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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

Opinion No. 5845

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

Appellate Case No. 2021-001388

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.

Reply in Support of Petition for Rehearing

**I. THE JURY IS THE FACTFINDER. THE COURTS ARE NOT. MIDLANDS’
FACTUAL CONTENTIONS FAIL FOR THAT REASON.**

A. The Law

As argued at length in the Petition for Rehearing (Am. Pet. pp. 5-11), the proper role for a court reviewing a jury’s punitive damage award, or reviewing a lower court’s review of the award, is limited. It is simply to determine whether the evidence would permit the jury to find facts that support its verdict. That is because the jury is the factfinder. Courts are not. The Petition cited and quoted many authorities supporting this position.¹ The Return does not,

¹ The Petition cited and quoted, among other authorities, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520 (2003); *Peel v. Att’y Registration & Disciplinary Comm’n of Illinois*, 496 U.S. 91, 108, 110 S. Ct. 2281, 2291-92 (1990); *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1331 (11th Cir. 1999); *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 583 686 S.E.2d 176, 182-83 (2009); *Hollis v. Stonington Dev., LLC*, 394 S.C. 383,

because it cannot, present any authority holding the reverse. It neither counters nor acknowledges this basic point.

Largely as a result, Respondent's attempts to argue in favor of judicial fact-finding fail. Respondent argues as if the proper standard is an "any evidence" standard, in which a lower court's factfinding that is contrary to the verdict will be upheld if any evidence supports it. That is an improper standard. At times, Respondent writes as if the lower court or reviewing court may apply a de novo standard to the facts, in which the judge in effect asks what he would believe were he a jury member. That, too, is the wrong standard.

These principles are not unique to punitive damages awards. When a jury convicts on both a larger and a lesser offense, a judge does not ask whether he would have convicted only on the lesser offense. He does not ask whether he might have seen certain facts differently. He does not refuse to impose the statutory sentence for the aggravated offense, unless no reasonable jury could have found the facts justify the larger penalty. He properly asks only whether there is testimony from which a reasonable jury could convict for the greater offense.

So too here.

B. The Judicial Factfindings at Issue Here.

The Petition for Rehearing challenged several of the factual statements in this Court's opinion. Some were made directly by this Court in summarizing what the lower courts held. Some were recitations of facts the circuit "found." There is some overlap. These were (1) that Midlands was attempting to keep the car away from a consumer; (2) that Midlands was unaware of any prohibition on selling clipped cars without disclosure and so had a "good faith" basis for not disclosing; (3) that Midlands was unaware of the damage when Midlands sold the car as

405, 714 S.E.2d 904, 916 (Ct. App. 2011); *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 742 (N.C. App. 2009)).

“certified” to its first purchaser; (4) that “there is no evidence that [Respondent] ever made a false representation;” (5) that this was an “isolated incident,” and (6) that there was little, if any, chance of harmful consequences to O&W. Additional factual problems were discussed in the footnotes.

Midlands’ Return ignores this basic principle of deference to the jury.

C. Application: The Opinion Rests on Improper Judicial Factfinding that Is Contrary to the Jury’s Verdict.

1. The Finding that Midlands Was Attempting to Avoid Returning the Car to the Hands of a Consumer

As discussed at length in the Brief of Petitioners, their Reply Brief, and their Petition for Rehearing, Midlands’ testimony to the jury teemed with declarations of complete and total disregard for whether the car Midlands sold to a used-car dealer was to be then sold to a consumer. Midlands’ corporate representative and Midlands’ managers at the times of the sales so testified. Nevertheless, the Court’s opinion states that Midlands sold the car to a dealer (without disclosing its dangers) “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).

Midlands does not and cannot credibly claim that a reasonable jury would have to accept that as a “fact.” Its claim is limited to an argument that there is evidence in the record that would support this factual finding. “This finding is supported by the testimony[.]” (Ret. p. 2). But that is not the test. The test is whether the evidence would compel a jury to find that Midlands was attempting to avoid the car going to a consumer and to modify its award accordingly.

