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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

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Opinion No. 5845

(S.C. Ct. App. Filed August 11, 2021)

Appellate Case No. 2021-001388

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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.

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## Petition for Rehearing

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The Court should rehear due to misapprehension of important facts and misapplication of applicable law.

## I. THE COURT SHOULD REHEAR BECAUSE IT MISAPPREHENDS THE FACTS OF THE CASE.

The Court should rehear due to several misapprehended facts.

**First**, the opinion states, sua sponte, that Respondent was attempting "to avoid returning the car to the hands of a consumer." *O'Shields v. Columbia Auto., LLC*, No. 2021-001388, 2024 WL 826388, at *1 (S.C. Feb. 28, 2024). There is no support in the Record for this. The testimony was entirely the reverse:

> Q. And when the cars go through the red-light auction, y'all don't care how people use them, right? That's up to them.

A. No. We're just disposing of a vehicle. We can't determine who's going to buy it. It's an auction. There's a bunch of guys there buying it, and what they do with it, I don't know what they're going to do with it. But that's irrelevant.

Q. And you all don't – you don't care what they do with it, right?

A. If I sold something on E-Bay, I don't know what the buyer's going to do with it. I mean, I don't know. We're just disposing of the car. If they want to use it for shoveling parts at a junkyard, or whatever they want to do.

Q. I understand –--

A. That's up to them.

Q. –-- I understand you don't know what everybody's going to do with their cars. I get that. What I'm saying is, Midlands Honda doesn't care what those people do with the cars. Yes or no.

A. It's not part of the equation, no.

R. p. 541, lines 2-15 (Testimony of Respondent via its 30(b)(6) representative, Greg Nalewaja) (emphasis added).

And again Respondent testified,

Q. And so, you're aware that Midlands Honda – Well, I think the other day we talked about the auction and the process, all that. We don't need to go through that again. But when Midlands Honda sells cars to –- at the auction, they know they're going to other dealers, right?

A. Yes.

Q. It's a dealer-only auction, right?

A. Yes, sir.

Q. And those dealers turn around and they take them, and they put them on their lot and sell them, right?

A. Some do, yes.

Q. And when you all sell cars at the auction, green light, red light, whatever, you don't think about the consequences of what happens with those cars. They go and they get sold, and they go wherever they go, right?

A. Yes.

Q. And the other day, you told us that you didn't think that Midlands Honda owed any duty to Roger or anyone else when they sell cars at the auction, right?

A. Yes.

(R. p. 885, lines 12-20) (emphasis added).

There is simply no correlation between this uncontroverted testimony and a factual finding Respondent was attempting to keep this dangerous car out of the hands of consumers.[1]

Respondent testified: 1) it knew many cars it sold at to dealers at auction were then re-sold to consumers; 2) it did not consider the consequences of selling cars at auction; and 3) it owed no duty to anyone. There is simply no evidence Respondent had any well-intentioned desire to avoid the car getting into a consumer's hands. (Pet. Br. p. 11) (so arguing, and citing the two transcript sections above); *id*. p. 17 (similar.) By making this factual finding unsupported by the Record, the Court overlooked Petitioners' argument, and fundamentally altered the facts considered by the jury in awarding punitive damages.

Because the Court holds that $46,515 is the maximum punitive award due process allows against a dealer that was attempting to avoid returning a car to the hands of a consumer, it follows that a larger award is allowed for a dealer that was not so attempting. The Court should re-hear.

**Second,** the Court should rehear because it overlooks a crucial undisputed fact. It is undisputed that that Respondent knew it was violating the **law** when it sold the car to O&W. (Br. Pet. p. 31, Reply Br. p. 1 (quoting Pet. Br. p. 31).[2] The Court's statement that Respondent was unaware of the auction's rules and, "Accordingly, Respondent did not affirmatively disclose the

[1] If there were, the Court should defer to the factual findings of the jury, as discussed in Section II.A of this document.

[2] Petitioners' opening brief pointed out that Respondent knew it was violating the law, and their reply brief pointed out that Respondent does not dispute that fact. (Reply Br. p. 1, quoting Pet. Br. p. 31). Nor could Respondent have credibly claimed it was ignorant of the laws governing used car sales in a state where it was selling one hundred cars a year. (Pet. Br. pp. 6-7; Reply Br. p. 1.)

car's clipped condition," 2024 WL 826388, at *1, makes no sense in light of this overlooked fact.[3]

**Third,** the Court should rehear because its opinion confuses the point at which Respondent discovered the car was clipped. It writes that Respondent only discovered the car was clipped after it sold the car to Ecklund. It states, 2024 WL 826388, at *1, that Respondent "learned it had sold" a clipped car. But Respondent knew the car was clipped before and during its sale to Ecklund.

The contention that Respondent did not know the car was clipped when it made that sale was seemingly demolished at oral argument. When Respondent's counsel contended, "So I don't know that there is evidence that they knew about the clipped fuel line," Chief Justice Beatty replied, "Oh, really? They should have. With that 159-point inspection. What were they inspecting?" (21:32-21:39).[4] He added (21:49 through 22:59), "It is reasonable to assume they had to have known about this. I mean, how can you do a hundred and fifty-nine points on a car, inspecting each one of them, and not go underneath the car?" (emphasis added). Justice Hill gestured towards the large blow-up of Record page 380 that Petitioners had brought to oral argument, asking, "Is all of that damage visible once you put the car up on the rack?," Counsel responded, "Yes, Sir."[5]

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[3] The statement that the auction rules had changed, 2024 WL 826388, at *1, is also incorrect (Pet. Br. p. 31; Reply Br. pp. 1-3), but the discussion here assumes the rules had changed. Petitioners' Reply raised and debunked each source Respondent cited for its claim that the disclosure requirement was "new." *Id*. at 2-3 n.1. Nothing more should be required of an appellant. Nevertheless, even if the auction's disclosure requirement was new, Respondent was still violating the law.

[4] References in this format relate to the Supreme Court archived video of the oral argument.

