

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Oct 13 2022

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

APPENDIX

HAYNSWORTH SINKLER BOYD, PA
Harry Clayton Walker, Jr.
James Y. Becker
PO Box 11889
Columbia, SC 29211-1889
(803) 779-3080

Sarah P. Spruill
PO Box 2048
Greenville, SC 29602
(864) 240-3220

Attorneys for Respondent

LAW OFFICE OF BROOKS R. FUDENBERG,
LLC
Brooks R. Fudenberg
14 Ashe Street
Charleston, SC 29403
843-416-2558

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

Attorneys for Appellants

INDEX

Record on Appeal	Filed Separately, but Concurrently
Opinion No. 5845.....	1
Order Denying Rehearing	20
Order Denying Rehearing en banc.....	22
Final Brief of Appellants - Amended.....	24
Final Brief of Respondent	82
Final Reply Brief of Appellants.....	130
Supplemental Citations – Respondent	164
Supplemental Citations – Appellants.....	203
Appellants’ Petition for Rehearing and Suggestion for Rehearing En Banc - Amended	252

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Columbia Automotive, LLC d/b/a Midlands Honda,
Respondent.

Appellate Case No. 2017-000902

Appeal From Richland County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5845
Heard March 1, 2021 – Filed August 11, 2021

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

C. Steven Moskos, of C. Steven Moskos, PA, and Brooks
Roberts Fudenberg, of the Law Office of Brooks R.
Fudenberg, LLC, both of Charleston, for Appellants.

James Y. Becker and Robert Lawrence Reibold, both of
Haynsworth Sinkler Boyd, PA, of Columbia; Sarah
Patrick Spruill, of Haynsworth Sinkler Boyd, PA, of
Greenville; and Harry Clayton Walker, Jr., of
Haynsworth Sinkler Boyd, PA, of Charleston, all for
Respondent.

KONDUROS, J.: This case arises out of the sale of a 2003 Honda Civic by Columbia Automotive, LLC d/b/a Midlands Honda (Midlands) to Daniel O'Shields and Roger W. Whitley, together d/b/a O&W Cars (O&W), at the Automobile Dealer Exchange Services of America (ADESA) auction in North Carolina. After becoming aware the car had been "clipped"—reconstructed from two cars—O&W brought claims against Midlands in South Carolina for breach of contract, negligent misrepresentation, violation of the North Carolina Unfair Trade Practices Act (NCUTPA), and fraud.¹ After trial, the jury returned a verdict for O&W in the amount of \$6,645 in actual damages with respect to O&W's NCUTPA claim, and \$6,645 actual damages and approximately \$2.38 million in punitive damages for fraud.² The circuit court required O&W to elect between the punitive damages award and any attorney's fees award under the NCUTPA claim, and O&W elected to recover under the NCUTPA verdict. In its orders regarding post-trial motions, the circuit court reduced the punitive damages award to \$46,515; awarded attorney's fees in the amount of \$21,264; and denied offer of judgment interest to O&W. O&W appeals the rulings therein and the circuit court's ruling on election of remedies. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Sandra Gaskins bought the new 2003 Honda Civic in August 2003. In July 2004, Gaskins' daughter had an accident while driving the car, and it was deemed a total loss. Gaskins's insurer, Nationwide Mutual Insurance Company (Nationwide), bought the car and sold it at a salvage auction. An undetermined person modified the damaged car by welding the front half of the car to the back half of another car, and put it back into the stream of commerce. In June of 2008, Nancy Watkins sold the car to Midlands, and the car had a clean title. In July, the car underwent a 159-point inspection at Midlands, including an oil change, and was placed in Midlands'

¹ The parties and the circuit court agreed North Carolina's substantive law would apply in the case because North Carolina was the place of the contract at issue and the location of the alleged injury. *See Lister v. NationsBank of Del., NA.*, 329 S.C. 133, 144, 494 S.E.2d 449, 155 (Ct. App. 1997) ("in contract actions, South Carolina courts apply substantive law of place where contract at issue was formed and this rule applies where contract's formation, interpretation, or validity is at issue; however, where performance is at issue, law of place of performance governs." (citing *Witt v. Am. Trucking Ass'n, Inc.*, 860 F.Supp. 295, 300 (D.S.C. 1994))).

² The other claims were dismissed prior to trial.

certified preowned vehicle inventory. In August, Charles Ecklund purchased the car without knowledge of its modification.

In March 2010, Ecklund had an accident while driving the car and in having the vehicle repaired discovered it was clipped. Ecklund's wife notified Midlands of the issue by phone message. Near the end of the month, Ecklund traded the car in to Midlands. Within the next few days, Midlands placed the vehicle for sale at the ADESA auction in North Carolina under a red-light designation, which indicates the sale is "as is," but which also includes rules regarding disclosure as to certain types of defects or damage. Midlands did not notify the auction the car was clipped. An employee of the auction completed the disclosure form as power of attorney for Midlands.

O&W purchased the car for \$5,200 at the auction on April 1, 2010. In late June, O&W sold the car to the White family for \$6,800. In July, the Whites brought the car back to replace the timing belt and water pump, as they had discussed with Whitley, who agreed at the time of sale to provide the labor for those repairs. When the car was placed on the lift at a nearby garage, the technician was able to clearly see the car had been clipped, and indicated it was "a chopped up mess underneath." O&W refunded the purchase money to the Whites and retook possession of the car when the defect was discovered.

O&W sought to arbitrate the issue through the ADESA auction but was told the time period to seek arbitration had passed. Eventually, O&W filed the subject litigation in January of 2013. The matter proceeded to trial on April 18, 2016, in Richland County, and the jury returned a verdict for O&W for actual damages in the amount of \$6,645 on each of O&W's causes of action. In a bifurcated punitive damage hearing, the jury rendered a verdict for O&W for punitive damages in the amount of \$2,381,888.

Both parties filed posttrial motions. O&W moved to treble the verdict under the NCUTPA and for attorney's fees and costs. O&W also moved for offer of judgment interest under section 15-35-400 of the South Carolina Code (Supp. 2020), and for prejudgment interest. Midlands moved for judgment notwithstanding the verdict (JNOV) or in the alternative a new trial.

Midlands also filed a motion to require O&W to elect a remedy and moved for an order to reduce the punitive damages award to comply with section 1D-25 of the North Carolina General Statute and for an order to set off the judgment with the

amount previously paid by Nationwide.³ The circuit court granted Midlands' motion to require O&W to elect a remedy on May 18, 2016. On May 23, 2016, O&W moved to request reconsideration, asking the circuit court to allow it to elect a remedy after the court made its decision on the other motions, the rulings of which would impact O&W's election decision.

The circuit court heard posttrial motions on July 27, 2016. The circuit court reduced the punitive damages award to \$46,515 and granted \$21,264 in attorney's fees and \$529.07 in costs. The court also denied O&W's motion for offer of judgment interest.

By email on August 29, 2016, the circuit court notified counsel for the parties of its decision to direct O&W to elect from the following remedies: (1) treble damages of \$19,935 (\$6,645 in actual damages times three) and attorney's fees of \$21,264 for the NCUTPA cause of action, for a combined total of \$41,199 or (2) actual damages of \$6,645 and punitive damages reduced to \$46,515 for the fraud cause of action, for a total of \$53,160.

Without waiving its assertion it should not be required to elect between attorney's fees under the NCUTPA and actual and punitive damages on the fraud cause of action, O&W elected the first option, choosing treble damages and attorney's fees pursuant to the NCUTPA. Thereafter, O&W sought additional attorney's fees for work performed for additional time periods. This appeal followed.

LAW/ANALYSIS

I. Punitive Damages⁴

³ Midlands later withdrew its motion for setoff.

⁴ Midlands argues O&A waived its right to complain about the reduction in punitive damages by electing its remedy under the NCUTPA instead of its fraud cause of action. This argument is without merit. While "acts inconsistent with the continued assertion of a right may constitute waiver," O&A did not elect a remedy of its own accord but was required to by the circuit court. *MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 375, 588 S.E.2d 639, 642 (Ct. App. 2003). Additionally, Midlands continued to assert its position at trial and on appeal.

O&A contends the circuit court erred in reducing the jury's punitive damages award to \$46,515 on the basis that the jury's award of \$2,381,888 was excessive by constitutional standards.⁵ We disagree.

"Whether a punitive damages award is unconstitutionally excessive is a question of law reviewed de novo on appeal." *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 740 (N.C. Ct. App. 2009). 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 (1996). *Gore* set out three "guideposts" for evaluating whether a punitive damages award is grossly excessive: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 574-75. We will address each of the *Gore* guideposts in turn.

A. Reprehensibility

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *Gore*, 517 U.S. at 575).

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive

⁵ North Carolina law provides that "[p]unitive 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." N.C. Gen. Stat. § 1D-25(b) (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.). O&A acknowledges this statutory cap on a punitive damages award.

damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id. (citation omitted).

The harm in this case to the plaintiff was economic. The "target" of the conduct was ADESA auction buyers as opposed to the general consumer.⁶ No evidence demonstrated other instances in which Midlands had failed to make disclosures on an ADESA auction form or sold a clipped car through its certified program, and no direct evidence established the harm to O&W was intentional.

O&W rests its reprehensibility argument on the premise that Midlands, knowingly and intentionally, put a "Frankencar" on the road with no regard to the safety of others. O&W contends it strains credulity for Midlands to claim it was unaware the car had been clipped when Midlands originally sold it to Ecklund. However, Midlands obtained the car with a clean title because Nationwide failed to have the title marked "salvage." See N.C. Gen. Stat. § 20-71.3 (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.) (indicating a title of a salvage, rebuilt, or reconstructed vehicle must be so branded). In the absence of notice the car was salvaged, Midlands would not have been anticipating a clipped vehicle.⁷ O&A asserts the damage to the car would have been obvious. However, O&A's examination of the vehicle was two years and approximately 30,000 miles after Midlands' original inspection. Once Ecklund returned the car to Midlands, Midlands did not put the vehicle back on its lot, but sold it "as is" at auction, under a red light. While it failed to disclose the damage, such disclosure requirement had only been added at the auction several months prior without notice to Midlands of the change in

⁶ "Most ADESA auctions are for licensed, registered car and specialty dealers only." ADESA, <https://www.adesa.com/public-auctions> (last visited June 14, 2021).

⁷ The mechanic who performed the original inspection on Midlands' behalf was deceased at the time of trial.

terms.⁸ Ignorance is not an excuse for negligent conduct, but the record does not bear out a deliberate, willful, or repeated violation of the disclosure requirements.

Accordingly, we agree with the circuit court's assessment that the reprehensibility of Midlands' conduct is less than that required for such a large punitive award.

B. Amount of Actual Harm v. Punitive Damages Amount

The United State Supreme Court has declined on multiple occasions "to impose a bright-line ratio which a punitive damages award cannot exceed." *Campbell*, 538 U.S. at 424. "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. "While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1." *Id.* "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 *Gore*, 517 U.S. at 582). "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

In the instant case, the punitive damages award by the jury constituted a 358:1 ratio. A reduction to the \$250,000 statutory cap would result in a 37.5:1 ratio, and a reduction to the circuit court's punitive award amount would result in a 7:1 ratio. Because O&A essentially concedes the statutory cap applies, the real question is whether a 37.5:1 ratio violates due process; on its face, and under North Carolina law, not necessarily so.

In *Lacey v. Kirk*, 767 S.E.2d 632, 646-47 (N.C. Ct. App. 2014), the court upheld a 38:1 ratio when an executrix had, without basis, denied the testator's heirs their bequeathed property and accused them of murder, finding the executrix's conduct

⁸ The ADESA auction changed its required disclosure form approximately four months prior to the sale at issue. Under the terms of Midlands' agreement with ADESA, ADESA is to notify any auction participants in writing regarding any changes to their procedures. Midlands did not receive notice of the change to the disclosure form.

extremely reprehensible and obviously willful. In *Rhyne v. K-mart Corp.*, 562 S.E.2d 82, 94 (N.C. Ct. App. 2002), the court upheld a 30:1 and 23:1 ratio in favor of a husband and wife respectively who were violently and wrongfully detained and prosecuted by K-mart employees. In *Everhart*, 683 S.E.2d at 741, the court found a 25:1 ratio did not violate due process when the plaintiff had accidentally ingested bleach in the restaurant and the O'Charley's company policy placed the health and safety of the customer behind the corporation's need to complete paperwork in anticipation of litigation.

These cases are distinguishable from the case sub judice. In *Everhart* and *Rhyne*, the harm to plaintiffs was physical. In *Lacey*, the damage was economic, but extremely willful. In this case, as discussed under the first guidepost, the damage to plaintiff was economic and the conduct, while reckless, was not as demonstrably willful nor intended to harm as that in *Lacey*. Based on the circumstances of this case, we agree with the circuit court that the objectionable conduct in this case is more commensurate with a 7:1 ratio.

C. Criminal or Civil Penalties in Comparable Cases

"The third *BMW* 'guidepost' requires consideration of civil or criminal penalties that could be imposed for comparable misconduct, giving 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *Rhyne*, 562 S.E.2d at 94 (quoting *BMW*, 517 U.S. at 584).

The conduct for which Midlands was found liable could subject it to both civil and criminal penalties. A violation of the NCUTPA exposes the defendant to treble damages. See N.C. Gen. Stat. § 75-16 (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.) (stating a party injured under the NCUTPA "shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict"). A failure to disclose also constitutes a Class 2 misdemeanor. See N.C. Gen. Stat. § 20-71.4. (a)(2) ("It shall be unlawful for any transferor of a motor vehicle to . . . [t]ransfer a motor vehicle when the transferor has knowledge that the vehicle is, or was . . . a salvage motor vehicle, without disclosing that fact in writing to the transferee prior to the transfer of the vehicle."); see also N.C. Gen. Stat. § 20-71.4. (a)(2)(d) ("Violation of subsections (a) and (b) of this section shall constitute a Class 2 misdemeanor.") A Class 2 misdemeanor with no prior convictions is subject to one [to] thirty days of a community punishment that may be executed as a fine. N.C. Gen. Stat. § 15A-

1340.23 (c)(1) to (2) (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.).⁹ If the punishment is a fine, it shall not exceed \$1,000. N.C. Gen. Stat. § 15A-1340.23 (b) (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.).

In this case, Midlands' failure to disclose constitutes a misdemeanor offense not punishable by imprisonment and with civil penalties limited to three times the amount of actual damages. This factor tends to support a punitive damages award that is closer to a trebling of the actual damages, which in this case would be in line with the circuit court's reduction to a 7:1 ratio.

In sum, based on a review of the guideposts in *Gore*, we affirm the circuit court's reduction of punitive damages based on the facts of this case to \$46,515.

II. Attorney's Fees

In this case, O&W has requested a total of \$476,194.12 in attorney's fees. The circuit court awarded \$21,264 in fees and \$529.07 in costs. The circuit court made this reduction for several reasons and O&W raises numerous points on appeal. We will address each in turn.¹⁰

⁹ In *Everhart*, the court noted the United States Supreme Court recognized conduct that subjected the defendant to imprisonment may justify a larger punitive damages award. 683 S.E.2d at 741. The criminal statute at issue in *Everhart* involved the adulteration of food and was considered a Class 2 misdemeanor. At that time this subjected the defendant to up to 60 days imprisonment. *Id.* However, the sentencing statute has been adjusted, and now, a Class 2 misdemeanor imposes a community-only sentence as opposed to imprisonment. N.C. Gen. Stat. § 15A-1340.23 (c)(1) to (2).

¹⁰ As an initial matter, the South Carolina standard of review will apply to the consideration of the attorney's fee award. *See e.g., Boswell v. RFD-TV the Theather, LLC*, 498 S.W.3d 550, 557 (Tenn. Ct. App. 2016) (holding standard of review is procedural and will governed by forum law); *Moore v. Bi-State Dev. Agency*, 87 S.W.3d 279, 285 (Mo. Ct. App. 2002) (finding the standard of review is a procedural issue and forum law governs the standard of review for uses raised on appeal). Under South Carolina law, the determination of the amount of attorney's fees awarded pursuant to a statute is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006).

First, O&W argues the circuit court erred by apportioning attorney's fees between its NCUTPA and fraud claims. We agree.

Under the NCUTPA, the circuit court has the discretion to award attorney's fees if it determines "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." N.C. Gen. Stat. § 75-16.1(1). In some cases, apportioning attorney's fees between claims made by the plaintiff is appropriate. "However, where all of plaintiff's claims arise from the same nucleus of operative facts and each claim [is] 'inextricably interwoven' with the other claims, apportionment of fees is unnecessary." *Whiteside Ests., Inc. v. Highlands Cove, L.L.C.*, 553 S.E.2d 431, 443 (N.C. Ct. App. 2001) (quoting *Okwara v. Dillard Dep't. Stores, Inc.*, 525 S.E.2d 481, 487 (N.C. Ct. App. 2000)). When competent evidence in the record supports a finding that claims arose from a common nucleus of operative facts, attempting to separate the fees may be unrealistic. *Id.*

In this case, the circuit court attempted to carve out hours O&W's attorneys billed for work on the fraud claim for two reasons: (1) the attorney's fees award is authorized under the NCUTPA, not the common law claim of fraud, and (2) a fair portion of hours billed related to the pursuit of punitive damages, again, something not allowed under the NCUTPA. However, North Carolina cases do not appear to limit recovery of attorney's fees in this manner, provided the nucleus of operative facts test is met. In *Okwara*, the court declined to apportion fees between the plaintiff's § 1983 claim, which provided for attorney's fees, and her common law tort claim when both arose from a common nucleus of operative facts. 525 S.E.2d at 486-87. Likewise, in *Whiteside*, the court declined to apportion fees authorized by the Sedimentation Pollution and Control Act of 1973 and plaintiff's common law actions for nuisance and trespass, finding such division both "unnecessary and unrealistic" when the claims arose from the same nucleus of facts. 553 S.E.2d at 443. More recently, in *Philips v. Pitt County Memorial Hospital, Inc.*, the court declined to apportion fees awarded to the defendant for defending a frivolous punitive damages claim when the same nucleus of operative facts gave rise to the plaintiff's punitive damages claims as well as the underlying tortious conduct. 775 S.E.2d 882, 884-85 (N.C. Ct. App. 2015).

Based on the relevant case law and facts of this case, we conclude the circuit court erred in apportioning attorney's fees between the NCUTPA claim and the fraud claim which necessarily includes the pursuit of punitive damages. The underlying

conduct in the case was overlapping and the services could not reasonably and readily be separated.

Next, O&W appeals the trial court's ruling that Midlands had no longer refused to fully resolve the matter when it made a settlement offer to O&W on September 14, 2016. The NCUTPA only provides for attorney's fees when "there was an unwarranted refusal . . . to fully resolve the matter which constitutes the basis of such suit." N.C. Gen. Stat. § 75-16.1. The conduct of both the defendant and the plaintiff are relevant in determining this issue. *See DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020) (evaluating both parties' conduct during settlement negotiations when determining whether the defendant unreasonably refused to resolve the matter at issue).

The settlement offer, made after the trial and rulings on posttrial motions, was based on paying O&A the actual damages amount awarded (\$6,645), the attorney's fees awarded (\$21,264), and the reduced punitive damages awarded (\$46,515). Midlands made a mathematical error in adding these awards and offered \$81,069. In response to the settlement offer, O&A noted the mathematical error and flatly declined the offer. Midlands acknowledged its mistake, indicated there may be some room to negotiate, and twice asked O&A for a counteroffer. O&A did not respond. While we understand O&A believed its claims to be worth more than the offered amount, the summary dismissal of the offer to negotiate tempers any finding of an unreasonable refusal to resolve the case on Midlands' part. Therefore, the circuit court did not abuse its discretion in concluding Midlands was no longer unwilling to fully resolve the matter at that point. Consequently, we affirm the circuit court's finding that attorney's fees accrued after this date would be excluded from the circuit court's calculation of fees.¹¹

¹¹ The court also denied the final supplemental request for attorney's fees on the basis that O&A's attorneys were not expending time to "protect the judgment." *See Faucette v. Carmel Road, LLC*, 775 S.E.2d 316, 326 (N.C. Ct. App. 2015) (indicating a trial court may award attorney's fees for posttrial or appellate work by a prevailing party on an unfair trade practices claim when such work is expended in an effort to protect the judgment); *see also Cotton v. Stanley*, 380 S.E.2d 419, 422 (N.C. Ct. App. 1989) ("Fees are authorized for the prevailing party and may be awarded for all time, including appeal, reasonably expended in obtaining or sustaining the status of prevailing party."). This is an additional ground that sustains the circuit court's decision not to award those requested fees. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("[I]f

Third, O&W maintains the circuit court erred in excluding time for travel. We agree.

The circuit court excluded some hours, with no legal citation for its decision, based on "Plaintiff's choice to use a Charleston lawyer to bring suit in Richland County, rather than bringing the action in North Carolina. While Plaintiff was free to file suit in South Carolina, the [c]ourt will not impose the extra cost of this decision on the Defendant." The purpose of the fee award is to encourage private enforcement of the NCUTPA. *See Cotton*, 380 S.E.2d at 421 ("One purpose for the statute authorizing attorneys' fees is to encourage individuals to bring valid actions to enforce the statute by making such actions economically feasible.").

O&W was free to use counsel of its choice and should not be penalized for selecting a permissible forum and attorneys licensed to practice therein.

Finally, O&W claims the circuit court erred in applying a percentage reduction to effectuate a "reasonable attorney's fee" under *Hensley v. Eckerhart*, 461 U.S. 424 (1983). We disagree.

In North Carolina cases discussing reasonable attorney's fees, no matter the outcome, the touchstone is *Hensley*.¹² *Hensley*, a civil rights case, prompted the following discussion by the court.

The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were

convinced it is proper and fair to do so," the appellate court may rely on an additional ground to affirm the lower court's judgment.).

¹² *See DENC, LLC*, 454 F. Supp. 3d at 563 ("The Court may only award 'reasonable' attorneys' fees [under the NCUTPA]. Federal courts routinely apply the considerations set forth in *Hensley* . . . and North Carolina courts have cited and applied *Hensley* in a number of cases involving state statutes with fee-shifting provisions.")

unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

. . . .

If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

. . . .

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Id. at 433-37.

In an attempt to synthesize this calculation process, the Fourth Circuit Court of Appeals has said:

To determine the appropriate amount [of attorney's fees to be awarded], a district court should first identify the number of hours reasonably expended on the litigation and multiply that number by a reasonable rate. The court then should subtract fees for hours spent on unsuccessful claims unrelated to successful ones. Once the court has subtracted the fees incurred for unsuccessful, unrelated claims, it then awards some percentage of the remaining

amount, depending on the degree of success enjoyed by the plaintiff.

Johnson v. City of Aiken, 278 F.3d 333, 336-37 (4th Cir. 2002) (citations omitted).

As noted in the discussion on apportionment, several more recent North Carolina state cases indicate that fees do not have to be apportioned if they arise from a common nucleus of operative facts. Nevertheless, the final step as discussed in *Hensley* and *Johnson*, means the circuit court retains discretion—after making a decision about apportionment—to reduce the amount of fees based on the partial or limited success of the litigation, whether the claims are related or not.¹³

To summarize, we remand the issue of attorney's fees to the circuit court. On remand, the circuit court should not seek to apportion requested fees between the fraud and the NCUTPA claims. The circuit court may exclude fees incurred after the date of the September 2016 settlement offer. The circuit court should eliminate any redundant fees, improper cost, and paralegal fees as it had in the previous award. However, the court should not exclude fees for travel. Finally, the circuit court may—or may not—reduce the remaining amount of requested fees by a percentage it finds is appropriate to reflect reasonable attorney's fees based on the

¹³ *Morris v. Scenera Research, LLC*, 747 S.E.2d 362, 379 (N.C. Ct. App. 2013), *aff'd in part, rev'd in part*, 788 S.E.2d 154 (N.C. 2016), cited to by O&A, muddied the waters a bit on this issue. In it, the court "reverse[d] the business court's award of attorneys' fees and remand[ed] to the trial court for further findings of fact and conclusions of law regarding whether Morris's claims arose from a common nucleus of operative fact and, thus, whether he is entitled to all of his attorneys' fees." This truncated mandate suggests that if the claim entitling the plaintiff to attorney's fees and any additional claims arose from a common nucleus of facts, then the plaintiff should be awarded all the requested fees. The court of appeals so directed the lower court because it believed the trial court's fee reduction rested on apportionment that was made without factual findings to support such division. *Id.* at 378-79. On remand, the trial court issued an unpublished opinion stating it believed the discretion to reduce the attorney's fees to a "reasonable amount" by a percentage pursuant to *Hensley* was usurped by the court of appeals' mandate. *Morris v. Scenera Rsch., LLC*, No. 09 CVS 19678, 2017 WL 2380230 at *2 (N.C. Super. Ct. May 31, 2017). However, the court of appeals opinion cites to *Hensley* as authoritative, and *Hensley* provides for a reduction in fees based on partial or limited success even if the claims are related.

success of the litigation. This percentage may be impacted by the decision of the court regarding the election of remedies, which will be addressed in the next section.

III. Election of Remedies

O&W argues the circuit court erred in requiring it to elect between attorney's fees and punitive damages. We agree.

In *United Laboratories, Inc. v. Kuykendall*, 437 S.E.2d 374 (1993), United Labs brought both NCUTPA and common law tortious interference claims against Share, a company that hired its former employee, Kuykendall, contrary to a noncompete agreement. 437 S.E.2d at 375. United prevailed on both its claims. The issue thus became whether United could recover "both punitive damages under its common law claim and untrebled compensatory damages and attorneys' fees in its unfair practices claim." *Id.* at 378.

The decision noted one purpose of the election of remedies doctrine is to "prevent double redress for a single wrong." *Id.* at 379 (quoting *Smith v. Oil Corp.*, 79 S.E.2d 880, 885 (N.C. 1954)). Therefore, "a party may not recover punitive damages for tortious conduct and treble damages for a violation of Chapter 75 based on that same conduct." *Id.* However, the imposition of punitive damages and an award of attorney's fees serve entirely different purposes. *Id.* at 380. Punitive damages are designed to punish willful conduct and to deter others from committing similar acts. *Rhyne*, 594 S.E.2d at 6. The purpose of attorney's fees in Chapter 75, however, is to "encourage private enforcement" of Chapter 75. *Kuykendall*, 437 S.E.2d at 379. An award limited to attorney's fees plus treble damages will often prove inadequate to punish and deter the type of willful conduct that leads to punitive damages at common law. *Id.* Consequently, the court determined that although treble damages and punitive damages were redundant, an award of attorney's fees under the NCUTPA and punitive damages under the plaintiff's common law claim was permissible. *Id.* at 380-81.

O&W contends the enactment of section 1D-20 of the North Carolina General Statutes (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.) represents the legislature's rejection of *Kuykendall*. Contrastively, Midlands argues section 1D-20 represents the codification of *Kuykendall* in that it provides treble damages and punitive damages may not both be recovered. The statute provides that "[a] claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages." *Id.*

Section 1D-20 was enacted in 1995, and *Kuykendall* has not been abrogated or overruled. In a recent unpublished decision by the Fourth Circuit, *Driskell v. Summit Contracting Group, Inc.*, 828 F. App'x 858 (4th Cir. 2020), two of the three judges indicated section 1D-20 does not affect *Kuydendall*'s holding as to punitive damages and attorney's fees.

Our dissenting colleague would hold that [section] 1D-20 effectively overruled [*Kuykendall*'s] 'mix-and-match approach' and thus blocks Driskell from recovering both awards. But that provision—which was enacted in 1995 in an act establishing standards for punitive damages, . . . has never been construed to apply to attorney's fees It's true that Driskell's request for attorney's fees is "pursuant to" REDA [the Retaliatory Employment Discrimination Act], which provides for treble damages. But we think it doubtful that the Supreme Court of North Carolina would hold that REDA's separate allowance for an award of attorney's fees is a "remedy" in the way that § 1D-20 uses that term. After all, § 1D-20's title is "Election of extracompensatory remedies," and attorney's fees are strictly compensatory in that they reimburse a prevailing plaintiff's costs. The title of a statutory subsection, while "not controlling, [] does shed some light on the legislative intent underlying the enactment of that provision." *State v. Fletcher*, []807 S.E.2d 528, 539 (2017). And that light is (we think) sufficient here to reject the dissent's view.

Id. at 871 n.8.

While not binding precedent, we find the Fourth Circuit's majority position on this issue persuasive. See *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (finding the reasoning of federal case law persuasive).

Additionally, South Carolina has taken a similar position on the issue. In *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010), the buyer of a truck brought an action against the dealership for multiple claims, including fraud and various statutory claims. *Id.* at 35, 691 S.E.2d at 141-42. The jury awarded actual damages, punitive damages, and attorney's fees under a combination of

theories. *Id.* On appeal, our supreme court held that the buyer, Austin, could recover punitive damages, as well as attorney's fees and costs under the South Carolina Dealer's Act:

[A] plaintiff may recover attorney['s] fees under a statutory claim in addition to punitive damages under a common law claim. The rationale for this position is that an award for both does not amount to double recovery for a single wrong given attorney's fees are intended to make such claims economically viable for private citizens whereas an award of punitive damages is designed to punish wrongful conduct and deter future misconduct.

Id. at 56, 691 S.E.2d at 153.

The majority further opined:

Furthermore, given the recovery of attorney's fees under the Dealer's Act is not duplicative of the award of punitive damages, we do not believe a decision in favor of Austin would violate the election of remedies doctrine's prevention of double redress for a single wrong. As its name states, the doctrine applies to the election of "remedies" not the election of "verdicts." Thus, an award of attorney's fees and costs would merely serve to fully compensate Austin for pursuing his statutorily-authorized private right of action under the Dealer's Act, which we believe epitomizes the definition of a remedy. *See Black's Law Dictionary* 1163 (5th ed. 1979) (defining "remedy" as "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated").

Id. at 57, 691 S.E.2d at 153.

Based on all of the foregoing, we conclude the circuit court erred in requiring O&W to elect between punitive damages and attorney's fees. Therefore, on remand, the final award should include actual damages, punitive damages, and attorney's fees in an amount to be determined by the circuit court.

IV. Offer of Judgment Interest

Finally, O&W maintains the circuit court erred in denying its request for interest on the offer of judgment—\$280,000—to settle the case in April of 2015. The circuit court denied O&W's interest request because, while O&W made an offer of judgment of \$280,000, O&W elected recovery under the NCUTPA, and the amount of the attorney's fees award was lower than the offer to settle.¹⁴ O&W contends the amount the jury returned in its verdict—\$2.38 million—should be used to decide whether O&W was entitled to offer of judgment interest, as opposed to using the reduced punitive damages award—\$46,515—the court determined was appropriate.

Section 15-35-400(B) of the South Carolina Code (Supp. 2020) provides:

Consequences of NonAcceptance. If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer; . . . [¹⁵]

This court recently addressed this issue in *Garrison v. Target Corp.*, 429 S.C. 324, 377, 838 S.E.2d 18, 46 (2020) (*cert. granted*, S.C. Sup. Ct. Order dated October 19, 2020). The court indicated the use of the term "determination" in the first sentence of Rule 68(b) in combination with the last phrase "eight percent interest

¹⁴ The circuit court suggested O&W may not be entitled to offer of judgment interest under North Carolina law because only a defendant may make an offer of judgment there. *See* Rule 68, NCRCP ("At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer . . ."). However, because the issue would be procedural, not substantive, South Carolina law governs this question. *See Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2d 81, 83 (Ct. App. 2007) (stating procedural matters are determined in accordance with the law of the forum).

¹⁵ Rule 68 of the South Carolina Rules of Civil Procedure contains identical language.

computed on the amount of the verdict or award from the date of the offer *to the entry of judgment*" indicated the final, posttrial award was the proper amount for computing offer of judgment interest. *Id.* at 378-79, 838 S.E.2d at 47. Likewise, we conclude the circuit court's analysis should have been performed using the posttrial award as opposed to the jury's verdict. However, because we reverse the circuit court's decision as to the election of remedies and remand the issue of attorney's fees, we instruct the court to reevaluate its decision as to the offer of judgment interest as may be necessary in light of the final award.

CONCLUSION

We affirm the circuit court's reduction of the punitive damages award and reverse the circuit court's determination that O&W is required to elect between its punitive damages award and attorney's fees. We remand the issue of attorney's fees to the circuit court for analysis in accordance with the directives in this opinion. Because the award of offer of judgment interest may be affected by the decisions herein, we remand that issue to the circuit court as well. Consequently, the matter is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.

The South Carolina Court of Appeals

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

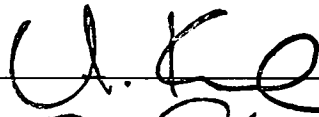
v.

Columbia Automotive, LLC d/b/a Midlands Honda,
Respondent.

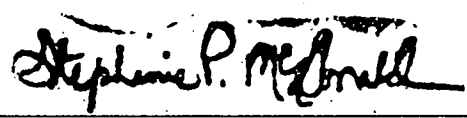
Appellate Case No. 2017-000902

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

Brooks Roberts Fudenberg, Esquire
C. Steven Moskos, Esquire
Harry Clayton Walker, Jr., Esquire

FILED
Oct 26 2021

Robert Lawrence Reibold, Esquire
Sarah Patrick Spruill, Esquire
James Y. Becker, Esquire
The Honorable R. Ferrell Cothran, Jr.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 26, 2021

Mr. Brooks Roberts Fudenberg, Esquire
14 Ashe St
Charleston SC 29403

Mr. C. Steven Moskos, Esquire
4000 Faber Place Dr.
Suite 300
Charleston SC 29405

Re: Daniel O'Shields v. Columbia Automotive
Appellate Case No. 2017-000902

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. See Rule 219, SCACR.

Very truly yours,

V. Claire Allen

CLERK

cc: Harry Clayton Walker, Jr., Esquire
Robert Lawrence Reibold, Esquire
Sarah Patrick Spruill, Esquire
James Y. Becker, Esquire
The Honorable R. Ferrell Cothran, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

RECEIVED
SEP 27 2019
SC Court of Appeals

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

Appellants,

v.

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

Respondent.