Moreover, Midlands’ selective quotation omits that the witness Respondent relies on stated—shortly before the excerpt that the Return quotes—that he knew the car would go to a consumer. “That guy that bought it, whoever he was, and I don’t know who he was, whoever he

would be, anytime you wholesale a car, they're buying a car to try to make a profit. They're buying a car to try to turn around and sell it to somebody." (R. p. 439, lines 18-22) (emphasis added) (testimony of Midlands' former general manager Randy Threatt).²

Moreover, that witness was caught lying. He testified that no one at Midlands knew the car was clipped when they sent it to the auction. Midlands' trial counsel had to admit not only that Midlands knew, but that specific witness knew.

"If we would have had the knowledge of the car had been cut in half and unsafe and unreliable, if we'd have known all that We didn't know that." Testimony of Randy Threatt. (R. p. 437:24-p. 438, line 4) (emphasis added). Given all the evidence to the contrary, Midlands' counsel had to admit to the jury that the facts were opposite to Mr. Threatt's testimony (R. p. 771, lines 14-21) (emphasis added) (Midlands' closing argument),

Now, you saw the note and not [*sic*] question we got this phone call from Mr. Ecklund. This is a clipped car. . . . I got what I got there. One thing we did know we had a note from Mr. Ecklund and no question it says this is a car there are two cars fit together I think is what the note said so we knew. Mr. Threatt knew . . .

See also R. pp. 1034-35 (message from Ecklund when he discovered the damage).

Thus, Midlands' Return relies on putting its spin on an ambiguous statement of a discredited witness, who clearly stated the opposite of the interpretation Midlands asks the Court to give his testimony. But it is the jury's right to accept or reject a witness's testimony. Clearly, the 12 members of the jury did not find Mr. Threatt credible. Nor did Midlands' trial counsel. This court should give great deference to the jury's findings who saw the demeanor and heard

² Neither the trial court nor the Court of Appeals found that Respondent was trying to keep the car from going to a consumer. Nor did Respondent so argue in its brief. The most Respondent could muster in its brief from which its Return quotes was "And there are many reasons why a dealer might purchase a vehicle" (Respondent's Br., p. 18) and "This wholesale versus consumer distinction was meaningful to Midlands."

the testimony of the witnesses. It should not substitute its belief derived from reading a transcript or the writings of the courts below for the findings of the jury.

The Court should therefore rehear.

2. The Courts Err in Finding Due Process Limits the Punitive Award Because a “Good-Faith” Reason Exists for Midland’s Non-Disclosures.

The Petition for Rehearing pointed out that this Court and the circuit court overlooked Midlands’ knowing violation of the laws. The Petition pointed to both the Court’s reference to the circuit court’s “important factual finding” that Midlands had a “good-faith basis” for not disclosing the danger of the car it was selling, and to the Court’s implicit adoption of the same or similar findings in its summary of the facts.

The Petition stated, “It is undisputed that that Respondent knew it was violating the **law** when it sold the car to O&W.” (Pet. p. 3 (citing Pet. Br. p. 31, Reply Br. p. 1)). “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.” *Id.* In its Return to the present Petition, Midlands disputes, for the first time, that it knew it was violating the law. Midlands does not dispute the second statement. It argues simply that “there is no evidence that Midlands was aware of any violation of . . . the North Carolina damage disclosure statute, N.C.G.S. § 20-71.4(a), at the time the Civic was sold.” (Ret. p. 2). It errs. Midlands’ Used Car Manager—who sent 100 cars a year to the auction and who negotiated with Petitioners—testified he was “well aware” of the North Carolina damage disclosure form as it is “required to be filled out” “on every car” (R. p. 379, lines 9-15). The form is one page, printed on both sides. It clearly states, “State law requires that every seller disclose” if he knows a vehicle has been “reconstructed.” It explains that “reconstructed” means “materially altered from original construction due to removal, addition or

substitution of new or used essential parts.”³ Because the form spells out that state law requires a seller to disclose the used vehicle was reconstructed “if he does or reasonably should know,” and Midlands was well aware of that form, it would have been unreasonable for a jury to conclude Midlands did not know it was violating the law.⁴

There was additional evidence that Midlands knew it was breaking the law. Petitioners did not present this additional evidence before, because that Midlands knew when it sold the car to Petitioners that it was breaking the law was not disputed until the Return to the present Petition. But on pages 179 and 180 of the Record, the auction’s representative testified that the disclosures on the form are “required by North Carolina DMV and dealers understand we will do what ever DMV’s rules are. So yes, they’re aware.” (R. p. 179, line 22-p. 180, lines 3. The auction “trust[s] that the dealer[s] selling cars at its auctions are following the applicable laws that apply to car sales.” (R. p. 180, lines 4-7).