[5] Counsel added, "You can see that the paint is different. You've got yellow paint there. And black paint there. So you know: these aren't parts from the same car." (41:55-42:26 [video shows photo 42:10-42:26]).

The jury also saw photographs where "[y]ou see holes" in the welds, showing cut brake and fuel lines, and other damage, and heard expert testimony. (Pet. Br. pp. 7-9) (Reply Br. pp. 3, 8). Respondent could not offer even a speculative guess as to how it could have missed knowing the car was clipped when Respondent sold it to Ecklund. (Pet. Br. p. 29) (quoting Respondent's closing to the jury) ("I don't have a clue.") There was ample evidence from which a reasonable jury could conclude Respondent did not "learn" for the first time that it had negligently "sold" a customer a clipped car after that customer complained; it knew the car was previously wrecked and poorly welded back together when it sold the car to Ecklund.

Additionally, a series of lesser erroneous factual statements are addressed in the footnote attached to this sentence.[6]

Because the Court holds $46,515 to be the proper punitive award against a dealer that tried to avoid returning a dangerous car to the hands of a consumer, did not know it was violating the law, and did not know during its prior sale that the car was clipped, it follows that a much larger award is allowable against a dealer that did not try to keep the danger out of the hands of a consumer, knew it was breaking the law, and knew it was selling a clipped car the first time it sold it.

[6] The Court's opinion also states that after Respondent learned the car was clipped, "As a result, it re-purchased the car from the buyer." Actually, Respondent refused to repurchase the car. It insisted on "swapping" him into another vehicle. (Pet. Br. p. 8 (citing R. p. 133, lines 3-21)). The buyer was vehemently opposed. He didn't want another vehicle from Respondent's agents; he deemed them untrustworthy. (*Id.*) The opinion then states that O&W's "purchaser subsequently discovered the car's true, clipped condition and returned it to Petitioner." That's not what happened. (Pet. Br. p. 9). O&W discovered the car's condition and informed their purchaser. The opinion creates a false equivalence between Respondent and Petitioners: that Respondents sold a clipped car, later learned it was clipped, and repurchased it; and Petitioners sold a clipped car, later learned it was clipped, and repurchased it. That is not what the Record shows.

## II. THE COURT SHOULD REHEAR BECAUSE THE JURY, NOT THE TRIAL COURT, IS THE FACT-FINDER AND THE COURT GIVES UNDUE DEFERENCE TO THE COURT OF APPEALS AND THE TRIAL COURT.

### A. THE JURY IS THE FACT FINDER. NOT THE TRIAL JUDGE.

The jury has the "constitutional role as factfinder," as then-Chief Judge Few wrote, *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 405, 714 S.E.2d 904, 916 (Ct. App. 2011); "[T]he seventh amendment guarantees the right to a jury determination of the amount of punitive damages . . . ." *Id.* (emphasis added) (citing, *inter alia*, U.S. Const. amend. VII; and quoting *Defender Indus. Inc. v. Northwestern Mut. Life Ins. Co.,* 938 F.2d 502, 507 (4th Cir. 1991)). The proper standard of review asks whether "the evidence would permit the jury to find these facts," i.e., facts that "support the jury's punitive damages award," *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 742 (N.C. App. 2009) (emphasis added).

Thus, the United States Supreme Court has repeatedly "mandated appellate courts to conduct *de novo* review of a trial court's application of [the due process guideposts] to the jury's award." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520 (2003) (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 433, 121 S.Ct. 1678 (2001)). There is no exception for reviewing trial courts' reductions of awards nor for factual findings by the trial court. Nor should[7] or could there be. In reducing an award, the trial

[7] This Court explained three reasons why the review is de novo in *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009) (citing federal case law),

> First, the concepts involved in the due process analysis of punitive damages awards are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." Second, the due process criteria acquire content only through application, and "independent review is therefore necessary if appellate courts are to maintain control of, and clarify, the legal principles." Third, "de novo review tends to 'unify precedent' and 'stabilize the law.'" We agree with this analysis.

court finds the jury's award excessive as a matter of law, that is, as a matter of federal constitutional law. Trial court conclusions on matters of law are universally reviewed de novo.

The uncertainty about the standard of review expressed during Respondent's oral argument[8] may be a holdover from the days when trial judges had the right to reduce punitive verdicts as a matter of their discretion. E.g., *Bradley v. Washington Fid. Nat. Ins. Co*., 170 S.C. 509, 171 S.E. 243, 247 (1933) (the amounts of actual and punitive damages "are left, under our law, almost entirely to the trial jury and the trial judge. . . .who saw the witnesses and heard their evidence."); *S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 153, 478 S.E.2d 57, 59 (1996) (noting "the view that the trial judge is vested with considerable discretion over the amount of a punitive damage award."); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 8 (N.C. 2004) (noting that before the enactment of North Carolina's punitive damages statute, trial judges in North Carolina had the power to remit punitive damages they deemed excessive.) [9]

Judges no longer have that discretion when hearing punitive damages cases under North Carolina law. The legislature removed that discretion from trial court judges by enacting N.C. Gen. Stat. § 1D-25(b), as the North Carolina Supreme Court extensively explained in *Rhyne,* 594

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385 S.C. at 583, 686 S.E.2d at 182-83 (citations omitted). These reasons for de novo review do not hinge on whether the trial court increased, decreased, or left intact the jury's verdict.

[8] "I think we all understand it's de novo, and it may just be me, but I am trying to understand why it would be de novo on a reduced amount" (23:15-23:28, Kittredge, J); "That's why I am trying to ferret out what is the appropriate standard of review" (26:01-26:06, Kittredge, J.); "As to the amount, would it be better to say our job is to, our scope of review is just to, consider the range of reasonableness of what the trial judge did. Would that be a better way to look at it?" (31:41-31:53, Hill, J.); Findings on a "specific factual question . . . . might be something we defer to. The due process conclusion that flows from that, though, is not something we defer to, I think" (33:14-33:39, Few, J.)

