Directive Is Entitled to Substantial Weight.

Midlands overstates in asserting "[t]he constitutional review is separate and distinct from the statutory [directive]." (Br. of Resp't pp. 23-24). A legislative determination may be overridden only when a constitutional violation is proven beyond reasonable doubt. "[U]nconstitutionality must be proven beyond a reasonable doubt. The fact that [one] challenges the ordinance, *as applied,* does not lessen the burden." *Rothschild v. Richland Cnty. Bd. of Adjustment*, 309 S.C. 194, 198, 420 S.E.2d 853, 856 (1992) (emphasis in original) (citations omitted). Moreover, "Because punitive damages are awarded to punish and deter defendants and

[20] Additionally, *Austin* was decided in 2010, before enactment of Section 15-32-530 of the South Carolina code, which governs punitive awards. Had the section been in effect when *Austin* was decided, it would have been an additional reason to find the award there permissible. (*See* discussion in text following this note.)

'[l]egislatures have extremely broad discretion in defining criminal offenses,' it necessarily follows that legislatures also 'enjoy broad discretion in authorizing and limiting permissible punitive damages awards.'" *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 10 (N.C. 2004) (quoting *Cooper Indus. v. Leatherman Tool Grp., Inc*., 532 U.S. 424, 432, 121 S.Ct. 1678, 1683, 149 L.Ed.2d 674, 684 (2001)).[21] Here, application of the statute creates no constitutional violation and certainly none beyond reasonable doubt. (In fact, the analogous South Carolina statute would have mandated judgment of at least two million dollars. S.C. Code Ann. § 15-32-530.[22]) Even were the Court to find that the amount determined by the Legislature is questionable, the Court should defer to the legislative determination.

B. A Proper Analysis

(1) Midlands' Conduct Was Highly Reprehensible.

Considering, in order, the five elements *State Farm* directs courts to consider under the reprehensibility prong, 538 U.S. at 419,

[a] The Parties agree the harm caused was economic as opposed to physical.

---

[21] The North Carolina Supreme Court's determination that the cap applies separately to each plaintiff is also entitled to deference. Midlands' argument that there was only one Plaintiff overlooks the fact that filings by both parties were consistently captioned "Plaintiffs," plural, all the way through trial (e.g., R. pp. 78, 84), and the text of the complaints and answers referred consistently to "Plaintiffs," plural (R. pp. 49-100).

[22] Under paragraph (B) of S.C. Code Ann. § 15-32-530, if a punitive verdict is for more than two million dollars, and

> the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and . . . the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant;

then "the trial court shall . . . enter judgment for punitive damages" for "the sum of two million dollars."

Paragraph (C) and its subparagraph (1) show the South Carolina legislature considers fraud so reprehensible they exempt fraud from any cap whatsoever. ("[T]here shall be no cap on punitive damages" if at the time of injury the defendant intended to and did harm the plaintiff).

[b] The tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others. Midlands repeatedly sold a highly dangerous vehicle without disclosure, and stated it did not care that people could be seriously injured. Under *Philip Morris*, that is "particularly reprehensible." 549 U.S. at 355.

[c] As Petitioners assert (Br. of Petitioners p. 31) and Midlands does not dispute, the "gravel lot," "Mom-and-Pop" dealers Midlands targeted had financial vulnerability.

[d] The conduct involved repeated actions, not an isolated incident. Midlands does not dispute Petitioners' assertions "that there were **repeated** attempts by Midlands to sell the vehicle **via the auction** without disclosure" (Br. of Petitioners p. 28) (emphasis in original), including its attempt to sell the vehicle to other dealers via the auction block and that Midlands made other, non-isolated, actions when it promised to get back to Petitioners, and violated its promise (*id*.) And the sale to Mr. Ecklund counts, as discussed above.

[e] The acts here cannot accurately be described as "the result of . . . mere accident." Selling this vehicle without disclosing its damage is *malum in se*, not just *malum prohibitum.* This was no accident.

The reprehensibility prong strongly favors Petitioners. The panel erred in holding otherwise, and in ignoring Midlands' explicit statements that it disregards the safety of others.

(2) The Ratio Prong Massively Favors Petitioners.

Midlands does not dispute Petitioners' showing (Br. of Petitioners pp. 33-34) that when actual damages are as small as they are here, courts approve ratios larger than those sought here, even when potential harm is excluded from the analysis. Thus, undisputed law makes the ratio prong favor Petitioners. Even more so when potential harm is included.