In contrast, in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), there was extensive evidence of a good-faith belief that disclosure was not required.

³ More fully, the form states, “**STATE LAW REQUIRES THAT EVERY SELLER DISCLOSE TO THE BUYER, IF HE DOES OR REASONABLY SHOULD KNOW THE INFORMATION LISTED BELOW.**” (R. p. 936). It asks, “Has this vehicle been reconstructed?” (*Id.*) An asterisk following the word “reconstructed” points the reader to definitions on the back of the page. The bottom of the main page reiterates, as a notice to the buyer, that “**STATE LAW REQUIRES YOU TO DISCLOSE**” when title is transferred.

See also Brief of Petitioners, page 7 (making similar point).

⁴ Midlands’ contention that there is no evidence it knew the law is besides the point. Ignorance of the law is no excuse. A car dealer selling 100 cars a year in a state has an obligation to know and follow the laws—as Midlands’ Used Car Manager testified. (Reply Br. p. 1) (citing R. p. 395, line 22-p. 396, line 16). This is especially so given that Midlands received the damage disclosure form with every car it purchased, and was admittedly well aware of that form, which stated the disclosure requirement. Any failure to know the law would be willful ignorance. Willful ignorance is not a “good-faith” failure to follow the law.

For twenty pages of the U.S. Reporter, the Supreme Court detailed that evidence.⁵ It included the small dollar value of the repair, both as an absolute figure and as a percent of the value of the car. The statute at issue there required disclosure of only “material” damages. Given the small amount of the repair cost, and that the damage posed no safety risk, one might reasonably have thought that the car being repainted was not a “material” fact—especially as the nondisclosure was proper under all the state statutes requiring disclosure, and prior Alabama case law had indicated that nondisclosures like BMW’s were proper under this very statute—until BMW’s jury decided BMW’s nondisclosure violated the ambiguous statute.

Here, the law not ambiguous. It unambiguously required disclosure of the damage to this Frankencar.

Additionally, the damage here was not such a small percentage of the car’s value that one could have reasonably thought it was not “material.” And the danger posed by the two half-cars poorly welded together, with cut fuel and brake lines is “material” in a way that repainting simply is not.

Here, the irreparable harm of the car being cut in half (“can’t be repaired” (R. p. 1035)), which destroyed almost all the car’s value, and posed significant safety risks, and was explicitly required to be disclosed, could not in good faith be considered exempt from disclosure. Because

⁵ The evidence on these points was massive. For twenty pages of the U.S. Reports, 517 U.S. at 563-582, 116 S. Ct. 1593-1602, the Court detailed the reasonableness of “exempting minor repairs,” such as the repainting at issue there, from disclosure requirements, *id.* at 570, 116 S. Ct. at 1596; that no state statute had required such disclosure, *id.* at 565-66, 569-74, 578, 116 S. Ct. at 1594, 1596, 1600; and that Alabama law had appeared not to require such disclosure until after the events at issue in *BMW v. Gore*, *id.* at 578 n.27, 116 S. Ct. at 1600 n.27. It repeatedly emphasized the small dollar value of the repair, both in absolute terms and as a percentage of the value of the car, and that the “damage” could not remotely be considered a safety issue, e.g., “no effect on its performance or safety,” *id.* at 576, 116 S. Ct. at 1599; “no indifference to or reckless disregard for the health and safety of others,” *id.*

the courts improperly invade the jury's province as factfinder and the legislature's role as rule-maker in imposing a "good-faith" reduction of the award, the Court should rehear.

3. The Court Should Rehear Because Its Factual Finding re When Midlands Learned the Car Was Dangerous Improperly Invades the Province of the Jury.

The opinion's factual finding that Respondent learned it had sold a clipped car only after selling it to Ecklund improperly finds a fact that is contrary to the jury's verdict. The proper question is simply whether a reasonable jury, as the factfinder, could conclude that Midlands knew when it sold the car to Ecklund. As Chief Justice Beatty asked at oral argument, if they did not discover the damage, "What were they inspecting"? (21:37-21:23).⁶ As shown at trial, there were visible holes in the welds and cut brake and fuel lines. After suit was filed, Midlands engaged an expert to inspect the car. (Pet. Br. p. 29; R. p. 519, line 10-p. 520, line 4). If Midlands' expert could have credibly testified that the 159-point inspection could have avoided concluding the car was dangerous, he would have. (*Id.*) Even the circuit court made no such finding; the appellate courts improperly substitute speculation for the expert testimony Midlands did not provide. As shown at oral argument (41:55-42:26), "all of that damage [is] visible once you put the car up on the rack."