[9] As the Eleventh Circuit clearly explained, "A remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. . . . A constitutional reduction, on the other hand, is a determination that the law does not permit the award." *Johansen v. Combustion Eng'g, Inc.,* 170 F.3d 1320, 1331 (11th Cir. 1999).

S.E.2d 1, 6-9. Under that statute, when an award exceeds the statutory limit, "the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount." (emphasis added). Because the North Carolina legislature has taken away the authority of trial judges to reduce punitive awards in their discretion, it makes no sense to review their work under an abuse of discretion standard.[10] Rather, the review is de novo.

### B. THE COURT GIVES UNDUE DEFERENCE TO THE COURT OF APPEALS AND THE TRIAL COURT.

The Court of Appeals' decision here claimed to apply a de novo standard of review to the trial court's conclusions, but actually employed an abuse of discretion standard, as Justice Kittredge noted at oral argument.[11] By "adopt[ing] the court of appeals' thorough analysis," 2024 WL 826388, at *2, this Court, too, claims to apply one standard of review, while actually employing another. This by itself should be grounds to rehear. So too should the panel's failure to give proper weight to the jury's factual findings.

The Court appears to afford undue preference to the trial court when it writes, 2024 WL 826388, at *1, of "several important factual findings" made by the trial court. First, as described above, the jury, not the trial court, is the factfinder. Second, some of these appear not to be

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[10] South Carolina has arguably done the same for punitive verdicts like the jury's in this case. "[T]he trial court shall reduce the award and enter judgment for punitive damages in the maximum amount." S.C. Code Ann. § 15-32-530; *State v. Price*, 441 S.C. 423, 438, 895 S.E.2d 633, 640 (2023) (quotation marks and citations omitted) ("The term 'shall' in a statute means that the action is mandatory.")

[11] He stated,

> The Court of Appeals hung on de novo. Yet it seems like they bent over backwards to be deferential to the trial court's forty-six thousand, five hundred. So lip service to de novo, but in actuality to me it looks like they applied abuse of discretion.

(25:43-26:01). He repeated the point when Respondent's counsel proposed one way to look at the trial judge's constitutional analysis. "That does sound deferential. . . . And it does sound ultimately what the Court of Appeals *actually* did." (32:03-32:13).

factual findings as much as legal conclusions. A finding that a fact is or is not within a constitutionally important category "is a question of law over which [appellate courts] should exercise de novo review." *Peel v. Att'y Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 108, 110 S. Ct. 2281, 2291-92 (1990).

Specifically, the Court states, "First, the trial court found Respondent had 'a good-faith basis for believing no duty to disclose exist[ed].' *See BMW of N. Am., Inc. v. Gore*." 2024 WL 826388, at *1 (alteration in original). Like the Court, the trial court overlooked the undisputed fact that Respondent knew it was violating the law.

The reference to *BMW v. Gore,* 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), does not save the analysis. The reason good faith was found in *BMW v. Gore* was that it was unclear whether a paint job was a "material fact" that had to be disclosed under the Alabama statute that defined fraud. That paint job cost 1.5 percent of the vehicle's worth. 517 U.S. at 564, 116 S. Ct. at 1593. The Supreme Court took care to explain how the statute created ambiguities as to whether a paint job had to be disclosed. BMW's acts complied with what had appeared to be Alabama law at the time of its acts[12] and "with the strictest extant state statute." *Id.* at 578, 116 S. Ct. at 1600.

Here, there can be no serious doubt that the car having been cut in half and unsafely welded to another car's frame is a material fact; the Court seemed clear on that at oral argument.[13] Here, it is undisputed that Respondent knew it was violating the law. Knowingly

[12] "[T]wo earlier decisions [by the Alabama Supreme Court] seemed to indicate that as a matter of law there was no disclosure obligation in cases comparable to this one." 517 U.S. at 578 n.27, 116 S. Ct. at 1600 n.27 (emphasis added). The law in other states, too, indicated there was no need to disclose repainting. *Id.* at 565-67, 569-74.

[13] For example, the following exchange occurred at 22:48-23:11,

> Justice Few: It's failure to disclose not that there's frame damage, like that it was injured at some point when somebody is changing the oil they

violating the law to sell a dangerous car is unlike failing to predict that the law would deem failure to disclose repainting to be fraudulent. [14] The holding that Respondent committed fraud in good faith should be reversed.

The Court writes, "Second, 'there is no evidence that [Respondent] ever made a false representation.'" 2024 WL 826388, at *1 (alteration in original). But the Record brims with evidence of false statements. Petitioners count ten false statements Respondent made to Ecklund, the first buyer from Respondent.[15] They even told him the car had all its original parts! (Reply Br. p. 6). Respondent also falsely represented to Petitioners that Respondent would get back to them after Petitioners discovered the fraud. Respondent also, as a matter of law, made a false representation to Petitioners when Respondent's agent did so on the North Carolina mandated

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> drop the car and it hit a bucket or something and it damaged the frame. The frame damage is that it's two frames! Fraudulently clipped together And deceptively sold without disclosure of that known fact. Am I wrong?
>
> Respondent: (Pause). No.

[14] Importantly, "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others," 517 U.S. at 576, 116 S. Ct. at 1599, unlike Respondent's.

*BMW v. Gore* held that when there is no health or safety risk, and the law is unclear, one may have a good-faith basis for believing it did not have to disclose a paint job that cost 1.5% of the value of the car. It did not hold that when the law is clear, one can have a good-faith basis for not disclosing a clipped car that was damaged 73% of the car's pre-wreck value. Pet. Br. p. 28 n.14 (damage as a percent of value). As Justice Few stated at oral argument (21:21 to 21:29), "One thing your client could do is not knowingly sell a knowingly clipped car with a knowingly clipped fuel line."