(3) Comparable Cases Compel a Decision in Favor of Petitioners.

Because there is no constitutional problem with punitive awards of $500,000 or $1 million for deceptive sales of previously-wrecked vehicles, *Krysa v. Payne*, 176 S.W.3d 150 (Mo. Ct. App. 2005) ($500,000); *Parrott v. Carr Chevrolet, Inc.,* 331 Or. 537, 17 P.3d 473 (2001) ($1 million), the $500,000 sought here is completely consistent with awards in comparable cases. This factor, too, weighs heavily in favor of awards at that amount.

Conclusion re Punitive Damages

All three of the *Gore* prongs weigh in favor of Petitioners. Midlands' acts could financially ruin a purchaser whose passenger was injured because the car broke apart, or change their life should the worst happen and the car results in a death. Midlands' claim that the potential harm is the reduced value of the car is against all law. The Court should MODIFY panel's affirmance of the 98% reduction of the punitive award and ORDER that awards be issued as directed by the Legislature of North Carolina.

II. ATTORNEY FEES

A. Controlling Principles Mandate a Decision in Petitioners' Favor.

The Supreme Court of North Carolina resolved the election issue in *Kuykendall* with "Permitting recovery of punitive damages in addition to attorneys fees on the unfair practices claim best serves Chapter 75's policy of encouraging enforcement of the Act." *United Laboratories, Inc. v. Kuykendall,* 437 S.E.2d 374 (N.C. 1993). This Court similarly resolved the election issue in *Austin* with "a decision in favor of Austin facilitates the purpose of the Act which is to provide buyers a private right of action against dealers who engage in deceptive practices." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010). A straight-ahead application of these principles compels a decision in favor of Petitioners.

Midlands disagrees. It cites a North Carolina Court of Appeals case it believes stands "in

direct contravention" to these principles. (Br. of Resp't 28). It should be obvious that the Court of Appeals may not overrule the Supreme Court.

The North Carolina Supreme Court has been insistent on this point. "In enacting G.S. 75-16 and G.S. 75-16.1, our Legislature intended to establish an **effective** private cause of action for aggrieved consumers in this State." *Marshall v. Miller*, 276 S.E.2d 397, 400 (N.C. 1981) (emphasis added). It added, 276 S.E.2d at 403-04 (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. The commentators agree that state statutes such as ours were enacted . . . so that local business interests could not proceed with impunity. . . Further provision for attorney fees, found in G.S. 75-16.1 . . . encourages private enforcement in the marketplace. . . . .
>
> **Were we to agree with the Court of Appeals, we think we would seriously weaken the effectiveness of G.S. 75-1.1** and circumvent the intent of the Legislature.

The Court should follow the North Carolina Supreme Court, and common sense as reflected in the Court's *Austin* decision.

B. Applications/Problems in Midlands' Analysis[23]

(1) The "Double-Bind" Holdings

(a) Brief Summary of Facts Going to the Termination of Fees. For five years of work (R. pp. 1343-57), the trial court announced a fee award of $21,264. (R. p. 1731). It did so via

[23] Midlands' claims of various concessions or failure to preserve issues are inaccurate and red herrings.

(1) The "untimely" timesheets Midlands references (p. 27 n.18) were replications of timesheets already timely raised to and ruled upon by the trial court, except these "new" ones were marked up to show the trial court that its apportionment of fees among claims made little sense. *Compare* R. pp. 1537-40, 1544-48 (timesheets served 07-21-16) *with* id. pp. 1960-1980 (timesheets served 12-15-16).

(2) Midlands also claims concessions were made at oral argument before the Court of Appeals, but provides no transcript. If the Court considers these claims, Petitioners would note:

(a) The supposed "concessions" re a 15% cut to the fee request and regarding time spent on an affidavit have nothing to do with the issues raised by Petitioners here. Those "concessions" concern time incurred

an email from the judge's clerk. (*Id*.) That email directed Midlands' counsel to draft the order; it offered no indication as to how the $21,264 figure was chosen. (*Id*.) The amount was exactly 40% of the recovery stated by that same email. (*Id*.) However, North Carolina does not allow UTPA fee awards based on a percentage-of-the-recovery; like South Carolina, it requires awards be based on a reasonable hourly rate for hours reasonably incurred. Midlands knew this. (R. pp. 1573-74).