BRIEF OF APPELLANTS

Brooks R. Fudenberg
Law Offices of Brooks R. Fudenberg, LLC
171 Church Street, Suite 160
Charleston, SC 29401
Tel.: (843) 416-2558 eFax: (910) 401-1242
BRF@Fudenberglaw.com

C. Steven Moskos
C. STEVEN MOSKOS, P.A.
4000 Faber Place Drive, Suite 300
N. Charleston, SC 29407
Tel. (843) 763-5297
csmoskos@earthlink.net

Attorneys for Appellants

TABLE OF CONTENTS

Table Of Authorities	ii
Statement Of The Issues	1
Statement of the Case.....	1
Statement Of Facts	9
Closings, Jury Charges, And Verdicts – Actual Damages Phase	20
1. Closings.....	20
2. Jury Charges.....	21
3. Verdicts	21
Punitive Damages Phase	22
I. The Lower Court Erred In Reducing Punitive Damages To \$46,515.....	23
A. The Standard of Review Is De Novo.....	24
B. Argument	24
1. North Carolina statutory law.....	24
2. The Jury’s Application of North Carolina’s Statutorily-Admissible Evidence	25
3. North Carolina case law	27
4. Federal Case Law	29
5. Additional Errors in the Order’s Analysis	34
Conclusion to Section.....	35
II. The Lower Court Erred In Awarding Unreasonably Low Attorney Fees.....	35
A. Law	35
Purposes of the Statutes	36
Requirements for fee awards.....	36
Determining the proper award	36

B.	Application	38
1.	The Order on Post-Trial Motions Errs in Numerous Ways	38
2.	Errors in the March 16 Order (on Appellants' Rule 59 Motion and Motion for Supplemental Fees)	41
3.	The Final Order Suffers from Lack of Jurisdiction and Significant Errors of Law.	43
	Conclusion to section	46
III.	The Lower Court Erred In Requiring Plaintiffs To Elect Between Punitive Damages And Attorney Fees And Costs.	46
IV.	The Lower Court Erred In Denying Offer Of Judgment Interest	49
	Conclusion	51

TABLE OF AUTHORITIES

CASES

<i>Adkins v. Varn</i> , 312 S.C. 188, 439 S.E.2d 822 (1993).....	50
<i>Austin v. Stokes-Craven Ford Holding Co.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010)	34-35, 47
<i>Blankenship v. Town and Country Ford, Inc.</i> , 174 N.C. App. 764, 622 S.E.2d 638 (N.C. Ct. App. 2005).....	47
<i>BMW v. Gore</i> , 517 U.S. 559 (1996).....	29, 31-34
<i>Boileau v. Seagrave</i> , No. COA07-1431, 2008 N.C. App. LEXIS 1833, 2008 WL 4630528 (Ct. App. Oct. 21, 2008)	28
<i>Bramhall v. Hurban</i> , NO. COA13-1069, 2014 N.C. App. LEXIS 574, 2014 WL 2507695 (N.C. Ct. App. Feb. 19, 2014)	28
<i>Broussard v. Meineke Discount Muffler Shops, Inc.</i> , 958 F. Supp. 1087 (W.D.N.C., 1997).....	47
<i>Brown v. Felkel</i> , 320 S.C. 292, 465 S.E.2d 93 (Ct. App. 1995)	46
<i>Brown v. King</i> , 166 N.C. App. 267, 601 S.E.2d 296 (2004)	48
<i>Cooper Indus., Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001).....	24
<i>Cotton v. Stanley</i> , 94 N.C. App. 367, 380 S.E.2d 419 (1989)	36-37, 42
<i>Custom Molders v. Am. Yard Prods.</i> , 342 N.C. 133, 463 S.E.2d 199 (1995).....	36
<i>Daugherty v. Ocwen Loan Servicing, LLC</i> , No. 16-2243, 701 F. App'x 246, 259, 2017 WL 3172422 (4th Cir. Jul. 26, 2017)	32
<i>Duncan v. Ford Motor Co.</i> , 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009).....	33
<i>Edwards v. West</i> , 128 N.C. App. 570, 495 S.E.2d 920 (N.C. Ct. App. 1998)	48-49
<i>Estate of Overbey v. Chad Franklin Nat'l Auto Sales N. LLC</i> , 361 S.W. 3d 364 (Mo 2012)	32
<i>Everhart v. O'Charley's, Inc.</i> , 200 N.C. App. 142, 683 S.E.2d 728 (N.C. Ct. App. 2009).....	24
<i>Faucette v. 6303 Carmel Rd., LLC</i> , 242 N.C. App. 267, 775 S.E.2d 316 (N.C. Ct. App. 2015)	36

<i>GE Betz, Inc. v. Conrad</i> , 231 N.C. App. 214, 752 S.E.2d 634 (N.C. Ct. App. 2013)	25-26
<i>Grabinski v. Blue Springs Ford Sales, Inc.</i> , 203 F.3d 1024 (8th Cir. 2000).....	32
<i>Knight Publ'g Co. v. Chase Manhattan Bank, N.A.</i> , 131 N.C. App. 257, 506 S.E.2d 728 (N.C. Ct. App. 1998)	47
<i>Lacey v. Kirk</i> , 238 N.C. App. 376, 767 S.E.2d 632 (N.C. Ct. App. 2014)	24, 28
<i>Laschkewitsch v. Legal & Gen. Am., Inc.</i> , No. 5:15-CV-251-D, 2017 U.S. Dist. LEXIS 180972, 2017 WL 4976442 (E.D.N.C. Nov. 1, 2017)	38
<i>Mace v. Pyatt</i> , 203 N.C. App. 245, 691 S.E.2d 81 (N.C. Ct. App. 2010)	28
<i>Mitchell v. Fortis Ins. Co.</i> , 385 S.C. 570, 686 S.E.2d 176 (2009)	24
<i>Morris v. Scenera</i> , 229 N.C. App. 31, 747 S.E.2d 362 (N.C. Ct. App. 2013)	38-41
<i>Out of the Box Developers, LLC v. Doan Law, LLP</i> , No. 10 CVS 8327, 2014 NCBC LEXIS 39, 2014WL4298329 (N.C. Super. Ct. Aug. 29 2014)	37, 39
<i>Parrott v Carr</i> , 17 P. 3d 473 (Or. 2001)	32
<i>Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.</i> , 180 N.C. App. 70, 637 S.E.2d 230 (N.C. Ct. App. 2006)	46
<i>Rhyne v. K-Mart Corp.</i> , 358 N.C. 160, 594 S.E.2d 1 (N.C. 2004)	25, 28-29, 33
<i>Riverside v. Rivera</i> , 477 U.S. 561 (1986)	37
<i>Saunders v. Branch Banking & Tr. Co.</i> , 526 F.3d 142 (4th Cir. 2008)	30, 32-33
<i>Southwood v. Credit Card Sol.</i> , No. 7:09-CV-00081-F, 2016 U.S. Dist. LEXIS 48039, 2016 WL 8710985 (E.D.N.C. Feb. 26, 2016)	48
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	30, 32-33
<i>Taylor v. Medenica</i> , 331 S.C. 575, 503 S.E.2d 458 (1998)	37
<i>TXO Prod. Prod. Corp. v. All. Res. Corp.</i> , 509 U.S. 443 (1993)	29, 32-33, 34-35
<i>United Va. Bank v. Air-Lift Assocs.</i> , 79 N.C. App. 315, 339 S.E.2d 90 (N.C. Ct. App. 1986)	36
<i>United Labs., Inc. v. Kuykendall</i> , 87 N.C. App. 296, 361 S.E.2d 292 (N.C. Ct. App. 1987)	44

<i>United Labs., Inc. v. Kuykendall</i> , 322 N.C. 643, 370 S.E.2d 375 (N.C. 1988)	44
<i>United Labs., Inc. v. Kuykendall</i> , 335 N.C. 183, 437 S.E.2d 374 (N.C. 1993)	36, 37, 46-48
<i>United Labs. v. Kuykendall</i> , 403 S.E. 2d 104 (Ct. App. 1991).....	43
<i>United States v. Oregon Lumber Co.</i> , 260 U.S. 290 (1922)	47
<i>Whiteside Estates, Inc. v. Highland Cove LLC</i> , 146 N.C. App. 449, 553 S.E.2d 431 (N.C. Ct. App. 2001)	37, 39

CONSTITUTIONAL PROVISIONS

Due Process Clause, U.S. Const. amend. XIV	1, 23-35
--	----------

STATUTES

N.C. Code Chapter 1D	24-34
N.C. G.S. 1D-1.....	25
N.C.G.S. 1D-15.....	25
N.C.G.S. 1D-20.....	47-49
N.C.G.S. 1D-25.....	25-28, 33-35
N.C.G.S. 1D-30.....	25
N.C.G.S. 1D-35.....	25
N.C.G.S. 14-100.....	33-34
N.C.G.S. 20-294.....	33
N.C.G.S. 75-1.1.....	35-36
N.C.G.S. 75-16.....	49
N.C.G.S. 75-16.1.....	36, 45-49
SC Code Section 15-32-530.....	24
S.C. Code § 15-35-400.....	1, 49-51

RULES

South Carolina Appellate Court Rule 205	43
South Carolina Appellate Court Rule 241	43

STATEMENT OF THE ISSUES

- I. Where senior managers of a Honda franchise fraudulently sold a hazardous vehicle consisting of two half-Civics joined together, without disclosing the nature of the vehicle, in violation of the North Carolina auction's rules and of North Carolina law, and the jury returned a punitive verdict of \$2,381,888.00, did the lower court err in holding that \$46,515.00 is the maximum punitive award allowed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution?
- II. Did the lower court err in the amount of its award of attorneys' fees under the North Carolina Unfair Trade Practice Act?
- III. Because the Supreme Courts of both North and South Carolina have held that a plaintiff entitled to statutory attorney fees and punitive damages for fraud need not elect between the two, did the lower court err in requiring Appellants to elect between the two?
- IV. Where Respondent rejected Appellants' offer to settle for \$280,000 pursuant to the offer of judgment statute, and the jury returned a verdict for \$2.38 million, did the lower court err in denying Appellants interest under the statute?

STATEMENT OF THE CASE

On January 17, 2013, Appellants Daniel O'Shields and Roger W. Whitley sued Respondent Columbia Automotive Company, LLC, d/b/a Midlands Honda ("CAC"), a Richland County automotive dealership, and Nationwide Mutual Insurance Company.¹ (R. pp. 49-59). Appellants' claims arose from the allegedly deceptive sale by CAC at an ADESA (Automobile Dealer Exchange Services of America) auction in Charlotte, North Carolina of a previously wrecked automobile. (*Id.*).

They sued under common law and South Carolina statutory law. CAC moved to dismiss the statutory claims on grounds that South Carolina law did not apply. (R. p. 1181). The motion was resolved by an order (R. p. 35) and a first amended complaint alleging violation of North Carolina rather than South Carolina law² (R. pp. 67-77).

¹ Nationwide subsequently settled and was dismissed from the case. (R. p. 42).

² The amended complaint alleged breach of contract, negligence, negligent misrepresentation, constructive fraud, fraud, and violation of the North Carolina Unfair Trade Practices Act. (R. pp. 67-77).

Appellants sent a \$280,000.00 Offer of Judgment to CAC pursuant to section 15-35-400 of the South Carolina Code of Laws on February 4, 2015. (R. pp. 1187-88). This offer was not accepted, and the matter proceeded to trial.

A bifurcated jury trial was held before the Honorable R. Ferrell Cothran, Jr., April 18-22, 2016. The jury was first presented claims for breach of contract, negligent misrepresentation, fraud, and violation of the North Carolina Unfair Trade Practices Act (“UTPA”), N.C.G.S. § 75-1.1. Two special interrogatories were also given to the jury. The jury returned an actual damages verdict of \$6,645, the amount requested by Appellants, on each claim. (R. p. 732, line 21-p. 733, line 5; pp. 43-44). The trial court then conducted the punitive damages phase of the trial. The jury returned a punitive verdict against CAC for \$2,381,888.00. (R. p. 47).

CAC subsequently served four post-trial motions with a memorandum supporting each. (R. pp. 1277-1300). These were: (1) Motion for Judgment Notwithstanding the Verdict (“JNOV”), or, in the Alternative, a New Trial, or a New Trial Nisi Remittitur (R. pp. 1277-93), arguing largely that numerous errors relating to the punitive damages award, including allowing the jury to hear testimony regarding safety issues, required a new trial absolute; and that the economic loss rule barred all claims except breach of contract; (2) Motion to Require Election of Remedies (R. pp. 1294-96), arguing that Appellants could not properly receive actual damages under more than one cause of action; (3) Motion to Enforce North Carolina Punitive Damages Cap of \$250,000 (R. pp. 1297-98), arguing that North Carolina statutes limited the punitive award to that figure; and (4) Motion for Setoff or Recoupment (R. pp. 1299-1300), seeking to set off the amount of Nationwide’s settlement.

Appellants served one post-trial motion seeking four types of relief, each with a supporting brief. (R. p. 1301). These sought (1) Trebling of Appellant’s UTPA verdict (R. pp. 1303-04); (2)

Interest under the Offer of Judgment Statute (R. pp. 1305-09), on grounds the verdict was for a greater amount than the rejected offer of judgment; (3) Prejudgment interest under N.C.G.S. § 24-5 (R. pp. 1310-15); and (4) Attorney's fees and costs accrued from June 29, 2011 through May 1, 2016 (R. pp. 1316-1433), seeking, in the alternative under the law of either state, compensation for 452.1 hours of work by trial counsel at \$390 an hour, a 50% multiplier, and costs of \$14,866.62. Regarding North Carolina law, Appellants argued the requirements were met under that State's UTPA that fees may be awarded if the violation was "willful" and the violator had made an "unwarranted refusal to fully resolve the matter," (R. pp. 1321-24); and that the amount of an award under North Carolina law is determined by four factors: the time and labor extended, the skill required, the customary fee for like work, and the experience and ability of the attorney (R. pp. 1324-25).

The Judge's clerk emailed all counsel on May 18 that the Judge required Appellants to elect their remedy within ten days. (R. pp. 1434). Citing *Austin v. Stokes-Craven Ford Holding Co.*, 387 S.C. 22, 691 S.E.2d 135 (2010), and *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (N.C. 1993), which had each held that one need not elect between punitive damages under one cause of action and statutory fees under another, Appellants elected actual and punitive damages under the fraud verdict and attorney fees under the UTPA verdict. (R. pp. 1435-37). They simultaneously moved to reconsider, asking to elect after the amount of each award was determined. (R. pp. 1438-39).

The parties filed responses to each of the other's motions. Appellants also served via email and US mail two additional timesheets with supporting affidavits. Mr. Moskos' detailed additional work through July 20, 153.8 hours, bringing his total hours to more than 600. (R. pp. 1529-41). Mr. Fudenberg's detailed 56.1 hours, starting with his joining the case on April 22 (R. pp. 1542-

51).

CAC then served its brief in opposition to the motion for a fee award. (R. pp. 1562-1710). It argued that fees were inappropriate, but if fees were awarded under North Carolina law, it agreed the amount was to be determined by the factors Appellants had listed (R. pp. 1573-74) (listing identical factors), and did not dispute that \$390 was an appropriate hourly rate. It identified up to 52.7 hours³ it maintained should be cut from Mr. Moskos' initial fee request (R. pp. 1576-77, 1700), and did not mention the later filings. Neither party maintained that a "percentage of the recovery" or "standard contingency-fee" award would be appropriate under North Carolina law.

A hearing on the motions was held on July 27.

The Judge's clerk emailed all counsel on August 29, 2016 (R. p. 1731) (emphasis in original):

Judge Cothran directs the plaintiff to elect from either of the following awards: 1. *Treble Damages and attorney's fees for the N.C. Unfair Trade Practices Cause of Action*: \$6,645(actuals) X 3=\$19,935 plus an award of attorney's fees of \$21,264 for a total of **\$41,199**. OR

2. *Actual and Punitive damages for the fraud cause of action*: \$6,645(actuals) plus \$46,515 in punitive damages for a total of **\$53,160**.

The email directed that after Appellants elected between the two choices, CAC was to serve a proposed order. It provided no further substantive guidance. Although the email does not state so directly, the attorney fees of \$21,264 equal 40.00% of the \$53,160 award.

Appellants elected the UTPA award. (R. p. 1854)

CAC then offered to settle the case on September 14, 2016 for \$81,069. (Conf. Doc., R. pp. 2007-08).

CAC submitted a proposed order on October 17. (R. pp. 1855-78). It (1) changed the

³ Included in that figure is "7.05 - 21.45 hours" CAC argued should be cut as work on punitive damages. (R. p. 1576). The figure in text uses the higher amount from the 7.05-21.45 range.

caption's designation of Plaintiffs to "Plaintiff" in the singular, (2) reduced the punitive damages under the fraud verdict to \$46,515, holding this was the maximum award consistent with federal due process (R. pp. 1861-64); (3) trebled the compensatory award under the UTPA to \$19,935 (R. pp. 1866; (4) denied Appellants' request for costs under North Carolina law and awarded instead \$529.07 in costs under Rule 54, SCRCP, on grounds that costs are procedural and thus governed by forum law (R. pp. 1873-74); (5) awarded prejudgment interest of \$1,993.38, with accumulation of interest ending on October 10, 2016 (R. p. 1878); (6) denied Appellants' claim under the offer of judgement statute for interest of \$236,628.01 and costs of \$14,279.82, on grounds the judgment entered was for a lesser amount than the offer (R. p. 1876); (7) held CAC's motion for a setoff to be decided later (R. p. 1857, 1878); and (8) granted CAC's motion to require Appellants to elect between the fraud and UTPA claims (R. p. 1878).

It also (9) granted in part Appellants' request for attorney fees under the UTPA, holding the requirements for fees under North Carolina's UTPA were met, and awarding \$21,264.00 (R. pp. 1866-73). The proposed order recognized this was 40% of the fraud award (R. p. 1873).

However, it stated the amount was based instead on a determination that only 54.525 hours were compensable. It reached that figure in two steps. First, "After a thorough review of the materials submitted, the Court has identified approximately 218 hours of entries that contain or could contain time spent on the NCUTPA claim." (R. p. 1871). It added, "the Court finds a [further] reduction of 75% is appropriate" (R. p. 1872), in part on grounds that much of the work did not relate to the UTPA claim (R. p. 1871). Multiplying these approximately 218 hours that survived the first cut by 25%, the order stated that 54.525 hours were compensable. Multiplying 54.525 hours by the \$390 hourly rate it found appropriate, the proposed order concluded that \$21,264.00 was the proper amount of fees.

The proposed order did not explicitly state how many hours of entries did not contain time incurred on the UTPA claim, but more than 600 hours had been requested.

The judge filed the proposed order as written on December 2, 2016. (R. pp. 1-23)

Appellants' motion under Rule 59 was filed December 20, 2017. (R. pp. 1884-98). It alleged numerous substantive errors in the above order. Regarding fees, Appellants maintained North Carolina law does not allow segregation of fees among claims that arose from the same facts, such as the claims here. Procedurally, Appellants sought clarification, in their motion and later, on the initial order's basis for the amount of the fee award. (R. pp. 1888-89, Mem. pp. 5-6); (R. pp. 2043, 2045, Reply in Supp. of rule 59 Mot. 5, 7). Appellants requested to see the list of entries that had been determined to contain potentially compensable work, and/or of entries that had been determined not to include such work.

Appellants' simultaneous motion for a supplemental fee award for counsels' work after July 21, seeking compensation for 167.4 hours by Mr. Moskos and 77.2 hours by Mr. Fudenberg (R. p. 1992), was argued in the same memorandum, which suggested the Court wait until it rules on CAC's outstanding motion for a set-off, and then consider all work since July 20. (R. pp. 1894, 1896, Mem. 11, 13). As it appeared to Appellants that Mr. Fudenberg's previous 56.1-hour request had not been included in the award of 54.525 hours, they also requested an award for Mr. Fudenberg's time through July 20.

CAC sent a proposed order to the Court and opposing counsel by email and post on January 13. (R. pp. 1997-2016). It did the following. (1) It denied Appellants' requests to reconsider rulings regarding punitive damages, election of remedies, and offer of judgment interest. (2) It corrected the prejudgment interest analysis as Appellants had requested, to allow interest to accrue until entry of judgment. (3) It stated that the prior order's fee award had included Mr. Fudenberg's

56.1 hours from April 22 through July 20. (4) It awarded an additional \$10,140 in fees for the work of Appellants' two counsel from July 21 to December 14, 2016, out of a requested \$74,295, reduced on grounds that much the work related to claims other than the UTPA claim, some of the work was impermissible, and that no fees would be awarded for work after September 13. On this last point, it reasoned that CAC's \$81,069 settlement offer on September 14 meant there was no longer an unwarranted refusal to fully resolve the matter.

CAC resent the same order to the Court and opposing counsel by email and post on January 23. The Judge's clerk then emailed on January 26, stating the Judge "has decided to deny plaintiff's motion to reconsider" and directing CAC to draft an order. (R. p. 2029). It provided no further substantive guidance.

Appellants' February 7 Reply was filed after the January 26 email stating the Court has decided to deny the motion and a month before the March 16 filing of the order. (2039-2047). The Reply contested the proposed holdings. It also requested, if the prior order had included Mr. Fudenberg's 56.1-hour July submission, that the new order clarify how many of the 54.525 compensated hours were for Mr. Moskos' work and how many for Mr. Fudenberg's. (R. p. 2042).

CAC's proposed order of January 13 and 23 was entered as the order of the Court on March 16, 2017. (R. pp. 24-29). It did not address Appellants' requests for information about the 218-hour analysis, stating, "The remainder of the motion is denied without further discussion." (R. p. 25).

On March 30, 2017, Appellants served a motion for \$55,614 in supplemental attorney fees for work undertaken from December 2016 through March 2017 (R. pp. 2058-82), followed April 11 by a Notice of Appeal of the two above orders. (R. pp. 2083-86). In so doing, they understood they had negated any possible claim on remand that they had waived those fees by waiting too

long to request them, and had effectively stayed the lower court proceedings so the motion would not be argued nor decided until a possible remand. (R. pp. 2094).

On April 20, CAC approached Appellants with a settlement offer of \$150,000. The parties then engaged in further settlement discussions through June 27. (R. pp. 2106-33). The highest offer by CAC was \$290,212.07 on May 16. (R. p. 2117).

On June 2, the judge's clerk emailed stating the judge wished to deny that final motion. (R. p. 2087). The email asked CAC to draft the order, but provided no further substantive guidance.

CAC sent a proposed order (R. pp. 2088-92) that "incorporate[d] and confirm[ed]" the prior order's holding there would be no fees for work after September 14. (R. p. 2090). It declared the Court "perplexed" as to why this motion was filed, given the prior order's ruling that no fees would accrue after September 14. (R. p. 2090, 1st Prop. Ord., p. 2). It stated, "these repeated fee motions for attorney fees illustrate that Plaintiff's counsel's primary incentive here is attorney compensation rather than recovery for their client." (*Id.*). It additionally held the Judge possessed, and was exercising, discretion to cease accrual of fees after September 14, and that North Carolina law did not allow post-verdict fees except to "protect the judgment."

Appellants' memorandum of law in opposition (R. p. 2093-2148) stated that Appellants had not expected the lower court to rule on their motion unless and until the appellate court remanded. (R. p. 2094, Mem., p. 2). It stated the motion had been filed to void any argument, on possible remand, that Appellants had waited too long to file for these fees. (*Id.*). It questioned the lower court's jurisdiction to issue the proposed order, citing Rules 205 and 241(a), SCACR. Were the Judge to nevertheless rule on the merits, it argued, the proposed new grounds to terminate the accumulation of fees were erroneous as matters of law, and incorporating the previous ruling was error for the same reasons Appellants maintained the previous ruling erred. It also argued CAC's

subsequent \$290,212.07 offer indicated the earlier \$81,069 offer was not reasonable. Were the Judge to rule on the merits, it requested additional fees of \$20,943 for Mr. Fudenberg's work between March 30 and June 28, and \$13,299 for Mr. Moskos'. It also objected to the characterization of Appellants' counsels' motives.

Appellant's opposition was served June 28. CAC wrote to the Court on July 25, stating it had not known that Appellants did not seek a ruling from the lower court while the matter was on appeal, and that it had no objection to the court waiting to rule until the case returned from the appellate court. (R. p. 2149). Appellants served a motion to the appellate court on August 4, asking that the appeal be held in abeyance until the lower court ruled. On August 7, CAC submitted a second proposed order to the lower court. (R. pp. 2150-55). The revised proposed order did not address the jurisdictional issues Appellants had raised. It was identical to the first draft except for a footnote, which stated that continuing efforts to settle have no bearing on the earlier decision. (*Id.*). This order was filed by the trial judge on August 14. (R. pp. 30-34).

Appellants filed a second notice of appeal on September 5, referencing this final order.

The total in dispute as of March 13, 2017 is \$1,379,655.71.

STATEMENT OF FACTS

On March 11, 2010, Randall Threatt, then-General Manager of Respondent Columbia Automotive Company, LLC ("CAC"), received a note stating that Edward Charles Ecklund's "wife called and wants you to call him about the car they got. She said it was 2 cars welded together and it's not safe. She said that they are going to call their lawyer." (R. p. 1034, Ex. 70, p. 1). It continued, "partly welded/glued[,] Back end[,] can't be repaired." (R. p. 1035, Ex. 70, p. 2).

Mr. Ecklund also called. (R. p. 131, lines 6-12). The problem was with the 2003 Honda Civic that CAC had sold him on August 2, 2008, as "100 percent Honda certified," with "all of the

original parts,” following a 159-point inspection. (R. p. 954, Ex. 12 (Window Sticker); p. 955, Ex. 13 (“certified” written on line 6); p. 957, Ex. 15 (Certified Pre-Owned Purchase Document); p. 1024, Ex. 66 (Invoice showing “159-point check”); p. 133, lines 3-21 (100% Honda-Certified); p. 107, lines 3-19; p. 393, lines 17-21 (159-point check)). It was actually two wrecked cars cut in half. The undamaged front half of one Civic had been welded to the undamaged back half of another.

“I told him that the vehicle is not safe to drive and I told him why.” (R. p. 131, lines 23-24) (*See also* R. p. 121, line 4–page 127, line 22 (detailing problems)).

As explained at trial, a driver of the front half of the car had swerved to avoid a deer and hit a tree, causing severe damage. (R. p. 299, lines 3-5 (testimony of Nationwide Insurance Company)). The repair estimate was \$10,388.10. (*Id.*, lines 24-25). Nationwide treated it as a total loss. (R. p. 300, lines 2-3). Somewhere, the front half of this car was poorly welded to the back half of another Civic, after which it was sold to Respondent, who Certified it and sold it to Mr. Ecklund.

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

(R. p. 132, lines 7-11 (Ecklund) (emphasis added)).

When buying the car, CAC had told him the car was “safe and reliable,” which he had told CAC was required, as he was starting active duty in the Reserve in Huntsville, Alabama, and would be driving back and forth to Fort Gordon, Georgia, where his wife was on active reserve. (R. p. 105, line 21-p.106, line 1; p. 106, lines 4-6, 11-15; p. 115, lines 17-23).

He learned of the damage after he was backed into in a parking lot. The vehicle was lifted on a rack. (R. p. 120, line 23-p. 121, line 2). From underneath, extensive damage was obvious. (R. p. 120, line 22 –p.130, line 15).

Mr. Threatt said the car had to come “back to the dealership to take a look at it” (R. p. 131, lines 13-20), and arranged for a truck to pick it up (R. p. 131, line 24-p. 132, line 4). When Mr. Ecklund returned to Columbia, Mr. Threatt repeatedly refused to accept the Frankencar back in exchange for a full refund. (R. p. 133, lines 3-21). Over the course of at least two days (R. p. 137, lines 3-18), they wore him down (R. p. 134, lines 20-23), until they traded him out of the 2003 Civic, which then had 77,767 miles (R. p. 988, Ex. 43), into a 2000 Accord with 126,403 miles (R. p. 136, lines 14-18).

According to CAC’s managers, the inspection for which Mr. Threatt said the car had to be brought back to the Dealership never happened. (R. p. 374, line 20-page 375, line 20; p. 377, lines 8-18 (Then-Used Car Manager Brent Ferrell); p. 438, lines 19-25 (Threatt)). Instead CAC sent the car to the ADESA auto auction in Charlotte, North Carolina, setting a floor price of \$7,200, and stating the vehicle was for the “red light” auction—but again failing to disclose the dangerous condition of the Civic. There are at least three serious problems with this:

* The auction rules require the seller to disclose unibody and frame damage.⁴ (R. p. 1004, Ex. 52, p. 9 (Arbitration Matrix,⁵ p. 1)). This vehicle had serious unibody damage. (R. p. 477, line 7-p. 514, line 8). The auction rules require disclosure of damage to pillars (R. p. 1005, Arbitration Matrix p. 2). Pillars of this car had been cut clear through. (R. p. 484, line 2-p. 512, line 4). The rules require disclosure when a vehicle has been reconstructed. (R. p. 1004, Arbitration Matrix p.

⁴ When the seller is present, the seller stands next to the auctioneer who makes the required disclosures while the car is on the block. (R. p. 161, lines 10-21, Guyer 28:10-21). When the seller will not be present, the seller is to make the required disclosures to ADESA. It may do so at the same time it informs the auction of the vehicle it will send and the required minimum bid. (R. p. 162, line 22-p. 163 line 19; p. 164, lines 2-11; *id.*, line 17-p. 165, line 11; p. 165, line 17-p. 166, line 6). It is undisputed that CAC did not make the disclosures.

⁵ It is called an “Arbitration Matrix;” the rules provide both substantive protections in requiring disclosures, and procedural protections: ADESA will “arbitrate” disputes if requested within a certain number of days following the sale. The number of days varies depending on the substantive issue. Thus a “matrix” showing what must be disclosed and how many days one has to invoke ADESA’s dispute-resolution services.

1) (requiring disclosure of “Salvage or Reconstructed/Theft Recovery/Stolen Vehicles (including history)”). This vehicle was reconstructed. (R. p. 382, lines 15-20). The “red light” means the seller is not guaranteeing anything mechanical with the car. (R. p. 169, line 7-p. 170, line 1 (Testimony of ADESA 30(b)(6) representative Joseph Richard Guyer)). It does not allow one to decline to mention wreck damage. (*Id.*).⁶

* North Carolina common law requires that one with superior knowledge, selling a vehicle, disclose faults the prospective purchaser would not be able to reasonably discover before the sale. (R. p. 716, lines 1-8 (comment of CAC’s counsel)). Used Car Manager Brent Ferrell, who sent the vehicle to the auction, declared that he had “superior knowledge” about the vehicle compared to the bidders at the auction. (R. p. 350, line 25-p. 351, line 3).⁷

* North Carolina statutory law requires disclosure. A non-waivable Damage Disclosure form is required any time a used vehicle is sold. (R. pp. 936-37, Ex. 1).⁸ The entire form is one sheet of paper. The front of the sheet asks five questions. The back provides definitions. The first question is,

1. Has this vehicle been damaged by collision or other occurrence to the extent that damages exceed 25 % of its value at the time of the collision or other occurrence?

The box for Answer “No” is checked.

The final question asks, “5. Has this vehicle been reconstructed?* (ANY year).”

⁶ Green light is “The best guaranty that a seller could offer.” (R. p. 167, lines 8-17 (testimony of ADESA’s representative)). It means, “there is not a single mechanical defect that would cost in excess of \$500 to repair.” (*Id.*).

⁷ He also knows that customers want to know if a car has been wrecked and rebuilt (R. p. 358, lines 7-11), and he intends for the buyers to believe and rely on the statements he makes about the vehicles he is selling (R. p. 352, lines 8-11).

⁸ Where, as here, the seller is not present at the auction, the form is completed by an ADESA representative, via a power of attorney, based on the information the seller has provided. (R. p. 146, line 20-p. 147, line 16; p. 175, line 1-p. 176, line 16, Guyer 13:20-14:16; 44:1-45:16).

(emphasis in original).⁹ Question 5, too, is answered, “No.”

The form further informs, in all capitals, boldfaced,

STATE LAW REQUIRES THAT EVERY SELLER DISCLOSE TO THE BUYER IF HE KNOWS OR REASONABLY SHOULD KNOW, THE INFORMATION LISTED BELOW. FAILURE TO DO SO WILL RESULT IN CIVIL LIABILITY.

CAC’s explanation for violating the auction rules was that they “didn’t read ’em.”

This is surprising, to say the least. CAC is a major franchise dealership (R. p. 900, line 22-p. 901, line 3); in 2010, it was selling upwards of 2,000 vehicles a year (R. p. 430, lines 7-11; p. 360, lines 10-11). Its Used Car Manager at the time, Brent Ferrell, testified it was selling 100 vehicles a year at that auction. (R. p. 360, lines 12-23). It was also buying from the auction. (R. p. 362, lines 17-23; p. 378, lines 14-15). This was the only auction CAC was dealing with. (R. p. 378, lines 14-15). Mr. Ferrell had been going there on CAC’s behalf for three years, more or less weekly. (R. p. 355, lines 22-25; p. 362, line 17-p. 363, line 1). “Q. And when you first sign up, they give you the rules, right? They give you some rules? A. Probably. I mean, I didn’t read ’em, but.” (R. p. 356, lines 22-25).

ADESA does not let dealerships just come in and sell. To buy or sell a car at the auction, a dealer must be “[r]egistered with the company.” (R. p. 144, line 20) (Testimony of ADESA representative). It must fill out a power of attorney. (R. p. 146, lines 20-22; p. 147, lines 19-20; R. p. 991, Ex. 45G/46T¹⁰). It must sign an indemnity/hold-harmless agreement. (R. p. 148, lines 2-22; p. 992, Ex. 46G/47T). It must verify it received the terms and conditions and policies from

⁹ The asterisk leads to the definitions on the reverse side that state (R. p. 937, Ex. 1, p. 2) (emphasis in original),

Reconstructed Vehicle—A motor vehicle of a type required to be registered hereunder that has been materially altered from original construction due to removal, addition or substitution of new or used essential parts; and includes glider kits and custom assembled vehicles.

¹⁰ Exhibit numbers ending in “G” reference the exhibit number in the Guyer deposition; Exhibit numbers ending in “T” reference the Trial Exhibit number.

the auction.¹¹ (R. p. 149, line 21–p. 150, line 11; p. 993, Ex. 48G/50T).¹²

These rules “are designed to protect both buyer and seller and ensure ethical practices.” (R. p. 212, lines 23-24 (testimony of ADESA representative); R. p. 996, Ex. 50G/52T, p. 1 (similar)). ADESA’s goal is “to hold an honest transaction for both parties.” (R. p. 193, lines 10-14).¹³ “[A]ll rules are always available on the dealer registration counter at the sale, at the auction.” (R. p. 214, lines 16-18) (emphasis added).

On the day CAC offered the Civic for sale at the auction, Appellant Roger Whitley was at the auction on behalf of himself and his partner, Appellant Daniel O’Shields. Roger and Daniel are elderly gentlemen who run a small used-car company in Shelby, North Carolina, a town of approximately 20,000. (R. p. 584, line 11; p. 588, lines 8-16; *id.*, lines 17-19). Roger was 76 years old at the time of trial. (R. p. 583, line 10). He had had a career in law enforcement, including 27 years as the Director of Criminal Justice at Gaston College, in charge of training and supervising police officer recruits. (R. p. 584, lines 13-18). Dan “lived a similar background.” (R. p. 588, lines 8-16). The goal of the business is not so much to make money as to give the two elderly gentlemen something to do that makes them feel useful, buying cars for their friends and people at church.¹⁴ They looked for good, small cars. (R. p. 589, lines 7-13; p. 595, lines 23-25).

¹¹ The Auction terms and conditions state, “By participating as purchaser or seller in any sale at the Auction, Dealer represents that it is . . . subject to the Terms and Conditions contained herein and other applicable auction rules . . . as a condition of doing business at the auction.” (R. p. 994, Ex. 49G/51T, under “2. Dealer eligibility and applicable rules”). (*See also* R. p. 150, line 16–p. 151, line 3 (Mr. Guyer reading from that rule)).

¹² General Manager Threatt signed all these on CAC’s behalf. (R. p. 147, lines 19-20; p. 991, Ex. 45G/46T; p. 148, lines 2-22; p. 992, Ex. 46G/47T; p. 150, line 21–p. 151 line 11; p. 993, Ex. 48G/50T).

¹³ “[B]y being a member of the NAAA, we have a code of ethics that we agree on fair practices for buyers and sellers and our job, as the auction, is to be a neutral party in the middle to hold an honest transaction for both parties.” (R. p. 193, lines 10-14).

¹⁴ “I bought cars for my friends. I bought cars for people at church.” (R. p. 587, lines 18-19). “I don’t make my living doing this.” (R. p. 651, line 14). “I really wasn’t about making money so much as I was maybe helping people. And I really — I made money, but that was not the object.” (R. p. 587, line 24–p. 588, line 2; *see also* R. p. 585, lines 15-22 (he enjoyed police work for similar reasons)).

Roger had gone often to that auction (R. p. 589, lines 14-20), over five years (R. p. 594, lines 10-12), buying cars under the green light, and “many under the red light” (R. p. 591, lines 18-23). “[T]here’s always been the same kind of announcements” making the required disclosures. (R. p. 594, lines 2-3). There might be something wrong with a red light car, but the ones they would bid on would be fixable. (R. p. 592, line 18-p. 593, line 18). “There are a lot of good cars that come out of there.” (R. p. 592, lines 14-17).

He never buys from certain dealers, but he “always trusted the franchise dealers.” (R. p. 591, line 4).

On this day, they were seeking a small car for a certain 16-year old girl. (R. p. 595, line 25-p. 596, line 2). She had asked for a car she could drive to school. (*Id.*). Roger noticed a 2003 Honda Civic with an obviously damaged door in the red light sale. (R. p. 597, lines 8-25). He listened for any disclosures about that car (*id.*, lines 1-2), but there were none. CAC had set a minimum price of \$7,200 for the vehicle. (R. p. 598, line 10-p. 599, line 15). The bidding did not reach that level. (*Id.*). Roger went to the sales office and, after some back-and-forth with CAC, a price of \$5,200 was set. (R. p. 598, line 17-p. 600, line 21). During these negotiations, Roger found the Civic on the lot, squeezed in with other cars. (R. p. 600, lines 9-11). He looked the car over, took it for a test drive. (*Id.*, lines 11-12). It seemed to run well. (*Id.*, lines 12-13). He did not raise it in the air to look underneath, as there are no lifts at the auction (R. p. 394, lines 13-16 (Ferrell)), no way to lift a car up to look underneath (R. p. 201, line 25-p. 202, line 9 (Guyer)). CAC’s corporate representative (R. p. 553, line 8-p. 554, line 2) and Mr. Ferrell (R. p. 391, lines 12-18) each testified that Roger had done nothing wrong in the way he went about purchasing the vehicle. (*Cf.* R. p. 443, line 23-p. 444, line 3 (Threatt) (similar)). The damage disclosure form was clean. (R. pp. 936-37, Ex. 1; p. 604, line 15-p. 605, line 1). The deal was consummated.

Roger returned with a truck the next day to transport the Civic, but the car was absent. (R. p. 607, line 6-p. 608, line 8). It had been returned to CAC. (*Id.*). It arrived at O&W's lot several days later. (*Id.*).

Appellants sent it to a garage to replace the door and fix a few items. (R. p. 609, lines 4-24; R. p. 638, lines 23-25). A timing belt and water pump were to be fixed later (R. p. 614, lines 7-12); the agreement was the girl's family would pay for these parts, and Roger and Dan would pay for the labor (*id.*). The family brought in the car soon afterwards for that work. (*Id.*, lines 15-17). The garage raised the car on the rack, and saw major damage. (*Id.*, lines 18-21, p. 621, lines 11-16). "It was a chopped-up mess underneath." (R. p. 621, lines 13-16).

Roger was back at the auction when they discovered the damage. (R. p. 614, lines 19-23). The garage called him. (*Id.*). "It was a sick feeling. A very sick feeling." (*Id.*). He told them to tell the girl's family and return their money. (*Id.*, line 24-p. 615, line 9). Roger and Dan also refunded the registration fees, approximately \$345, that the family had paid. (R. p. 619, lines 4-9).

Roger went to ADESA's sales office to complain and invoke the Auction's dispute-resolution "arbitration" period. (R. p. 615, line 14-p. 626, line 4). It was too late: The time had run while they waited for CAC to send the car. (R. p. 616, lines 13-19). He went upstairs and spoke with another ADESA representative, but all he could get was the name and telephone number for CAC's used car manager, Mr. Ferrell. (R. p. 616, line 21-p. 617, line 11).

He waited a day or two to cool down, then called CAC and, like Mr. Ecklund before him, demanded CAC give back his money and take back the car. (R. p. 617, line 13-p. 618, line 19). Mr. Ferrell took down all his information, including the VIN, and promised to get back to him. (*Id.*).

That call was in September of 2010. CAC did not respond.

At trial, Roger testified the vehicle was sitting in his back yard, was good for nothing except being disassembled into parts, and estimated a junkyard would pay \$500 for it. (R. p. 620, line 23-p. 623, line 3). Adding all their costs, and subtracting the \$500, he estimated total damages were \$6,645.00. (R. p. 623, line 25-p. 624, line 4). CAC attempted to elicit testimony the car was worth \$2,000 in its wrecked state (R. p. 646, line 17-p. 648, line 24); but presented no evidence the vehicle was worth anything near CAC's reservation price or its \$5,200 sales price to anyone who knew it was clipped.