[15] False statements one through six were made orally to Mr. Ecklund. Respondent repeatedly told Ecklund the car was "safe" and "dependable," a "Honda-Certified Used Car," "100 percent Honda certified," following a 159-point inspection (Pet. Br. p. 8), with all its original parts (Reply Br. p. 6). It showed Ecklund three documents (seven through nine) showing the vehicle was certified (R. pp. 954 (Window Sticker stressing "Certified"), 955 (Buyers Order with handwritten and double-underlined word "certified"), 957 ("CERTIFIED PRE-OWNED VEHICLE ADD-WRAP") and (ten) one document showing Midlands had changed the car's oil. (R. p. 1024). (Reply Br. p. 6).

disclosure form, denying the car had been reconstructed or damaged to an extent of more than 25% of its pre-damage value—especially when Respondent knew its agent would be filling out a state form with false information (Pet. Br. pp. 7, 10 (citing R. p. 936)).That agent even had a power of attorney to represent Respondent (Reply Br. p. 4). A jury could reasonably conclude that Respondent made a false representation, especially since the law requires them to attribute those falsehoods to Respondent.

Similarly, because there was ample evidence from which a jury could conclude the final sale to O&W was not an "isolated incident," *see* 2024 WL 826388, at *1, the trial court's conclusion to the contrary should be reversed.[16] Finally, the trial court's conclusion that there was little, if any, chance of harmful consequences to O&W should not be deferred to, as it was demolished by Justice Few at oral argument. (28:45 to 28:58). "What about the potential harm of the O&W car dealership to pay a massive punitive damages award to the plaintiff they sold the car to when it exploded on the highway on the way home from purchasing it because of a spliced fuel line?" And it is just common sense that Petitioner's car business would have suffered reputational harm if word got out that they were selling clipped cars.

The above incorrect factual statements would properly have affected the Court's evaluation of the reprehensibility of Respondent's acts. Accordingly, the Court should rehear.

[16] The jury was instructed to consider "The existence and frequency of any similar past conduct by the defendant." (R. p. 928, line 23-p. 929, line 12). Facts supporting a finding that this was not an isolated includes that (1) Respondent placed the clipped car "in Midlands' certified preowned vehicle inventory," *O'Shields*, 435 S.C. at 327, 867 S.E.2d at 451, (2 through 11) the ten statements and documents shown to Ecklund to convince him to buy this car (footnote 15); (12) the sale to Ecklund; (13) the refusal to repurchase the car from Ecklund; and then, two years later, (14) sending the car to the auction, again without disclosure, and (15) after it did not sell on the auction block, selling it to Petitioners, again without disclosure.

## III. THE COURT SHOULD REHEAR BECAUSE IT IS THE FIRST KNOWN OPINION TO HOLD A PUNITIVE DAMAGE AWARD MANDATED BY A COMPREHENSIVE PUNITIVE DAMAGES STATUTE TO BE EXCESSIVE.

Federal law trumps state law. This includes federal court interpretations of federal law. No question.

But it is also well established that state law can affect the application of federal law, even federal constitutional law. An example is *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). The Supreme Court had already held there is no federal constitutional right to picket or protest in privately-owned shopping centers. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L .Ed. 2d 131 (1972). To require a shopping center owner to allow such picketing would violate due process and the takings clauses. *Id*. at 567, 92 S. Ct. at 2228. "[O]ne of the essential sticks in the bundle of property rights is the right to exclude others," the *Pruneyar*d *Shopping Ctr.* Court recognized, 447 U.S. at 82, 100 S. Ct. at 2041, and the protestors there "may have 'physically invaded' appellants' property," *id.* at 84, 100 S. Ct. at 2042. But that was not "determinative." *Id.* More important was that the California Supreme Court had interpreted California's free speech and petition clauses—which were similar to the federal clauses[17]—to allow such picketing and protesting in privately-owned shopping centers. Therefore, the requirement to allow picketing and protesters, which would be a violation of the federal due process and takings clauses in Oregon, was neither a taking nor a due process violation in California, the Court unanimously held. *Id*. at 88, 100 S. Ct. at 2044.[18]

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[17] Article 1, § 3, of the California Constitution states, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." *PruneYard Shopping Ctr.*, 447 U.S. at 80, 100 S. Ct. at 2040. Article 1, § 3, of the California Constitution states, "[P]eople have the right to . . . petition government for redress of grievances." *Id.*

[18] State law can even affect property rights in navigable waters. E.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot*., 560 U.S. 702, 707, 130 S. Ct. 2592, 2597-98

This Court, too, has noted the interplay between state statutory provisions and federal constitutional provisions in other contexts. "It is well settled that ordinances, as with other legislative enactments, are presumed constitutional; their unconstitutionality must be proven beyond a reasonable doubt. The fact that Rothschild 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) (citing *Robinson v. Richland County Council,* 293 S.C. 27, 358 S.E.2d 392 (1987); *Edens v. City of Columbia,* 228 S.C. 563, 91 S.E.2d 280 (1956); and *Richards v. City of Columbia,* 227 S.C. 538, 88 S.E.2d 683 (1955)). *See also Condor, Inc. v. Bd. of Zoning Appeals, City of N. Charleston*, 328 S.C. 173, 179, 493 S.E.2d 342, 344 (1997) (that it would be unconstitutional to apply a statute to given facts must be proven "beyond a reasonable doubt.").

The United States Supreme Court has repeatedly emphasized this interplay in the specific context of punitive damages.

> [W]e have emphasized the need to avoid an arbitrary determination of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice ... of the severity of the penalty that a State may impose," *BMW, supra,* at 574, 116 S.Ct. 1589; it may threaten "arbitrary punishments," *i.e.,* punishments that reflect not an "application of law" but "a decisionmaker's caprice," *State Farm*, *supra*, at 416, 418, 123 S.Ct. 1513 (internal quotation marks omitted)[.]

*Philip Morris USA v. Williams*, 549 U.S. 346, 352, 127 S. Ct. 1057, 1062 (2007) (emphasis added) (quoting *BMW v. Gore* and *State Farm v. Campbell*).