Midlands' counsel accepted Petitioners' counsels' hourly rates of $390. (R. p. 1873) (proposed order). Midlands' counsel thus had to come up with a way to make the compensable hours equal 54.252 (R. p. 1872) (proposed order). ($21,264 divided by $390 per hour equals 54.252 hours).

Midlands drafted a proposed order that first eliminated all but "approximately" 218 hours (R. p. 1871) out of more than 600 hours requested (R. pp. 1331, 1540, 1548). The stated ground was that the other hours were properly "apportioned" to other causes of action. (R. pp. 1871). This was a cut of approximately two-thirds. (Approximately, because the proposed order referred to

---

before September 14, 2016, not whether Petitioners are entitled to attorney's fees for work after that date, nor do they go to the "degree of success" issue.

(b) Nor did Petitioners so "concede." In response to a Judge who had stated a belief that the proper award was somewhere between the amount requested and the amount awarded (24:52-25:06), directed counsel "to bid against yourself" (28:05-28:19) and asked what percentage would be appropriate (*id*.), counsel maintained no reduction was proper, but if there were to be a reduction, 15 to 20% would cover it. That 15 to 20% included the trial court's virtual elimination of time spent on the affidavit. The affidavit took a great deal of time because it was in response to late-filed affidavits of Midlands' two attorneys, each of whom swore Mr. Moskos had proved unreasonable in settlement efforts in prior cases where they represented opposite sides (R. pp. 1702, 1707). Mr. Moskos reviewed the closed cases and dates and substance of each settlement offer in those cases so he could assure the trial court he had been reasonable in those cases. But it's true: upon reflection, Mr. Moskos agrees he should not have bit at that bait. Although the trial judge should have allowed more than the two hours it awarded for that affidavit, counsel at oral argument was more concerned with other issues.

(c) Counsel did state that fees are determined by "how strongly the defendant fights," but that was in reference to Midlands' denial of numerous facts and all liability until it admitted, in closing, to breach of contract, its 16 affirmative defenses (R. pp. 88-91), and the several hearings that resulted. Midlands presents this statement as instead going to whether Midlands made reasonable settlement offers, but even so read, it cuts against Midlands, as Midlands made no reasonable attempt to settle pre-trial, and its three-percent post-trial offer was unreasonable.

"approximately" 218 hours that survived the first cut.) The one-third of the hours that survived that first cut were then reduced by another three-quarters (R. pp. 1871-72), again largely on grounds that still more time had to be apportioned to other causes of action (*id*.). That left one-quarter of one-third, which is approximately eight percent.[24] Ninety-two percent of the requested hours were cut, virtually all on grounds of "apportionment."

The Judge signed the proposed order unchanged.

This was not going to survive appeal. *First*, because, as the panel held, North Carolina law does not allow apportionment among claims stemming from a common nucleus of operative fact. *Second*, because even if North Carolina law did allow apportionment, there was no way that 92% of counsel's time was devoted to matters unrelated to the NCUPTA claim. *Third*, because it was obvious that limiting the initial fee award to 54.525 hours for five years' work, including travel to Illinois (R. p. 102) and Charlotte (R. p. 140), multiple hearings and a five-day trial, would not stand. *Rish* (inadequate fee award held to be abuse of discretion); *Custom Molders, Inc. v. Am. Yard Prod., Inc.,* 463 S.E.2d 199, 204 (N.C. 1995) ("Once the trial court decides to award attorneys' fees, however, it must award a reasonable fee.")

Defense counsel knew, or should have known, this 92% reduction would not survive appeal. And it did not survive appeal.

So what did Midlands' counsel do in the interim? They made an offer to settle the entire case for $81,069, an amount that makes sense only if the 92% cut in the fee request was expected to survive.[25] And they convinced the trial Judge to sign off on ending fees incurred after the date of that offer. In other words, they presented Petitioners with a wrongful choice: accept the

[24] Petitioners repeatedly requested to see the timesheets showing which hours had been cut. (R. pp. 1888-89, 2041). Their requests were not granted.

[25] One would also have to expect the 98% cut to the punitive award to survive for the offer to be reasonable.

erroneous denial of virtually all compensation already earned—or incur uncompensated fees to obtain compensation that had already been earned.

That is just not right. It also violates governing law, as described below.