Extensive evidence presented to the jury showed the Civic was dangerous and that CAC's senior managers knew it, but did not care.

Appellants' expert, Brian Allen, testified extensively to safety problems. (R. p. 477, line 5-p. 517, line 16). "[B]ased on a reasonable degree of certainty in [his] field of expertise," (R. p. 514, lines 1-4), he concluded, "this vehicle shouldn't be driven. Shouldn't be allowed on the road" (R. p. 513, lines 16-17). The reasons were numerous:

First, to clip two half-cars together is against the manufacturer's recommendations. (R. p. 495, lines 3-5). That is important because the manufacturer did the research and engineering. (R. p. 482, lines 18-20). If a vehicle is repaired against specifications, "it's not gonna respond the way it was designed to respond in a subsequent accident." (R. p. 505, lines 18-23).

Second, the work here was shoddy. Mr. Allen identified numerous welds as poorly done. "[T]hey want their spot welds two inches apart [so] if it gets hit and it collapses between those welds it's a crumple zone. It absorbs energy. Well when one's welded solid like that its not gonna collapse the way it's designed to collapse." (R. p. 503, lines 19-23). Another weld was "just God awful to tell you the truth." (R. p. 502, lines 23-24). "[A]lmost a half to three quarters inch gap between on this structure panel here that's not even welded in this one." (R. p. 489, lines 10-11).

“[Y]ou can see where this metal is ripped apart here, and right here, it’s not welded back.” (R. p. 491, lines 7-9). “It’s literally ripped apart.” (*Id.*, line 22). “It’s extremely poor quality work. You see holes in the welds right here.” (R. p. 497, lines 20-21).¹⁵

He identified additional problems (e.g., R. p. 512, lines 9-14¹⁶).

CAC’s expert had also inspected the vehicle (R. p. 519, line 10-p. 520, line 4), yet CAC called no one to challenge Mr. Allen’s conclusions.

Evidence showed CAC’s senior managers knew this was two half-cars put together into a dangerous vehicle. Mr. Ecklund had told them. His wife had told them. It did not require a mechanic to see this car is dangerous. CAC’s mechanics had given it a 159-point Honda-Certified Inspection. They knew.¹⁷ After all the evidence was in, CAC’s counsel admitted in closing that CAC knew “this is two cars put together.” (R. p. 772, lines 7-8).

Senior Management knew, but did not care. CAC’s past and present Senior Management—its former Used Car Manager, former General Manager, and current General Manager—all testified CAC had done nothing wrong. Mr. Ferrell testified CAC did nothing wrong in either sale, not the sale to the Ecklunds (R. p. 342, line 18-p. 343, line 11), nor the sale to Roger and Dan: “You don’t think you did anything wrong there? A. No, sir.” (R. p. 343, lines 10-11). Mr. Threatt

¹⁵ CAC repeatedly argued outside the jury’s presence that the safety of the vehicle could not be considered by the jury or Court: It “isn’t relevant” (R. p. 254, lines 5-8); (p. 255, lines 1-3) (similar); (p. 310, lines 4-6) (similar). “There’s a Bill of Sale that goes with it; the word safety isn’t in there anywhere. I’ve said that over and over.” (R. p. 470, lines 9-10). *See also* R. p. 471, lines 14-15 (“MR. MOSKOS: The damage disclosure statement and - - MR. WALKER: Where is the word safety?”).

¹⁶ E.g., “They cut your brake lines” and simply “sectioned your brake lines back together.” (R. p. 512, lines 9-14.) “[I]t’s a safety issue.” (*Id.*).

¹⁷ CAC had additional information putting it on notice it should investigate. Two Carfaxes, one from 2008 and one from 2010 each reported accident damage and recommended inspection. (R. pp. 1027, 1030, Exs. 67, p. 2, 68, p. 2; p. 372, lines 10-19; p. 423, line 18-p. 426, line 2). Had the Carfaxes not spelled it out, when a Carfax shows accident damage, it puts one on notice the vehicle needs to be inspected, and CAC knew it puts one on notice, as Mr. Threatt testified (R. p. 418, lines 22-25)—although when confronted with a Carfax CAC possessed in 2008, showing accident damage to this vehicle, he changed his mind (R. p. 423, line 18-p. 425, line 10).

similarly testified, “[W]e did nothing wrong.” (R. p. 447, lines 24-25).

Mr. Ferrell also testified that his only interest in cars is “for the metal and being able to sell it.” (R. p. 343, lines 21-23). He doesn’t think about the consequences when selling these cars. (R. p. 388, lines 5-7). He maintains CAC has no responsibility to protect the public by letting people know the kind of cars they are buying. (R. p. 391, lines 19-22).

Current General Manager Greg Nalewaja was also CAC’s 30(b)(b) representative.¹⁸ He had not called the prior Managers to ask what had happened.¹⁹ After listening to the testimony of the others, he, too, said CAC had done the right thing: “Did Midlands Honda sell this car properly in April of 2010, when it sold the car at the auction? Yes or no, did it do the right thing? A. Yes.” (R. p. 543, lines 17-20). Offered repeated opportunities to condemn the actions of his predecessors, he instead offered praise. “Randy did the right thing.” (R. p. 527, lines 4-6). They “dispose[d] of it the way they should.” (R. p. 535, lines 18-20). They handled it “the best way.” (R. p. 536, lines 6-14). “[E]xactly what we would do.” (R. p. 545, lines 19-20).²⁰

Senior Management testified that a vehicle CAC had sold as Honda-Certified PreOwned being returned as actually two half-vehicles was not sufficiently unusual to be remembered. (R. p.

¹⁸ His testimony has to be read to be believed. He bobbed and weaved throughout his initial examination by Appellant’s counsel. *See generally* R. pp. 521-554. He was suddenly clear when questioned by Defense Counsel. (R. pp. 554-563). He was the last witness called other than Appellant Roger Whitley, and had sat through the earlier testimony. (R. p. 522, line 24-p. 523, line 1). Yet he would not say that he believes the Frankencar is unsafe (R. p. 523, lines 12-18); nor that it has no value as a retail piece (*id.*, line 19-p. 525, line 9; p. 527, lines 1-4, 9-20); nor whether this car should have been sent to a salvage auction (“I can’t say”) (p. 567, line 23-p. 568, line 1); he evaded answering whether CAC should have looked to see how the damage evaded detection in its Honda Authorized Certification (R. p. 545, lines 4-12), finally concluding there was no need to do so (*id.*, lines 23-24).

¹⁹ Yet he is “the person who is responsible for handling this case,” and has been since he arrived at CAC in 2013. (R. p. 528, lines 21-24; p. 529, lines 18-20). He had not bothered to get the auction rules until they were given to him by Appellants’ counsel. (R. p. 565, lines 14-25). Nor did he change any CAC policy or procedure because of this suit. (R. p. 554, lines 14-17).

²⁰ He had been in the car business in North Carolina for twenty years, always at a franchise dealership. (R. p. 521, line 25-p. 522, line 2; p. 526, lines 13-15; p. 530, lines 7-9). The five years immediately prior to taking over at CAC were at the sister dealership in North Carolina owned by CAC’s owner. (R. p. 529, line 21-p. 530, line 1; p. 538, lines 23-25). He knows one cannot register an unsafe vehicle for use on the road in North Carolina. (R. p. 553, lines 5-7).

374, line 20-p. 375, line 20; p. 377, lines 8-18 (Ferrell); p. 427, lines 18-25 (Threatt)). Nor would it justify an inspection to learn how they missed the damage. (R. p. 374, line 20-p. 375, line 20; p. 377, lines 8-18 (Ferrell); p. 545, lines 21-24 (Nalewaja)).

Senior Management also testified it made no difference whether they knew the extent of damage, they would do the same thing either way (R. p. 437, line 24-p. 438, line 2; p. 377, lines 2-3). The sale of this car was treated exactly like any other sale. (R. p. 361, lines 4-8).

Like Mr. Threatt before him (R. p. 439, lines 21-22), Mr. Nalewaja testified that he expects the dealers who buy CAC's cars at auction to "turn around and re-sell these cars." (R. p. 538, line 6). Once they are sold at the auction, CAC "doesn't care what those people do with the cars." (R. p. 541, line 22). "We're just disposing of a vehicle." (*Id.*, line 5). Whether it will be sold to a consumer and put back on the road is "irrelevant." (*Id.*, line 9).

Closings, Jury Charges, And Verdicts—Actual Damages Phase

1. Closings. In his closing on actual damages (R. p., 739, line 7-p. 767, line 17), Appellants' counsel generally summarized the evidence; and requested the jury award \$6,645.00 (R. p. 767, lines 9-15). This amount reflected the sales price of the car, less its \$500 value at the time of the sale, the auction fee, the fees for which Appellants had reimbursed the family of the 16-year old girl, and other expenses. (R. p. 759, lines 12-19).

In CAC's closing, confronted by overwhelming evidence, counsel conceded breach of contract, arguing it was a simple mistake (R. p. 778, lines 5-6), and contended the Appellants should have discovered the unibody damage before buying the vehicle (R. p. 776, lines 3-6). He suggested Roger and Daniel were the deceptive ones ("The first thing I want to touch on is just who sneaked in to deceive") (R. p. 768, lines 13-14), because unlike with the Ecklunds, there was no documentary evidence that Appellants had called CAC to complain (R. p. 769, line 21-p. 770,

line 4). Therefore, he argued, Appellants had not called, but instead had waited to sue because they “really wanted to wait until everybody forgot everything.” (R. p. 770, lines 8-9).

Counsel then vouched for his own credibility to the jury, stating, “I don’t mislead people.” (R. p. 774, line 7). He set forth that he was unlike other trial lawyers, who he suggested were dishonest, stating, “I just tell the truth,” “I do it different [than other trial attorneys].” (*Id.*, lines 14-5).

He ended by stressing the jury could not find for Appellants on any claim except the contract action if “they didn’t do a careful inspection.” (R. p. 782, lines 9-16).

2. Jury Charges. The trial judge charged the jury on breach of contract, negligent misrepresentation, fraud, and unfair trade practices. (R. p. 823, line 7-p. 846, line 15).²¹ The fraud charge (R. p. 836, line 12-p. 838, line 8) instructed the jury it could find for Appellants only if, among other requirements, it found the false representation or concealment “was reasonably calculated to deceive” (R. p. 836, line 24); and was “with the intent to deceive and with the intent to be acted upon” (R. p. 837, lines 5-6), and that Appellants’ “reliance upon the false representation or concealment was reasonable” (*Id.*, lines 9-10). The UTPA charge similarly instructed that Appellants must prove “they actually relied” on the misrepresentation and “the reliance was reasonable.” (R. p. 842, lines 5-8).

3. Verdicts. The jury returned verdicts on each cause of action for \$6,645, the amount requested by Appellants. (R. pp. 43-44, Verdict pp. 1-2). They also answered in favor of Appellants’ position special interrogatories, requested by CAC (R. p. 732, line 21-p. 733, line 5), by stating that the North Carolina Damage Disclosure Form was provided to Appellants at the time of the transaction, and that none of their verdicts were based only on that form (R. p. 45, Verdict

²¹ On grounds that North Carolina’s economic loss doctrine precluded such a charge, he did not charge on the cause of action for simple negligence. (R. p. 709, line 11-p. 713, line 25).

p. 3).

Punitive Damages Phase

Over Appellants' objection (R. p. 579, line 6-p. 580, line 10), CAC successfully argued that North Carolina law, rather than South Carolina's, controls punitive damages issues in this case. On CAC's motion (R. p. 265, lines 11-24), punitive damage issues were tried separately. The only testimony in the punitive damages phase was by Mr. Nalewaja. Testifying as CAC's corporate representative (R. p. 884, lines 16-18), he stated that CAC is not concerned with the consequences when it sells a car at auction (R. p. 885, lines 12-16). He reiterated that in selling the cars, CAC owed no duty to anybody (R. p. 885, lines 17-20).

He testified that CAC had profited from the vehicle when all was done. (R. p. 896, lines 18-21).²² Although he was responsible for handling CAC's response to the suit, Mr. Nalewaja had not previously learned who sent the car to the auction; he learned at trial. (R. p. 890, line 17-p. 891, line 9).

No judgment against a car dealership in South Carolina has been sufficiently large that he would have heard of it. (R. p. 898, line 22-p. 899, line 15). Nor has any award out of South Carolina been large enough to be talked about at the retreats he goes to. (*Id.*).

He testified the financial statement provided to Honda for calendar year 2015 showed CAC had revenues of \$2,381,888 and a net worth of \$10,969,318. (R. p. 900, line 13-p. 903, line 9; R. p. 1061, Ex. 96).

In closing, Appellants' counsel talked about the purposes of punitive damages as stated in

²² This included the price CAC paid for it, the amount obtained from Mr. Ecklund, the value of the older vehicle CAC swapped Mr. Ecklund into, and the funds received from the auction. (R. p. 891, line 23-p. 896, line 21). "So, at the end of the day, this rebuilt, wrecked, unsafe, dangerous car made a Four hundred and twenty-nine dollar profit for Midland, right? A. Yes." (R. p. 896, lines 18-21).

North Carolina law and the evidence the jury could consider. He told the jury, “we are not asking you to put them out of business. That is not the purpose of today. We are trying to change conduct. We are trying to deter conduct.” (R. p. 922, lines 22-24). Referencing the ten-million-plus dollar net worth, he asked them to consider “Fifteen percent to twenty-five percent. That’s one point five to two point seven five million dollars.” (*Id.*, line 25-p. 923, line 4).

CAC’s counsel emphasized the clear and convincing evidence standard. (R. p. 924, lines 1-23; p. 927, lines 7-14). He declined to suggest the amount of any appropriate award. (R. p. 927, lines 16-18).

He then urged the jury to put their trust in Mr. Nalewaja. (R. p. 925, lines 4-7; p. 926, line 24-p. 927, line 2; p. 927, lines 17-21).²³

The jury was charged (R. p. 928, line 3-p. 929, line 23) per CAC’s proposed instructions (R. p. 930, lines 19-25). It returned a verdict for \$2,381,888, within Appellants’ requested range. (R. p. 47, Verdict p. 5).

ARGUMENT

I. THE LOWER COURT ERRED IN REDUCING PUNITIVE DAMAGES TO \$46,515.

Recognizing that the test is whether an award is so “grossly excessive” as to violate due process (R. p. 6); and that “In deference to the jury, the court can do no more than determine the upper limit” consistent with the Constitution (R. p. 8), the order on post-trial motions nevertheless erred in holding that “upper limit” to be \$46,515 (R. pp. 8, 9).

²³ He urged the jury to believe “we’ve done what we’re supposed to do to try to remedy that problem.” (R. p. 925, lines 8-9). He presented Mr. Nalewaja as the solution. “You’ve seen Mr. Nalewaja. He . . . sat here today and told you we make sure our used car people know the rules. That’s what we’re supposed to do.” (*Id.*, lines 4-7). “And we’ve got new leadership. Mr. Nalewaja’s been there awhile.” (R. p. 926, lines 24-25). But the jury was entitled to see Mr. Nalewaja as part of the problem, as discussed on pages 19-20 and 22 above.

A. The Standard of Review Is *De Novo*.

“Whether a punitive damages award is unconstitutionally excessive is a question of law reviewed *de novo* on appeal.” *Everhart v. O’Charley’s, Inc.*, 200 N.C. App. 142, 157, 683 S.E.2d 728, 740 (N.C. Ct. App. 2009). *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009).

“Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Lacey v. Kirk*, 238 N.C. App. 376, 382, 767 S.E.2d 632, 638 (N.C. Ct. App. 2014) (emphasis added) (internal quotation marks omitted).

B. Argument

There is no constitutional problem with the jury’s award. If there were, a reduction to the South Carolina statutory cap of two million dollars, SC Code Section 15-32-530(B), would cure it. North Carolina statutory law limits awards in cases like the present to \$250,000 per plaintiff, far below the constitutional maximum. Awards at the relevant statutory cap would be permissible under the Constitution.

The jury’s verdict of \$2,381,888 was less than 25% (21.71%) of CAC’s net worth. Two awards of \$250,000 each, totaling \$500,000, would still be less than 5% (4.56%).²⁴ The order erroneously reduced the verdict to one award of \$46,515, less than one-half of one percent of CAC’s net worth (0.42%). This does not reflect the outrageousness of CAC actions nor provide sufficient deterrence.

1. North Carolina Statutory Law

The North Carolina legislature enacted a comprehensive statutory system governing

²⁴ The caption in every filing in this case, both by the parties and by the Court, was “Plaintiffs,” plural, until CAC took it upon itself to change the caption in the order on post-trial motions. It did so without even a motion to realign the parties, let alone a hearing on the matter. The proper designation is plural.

punitive damages in 1995. Chapter 1D, entitled “Punitive Damages,” provides defendants significant substantive and procedural protections. It allows defendants to demand a bifurcated trial. N.C.G.S. 1D-30. It sets a high substantive bar for an award. Negligence does not suffice. The wrongfulness must rise to the level of fraud, malice, or willful or wanton conduct. N.C.G.S. 1D-15(a). That wrongful intent must be shown by clear and convincing evidence. *Id.*, ¶ (b). Nor does *respondeat superior* suffice for actions of low-level employees. Corporations are liable only if “officers, directors, or managers participated in or condoned the conduct.” *Id.*, ¶ (c).

Further constraints regard the amount of any award. The statutes restrict the evidence the jury may consider in that regard, and require the jury to be instructed that the purpose of any award is “to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.” 1D-35(1); 1D-1.

The Chapter then limits awards to the greater of \$250,000 or three times actual damages, per plaintiff. 1D-25, “Limitation of amount of recovery,” ¶ (b) (limiting the awards); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1, 20 (N.C. 2004) (“[S]ection 1D-25(b) applies to the individual jury verdict of each plaintiff”); *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 752 S.E.2d 634, 653 (N.C. Ct. App. 2013) (limit is per plaintiff). If a jury returns an award above the statutory cap, the trial court “shall” enter judgment at the amount of the cap. 1D-25(b).²⁵

2. The Jury’s Application of North Carolina’s Statutorily-Admissible Evidence

Per charges CAC proposed, the jury was instructed that in making its award it could

²⁵ § 1D-25(b) provides:

(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.

consider only: [1] “The reprehensibility of the defendant’s motives and conduct,” [2] “A likelihood at the relevant time of serious harm to the plaintiff or others similarly situated,” [3] “The degree of the defendant’s awareness of the probable consequences of its conduct,” [4] “The duration of the defendant’s conduct,” [5] “The actual damages suffered by the plaintiff,” [6] “Any concealment by the defendant of the facts or consequences of its conduct,” [7] “The existence and frequency of any similar past conduct by the defendant,” [8] “Whether the defendant profited by the conduct,” and [9] “The defendant’s ability to pay punitive damages, as evidenced by his revenue or its revenues or net worth.” (R. p. 928, line 23-p. 929, line 17). The jury was twice instructed, once just before and once just after the above, that “any amount you award must bear a rational relationship to the sum reasonably needed to punish the defendant for any egregiously wrongful acts committed against the plaintiffs, or plaintiff; and to deter the defendant and others from committing similar wrongful acts.” (R. p. 928, lines 17-22; R. p. 929, lines 18-23 (almost identical)).

The jury properly returned a verdict meant to punish CAC and deter similar wrongful acts. Selling a rolling death-trap once without disclosure is extremely reprehensible. Selling it twice, more so. The likelihood of serious harm was substantial. The consequences were obvious even to a layperson like Mr. Ecklund. CAC was completely aware the car was unsafe, but the only consequence that mattered to CAC was that CAC made money. The conduct lasted more than two years from CAC’s affixing a “Certified” label to the windshield to its refusal to reimburse Mr. Ecklund, through its sending the car to the auction without disclosure, and its negotiations in bad faith with Appellants, and another two years as it hoped Appellants would simply go away. CAC twice concealed the true nature of the vehicle. Past conduct includes selling the exact same vehicle without disclosure and shipping wrecked vehicles to the auction without disclosure, as a matter of

course. CAC profited from the conduct. While the actual damages were low, CAC's net worth was almost eleven million dollars; the jury's entire verdict was less than 25% of that, and awards at the statutory cap would equal 2.3% each.

The jury was also instructed that its award should bear a reasonable relationship to the amount reasonably needed to punish and deter. Since no one at CAC even considered it notable that it sold a clipped car as a Honda-Certified PreOwned car, nor thought it worthwhile to ask how the mechanic "missed" the extensive damage, the current General Manager repeatedly praised how this car was sold, and all Managers denied any wrongdoing and any responsibility to or concern for the public in selling dangerous cars, the jury was amply justified in determining an extraordinary award was proper.

The order's analysis errs in stating otherwise. It contains additional errors too numerous to list. Some are described in the attached note,²⁶ but one error alone makes the order's analysis irreparably flawed: it states (R. p. 5), "[I]t would have been difficult for Defendant to foresee serious harm." How hard is it to foresee serious harm in selling this Frankencar without disclosure?

3. North Carolina Case Law

North Carolina courts routinely reduce verdicts above the statutory cap to the statutorily-mandated amount, and just as routinely find awards so reduced to be permissible under the statutes and state and federal constitutional law. *E.g.*, *Mace v. Pyatt*, 203 N.C. App. 245, 254, 691 S.E.2d 81 (N.C. Ct. App. 2010) (punitive damages award properly reduced by trial court to the statutory

²⁶ (1) The order ignores CAC's violations of the law. It reads as if the only error was not following auction rules. (2) The assertion (R. p. 4) of a supposed "good-faith basis" for belief that CAC had no duty to disclose is negated by the jury's finding of fraud. (3) The statement, *id.*, that there is no evidence that "CAC made a false representation directly to Plaintiff, or was even aware" of the North Carolina damage disclosure form omits that its agent by power of attorney did make a false representation, and that it is not believable that a major dealer buying and selling 100 cars a year in North Carolina is unaware of the legally-required form.

cap of \$250,000; actual damage award vacated by appellate court and remanded for new trial on actual damages only; however, “as plaintiff has conclusively shown that she has suffered at least nominal damages,” the punitive damage award stands) (conversion of trailer and its contents); *Lacey v. Kirk*, 238 N.C. App. 376, 394-95, 767 S.E.2d 632 (N.C. Ct. App. 2014) (punitive damage award properly reduced by the trial judge to the statutory cap of \$250,000 for each Plaintiff; compensatory damage award of \$6,569.02, slightly less than in the present case) (executrix refused to disburse and defamed beneficiaries of will); *id.* at 396 (citing *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82 (2002), *aff’d*, 358 N.C. 160, 594 S.E.2d 1 (2004) as “upholding awards involving ratios of punitive damages to compensatory damages of 30 to 1 and 23 to 1 and describing these ratios as ‘relatively low’”).

[G]iven that the ratio of compensatory damages to punitive damages present in this case is fully consistent with ratios that have been held not to be excessive in other cases, we find no basis for overturning the punitive damages award in this case based on the relative levels of compensatory and punitive damages awarded by the trial court.²⁷

Id.

North Carolina case law is sound, given the statutory directive that when a verdict exceeds the cap, the trial court “shall reduce the award and enter judgment for punitive damages in the maximum amount,” § 1D-25(b) (emphasis added); the North Carolina Supreme Court’s holding that the statutes are constitutional, *Rhyne*; and opinions of United States Supreme Court Justices emphasizing the relationship between the process afforded by a state’s punitive damages law and

²⁷ If the Court wishes to consider unpublished cases, see *Boileau v. Seagrave*, No. COA07-1431, 2008 N.C. App. LEXIS 1833, at *21-22, 2008 WL 4630528 (Ct. App. Oct. 21, 2008) (upholding \$100,000 punitive damages award on \$1 in actual damages); *Bramhall v. Hurban*, NO. COA13-1069, 2014 N.C. App. LEXIS 574 at *8, 2014 WL 2507695 (N.C. Ct. App. Feb. 19, 2014) (“any error by the jury in awarding punitive damages ‘more than eighty-four times’ the compensatory damages amount was cured when the trial court reduced the award.”).

the degree of deference afforded the substantive result.²⁸

To the extent, if any, that the Court wishes to defer to the North Carolina appellate courts in applying North Carolina law, it should direct that each Appellant is entitled to an award of \$250,000, if there is any reasonable way to read the Constitution as so allowing. In the alternative, it should hold that a single award of \$250,000 is proper. As argued below, compelling grounds exist for the proposition that awards at the statutory cap are not barred by the Constitution.

4. Federal Case Law

It is only when an award is “grossly excessive” that constitutional concerns arise. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 454 (1993). “A violation of a state law ‘reasonableness’ requirement” does not suffice. *Id.* at 458 n.24. Three guideposts determine whether “a person receive[s] fair notice . . . of the severity of the penalty that a State may impose.” *BMW v. Gore*, 517 U.S. 559, 574 (1996). These are: “the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm [and the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.” *Id.* at 574-75.

a. Reprehensibility: “[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.” *Gore*, 517 U.S., at 575. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S., at 576-577):

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or

²⁸ *E.g.*, *BMW v. Gore*, 517 U.S. 559, 586-597 (1996) (Breyer, J. concurring) (emphasizing that it is both the lack of constraining standards, including the absence of “legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion,” *id.* at 595 (emphasis added), “taken together” with “the severe disproportionality between the award and the legitimate punitive damages objectives,” *id.* at 596-97, that made the award there unconstitutional).

safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

“[A] single factor can provide justification for a substantial award of punitive damages.” *Saunders v. Branch Banking & Tr. Co.*, 526 F.3d 142, 153 (4th Cir. 2008) (quoting *Bach v. First Union Nat. Bank*, 486 F.3d 150, 157 (6th Cir. 2007)) (“allowing punitive damages award of \$400,000” where “‘only one’” factor was present, “‘a vulnerable victim’”).

Here, four factors support awards at or above the statutory maximum; only one factor, whether the harm caused was physical, supports reducing the award. The *second* factor, whether the conduct evinced an indifference to or a reckless disregard of the health and safety of others, is massively present. *Third*, the targets of the conduct had financial vulnerability—Appellants have a little business, buying and selling used cars, mostly small; CAC knew the purchasers of similar cars at the auction were “lower-end,” “gravel lots,” “Mom-and-pop” (R. p. 384, lines 1-20 (testimony of Mr. Ferrell)). Similarly, Mr. Ecklund was active duty reserve, driving back and forth from Alabama. This factor supports awards at or above the statutory cap. *Fourth*, this incident was not isolated. CAC had passed off the exact same Frankencar to another customer. Its managers testified that the sale to Appellants was treated exactly like every other sale. CAC discloses no damage in any car it red-lights. CAC sees no duty to anyone else when selling a dangerous car. *Fifth*, the jury found fraud, not mere accident. Four out of five support awards above the statutory caps, factors two, four, and five markedly so.

Even if believed, the managers’ story allows no due process concerns with awards at the statutory caps: they bought and sold hundreds of cars in North Carolina without knowing the state’s law; did so via ADESA without reading ADESA’s rules; sold a clipped car as “Certified”

and did not bother to determine how that happened; sent it to the auction without disclosure; stated they did not care if the vehicle was put on the highway.

But the jury was entitled to disbelieve them. The story that Mr. Ecklund was happy to be traded out (R. p. 375, lines 6-7), is not credible, as Mr. Ecklund testified he was deeply unhappy (R. p. 137, lines 6-8). The story that managers did not know of the damage until Mr. Ecklund told them two years after the sale, and then simply took his word for it, is similarly incredible. Automotive dealerships do not do that. If they accepted return whenever a customer said there was something wrong, they would go out of business. The story that best fits the facts is that CAC's managers knew the nature of the "Honda Certified" vehicle when they sold it to Mr. Ecklund. That is why they took it back when he said it was two half-cars put together and unsafe, and did not even inspect to see if he was telling the truth. That is why they did not ask the mechanic who had certified it how it passed his inspection. That is why they shipped it to a red light sale. That is why they sold it without disclosing it as a reconstructed, "clipped" car. They knew that if they disclosed, no one would pay anything near \$7,200 for it.

b. Ratio between "the actual or potential harm suffered by the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 418 (2003) (emphasis added). Here, there simply is no problem: The potential harm was serious injury and/or death. "While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents." *Gore*, 517 US at 581 n.34 (quoting *TXO*, 509 U.S. at 462).

If the Court desires further discussion, awards here at the statutory cap of \$250,000 would be at a ratio of 37.62 to 1 to actual damages (excluding potential harm). This is well within precedent. Cases involving deceptions related to automotive sales include *Parrott v Carr*, 17 P.

3d 473 (Or. 2001) (\$11,496 compensatory, \$1 million punitive, 87:1); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N. LLC.*, 361 S.W. 3d 364 (Mo 2012) (\$4,500 compensatory, \$500,000 punitive, 111:1) (deceptive financial acts in automobile sale) (reduced from \$1 million due to state statutory cap); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) (\$50,000 award against wholesaler, 99:1, and \$100,000 award against its associated retailer, 55:1) (deceptive sale of previously-wrecked vehicle).

Ratios may be much greater where, as here, actual damages are small and purely economic.²⁹ “The Supreme Court has long recognized that greater ratios may comport with due process, however, when reprehensible conduct results “in only a small amount of economic damages.””³⁰ *Saunders*, 526 F.3d at 154 (quoting *State Farm*, 538 U.S. at 425). *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 446 (1993) (\$19,000 compensatory, \$10 million punitive, 526:1); *Saunders* (\$1,000 compensatory, \$80,000 punitive, 80:1); *id.* at 154 (citing, *e.g.*, *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354 (11th Cir. 2004) (\$115 compensatory, \$250,000 punitive, 2,172:1); *Abner v. Kan. City S. R.R.*, 513 F.3d 154, 165 (5th Cir. 2008) (\$1 compensatory, \$125,000 punitive, 125,000:1)).³¹ “[R]atios *greater* than those we have previously upheld”—and the Court had previously upheld the 526.3:1 ratio in *TXO*—may be constitutional in such situations. *State Farm*, 538 U.S. at 425 (emphasis added).

c. “Civil penalties authorized or imposed in comparable cases.” *Gore*, 517 U.S. at 575.

²⁹ The actual damages here are purely economic, and the amount—\$6,645.00—is low, as the Order recognizes (R. p. 15) (“the small amount of actual damages”).

³⁰ This may be because other compensatory awards, such as for mental suffering, may contain a component that is “duplicated in the punitive award,” *State Farm*, 538 U.S. at 426, and so do not support as high ratios.

³¹ The Fourth Circuit recently addressed the issue in *Daugherty v. Ocwen Loan Servicing, LLC*, No. 16-2243, 701 F. App'x 246, 249, 2017 WL 3172422 (4th Cir. Jul. 26, 2017) (unpublished) (finding, on a compensatory award slightly smaller than the award here, \$6,128.39, and a slightly larger punitive verdict, \$2.5 million, with no intentional wrongdoing, no potential profit for the wrongdoer, and no significant threat to health or safety, that \$600,000 is the proper punitive damage award).

As the North Carolina Supreme Court has held, one worthy reason for the cap in 1D-25 is “to provide clear notice of possible penalty to defendants” of the potential punitive damage liability. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004). This directly addresses the concern the federal Supreme Court had with common law regimes which lack a statutory limit, leaving a need to look to analogous statutes for notice of the amount of a possible penalty. Here, the legislature has spelled it out: if a malfeisor’s mental state rises to the level of fraud, willful and wanton, or malice, he faces punitive liability to each plaintiff for \$250,000 if he inflicts actual damage of \$83,333.33 or less. If he inflicts greater harm, he is liable for three times that harm as a punitive award. The legislature directly filled the need the Supreme Court identified to provide “fair notice . . . of the severity of the penalty that a State may impose.”

Another way to put it is that the civil penalties authorized in comparable cases are identical. Comparable cases are those in which the wrongdoer’s act caused damage of less than \$83,333.34, but the factfinder found it sufficiently appalling to justify \$250,000 or more as penalty. Civil penalties imposed in comparable cases are also identical. Where a verdict is above the cap, North Carolina routinely imposes the statutory cap of \$250,000 per plaintiff. Any deviation by this Court from that consistent practice would create the very uncertainty the federal Supreme Court was trying to reduce.

If the Court wishes to look at other statutorily-authorized penalties for similar conduct, N.C.G.S. § 20-294 authorizes revocation of a dealer’s license for conduct such as this, ¶ 4. It does so again in ¶ 6. Again in ¶ 7.³² Criminal penalties under N.C.G.S. § 14-100 for “obtaining property

³² The Order gets this wrong. In proposing \$1,500 and \$1,000 as the appropriate comparative penalties, it ignores the teaching of *Duncan v. Ford Motor Co.*, 385 S.C. 119, 147, 682 S.E.2d 877, 891 (Ct. App. 2009). Citing *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006) and *Collins Entm’t Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 142, 584 S.E.2d 120, 129 (Ct. App. 2003), the Court of Appeals wrote, “both cases stated ‘the statutory penalties are set at such a low level, there is little basis for comparing it with any meaningful

by false pretenses,” which is similar to fraud, are ten to 30 months.³³

In sum, comparable penalties are identical under the statutory cap. They provide strong grounds for awards at the cap. Other penalties are greater, and provide even stronger support.

5. Additional Errors in the Order’s Analysis

The order misreads *Austin v. Stokes-Craven Ford Holding Co.*, 387 S.C. 22, 691 S.E.2d 135 (2010). *Austin* found it particularly reprehensible that the dealer “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. So too here, with a vengeance: the previously-wrecked pickup truck with an alignment problem in *Austin* was not nearly as hazardous as the two half-Civics improperly combined here.³⁴

Nor did *Austin* hold that potential harm is excluded from the ratio; rather, it noted the “high” ratio between the punitive and compensatory awards, and then affirmed the jury’s verdict, due in part to “a potential for Austin or his passengers to be subjected to serious injury.” *Id.* at 54, 691 S.E.2d at 151. Even more so here. The other factors were, first, “evidence of Stokes–Craven’s ability to pay,” *id.*, an award equal to 15% of that dealer’s net worth. This would equal an award of \$1,645,397.70 here.³⁵ Second was the deterrent effect of the award. The \$216,000 awarded by

punitive damage award.’ The applicable civil fines in this case lead us to the same conclusion.”

³³ Criminal penalties under N.C.G.S. § 14-100 for “obtaining property by false pretenses” are ten months for an offender with no prior convictions. Case law suggests the “no prior convictions” status is not the right status. Rather, “A sentencing judge may even consider past criminal behavior which did not result in a conviction.” *Gore*, at 573 n.19. Given the prior sale to the Ecklunds, the maximum penalty would be 30 months.

³⁴ Moreover, in *Austin* the fraud was by a salesman; while here, it was by senior management. *Cf. TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 469 (1993) (Kennedy, J., concurring) (wrongdoing by “low level employees” does not justify awards as high as wrongdoing by “senior management”). If the Order intends that the sale having been between two businesses mandates a reduction in the punitive award, it errs, as *TXO*, with its 526.3:1 ratio, was a dispute between two businesses.

³⁵ Stokes-Craven’s net worth was \$1,444,561, *id.* at 51-52, 691 S.E.2d at 150. The \$216,000 award was 15.0% of that amount. A 15.0% award here would be \$1,645,397.70.

the *Austin* jury ten years ago was not sufficiently large to have been heard of by automobile dealers in South Carolina, let alone stop them from fraudulently selling dangerous, wrecked vehicles. A significantly larger amount is required.

Conclusion to Section. At trial, CAC's net worth was \$10,969,318. North Carolina statutes might limit each Appellant to a punitive award of \$250,000, or 2.38% each. The federal Constitution does not. The trial judge erred as a matter of law in limiting the award to 0.42% of CAC's net worth. The Court should remand for entry of two punitive damage awards of \$250,000 each.

II. THE LOWER COURT ERRED IN AWARDING UNREASONABLY LOW ATTORNEY FEES.

Three orders deal with attorney fees, the order on post-trial motions, the order on Appellants' Rule 59 motion and supplemental fee request for work through December 2016, and the final order on Appellants' motion for supplemental fees for work from December 2016 through March 2017. They err in numerous ways. The first and second orders err in apportioning fees among causes of action, which North Carolina law forbids where the claims arise from a common nucleus of facts. The second and third orders err in concluding that a post-verdict settlement offer stopped fees from accruing. Each order errs in additional ways.

A. Law

Purposes of the Statutes. In North Carolina, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." G.S. 75-1.1. "The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce." *United Va.*

Bank v. Air-Lift Assocs., 79 N.C. App. 315, 319-20, 339 S.E.2d 90, 93 (N.C. Ct. App. 1986).

The purpose of fee awards “is to encourage private enforcement” of the Act, *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 192, 437 S.E.2d 374, 380 (N.C. 1993) (internal quotation marks omitted), and to ensure that such cases are “economically feasible,” *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (N.C. Ct. App. 1989). Once it is determined that fees are appropriate, North Carolina ensures the award is adequate.

Requirements for fee awards. To receive fees under North Carolina’s UTPA, one must show a UTPA violation and that (a) the act complained of was done “willfully,” § 75-16.1(1), and (b) “there was an unwarranted refusal” by the party who violated the law “to fully resolve the matter which constitutes the basis of such suit,” *id.* A “failure to promptly offer the unconditional return of the money” suffices for (b). *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 275, 775 S.E.2d 316, 323 (N.C. Ct. App. 2015). If these are met, the court may in its discretion award fees.

Once these conditions are met, they carry through to the end of the case; one cannot change the fact that there was an unwarranted refusal to fully resolve the matter by making a post-verdict “reasonable settlement offer.” “Since the trial court had already found in the previous order that defendants’ conduct was wilful and that their refusal to settle the dispute was unwarranted, plaintiffs were, in our opinion, entitled to legal fees for prosecuting the appeal as well as for the preparation for retrial.” *Cotton*, 94 N.C. App. at 370, 380 S.E.2d at 422.