Perhaps that is why—as far as we know—no court other than in this case has ever held an award mandated by a comprehensive punitive damages statute to be unconstitutionally excessive. Instead, federal courts evaluating federal due process claims routinely hold punitive damages

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(2010) ("Generally speaking, state law defines property interests, including property rights in navigable waters and the lands underneath them.")

caps to be important to the analysis, and routinely hold awards that conform to the statute to be constitutional. For example, the Fourth Circuit favorably quoted the First Circuit: "[A] punitive damages award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated." *E.E.O.C. v. Fed. Express Corp.*, 513 F.3d 360, 378 (4th Cir. 2008) (alteration in original) (quoting *Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000)). In fact, the First, Second, Fourth, Seventh, Ninth, Tenth and Eleventh circuits have all held similarly—that the caps are important to the constitutional analysis, and that awards at the caps are constitutional. [19]

Justice Kittredge recognized during oral argument that this is a good point. Petitioners' counsel stated (11:15 to 11:58),[20]

> [B]ut I do think that the fact of the statute has to be taken into account, first, because as this Court has ruled, when you're saying the statute is unconstitutional as applied, you have a very high burden to prove it. And second because the concerns that led to the Supreme Court issuing these rules, those were all in common-law punitive damages cases. They've never said that an award under a statutory limit was unconstitutional. In fact, they've basically said, "Please, States, write some law on this, so we don't have this unbridled discretion, we don't have an award, basically similar

[19] *Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000); *Luciano v. The Olsten Corp.*, 110 F.3d 210 (2nd Cir. 1997) (finding the legislative mandate relevant, and thus upholding award at the cap); *E.E.O.C. v. Fed. Express Corp.*, 513 F.3d 360, 378 (4th Cir. 2008); *Lust v. Sealy, Inc*., 383 F.3d 580, 590–91 (7th Cir. 2004) (Posner, J.) (same); *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1056 (9th Cir. 2014) (same) ("An exacting *Gore* review, applying the three guideposts rigorously, may be appropriate when reviewing a common law punitive damages award. However, when a punitive damages award arises from a robust statutory regime, the rigid application of the *Gore* guideposts is less necessary or appropriate."); *Deters v. Equifax Credit Info. Servs., Inc*., 202 F.3d 1262, 1273 (10th Cir. 2000) (same); *U.S. E.E.O.C. v. W&O, Inc.,* 213 F.3d 600, 616 (11th Cir. 2000) (same).

[20] At 9:38 to 9:56, Petitioners' counsel similarly argued, "I think the defendant is stuck with $250,000 as a statutory matter. As far as the constitutional matter goes, the Supreme Court in all those cases was concerned about [air quotes] unbridled discretion [end air quotes] of juries. They could consider anything they wanted to. There were no limits on what they could award." *See* cases in footnote 19.

> facts, one guy getting four thousand dollars punitives, and one guy getting four hundred thousand dollars punitives."

Justice Kittredge responded, "That's a good point. I appreciate that, Sir. . ." (11:58 to 12:00).

But this good point never made it into the analysis. It was apparently overlooked, as were similar points in the briefs (e.g., Pet. Br. 24-25; Reply Br. 10-11).

Renowned conservative Judge Richard Posner has similarly written that without legislative guidelines, punitive awards will be arbitrary. "But as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary." *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (citing, e.g., *BMW v. Gore*). Perhaps the only way to avoid this problem, which the Supreme Court noted in *BMW v. Gore*, *State Farm v. Campbell*, and *Philip Morris v. Williams*, is to have statutes such as North Carolina's, so that punishments reflect "an 'application of law'" rather than "a decisionmaker's caprice."

Because the opinion does not consider whether the fact of the existence of a statute affects the due process analysis, and overlooks a "good point" that has been adopted by the vast majority of the federal circuits, the Court should rehear, especially because the opinions here make South Carolina the first known jurisdiction to reject a punitive damages award at a statutory cap.

## IV. THE COURT SHOULD REHEAR BECAUSE THE OPINION CONFLICTS WITH REPEATED HOLDINGS OF THE U.S. SUPREME COURT ON THE SUBSTANCE OF DUE PROCESS REVIEW.

"We have instructed courts to determine the reprehensibility of a defendant by considering whether: . . . the tortious conduct evinced an indifference to or a reckless disregard

of the health or safety of others[.]" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521, 155 L. Ed. 2d 585 (2003) (citing *BMW v. Gore*, at 576–577, 116 S.Ct. 1589). The decisions in this case never discuss the indifference to or reckless disregard for the health and safety of anyone other than Respondent, which they dismiss. Nor do they discuss the related issue of whether the wrongfeasor's acts threatened anyone other than the plaintiff.

Plaintiffs may "show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Phillip Morris v. Williams*, at 355, 127 S. Ct. at 1064. "[W]e recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Id*., at 357. "[C]ounsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse." *Id.* "And a jury consequently may take this fact into account in determining reprehensibility." *Id.* The Supreme Court said that Petitioners could argue it to the jury. Petitioners did so. But it is notably absent from the analysis of the South Carolina courts. The courts here never address the many outright declarations of reckless disregard for health and safety. Nor, except perhaps for the Court's mistaken finding that Respondent was trying to keep the dangerous car away from consumers, do they discuss whether Defendant's acts posed a threat to others, such as a consumer, her passengers, and the public that shared the road with this dangerous Frankencar.

Because the United States Supreme Court has held that due process review requires consideration of reckless disregard for health and safety, and that posing risks to the safety of additional people is more reprehensible than posing a risk to the safety of one isolated person, the Court should rehear and address these factors.

## V. THE COURT SHOULD REHEAR BECAUSE THE OPINION CONFLICTS WITH MANY OF ITS OWN HOLDINGS.

The opinion "affirm[s] and adopt[s] the court of appeals' thorough analysis." 2024 WL 826388, at *2. In so doing, the opinion overrules important aspects of several of its own cases.