The only "evidence" the Return offers on this point is that the vehicle had a clean title—which does not obviate the point that the inspection would have shown the damage; that Midlands had no record of its inspection—which should be held against Midlands; and, inaccurately, that "It was only after Charles Ecklund returned the Civic that Midlands became aware of the prior damage. (R. at 131:2-20, 136:2-5)." But Record page 131 establishes only that the general manager—who had neither inspected nor sold the car—professed ignorance that the

⁶ References in this format relate to the Supreme Court archived video of the oral argument.

car had any problems. And page 136 is not even about this car. It is about the 2000 Accord with 126,000 miles Midlands “swapped” Ecklund into (*id.*) in place of his 2003 Civic with 78,000 miles (R. p. 1014) when Midlands’ refused his request to undo the deal for the Civic (Pet. Br. p. 8).

Here, too, even if Midlands had been ignorant of the facts, it would be no defense. Before Ecklund purchased the car, the saleslady “said it was, you know, 100 percent Honda certified,” “went through multi-point inspection;” “100-point inspection from top to bottom, front to back. Everything was good on the car. It had all of the original parts.” (R. p. 107, lines 3-19); *see also* Pet. Br. p. 8 (citing R. p. 107 and other places where Midlands assured Ecklund the car was 100 percent Honda certified); Reply Br. p. 6 n. 10 (gathering additional evidence of the fraud on Mr. Ecklund). *See* Brief of Petitioners p. 30 (quoting *Brooks Equip. & Mfg. Co. v. Taylor*, 55 S.E.2d 311, 315 (N.C. 1949) (“[I]t makes no difference whether he was consciously misrepresenting the fact, or was merely recklessly reporting something to be true of which he had no knowledge.”); Reply Br. p. 6 n. 10 (quoting *Carroll Motors, Inc. v. Purcell*, 273 S.C. 745, 747, 259 S.E.2d 604, 605 (1979) (“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.”)).

The evidence is overwhelming that Midlands knew the car was clipped when it sold the car to Ecklund. And if it did not know, it was still fraud. In finding as a fact that Midlands only discovered after the fact that it had deceived Ecklund, the Court improperly invades the province of the jury. In apparently reducing the award on that ground, the Court errs. It should rehear.

4. The Record Brims with False Statements by Midlands.

The Petition on page 9 detailed ten false statements in a footnote and more in text. The Return ignores all but one. It argues that it should not be held legally responsible for the explicit

false statements made by its agent with power of attorney, statements that Midlands knew its agent would make.⁷ For reasons explained in the Petition, those statements should count against Midlands. In any event, more than ten undisputed false statements remain. The Court should rehear, revise the declaration that Midlands made no false misrepresentation, and adjust the award accordingly.

5. The Finding that this Was an Isolated Incident.

The Return has no counter to the Petition’s argument that there was ample evidence from which a reasonable jury could find the sale to Petitioners was not an isolated incident, nor to the fifteen related and deceptive acts by Midlands. The courts invade the province of the jury by finding the facts to be otherwise.

6. Midlands Concedes the Harm.

Respondent does not address the contention that the circuit court erred in finding “there was little, if any, chance of harmful consequences to the [Petitioner]” nor the related contention that the courts erred in overlooking the potential harm to others.

In quoting the trial court as limiting consideration of “the chance of harmful consequences to the [Petitioner],” 2024 WL 826388, at *1 (alteration in original), the Court may be erroneously relying on the statement in *Philip Morris* that “We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.” *Philip Morris USA v. Williams*, 549 U.S. 346, 354, 127 S. Ct. 1057, 1063, 166 L. Ed. 2d 940 (2007). One might misread that statement as

⁷ It is undisputed that Midlands was buying cars from the North Carolina auction (Pet. Br. p. 7; R. p. 362, lines 11-23; p. 449 line 14–p. 450 line 23), and that the form is filled out “on every car” (R. p. 379, lines 9-15).

indicating that potential harm to others may not be considered. But that statement was in the context of a holding that juries may not directly award punitive damages for acts that harmed others. For example, a jury may not properly conclude a proper punitive award for harming the plaintiff is *Y* dollars, and that the defendant did exactly the same thing to nine others, and thus award ten times *Y*.