Determining the proper award. Whether to award fees may be in the discretion of the trial court, but “Once the trial court decides to award attorneys’ fees, however, it must award a reasonable fee.” *Custom Molders v. Am. Yard Prods.*, 342 N.C. 133, 142, 463 S.E.2d 199, 204 (N.C. 1995). *Cotton*, 94 N.C. App. at 369, 380 S.E.2d at 421 (same). North Carolina specifies the

method to determine a reasonable fee. North Carolina does not base UTPA fee awards on a percentage-of-the-recovery.³⁶ The stakes in such cases are often too small for a standard contingency fee to be reasonable.³⁷ Instead, courts are to employ a set of factors that include “the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.” *Cotton*, 94 N.C. App. at 369, 380 S.E.2d at 421.³⁸

Fees are not to be apportioned among claims where multiple claims arise from a common nucleus of facts. “[A]ll three claims arose from a common nucleus of facts making apportionment of the fees unnecessary and unrealistic.” *Whiteside Estates, Inc. v. Highland Cove LLC*, 146 N.C. App. 449, 467, 553 S.E.2d 431, 443 (N.C. Ct. App. 2001). Even fees for failed claims are apportioned only where one “failed to prevail on a claim that is distinct in all respects” from the statutory claim. *Morris v. Scenera*, 229 N.C. App. 31, 58, 747 S.E.2d 362, 378 (N.C. Ct. App. 2013) (emphasis added), *aff’d in part and rev’d in part on other grounds*, 368 N.C. 857, 788 S.E.2d 154 (2016).³⁹ It is an abuse of discretion to require allocation of fees where claims are not distinct in all respects. *Morris*, 229 N.C. App. at 56-59, 747 S.E.2d at 377-79.

³⁶ For example, the Order here relies (R. p. 17), on *Out of the Box Developers, LLC v. Doan Law, LLP*, No. 10 CVS 8327, 2014 NCBC LEXIS 39, 2014WL4298329 (N.C. Super. Ct. Aug. 29 2014). That case awarded \$467,827.63 in fees on \$25,676 in damages. 2014 NCBC LEXIS at *15 (awards of \$15,675, \$1.00, and \$10,000); at *69 (fees).

³⁷ Cf. *Taylor v. Medenica*, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998) (affirming fee award of \$500,000 on actual damages of less than \$36,500 under SC UTPA); *Riverside v. Rivera*, 477 U.S. 561, 579–80 (1986) (plurality) (there would be no need for such a provision if standard contingency contracts sufficed to attract quality counsel); *id.* at 586 (Powell, J., concurring) (same).

³⁸ Additional factors may include “the novelty and difficulty of the questions of law”; ‘the adequacy of the representation,’ the ‘difficulty of the problems faced by the attorney,’ especially any ‘unusual difficulties,’ and ‘the kind of case . . . for which the fees are sought and the result obtained.’ *Kuykendall*, 335 N.C. at 195, 437 S.E.2d at 381-82.

³⁹ Cf. *Laschkewitsch v. Legal & Gen. Am., Inc.*, No. 5:15-CV-251-D, 2017 U.S. Dist. LEXIS 180972, at *6-7, 2017 WL 4976442 (E.D.N.C. Nov. 1, 2017) (unpublished) (“As noted, all claims in this case were based on the same intertwined nucleus of facts—Laschkewitsch’s fraud. Apportioning fees is unnecessary and unrealistic.”)

B. Application

1. The Order on Post-Trial Motions Errs in Numerous Ways

Appellants do not challenge the findings in the first order that an award of fees was appropriate, that the willfulness requirement was met by the jury's finding of fraud, and that there had been an unwarranted refusal to fully resolve the matter (R. p. 12).⁴⁰

The amount stated for fees in the August 29, 2016 email from the Judge's clerk, and awarded by the first order, equals 40.00% of the larger of the two judgments offered to Appellants. Perhaps the judge's intent then was to award a standard contingency fee. If so, that would be error under the authorities above. North Carolina bases UTPA fee awards instead on the factors listed above, as each party recognized in its post-trial briefs.⁴¹ Nor does the order claim to be based on a percentage-of-the recovery.

Rather, the order states it is based on a two-step reduction from the hours for which compensation was requested, resulting in there being 54.525 compensable hours. The order then multiplied 54.525 hours by the \$390 hourly rate to arrive at the \$21,264 figure. (Appellants had requested compensation for more than 600 hours of attorney time.)

Each step of the reduction is based in whole or in part on a supposed allocation of fees among Appellants' claims. The first step reduced the pool of potentially compensable hours to 218. It did so on grounds that the other entries contained no work related to the UTPA claim.⁴² The second step reduced the hours that survived the first cut by an additional 75%, on similar

⁴⁰ As the order states, CAC's highest offer was \$15,000 "plus a reasonable attorney fee," by which it sought to resolve not only the UTPA claim, but all the claims, including claims for negligent misrepresentation and fraud.

⁴¹ R. pp. 1324-25, Pls.' Br. in Supp. Pls.' Req. for Att'y's Fees, 9-10; R. pp. 1573-74, Def.'s Br. in Opp. to Pls.' Mot. for Att'y's Fees, 12-13.

⁴² "After a thorough review of the materials submitted, the Court has identified approximately 218 hours of entries that contain or could contain time spent on the NCUTPA claim." (R. p. 16, Order, p. 16).

grounds.⁴³

The order errs as a matter of law in apportioning fees. The only authority the order relies on to allocate fees by cause of action is a Business Court case, *Out of the Box Developers, LLC v. Doan Law, LLP*, No. 10 CVS 8327, 2014 NCBC LEXIS 39, 2014WL4298329 (N.C. Super. Ct. Aug. 29 2014). In *Morris*, reversing the same judge on whose opinion the order relies, the Court of Appeals wrote, 229 N.C. App. at 58-59, 747 S.E.2d at 379 (emphasis added),

The business court's 14 May 2012 judgment provided no authority for its determination that Morris's award of attorneys' fees "should, in part, be allocated among the claims on which he was successful and those on which he was not." . . . Accordingly, we reverse the business court's award of attorneys' fees and remand to the trial court for further findings of fact and conclusions of law regarding whether Morris's claims arose from a common nucleus of operative fact and, thus, whether he is entitled to all of his attorneys' fees.

Thus, one possibility would be for the Court to remand this matter for the trial court to determine whether Appellants' "claims arose from a common nucleus of operative fact and, thus, whether [they are] entitled to all of [their] attorneys' fees." However, it is obvious the claims⁴⁴ here all arose from the same nucleus of operative fact. Indeed, the lower court has already ruled, in another part of its order, "Plaintiffs claims all arose from the same transaction [and] involved the same injury." (R. p. 20).⁴⁵ Rather than remand for that determination, the Court could spare resources of the lower court and counsel, and likely of this Court when the party unsuccessful on remand appeals, and declare that Appellants are entitled to all their attorneys' fees.⁴⁶

⁴³ "[T]he Court finds a [further] reduction of 75% is appropriate," because "many of these time entries [that made it into the "pool" of 218 hours] are vague or relate to large blocks of time, only some of which are attributable to the NCUTPA cause of action." (R., pp. 16-17) (emphasis added).

⁴⁴ Other than time spent early in the case that went solely to the settling Defendant, which was detailed separately and for which fees were not sought (R. pp. 1333-34, Aff. 05-02-16, pp. 1-2; R. pp. 1358-60, Ex. 3), and thus is not relevant here.

⁴⁵ Similarly, it is apparent the claims here are not "distinct in all respects," as is required for apportionment by claim. *Morris*, 229 N.C. App. at 58, 747 S.E.2d at 378.

⁴⁶ See also *Whiteside Estates, Inc.*, 146 N.C. App. at 467, 553 S.E.2d at 443 ("[A]ll three claims arose from a common

Alternatively, the Court may wish to address more specifically the order's determination of the amount of the award. The proposed order's declaration that only 218 hours of entries contained potentially compensable work was surprising to Appellants, as the Judge had mentioned nothing about hours being unrelated to the UTPA claim, and the most CAC had claimed to identify as non-compensable was 52.7 hours from Mr. Moskos' initial fee request. In the proposed and filed order, more than 400 hours were cut in the first step (followed by a 75% cut of what remained).

However, despite their requests, Appellants have not been allowed to see the list of entries totaling 218 hours that the order deemed to contain potentially UTPA-related work or the list of hours that were deemed not to contain any such work. The Order provides but a single example of an entry it considers "unrelated in any way to the NCUTPA claim." (R. p. 16). It quotes that entry, which includes "Telephone conference with Jamie Flynn regarding [the upcoming] testimony of Nationwide," and "Review or objections and counter-designations of video testimony of Ecklund and Guyer." Nationwide's testimony established the front half of the Frankencar was from a wrecked vehicle. Ecklund's testimony established that CAC had previously sold the same car without disclosure, and that CAC had been directly told of the vehicle's nature. Guyer testified to the auction rules and the many steps the auction employs to ensure sellers know the rules. These go to all claims, including the UTPA claim, and/or to the willfulness required for UTPA fee awards.

If the Court is not inclined to follow *Morris* as suggested above, it should remand with directions that the list of entries comprising those 218 hours be provided to Appellants so that a proper record may be established for appeal.

nucleus of facts making apportionment of the fees unnecessary and unrealistic.").

2. Errors in the March 16 Order (on Appellants' Rule 59 Motion and Motion for Supplemental Fees)

Appellants timely filed a Motion Pursuant to Rule 59, alleging errors in numerous aspects of the first order. They simultaneously filed a Motion for Supplemental Fees from the date of their July 20 fee requests until just prior to service of these motions.⁴⁷ Because it appeared to Appellants that the original finding that only 218 hours of entries potentially related to the UTPA claim included no time for Mr. Fudenberg's work,⁴⁸ they requested that an award be made for his work through July 20. The second order (R. pp. 24-29) "clarifie[d]" that Mr. Fudenberg's previous request for work through July 20 was included in the previous award of 54.525 hours (R. p. 25). However, it ignored Appellants' request in their Reply (R. p. 2042) that if Mr. Fudenberg's 56.1 hour request was included in the prior award, the new order specify how many of the 54.525 hours were for Mr. Fudenberg's work and how many for Mr. Moskos'.

The order divides the requests for fees after July 20 into three periods. It errs in each:

(a) In reducing the award for work from July 21 through July 27, 2016, the order errs for reasons stated above. It reduced the request by 50%, from \$14,040 to \$7,020, on grounds some entries were not clear on whether the work was related to the UTPA claim, and other entries were unrelated to that claim. For reasons discussed above, this is error.

(b) The order errs in reducing the award for time spent on Mr. Moskos' affidavit to two hours from 65.2 during the period July 28 through September 13. Mr. Moskos' affidavit was in

⁴⁷ Mr. Moskos' timesheets were current through the date of service of the motions, December 15, 2016. Mr. Fudenberg's concluded one day prior.

⁴⁸ Among other reasons, the order did not state how many requested hours it was considering. However, it did use a figure for the total request by Appellants that was the amount sought for Mr. Moskos' fees and costs (R. p. 1535, 1st. Supp. Affidavit of C. Steven Moskos, at 7 (requesting \$370,543.12 "for affiant's services," including paralegal fees and costs); R. p. 14, Order on post-trial motions at 14 (stating that Appellants seek "fees and costs totaling \$370,543.12")), thus indicating that Mr. Fudenberg's work had not been included in the set of hours from which the 218 hours of entries were found.

in response to affidavits served by CAC's counsel which alleged Mr. Moskos was difficult to settle with, here and in prior cases they had had. Mr. Moskos thus had to review the entire file, including interactions from years prior, in the present case and the closed files in prior cases to ensure his recollection was correct. To provide context for why offers were made or rejected, Mr. Moskos presented his understanding of the law in the affidavit. This required hours of work for which he deserves to be compensated. It was an abuse of discretion to cut his time so markedly.

The order did not otherwise reduce the request for that period.

(c) The order errs in holding no fees accrue after September 13. The second order erroneously halts all fees after September 13 on grounds that CAC made a settlement offer of \$81,069 on that date. It errs as a matter of law. It conflicts with the plain language of the statute, because later "reasonable" offers cannot change the fact that "there was an unwarranted refusal" to settle. The order cites no authority for its proposition that the past can be changed. It conflicts with controlling precedent. "Since the trial court had already found in the previous order that defendants' conduct was wilful and that their refusal to settle the dispute was unwarranted, plaintiffs were, in our opinion, entitled to legal fees for prosecuting the appeal as well as for the preparation for retrial." *Cotton*, 94 N.C. App. at 370, 380 S.E.2d at 422 (emphasis added). So too here. The trial court had found in its previous order that CAC's conduct was willful and the refusal to settle unwarranted.¹

The order errs again as \$81,069 was not a reasonable offer to settle the entire matter. CAC later implicitly acknowledged as much in raising its offer to \$290,212.07. (R. p. 2117).

¹ Nor would it be sensible to allow a post-verdict offer to cut off attorney fees during appeal in a UTPA case. To allow the judge whose order is being appealed to decide what amount is reasonable would lock in his erroneous reasoning, as it would force plaintiffs either to accept what that judge considers reasonable or to work without fees.

3. The Final Order Suffers from Lack of Jurisdiction and Significant Errors of Law.

The order filed August 14, 2017 (R. pp. 30-34) explicitly incorporates the second order, which was under appeal when the third order issued. Appellants continue to maintain that the lower court lacked jurisdiction to issue that third order. Rules 205 and 241(a), SCACR. As explained in their response to CAC's proposed order, Appellants had filed that motion to void any argument on remand that they had waived the claim to those fees by not timely filing the request.⁵⁰ By filing for those fees, and then noticing the appeal, Appellants thought proceedings were stayed so the motion would not be argued nor decided until a possible remand.

Substantively, the order errs as a matter of fact in finding (R. p. 31), that Appellants refused to negotiate, ignoring the voluminous evidence attached to Appellants' memorandum demonstrating their negotiating and repeated attempts to obtain clarification from CAC regarding its offers. (R. pp. 2106-2133). It also errs by incorporating the second order for the same reasons the second order errs.

While the second order presented no authority for the proposition that a post-verdict offer can stop the accumulation of fees, the third order cites *United Labs. v. Kuykendall*, 403 S.E. 2d 104 (N.C. Ct. App. 1991). The case stands for a proposition almost directly the opposite. That opinion concerned, *inter alia*, an offer made after conclusion of a first set of appeals, and before a re-trial. The offer was held insufficient. The order reads that opinion as establishing that a post-trial offer can stop fees from accumulating. (R. p. 32, Ord. p. 3). It does so because the trial court had initially issued an award of fees and costs totaling \$47,522.23. *Id.* (citing 403 S.E. 2d at 106). The order reasons that the discussion in the cited opinion regarding attorney fees concerned

⁵⁰ The previous order, filed March 16, 2017, suggested that waiting from July 20 to December 15 to seek fees for July 20 might have been so long as to forfeit a claim. (R. p. 25, Ord., p. 2).

whether additional fees would be awarded, or whether instead the offer would stop the accumulation of fees. (*Id.*) (citing 403 S.E. 2d at 111) (reading the issue as whether “further attorneys fees” should be awarded and the holding as “Additional attorney fees were awarded”).

The order cites 403 S.E. 2d, page 106, for the existence of the earlier award. Page 106 is not part of the formal “Opinion.” The formal Opinion does not mention the earlier award. Appellants do not suggest it was improper to cite the prefatory material. However, that prefatory material in turn references prior reported appellate opinions in the case. Turning to those published opinions makes clear that the Court of Appeals threw out that initial fee award, as it was a jury award on an issue reserved for the judge. 87 N.C. App. 296, 300, 309-10, 361 S.E.2d 292, 294, 300 (N.C. Ct. App. 1987). That Court further remanded the case on several grounds, one being that a retrial was required on the UTPA claim. *Id.* at 309-10, 361 S.E.2d at 300. The Supreme Court took the case, and again remanded on various grounds, including that a retrial was required on the UTPA claim. 322 N.C. 643, 665-66, 370 S.E.2d 375, 389 (N.C. 1988).

Thus, in the opinion the order cites, the Court of Appeals was not considering whether “further” fees should be awarded. It was not determining whether “[a]dditional” fees should be awarded. It was not, in short, contemplating whether a post-appeal offer could stop fees from accruing in a case in which it had already been determined that fees were appropriate.

It held the opposite: an unwarranted refusal to settle the entire case operated both backwards and forwards, to require fees for all previous and future events. Its only reservation was that the judge had not provided findings on the factors (“the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney”) that determine the amount of fees. 403 S.E. 2d at 111. Once these were established, the unwarranted refusal between the two appeals would justify “making a ‘full award of attorneys’ fees for the first

trial and the two appeals despite the two reversals and the need for a second trial.” *Id.* at 110. Lest there be any doubt, it added, “We also note that plaintiff’s attorneys are entitled to fees for post-trial motions and this appeal,” *id.* at 111, and reiterated, “[W]e remand this cause for entry of findings of fact consistent with this opinion on the attorneys’ fee award including an award of attorneys’ fees for post-trial motions and this appeal.” *Id.* at 112.

The order’s Roman II, holding the trial court may, simply in its discretion, stop the accumulation of post-trial fees, errs because, as stated in the *Kuykendall* opinion the order cites, once the entitlement to fees is shown, 403 S.E. 2d at 111, “plaintiff’s attorneys are entitled to fees for post-trial motions” as a matter of law.

The Order’s Roman III, holding as a matter of law that “post-trial fees or appellate fees” may accrue only to “protect the judgment” (R. p. 33), rips out of context language stating that appeals defending UTPA awards entitle the plaintiff to fees, and erroneously concludes that therefore fees are appropriate only for appeals defending an award. It is directly contrary to North Carolina law. “We note that when attorney’s fees are authorized under section 75-16.1, such fees include those for appeal.” *Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 82, 637 S.E.2d 230, 237 (N.C. Ct. App. 2006), *aff’d per curiam*, 361 N.C. 347, 643 S.E.2d 586 (N.C. 2007). Nor would it be sensible to limit post-verdict fee awards to protecting a judgment. If a plaintiff proves a violation, and yet due to preserved error in admission of evidence, the award is \$10.00, when a proper verdict would be \$4,000.00, the intent behind the fee-shifting statute was not to deny fees incurred in correcting that error.

The Order’s disparagement of the motives of Appellants’ counsel (“[T]hese repeated motions for attorneys’ fees illustrate that Plaintiff’s counsel’s primary incentive here is attorney compensation rather than recovery for their client.” (R. p. 2090, first proposed order, p. 2; R. p.

2152, second proposed order, p. 2; R. p. 31, filed order p. 2)) are inappropriate and erroneous. “The fee award is made to the party, not to his lawyer.” *Prevatte v. Asbury Arms*, 302 S.C. 413, 418, 396 S.E.2d 642, 645 (Ct. App. 1990). Nor does the author of the order have any knowledge of the fee or other agreements between Appellants and their counsel.

Conclusion to section. The lower court lacked jurisdiction to issue its final order, and its disparagement of counsel is inappropriate and erroneous. Each of the other errors are prejudicial. The Court should remand with instructions to award Appellants’ full requests for fees, with a multiplier of 1.5, a 50% increase.

III. THE LOWER COURT ERRED IN REQUIRING APPELLANTS TO ELECT BETWEEN PUNITIVE DAMAGES AND ATTORNEY FEES.

The order on post-trial motions erred, as a matter of law, in requiring Appellants to elect, in their entirety, between their UTPA verdict and an award of attorney fees under N.C. G.S. 75-16.1, on the one hand, and their fraud verdict and an award of punitive damages, on the other.

The doctrine of “election of remedies” is “not favored by the courts,” has been criticized as “harsh,” is “ordinarily applied in a strict and limited way,” is “not [to] be lightly enforced or unduly extended,” and “should not be applied in an oppressive manner or in a formulaic way, but rather with due consideration for the equities of the case.” AMJUR, Election of Remedies, § 5 (2006). Its purposes are to prevent a plaintiff from recovering “inconsistent remedies,” and “to ‘prevent double redress for a single wrong.’” *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 191, 437 S.E.2d 374, 379 (N.C. 1993).⁵¹

Here, Appellants do not seek to recover the same actual damages twice, nor the same punitive damages twice, nor the same attorney fees twice. They do not seek a “double recovery.”

⁵¹ Cf. *Brown v. Felkel*, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct. App. 1995) (“Use of the doctrine is limited to cases where a double recovery by the plaintiff is threatened.”)

They seek only to recover punitive damages under their fraud claim and attorney fees under 75-16.1 associated with their UTPA claim. They are entitled to do so under North Carolina law, *Kuykendall*, 335 N.C. at 192-95, 437 S.E.2d at 379-81 (so holding).

South Carolina law is the same. *Austin v. Stokes-Craven Ford Holding Co.*, 387 S.C. 22, 55-57, 691 S.E.2d 135, 152-53 (2010). To the extent that election of remedies is procedural rather than substantive, see *United States v. Oregon Lumber Co.*, 260 U.S. 290, 304 (1922) (Brandeis, J., dissenting, joined by Taft, C.J., and Holmes, J.); *Knight Publ'g Co. v. Chase Manhattan Bank, N.A.*, 131 N.C. App. 257, 265, 506 S.E.2d 728, 733 (N.C. Ct. App. 1998); and thus governed by forum law, Appellants are entitled to recover under South Carolina law.

Nor does North Carolina statute 1D-20, cited in the order, mandate the reverse result. Enacted in 1995, 1D-20 codified *Kuykendall's* holding, 335 N.C. at 191, 437 S.E.2d at 379, that one could not recover both multiple damages under a statute and punitive damages based on the same conduct. *Kuykendall* remains good law. No North Carolina case has held that *Kuykendall* has been superseded, nor cast doubt on its continuing validity, nor does Shepard's Citations list it as superseded. Rather, North Carolina state and federal courts continue to cite the case as good law. *Blankenship v. Town and Country Ford, Inc.*, 174 N.C. App. 764, 769-70, 622 S.E.2d 638, 642 (N.C. Ct. App. 2005); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 958 F. Supp. 1087 (W.D.N.C., 1997), *rev'd on other grounds*, 155 F.3d 331 (1998).⁵²

Nor has any North Carolina case since 1D-20 was enacted held that a fee award under North Carolina Statute 75-16.1 precludes an award of punitive damages. Rather, North Carolina state and federal courts have held, subsequent to both *Kuykendall* and the statute, that plaintiffs

⁵² Nor, when Justice Pleicones cited *Kuykendall* for the same proposition argued here—the only instance in which the case has been cited in South Carolina appellate courts—was there any indication that *Kuykendall* is not good law. *Austin*, 387 S.C. at 64, 691 S.E.2d at 157 (Pleicones, J., concurring in part).

are entitled to both. *E.g.*, *Brown v. King*, 166 N.C. App. 267, 271, 601 S.E.2d 296, 298 (N.C. Ct. App. 2004) (“Defendant next argues that the court erred in awarding attorney fees pursuant to N.C. Gen. Stat. § 75-16.1 when the plaintiff had elected to seek punitive damages and an equitable remedy. [W]e disagree.”); *Southwood v. Credit Card Sol.*, No. 7:09-CV-00081-F, 2016 U.S. Dist. LEXIS 48039, at *127-44, 2016 WL 8710985 (E.D.N.C. Feb. 26, 2016) (unpublished) (repeatedly granting punitive damages and attorney fees in favor of each of multiple plaintiffs against several defendants).

This makes sense. First, “Since recovery of attorneys fees requires proof different from that which gives rise to punitive damages, the claims do not arise from the same course of conduct.” *Brown v. King*, 166 N.C. App. at 271, 601 S.E.2d at 299 (quoting *Kuykendall*, 335 N.C. at 192, 437 S.E.2d at 379-80). “Furthermore, the policies behind recovering attorneys fees and recovering punitive damages are wholly different.” *Id.* (quoting *Kuykendall*, 335 N.C. at 192, 437 S.E.2d at 380). “Permitting recovery of punitive damages on the common law claim in addition to attorneys fees on the unfair practices claim best serves Chapter 75’s policy of encouraging private enforcement of the Act.” *Kuykendall*, 335 N.C. at 193, 437 S.E.2d at 380.

Moreover, the very language of N.C.G.S. 1D-20, quoted in the Order, does not apply here, as it states that one may not receive punitive damages and any other remedy “pursuant to another statute that provides for multiple damages” (emphasis added). The term “statute” is singular. N.C.G.S. 75-16.1 does not provide for multiple damages. N.C.G.S. 75-16 does, but under North Carolina’s statutory approach, the exemplary damages of 75-16 are not part of 75-16.1. North Carolina considers these to be statutes, plural, not a “statute,” singular. *Edwards v. West*, 128 N.C. App. 570, 574, 495 S.E.2d 920, 923 (N.C. Ct. App. 1998) (emphasis added),

The second issue is whether the trial court erred in denying defendants’ motion for directed verdict at the close of all evidence on the fraud claim pursuant to N.C.

Gen. Stat. §§ 75-1.1 and 75-16 (1994). A claim pursuant to these statutes is typically known as an unfair and deceptive trade practice claim.

CAC unintentionally admitted as much below, favorably excerpting a passage referring to the trebled damages provided by 75-16 and the attorney fees provided by 75-16.1 as “the Chapter 75 statutory group of remedies.” (R. p. 1441, Def.’s Resp. Pls.’ Election of Remedies, p. 2 (quoting *Kuykendall*, 437 S.E.2d at 382 (Meyer, J., dissenting)). N.C.G.S. 1D-20, again, prohibits receiving punitive damages and another remedy from another “statute,” singular, not “another statutory group.”

The Court should remand with directions that Appellants are entitled to their punitive damages and attorney fees.

IV. THE LOWER COURT ERRED IN DENYING OFFER OF JUDGMENT INTEREST.

South Carolina Offer of Judgment statute 15-35-400 provides a detailed procedure to make Offers of Judgment and clear consequences for non-acceptance. Paragraph A, entitled “Offer of Judgment”, states that in any civil action seeking to recover money damages, except a domestic relations case, a party may file, up to twenty days before trial date, with the clerk of court, and directed to the opposing party, with notice provided to the opposing attorney or party, a written, signed offer to take or accept judgment resolving the case. The opposing party then has twenty days, or at least ten days before trial, to file its acceptance.

Paragraph (B), entitled “Consequences of NonAcceptance,” spells out the consequences for one who rejects such an offer and is then subjected to an adverse verdict:

(B) Consequences of NonAcceptance. If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer; or (3) if the offeror is a defendant, a reduction

from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer.

(emphasis added).

Appellants served an offer on February 4, 2015, more than a year before the April 22, 2016 trial, to settle the case for \$280,000.00. (R. pp. 1187-89). They filed a signed copy with the Clerk and served Defense Counsel. They obtained a verdict of \$2,381,888.00, far greater than the offer. The order on post-trial motions erred in refusing to enforce the statute.

The order erroneously substituted the word “recovery” (R. p. 21), in place of the statute’s word, “verdict.” It then held that because the “recovery,” after the Court’s reduction of the punitive damage verdict, was less than the offer, the statute did not apply. This, the lower court had no power to do. “A basic rule of statutory construction is that the words must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute’s operation.” *Adkins v. Varn*, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993) (citing, e.g., *Berkebile v. Outen*, 426 S.E.2d 760 (1993)). “Where a statute contains terms which are clear and unambiguous, a court must apply those terms according to their literal meaning.” *Id.* (citing *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)).

In a footnote, the order suggests that South Carolina’s Offer of Judgment statute “may” not apply, on grounds the statute may be substantive rather than procedural. (R. p. 21 n.9). But of course the Offer of Judgment statute is procedural. It creates no new cause of action nor amends a common-law cause of action. It applies across the board to all civil cases seeking money damages in South Carolina courts except domestic relations cases. It is within Article 3, “Judgment By Default Or Confession,” a procedural matter, within Chapter 35, “Judgments And Decrees Generally,” concerning procedural matters. The statute’s obvious purpose is to provide a procedure to reduce burdens on South Carolina courts by encouraging litigants to end the case.

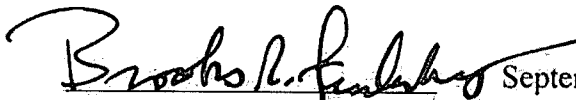
Scrupulously neutral between plaintiffs and defendants, it is non-substantive, procedural.

The lower court erred in substituting its word, "recovery", for the clear language of the statute, "verdict." The Court should remand with directions to award Appellants interest pursuant to the Offer of Judgment Statute.

Conclusion

Appellants respectfully request the Court direct that the jury's award of punitive damages be cut by \$1.83 million, from a single award of just over \$2.38 million to two awards of \$250,000 each, and not by \$2.34 million to a single award of \$46,515. They request the remand direct that Respondent is responsible for their full fee requests previously submitted, that they are entitled to fees for this appeal, and that the third order regarding fees be reversed in its entirety. They further request this Court direct they need not elect between awards of punitive damages and of attorney fees. Appellants also request that the Court remand for entry of interest under the offer of judgment statute, and for such other relief as the Court may see fit.

Respectfully submitted,

 September 23, 2019

Brooks R. Fudenberg
Law Offices of Brooks R. Fudenberg, LLC
171 Church Street, Suite 160
Charleston, SC 29401
Tel.: (843) 416-2558
BRF@Fudenberglaw.com

C. Steven Moskos
C. STEVEN MOSKOS, P.A.
4000 Faber Place Drive, Suite 300
N. Charleston, SC 29405
Tel. (843) 763-5297
csmoskos@earthlink.net

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 13-CP-40-0319

RECEIVED
AUG 22 2019
SC Court of Appeals

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

v.

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

BRIEF OF RESPONDENT

HAYNSWORTH SINKLER BOYD, P.A.

James Y. Becker (SC Bar No. 64991)
H. Clayton Walker, Jr. (SC Bar No. 5779)
Robert Reibold (SC Bar No. 9284)
P.O. Box 11889
Columbia, SC 29211-1189
(803) 779-3080
jbecker@hsblawfirm.com
cwalker@hsblawfirm.com
rreibold@hsblawfirm.com

Sarah P. Spruill (SC Bar No. 68337)
P.O. Box 2048
Greenville, SC 29602
(864) 240-3200
sspruill@hsblawfirm.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
COUNTER STATEMENT OF FACTS	6
I. PRIOR HISTORY OF THE CIVIC.....	7
A. Before reaching Midlands, the Civic was wrecked, sold with no indication it was a salvaged vehicle on its title, and repaired.	7
B. Midlands acquired the Civic in June 2008.....	7
C. Midlands sold the Civic to Ecklund.....	8
D. Midlands sends the car to ADESA to be sold as a red light sale.	8
1. Buying and selling at ADESA.	8
2. The sale of the Civic to O&W.	9
ARGUMENT	11
I. THE TRIAL COURT’S REDUCED PUNITIVE DAMAGES AWARD OF \$46,515 COMPORTS WITH THE LAW AND DUE PROCESS. IN ADDITION, O&W WAIVED THE RIGHT TO COMPLAIN ABOUT THE PUNITIVE DAMAGES AWARD WHEN IT ELECTED ITS REMEDY UNDER THE NCUTPA.....	11
A. Because O&W did not elect punitive damages, it cannot now complain about the trial court’s review of that portion of the jury’s verdict.	11
B. The trial court conducted a complete and thorough review of the punitive damages award as required under state and federal law. The reduced award of \$46,515 comports with the law and due process.	13
1. Standard of Review.....	13
2. The jury’s punitive damages award was excessive as a matter of due process.	14
a. Reprehensibility.....	15
b. Ratio.....	18
c. Civil Penalties.....	18
3. The constitutional review is separate and distinct from the statutory punitive damages cap imposed by N.C.G.S. § 1D-25.....	19
II. THE TRIAL COURT’S ATTORNEY’S FEE AWARD REFLECTS A FAIR EXERCISE OF DISCRETION AND MUST BE AFFIRMED, PARTICULARLY IN LIGHT OF THE MATERIALS SUBMITTED BY O&W’S COUNSEL, THE REFUSAL TO SETTLE THIS MATTER AFTER TRIAL DESPITE MIDLANDS’S GOOD FAITH EFFORTS, AND THE EMPHASIS PLACED ON PUNITIVE DAMAGES WHICH ARE NOT RECOVERABLE UNDER THE NCUTPA.....	20
B. Attorney’s fees under the NCUTPA.....	21
1. The trial court’s order of November 28, 2016 awarded a reasonable fee based on the applicable case law and its view of this case and the materials submitted by the parties.	23

2. The trial court’s order of February 27, 2017 is consistent with the NCUTPA and the underlying purpose of fee awards under the NCUTPA.	28
3. The trial court’s order of August 10, 2017 is valid and should be affirmed.	31
a. The trial court had jurisdiction to enter the order.	31
b. The August 10, 2017 order is correct on its merits.	32
III. THE TRIAL COURT CORRECTLY REQUIRED O&W TO ELECT “PRIOR TO JUDGMENT, BETWEEN PUNITIVE DAMAGES AND ANY OTHER REMEDY[.]”	33
A. N.C.G.S. § 1D-20 applies and limits O&W to recovery under either its fraud claim or its NCUTPA claim.	34
B. N.C.G.S. § 1D-20 means exactly what it says.	36
IV. THE TRIAL COURT CORRECTLY DETERMINED THAT OFFER OF JUDGMENT INTEREST IS NOT APPLICABLE IN THIS CASE.	39
CONCLUSION.	40

TABLE OF AUTHORITIES

CASES

<i>Adamson v. Marianne Fabrics, Inc.</i> , 301 S.C. 204, 391 S.E.2d 249 (1990)	12
<i>Austin v. Stokes-Craven Holding Corp.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010).....	17-18
<i>Blankenship v. Town and Country Ford, Inc.</i> 622 S.E.2d 638 (N.C. Ct. App. 2005)	38
<i>Blumberg v. Nealco</i> , 310 S.C. 492, 427 S.E.2d 659 (1993)	21
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996).....	14-15, 19
<i>Boswell v. RFD-TV the Theater, LLC</i> , 498 S.W.3d 550 (Tenn. Ct. App. 2016)	20
<i>Branham v. Ford Motor Co.</i> , 390 S.C. 203, 701 S.E.2d 5 (2010).....	14
<i>Broussard v. Meineke Discount Muffler Shops</i> , 958 F.Supp 1087 (W.D.N.C. 1997), <i>rev'd on other grounds</i> by 155 F.2d 331 (4 th Cir. 1998)	38
<i>Compton v. Kirby</i> , 577 S.E.2d 905 (N.C. Ct. App. 2003)	12
<i>Di Frega v. Pugliese</i> , 596 S.E.2d 456 (N.C. Ct. App. 2004).....	36
<i>Durham v. Vinson</i> , 360 S.C. 639, 602 S.E.2d 760 (2004)	14
<i>EFCO Corp. v. Renaissance on Charleston Harbor, LLC</i> , 370 S.C. 612, 635 S.E.2d 922 (Ct. App. 2006)	21
<i>Ellis v. Northern Star Co.</i> , 388 S.E.2d 127 (N.C. 1990).....	11
<i>Evans v Full Circle Productions, Inc.</i> , 443 S.E.2d 108 (N.C. Ct. App. 1994)	22
<i>Everhart v. O'Charley's, Inc.</i> , 683 S.E.2d 728 (N.C. Ct. App. 2009).....	20
<i>GE Betz, Inc. v. Conrad</i> , 752 S.E.2d 634 (N.C. Ct. App. 2013).....	14
<i>Halley Nursery Co. v. Forrest</i> , 298 S.C. 520, 381 S.E.2d 906 (1989)	25
<i>Harris-Jenkins v. Nissan Car Mart, Inc.</i> , 348 S.C. 171, 557 S.E.2d 708 (Ct.App. 2001).....	26
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	23, 26-27
<i>Hollis v. Stonington Dev., LLC</i> , 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011)	13
<i>Horak v. Southern Real Estate Co. of Charlotte, Inc.</i> , 563 S.E.2d 47 (N.C. Ct. App. 2002)	36
<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010).....	24, 28, 33
<i>Lacey v. Kirk</i> , 767 S.E.2d 632 (N.C. Ct. App. 2014).....	21
<i>Lemons v. Old Hickory Council</i> , 367 S.E.2d 655 (N.C. 1988)	34
<i>Llera v. Sec. Credit Sys., Inc.</i> , 93 F. Supp. 2d 674 (W.D.N.C. 2000).....	22
<i>Mapp v. Toyota World, Inc.</i> , 344 S.E.2d 297 (N.C. Ct. App. 1986).....	11
<i>Marshall v. Miller</i> , 276 S.E.2d 397 (N.C. 1981)	30
<i>Martin Architectural Products, Inc. v. Meridian Constr. Co.</i> , 574 S.E.2d 189 (N.C. Ct. App. 2002)	26
<i>Maybank v. BB&T Corp.</i> , 416 S.C. 541, 787 S.E.2d 498 (2016)	25
<i>McAfee v. Boczar</i> , 738 F.3d 81 (4th Cir. 2013).....	21
<i>Mitchell v. Fortis Ins. Co.</i> , 385 S.C. 570, 686 S.E.2d 176 (2009).....	13-14
<i>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche</i> , 327 S.C. 238, 489 S.E.2d 470 (1997)	23-24
<i>Moore v. Bi-State Dev. Agency</i> , 87 S.W. 3d 279 (Mo. Ct. App. 2002)	20
<i>Morris v. Scenera Research, LLC</i> , 747 S.E.2d 362 (N.C. Ct. App. 2013), <i>aff'd in part, rev'd in part</i> , 788 S.E.2d 154 (N.C. 2016)	25-27
<i>Nakatsukasa v. Furiex Pharm., Inc.</i> , No. 14 CVS 6156, 2015 WL 4069818 (N.C. Super. July 1, 2015)	22
<i>Okwara v. Dillard Dep't Stores, Inc.</i> , 525 S.E.2d 481 (N.C. Ct. App. 2000)	25
<i>Out of the Box Developers, LLC v. Doan Law, LLP</i> , No. 10 CVS 8327, 2014 WL 4298329 (N.C. Super. Aug. 29, 2014).....	26-27

<i>Patterson v. State</i> , 359 S.C. 115, 597 S.E.2d 150 (2004)	34
<i>Perkins v. Arkansas Trucking Servs., Inc.</i> , 528 S.E.2d 902 (N.C. 2000)	35
<i>Phillip Morris, USA v. Williams</i> , 549 U.S. 346 (2007)	14
<i>Rhyne v. K-Mart Corp.</i> , 562 S.E.2d 82 (N.C. Ct. App. 2002), <i>aff'd</i> , 594 S.E.2d 1 (N.C. 2004). 19	
<i>Shepard v. Bonita Vista Properties, L.P.</i> , 664 S.E.2d 388 (N.C. Ct. App. 2008)	22
<i>Smith v. Strickland</i> , 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994)	12
<i>Southeast Air Charter, Inc. v. Stroud</i> , No. 11 CVS 946, 2015 WL 4897790 (N.C. Super. Aug. 17, 2015)	23
<i>Southwood v. Credit Card Solution</i> , No. 7:09-CV-00081-F, 2016 WL 8710985 (E.D.N.C. Feb. 26, 2016), <i>report and recommendation adopted sub nom, SouthWood v. CCDN, LLC</i> , No. 7:09-CV-183-F, 2016 WL 1389596 (E.D.N.C. Apr. 7, 2016)	38
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	passim
<i>State v. Mayo</i> , 807 S.E.2d 654 (N.C. Ct. App. 2017)	35
<i>Stilley v. Automobile Enterprises of High Point, Inc.</i> , 284 S.E.2d 684 (N.C. Ct. App. 1981)	17
<i>Taylor v. Nix</i> , 307 S.C. 551, 416 S.E.2d 619 (1992)	24
<i>Tillman v. Oakes</i> , 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012)	31-32
<i>United Laboratories, Inc. v. Kuykendall</i> , 403 S.E.2d 104, 111 (1991), <i>aff'd</i> , 437 S.E.2d 374 (N.C. 1993)	22, 36-38
<i>Whiteside Estates, Inc. v. Highlands Cove, L.L.C.</i> , 553 S.E.2d 431 (N.C. Ct. App. 2001)	24
<i>Williamson v. Middleton</i> , 374 S.C. 419, 649 S.E.2d 57 (Ct. App. 2008), <i>rev'd on other grounds</i> , 383 S.C. 490, 681 S.E.2d 867 (2009)	21

STATUTES

N.C.G.S. § 1D-15(c)	16
N.C.G.S. § 1D-20	passim
N.C.G.S. § 1D-25	19
N.C.G.S. § 1D-50	14
N.C.G.S. § 12-3(1)	35
N.C.G.S. § 15A-1340.23(b)	19
N.C.G.S. § 20.71-4	19
N.C.G.S. § 20-348	19
N.C.G.S. § 75-16	19, 34
N.C.G.S. § 75-16.1	22
S.C. Code Ann. § 15-35-400	39-40

OTHER AUTHORITIES

Black's Law Dictionary (10 th ed. 2014)	36
1995 North Carolina Laws Ch. 514 (H.B. 729)	37

RULES

Rule 205, SCACR	32-33
Rule 208, SCACR	11
Rule 220, SCACR	11
Rule 241, SCACR	31

STATEMENT OF THE ISSUES ON APPEAL

- 1. Did O&W Cars waive any challenge to the trial court's punitive damages review by failing to elect recovery under its fraud cause of action and instead electing recovery under the North Carolina Unfair Trade Practices Act?**
- 2. Did the trial court correctly reduce the punitive damages award to a ratio of from a 358:1 ratio of punitive damages to actual damages to a ratio of 7:1 to comport with due process following a complete and thorough review of the punitive damages award as required under state and federal law?**
- 3. Was the trial court within its discretion in issuing its orders regarding an award of attorney' fees under the North Carolina Unfair Trade Practices Act in light of the materials submitted by O&W's counsel, the refusal to settle this matter after trial despite Midlands' good faith efforts, and the emphasis placed on punitive damages which are not recoverable under the NCUTPA?**
- 4. Did the trial court correctly require O&W Cars to elect, prior to judgment, between punitive damages and any other remedy?**
- 5. Did the trial court correctly determine that offer of judgment interest is not applicable when the offer of judgment amount exceeded the amount of the final judgment?**

STATEMENT OF THE CASE

Daniel O'Shields and Roger W. Whitley d/b/a O&W Cars¹ ("O&W") filed this action on January 17, 2013 against PSC Automotive Group d/b/a Midlands Honda ("Midlands") and Nationwide Mutual Insurance Company ("Nationwide"). (R. at 48-59). The original complaint included the following causes of action, all of which stem from the sale of a used car by Midlands to O&W at the ADESA automobile auction in Charlotte, North Carolina: (1) breach of contract; (2) negligence; (3) negligent misrepresentation; (4) constructive fraud; (5) fraud; (6) South Carolina Dealer's Act; and (7) South Carolina Unfair Trade Practices Act ("SCUTPA"). (*Id.*). Midlands moved to dismiss the South Carolina statutory claims. (R. at 1181-83).