### A. The Opinion Effectively Overrules *Garrison*, *Mitchell*, and *Austin* on the Topic of Harm to Others.

In *Garrison*, the trial court was reversed for not having considered the harm to others. The Court held, "[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). It also approvingly noted that the Court of Appeals, in reversing the trial court, had itself noted "the possible harm to other victims that might have resulted if similar future behavior were not deterred." 435 S.C. at 584, 869 S.E.2d at 807 (2022).

The Court again held harm to others counts in *Mitchell*. "[I]t is appropriate to consider . . . the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 591, 686 S.E.2d 176, 187 (2009) (emphasis added).

In *Austin*, the Court considered the risk to others in analyzing the ratio (the potential harm to "Austin or his passengers"), *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 54, 691 S.E.2d 135, 151 (2010), and in analyzing reprehensibility,

> We believe these misrepresentations, particularly as to whether the vehicle had been wrecked, evinced an indifference to or a reckless disregard of the health and safety of Austin and the general public that would share the road with the potentially unsafe vehicle.

*Id.* at 53, 691 S.E.2d at 151 (emphasis added).

Regardless of whether the potential harm to others goes to the analysis of the ratio or of reprehensibility, this Court has been clear that it must be considered in the due process analysis and that it is reversible error not to consider it. By adopting the Court of Appeals' analysis, the Court implicitly reverses those cases.

### B. The Opinion Effectively Overrules Several Cases About Comparable Awards.

By adopting the Court of Appeals' discussion of the third *Gore* factor, 435 S.C. at 333-34, 867 S.E.2d at 454—which is now ***this*** Court's discussion of the third *Gore* factor—the Court overturns its own holdings in *James v. Horace Mann Ins. Co.*, another aspect of its holding in *Austin*, and the Court of Appeals' holdings in *Collins.*

In *James v. Horace Mann,* this Court rejected statutory penalties that included "a fine not to exceed $15,000 if the conduct was not willful or a fine not to exceed $30,000 if the conduct was willful" as a proper comparison for punitive damages awards. 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006). "We find the statutory penalties are set at 'such a low level, there is little basis for comparing it with any meaningful punitive damage award.'" (*Id.*) (quoting the Court of Appeals' decision in *Collins*). By adopting and approving the Court of Appeals decision here that compared the punitive award to "a fine, [that] shall not exceed $1,000," 435 S.C. at 334, 867 S.E.2d at 454, the Court overturns its decision and the *Collins* decision on which it relied.[21]

[21] The Court overturns another aspect of *Collins. Collins* "reject[ed] ABG's argument" that trebled damages provided in "the South Carolina Unfair Trade Practices Act are for 'comparable misconduct.'" *Collins Entm't. Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 142-43 & n.3, 584 S.E.2d 120, 129-30 & n.3 (Ct. App. 2003), *aff'd*, 368 S.C. 410, 629 S.E.2d 635 (2006). In the present case, the Courts accepted the identical argument that trebled damages under the UTPA are a proper comparison. 435 S.C. at 333, 867 S.E.2d at 454 ("A violation of the NCUTPA exposes the defendant to treble damages.").

The Court overturns another aspect of its decision in *Austin I*. That case concerned the fraudulent sale of a previously-wrecked vehicle; this Court held it was compelled to review factually-similar cases, and thus compared the punitive award there to punitive awards for other fraudulent sales of previously-wrecked vehicles.

> Finally, we must consider the difference between the punitive damages awarded to Austin and the civil penalties authorized or imposed in comparable cases. Because the jury awarded punitive damages pursuant to Austin's fraud cause of action, we are compelled to review factually-similar cases. Based on our review of these cases, we conclude the award of punitive damages in the instant case is consistent with those of comparable cases. *See, e.g., Krysa v. Payne,* 176 S.W.3d 150 (Mo. Ct. App. 2005) (affirming jury verdict of $18,449.53 in compensatory damages and $500,000 in punitive damages awarded to purchasers of a used vehicle against dealership where dealership: did not provide title to purchasers at the time of purchase; failed to disclose that the vehicle had thirteen prior owners; affirmatively misrepresented the condition of the vehicle; and failed to disclose that the vehicle had sustained significant wreck damage); *Parrott v. Carr Chevrolet, Inc.,* 331 Or. 537, 17 P.3d 473 (2001) (affirming award of $11,496 in compensatory damages and $1 million in punitive damages where the defendant car dealership sold the plaintiff a vehicle that had been previously involved in a serious accident and was missing several pieces of emission control equipment).

*Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 54–55, 691 S.E.2d 135, 152 (2010) (footnote omitted). The Court's opinion here is devoid of any comparison between the award made by the jury here to awards in factually similar cases. 435 S.C. at 333-34, 867 S.E.2d 454 (discussing third *Gore* guidepost). Furthermore, the Court offers no explanation for why it deemed such a review unnecessary.

While it is clear this Court is empowered to overrule its own opinions that it now believes are outdated, the Court's abbreviated opinion raises questions about whether it actually intended to do so. Accordingly, the Court should rehear to reconsider the far-reaching implications of the Court's adoption and praising of the analysis of a Court of Appeals decision that effectively overrules a number of this Court's opinions.

## VI. WHAT THE COURT SHOULD DO ON REHEARING

The Court may wish to grant oral argument. If it does not, the Court should raise the judgment to the legislatively-mandated amount. Petitioners request oral argument. If the Court does not grant oral argument, it should raise the judgment to the legislatively-mandated amount. It may do so by following all the circuits that have held the existence of a statute affects the constitutional analysis and which have held punitive awards at statutory amounts to be constitutional. It may also do so without discussing the effect of the statute on due process analysis by various routes. It may do so by following all the circuits that held large ratios are appropriate where the actual damages are small, as discussed in Section B.2 below. It may do so by following all the North Carolina holdings that awards at North Carolina's cap are constitutional. It may do so based on first principles, as discussed in Section A below. But if South Carolina is going to remain the first jurisdiction to hold punitive awards prescribed by statute to be unconstitutional, the Court should explain why the statute does not affect its constitutional analysis, unlike the federal circuits that, following the United States Supreme Court's repeated emphasis on the need for legislative cabining, deem the existence of a statute to be important in their punitive damages analysis.