Not stopping there, Midlands also proposed, and the trial Judge signed, a final order directly prohibiting fees for work performed to correct his errors. Only fees incurred to obtain or sustain a plaintiff's status as the prevailing party are compensable, he held, not fees incurred to correct his errors. This second double-bind is entirely opposite to the purpose of fee-shifting. Moreover, the effect here, as with the other holding, is to improperly put Petitioners in a double-bind (accept the erroneous denial of compensation, or incur uncompensated fees to obtain that wrongfully-denied compensation).

The Court of Appeals erred in accepting this double-bind. It would make no sense to have a fee-shifting statute, designed to provide UTPA claimants with compensation for their attorney's work, only to require the attorneys to work without compensation to obtain that compensation. Nor should a trial court be allowed to insulate its erroneous holdings from review by placing plaintiffs in such a double-bind.

Especially where, as here, the holdings are contrary to law for even more reasons.

(b) The First Double-Bind Fails. Midlands avoids all mention of the sole case on which the panel relied for the proposition that a post-verdict offer may terminate the accrual of fees. That case is *DENC, L.L.C. v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552 (M.D.N.C. 2020). Midlands does not dispute that *DENC* requires that an offer be reasonable and that the reasonableness be determined in light of what is ultimately awarded. (*See* Br. of Petitioners p. 42) (quoting *DENC,* 454 F. Supp. at 566-67). Nor does Midlands deny that its offer represented less than three percent of the amount in dispute, as Petitioners' main brief repeatedly points out (*See*

esp. Br. of Petitioners p. 41 & n.23; *see also id.* pp. 15-16, 42, 44). The Court should reverse on the undisputed ground that *DENC* requires an offer to be reasonable and the ground that this offer was unreasonable.[26]

More broadly, the Court should hold that the attempt to place Petitioners in a double-bind of having to choose between an almost total denial of compensation for their attorneys' previous work or incurring uncompensated fees to gain that compensation, is unreasonable.

(c) The Second Double-Bind Fails. Midlands' second double-bind states that only time spent obtaining or sustaining the status of a prevailing party is compensable—meaning, time spent correcting the trial court's errors is not.[27] Petitioners' main brief points out that widely-held principles and the North Carolina Supreme Court require the fee-shifting provision here to be construed broadly (pp. 38-40); Midlands responds with a Court of Appeals opinion Midlands says is in "direct contravention" of those holdings. But the Court of Appeals may not override the Supreme Court, which has explicitly held the statute intends fees to be awarded for post-judgment work to increase the award, like Petitioners' work here, *Custom Molders*, 463 S.E.2d at 204. Petitioners' main brief points out that the panel erred in its reading of two decisions by the North Carolina Court of Appeals by mistaking a sufficient condition for a necessary condition (p. 45 & n.25); Midlands does not dispute this, but merely repeats the quotations by the panel of those North Carolina cases.

The attempt to place Petitioners in a double-bind of having to choose between an almost total denial of compensation for their attorneys' previous work or incurring uncompensated fees

[26] The Court should also reverse on grounds that post-verdict offers cannot terminate fees. Midlands admits it "has not located any North Carolina case" holding that post-verdict offers may terminate fees (Br. of Resp't p. 30) and the sole case the Court of Appeals cited in support is to the contrary ("[C]ourts may look to a defendant's efforts to settle a matter *before* trial"), *DENC*, 454 F. Supp. 3d at 562 (emphasis added).

[27] The panel placed this point in a footnote as an additional sustaining ground.

to gain that compensation should be rejected.

(d) Midlands' Final Attempt to Impose a Double-Bind Fails. The Court of Appeals declined to rely on Midlands' final contention, that "The trial court [supposedly] had the ability, in its discretion, to refuse to award any fees after September 14, 2016." Its claim that Petitioners have not sufficiently preserved their objections to the Judge's abuse of discretion fails, as the fees discussions in the briefs and petitions are all about abuse of discretion, including the failure to follow the law that guides the discretion. To the extent Midlands means the trial judge had complete, unbounded, discretion, of the "what the judge ate for breakfast" type, it errs. *See United States v. Wilson,* 355 F. Supp. 2d 1269, 1284 (D. Utah 2005) (condemning such an approach). It's unadulterated *ipse dixit,* impermissible under North Carolina law*, see State v. Abbott*, 34 S.E. 412, 419 (N.C. 1899). To the extent Midlands urges anything other than complete unbounded discretion, its indirect citation in a long block quotation to dictum in *Evans v. Full Circle Productions, Inc.*, 443 S.E.2d 108, 110 (N.C. App. 1994) seems to indicate the discretion may be limited to determining whether a case is an "extreme case[]" for UTPA purposes. But dictum from the Court of Appeals cannot override holdings of the state Supreme Court.[28] Even if it could, this is an extreme case. The jury found this to be an extreme case by awarding punitive damages. (They did so after being