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

This matter was tried before a jury from April 18-22, 2016. Midlands admitted liability on the breach of contract claim. (R. at 685:12-14). The trial court found the economic loss rule barred

¹ O&W is a used car dealership in Shelby, North Carolina owned by O'Shields and Whitley as a general partnership. (R. at 588:8-23). The contract at issue was between Midlands and O&W. (R. at 1013-14). As reflected repeatedly in the trial transcript, O&W only sought one recovery in this action. (*See e.g.*, R. at 289:24-290:6, 291:18-292:1 (Plaintiff's Opening); 750:22-23, 753:6-9, 766:19-21 (Plaintiff's Closing)).

the negligence claim. (R. at 709:11-14). The jury rendered a verdict of \$6,650 in actual damages on the following causes of action: (1) breach of contract; (2) negligent misrepresentation; (3) NCUTPA; and (4) fraud. (R. at 43-46). The jury also returned a verdict of \$2,381,888.00 in punitive damages on the fraud cause of action. (R. at 47). The trial court granted the parties ten days to make any post-trial motions. (R. at 935:4-9).

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

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

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

The trial court issued a written order addressing the post-trial motions on November 28, 2016.² (R. at 1-23). In that order, the trial court provided the basis for the alternative remedies set forth in the August 29 email, including its due process review of the punitive damages award as required by N.C.G.S. § 1D-50 and its decision on O&W's attorney's fee request. The punitive damages review included a discussion of each of the factors listed in the applicable North Carolina statute, N.C.G.S. § 1D-35 and a due process analysis. With respect to the attorney's fee request, the trial court considered all of the facts before it on each of the elements for an award under the NCUTPA, including the parties efforts to "fully resolve the matter which constitutes the basis of [this] suit," and determined an award of \$21,264 was appropriate.

By motions dated December 15, 2016, O&W moved for supplemental attorney's fees incurred after July 20, 2017 and asked the trial court to reconsider its November 28, 2016 order in the following respects: (1) reference to O&W in the singular; (2) whether Midlands needed to renew a directed verdict motion between the actual and punitive damage phases of the trial; (3) that the trial court was not required to perform a written punitive damage award review; (4) that the trial court's civil penalties analysis was incomplete or inaccurate; (5) that O&W's closing argument was not improper; (6) an allegation that Midlands failed to make any effort to resolve the matter; (7) an allegation that there was no requirement that an affidavit be filed quickly after the hearing on the post-trial motions; (8) that the award of attorney's fees, while analytically correct, was unreasonably low; (9) that the award of attorney's fees did not include co-counsel's time; (10) that the trial court erred in not awarding offer of judgment interest; and (11) that the award of interest was not calculated correctly. (R. at 1884-1992).

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

Midlands submitted a memorandum in response to O&W's motions, which, among other things, provided additional information about its efforts to "fully resolve the matter" following the trial court's August 29 election instructions and argued that there was not an "unwarranted refusal to settle" after September 14 because Midlands had offered to pay "a sum reflecting actual damages plus the trial court's award of both punitive damages and attorney's fees for a total of \$81,069 (\$6,645 in actual damages + \$46,515 in punitive damages + \$21,264 in attorney's fees)."³ (R. at 1999-2010).

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

O&W again moved for supplemental fees on March 30, 2017. (R. at 2058-82). A notice of appeal followed on April 11, 2017. (R. at 2086). After receiving an email from the trial court indicating it intended to deny the motion, O&W submitted an additional memorandum on June 28, 2017. (R. at 2087, 2093-148). It was only there that O&W raised a possible issue as to the trial

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

court's jurisdiction. Midlands responded on July 25, 2017 that it did not object "to delaying a decision on the motion as [O&W] has suggested." (R. at 2149).

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

COUNTER STATEMENT OF FACTS

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

As the trial court recognized, Ecklund's involvement with the Civic is largely irrelevant to this case. (R. at 237:14-17, 242:12-14). The alleged misconduct here involved violation of

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

ADESA's rules and a North Carolina statutory disclosure requirement, which has no South Carolina statutory counterpart. Ecklund's transaction did not involve ADESA or occur in North Carolina, and he is not a party to this case. The only relevance his testimony had was to establish Midlands' prior knowledge of the Civic's condition, a fact which Midlands conceded.

I. Prior History of the Civic.

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

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

B. Midlands acquired the Civic in June 2008.

When Midlands acquired the Civic in June of 2008, it had a clean title. (R. at 382:10-14). The Civic underwent a standard inspection for certification at Midlands Honda. (R. at 393:10-21). Midlands did not discover the prior damage in this process as far as it could ascertain from its records. (*Id.*; R. 1024-25).⁶

Midlands' used car manager, Brent Ferrell, was responsible for valuing the car when it was sold to the dealership. (R. at 347:25-348:3). It was his practice to conduct a visual inspection of

⁵ Brian Allen, O&W's expert mechanic, inspected the Civic. When he removed the rear seats, he noticed that the structural panel had been cut in half and welded back together. (R. at 488:7-10). He then removed other sections of the interior, and discovered that the vehicle was a "clipped car", or a car in which two sections of different vehicles have been welded together. (R. at 512:22-513:2). In the 70s and 80s, it was common practice to repair a car in this manner, but such repairs have since fallen out of favor. (R. at 499:4-16).

⁶ Terry Smith, the mechanic who performed the inspection, died in 2011, before notice of any dispute with O&W. (R. at 409:18-25, 554:24-555:16).

the interior and exterior and test-drive the car to make sure there were no transmission issues. (R. at 348:4-19). He would then consult the dealer's black book to put a value on the car. (*Id.*). He did not send cars to the service department or put them on a lift as part of this process. (R. at 348:5-349:4). Based on this normal practice, Farrell did not discover the prior damage. (R. at 358:20-24, 369:8-24).

C. Midlands sold the Civic to Ecklund.

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

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

1. Buying and selling at ADESA.

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

ADESA adopted a new set of rules in January 2010, four months before the sale of the Civic. (R. at 996-1010, 408:24-409:3, 635:6-21). The 2010 rules did not require disclosure of wreck damage if a vehicle was sold under a red light. (R. at 996-1010). The 2010 rules did,

however, contain a new requirement that unibody damage be disclosed even if a vehicle was sold under a red light. (R. at 162:7-10, 293:20-294:2, 996-1010).

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

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

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

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

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

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

red light generally means that the seller is relinquishing all liability. (*Id.*; R. at 434:7-435:1). A red light sale is an “as-is” sale. (R. at 397:15-22, 1014). Joe Guyer, ADESA’s general manager, agreed that it is common knowledge that if a car goes through auction on a red light that means something is wrong with it. (R. at 142:1-13, 339:9-17). In addition, ADESA’s rules required a buyer to inspect a vehicle before purchasing. (Pl. Ex. 52 at 3(d) and 9(a); Tr. at 408:13-09:9, R. at 630:13-631:9, 996-1010 (¶¶ 3(d) and 9(a))).

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

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

ARGUMENT⁷

As discussed above, this case and this appeal involves a contractual dispute between two car dealers relating to a single transaction to sell a car for \$5,200. It was not a face-to-face interaction. Instead, O&W dealt exclusively with ADESA. ADESA filled out much of the paperwork. Neither O&W nor Midlands were aware of the recent ADESA rules change. The trial court understood what was at issue and noted during the trial, “I mean this is a Magistrate Court case you understand. The jurisdiction’s under the Six Thousand Dollars.” (R. at 695:18-20). This case should be reviewed on appeal through this same lens.

I. The trial court’s reduced punitive damages award of \$46,515 comports with the law and due process. In addition, O&W waived the right to complain about the punitive damages award when it elected its remedy under the NCUTPA.

A. Because O&W did not elect punitive damages, it cannot now complain about the trial court’s review of that portion of the jury’s verdict.

O&W did not elect punitive damages. (R. at 1854). Therefore, O&W cannot now complain about the trial court’s review of the punitive damages award.

By statute and at common law in North Carolina, a plaintiff who obtains both a common law punitive damages award and a statutory treble damages award must elect between them. *Ellis v. Northern Star Co.*, 388 S.E.2d 127, 132 (N.C. 1990); *Mapp v. Toyota World, Inc.*, 344 S.E.2d 297, 301 (N.C. Ct. App. 1986); N.C.G.S. § 1D-20 (“A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to a statute that provides for multiple

⁷ Pursuant to Rule 208(b), SCACR, the Standard of Review will be set forth at the beginning of each argument. In addition, to the extent any argument contained in this brief was not presented to the trial court, Midlands notes that this Court may affirm for any reason appearing in the record. Rule 220, SCACR.

damages.”).⁸ The same is true in South Carolina. *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990); *Smith v. Strickland*, 314 S.C. 192, 197-98, 442 S.E.2d 207, 210 (Ct. App. 1994) (“As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages, where their recovery concerns a single wrong.”).

Because O&W elected recovery under the NCUTPA, it may not recover punitive damages. Therefore, its arguments regarding the propriety of the trial court’s review of the punitive damages award are moot. *See Compton v. Kirby*, 577 S.E.2d 905, 918 (N.C. Ct. App. 2003) (“Plaintiffs were required to elect between the treble damages and the \$90,000 punitive damages award, and chose treble damages. Defendant’s arguments regarding punitive damages are therefore moot . . .”).

Had O&W wished to preserve its right to recover a punitive damages award, the proper course of conduct would have been to elect recovery of the fraud verdict, including punitive damages, and then to appeal the trial court’s presumed denial of attorney’s fees. O&W initially took this position, but then changed its stance. (R. at 1435-37, 1854). Presumably, O&W made a calculated decision that its recovery of attorney’s fees would exceed recovery of punitive damages after the trial court reduced the award, and opted to attempt to maximize its recovery. O&W cannot now have its cake and eat it too.

⁸ As further argued below, § 1D-20 also requires affirmance of the trial court’s ruling requiring an election of remedies between punitive damages and all recovery under the NCUTPA, including attorneys’ fees, be affirmed.

B. The trial court conducted a complete and thorough review of the punitive damages award as required under state and federal law. The reduced award of \$46,515 comports with the law and due process.

This is a commercial case, not a personal injury action. It is a dispute between two car dealers over the sale of a \$5,200 used car. The jury determined that O&W's actual damages totaled \$6,650 and then awarded \$2,381,888.00 in punitive damages on the fraud cause of action. *This award is 358 times the actual damages award.* A punitive damages award of this size does not comport with due process, and the trial court was correct in reducing the award to \$46,515.

O&W focuses on Midlands' net worth in its attempt to justify the large punitive damages award. This focus on net worth, however, is not dispositive and does not compel reversal. If that analysis were to be accepted, it would mean that *as a matter of due process*, it would always be appropriate to assess higher punitive damage awards to higher net worth defendants simply because of their net worth. This is not and has never been the law. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003). As the South Carolina Supreme Court has stated:

We caution that trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth.

Mitchell v. Fortis Ins. Co., 385 S.C. 570, 588 n. 8, 686 S.E.2d 176, 185 n. 8 (2009).

1. Standard of Review.

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

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

There are constitutional limits on the amount of punitive damage awards. Punitive damages must bear a reasonable relationship to compensatory damages. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996) (“[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.”). In *Gore*, the Supreme Court set forth guideposts for determining the constitutionality of a punitive damages award: (1) reprehensibility of the defendant’s conduct; (2) the disparity between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Id.* at 575; *see also Mitchell*, 385 S.C. at 587-89, 686 S.E.2d at 185-86.

Here, the trial court correctly assessed these guideposts in the context of the transaction at issue in this case: the sale of the Civic by Midlands to O&W at ADESA. (R. at 11-19).⁹ It is those facts that govern this analysis, not the previous transaction with Ecklund. *See Phillip Morris, USA v. Williams*, 549 U.S. 346, 353 (2007) (“The Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially strangers to the litigation.”); *Branham v. Ford Motor Co.*, 390 S.C. 203, 238, 701 S.E.2d 5, 23-24 (2010); *Durham v. Vinson*, 360 S.C. 639, 652-53, 602 S.E.2d 760, 767 (2004); *GE Betz, Inc. v. Conrad*, 752 S.E.2d 634, 653-54 (N.C. Ct. App. 2013) (citing *Gore* and *Campbell*

⁹ The trial court complied with N.C.G.S. § 1D-50 by providing a written order discussing the factors which North Carolina requires be addressed when a trial court reviews an award of punitive damages. Because the statute does nothing more than require a written order, and because the trial court satisfied this requirement, N.C.G.S. § 1D-50 is irrelevant to this appeal, except to the extent the factors set forth therein bear on the due process analysis.

and noting “the Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts on nonparties” and “as a general rule, a [s]tate [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the [s]tate’s jurisdiction.”). O&W’s repeated attempts to justify the punitive damages award by reference to Ecklund, who was neither a party to this action nor a resident of North Carolina or South Carolina at the time of the sale to O&W, are improper.

Because review is *de novo*, each of the *Gore* guideposts is discussed below:

a. Reprehensibility.

The conduct here is not sufficiently reprehensible to justify the massive punitive damages award imposed by the jury for many reasons, including the following:

- The Civic was sold under a red light. It was undisputed at trial that a sale under red light at an auction is a warning to the buyer that something is wrong with the vehicle. The presence of an actual warning by Midlands to O&W distinguishes this case from every case cited by O&W.
- The Civic was sold “as is.” In addition to being sold under a red light, the Civic was sold “as is.” A car dealer such as O&W should be on particular alert when purchasing a vehicle “as is.”
- The Civic had visible wreck damage. The presence of visible wreck damage on the Civic served as yet another indicator that the Civic was a problem vehicle.
- This case involves an alleged non-disclosure, as opposed to an affirmative misrepresentation. The United States Supreme Court has stated that while suppression of a material fact can support tort liability and even a modest punitive damages award, this conduct is less reprehensible than a deliberate false statement, particularly where, as here, there is a good-faith basis for believing no duty to disclose exists. *BMW of North America, Inc. v. Gore*, 517 U.S.

559, 580 (1996). O&W argued that ADESA's rules required Midlands to disclose unibody damage and it failed to do so. However, O&W presented no evidence that Midlands was aware that ADESA had changed its rules to require disclosure of unibody damage even when a vehicle was sold under a red light.¹⁰

- This case involves the sale of a single used car. There is no evidence in the record that the facts relating to the sale of the Civic to O&W were anything other than an isolated incident. The sale of the Civic to Ecklund did not involve ADESA, auction rules, or North Carolina statutory disclosure forms. There is also no evidence Midlands knew of the prior damage to the Civic when it sold the Civic to Ecklund. There has been no judicial determination of wrongdoing of any kind in connection with Ecklund's transaction. He is not and has never been a party to this case. As the United States Supreme Court cautioned in *Campbell*, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

- There was little risk of serious harm to O&W. O&W mocks the trial court's conclusion that there was little risk of serious harm in the transaction between Midlands and O&W. Derision, however, falls short of actual analysis. Unlike many of the cases cited by O&W, this case did not involve personal injury. It is a commercial case over a used car purchased for \$5,200. Total actual damages were \$6,650. Additionally, Midlands provided a red light warning and sold the car "as is" with visible wreck damages, actions which should have impressed upon O&W that

¹⁰ To the extent O&W argues that ADESA's clerk made an affirmative representation on the North Carolina damage disclosure form and that Midlands is liable for this representation because Midlands had appointed ADESA as its agent under a power of attorney, it is sufficient to note that N.C.G.S. § 1D-15(c) provides that "[p]unitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another." Thus, the representations made by ADESA's clerk on the damage disclosure form cannot support a punitive damages award under North Carolina law.

care needed to be exercised in connection with the Civic. ADESA's rules also required O&W to carefully inspect the Civic. Finally, as a motor vehicle dealer which made repairs to the Civic, O&W was required by North Carolina law to inspect the Civic for defects which might make it a menace to those who might use the vehicle or come in contact with the vehicle if they undertook to repair or recondition the vehicle. *Stilley v. Automobile Enterprises of High Point, Inc.*, 284 S.E.2d 684, 688 (N.C. Ct. App. 1981). Had O&W conducted its own inspection of the Civic, as it was required to do, the prior repairs to the Civic would have been discovered. O&W's criticisms of Midlands' failure to discover the prior damage to the Civic fall flat in light of the fact the O&W also failed to inspect and discover the prior damage before reselling the car to a third party.

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

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

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

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

(R. at 7). As a result, the trial court determined that the conduct here was not as reprehensible for purposes of this analysis as that in *Austin*. O&W's argument ignores all of these findings.

b. Ratio.

The United States Supreme Court has stated that, while there is no bright-line rule, an award of "more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). In most cases then, an award more than four to five times the compensatory damages is unconstitutional. For the rare case in which a greater ratio is appropriate, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Here, the jury's verdict results in a ratio of 358:1 and therefore fails any ratio test.

By way of further analogy to *Austin*, if an 8.21:1 ratio is "high" in a case which involved worse conduct in a consumer transaction as discussed above, then a similar ratio would be "high" in a transaction between sophisticated parties, particularly where the purchasing dealer chose not to inspect a vehicle being sold under a red light.¹¹ The trial court therefore found a ratio of 7:1 represented the outside limits of due process in this case.

c. Civil Penalties.

O&W does not make any specific arguments as to the civil penalties considered by the trial court. Instead, it cites to other statutes relating to punitive damages, dealer licensing provisions,

¹¹ Given the distinctions between this case and *Austin*, O&W's arguments that any ratio in excess of 8.21:1 is appropriate should be rejected.

and criminal statutes. The trial court's references relate to the specific conduct at issue in this case, and are therefore, the appropriate statutes to guide this analysis. North Carolina's damage disclosure statute requires that a transferor of a motor vehicle disclose whether the vehicle has been reconstructed. N.C.G.S. § 20-71-4. It also provides that a violation may be redressed by a civil action under N.C.G.S. § 20-348. *Id.* This section authorizes recovery of "[t]hree times the amount of actual damages sustained or one thousand five hundred dollars (\$1,500), whichever is greater."¹² The maximum recovery for a violation of the NCUTPA is treble damages. N.C.G.S. § 75-16. Thus, the jury's punitive damages award vastly exceeded any comparable civil penalty, and the trial court was correct in finding that this factor supported a lower limit for purposes of the due process analysis.

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

O&W places great weight on N.C.G.S. § 1D-25, which caps punitive damages in North Carolina at three times actual damages or \$250,000, whichever is greater. It argues that the existence of the punitive damages cap somehow satisfies the constitutional due process analysis presented above. This argument improperly conflates the constitutionality of the punitive damages cap with the due process review of a punitive damages award. The application of the cap is separate and apart from the due process analysis presented above. *See Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 93 (N.C. Ct. App. 2002), *aff'd*, 594 S.E.2d 1 (N.C. 2004) (applying statute to reduce punitive award and then applying due process analysis required by *Gore*); *Everhart v.*

¹² Violation of the damage disclosure statute is also a class 2 misdemeanor. To the extent criminal penalties are relevant in this analysis, a class 2 misdemeanor carries a maximum fine of \$1,000. N.C.G.S. § 15A-1340.23(b).

O'Charley's, Inc., 683 S.E.2d 728, 740 (N.C. Ct. App. 2009) (considering whether punitive award satisfied due process even after reduction to statutory limit).

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

II. The trial court's attorney's fee award reflects a fair exercise of discretion and must be affirmed, particularly in light of the materials submitted by O&W's counsel, the refusal to settle this matter after trial despite Midlands's good faith efforts, and the emphasis placed on punitive damages which are not recoverable under the NCUTPA.

A. The trial court's award of attorney's fees cannot be disturbed absent an abuse of discretion.

As an initial matter, the South Carolina standard of review will apply to the consideration of the attorney's fee award because it is a procedural matter rather than a substantive one for purposes of the conflict of laws analysis. *See e.g., Boswell v. RFD-TV the Theater, LLC*, 498 S.W.3d 550, 557 (Tenn. Ct. App. 2016) (standard of review is procedural and will governed by forum law); *Moore v. Bi-State Dev. Agency*, 87 S.W. 3d 279, 285 (Mo. Ct. App. 2002) (the standard

of review is a procedural issue and forum law governs the standard of review for uses raised on appeal). Under South Carolina law, the determination of the amount of attorney's fees awarded pursuant to a statute is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006); *Blumberg v. Nealco*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). "An appellate court will not reverse an award of attorney's fees unless it is based on an error of law or is without *any evidentiary support*." *Williamson v. Middleton*, 374 S.C. 419, 427, 649 S.E.2d 57, 62 (Ct. App. 2008), *rev'd on other grounds*, 383 S.C. 490, 681 S.E.2d. 867 (2009) (emphasis in original).¹³ In making this determination, appellate courts consider that the trial court possesses "close and intimate knowledge of the efforts expended and the value of the services rendered." *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013).

As discussed in detail below, the trial court committed no error of law and the record contains evidentiary support for its ruling. The trial court's attorney fee award must therefore be affirmed.

B. Attorney's fees under the NCUTPA.

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

[i]n any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, *in his discretion*, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

¹³ North Carolina has a similarly deferential standard of review for attorney's fee awards. As set forth by the North Carolina Court of Appeals, "our review [of an order awarding attorneys' fees] is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *Lacey v. Kirk*, 767 S.E.2d 632, 648 (N.C. Ct. App. 2014).

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C.G.S. § 75-16.1 (emphasis added). The plain wording of the statute confirms that: (1) attorney's fees may not be awarded unless there was an unwarranted refusal to settle; and (2) even if such a refusal is present, an award of fees rests in the discretion of the Court and is reserved for "extreme cases." See *Evans v Full Circle Productions, Inc.*, 443 S.E.2d 108, 110 (N.C. Ct. App. 1994). As stated by O&W, the purpose of the fee award "is to encourage private enforcement" of the NCUTPA. See *Shepard v. Bonita Vista Properties, L.P.*, 664 S.E.2d 388, 396 (N.C. Ct. App. 2008). To this end, a plaintiff has the burden of establishing that there has been an unwarranted refusal to settle before any fee award can issue. *Llera v. Sec. Credit Sys., Inc.*, 93 F. Supp. 2d 674, 680 (W.D.N.C. 2000). In addition, trial courts retain the discretion to deny attorney's fees even if the elements of § 75-16.1 are met. *Id.*

North Carolina law requires that attorney's fee requests be reviewed using the following factors: (1) time and labor extended; (2) the skill required; (3) the customary fee for like work; and (4) the experience or ability of the attorney. *United Laboratories, Inc. v. Kuykendall*, 403 S.E.2d 104, 111 (1991), *aff'd*, 437 S.E.2d 374 (1993). North Carolina courts do not employ a multiplier. *Nakatsukasa v. Furiex Pharm., Inc.*, No. 14 CVS 6156, 2015 WL 4069818 at *8 (N.C. Super. July 1, 2015) ("Plaintiffs have not cited to, and this Court is unable to find, any reported case in which a North Carolina court has applied a 'multiplier' to increase the lodestar amount.").¹⁴

¹⁴ O&W references a multiplier in its brief, but does not make any argument relating to the trial court's finding that this case does not present the rare and exceptional circumstances required for the imposition of a multiplier. (R. at 13 n. 5). As such, this finding has not been appealed and is

1. **The trial court's order of November 28, 2016 awarded a reasonable fee based on the applicable case law and its view of this case and the materials submitted by the parties.**

The most useful starting point for determining the amount of a reasonable attorney's fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Southeast Air Charter, Inc. v. Stroud*, No. 11 CVS 946, 2015 WL 4897790 at * 3 (N.C. Super. Aug. 17, 2015) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Hours that are excessive, redundant, or otherwise unnecessary are removed and should not be included in the trial court's assessment of attorney's fees. *Id.*

Here, O&W has requested a total of \$476,194.12 in attorney's fees for a case resulting in a verdict on the NCUTPA claim of \$6,650. (R. at 1302-09, 1316-1433, 1529-1551, 1734-1851, 1884-1991, 1992, 2058-2082). The original submission included approximately 14 pages of vague time descriptions for Moskos. (R. at 1343-56). Given O&W's burden, Midlands only undertook to provide examples of why the request was excessive in opposition, not to list every improper or unrelated entry. (R. at 1562-1710).

The trial court reduced the number of hours claimed for several reasons: (1) all paralegal time was removed as unrecoverable under North Carolina law; (2) some time was excluded as excessive based on the description provided; (3) time relating to pursuing claims against Nationwide was excluded; (4) the inclusion of travel time was not reasonable to the extent it was necessitated by O&W's choice of an out-of-state, out-of-area attorney and (5) some time was excluded as unrelated to the NCUTPA claim, the only claim for which a fee award was available. The trial court is not required to itemize its findings.

the law of the case. See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding unappealed ruling is law of the case).

O&W has not appealed the first four reasons for reducing the amount of the fee award claimed, and it is now law of the case. *ML-Lee Acquisition Fund, L.P.*, 327 S.C. at 241, 489 S.E.2d at 472. To the extent these rulings serve as an additional basis for the trial court's attorney's fee award, the two-issue rule applies and will prevent reversal. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

O&W argues that the trial court erred in apportioning fees between the NCUTPA cause of action, which authorizes recovery of attorney's fees, and all of the other claims raised by O&W.¹⁵ To the contrary, the better practice is to exclude fees for non-statutory claims. *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) ("[t]he defendant's attorney argued fees related to the nonstatutory cause of action should have been excluded. We agree."); see *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 553 S.E.2d 431, 443 (N.C. Ct. App. 2001) ("Defendant correctly argues that fees are not recoverable for plaintiff's common law nuisance and trespass claim nor in defending against a counterclaim for abuse of process) (emphasis added).

To be fair, this apportionment is not required. "[W]hen an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made." *Taylor*, 307 S.C. at 557, 416 S.E.2d at 619; *Whiteside*, 553 S.E.2d at 443 ("where all of plaintiff's claims arise from the same nucleus of operative facts and each claim was "inextricably interwoven" with the other claims, apportionment of fees is unnecessary.") Importantly, however, trial courts are generally not

¹⁵ The trial court appears to have been particularly troubled by the prospect of awarding fees for O&W's pursuit of a punitive damages award, which is not recoverable under the NCUTPA. (See R. at 11-13).

prohibited from apportionment, when, in the trial court's discretion, it is appropriate to do so. *See, e.g. Maybank v. BB&T Corp.*, 416 S.C. 541, 581–82, 787 S.E.2d 498, 519 (2016) (affirming reduction of attorney's fees by 20% to account for time not spent on UTPA claim even where all claims shared common facts); *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 524, 381 S.E.2d 906, 909 (1989) (affirming trial court's award of less than 50% the amount of attorney's fees requested to account for time which was not spent on statutory UTPA claim).

O&W relies heavily on *Morris v. Scenera Research, LLC*, 747 S.E.2d 362 (N.C. Ct. App. 2013), *aff'd in part, rev'd in part*, 788 S.E.2d 154 (N.C. 2016) to argue that the trial court lacked the authority to limit recovery of attorney's fees to work on the only claim for which they are authorized. *Morris* is not a NCUTPA case. O&W's reliance on it is misplaced for a number of reasons.

First, O&W's reading of *Morris* stands apart from other North Carolina appellate decisions on this issue, which have held only that where all of a plaintiff's claims arise from the same nucleus of operative facts and each claim was 'inextricably interwoven' with the other claims, apportionment is unnecessary, not that apportionment is prohibited. Apportionment is instead left to the discretion of the trial court. *See Okwara v. Dillard Dep't Stores, Inc.*, 525 S.E.2d 481, 486–87 (N.C. Ct. App. 2000) (finding determination as to whether the fee should be reduced on a claim by claim basis is "left largely to the discretion of the trial courts.").

In addition, *Morris* did not reverse the trial court's award of attorney's fees because the trial court had apportioned between claims. Instead, it remanded the matter to the trial court for further findings on the issue. *Morris*, 747 S.E.2d at 379. Although parts of the *Morris* decision were later appealed, the attorney's fee award was not. North Carolina's Supreme Court did not therefore have the opportunity to address what appears to be an atypical ruling from the North

Carolina Court of Appeals. The North Carolina Supreme Court has never held that apportionment of fees among statutory and non-statutory claims is prohibited.

Additionally, while permitting the trial court to forego segregation of fees by claim could serve the interest of judicial economy, prohibiting a trial court from doing so would be incongruous with the general principle that attorney's fees may not be recovered unless such recovery is expressly authorized by statute or contract. Both North and South Carolina follow this rule. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct.App. 2001) ("In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees"); *Martin Architectural Products, Inc. v. Meridian Constr. Co.*, 574 S.E.2d 189, 192 (N.C. Ct. App. 2002) ("the general rule in North Carolina is that a party may not recover its attorney's fees unless authorized by statute").

Even if *Morris* can be construed to apply here as O&W suggests, the trial court's decision does not conflict with *Morris*. The case cited by the trial court here, *Out of the Box Developers, LLC v. Doan Law, LLP*, No. 10 CVS 8327, 2014 WL 4298329 at *9 (N.C. Super. Aug. 29, 2014), provides the following discussion of *Morris*:

The court must consider these factors in a way that accounts for OTB's limited success. If a plaintiff brings multiple claims arising from a common nucleus of facts, and succeeds on some claims but not others, the court is not necessarily required to allocate fees between the successful and unsuccessful claims. *Morris v. Scenera Research, LLC*, — N.C.App. —, 747 S.E.2d 362, 378 (2013). At the same time, where the fee requested and the success achieved are incongruous, an adjustment must be made to assure that the fee awarded is reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Thus, *Morris* stands for the proposition that the trial court is not required to allocate, not for the proposition that the trial court cannot allocate as argued by O&W. As noted in *Out of the Box*, "[h]owever, in stating that the trial court is not required to allocate fees, the Court of Appeals did

not further hold that the trial court should never adjust to recognize any partial success. *Out of the Box Developers, LLC* at *10. Indeed, *Hensley* instructs to the contrary: “the most critical factor is the degree of success obtained.” *Id.* (quoting *Hensley*, 461 U.S. at 436). As stated in *Morris* “where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.” *Morris*, 747 S.E.2d at 378. Stated differently, trial courts retain the authority to adjust attorney’s fees awards to ensure that such awards are reasonable in relation to the results obtained.

Where, as here, a party has not obtained “substantial relief” as to all claims raised, any alleged prohibition on apportionment of fees would not apply. O&W asserted eight claims in this action, but either abandoned or was unsuccessful on four of them. Thus, the trial court was free to adjust the award to reflect the degree of success obtained. The trial court specifically concluded that O&W’s initial attorney’s fees request was “not reflective of the fees reasonably expended” to achieve the NCUTPA verdict. (R. at 14).

Furthermore, as discussed above, this case was one in which the maximum recovery under the NCUTPA, even after treble damages, could *never* have exceeded \$20,000. The amount awarded certainly does not operate as a direct limit on the amount of attorney’s fees which may be recovered, but at some point, the amount of attorney time devoted to recovery of less than \$20,000 can become *unreasonable*. O&W requested close to one-half million dollars in attorney’s fees before appeal.¹⁶ At some point, as noted by the trial court, “Plaintiff’s counsel’s primary incentive here [became] attorney compensation rather than recovery for their client.” (R. at 31).

¹⁶ O&W’s initial fee request totaled \$370,543.12. (R. at 14). Its first motion for supplemental attorney’s fees sought an additional \$50,000 in attorney’s fees. (R. at 1894). Its second supplemental motion for fees sought an additional \$55,614.00. (R. at 2058). In total, O&W sought attorney’s fees of \$476,194.12 before any notice of appeal was filed.

For all of these reasons, the trial court was within its discretion in issuing its original attorney's fee award of \$21,264. The award does not contain an error of law and is supported by the evidence.

2. The trial court's order of February 27, 2017 is consistent with the NCUTPA and the underlying purpose of fee awards under the NCUTPA.

O&W filed a motion to reconsider the November 28, 2016 order together with a supplemental fee request. (R. at 1884-98). In its order ruling on the Rule 59(e) motion, the trial court clarified that it had considered Fudenberg's submitted time in making its earlier ruling. The trial court further declined to consider O&W's new affidavits submitted to clarify or detail its earlier submissions to the trial court in order to correct the deficiencies in the descriptions of the time claimed. It also declined to consider time from May 2, 2016 through July 20, 2016 that had not been submitted previously because O&W had every opportunity to submit that time prior to the hearing. O&W raises the question of Fudenberg's time in this period in its brief, but does not challenge the other findings on these points.