Yet the potential harm to others “is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility.” *Id.* at 346, 355, 127 S. Ct. at 1063-624 (2007).

[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. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

Id. “[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, 127 S. Ct. at 1065.

Summation as to Part I

The opinion errs in its reprehensibility analysis by improperly invading the province of the jury in finding facts, and in not considering the potential harm to others as directed by the United States Supreme Court as a factor supporting the amount of the award. It should rehear and adjust the award accordingly.

II. 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.

The Petition pointed out that the Court of Appeals opinion the Court adopts is the first known opinion to hold a punitive damage award mandated by a comprehensive punitive damages statute is unconstitutional. Midlands does not present a counter-example. It does not

present a slew of cases to show the split of authority is about equal. It does not present a single case.

Instead, it attempts to divert attention from this important point by stating, “Nothing in the opinion invalidates or finds unconstitutional statutes setting caps for punitive damages.” That is true: The Court did not invalidate all statutes setting caps for punitive damages. Nor did it hold North Carolina’s punitive damage unconstitutional on its face. But it did indisputably hold North Carolina’s statute unconstitutional as applied. Specifically, it held the federal due process clause renders application of the North Carolina statutory mandate here to be unconstitutional.⁸

Under the directive of the North Carolina legislature, when a punitive award is more than \$250,000, and compensatory damages are less than one-third of that amount (i.e., \$83,333.33), courts are to award \$250,000.

Nor does Midlands try to counter the Petition’s recitation of this Court’s cases stating that an as-applied challenge to the constitutionality of a statute must be proven beyond reasonable doubt. (Pet. pp. 13, 22). Nor does Midlands argue the unconstitutionality of applying the statute here has been proven beyond a reasonable doubt. Nor could it do so given the Supreme Court’s

⁸ The North Carolina General Statutes provide, in Section 1D-25,

- (a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.
- (b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.
- (c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

N.C. G.S. § 1D-25 (emphasis added).

statements that its due process guideposts are meant to provide direction in the absence of statutory direction from state legislatures, and the unbroken string of federal cases stating that the presence of a statutory amount for punitive awards is important evidence. Nor does Midlands present a single case as contrary authority. Given that the holdings in all cases—except this one—find awards of punitive damages at statutory amounts to be constitutional, the absence of a single counter-vailing case must cause at least reasonable doubt.

III. THE RATIO IS NOT THE BE-ALL AND END-ALL.

The Return's Part II discusses only one of the *Gore* guidelines. There, Midlands writes of what it calls, "The outer limit ratio allowable as a matter of due process." But there is no outer limit ratio allowable as a matter of due process. "[T]here are no rigid benchmarks that a punitive damages award may not surpass." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003). In fact, the ratio is not even the most important guidepost. *Id.* at 419, 123 S. Ct. at 1521.

Having upheld in *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453, 113 S. Ct. 2711, 2718, 125 L. Ed. 2d 366 (1993) "a \$10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury," the Court in *State Farm* held "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.'" *State Farm*, 538 U.S. at 425, 123 S. Ct. at 1524 (quoting *BMW v. Gore*, 517 U.S. at 582, 116 S. Ct. at 1602). The small actual damages here warrant a higher ratio.

Perhaps Respondent is thinking of other language in *State Farm* indicating most awards should reflect a ratio of less than 10 to 1. That would rewrite the North Carolina statute. It would mean that punitive awards supported by less than \$25,000 in compensatory awards would not

receive the statutorily-mandated amount. It would extend the Court’s holding to something akin to a facial invalidation of the statute. It would conflict with all the case law cited in the Petition (pages 23-24) of Courts routinely upholding statutorily-authorized or -mandated punitive amounts—to which Respondent has not one counter-example.

There is no need for this Court to rewrite North Carolina’s statute, in conflict with all the other courts that uphold awards at statutorily-authorized amounts.