**A**. It may be helpful to go back to first principles. *BMW v. Gore* stated,

> Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. . . . Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve.

517 U.S. at 568, 116 S. Ct. at 1595 (emphasis added) (citation omitted); *see also Phillip Morris v. Williams*, 549 U.S. at 352, 127 S. Ct. at 1062 (quoting *BMW v. Gore*) ("This Court has long

made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'").

To "begin[] with an identification of the state interests," the state interest in deterrence suffices to make $250,000 not "grossly excessive."

The Supreme Courts of both states recognize the interest in deterrence and that awards must be grossly excessive in relation to the interests if they are to be declared unconstitutional. They do so in the present case[22] and others.[23] *Gore's* three guideposts are tools to use in making that determination, i.e., "whether a punitive damages award is grossly excessive," *O'Shields*, 435 S.C. at 330, 867 S.E.2d at 452, *aff'd*, 2024 WL 826388 (emphasis added); *Rhyne*, 594 S.E.2d at 18 ("the standards suggested by the United States Supreme Court [are] to prevent grossly excessive awards").

An award at the legislatively-mandated amount is plainly not "'grossly excessive' in relation to these interests." The $216,000 punitive judgment affirmed in *Austin I,* for deceptively selling a previously-wrecked vehicle was clearly not sufficient to deter Respondent from selling

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[22] "Punitive damages are designed to punish willful conduct and to deter others from committing similar acts." 435 S.C. at 341, 867 S.E.2d at 458, *aff'd*, 2024 WL 826388 (citing *Rhyne*, 594 S.E.2d at 6); *id.* at 330, 867 S.E.2d at 452,

> When a punitive damages award is "grossly excessive," it violates the due process clause of the Fourteenth Amendment. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996). *Gore* set out three "guideposts" for evaluating whether a punitive damages award is grossly excessive[.]

[23] *Lacey v. Kirk*, 767 S.E.2d 632, 646 (N.C. App. 2014), *writ denied, review denied*, 771 S.E.2d 321 (N.C. 2015) (the question "is whether an award of $250,000 in punitive damages for each Plaintiff contained in the final judgment is grossly excessive"); *James v. Horace Mann Ins. Co.*, 371 S.C. at 193-94, 638 S.E.2d at 670 (similar).

*See also Mitchell, Jr. v. Fortis Ins. Co*., 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009) (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964) ("to deter the wrongdoer and others from committing like offenses in the future.")); *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (similar); *McAlhaney v. McElveen*, 413 S.C. 299, 306, 775 S.E.2d 411, 415 (Ct. App. 2015) (similar).

the vehicle here. Accounting for inflation, $216,000.00 in March of 2010 is equivalent to $308,000.31 in February of 2024. Federal Bureau of Labor statistics CPI Inflation Calculator, available at https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=216000&year1=201003&year2=202402. It follows that an amount greater than North Carolina's cap is not grossly excessive in relation to the amount needed to deter. There is nothing an analysis of the guideposts can do to change that.

This is especially so because here, we have a statute, not a common-law regime, and this Court has consistently held that a statute may be declared unconstitutional as applied only if the unconstitutionality of the application is "proven beyond a reasonable doubt." *Rothschild*, 309 S.C. at 198, 420 S.E.2d at 856 and cases cited there; *see also Condor, Inc. v. Bd. of Zoning Appeals, City of N. Charleston*, 328 S.C. 173, 179, 493 S.E.2d 342, 344 (1997).

Here, it is not beyond reasonable doubt that an award of $250,000 would be "grossly excessive" in relation to the state's legitimate interest in deterrence.

**B.** If the Court believes an analysis of the guideposts is necessary, it should do a full de novo review of the lower court findings, not a deferential review. It should find that all three guideposts point to an award at the statutorily-mandated amount.

**1. Reprehensibility**

For reasons detailed in Part I of this petition, the reprehensibility is much higher than the Court apprehended. There was no praiseworthy desire on the part of Respondent to keep this car out of the hands of a consumer. The jury was entitled to find that Respondent knew what it was doing when it sold the car to Ecklund. The knowing violation of the law negates any claim of a good-faith belief that Respondent did not have to disclose. There were multiple false statements; the jury was entitled to find the steps leading to final sale not to be an isolated incident; and there

was risk of serious harm to O&W and to others. Repeatedly risking lives with repeated fraudulent sales of a poorly welded-together Frankencar with cut break and fuel lines and repeated statements of utter disregard of the risks is highly reprehensible. And the jury so found.

**2. The Court Should Allow a Ratio Similar to Ratios Federal Circuit Courts and North Carolina Appellate Courts Allow.**

The Court should not limit the award to a 9.9 ratio. The opinion that said "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and that "Single-digit multipliers are more likely to comport with due process," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524 (2003), went on to say, on the same page, "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages,'" *id*. (quoting *BMW v. Gore*).

Federal Circuit Courts since the April 7, 2003 decision in *State Farm v. Campbell* have repeatedly held that much larger ratios are needed where the actual damages are relatively small. The Fourth Circuit did so. *Saunders v. Branch Banking & Tr. Co*., 526 F.3d 142, 153-54 (4th Cir. 2008) ($1,000 compensatory, $80,000 punitive, an 80-to-1 ratio, under facts much less reprehensible than those here). It did so again in *Daugherty v. Ocwen Loan Servicing, LLC*, No. 16-2243, 701 F. App'x 246, 249, 2017 WL 3172422 (4th Cir. 2017) ($600,000 is the proper punitive damage award on a compensatory award of $6,128.39, with no intentional wrongdoing, no potential profit for the wrongdoer, and no significant threat to health or safety). The Fifth Circuit did so. *Abner v. Kan. City S. R.R.,* 513 F.3d 154, 165 (5th Cir. 2008) ($1 compensatory, $125,000 punitive, 125,000-to-1). *See also Williams v. Kaufman County*, 352 F.3d 994 (5th Cir. 2004) (150-to-1); *Lincoln v. Case,* 340 F.3d 283 (5th Cir, Dec. 9, 2003) (110-to-1). The Sixth