With respect to the timeliness of the request for fees from May 2, 2016 through July 20, 2016,¹⁷ O&W has not appealed the trial court's finding that the request was not timely. As a result, the trial court's denial of that part of O&W's fee petition is barred by application of the two issue rule and must be affirmed. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

With respect to the request for fees after July 20, 2016, the trial court divided its analysis by time period. For hearing preparation time (July 21, 2016 through July 27, 2016), the trial court awarded 50% of the fees claimed on the basis that the time should be allocated between the

¹⁷ O&W sought recovery for 153.8 hours of attorney time from May 2 through July 20, totaling \$59,982 (exclusive of any multiplier). (R. at 1529-36 (¶¶ 2-6 and 24-27)).

NCUTPA claim and the other issues being argued. This allocation is borne out by the time entries and the time spent on punitive damages at the post-trial motion hearing. (R. at 1960-1971, 1981-91). For purposes of this hearing, the facts underlying the punitive damages analysis were not the same as the underlying facts giving rise to the NCUTPA claim. Midlands incorporates its arguments above as to the merits of this allocation.

For the post-hearing period until September 14, 2016, the Court determined the fees claimed by Moskos for an affidavit were grossly excessive. At that time, the trial court had already provided the following comment about the affidavit in the November 28 order:

At the hearing, Plaintiff asked for leave to submit an additional affidavit in support of the request for attorney's fees. The Court agreed, but asked that any affidavit be filed quickly. More than thirty days later and after the Court has issued guidance to the parties about its rulings, Plaintiff submitted a lengthy affidavit. Defendant objected, citing, among other things, the lateness of the affidavit and the fact that the affidavit contained legal arguments and opinions rather than additional facts. The Court notes that much of the affidavit is improper as it contains legal arguments and speculation about which the Affiant lacked personal knowledge, but it has considered the factual representations as part of its analysis.

(R. at 12 n. 4). Consistent with this ruling, the trial court only awarded fees for two hours in connection with the affidavit. This is consistent with the trial court's discretion not to award any fees it deems excessive, redundant, or otherwise unnecessary. The trial court awarded all other fees claimed in this period.

The trial court declined to award any fees after September 14, 2016. This request for fees incurred in this period was a separate and new request. Before making a new fee award, the trial court reviewed the requirements of N.C.G.S. § 75-16.1(1), including its requirement that there be an unwarranted refusal to settle. In response to O&W's request, Midlands submitted evidence that it had made offers to settle the entire case based on the trial court's previous guidance. It increased its prior offer to \$81,069, a sum which provided O&W with: (1) the complete fraud judgment,

including punitive damages as reduced by the trial court; and (2) the complete unfair trade practices act judgment, including attorney's fees as awarded by the trial court. Based on its review of the materials submitted by the parties, the trial court at that point determined that N.C.G.S. § 75-16.1(1) was no longer met because Midlands had made a good faith effort to settle the entire case.

Midlands has not located any North Carolina case addressing the issue of whether continued efforts to settle post-trial can cut off a continuing entitlement to fees, nor has O&W. Instead, O&W points to cases where additional awards have been made for post-trial activities. Those cases do not, however, consider additional settlement efforts by the parties. Consideration of post-trial settlement is consistent with the purposes of the statute, which are: (1) to encourage private enforcement; and (2) to increase the prospects for settlement. *Marshall v. Miller*, 276 S.E.2d 397, 403-04 (N.C. 1981). A plaintiff's pre-trial and trial fees are not impacted by consideration of post-trial settlement efforts, and private enforcement is therefore not discouraged. Additionally, prospects for settlement dramatically increase if post-trial settlement offers may be considered in subsequent fee applications. The defendant has an incentive to increase its offer so that it will not be exposed to additional fee requests, and the plaintiff has an incentive to accept a reasonable offer, or risk not recovering for fees for post-trial or appellate work. Given the trial court's discretion in these matters and the underlying purpose behind fee awards, this approach is perfectly consistent with North Carolina law and the NCUTPA.

The construction urged by O&W runs counter to these goals and gives a plaintiff a motive to reject settlement. If, as O&W contends, no post-trial settlement activities may be considered, then a plaintiff who obtains an initial award of fees under the NCUTPA may then simply ignore a defendant's settlement offers. It would allow a plaintiff to accrue huge additional attorney's fee awards, and would require appellate courts to address unnecessarily disputes that should be settled.

For these reasons, the February 27 order is supported by the law and the evidence and should be affirmed.

3. The trial court's order of August 10, 2017 is valid and should be affirmed.

a. The trial court had jurisdiction to enter the order.

O&W spends a single paragraph arguing that its appeal of the trial court's March 16, 2017 order on its first supplemental fee petition deprived the trial court of jurisdiction to enter its subsequent order on O&W's second supplemental fee petition. O&W relies on Rules 241(a) and 205, SCACR. This argument is flawed as neither of these rules applies. Moreover, even if Rule 205 were applicable, the trial court retained jurisdiction to address the second supplemental fee petition because it was not affected by the appeal.

This Court addressed Rule 241 in *Tillman v. Oakes*, 398 S.C. 245, 254–55, 728 S.E.2d 45, 50–51 (Ct. App. 2012), as follows:

When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of the order; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241. If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal. That is the purpose of a stay under Rule 241 – to determine whether the appealed *order* may be carried out or enforced – not to determine whether the *action* may proceed in the lower court while the appeal is pending.

(emphasis in original).

The March 16, 2017 order was an order on an attorney's fee petition. It addressed the trial court's award of additional fees. While it is true that under Rule 241(a), the March 16, 2017 order could not be carried out or enforced after O&W filed its notice of appeal, there was never an attempt to carry out or enforce that order. Instead, the trial court ruled on a *second* supplemental

fee petition which was not addressed in the March 2017 order. It is this distinction that takes the second order out of the scenario contemplated in Rule 241.

Generally, the question of whether the trial court has continuing jurisdiction over a particular matter while a case is on appeal answered by Rule 205. *See Tillman*, 398 S.C. at 255, 728 S.E.2d at 51 (whether a court can proceed during the pendency of the action is governed by Rule 205, SCACR). However, Rule 205 was not triggered under the specific facts of this case.

Here, O&W specifically sought permission from this Court to allow the trial court to rule on the remaining fee petition so that O&W could appeal all of these issues at once. O&W there argued that it would promote judicial economy if the trial court's order on the remaining fee petition "were to be consolidated for appeal with the prior orders in this case." Having sought and obtained permission from this Court to allow the trial court to rule on remaining fee petition during the pendency of this appeal, O&W cannot now complain that the trial court acted on the remaining fee petition.

Even if O&W could properly invoke Rule 205, the rule would not deprive the trial court of jurisdiction to enter the August 10, 2017 order. The rule specifically provides that "[n]othing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. The remaining fee petition was not affected by the appeal to the extent it was an additional request for fees that had not been previously sought.

b. The August 10, 2017 order is correct on its merits.

As argued previously, the trial court had the discretion to assess entitlement to fees under the NCUTPA and to determine fees would no longer accrue once Midlands made an effort "to fully resolve the matter." The trial court expressed its exasperation with O&W's counsel, particularly given the trial court's earlier rulings relating to attorney's fees. (R. at 30-33).

In addition to its earlier rulings based on the statute and the settlement posture of the case, the trial court included an additional ruling denying fees as a matter of its general discretion. The trial court also denied the award because it found that the time spent in this period was not to protect O&W's status as prevailing party. In this period, there were no pending motions by Midlands and Midlands did not cross-appeal; thus, O&W's prevailing party status was not in jeopardy. O&W has not appealed these alternate rulings, and as such, the two issue rule provides an additional basis for affirming the August 10, 2017 order. *Jones*, 387 S.C. at 346, 692 S.E.2d at 903.

III. The trial court correctly required O&W to elect “prior to judgment, between punitive damages and any other remedy[.]”

O&W does not dispute that it is not entitled to recover damages on both its fraud claim and its NCUTPA claim.¹⁸ Rather, it seeks to recover actual and punitive damages under its fraud claim and attorney's fees under its NCUTPA claim. O&W asserts the trial court erred in requiring it to elect between recovery of actual and punitive damages and recovery of attorney's fees. This argument lacks merit for two reasons. First, it is moot based on O&W's election for recovery under the NCUTPA as discussed above. Second, the trial court's ruling is consistent with the applicable North Carolina statutory scheme.

As set forth in N.C.G. S. § 1D-20, “[a] claimant must elect, prior to judgment, between punitive damages and *any other remedy* pursuant to another statute that provides for multiple damages.” (emphasis added). The italicized text indicates that in cases in which a plaintiff recovers both punitive damages and a verdict under a statute which awards multiple damages, such as the

¹⁸ In fact, O&W argued election to the jury. (R. at 753:1-754:8). This section of argument again reflects that there was only one plaintiff in this action and includes repeated references to what “Mr. Whitley” and/ or “Roger” will receive.

NCUTPA, the plaintiff must choose between the punitive damages award and “any other remedy” authorized by the statute.

The words “any other remedy” are not vague or ambiguous. They are broad. Attorney’s fees are another remedy provided by the NCUTPA, which authorizes multiple damages, and they fall within the scope of § 1D-20. This statute is clear and unambiguous, and its language must be given its plain and literal meaning. *Lemons v. Old Hickory Council*, 367 S.E.2d 655, 658 (N.C. 1988) (“[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning”); *Patterson v. State*, 359 S.C. 115, 119, 597 S.E.2d 150, 152 (2004) (when the terms of a statute are clear, the court must apply those terms according to their literal meaning). The trial court therefore correctly ruled that N.C.G.S. § 1D-20 required O&W to elect between recovery for fraud and all remedies for violation of the NCUTPA.

O&W makes two arguments to escape the effect of N.C.G.S. § 1D-20. It argues that the statute does not apply. It also argues that the statute does not mean what it says. According to O&W, §1D-20 does not actually require election between punitive damages and “any other remedy,” but only requires an election between punitive damages and treble or multiple damages. Both arguments are flawed.

A. N.C.G.S. § 1D-20 applies and limits O&W to recovery under either its fraud claim or its NCUTPA claim.

In its attempt to avoid the operation of § 1D-20, O&W focuses on the word “statute.” It argues that because the word “statute” is singular rather than plural, it refers only to individual code sections and not to the NCUTPA as a whole. Under this construction, O&W could be forced to elect between punitive damages and the remedies provided in N.C.G.S. § 75-16, which

authorizes treble damages, but not between punitive damages and attorney's fees, which O&W argues are authorized by a separate statute, N.C.G.S. § 75-16.1.

This argument ignores the requirements of N.C.G.S. § 12-3, which statutorily codifies the manner in which North Carolina statutes are to be construed. This statute provides in pertinent part as follows:

In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:

(1) Singular and Plural Number, Masculine Gender, etc. - Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

N.C.G.S. § 12-3(1). This statute requires that a reference to a singular subject or thing should also be construed as a reference to multiple subjects or things. Stated differently, North Carolina law does not permit the word "statute" as used in §1D-20 to be construed as purely singular, and, in the absence of this narrow construction, O&W's argument collapses. Moreover, generally, different parts of the same act are to be construed together to achieve the intent of the legislature. *State v. Mayo*, 807 S.E.2d 654, 657 (N.C. Ct. App. 2017) ("In discerning the intent of the legislature, statutes in *pari materia* should be construed together and harmonized whenever possible. In *pari materia* is defined as upon the same matter or subject.") (internal quotations omitted).

This is also consistent with the ordinary meaning of the term used, "statute." *See Perkins v. Arkansas Trucking Servs., Inc.*, 528 S.E.2d 902, 904 (N.C. 2000) ("Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural

and ordinary meaning.”); *Hughes v. Western Carolina Regional Sewer Authority*, 386 S.C. 641, 646, 689 S.E.2d 638, 641 (Ct. App. 2010) (“When confronted with an undefined term in a statute, a court must interpret it in accordance with its usual and customary meaning.”). “Statute” is ordinarily synonymous with “Act.” Indeed, Black’s Law Dictionary provides that “*act* or *legislation* is sometimes substituted for *statute*.” Black’s Law Dictionary (10th ed. 2014) (emphasis in original). North Carolina courts routinely refer collectively to the code sections in Chapter 75 as the North Carolina Unfair Trade Practices Act. *E.g.*, *Di Frega v. Pugliese*, 596 S.E.2d 456, 462 (N.C. Ct. App. 2004) (“Even a party who intentionally breaches a contract is not, without more, liable for such conduct under the North Carolina Unfair Trade Practices Act.”); *Horak v. Southern Real Estate Co. of Charlotte, Inc.*, 563 S.E.2d 47, 51 (N.C. Ct. App. 2002) (discussing a claim for violation of the “Unfair and Deceptive Trade Practices Act” or, simply, the “Act” and stating that “Chapter 75 of our statutes establishes an action for unfair or deceptive practices or acts in or affecting commerce”). O&W’s attempt to distinguish between a single statute and the NCUTPA as a whole is inconsistent with general usage and North Carolina statutory requirements.

B. N.C.G.S. § 1D-20 means exactly what it says.

Section 1D-20 states that a claimant must elect between punitive damages and “any other remedy” pursuant to another statute that provides for multiple damages. It means just that. O&W argues that §1D-20 should be construed in a manner that differs from its text. It argues that §1D-20 does not require election between punitive damages and “any other remedy,” but only requires an election between punitive damages and the single remedy of multiple damages.

O&W bases this argument on *United Laboratories, Inc. v. Kuykendall*, 437 S.E.2d 374 (N.C. 1993). In *Kuykendall*, the North Carolina Supreme Court permitted a claimant to recover punitive damages on a tort claim and attorney’s fees on an NCUTPA claim. *Id.* at 381. However,

O&W's reliance upon *Kuykendall* is misplaced. It ignores the history of North Carolina's election of remedies rule and events that have unfolded subsequent to the *Kuykendall* decision. Notably, §1D-20 did not exist when *Kuykendall* was decided, and rather than codifying the result in *Kuykendall*, §1D-20 partially repudiated *Kuykendall*.

Before *Kuykendall*, North Carolina required claimants to elect between punitive damages and any and all of remedies under the NCUTPA. *Id.* at 382 (Meyer, J., dissenting). The majority opinion in *Kuykendall* abandoned this long-standing common law rule. *Id.* at 381. North Carolina's legislature enacted N.C.G.S. § 1D-20 less than two years later.¹⁹ Section 1D-20 does not require claimants to elect solely between punitive damages and treble damages. It could easily have so stated if that were its purpose. Section 1D-20 instead requires claimants to elect between punitive damages and *any other remedy* pursuant to another statute that provides for multiple damages. Section 1D-20 cannot be viewed as codifying the *Kuykendall* decision. Its language is contrary to that decision. Section 1D-20 repudiates the *Kuykendall* decision in part and reinstates the prior common law rule.

To the extent there is any doubt that the words "any other remedy" are intended to include more than just the remedy of treble or multiple damages, the legislative history of N.C.G.S. § 1D-20 is instructive. Version 1 of House Bill 729 ("An act to establish standards and procedures for the recovery of punitive damages in civil actions"), which was a broad package addressing punitive damages as part of general tort reform, contained different text for proposed §1D-20. CIVIL ACTIONS—PUNITIVE DAMAGES—RECOVERY STANDARDS AND PROCEDURES, 1995 North Carolina Laws Ch. 514 (H.B. 729). Version 1 of House Bill 729 provided, "[p]unitive damages shall not be awarded to a claimant pursuant to G.S. 1D-45, who elects a remedy pursuant

¹⁹ Section 1D-20 was enacted in 1995 and became effective on January 1, 1996.

to another statute that provides for multiple damages.” *Id.* This language is consistent with O&W’s arguments and *Kuykendall*; however, the original text was amended prior to its enactment. As quoted above, the enacted version of §1D-20 reads, “[a] claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.”

The original version’s reference to “*a remedy*” was stricken and replaced with “*any other remedy*.” This amendment to pending legislation makes it clear the North Carolina General Assembly intended to broaden the scope of §1D-20 beyond the single remedy of multiple or treble damages to include other remedies pursuant to a statute that provides for multiple damages.

O&W is correct when it states that §1D-20’s partial abrogation of *Kuykendall* has not been addressed by subsequent courts. This issue has received little to no attention in North Carolina.²⁰ In fact, no published case has cited §1D-20 since its enactment. The plain language and legislative history of §1D-20 strongly suggest that *Kuykendall* has been partially abrogated to the extent it holds a party can recover punitive damages and attorney’s fees pursuant to the NCUTPA. Accordingly, the trial court correctly applied §1D-20 in requiring O&W to elect between recovery of punitive damages and any all remedies under the NCUTPA, including attorney’s fees.

²⁰ None of the cases cited by O&W mentions § 1D-20. In *Blankenship v. Town and Country Ford, Inc.* 622 S.E.2d 638 (N.C. Ct. App. 2005), the North Carolina Court of Appeals noted that the defendant had cited to *Kuykendall*, but the court distinguished it and applied a different election of remedies case. *Broussard v. Meineke Discount Muffler Shops*, 958 F.Supp 1087, 1106-07 (W.D.N.C. 1997), *rev’d on other grounds* by 155 F.2d 331 (4th Cir. 1998), did not involve attorney’s fees. *Southwood v. Credit Card Solution*, No. 7:09-CV-00081-F, 2016 WL 8710985 at *1 (E.D.N.C. Feb. 26, 2016), *report and recommendation adopted sub nom, SouthWood v. CCDN, LLC*, No. 7:09-CV-183-F, 2016 WL 1389596 (E.D.N.C. Apr. 7, 2016), also did not involve attorney’s fees, but instead discussed whether punitive damages are available when treble damages are *not* awarded under the NCUTPA.

IV. The trial court correctly determined that offer of judgment interest is not applicable in this case.

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

The trial court here determined that no award could be made because the actual judgment amount of \$43,721.45 fell far below O&W's \$280,000 offer of judgment. (R. at 21). O&W contends that because § 15-35-400(B) uses the term "verdict," the trial court was required to compare the offer of judgment to the initial jury verdict of \$2,381,888 rather than final judgment amount.

O&W's argument ignores the actual text of § 15-35-400(B), which provides in pertinent part:

If any offer of judgment is not accepted and the offeror obtains a *verdict or determination* at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of *the verdict or award* from date of the offer; or (3) if the offeror is a defendant, a reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer.

(emphasis added). The statute does not limit comparison of the offer to the "verdict." It contemplates comparison of the offer amount to the "verdict" *or* the "determination." It also uses the terms "verdict" and "award" interchangeably. The statute's use of the terms "determination" and "award" indicates that offer of judgment amount should be compared to the amount of the final determination or award. As a result, the trial court correctly rejected O&W's claim for interest and costs in connection with its offer of judgment.

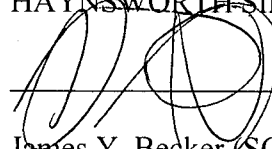
O&W cites no cases in support of its statutory interpretation of the offer of judgment rule, and its interpretation produces an absurd result. Excessive jury verdicts and unconstitutional punitive damage awards may of course be reduced by trial courts. Section 15-35-400(B) could not have been intended to impose penalties upon a defendant for failing to accept an offer of judgment where, as here, the offer exceeded the upper limit of constitutionally recoverable damages as determined by the trial court. A defendant should not be bound to accept an offer of judgment that is excessive as a matter of law simply because of the possibility that a jury may render an excessive verdict. O&W's construction provides an incentive for a plaintiff to make an offer of judgment far in excess of what the law would deem reasonable, an incentive that works counter to the statute's purpose of promoting settlement of claims. For these reasons, the trial court's ruling that O&W is not entitled to interest or costs in connection with its offer of judgment should be affirmed.

CONCLUSION

For these reasons, the trial court's orders should be affirmed.

Respectfully submitted,

HAYNSWORTH-SINKLER BOYD, P.A.



James Y. Becker (SC Bar No. 64991)
H. Clayton Walker, Jr. (SC Bar No. 5779)
Robert Reibold (SC Bar No. 9284)
P.O. Box 11889
Columbia, SC 29211-1189
(803) 779-3080
jbecker@hsblawfirm.com
cwalker@hsblawfirm.com
rreibold@hsblawfirm.com

Sarah P. Spruill (SC Bar No. 68337)
P.O. Box 2042
Greenville, SC 29602
(864) 240-3200
sspruill@hsblawfirm.com

Attorneys for Respondent

Dated: August 21, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 13-CP-40-0319

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

v.

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

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent Columbia Automotive Company, LLC, d/b/a
Midlands Honda, in this matter complies with Rule 211(b), SCACR.

(Signature Page Follows)

RECEIVED
AUG 22 2019
SC Court of Appeals

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



James Y. Becker (SC Bar No. 64991)
H. Clayton Walker, Jr. (SC Bar No. 5779)
Robert Reibold (SC Bar No. 9284)
P.O. Box 11889
Columbia, SC 29211-1189
(803) 779-3080
jbecker@hsblawfirm.com
cwalker@hsblawfirm.com
rreibold@hsblawfirm.com

Sarah P. Spruill (SC Bar No. 68337)
P.O. Box 2048
Greenville, SC 29602
(864) 240-3200
sspruill@hsblawfirm.com

Attorneys for Respondent

Dated: August 21, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

RECEIVED
AUG 29 2019
SC Court of Appeals

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

Appellants,

v.

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

Respondent.

REPLY BRIEF

Brooks R. Fudenberg
Law Offices of Brooks R. Fudenberg, LLC
171 Church Street, Suite 160
Charleston, SC 29401
Tel.: (843) 416-2558 eFax: (910) 401-1242
BRF@Fudenberglaw.com

C. Steven Moskos
C. STEVEN MOSKOS, P.A.
4000 Faber Place Drive, Suite 300
N. Charleston, SC 29407
Tel. (843) 763-5297
csmoskos@earthlink.net

Attorneys for Appellants

TABLE OF CONTENTS

Table Of Authorities	iv
I. CAC Has Not Established That Punitive Awards At The Statutory Cap Are Beyond Constitutional Limits.	1
A. CAC Is Not Entitled to A Reduction in the Punitive Award for Acting In “Good Faith” Because CAC Acted in Bad Faith.	1
B. CAC’s Argument that Appellants Had Little Risk Because They Should Have More Quickly Discovered CAC’s Deception Is Negated by Jury Findings.	2
C. Ample Evidence Shows that CAC Defrauded Ecklund.	3
D. <i>Phillip Morris</i> Allows Consideration of CAC’s Prior Bad Acts and the Risk of Substantial Harm CAC’s Actions Posed to Others.	3
E. CAC’s Argument that There Was No Affirmative Misrepresentation Is Contrary to CAC’s Only Authority on the Subject.	4
F. CAC Provides No Valid Reason to Depart from North Carolina Practice. Therefore, Because North Carolina Courts Would Accord Punitive Damages at the Statutory Cap, the Court Should Do the Same.	4
Conclusion to Section	5
II. CAC’s Defense Of The Unreasonably Low Fee Awards Contains Numerous Errors.	6
A. CAC’s Defense of the Fee Award in the Order on Post-Trial Motions Errs. The Amount Was Arbitrarily Low and Relied on Impermissible “Apportionment” Among Non-Apportionable Claims. These Issues Are Preserved.	6
1. The Inadequacy of the Order’s Award Is Preserved for Appeal.	6
2. It Is Error to Apportion Fees Among Claims Arising from A Common Nucleus of Operative Fact. CAC Errs in Arguing (a) that <i>Morris v. Scenera Research, LLC</i> Allows Discretion to Allocate Such Fees and (b) that <i>Morris</i> Does Not Apply to Unsuccessful Claims.	7

a.	CAC Errs in Relying on a Trial Judge for Its Position that <i>Morris</i> Allows Allocation of Fees Among Claims Arising from a Common Nucleus of Operative Fact. That Judge Disagrees with CAC	8
b.	Because <i>Morris</i> Concerned Unsuccessful Claims, <i>Morris</i> Cannot Be Read As Allowing an Exception for Unsuccessful Claims.	9
3.	Additional Matters: This Was an Extreme Case; Appellants Obtained All Possible Recovery; and Fees Are Not to Be Limited In Proportion to the Stakes.	10
B.	Issue in the March 16 Order on the Motion Pursuant to Rule 59 and for Supplemental Fees	11
1.	Appellants' July 21, 2016 Request for Fees from May through July 20 Was Timely, and the Lower Court Did Not Rule Otherwise.	11
C.	Issues in the Final Order	11
1.	CAC's Reliance on <i>Marshall v. Miller</i> Cannot Save the Erroneous Holding that a Post-Verdict Offer Stopped Fees from Accruing, as CAC's Policy Argument Is Contrary to <i>Marshall</i>	11
2.	Even If <i>Marshall</i> Stood for the Proposition for which CAC Cites It, CAC's Offer Would Not Suffice.	14
3.	CAC's Final Argument Regarding Fees Misreports Appellants' Brief.	14
III.	Election Issues	15
A.	Regarding CAC's Issue I, Which Asks Whether Appellants Waived Their Right to Challenge the 98% Reduction of the Jury's Punitive Verdict.	15
B.	The Lower Court Erred In Requiring Election Between Punitive Damages And Fees Pursuant To N.C.G.S. 75-16.1.	16
1.	The Court Should Apply South Carolina Law. South Carolina Law Mandates A Decision in Favor of Appellants.	16
2.	North Carolina Law Mandates A Decision in Favor of Appellants.	17

a.	The North Carolina Court of Appeals Disagrees with CAC’s Argument that <i>Kuykendall</i> Was So Extensively Superseded It No Longer Applies to Fee Awards Pursuant to N.C.G.S. § 75-16.1.	17
b.	The North Carolina Court of Appeals’ Decision Is Not Erroneous.	17
c.	North Carolina Principles of Statutory Construction Also Mandate A Decision for Appellants.	19
	Conclusion to Section.....	21
IV.	CAC Misreads The Offer Of Judgment Statute And Implicitly Asks The Court To Reinstate Prior Law.	21
	Conclusion to Section	24
	Conclusion	24

TABLE OF AUTHORITIES

CASES

<i>Austin v. Stokes-Craven Ford Holding Co.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010)	16, 21, 25
<i>Barbee v. Atl. Marine Sales & Serv.</i> , 446 S.E.2d 117 (N.C. Ct. App. 1994).....	18
<i>Bashford v. N.C. Licensing Bd. for Gen. Contractors</i> , 420 S.E.2d 466 (N.C. Ct. App. 1992).....	18
<i>Benat v. State Farm Mut. Ins. Co.</i> , 286 S.C. 132, 333 S.E.2d 57 (Ct. App. 1985)	23-24
<i>Blair v. Robinson</i> , 631 S.E.2d 217 (N.C. Ct. App. 2006).....	20
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996).....	1-2, 5
<i>Britt v. Jones</i> , 472 S.E.2d 199 (N.C. Ct. App. 1996).....	13, 18
<i>Brookwood Unit Ownership Ass'n v. Delon</i> , 477 S.E.2d 225 (N.C. Ct. App. 1996)	20
<i>Brown v. King</i> , 601 S.E.2d 296 (2004).....	13, 17-19, 21, 25
<i>Bruning & Federle Mfg. Co. v. Mills</i> , 647 S.E.2d 672 (N.C. Ct. App. 2007)	6
<i>City Fin. Co. v. Boykin</i> , 358 S.E.2d 83 (N.C. Ct. App. 1987)	10
<i>Compton v. Kirby</i> , 577 S.E.2d 905 (N.C. Ct. App. 2003)	16
<i>Concrete Spaces, Inc. v. Sender</i> , 2 S.W.3d 901 (Tenn. 1999).....	15
<i>Crystal Coast Invs., LLC v. Lafayette SC, LLC</i> , 780 S.E.2d 891, 2015 N.C. App. LEXIS 967 (N.C. Ct. App. 2015)	15
<i>Davis v. Chase Home Fin., LLC</i> , 745 S.E.2d 376, 2013 N.C. App. LEXIS 622 (N.C. Ct. App. 2013).....	20
<i>Everhart v. O'Charley's, Inc.</i> , 683 S.E.2d 728 (N.C. Ct. App. 2009).....	4
<i>First Union Nat'l Bank v. FCVS Commc'ns</i> , 321 S.C. 496, 469 S.E.2d 613 (Ct. App. 1996).....	15
<i>Henderson v. Summerville Ford-Mercury, Inc.</i> , 405 S.C. 440, 748 S.E.2d 221 (2013).....	22

<i>In re McClendon</i> , 488 B.R. 876 (Bankr. E.D.N.C. 2013).....	18
<i>I'On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	24
<i>Layman v. State</i> , 376 S.C. 434, 658 S.E.2d 320 (2008).....	6
<i>Leftwich v. Gaines</i> , 521 S.E.2d 717 (N.C. Ct. App. 1999)	13
<i>Leonard v. Sink</i> , 150 S.E. 813 (N.C. 1930)	19-21, 25
<i>Marshall v. Miller</i> , 276 S.E.2d 397 (N.C. 1981)	10-14, 25
<i>Morris v. Scenera Research, LLC</i> , 747 S.E.2d 362 (N.C. Ct. App. 2013)	7-10
<i>Morris v. Scenera Research, LLC</i> , No. 09-CVS-19678, 2016 NCBC LEXIS 101 (N.C. Super. Ct., Dec. 19, 2016)	8
<i>Morris v. Scenera Research, LLC</i> , No. 09-CVS-19678, 2017 NCBC LEXIS 48 (N.C. Super. Ct., May 31, 2017).....	8
<i>Okwara v. Dillard Dep't Stores, Inc.</i> , 525 S.E.2d 481 (N.C. Ct. App. 2000).....	8-9
<i>Out of the Box Developers, LLC v. Doan Law, LLP</i> , No. 10 CVS 8327, 2014 NCBC LEXIS 39, 2014WL4298329 (N.C. Super. Ct. Aug. 29 2014).....	8
<i>Philip Morris USA v. Williams</i> , 549 U.S. 346 (2007).....	3-5
<i>Poor v. Hill</i> , 530 S.E.2d 838 (N.C. Ct. App. 2000).....	18
<i>Rish v. Rish</i> , 296 S.C. 14, 370 S.E.2d 102 (Ct. App. 1988).....	7
<i>Rhyne v. K-Mart Corp.</i> , 562 S.E.2d 82 (N.C. Ct. App. 2002).....	4
<i>Rowell v. N.C. Equip. Co.</i> , 552 S.E.2d 274 (N.C. Ct. App. 2001).....	20
<i>Seafare Corp. v. Trenor Corp.</i> , 363 S.E.2d 643 (N.C. Ct. App. 1988)	13
<i>Shepard v. Bonita Vista Props., L.P.</i> , 664 S.E.2d 388 (N.C. Ct. App. 2008).....	13
<i>State v. Biggers</i> , 12 S.E. 1024 (N.C. 1891)	19
<i>State v. Corey D.</i> , 339 S.C. 107, 529 S.E.2d 20 (2000).....	6-7, 23-24
<i>State v. Greer</i> , 302 S.E.2d 774 (N.C. 1983)	19
<i>Taylor v. Nix</i> , 307 S.C. 551, 416 S.E.2d 619 (1992)	9
<i>Tucker v. Doe</i> , 413 S.C. 389, 776 S.E.2d 121 (Ct. App. 2015).....	3

<i>United Labs., Inc. v. Kuykendall</i> , 437 S.E.2d 374 (N.C. 1993).....	13, 17-18, 21, 25
<i>United Labs. v. Kuykendall</i> , 403 S.E. 2d 104 (Ct. App. 1991).....	12-13, 17, 25
<i>Walker v. Fleetwood Homes of N.C., Inc.</i> , 653 S.E.2d 393 (N.C. 2007).....	20
<i>Watkins v. Cent. Motor Lines, Inc.</i> , 181 S.E.2d 588 (N.C. 1971).....	20
<i>Whiteside Estates, Inc. v. Highland Cove LLC</i> , 553 S.E.2d 431 (N.C. Ct. App. 2001)	7-9
<i>West v. Tilley</i> , 461 S.E.2d (N.C. Ct. App. 1995)	21
<i>X-It Prods., L.L.C. v. Walter Kidde Portable Equip., Inc.</i> , 227 F. Supp. 2d 494, 522 (E.D. Va. 2002).....	16

CONSTITUTIONAL PROVISIONS

Due Process Clause, U.S. Const. amend. XIV.....	1-6
---	-----

STATUTES

N.C.G.S. § 1A-1, Rule 68	22
N.C.G.S. 1-324.7.....	19
N.C. Code Chapter 1D	5
N.C.G.S. 1D-15.....	4
N.C.G.S. 1D-20.....	17-21
N.C.G.S. 7A-305.....	20
N.C.G.S. 7A-320.....	20
N.C.G.S 14-152.....	19
N.C.G.S. 75-16.1.....	10, 15, 16-21, 25
S.C. Code § 15-35-400.....	21-25

Amended and Repealed Statutes

O.C.G.A. § 9-11-68 (2005) (amended 2006).....	23
S.C. Code §Section 10-1001 (1962) (repealed 1985).....	22
S.C. Code 15-21-10 (1976) (repealed 1985).....	22

RULES

Fed. R.Civ. P. 68.....	22
Rule 68, SCRCP.....	22-23

Prior Versions of Rules

2005 Fed. R.Civ. P. 68 (1966 amend.).....	22
Rule 68, SCRCP (1985 amend.)	22
Rule 68, SCRCP (1986 amend.)	22
Rule 68, SCRCP (1994 amend.)	22-23

I. CAC HAS NOT ESTABLISHED THAT PUNITIVE AWARDS AT THE STATUTORY CAP ARE BEYOND CONSTITUTIONAL LIMITS.

The Court should reject Respondent Columbia Automotive Company's ("CAC") invitation to view repeated fraudulent sales of a rolling death-trap as at core a magistrate court case, and accept the jury's determination of the gravity of the matter.

A. CAC Is Not Entitled to A Reduction in the Punitive Award for Acting In "Good Faith" Because CAC Acted in Bad Faith.

CAC argues (p. 16) that it is entitled to a reduction of the punitive award, alleging it acted in "good faith." However, the jury was instructed it could find fraud only if CAC's actions were "calculated to deceive" and "with the intent to deceive" (R. p. 836, line 24-p. 837, line 5). Because the jury found CAC intended to deceive, there can be no finding of good faith.

Moreover, CAC's "good faith" argument is based on its alleged ignorance of the auction rules. However, CAC does not claim to have been unaware of the law requiring disclosure. Deliberate violation of the law, with alleged ignorance of the auction rules, suffices to negate any good faith defense.¹

Additionally, CAC's claim of a "good-faith" failure to disclose is not supported by the authority CAC cites, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1995). *BMW* concerned repaired paint. The good faith was that the defendant there had "sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure." *Id.* at 579. Being

¹ CAC's argument that there was "a new requirement that unibody damage had to be disclosed" under the rules would not support its "good faith" argument even were it accurate—and it is not accurate. CAC's Initial Brief, on page 9, referenced Guyer Dep. 87:22-88:6, which was presented only to the judge, not the jury. CAC later wrote the Clerk of Court asking to replace that reference with three others, but made no motion to do so. In an abundance of caution, Appellants address both sets of references. The next seven lines of the Guyer Dep., i.e. 88:7-13 (R. p. 222, lines 7-13), make the reference contrary to CAC's point. The exhibit and other testimony that CAC references, whether in its Initial Brief, or in its letter to the Clerk, state nothing more than that the rules were updated in 2010. None say the disclosure requirements were new. In fact, the testimony was that the same disclosures were made under the former rules. (E.g., R. p. 594, lines 2-3). Nor is it plausible that the former rules allowed one to violate the law. Moreover, the jury was entitled to disbelieve CAC's claim that it did not know the rules, especially as CAC was selling 100 cars a year at that auction.

cut in half is not “minor damage.” Moreover, CAC claims it never attempted to determine what the rules were. They were given the rules, but “didn’t read ‘em;” the rules were always available at the check-in counter, CAC still did not read them. (R. p. 356, lines 22-25; R. p. 214, lines 16-18, Guyer 89:16-18). CAC’s explanation amounts to willful ignorance.

Because being cut in half is not minor damage, willful ignorance is not good faith, knowingly violating the law is not good faith, and calculating to deceive is not good faith, CAC is not constitutionally entitled to a “good faith” reduction in the punitive award.

B. CAC’s Argument that Appellants Had Little Risk Because They Should Have More Quickly Discovered CAC’s Deception Is Negated by Jury Findings.

CAC argues on page 17 that there was little risk of harm to Appellants because they should have discovered CAC’s fraud earlier. However, the jury was instructed not to find fraud unless Appellants proved that “a reasonable person, in the exercising of ordinary care for his own affairs would have relied on the false representation, or would have not discovered the concealment.” (R. p. 876, lines 11-14). Therefore, the jury’s finding of fraud negates CAC’s argument that Appellants should have discovered CAC’s deception earlier.² The jury was right: as there were no lifts at the auction (R. p. 394, lines 13-16), it would have been unreasonable to expect the buyer to discover CAC’s fraud.³

² The jury was also instructed not to find a UTPA violation if Appellants “should have discovered the truth of the matter.” (R. p. 842, lines 18-19). They again found contrary to CAC’s position by finding a UTPA violation.

³ CAC’s managers admitted as much—that there was nothing wrong in the way Roger went about buying the car. (R. p. 553, line 8-p. 554, line 2; p. 391, lines 12-18; p. 443, line 23-p. 444, line 3).

CAC’s supporting arguments, pages 15-16, that the Civic was sold under a red light, as-is, and with visible wreck damage [i.e., a damaged door] fail for the reasons above. Additionally, there are still rules. The visible damage to the door would have caused a reasonable buyer to think the reason the car was in the red-light auction was due to the damaged door, not that the seller is violating the rules and the law. Thus, this set of CAC’s arguments, too, are contrary to the jury’s findings and illogical.