IV. THE COURT SHOULD REHEAR BECAUSE ITS OPINION CONTRADICTS ITS PRIOR HOLDINGS.

Respondent claims there is nothing new here, so the Court should move on. “There is nothing new in the Petition,” Respondent claims. (Ret. p. 4). Petitioners respectfully disagree. There are new points in the Petition that could not have been raised earlier, because they did not exist earlier. Moreover, there is nothing wrong with a Petition for Rehearing raising points that had been previously raised; the governing rule of appellate procedure encourages petitioners to bring to the Court’s attention points that had been overlooked.

The adoption by this Court of a Court of Appeals opinion that contradicts this Court’s prior holdings is new. Had this Court’s opinion here distinguished its prior holdings the Court of Appeals contradicts—e.g., in *Garrison*, *Mitchell*, *Austin*, and *James*⁹—that would be one thing. Had it directly overruled them, that would be another. Almost certainly, if the Court had directly overruled its prior decisions, it would have explained why it was doing so. But it did not do so. Thus, Petitioners properly claimed in seeking rehearing that the Court had overlooked their

⁹ Pages 17-19 of the Petition explored ways in which the opinion contradicts holdings of *Garrison v. Target Corp.*, 435 S.C. 566, 584, 585, 869 S.E.2d 797, 807, 808 (2022); *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 591, 686 S.E.2d 176, 187 (2009); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 53, 54, 52, 691 S.E.2d 135, 151, 152 (2010); and *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006), and two holdings of *Collins Entm’t Corp. v. Coats & Coats Rental Amusement*, one implicit in the overturning of *James*, and another at 355 S.C. 125, 142-43 & n.3, 584 S.E.2d 120, 129-30 & n.3 (Ct. App. 2003).

arguments. *See* Rule 221(a), SCACR (stating that a petition for rehearing “shall state with particularity the points supposed to have been overlooked or misapprehended by the court”).

One suspects that the real reason Respondent does not address the contradiction between the Court of Appeals’ opinion here and this Court’s own prior opinions is not that Respondent misunderstands Rule 221(a), but that it has no decent argument that the opinion here does not conflict with those prior decisions of this Court. Neither in their Brief of Respondent nor in oral argument before this Court did Respondent attempt to distinguish those cases or claim that Petitioners had misquoted them.¹⁰

Thus, although the Return states on page 1 that “Midlands will not repeat the arguments raised in its Respondent’s brief here, but incorporates those arguments by reference,” there are simply no arguments to incorporate by reference regarding the direct conflict between the Court’s prior decisions and its adoption of the Court of Appeals opinion here.¹¹

Thus, for reasons stated in the Petition, the Court should rehear.

CONCLUSION

It is undisputed that the opinion the Court adopts here applies an overly-deferential review to the trial court’s application of the guideposts to the jury’s award. The United States Supreme Court “mandated appellate courts to conduct de novo review of a trial court’s

¹⁰ One might think *Austin* is the exception, as Respondent’s brief interpreted *Austin*. But Respondent’s brief did not discuss the aspects of *Austin* that directly conflict with current opinion.

¹¹ Also “new” is the adoption of a Court of Appeals opinion that one Justice accurately described at oral argument as purporting to apply the de novo standard of review to the circuit court’s reduction of the award, while actually applying an abuse of discretion standard, and the conflict between the factual findings in the opinion and the Court’s clear and lucid explanations at oral argument that the facts were the reverse of these, with no discussion as to why those statements at oral argument are wrong or irrelevant or otherwise unworthy of consideration. The Return has no counter to these points.

application of them to the jury's award [because e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice."¹² Accordingly, the Court should rehear, and apply exacting appellate review to the trial court's application of the guidelines to the jury's award, with recognition of the jury's—not the trial court's—constitutional role as factfinder, and take into account Respondent's knowledge of the law and condition of the car, Respondent's repeated statements of utter disregard for the health and safety of the public, and its obvious risking of serious harm to those in the car and those who would share the road with the poorly-welded, fuel-and-brake-lines clipped, Frankencar, or base the award upon the statutory law, as the federal circuits do.

Respectfully submitted,

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¹² *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 418, 123 S. Ct. 1513, 1520 (internal quotation marks omitted) (quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 121 S.Ct. 1678, 149 L. Ed. 2d 674 (2001)) (in turn quoting *BMW v. Gore*, 517 U.S. at 587, 116 S.Ct. 1589).