[28] (1) The dictum Midlands indirectly cites from the Court of Appeals opinion to *narrow* the scope of the fee-shifting provision cannot override the repeated holdings of the Supreme Court to construe the provision *broadly*. "N.C.G.S. § 75-16.1 should be construed and applied liberally" "to bring within it all cases fairly falling within its intended scope." *Hicks v. Albertson,* 200 S.E. 2d 40, 42 (N.C. 1973). *See also Marshall v. Miller*, 276 S.E.2d 397, 400 (N.C. 1981) (emphasis added) (statute is to be construed to provide "an **effective** private cause of action"); *Austin*, 387 S.C. at 57, 691 S.E.2d 153 (2010) (analogous provision "epitomizes the definition of a remedy.")

(2) Moreover, the dictum is poorly reasoned. Supreme Courts have explained in depth why inclusion of a phrase making fees available in the trial court's discretion simply means a trial court may deny fees if "special circumstances" exist and should not be read to make fee awards the exception. *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968) (per curiam); *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (following *Newman*); *Hueble v. S.C. Dep't of Nat. Res.*, 416 S.C. 220, 232, 785 S.E.2d 461, 467 (2016) (same); *McDowell v. S.C. Dep't of Soc. Servs*., 304 S.C. 539, 405 S.E.2d 830 (1991) (similar).

repeatedly instructed, as requested by Midlands (R. p. 930, line 17-p. 931, line 7), to award punitive damages only for "egregiously wrongful acts" (R. p. 928, line 20, p. 929, line 22).[29] It would have been an abuse of discretion for the trial judge to hold this case insufficiently extreme for a fee award. If repeatedly risking lives by deceptive sales of such a dangerous vehicle is not an "extreme case" for UTPA purposes, it is difficult to conceive of what is.

Denying fees on the basis that an unreasonable offer was made, or that the judge does not want his decisions challenged, is unreasonable. Because it was unreasonable and an abuse of discretion to hold that fees terminated on the date of Midlands' unreasonable offer, it remains unreasonable and an abuse of discretion, no matter how often Midlands claims it was within the trial court's discretion.

(2) *Hensley*

Midlands quotes the panel blandly quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983), but never explains what the panel could have meant other than, as Petitioners argue (Br. of Petitioners pp. 46-48), the panel misread *Hensley* as allowing reductions of fee requests due to the small stakes typical of UTPA cases.[30] The Court should correct the panel's apparent misstatement of federal and North Carolina law.[31] More narrowly, the Court could hold that fees may not be reduced due to any supposed "partial or limited success" because Petitioners' main brief maintains Petitioners had 100% success under *Hensley*, and Midlands does not contest that.

---

[29] *See also* NC Pattern Jury Instruction - Civil 810.98, requested by Midlands (R. p. 930, line 17-p. 931, line 7).

[30] *Hensley* holds the reverse: "Where [as here] a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

[31] An obvious option is to wait and see what the trial court does on remand, but that equally obviously risks another appeal solely on this issue. In the interim, the panel's opinion would likely be cited by defendants in other cases as holding UTPA fees may be reduced due to the limited stakes at issue, which would create unnecessary problems for lower courts.

Conclusion re Attorney Fees Issues

In its holdings challenged here, the panel failed to recognize that the purpose of the statute is to prevent business interests from proceeding with impunity, given the small dollar amounts involved; that the statute is to be interpreted broadly as a remedial measure; that the fee provisions are intended to give force to the statute by encouraging victims to sue even when the small amounts at stake would make the fees out of proportion to the recoveries; that the fee provision is intended to prevent defendants from having an unfairly superior bargaining position during negotiations; and that the fee provision here epitomizes the definition of a remedy. The opinion contradicts the Supreme Courts of the United States, North Carolina, and South Carolina, and common sense. It should be REVERSED.