C. Ample Evidence Shows that CAC Defrauded Ecklund.

CAC's assertion, p. 16, that there is "no evidence Midlands knew of the damage to the Civic when it sold the Civic to Ecklund," is erroneous. CAC's 159-point inspection could not have missed the damage. Moreover, when Ecklund complained the car was an unsafe combination of two half-cars, CAC's senior management "swapped him out" without investigating his allegation or asking their mechanic how he could have missed the extensive damage. That makes sense only if CAC's managers already knew the car was wrecked.⁴

D Philip Morris Allows Consideration of CAC's Prior Bad Acts and the Risk of Substantial Harm CAC's Actions Posed to Others.

CAC writes that *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) forbids consideration of the harm its actions caused to Ecklund and the substantial risk of harm its actions posed to the general public. However, *Philip Morris* held, "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* at 355 (emphasis added). Thus the actual harm to Ecklund, and the substantial risk of harm CAC's conduct posed to the general public, are properly considered as evidence of reprehensibility.⁵

⁴ CAC's argument to the jury that it could not ask the mechanic "How the heck he missed it" because he died in 2011, before suit was filed (R. p. 771, lines 7-12), and its similar argument in its Brief (p. 8 & n.6), miss the question: Why didn't management ask him in 2010, when Ecklund complained the car was two half-cars? The obvious answer is, because they already knew when they sold Ecklund the car.

⁵ *Philip Morris* was concerned lest juries "directly" award punitive damages based on these factors, *id.* at 355; e.g., award damages on behalf of "persons who are not before the court," *id.* at 349. Therefore, courts are to limit such matters to the "rubric of reprehensibility" "upon request." *Id.* at 357.

CAC made no such request. Nor did it object to the instructions given, which allowed consideration of similar factors. (R. p. 928, line 23-p. 929, line 17). Therefore, under *Tucker v. Doe*, 413 S.C. 389, 408-09, 776 S.E.2d 121, 132 (Ct. App. 2015) (holding that failure to object to jury charge on punitive damages waives any alleged error in the charge), the Court need not limit consideration of these factors to the reprehensibility prong of punitive damage analysis.

E. CAC's Argument that There Was No Affirmative Misrepresentation Is Contrary to CAC's Only Authority on the Subject.

CAC does not dispute that a (1) misrepresentation was made that the Civic had not been reconstructed; (2) on the required damage disclosure form; (3) by CAC's agent, who had power of attorney. However, CAC argues, p. 16 & n.10, that this misrepresentation "cannot support a punitive damages award." CAC presents as authority the first sentence of a statutory paragraph: "[P]unitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another." *Id.* (quoting N.C.G.S. § 1D-15(c)). However, the other sentence of § 1D-15(c) makes the statute to opposite effect. It 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." Here, officers and managers committed all the relevant conduct.⁶ Therefore, the statute is contrary to CAC's point.

F. CAC Provides No Valid Reason to Depart from North Carolina Practice. Therefore, Because North Carolina Courts Would Accord Punitive Damages at the Statutory Cap, the Court Should Do the Same.

CAC cites only procedural cases in its discussion of the North Carolina statutes, and CAC does not follow the procedure those cases specify. On page 20, CAC cites *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 93 (N.C. Ct. App. 2002), as "applying statute to reduce punitive award and then applying due process analysis," and *Everhart v. O'Charley's, Inc.*, 683 S.E.2d 728, 740 (N.C. Ct. App. 2009) to similar effect. CAC instead first attacks the uncapped awards (pages 13-19), and then hopes (page 20) that the Court will agree that \$500,000 must also be too large. CAC has effectively abandoned any argument that awards at the cap are unconstitutional.

⁶ At trial, they were still condoning it. See § 1D-15 ¶ (a) (listing "fraud" as an "aggravating factor").

Nor does CAC address the interaction between the significant protections North Carolina's statutory regime provides defendants and the constitutional analysis. Instead, CAC misstates Appellants' position. CAC errs in stating, on page 20 of its brief, that Appellants "argue[] that the existence of the statutory cap somehow satisfies the due process analysis." Appellants instead maintain that the Chapter as a whole entitles awards consistent with its requirements to a heightened presumption of validity. "Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may" lead to due process problems. *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (emphasis added); *see also BMW*, 517 U.S. at 586-597 (Breyer, J. concurring) (discussing the positive relationship between the degree of "cabin[ing]" of discretion and the strength of the presumption of constitutional validity). Because of the significant cabining of juror discretion and other procedural protections provided by the Chapter, outlined in Section I.B.1 of Appellants' main brief, awards consistent with North Carolina statutory law properly receive a heightened presumption of validity.⁷

Additionally, because North Carolina statutory law clearly states the severity of the penalty the state may impose, the third prong of punitive damages analysis supports the constitutionality of North Carolina awards at the statutory caps.

Nor does CAC cite a single case where North Carolina jury verdicts above the statutory cap were reduced below the cap, nor where awards at the cap were held unconstitutional, nor where any award was other than per plaintiff.

Conclusion to section. Because CAC acted in bad faith, injured others, and risked serious harm to Appellants, their customer, her potential passengers, and the public, and for other reasons

⁷ This does not mean North Carolina awards at the caps could never be unconstitutional. A case involving remorse by the wrongdoer, no similar bad acts, and no risk to health or safety, could suffice. But that is the opposite of the present case.

detailed in Appellants' main brief, North Carolina's statutory requirement that awards be entered at the cap should be followed.

II. CAC'S DEFENSE OF THE UNREASONABLY LOW FEE AWARDS CONTAINS NUMEROUS ERRORS.

CAC's statement regarding the standard of review overlooks the rule that questions of law regarding fee determinations are reviewed *de novo*. *Bruning & Federle Mfg. Co. v. Mills*, 647 S.E.2d 672, 674 (N.C. Ct. App. 2007); *Layman v. State*, 376 S.C. 434, 443-44, 658 S.E.2d 320, 325 (2008). *See also State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000) ("The term 'abuse of discretion' has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support.").

A. CAC's Defense of the Fee Award in the Order on Post-Trial Motions Errs. The Amount Was Arbitrarily Low and Relied on Impermissible "Apportionment" Among Non-Apportionable Claims. These Issues Are Preserved.

1. The Inadequacy of the Order's Award Is Preserved for Appeal.

CAC argues on page 24 that four reasons prevent reversal "to the extent" these reasons account for reduction of the requested fees in the first award. But those reasons hardly account for any reduction. The bulk of the reduction was stated to be due to apportionment of fees among claims (discussed in the next section). The order stated fees were reduced in two stages. Apportionment (or "allocation") accounted for all of the 400-plus hours that were excluded by the first stage. (R. p. 16). Apportionment also counted for an undetermined portion of the 163-hour reduction in the second stage. (R. pp. 16-17). CAC's four reasons accounted for part of that second stage. Evaluating the distribution of cuts within that second stage would require access to the documents showing which time entries survived that first cut and thus were in the pool of entries that the second stage cut by 75%—documents Appellants asked to see below, and were denied,

and which their main Brief requested, as an alternative remedy, be provided to them on remand. (R. pp. 1888-89, Mot. Recon. pp. 5-6 (so requesting); R. p. 2041, Reply in Supp. p. 3 (same); R. p. 25, Order p. 2 (denying their request); Main Br., 38-39 (asking that the Court direct the documents be provided).)

If the Court desires to rule without enabling Appellants to see these documents, the Court should either find that the “extent” of these four factors is minimal; or limit any reduction to the hours CAC supposedly identified as going to the four factors (Appellants’ main brief, p. 4 & n.3, points out that CAC claimed 52.7 hours going to all five factors, including 21.45 “apportioned” to other claims; that leaves 31.25 for CAC’s four factors); or hold that an award of 54.525 hours for five years’ work, including travel to Illinois (R. p. 102), and a five-day trial, is arbitrary, unreasonable and constitutes an abuse of discretion. *Corey D. See also Rish v. Rish*, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988) (inadequate fee award held to be abuse of discretion).

2. It Is Error to Apportion Fees Among Claims Arising from A Common Nucleus of Operative Fact. CAC Errs in Arguing (a) that *Morris v. Scenera Research* Allows Discretion to Allocate Such Fees and (b) that *Morris* Does Not Apply to Unsuccessful Claims.

The first and second orders apportioned fees among claims that arose from the same nucleus of operative facts. This accounts for the bulk of the reduction from the requested amounts.

Appellants’ main brief argued that *Whiteside Estates, Inc. v. Highland Cove LLC*, 553 S.E.2d 431 (N.C. Ct. App. 2001), and especially *Morris v. Scenera Research, LLC*, 747 S.E.2d 362 (N.C. Ct. App. 2013), *aff’d in part and rev’d in part on other grounds*, 788 S.E.2d 154 (2016), bar apportionment of fees among claims arising from a common nucleus of operative facts. CAC asserts that *Morris* simply allows trial courts the discretion to allocate such fees, and that if *Morris* does prohibit such allocations, unsuccessful claims are an exception.

a. CAC Errs in Relying on a Trial Judge for Its Position that *Morris* Allows Allocation of Fees Among Claims Arising from a Common Nucleus of Operative Fact. That Judge Disagrees with CAC.

To assert that *Morris* allows trial courts discretion to apportion fees, CAC relies centrally on an extensive block-quotation from *Out of the Box Developers, LLC v. Doan Law, LLP*, 10 CVS 8327, 2014 NCBC LEXIS 39 (N.C. Super. Ct. Aug. 29, 2014), a trial court order. (P. 27). Wake County Business Court Judge Gale wrote that order. This is the same judge who was reversed in *Morris*.

If Judge Gale agreed in 2014 with CAC's reading of the appellate decision, he has changed his mind. In 2016 and in 2017, on remand in *Morris*, he rejected CAC's reading.

[T]he Court of Appeals further adopted Plaintiff's contention that the Court has no discretion to allocate fees among claims absent express findings that the unsuccessful claims did not arise from a common nucleus of operative fact upon which the successful claims were based.

No. 09-CVS-19678, 2016 NCBC LEXIS 101, ¶ 31 (N.C. Super. Ct., Dec. 19, 2016) (emphasis added) (citing *Morris*, 747 S.E.2d at 377-78). The 2017 order stated, "In short, the Court of Appeals' holding essentially mandates that Plaintiff must recover all fees related to any claim arising from a nucleus of operative facts common to his successful wage and discharge claims." 2017 NCBC LEXIS 48 ¶ 5 (N.C. Super. Ct., May 31, 2017) (emphasis added) (citing 747 S.E.2d at 377-78). Judge Gale now states he "has no discretion" to allocate fees among such claims and all fees related to any claim arising from a common nucleus are to be awarded. This directly contradicts CAC's proposition.

Nor do CAC's other authorities lead to a different result. CAC suggests that the earlier Court of Appeals opinions in *Whiteside*, *supra*, and *Okwara v. Dillard Dep't Stores, Inc.*, 525 S.E.2d 481 (N.C. Ct. App. 2000), conflict with *Morris*, but the North Carolina Court of Appeals

disagrees: It relied on these cases in *Morris*. 747 S.E.2d at 378-79.⁸ CAC also cites three cases for the proposition that South Carolina law allows apportionment, which is of marginal relevance at most. CAC's reliance on one of those cases, *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992), is completely inapposite, given the refusal to follow the procedure that case sets forth for apportioning fees.

b. Because *Morris* Concerned Unsuccessful Claims, *Morris* Cannot Be Read As Allowing an Exception for Unsuccessful Claims.

CAC argues that *Morris*' "alleged prohibition on apportionment of fees would not apply" to Appellants' "abandoned" or otherwise "unsuccessful" claims. (P. 28). Had *Morris* allowed apportioning for unsuccessful claims, the four unsuccessful claims here could not remotely justify the magnitude of the reduction in requested fees here.⁹ Moreover, CAC's argument has internal problems, as discussed in the attached note.¹⁰ However, because *Morris* concerned unsuccessful

⁸ CAC also misreads these cases. *Whiteside*, 553 S.E.2d at 443, did not, as CAC has it, 25-26, hold "only that where all of plaintiff's claims arise from the same nucleus of operative facts . . . apportionment is unnecessary." Rather, it held that apportionment of fees where claims arise from a common nucleus of facts is "unnecessary and unrealistic." *Id.* (emphasis added). Nor did *Okwara v. Dillard Dep't Stores, Inc.*, 525 S.E.2d 481, 486-87 (N.C. Ct. App. 2000), hold it is "largely left to the discretion of the trial courts" whether to undertake that "unrealistic" task. Rather, it "largely left to the discretion of the trial courts" the determination of whether the claims "stem from a common nucleus of law or fact."

⁹ These claims each arose from CAC's sale to Appellants of the Frankencar. CAC makes no argument that the unsuccessful claims here did not arise from the same nucleus of operative fact as the successful claims. Nor would such an argument be credible.

¹⁰ CAC relies on a partial sentence from *Morris*, "'where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.'" CAC 27 (quoting *Morris*, 747 S.E.2d at 378). That is from the final sentence of a three-sentence block quotation within *Morris*. The full quotation is,

"Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney[s'] fees reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."

Morris, 747 S.E.2d at 378 (alteration in original) (emphasis added) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 460 (1983)). Taken as a whole, the three sentences mean that unsuccessful claims that do not share a common core of operative fact with the successful claims may be apportioned, but claims sharing a common core may not, where, as here, plaintiff obtained substantial relief.

claims, one need not ponder whether unsuccessful claims are an exception to *Morris*' holding. The lower court in *Morris* had ruled that “the total fees and expenses sought should, in part, be allocated among the claims on which [Morris] was successful and those on which he was not.” 747 S.E.2d at 377 (emphasis added) (quoting the order below). The appellate court “agree[d] with *Morris*” that “the business court erred” because “claims that arise from a common nucleus of operative fact should not be allocated.” *Id.* It makes no sense to say that *Morris*' prohibition does not apply to unsuccessful claims; *Morris* applied that prohibition to unsuccessful claims.

Morris forbids apportioning fees among claims arising from a common nucleus of operative fact. It allows no discretion and no exception even for unsuccessful claims.

3. Additional Matters: This Was an Extreme Case; Appellants Obtained All Possible Recovery; and Fees Are Not to Be Limited In Proportion to the Stakes.

To the extent that CAC may be implying that fees should be limited because attorney fees under N.C.G.S. § 75-16.1 are reserved for extreme cases, CAC errs. If repeated intentionally deceptive sales of a Frankencar that posed a substantial risk of serious injury and death is not an extreme case, it is difficult conceive of what is. To the extent, if any, that CAC argues that substantial success means obtaining most of the possible recovery, Appellants achieved substantial success. The jury awarded 100% of their requested actual damages and they will recover punitive damages at the statutory or constitutional cap.

CAC argues, and errs in arguing, that fees under 75-16.1 should be proportionate to the stakes. North Carolina courts see the policy behind 75-16.1 very differently. They see it as designed, in part, to encourage plaintiffs to litigate these cases precisely when the fees are out of proportion to the stakes, *Marshall v. Miller*, 276 S.E.2d 397, 403-04 (N.C. 1981), and to resist the temptation to settle, *City Fin. Co. v. Boykin*, 358 S.E.2d 83, 85 (N.C. Ct. App. 1987).

B. Issue in the March 16 Order on the Motion Pursuant to Rule 59 and for Supplemental Fees.

Only one issue unique to the second order needs discussion. The bulk of the second order's reductions in the requested fees were due either to apportioning among claims that arose from a common core of operative facts (as discussed above) or to holding that fees stopped accumulating on September 13 (discussed in more depth in the third order, so addressed in the discussion of that order). Appellants' arguments on those issues apply to this order.

1. Appellants' July 21, 2016 Request for Fees from May through July 20 Was Timely, and the Lower Court Did Not Rule Otherwise.

CAC's argument on page 29, regarding the order on the motion to reconsider and the two-issue rule, may leave the impression that Appellants' July 21, 2016 request for fees from May 2 to July 20 was ruled untimely. That would be an incorrect conclusion. Appellants' initial timesheets for that period were ruled on, in the order on post-trial motions, as discussed in Section A above. Only that first set need be considered.¹¹

C. Issues in the Final Order

1. CAC's Reliance on *Marshall v. Miller* Cannot Save the Erroneous Holding that a Post-Verdict Offer Stopped Fees from Accruing, as CAC's Policy Argument Is Contrary to *Marshall*.

CAC argues that its post-verdict settlement offer of September 14, 2016, sufficed to stop fees from accumulating after September 13. To get there, CAC needs this Court to hold something no North Carolina court has ever held—i.e., that a post-verdict offer can cut off the accumulation of fees.

¹¹ CAC refers to a second set of timesheets for the same period. These sheets did not present additional hours. These were submitted, not, as CAC has it, to “correct [] deficiencies” in the earlier submissions, but in response and objection to the original order's failure to identify the entries that supposedly did not relate to the UTPA claim. (R. p. 1888-89, Rule 59 Mot., pp. 5-6; R. p. 2041, Reply Supp. Mot., p. 3). The order on the motion for reconsideration refused to consider this second set.

CAC concedes the order below cannot be sustained on the grounds stated there. That order relied on the Court of Appeals' decision in *United Labs. v. Kuykendall*, 403 S.E. 2d 104 (N.C. Ct. App. 1991), *aff'd*, 437 S.E.2d 374 (N.C. 1993). Appellants' brief points out, 42-43, that the case actually supports the opposite proposition. CAC now implicitly concedes the case is not on point. Indeed, CAC admits it has no case on point: CAC "has not located any North Carolina case addressing the issue of whether continued efforts to settle post-trial can cut off a continuing entitlement to fees." (P. 31).

With no case on point, CAC attempts a policy argument. It now relies on *Marshall v. Miller*, 276 S.E.2d 397, 403-04 (1981). *Marshall* does not support CAC's position either. CAC (a) attempts to extend to fees a policy from which *Marshall* excluded the fees provision, and (b) gets the policy wrong. (a) *Marshall* did not find, as CAC has it, a generic purpose to "increase the prospects for settlement" floating around in the UTPA. Instead, it found that the "provision for treble damages found in G.S. 75-16" "increases the incentive for reaching a settlement." *Id.* at 404 (emphasis added).¹² Treble damages do not increase plaintiffs' incentive to settle. They increase only defendants' incentive to settle.

As to the fees provision at issue here, *Marshall* excluded that provision from its "settlement" rationale. Indeed, *Marshall* found the policy behind that provision to be exactly the

¹² *Marshall*, 276 S.E.2d at 403-04 (emphasis added) (citation omitted).

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 to supplement federal legislation, *so that local business interests could not proceed with impunity*, secure in the knowledge that the dimensions of their transgression would not merit federal action. *Given the small dollar amounts often involved in such suits*, statutory provision for **treble damages** found in G.S. 75-16 serves two purposes. First, it makes more economically feasible the bringing of an action where the possible money damages are limited, and thus encourages private enforcement. Second, it **increases the incentive for reaching a settlement**. Further provision for attorney fees, found in G.S. 75-16.1, also encourages private enforcement in the marketplace. The dissimilarity in language used by our Legislature in G.S. 75-1.1 and G.S. 75-16.1 [is noted].

opposite: it “encourages private enforcement.” *Id.*

Were there any doubt, as to both provisions, *Marshall* placed its analysis in context of “the overall purpose” of the statutory scheme, which is to ensure that “business interests could not proceed with impunity . . . [g]iven the small dollar amounts often involved in such suits.” *Id.*

Other cases take the same approach.¹³ A wealth of decisions hold that the purpose of the fees provision is the opposite of CAC’s proposed policy.¹⁴ CAC’s policy is also contrary to North Carolina practice, *see Kuykendall*, 403 S.E.2d 104 (N.C. Ct. App. 1991) (a single unwarranted refusal to settle operates both backwards and forwards, justifying fees for all time reasonably incurred, from before the first trial through the second appeal).¹⁵

In sum, CAC subtly changes the words from a reliance on trebled damages to “increase the incentive for reaching a settlement” in the context of the need to prevent deceptive merchants from acting with impunity, to a generic “increase the prospects for settlement” rationale, asks the Court to apply it to both sides, and to extend it to the fees provision *Marshall* excluded from that analysis. The purposes of the statutes within the UTPA are to deter businesses from being deceptive, to encourage them to settle when they are credibly accused, and to encourage plaintiffs to litigate the cases. The statutes are not neutral between the deceptive merchant and its victim. CAC obviously

¹³ As to treble damages, see, e.g., *Seafare Corp. v. Trenor Corp.*, 363 S.E.2d 643, 653 (N.C. Ct. App. 1988) (emphasis added) (“Two purposes of the statutory provision for treble damages are to facilitate bringing actions where money damages are limited and to increase the incentive for reaching a settlement.”)

¹⁴ “The purpose of attorneys fees in Chapter 75, however, is to ‘encourage private enforcement’ of Chapter 75.” *United Labs., Inc. v. Kuykendall*, 437 S.E.2d 374, 380 (N.C. 1993) (quoting *Marshall*). “The purpose of attorneys fees in Chapter 75 . . . is to ‘encourage private enforcement’ of Chapter 75.” *Shepard v. Bonita Vista Props., L.P.*, 664 S.E.2d 388, 396 (N.C. Ct. App. 2008) (quoting *Kuykendall*, in turn quoting *Marshall*). *Brown v. King*, 601 S.E.2d 296, 298-99 (N.C. Ct. App. 2004) (similar); *Leftwich v. Gaines*, 521 S.E.2d 717, 729 (N.C. Ct. App. 1999) (similar); *Britt v. Jones*, 472 S.E.2d 199, 202-03 (N.C. Ct. App. 1996) (similar).

¹⁵ North Carolina Courts do not say, “Defendant’s refusal, six months before trial, to offer more than \$100,000 constituted an unwarranted refusal, so we award fees from time of that offer through trial”—they award fees for all the time, from the beginning of the case. They do not say, “Defendant unreasonably refused to settle six months before trial, but made a great offer on the second day of trial, so we award fees until the second day of trial”—they award fees for the whole case.

dislikes this, but it is State policy. CAC's argument that the Court should read *Marshall* to create a policy contrary to *Marshall's* should be rejected.

2. Even If *Marshall* Stood for the Proposition for which CAC Cites It, CAC's Offer Would Not Suffice.

CAC errs in arguing, Br. 30-31, that its post-verdict settlement offer was a reasonable amount to "fully resolve the matter." The offer was \$81,069. CAC's exposure was easily more than a million dollars. (It included \$500,000 in punitive damages at \$250,000 per plaintiff, \$236,628.01 in offer of judgment interest, \$6,645 in actual damages, \$1,993.38 in pre-judgment interest, and \$258,180.00 in unmultiplied fees for the first five years of work through July 20, 2016, totaling \$1,003,446.39—in addition to fees incurred after that period, and post-judgment interest.) The clerk's email (R. p. 1731), stated an award of \$53,160, so Plaintiffs were being offered a premium of only \$27,909 to throw in the towel on all these sums. That is 2.94 cents on the dollar on the outstanding amounts.¹⁶ The statute and the policy behind it do not allow such an offer to cut off the entitlement to fees.

The lower court erred as a matter of law in holding that post-verdict offers can stop the accumulation of fees, and further abused its discretion in holding that if North Carolina allows post-verdict offers to stop fees, 2.94 cents on the dollar suffices.

3. CAC's Final Argument Regarding Fees Misreports Appellants' Brief.

CAC lists two rulings on p. 34 of its Brief that it claims Appellants have not appealed. CAC claims the two-issue rule therefore allows affirmance regardless of the merits. These issues are the order's claimed "general discretion" to award inadequate fees, and its holding that fees cannot be awarded to correct inadequate judgments. CAC errs. Appellants' Brief addressed these issues.

¹⁶ $(1,003,446.39 - 53,160) = 950,286.39$. $(81,069 - 53,160) = 27,909$. $(27,909 / 950,286.39) = 2.94$ percent.

(Section II.B.3, pp. 43-44). Actually, it is CAC that has failed to address these points substantively and thus should be treated as confessing that Appellants' position is correct. *First Union Nat'l Bank v. FCVS Commc'ns*, 321 S.C. 496, 502-04, 469 S.E.2d 613, 617-18 (Ct. App. 1996), *rev'd on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

III. ELECTION ISSUES

A. Regarding CAC's Issue I, Which Asks Whether Appellants Waived Their Right to Challenge the 98% Reduction of the Jury's Punitive Verdict

As an initial matter, the Court should moot the entire issue by holding that the lower court erred in requiring Appellants to elect between the punitive damages awarded by the jury and their entitlement to fees under N.C.G.S. § 75-16.1, as argued in Part B below.

If the Court wishes to reach the merits, the answer is clear. The lower court directed Appellants to choose between two awards. Appellants maintain the amount of each award was erroneous. Appellants are entitled to bring both errors to the attention of the appellate court, and then, if the appellate court agrees that the election was based on an erroneous ruling, to elect based on corrected rulings. "Another advantage to letting the fact finder decide each theory of recovery is that all the findings on liability and damages are preserved for review." *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 908-09 (Tenn. 1999) (emphasis added) (citing *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1279 (8th Cir. 1981)).

Moreover, "[W]aiver is 'an intentional relinquishment of a known right,'" *Crystal Coast Invs., LLC v. Lafayette SC, LLC*, 780 S.E.2d 891, 2015 N.C. App. LEXIS 967 (N.C. Ct. App. 2015) (unpublished). Here, Appellants repeatedly maintained they should not be required to elect between the two, but dutifully complied with the order. (R. p. 1436; p. 1854). No waiver occurred.

CAC errs in arguing the reverse. Its claim that Appellants could have elected the punitive verdict and still appealed error in the UTPA award contradicts its argument that electing one

potential award voids any challenge to the other. Nor do any of CAC's authorities stand for the proposition that errors below are unreviewable. The statute CAC relies on does not apply, for reasons discussed below, and it says nothing about preventing an appeal of the order. CAC appears to place most reliance on *Compton v. Kirby*, 577 S.E.2d 905, 918 (N.C. Ct. App. 2003), but the case is not on point. It was not an appeal by a plaintiff challenging errors in two potential awards. Plaintiff had chosen one potential award over another, and was apparently content. Defendant appealed. He argued first that one potential award, and then that the other, was erroneous. The appellate court held the elected award was proper, and therefore "Defendant's arguments regarding [the other potential award] are therefore moot, and this assignment of error is overruled." *Id.* at 917-18. The case simply has no bearing on the issue CAC raises.

Because CAC's position would improperly require a plaintiff to predict which award an appellate court will restore to the greater amount when a lower court has erred in each of the choices it offers the plaintiff, CAC's position should be rejected.

B. The Lower Court Erred In Requiring Election Between Punitive Damages And Fees Pursuant To N.C.G.S. § 75-16.1.

1. The Court Should Apply South Carolina Law. South Carolina Law Mandates a Decision in Favor of Appellants.

CAC does not address the question of whether election is a procedural matter governed by forum state law. The Court can resolve the election issue by holding that election is procedural and applying South Carolina law. *E.g.*, *X-It Prods., L.L.C. v. Walter Kidde Portable Equip., Inc.*, 227 F. Supp. 2d 494, 522 (E.D. Va. 2002) ("Where multiple causes of action result in the same damages and are based on the same facts, the question arises as to whether and how there must be an election of remedies. Generally, such is a procedural matter which invokes the forum state law."); *Austin v. Stokes-Craven Ford Holding Co.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (holding that one need not elect between punitive damages under one cause of action and statutory fees

under another).

2. North Carolina Law Mandates A Decision in Favor of Appellants.

a. The North Carolina Court of Appeals Disagrees with CAC's Argument that *Kuykendall* Was So Extensively Superseded It No Longer Applies to Fee Awards Pursuant to N.C.G.S. § 75-16.1.

CAC agrees with Appellants that *United Labs., Inc. v. Kuykendall*, 437 S.E.2d 374, 379-81 (N.C. 1993) held one need not choose between punitive damages under a common-law tort and fees pursuant to N.C.G.S. § 75-16.1. However, CAC argues that *Kuykendall* has been so “repudiated” by a statute, whose effective date was “January 1, 1996,” that one may no longer receive 75-16.1 fees if one recovers punitive damages.¹⁷ CAC’s Br., 38 & n.19. The North Carolina Court of Appeals disagrees. *Brown v. King*, 601 S.E.2d 296, 299 (N.C. Ct. App. 2004) (“Here, plaintiff was properly awarded both attorney fees and punitive damages based on the necessary findings by the court and jury.”) (affirming awards of both punitive damages and fees pursuant to 75-16.1).

b. The North Carolina Court of Appeals’ Decision Is Not Erroneous.

To the extent, if any, that the Court desires to look behind the holding in *Brown* to see if the North Carolina appellate court accurately stated North Carolina law, *Brown* makes perfect sense. The statute on which CAC relies, N.C.G.S. § 1D-20, provides, “A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute

¹⁷ Since January 1, 1996, *Kuykendall* has been cited in 42 North Carolina appellate opinions. In addition, it has been cited in eight lower North Carolina court orders; four federal Fourth Circuit decisions, and 27 federal North Carolina district and bankruptcy courts orders and judgments. A total of 81 opinions and orders by courts in North Carolina. None of these has referred to *Kuykendall*, even in a parenthetical, as “superseded by statute.”

Including multiple citations in the same opinion, the citations to the Supreme Court’s decision in *Kuykendall* are well over 100. The Court of Appeals decision which the Supreme Court affirmed held similarly. There are additional North Carolina decisions and orders citing that decision since the statute’s effective date. That makes approximately 100 opinions or orders by North Carolina State and federal courts, many with multiple citations to *Kuykendall*, and none indicating it has been superseded.

that provides for multiple damages.” The Legislature used the word “elect,” not the word “choose.”¹⁸ Where a statute employs a word that has common-law meaning, North Carolina law will “engraft upon the statute at issue the common law definition.” *Bashford v. N.C. Licensing Bd. for Gen. Contractors*, 420 S.E.2d 466, 469 (N.C. Ct. App. 1992). Election under North Carolina law requires that recoveries be based on the same course of conduct. Here, the recoveries are based on different conduct. The statute’s requirement that one “elect” simply has no bearing. See *Poor v. Hill*, 530 S.E.2d 838, 848 (N.C. Ct. App. 2000) (citation omitted) (election required only upon a “determination that the ‘same course of conduct’ gave rise” to both claims); *Britt v. Jones*, 472 S.E.2d 199, 201-02 (N.C. Ct. App. 1996) (election inapplicable where claims were “not based solely on” the same conduct); *Brown*, 601 S.E.2d at 299 (claims for punitive damages and for fees under 75-16.1 “do not arise from the same course of conduct,” as fee awards under 75-16.1 require that there was an unwarranted refusal by the defendant to fully resolve the matter which constitutes the basis of the suit) (following *Kuykendall*); *In re McClendon*, 488 B.R. 876, 897 (Bankr. E.D.N.C. 2013) (claims for 75-16.1 fees arise from “wholly different acts” than the underlying claim) (following *Kuykendall*). CAC simply ignores this particularity of 75-16.1.

Further, unlike in certain cases, where finding of an unwarranted refusal was based at least in part on pre-suit conduct by the party itself, *e.g.*, *Barbee v. Atl. Marine Sales & Serv.*, 446 S.E.2d 117, 119-20, 122 (N.C. Ct. App. 1994), here, the finding of an unwarranted refusal was based entirely on post-filing conduct on CAC’s behalf by its counsel. (R. p. 12, Order, p. 12).¹⁹ CAC does not claim, nor could it credibly claim, that its attorneys’ conduct was part of the underlying

¹⁸ In fact, the statute is entitled (emphasis added), “Election of extracompensatory remedies.”

¹⁹ See also R. pp.1566-70, CAC’s Br. in Opp. Pl.’s Mot. for Att’y fees, 5-9 (arguing that its attorneys’ conduct in making certain offers and rejecting others, and Appellants’ attorney’s conduct in rejecting and making offers, established there was no unwarranted refusal); R. pp. 1317-20, 1323-24, Appellants’ Br. in Supp. of Pls.’ Mot for Att’y s Fees, 2-4, 8-9 (detailing similar conduct and arguing the reverse).

fraud. It thus appears obvious that the conduct leading to the two recoveries requested here was not the same conduct.

Moreover, North Carolina principles of construction require that statutes be read to avoid conflict where possible, and where it is not possible to avoid conflict altogether, to limit the conflict to the extent possible.

It is said in *S. v. Kelly*, 186 N.C. 365: ‘Where two statutes are thus in conflict and cannot reasonably be reconciled, the latter one repeals the one of earlier date to the extent of repugnance. *Commissioners v. Henderson*, 163 N.C. 114; *Commissioners v. Commissioners*, 186 N.C. 202. “Between the two acts there must be plain, unavoidable and irreconcilable repugnance, and even then the old law is repealed by implication only pro tanta to the extent of the repugnancy.”

Leonard v. Sink, 150 S.E. 813, 815 (N.C. 1930) (emphasis added). See also *State v. Greer*, 302 S.E.2d 774, 777 (N.C. 1983) (similar); *State v. Biggers*, 12 S.E. 1024, 1025 (N.C. 1891) (similar). The grounds provided in *Brown* for affirming the awards reasonably resolve any “repugnance” between the statutes, *Leonard*, 15 S.E. at 815.

Under a straight-ahead reading of the statute, election does not apply to claims based on different courses of conduct. Even more so under a directive to avoid “repugnance” between statutes. The Court should follow *Brown*.

c. North Carolina Principles of Statutory Construction Also Mandate A Decision for Appellants.

CAC misinterprets N.C.G.S. § 12-3’s statement that singular words shall “be applied to several persons or things.” Here, that simply means that more than one statute that provides for multiple damages can be affected by 1D-20. Thus, § 1-324.7 (providing for double damages) and § 14-152 (same) each come within 1D-20’s ambit. That is not a directive to combine statutes that do not provide for multiple damages with those that do, in order to create a conflict between statutes. Further, CAC’s argument that the word “statute” can only mean one thing, “sometimes” “act” and “sometimes” “legislation” (CAC’s Br. at 37) is self-contradictory. As indicated in

Appellants' main brief, the fee provision here and the treble damages provision are sometimes referred to separate "statutes." The attached note gathers a sampling of additional authorities referring to a single provision at the level of 75-16 or 75-16.1 as a "statute," singular, and to two or more of these as "statutes," plural.²⁰ Under *Leonard*, these provisions should be read as separate statutes for the purpose of determining whether 1D-20 applies. Since 75-16.1 simply does not provide for multiple damages, there is no conflict.

Additionally, one can read 75-16.1 fees, for present purposes, as "costs" rather than a "remedy." North Carolina considers attorney fees to be "costs," an expense incurred due to the lawsuit. In contrast, "remedies" rectify harms occurring in the "real world." See N.C.G.S. § 7A-305, "Costs in civil actions", ¶ d (listing "Counsel fees, as provided by law" along with "Witness fees," "Jail fees," "Expense of service of process" and the like as "expenses"); § 7A-320 ("The costs set forth in this Article are complete and exclusive, and in lieu of any other costs and fees."). That is, counsel fees, as provided by a statute, are considered expenses that may be reimbursed as costs of litigation, not "remedies" designed to remediate harms. As 75-16.1 itself states (emphasis added), "such attorney fee to be taxed as a part of the court costs." One can reconcile any apparent conflict by reading 75-16.1 fees, for present purposes, as "costs" rather than "remedies."

²⁰ *Walker v. Fleetwood Homes of N.C., Inc.*, 653 S.E.2d 393, 399 (N.C. 2007) (referring to §§ 143-143.10 and 143-143.13 as "these statutes" and "those statutes"); *Watkins v. Cent. Motor Lines, Inc.*, 181 S.E.2d 588, 591-92 (N.C. 1971) (referring to G.S. 97-47 as "this statute"); *Davis v. Chase Home Fin., LLC*, 745 S.E.2d 376, 2013 N.C. App. LEXIS 622 (N.C. Ct. App. 2013) (unpublished) (referring to section 53-244.110 and N.C. Gen. Stat. § 53-244.111 as "these statutes"); *Blair v. Robinson*, 631 S.E.2d 217, 221 (N.C. Ct. App. 2006) (referring to § 1-352 (2005) and § 1-352.1 (2005) as "these statutes"); *Rowell v. N.C. Equip. Co.*, 552 S.E.2d 274, 277 (N.C. Ct. App. 2001) (referring to "N.C. Gen. Stat. Sec. 25-2-201 (1999)" as a "statute," singular, and to "N.C. Gen. Stat. Sec. 25-1-206" as a "statute," singular, and referring to the two, collectively, as "these statutes").

Given CAC's insistence that "statute" means "Act" and "Act" means "Chapter," one should also note *Brookwood Unit Ownership Ass'n v. Delon*, 477 S.E.2d 225, 226 (N.C. Ct. App. 1996) ("The court may award reasonable attorney's fees to the prevailing party." G.S. 47C-4-117 (1986). This statute is specific authority contained within the very Chapter that currently governs in part the operation of [petitioner].")

The point is not that statute must mean "Act" or must mean something else. The point is that the word is used with different meanings, and as directed by *Leonard*, the Court should read it as having a meaning that avoids conflict.

Finally, CAC cannot have it both ways. Either fees pursuant to 75-16-1 are remedies for present purposes or they are not. If 75-16.1 fees are not “remedies,” they do not come within 1D-20’s regulation of “remed[ies].” Conversely, if 75-16.1 fees are “remedies,” then 75-16.1 is remedial and it must be interpreted to fulfill its aims; *West v. Tilley*, 461 S.E.2d 1, 3 (N.C. Ct. App. 1995). Here, it would be interpreted to be a “statute” in its own right, as in the cases cited in note 20 above.

Conclusion to section. The Court should follow *Austin*, *Kuykendall*, *Brown*, and/or *Leonard*.

IV. CAC MISREADS THE OFFER OF JUDGMENT STATUTE AND IMPLICITLY ASKS THE COURT TO REINSTATE PRIOR LAW.

The Court should moot all of CAC’s arguments by holding that the proper recovery here is more than the \$280,000 Appellants offered.