Circuit did so. *Romanski v. Detroit Entm't, LLC.*, 428 F. 3d 629 (6th Cir. 2005) ($600,000 punitive damages award on compensatory damages of $279.05, a 2,150-to-1 ratio). The Seventh Circuit did so in an opinion by the noted conservative jurist Richard Posner. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. October 21, 2003). He upheld a jury award of $186,000 in punitive damages with an award of $5,000 in compensatory damages, a 37.2-to-1 ratio similar to the ratio an award at the cap produces here. The Eight Circuit did so. *Bryant v. Jeffrey Sand Co.*, 919 F.3d 520 (8th Cir. 2019) (affirming 250,000-to-1 ratio); *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 876–77 (8th Cir. 2008) (reducing ratio from 1,087,500-to-1 to 108,750-to-1). The Ninth Circuit did so. *Arizona v. ASARCO LLC,* 773 F.3d 1050, 1052–53 (9th Cir. 2014) (en banc) (300,000-to-one) (reversing panel's holding that 125,000 was the maximum). The Eleventh Circuit did so. *Kemp v. Am. Tel. & Tel. Co.,* 393 F.3d 1354 (11th Cir. 2004) ($115 compensatory, $250,000 punitive, 2,172-to-1).

As the Fourth Circuit summarized in *Saunders*, 526 F.3d at 154 (emphasis added), "Our sister circuits agree that when a jury only awards nominal damages or a small amount of compensatory damages, a punitive damages award may exceed the normal single digit ratio[.]"[24]

And of course, North Carolina appellate courts always uphold awards at the amount mandated by the legislature. (Pet. Br. pp. 24-25). They recognize that "[L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards,"

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[24] So does the federal District of South Carolina. *Westmoreland v. Varnadore*, No. CV 1:05-3475-MBS, 2008 WL 11472131, at *1 (D.S.C. Jan. 8, 2008) (approving 50,000 to 1 ratio).

So do other state courts. *E.g.*, *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N. LLC.,* 361 S.W. 3d 364 (Mo. 2012) ($4,500 compensatory, $500,000 punitive, 111:1); *Myers v. Workman's Auto Ins.,* 90 P.3d 977 (Idaho 2004) (affirming $300,000 punitive damages when jury awarded nominal damages of $735, a 408-to-1 ratio). "The punitive damages in the amount of $1,450,000.00 and compensatory damages assessed against the Hospital in the amount of $3,750.00 equates to a ratio of 386 to 1." *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 879 (Ky. 2016) (affirming these awards).

*Rhyne,* 562 S.E.2d at 94 (N.C. App. 2002), *aff'd*, 594 S.E.2d 1 (N.C. 2004) (quoting *BMW v. Gore*). They further characterize ratios of 30 to 1, 25 to 1, and 23 to 1 as "relatively low," *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 741 (N.C. App. 2009); *Rhyne*, 562 S.E.2d at 94.

They uphold higher ratios. *Lacey v. Kirk*, 767 S.E.2d 632, 646-47 (N.C. App. 2014), *review denied*, 771 S.E.2d 321 (2015), affirmed two awards at 38 to one. In *Mace v. Pyatt,* 691 S.E.2d 81, 84 (N.C. Ct. App.), *review denied*, 705 S.E.2d 354 (N.C. 2010), and *Chisum v. Campagna*, 855 S.E.2d 173, 191 (N.C. 2021), the North Carolina appellate courts upheld much higher ratios. In *Mace*, the Court of Appeals reduced to the statutorily-mandated amount of $250,000 a jury award of $500,000 on actual damages of $50,000; and vacated the actual damages award, because the plaintiff had provided no actual evidence of value. The actual damages amount was remanded for a new trial, which would likely result in at least nominal damages, 691 S.E.2d at 89, "and plaintiff's punitive damages award can be properly supported by an award of nominal damages standing alone." 691 S.E.2d at 90. So it implicitly held 250,000 to one is permissible. Holding that *Mace* was correctly decided, the Supreme Court in *Chisum* affirmed awards of 104,175 to one and 145,825.00 to one. 855 S.E.2d at 183-84 (awards of $1 each against Richard and Rocco Campagna to Judges Road Industrial Park, LLC), at 186 (punitive awards after reduction to the statutory amount); at 190 (discussing *Mace*); at 191 (affirming the awards and holding that *Mace* was correct).

That makes seven North Carolina plaintiffs. Five each had actual damages in amounts much like the amounts here. Two with one dollar actual damage. All were awarded judgment as directed by the statute. The award here should be the same.

Justice Kittredge stated at oral argument (12:03-12:37) (emphasis added), that "in those cases that dealt with 25 to one or 30 to 1 or 38 to 1 [ratios, the North Carolina courts] clearly felt

they had to find enhanced or increased reprehensibility beyond the normal recklessness that gives rise to punitive damages." Here, too, we have more than the slightly-more-than-plain-negligence that allows for punitive damages. We have intentional fraud. We have putting people's lives at risk. We have repeated express statements of indifference to the health or safety of others. We have actions showing that indifference. We have risk of harm to the general public. We have reprehensibility beyond the normal recklessness that gives rise to punitive damages. Therefore, the Court should rehear.

## CONCLUSION

In the first-ever appellate holding that an award at a statutory cap is unconstitutionally excessive, South Carolina overturns the will of the North Carolina legislature, in an opinion that applies an overly-deferential standard of review to judicial findings in place of the jury's findings. It so holds in conflict with the many federal circuits that have addressed this issue of federal constitutional law, in conflict with the North Carolina appellate courts that have always held awards at the cap to be constitutional, and in conflict with many of its own precedents. It misapprehends and overlooks additional points as addressed above. The Court should rehear and hold that an award at the statutorily-mandated amount does not offend due process.

Respectfully submitted,

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