III. OFFER OF JUDGMENT[32]

A. The Court decided this issue in *Garrison*, and implicitly decided it long ago. *Garrison v. Target Corp*., 435 S.C. 566, 585-87, 869 S.E.2d 797, 808-09 (2022), stated what must have been obvious to the Court: S.C. Code Ann. § 15-35-400(B) (Supp. 2020) "provid[es] that when a plaintiff's offer of judgment is not accepted and she obtains a **verdict or determination** at least as favorable as her offer, she is entitled to receive eight percent interest on the amount of the verdict or award from the date of the offer." *Id*. at 587, 869 S.E.2d at 809 (emphasis added). In fact, it *was* obvious to the Court. "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." *Id*. at 586, 869 S.E.2d at 808 (emphasis added). The *Garrison* Court held enforcing the statute as written to be compelled by prior holdings. 435 S.C. at 586, 869 S.E.2d at 808 (quoting authorities).

[32] The Court's ruling on punitive damages may moot this issue.

B. If the Court desires to look beyond *Garrison*, Petitioners would offer the following:

The statute *is* clear and unambiguous**.** The statute says one is entitled to offer of judgment benefits when one obtains a verdict "**or**" a determination at least as favorable as the offer. One need not receive both a verdict and a final determination at least as favorable as the offer.[33] Had *Garrison* never been decided, the outcome today would still be foreordained.

Midlands concedes at the outset that Section 15-35-400 means exactly what the Court said it means (which is exactly what Petitioners maintain it means): "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." (Br. of Resp't p. 34). That happened here, so Petitioners are entitled to recover.

Midlands **then argues the reverse.** Midlands asks the Court to limit comparison of the offer to the "judgment," for purposes of determining whether an award shall issue. (E.g., Br. of Resp't p. 35).[34] Its route to that conclusion ties itself into knots, as does the Court of Appeals' similar reasoning,[35] but its conclusion is enough for present purposes, as Midlands is asking this

---

[33] By analogy, if a statute said one who uses either "a rifle **or** a pistol" is subject to a higher penalty, it would be no defense to claim one used only a pistol, not a rifle.

[34] Midlands presents the question as "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?"** Br. of Resp't p. 1 (emphasis added). (*See also id*. p. 34 (heading in Argument section); p. 35 (arguing "the final award is trigger for the application of § 15-35-400(B)")).

[35] (**a**) **Midlands begins** its analysis of the statute by arguing, "The statute [Section 15-35-400(B)] does not limit comparison of the offer to the 'verdict.' It contemplates comparison of the offer amount to the 'verdict' or the 'determination.'" (Br. of Resp't p. 35). **Midlands ends** by arguing the statute limits comparison to the "determination" (*id*.), thereby contradicting its thesis.

(**b**) Midlands seems to take the phrase "verdict or award" from Paragraph (B), clause (2) (which concerns the amount of any award, not whether an award shall issue), and import it entirely into the main portion of paragraph B (which concerns whether an award shall issue, not the amount of the resulting award), swapping out the phrase "verdict or determination" in favor of "verdict or award," and then finally eliminating the word "verdict," so that one would be left with a paragraph that begins (deleted material in ~~red strikethrough,~~ added material in blue), "If an offer of judgment is not accepted and the offeror obtains a ~~verdict or determination~~ judgment at least as favorable as the rejected offer, the offeror shall be allowed

Court to undo a change the Legislature enacted.

Midlands asks the Court to undo a Legislative Change. Before 2004, South Carolina law required one seeking offer of judgment benefits to obtain a "judgment" more favorable than the offer. Rule 68, SCRCP (1994 Am.) ("If the complaining party fails to obtain a judgment or a more favorable judgment he cannot recover"). In enacting the current statute, the Legislature changed that. It makes no sense to say that what the Legislature meant was "obtains a more favorable judgment" than the offer, when the Legislature explicitly replaced that wording with the current language.

Courts may not properly do that. Respondent points to no case, and Petitioners are unaware of any, wherein any Supreme Court changed a statute back after the Legislature had changed it, save perhaps in instances of clear-cut constitutional violations. There is no

---

to recover." Thus, although Midlands claims to simply read the plain language, **Midlands engages in statutory construction, which is itself erroneous** where, as here, the words of a statute are plain, unambiguous, and convey a clear meaning. *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

(**c**) **Midlands' arguments about legislative intent are irrelevant given the above.** *See also State v. Carrigan*, 284 S.C. 610, 616, 328 S.E.2d 119, 122 (Ct. App. 1985) (emphasis added) (citation omitted) ("Where the language of a statute is clear and unambiguous, it requires no construction and must be literally applied. In other words, *it means what it says*"). But **if one were to employ statutory construction, Midlands' argument about legislative intent would still fail.** As discussed in text, the Legislature changed the governing directive from allowing only those who receive a judgment as favorable as the offer to recover, to allowing anyone who obtains a "verdict or determination" as favorable as the offer to recover. The Legislature could have changed the law for any number of reasons. Perhaps it intended to reduce the power of a highly educated elite and place more power in a cross-section of the community, or to prevent judges adding to or subtracting from verdicts to control whether a party will recover under the statute, or to exclude pre-judgment interest from the determination, or to exclude set-offs, or to make those who commit really bad acts, but whose punitive liability is statutorily capped, to at least pay interest on the full amount, or to push defendants harder to settle by opening them up to larger penalties. Nor does it make sense to say that what the Legislature meant was "obtains a more favorable judgment" than the offer, when the Legislature explicitly replaced that wording with the current language.

(**d**) Finally, **Midlands' argument about legislative intent misconceives the intent behind the word "determination."** In legislating that a party may recover if it "obtains a verdict or determination" as favorable as the rejected offer, the Legislature likely intended "determination[s]" to include orders of dismissal, grants of summary judgment, and the like. It was not attempting to excise the word "verdict" from the phrase.

constitutional violation here.[36] If the Legislature did not mean what it wrote, the solution, under our system of government, is for the Legislature—not the courts—to rewrite the statute. The cases *Garrison* cited are hardly the only precedents so holding. "Although [a result] may seem illogical . . . it is beyond this Court's power to effect a change in the statutes enacted by the Legislature." *State v. Corey D.*, 339 S.C. 107, 120,529 S.E.2d 20, 27 (2000) (citing *Keyserling v. Beasley*, 322 S.C. 83, 86,470 S.E.2d 100, 101 (1996)). *See also Benat v. State Farm Mut. Ins. Co.,* 286 S.C. 132,134, 333 S.E.2d 57, 58 (Ct. App. 1985) ("We have no legislative authority and cannot vary a statutory scheme and this is true no matter how logical the basis of the variance").

Conclusion re Offer of Judgment

Statutory language clearly and unambiguously provides that Petitioners are entitled to recover offer of judgment interest. Courts are without power to rewrite clear and unambiguous language. If anything, this is even more so when Courts are asked to undo a change the Legislature enacted. The panel's holding to the contrary should be REVERSED and the matter remanded to the trial court.

Conclusion

If the panel's opinion stands, the public purpose of protecting people from dangerous cars would not be served. Midlands does not address this. If the opinion's holding on fees stands, the predictable result is fewer attorneys willing to take on even the most meritorious UTPA suits—a result in direct contravention of the whole point of N.C.G.S. 75-16-1, which is to ensure "effective access" to the judicial system for all persons with UTPA grievances. Midlands largely avoids the word "or" in the phrase "verdict or determination" via a convoluted argument that equates "verdict

[36] Nor would adding offer of judgment interest to a punitive award push an otherwise-proper punitive award over the constitutional limit, as these are different awards that punish different conduct.

or determination" with "judgment amount only."

Due to the failures of the opinion below to follow directives of the controlling Supreme Courts, and its conflicts with principles well-established nationally, as well as with the Court of Appeal's own prior precedents, this Court should hold the reduction in the jury's punitive award is to be modified as directed by the North Carolina legislature, reverse the holding that fees cannot be awarded for time spent correcting trial court errors and the misreading of *Hensley*, and direct, again, that the offer of judgment statute be applied as written.

Respectfully submitted,

s/Brooks R. Fudenberg
LAW OFFICES OF BROOKS R. FUDENBERG, LLC
Brooks R. Fudenberg
14 Ashe Street
Charleston, SC 29403
Tel.: (843) 416-2558
eFax: (910) 401-1242
BRF@Fudenberglaw.com

s/C. Steven Moskos
C. STEVEN MOSKOS, P.A.
C. Steven Moskos
6650 Rivers Ave., Ste 210
N. Charleston, SC 29406
Tel. (843) 763-5297
Steve@moskoslawfirm.com

Attorneys for Petitioners