S.C. Code Ann. §15-35-400 (“Offer of judgment; acceptance; consequences of nonacceptance; attorney's fees.”), enacted in 2005, controls this issue. It provides, in particularly relevant part (emphasis added), “(B) Consequences of NonAcceptance. If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover.” Appellants made an offer of \$280,000. The offer was not accepted. Appellants obtained a verdict of \$2.38 million. That settles the issue, under the plain language of the statute: they “shall be allowed to recover.”

CAC concedes this point at the outset. It opens its argument, p. 40, “O&W sought interest and costs under S.C. Code Ann. §15-35-400. This statute permits a party who makes an unaccepted offer of judgment and obtains a verdict or determination at least as favorable as the rejected offer to recover interest and costs.” This is exactly what Appellants did.

Appellants need not receive both a verdict and another determination at least as favorable

as the rejected offer as the statute states “or,” not “and.” Moreover, the statute states, “the offeror shall be allowed to recover,” and “The term ‘shall’ in a statute means that the action is mandatory.” *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 454, 748 S.E.2d 221, 228 (2013). If a statute stated that one who uses “a rifle or a pistol” in a certain manner “shall” be guilty, a judge could not acquit on grounds the defendant used only a pistol, not a rifle.

CAC is asking the Court not simply to rewrite the statute, but to undo a change the Legislature made. CAC argues that what really counts is the final “judgment.” “The trial court here determined that no award could be made because the actual judgment amount” was less than the offer. CAC’s Br. at 40. *See also id.* (arguing that the “offer of judgment amount should be compared to the final determination or award.”) That is what Rule 68 SCRPC used to state, and that is what the Legislature changed by enacting the statute.

As detailed in the attached note, at the time 15-35-400 was enacted, South Carolina law had long read as CAC says it should read now; so too did the law governing offers of judgment in the federal system and in our two neighboring states.²¹ At the time the statute was enacted, SCRPC 68, as amended in 1994, governed. That amendment caused the Rule to read, in pertinent part

²¹ From 1962 until enactment of the statute, with one brief exception, South Carolina law had read as CAC wants it to read now. Former Section 10-1001 (1962) (“Offer of compromise by defendant”) provided, “if the plaintiff fail to obtain a more favorable judgment he cannot recover.” (emphasis added). Renumbered as 15-21-10 (1976), it continued unchanged until repeal of that statute effective July 1, 1985.

Rule 68, SCRPC (“Offer of Judgment”), began to govern the same day. Its original form did not state what the offer was to be compared to. An amendment effective less than a year later (May 1, 1986) caused it to read, “If the complaining party fails to obtain a more favorable judgment he cannot recover.” (emphasis added).

The 1994 amendment caused the Rule to read in pertinent part, “If the complaining party fails to obtain a judgment or a more favorable judgment he cannot recover.” So the law stood at the time of enactment of the current statute.

At that time, the analogous Federal Rule of Civil Procedure, and the laws of our two neighboring states, also each compared the offer to the “the judgment finally obtained.” 2005 Fed. R. Civ. P. 68, <http://www.uscourts.gov/rules-policies/archives/superseded-rules/federal-rules-civil-procedure-2005>; Ga. L. 2005, p. 1, § 5/SB 3; 2005 Ga. SB 3 (enacting O.C.G.A. § 9-11-68); N.C.G.S. § 1A-1, Rule 68. The Federal Rule 68 and Georgia’s have since been modified, the federal rule in 2007 and 2009, Georgia’s in 2006, O.C.G.A. § 9-11-68, but each continues to compare the offer to the “judgment.”

(emphasis added), “If the complaining party fails to obtain a judgment or a more favorable judgment he cannot recover.” That is how the law stood when the Legislature enacted the current statute.

In changing the law from hinging on the amount of the “judgment” to “verdict or determination,” the Legislature obviously thought they were doing something. The “verdict” part is obvious. What they meant by “determination” need not be decided today. Most likely, they were concerned about adjudications that do not have verdicts, such as bench trials.

Had the Legislature wanted the law to compare the offer to the “judgment,” it knew how to do so. They did the reverse: they changed the law. This Court is without power to change it back:

Although it may seem illogical that respondent will be treated as a juvenile in family court for the CSC and burglary charges, while being treated as an adult in general sessions court for the murder charges, 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)). “We have no legislative authority and cannot vary a statutory scheme and this is true no matter how logical the basis of the variance.” *Benat v. State Farm Mut. Ins. Co.*, 286 S.C. 132, 134, 333 S.E.2d 57, 58 (Ct. App. 1985).

Moreover, the Supreme Court then amended Rule 68 so that it, too, now mandates that “the offeror shall recover” if he “obtains a verdict or determination at least as favorable as the rejected offer.” CAC’s position would require the Court of Appeals to un-amend the Supreme Court’s amendment of the Rule. This, the Court may not do.

CAC’s remaining argument is unpreserved, contrary to law, and wrong on the merits. CAC argues it is illogical to apply the statute as written to this case. First, the argument was not ruled on, nor even raised, below, and so should not be considered. “[T]he appellate court likely would

perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal.” *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). Second, CAC’s argument is contrary to law. *Corey D.*, 339 S.C. at 120, 529 S.E.2d at 27 (“Although it may seem illogical” to apply a statute as written in a given case, “it is beyond this Court’s power to effect a change in the statutes enacted by the Legislature”). Third, the statute is not illogical. The Legislature could have changed the law for any number of legitimate reasons. Perhaps they simply wanted to reduce the power of an elite and place more power in a cross-section of the community. Perhaps they wanted to prevent judges adding to or subtracting from verdicts to enable or to prevent a party’s recovery under the statute. Perhaps they did not want pre-judgment interest included in the determination, or set-offs excluded. Perhaps they wanted people who had committed really bad acts, as here, but whose liability was statutorily capped, to at least pay interest on the full amount.²² Whether this is a good or a bad policy is a matter for the Legislature, not a court. *Corey D.; Benat*.

Conclusion to Section. The Court should reject CAC’s request that it undo the Legislature’s change and hold that the statute is to be enforced as written.

Conclusion

For the reasons stated above and in their main brief, Appellants request the Court:

Reinstate the jury’s punitive verdict as two awards at the statutory cap, well within the upper constitutional bound;

Reverse the lower court’s 92% reduction of the initial fee request, and/or the refusal to

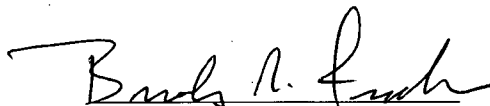
²² Nor does it matter if the underlying verdict was for more than a constitutional amount. As long as the total award, including interest, is not above the constitutional maximum, there is no problem. Here, \$750,000 or \$1,000,000 is not above the constitutional maximum, given the enormity of the wrong, and CAC’s denial of any concern for the risks its deceptions posed to others. Adding offer of judgment interest—even were it included as “punitive” damage for constitutional purposes—would leave the awards well within constitutional limits.

show on the record the entries that were identified as not containing UTPA work, and/or the apportioning of fees among claims arising from a common core of operative fact; reject CAC's contention that *Marshall v. Miller* enables an offer of 2.94 cents on the dollar to stop fees from accumulating for post-verdict work; and, like the North Carolina Court of Appeals in *Kuykendall*, include instructions on remand that fees are to be awarded for this appeal;

Follow *Austin, Kuykendall, Brown, or Leonard*, and hold that Appellants should not have been required to elect between punitive damages and fees pursuant to N.C.G.S. § 75-16.1; and

Decline the invitation to override the Legislature and the Supreme Court, and hold that the offer of judgment statute will be enforced as written.

Respectfully submitted,

 August 27, 2019

Brooks R. Fudenberg
Law Offices of Brooks R. Fudenberg, LLC
171 Church Street, Suite 160
Charleston, SC 29401
Tel.: (843) 416-2558
BRF@Fudenberglaw.com

Attorneys for Appellants

C. Steven Moskos
C. STEVEN MOSKOS, P.A.
4000 Faber Place Drive, Suite 300
N. Charleston, SC 29405
Tel. (843) 763-5297
csmoskos@earthlink.net

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

RECEIVED
AUG 29 2019
SC Court of Appeals

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

Appellants,

v.

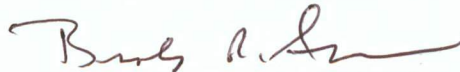
Columbia Automotive Company,
LLC d/b/a Midlands Honda,

Respondent.

CERTIFICATE PURSUANT TO RULE 211(b), SCACR

I certify that the Brief of Appellants and the Reply Brief comply with Rule 211(b),
SCACR.

August 27, 2019



Brooks R. Fudenberg
Law Offices of Brooks R. Fudenberg, LLC
171 Church Street, Suite 160
Charleston, SC 29401
Tel.: (843) 416-2558 eFax: (910) 401-1242
BRF@Fudenberglaw.com
Attorney for Appellants

February 15, 2021

VIA EMAIL ONLY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

Feb 16 2021

SC Court of Appeals

RE: *Daniel O'Shields And Roger W. Whitley, A Partnership d/b/a O&W Cars v.
Columbia Automotive Company, LLC d/b/a Midlands Honda*
Case No. 2013-CP-40-03019
Appellate Case No. 2017-000902

Dear Ms. Kitchings:

Respondent Columbia Automotive Company, LLC d/b/a Midlands Honda ("Midlands") submits this letter in accordance with Rule 208(b)(7), SCACR. In the course of preparing for argument in this matter, Midlands has identified additional pertinent and significant authorities, which are listed below together with an indication as to the related portions of the Respondent's Brief:

1. N.C.G.S. § 6-21.1. Additional authority relating to the availability of attorney's fees by statute in North Carolina. See Argument II of Respondent's Brief.
2. *Dennis v. Atl. Coast Line R. R.*, 70 S.C. 254, 49 S.E. 869, 870 (1904). Addresses treatment of out of state statutory claims by South Carolina courts. See Argument III of Respondent's Brief.
3. *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020), reh'g denied (Feb. 20, 2020), cert. granted (Oct. 19, 2020). Addresses the calculation of prejudgment interest and Rule 68, SCRCP. See Argument IV of Respondent's Brief.

These materials are attached for the Court's convenience.

The Honorable Jenny Abbott Kitchings
February 15, 2021
Page 2

With kind regards,

HAYNSWORTH SINKLER BOYD, P.A.



Sarah P. Spruill

SPS/jmb
Enclosures

cc: H. Clayton Walker, Jr. (via email only with attachments)
Robert L. Reibold (via email only with attachments)
Jamie Becker (via email only with attachments)
C. Steven Moskos (via email only with attachments)
Brooks R. Fudenberg (via email only with attachments)

 KeyCite Yellow Flag - Negative Treatment
Certiorari Granted October 19, 2020

429 S.C. 324
Court of Appeals of South Carolina.

Carla Denise GARRISON and Clint
Garrison, Appellants/Respondents,

v.
TARGET CORPORATION,
Respondent/Appellant.

Appellate Case No. 2017-000267

|
Opinion No. 5711

|
Heard May 15, 2019

|
Filed January 15, 2020

|
Rehearing Denied February 20, 2020

|
Certiorari Granted October 19, 2020

Synopsis

Background: Customers sued department store for negligence, violation of Unfair Trade Practices Act, and loss of consortium. Jury returned verdict for customers, and the Circuit Court, Anderson County, [R. Keith Kelly, J.](#), granted store's motion for judgment notwithstanding the verdict (JNOV) on punitive damages but denied it on liability, and granted customers' motion for costs and post-judgment interest, but granted customer's motion for pre-judgment interest on compensatory damages only. Customers and store appealed.

Holdings: The Court of Appeals, [Geathers, J.](#), held that:

[1] sufficient evidence supported circuit court's ruling that store had constructive knowledge of syringe in its parking lot;

[2] punitive damages award was supported by sufficient evidence that store engaged in pattern of reckless, willful, or wanton conduct;

[3] trial court's comparison of \$4.5 million punitive damages award to \$100,000 compensatory damages

award, rather than potential damages suffered by customers, was error;

[4] punitive damages award of \$4.5 million violated due process;

[5] store waived statutory limits to punitive damages award;

[6] punitive damages award did not result from passion, caprice, or prejudice; and

[7] as a matter of first impression, customers were not entitled to prejudgment interest on punitive damages award.

Affirmed in part, reversed in part, and remanded.

[Hill, J.](#), filed opinion concurring in part and dissenting in part.

West Headnotes (56)

[1] Evidence Suppression or spoliation of evidence

The "doctrine of spoliation" allows the jury to draw an adverse inference against a party who fails to preserve material evidence for trial; it is for the jury to determine whether the party has offered a satisfactory explanation for that failure, and if the jury finds the explanation unsatisfactory, it is permitted, but not required, to draw the inference that the evidence would have been unfavorable to the party's claim.

[2] Appeal and Error Postverdict motions; judgment notwithstanding verdict (JNOV) Judgment Evidence and inferences that may be considered or drawn

When ruling on a motion for judgment notwithstanding the verdict (JNOV), the trial court is required to view the evidence and the

inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party; the Court of Appeals must follow the same standard.

the jury's findings.

[3] Trial ➡ Inferences from evidence

If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury.

[4] Judgment ➡ Credibility of witnesses and weight of evidence

In considering a judgment notwithstanding the verdict (JNOV), the trial judge is concerned with the existence of evidence, not its weight.

[5] Appeal and Error ➡ Postverdict Motions; Judgment Notwithstanding Verdict (Jnov)
Judgment ➡ Credibility of witnesses and weight of evidence

When considering a judgment notwithstanding the verdict (JNOV), neither an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.

[6] Judgment ➡ Where there is no evidence to sustain verdict

When considering a judgment notwithstanding the verdict (JNOV), the jury's verdict must be upheld unless no evidence reasonably supports

[7] Appeal and Error ➡ Punitive or exemplary damages

An appellate court must review de novo a circuit court's post-trial "due process review" of a punitive damages award. *U.S. Const. Amend. 14.*

[8] Appeal and Error ➡ Mistake, passion, or prejudice; shocking conscience or sense of justice
New Trial ➡ Excessive damages in general

If a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration not founded on the evidence, then it is the duty of the trial court and the appellate court to set aside the verdict absolutely.

[9] New Trial ➡ Amount of recovery in general

The jury's determination of damages is entitled to substantial deference for purposes of a motion for a new trial.

[10] Appeal and Error ➡ Review for Correctness or Error

The circuit court's decision on whether to grant a new trial based on the amount of the verdict will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled

by a manifest error of law.

[11] **Negligence** — Conditions created or known by defendant

Negligence — Defect or dangerous conditions generally

Negligence — Knowledge or Notice in General

To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant that created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it.

[12] **Notice** — Constructive Notice

Constructive notice is a legal inference, which substitutes for actual notice.

[13] **Negligence** — Constructive notice

A defendant will be charged with constructive notice of a dangerous or defective condition whenever it appears that the condition has existed for such length of time prior to the injury that, under existing circumstances, the defendant should have discovered and remedied it in the exercise of due care; this temporal element does not require the plaintiff to precisely measure the lifespan of the hazard.

[14] **Negligence** — Premises Liability

Sufficient evidence supported circuit court's ruling in negligence action that syringe had been in department store's parking lot long enough for store to have constructive knowledge of it; customers testified that syringe was old, dirty and weathered and appeared to have "been there a long time," customer testified that debris surrounding syringe looked weathered, and store manager testified that syringe looked "dirty and dingy" and one end was broken off.

[15] **Damages** — Grounds for Exemplary Damages

In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights.

[16] **Negligence** — Reckless conduct
Negligence — Willful or wanton conduct

A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights.

[17] **Damages** — Grounds for Exemplary Damages

A conscious failure to exercise due care constitutes willfulness for purposes of a punitive damages award.

[18] **Judgment** — Credibility of witnesses and weight of evidence

Judgment ➡ Where directed verdict or binding instructions would have been proper

The nature of a judgment notwithstanding the verdict (JNOV), which is merely a renewal of a directed verdict motion, requires the circuit court to determine the existence of evidence to support the award and not its weight.

[19] **Judgment** ➡ Evidence and inferences that may be considered or drawn

On a motion for judgment notwithstanding the verdict (JNOV), if more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the verdict should be upheld.

[20] **Evidence** ➡ Degree of Proof in General

The clear and convincing measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt.

[21] **Appeal and Error** ➡ Sufficiency of evidence
Appeal and Error ➡ Sufficiency of evidence

On appeal from the denial of a motion for directed verdict or judgment notwithstanding the verdict (JNOV), the appellate court may only reverse if there is no evidence to support the circuit court's ruling.

[22] **Damages** ➡ Exemplary damages

When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness, as required for an award of punitive damages.

[23] **Damages** ➡ Exemplary damages

The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton.

[24] **Damages** ➡ Punitive damages

Punitive damages award was supported by sufficient evidence that department store engaged in pattern of reckless, willful, or wanton conduct in negligence action brought by customers after their daughter was injured by syringe in store's parking lot; store employees were aware of importance of inspecting and cleaning parking lot, customers presented evidence that store's assertion that it regularly inspected and cleaned parking lot was false, and that store had constructive knowledge of presence of syringe.

[25] **Constitutional Law** ➡ Punitive damages
Damages ➡ Exemplary damages

There are three stages for a trial court's review of punitive damages; first, the court must determine whether the defendant's conduct rises to a sufficient level of culpability to submit the issue to the jury, second, the court must conduct a post trial review to evaluate whether the award

deprives the defendant of due process. U.S. Const. Amend. 14.

[26] **New Trial** ➡ Excessive Damages
New Trial ➡ Remission or Reduction of Excess of Recovery

If the trial court concludes in a review of an award of punitive damages that the defendant's due process rights were violated, a new trial absolute or new trial nisi remittitur is required. U.S. Const. Amend. 14.

[27] **Constitutional Law** ➡ Punitive damages
Damages ➡ Nature and Theory of Damages Additional to Compensation
Damages ➡ Constitutional limitations on amount in general

While states possess discretion over the imposition of punitive damages, there are procedural and substantive constitutional limitations on these awards; because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amend. 14.

[28] **Constitutional Law** ➡ Punitive damages

To the extent an award of punitive damages is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

[29] **Damages** ➡ Constitutional limitations on amount in general

A trial judge shall review the constitutionality of a punitive damages award by determining whether the award was reasonable under the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

[30] **Appeal and Error** ➡ Punitive or exemplary damages

An appellate court reviews de novo the trial judge's application of the guideposts used to determine the constitutionality of a punitive damages award.

[31] **Damages** ➡ Nature of act or conduct

In terms of reprehensibility of defendant's misconduct, a court considering the reasonableness of a punitive damages award should consider whether: (1) the harm caused was physical as opposed to economic, (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others, (3) the target of the conduct had financial vulnerability, (4) the conduct involved repeated actions or was an isolated incident, and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

[32] **Damages** ➡ Measure and Amount of Exemplary Damages

Damages ➡ Actual damage or compensatory damages; relationship and ratio

There are no rigid benchmarks that a punitive damages award may not surpass, so long as the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered.

brought by customers against department store, where potential harm faced by consumers' daughter who was injured by syringe lying in store parking lot included contraction of potentially fatal communicable disease, store had not increased its surveillance or cleaning methods since date of injury, and store was a \$73 billion dollar-a-year corporation at time of trial.

[33] **Damages** ➡ Actual damage or compensatory damages; relationship and ratio

A court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider the likelihood that the award will deter the defendant from like conduct, whether the award is reasonably related to the harm likely to result from such conduct, and the defendant's ability to pay, but may not rely upon these considerations to justify an otherwise excessive punitive damages award.

[36] **Constitutional Law** ➡ Punitive damages
Damages ➡ Wealth of defendant
Damages ➡ Constitutional limitations on amount in general

A defendant's wealth cannot justify an otherwise unconstitutional punitive damages award; while the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth. *U.S. Const. Amend. 14*.

[34] **Damages** ➡ Actual damage or compensatory damages; relationship and ratio

In reviewing the ratio guidepost for the reasonableness of a punitive damages award, a court need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the potential harm suffered by the plaintiff.

[37] **Damages** ➡ Measure and Amount of Exemplary Damages

When identifying comparable cases for determining the reasonableness of a punitive damages award, a court may consider the type of harm suffered by the plaintiff or plaintiffs, the reprehensibility of the defendant's conduct, the ratio of actual or potential harm to the punitive damages award, the size of the award, and any other factors the court may deem relevant.

[35] **Damages** ➡ Amount Awarded in Particular Cases

Trial court's comparison of \$4.5 million punitive damages award to \$100,000 compensatory damages award, rather than to potential harm, was error in negligence action

[38] **Constitutional Law** ➡ Punitive damages
Damages ➡ Amount Awarded in Particular Cases

Punitive damages award of \$4.5 million in

negligence action brought by customers against department store violated due process, and matter would be remanded for remittitur; although potential harm to daughter of customers injured by syringe found in store parking lot exceeded actual damages award of \$100,000, and thus ratio of punitive to potential damages was less than 45:1, the evidence did not allow precise determination of that ratio, and store's misconduct in failing to clean parking lot was only moderately reprehensible. [U.S. Const. Amend. 14](#).

[39] Evidence ➡ **Matters of Defense and Rebuttal**
Pleading ➡ **Admissions in General**

An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action; in other words, it assumes all elements of the plaintiff's case have been established, and the burden of proof shifts to the defendant to show he is not liable. [Fed. R. Civ. P. 8\(c\)](#); [S.C. R. Civ. P. 8\(c\)](#).

1 Cases that cite this headnote

[40] Evidence ➡ **Elements of cause of action or claim**

Where the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case. [Fed. R. Civ. P. 8\(c\)](#); [S.C. R. Civ. P. 8\(c\)](#).

1 Cases that cite this headnote

[41] Pleading ➡ **Nature and office of pleading in confession and avoidance**

An "avoidance" is the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such

former pleading, shows cause why they should not have their ordinary legal effect. [Fed. R. Civ. P. 8\(c\)](#); [S.C. R. Civ. P. 8\(c\)](#).

[42] Pleading ➡ **Necessity for defense**

Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise; a defendant should not be permitted to "lie behind a log" and ambush a plaintiff with an unexpected defense. [Fed. R. Civ. P. 8\(c\)](#); [S.C. R. Civ. P. 8\(c\)](#).

[43] Pleading ➡ **Necessity for defense**

A defendant's failure to plead an affirmative defense or avoidance as required by the rules of civil procedure is deemed a waiver of the right to assert it. [Fed. R. Civ. P. 8\(c\)](#); [S.C. R. Civ. P. 8\(c\)](#).

[44] Pleading ➡ **Necessity for defense**

Courts may overlook a defendant's failure to plead an affirmative defense when it is timely raised to the trial court without resulting in unfair surprise to the opposing party; however, courts will enforce the pleading requirement when a statutory liability limit affects the proof to be presented at trial, since a plaintiff lacking notice that a defendant will rely on such a statute is unlikely to conduct the discovery or other investigation necessary to obtain proof overcoming the statutory limit. [Fed. R. Civ. P. 8\(c\)](#); [S.C. R. Civ. P. 8\(c\)](#).

[45] Damages — Statutory Provisions

Department store waived statutory limits to punitive damages award in negligence action brought by customers, where store failed to plead recovery limits as affirmative defense or avoidance, or raise the defense prior to conclusion of discovery, and statute limiting amount of punitive damages provided for circumstances under which no cap applied based on defendant's misconduct, but did not provide for post-evidentiary hearing on this issue, and thus store's failure to raise defense affected evidence produced by customers at trial. *S.C. Code Ann. § 15-32-530*.

1 Cases that cite this headnote

[46] Appeal and Error — Motion to modify judgment or order

Department store did not preserve for appeal its argument that only correct relief for due process violation of excessive punitive damages award in negligence action brought by customer was new trial absolute or new trial nisi remittitur, where this argument was made in alternative to store's motion to set aside award granted by circuit court, and store did not file motion to alter or amend judgment to reflect that new trial was necessary. *U.S. Const. Amend. 14; S.C. Code Ann. § 15-32-530; S.C. R. Civ. P. 59(e)*.

[47] New Trial — Amount of recovery in general

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice.

[48] New Trial — Excessive damages in general
New Trial — Inadequate damages

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, circuit court must avoid conflating the constitutionality of a damages award with an award motivated by passion or prejudice.

[49] New Trial — Excessive Damages

When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge alone has the power to reduce the verdict by the granting of a new trial nisi.

[50] New Trial — Amount of recovery in general
New Trial — Conditions on Granting or Refusing New Trial
New Trial — Remission or Reduction of Excess of Recovery

Circuit court that determines that a verdict is either excessive or inadequate may not impose a substitute for the jury verdict on an unwilling plaintiff or defendant, and thus, the court may give to the opposing party a new trial unless the plaintiff agrees to remit a part of the verdict or the defendant agrees to add a sum to the verdict.

[51] Damages — Discretion as to amount of damages
Damages — Discretion as to amount of damages
Damages — Discretion as to amount of damages

The amount of unliquidated damages that a jury might properly award is largely a matter of judgment based upon the facts and

circumstances of each case.

[52] Appeal and Error — Excessive award; remittitur

In determining the question of whether verdict awarded for plaintiff's unliquidated damages is excessive, the facts must be viewed in the light most favorable to the plaintiff.

[53] Damages — Excessive damages in general

When the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive.

[54] Damages — Amount Awarded in Particular Cases

New Trial — Excessive damages in general

Punitive damages award of \$4.5 million in negligence action brought by customers against department store did not result from passion, caprice, or prejudice, and thus store was not entitled to new trial absolute; rational inferences from evidence before jury included potential harm to customers' daughter of contracting potentially fatal communicable disease after she was injured by syringe left in store's parking lot, and risk of harm to others given store's failure to increase frequency of cleaning parking lot after injury despite awareness of importance of keeping lot safe for customers.

[55] Interest — Torts; wrongful death
Interest — Punitive damages; penalties

Customers were not entitled to prejudgment interest on punitive damages awarded by jury, but set aside by trial court, in negligence action brought against department store that rejected customer's pretrial offer of judgment; trial court plain language of rule awarding prejudgment interest contemplated that it be computed on final judgment after resolution of all post-trial motions.

[56] Interest — Torts; wrongful death
Interest — Punitive damages; penalties

Customers were not entitled to prejudgment interest on punitive damages awarded by jury in negligence action brought against department store that rejected customer's pretrial offer of judgment; purpose of prejudgment interest was to compensate party making offer of judgment rather than punish the party who rejected it, and amount of punitive damages could not be ascertained until trier of fact had heard all evidence. S.C. R. Civ. P. 68(b).

****23** Appeal From Anderson County, R. Keith Kelly, Circuit Court Judge

Attorneys and Law Firms

Joshua Thomas Hawkins and Helena LeeAnn Jedziniak, both of Hawkins & Jedziniak, LLC, of Greenville; and G. Todd Butler, of Phelps Dunbar LLP, of Jackson, Mississippi, all for Appellants/Respondents.

Lewis F. Powell, III and George P. Sibley, III, both of Hunton & Williams LLP, of Richmond, Virginia; and Knox L. Haynsworth, III, of Brown, Massey, Evans, McLeod & Haynsworth, LLC, of Greenville, all for Respondent/Appellant.

Opinion

GEATHERS, J.:

***335 **24** In this negligence action, Appellants/Respondents, Carla Denise Garrison and Clint Garrison (the Garrisons), challenge the circuit court's order setting aside the jury's \$4.5 million punitive damages award, arguing (1) there was sufficient evidence to support the jury's finding that the conduct of Respondent/Appellant Target Corporation (Target) was reckless, willful, or wanton; (2) the verdict was not excessive; and (3) Target waived the application of the punitive damages caps set forth in [section 15-32-530\(A\) of the South Carolina Code](#) (Supp. 2019). The Garrisons also challenge the circuit court's pre-judgment interest award, arguing the circuit court erred by calculating the interest on compensatory damages only. Target appeals the circuit court's denial of its motion for a judgment notwithstanding the verdict (JNOV) as to liability, arguing there was insufficient evidence of Target's constructive knowledge of a dangerous condition on its premises. ***336** Target also appeals the denial of its motion for a new trial absolute, arguing the punitive damages award reflected the jury's passion, caprice, and prejudice. We affirm in part, reverse in part, and remand for a remittitur of the jury's punitive damages award.

FACTS/PROCEDURAL HISTORY

On May 21, 2014, Appellant/Respondent Carla Denise Garrison (Denise) and her eight-year-old daughter (Daughter) visited the Target store in Anderson. After parking her car, Denise retrieved her coupon book and placed it on the hood of the car to examine it. As she was examining the coupon book, Denise heard Daughter ask, "Mommy, what is this?" Denise turned her attention to Daughter and saw her holding a syringe with a needle in it. Denise "immediately reacted" by swatting the syringe out of Daughter's hand, exclaiming, "Don't ever pick anything like that up, that's dirty, that's nasty." When Denise swatted the syringe, the needle punctured her right palm, and she noticed a bead of blood emerge from the puncture site.

Denise went inside the store to wash her hands several times and called her husband, Appellant/Respondent Clint Garrison (Clint). Clint advised Denise to report the incident, so Denise spoke to the store manager, Shelby Brintnall, and they both took photographs of the syringe lying in the parking lot. Brintnall took possession of the syringe and completed a "Guest Incident Report" form, recounting the incident as Denise had relayed it to her.¹ In

response to the form's question, "Was the floor/ground clean and dry," Brintnall checked the "No" box. Brintnall also advised Denise to get medical treatment and give the bill to her. After Denise left the store, Brintnall completed a second report that was entitled "LOD Investigation Report."² In this report, Brintnall indicated that she did not see a needle in the syringe.

¹ Brintnall testified she placed the syringe in a bag and placed a label on the bag stating "Do Not Touch" and the syringe later "end[ed] up" in a "hazard box."

² "LOD" is an acronym for the store's team "lead-on-duty."

***337** The next day, Denise visited the local hospital emergency room, where a nurse referred Denise to an infectious disease specialist, Dr. Potts,³ at AnMed Health Specialty Clinic. The clinic collected a blood sample to have it tested for HIV and [hepatitis](#), and Dr. Potts prescribed several medications targeted at preventing HIV and [hepatitis](#). The medications caused Denise to feel dizzy and lose her balance. They also upset her stomach, put her into a "zombie-like state," and caused her to have night terrors. Clint testified that Denise was bedridden during this time. Clint had to take unpaid leave from work to care for Denise, and Clint's mother had to help care for the Garrisons' four children. Further, Denise had to have her blood tested every three months for approximately one year.

³ The record does not indicate a first name for Dr. Potts.

****25** Soon after Denise started taking the medications, an investigator for Target telephoned Denise and asked her if she thought Target was responsible for her injury. She told the investigator that Target was "supposed to take care of the parking lot" but she was asking only that Target pay her medical bills. Denise eventually filed an action against Target seeking damages for negligence and violation of the South Carolina Unfair Trade Practices Act. Subsequently, Denise submitted to Target a \$12,000 offer of judgment, but Target did not accept the offer. Denise and Clint later filed a second action against Target, asserting causes of action for negligence and loss of consortium. The circuit court consolidated the two actions and conducted a trial on September 5 through 8, 2016.

At trial, Brintnall testified that Target's Anderson store did not have a formal policy for regular "safety sweeps" of the parking lot but there were measures in place to

keep the parking lot in order. She stated that the store had cart attendants who retrieved carts from the parking lot and simultaneously checked for debris and picked it up. The attendants also advised the team lead-on-duty of anything they saw that “need[ed] to be noted.” However, Brintnall admitted that management did not “have a set time” for the cart attendants to perform these tasks; rather, they did them “every so often.” Brintnall added that the store’s Property Maintenance Technician, Jonathan Jackson, “walk[ed] the building” in the mornings.

***338** ^[1]The parties also introduced testimony regarding Target’s loss of the syringe and the Garrisons’ loss of photographs of the syringe. Brintnall explained that after she took possession of the syringe, she thought that a co-worker disposed of it but later learned that it was still at the store. Subsequently, an employee of the Garrisons’ counsel took photographs of the syringe with her cell phone, but those photographs could not be produced for trial. Brintnall then lost track of the syringe once again, and its location at the time of trial was a “great mystery.” Moreover, Clint was unable to retrieve from his own cell phone photographs purportedly showing the needle in the syringe. In light of all of this testimony, the circuit court gave a jury instruction on the doctrine of spoliation.⁴

⁴ The doctrine of spoliation allows the jury to draw an adverse inference against a party who “fails to preserve material evidence for trial.” *Stokes v. Spartanburg Reg’l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006). It is for the jury “to determine whether the party has offered a satisfactory explanation for that failure,” and if the jury “find[s] the explanation unsatisfactory, [it is] permitted—but not required—to draw the inference that the evidence would have been unfavorable to the party’s claim.” *Id.*

At the conclusion of the trial, the jury returned a verdict for Denise that included \$100,000 in compensatory damages and \$4.5 million in punitive damages. The jury also awarded Clint \$3,500 for lost wages and \$5,000 for loss of consortium. The circuit court granted Target’s motion for a JNOV as to punitive damages but denied Target’s remaining post-trial motions. The circuit court granted the Garrisons’ motion for costs, pre-judgment interest, and post-judgment interest but calculated pre-judgment interest on compensatory damages only. These cross-appeals followed.

ISSUES ON APPEAL

1. Was there sufficient evidence of Target’s constructive knowledge of a dangerous condition on its premises to allow the issue of Target’s liability to go to the jury?

2. Was there sufficient evidence of Target’s recklessness, willfulness, or wantonness to support the jury’s punitive damages award?

3. Did the amount of the punitive damages award violate due process?

***339** 4. Did Target waive the application of the punitive damages caps in [section 15-32-530](#)?⁵

****26** 5. Did the punitive damages award reflect the jury’s passion, caprice, and prejudice such that a new trial absolute was required?

6. Did the circuit court err by calculating pre-judgment interest on compensatory damages only?

⁵ Because we conclude that Target waived the application of [section 15-32-530](#), we need not address whether the statute is constitutional or whether the cap in subsection (A) applies to the Garrisons. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

STANDARD OF REVIEW

JNOV

^[2] ^[3]“When ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.” *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). “This court must follow the same standard.” *Id.* “If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury.” *Id.* (quoting *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965)).

^[4] ^[5] ^[6]“In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight.” *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d

272, 274 (2003). “When considering a JNOV, ‘neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.’ ” *Id.* (alteration in original) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998)). “The jury’s verdict must be upheld unless no evidence reasonably supports the jury’s findings.” *Id.*

Punitive Damages

^[7]An appellate court must review de novo a circuit court’s post-trial “due process review” of a punitive damages *340 award. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009).

New Trial Absolute

^[8] ^[9] ^[10] “[I]f a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration not founded on the evidence[,] then it is the duty of the trial court and the appellate court to set aside the verdict absolutely.” *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 33, 410 S.E.2d 21, 25 (Ct. App. 1991). Nonetheless, “the jury’s determination of damages is entitled to substantial deference[,]” and the circuit court’s decision on whether to grant a new trial based on the amount of the verdict “will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). An exception to this rule is that an appellate court must review de novo a circuit court’s post-trial “due process review” of a punitive damages award. *Mitchell*, 385 S.C. at 583, 686 S.E.2d at 183.

LAW/ANALYSIS

I. Constructive Notice

^[11] ^[12] ^[13] Target maintains the circuit court erred by denying its JNOV motion as to liability because there was

insufficient evidence of its constructive knowledge of a dangerous condition on its premises.

To recover damages for injuries caused by a dangerous or defective condition on a storekeeper’s premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant [that] created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it.

Wintersteen v. Food Lion, Inc. (Wintersteen II), 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). “Constructive notice is a legal inference, which substitutes for actual notice.” *Major v. City of Hartsville*, 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014). “The defendant will be charged with constructive notice whenever it appears that the condition has existed for such length of time prior to the injury that, under existing circumstances, he *341 should have discovered and remedied it in the exercise of due care” *Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77 (1971). Target admits that this “temporal element does not require the **27 plaintiff to precisely measure the lifespan of the hazard.”

In denying Target’s motion, the circuit court stated

[A]lthough there was no direct evidence as to the exact length of time the syringe had been in the parking lot, witnesses testified the syringe was “dingy, dirty and gross,” and bore a “weathered” look similar to other items of trash in the parking lot. That testimony, when viewed in the light most favorable to Plaintiffs, leads to the reasonable inference that the syringe was in Target’s parking lot long enough to impute constructive knowledge. Thus, judgment as a matter of law is not appropriate on the constructive knowledge issue. (emphasis added).

^[14] When viewed in the light most favorable to the Garrisons, there was sufficient evidence to support the circuit court’s ruling. See *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 (“In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight.”); *Williams Carpet*, 400 S.C. at 325, 734 S.E.2d at 180 (“When ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.”); *id.* (“This court must follow the same standard.”).

Denise testified that the syringe was old, dirty, and nasty and that she “could tell [that], obviously[,] it had been there a long time.” Further, Shelby Brintnall, the manager on duty at the time Denise was injured, testified that she saw the syringe and admitted that it “look[ed] like it [had]

some wear on it.” Brintnall stated that the syringe was “dirty and dingy” and one end of it had been broken off. She also affirmed that the photograph taken of the syringe showed “dings” on it as well as grime. Clint testified that from viewing the photograph of the syringe on the ground near the site of the injury, he could tell that the syringe had “been there a[]while” because it, along with surrounding debris, was “weathered.” Clint also testified that some discarded twine lying near the syringe was *342 discolored and looked like it had been run over. Admittedly, the photographs depict the location where the syringe landed after Denise had swatted it away from her daughter’s hands. Nonetheless, it is unlikely that the location where the syringe landed was any significant distance from its original location in the parking lot.

Target argues this court should not consider the Garrisons’ testimony concerning how long the syringe had been in the parking lot because it was speculative. However, it is reasonable to infer from witness descriptions of the syringe’s weathered appearance that it had been lying in the parking lot long enough for Target’s employees to have discovered it. See *Williams Carpet*, 400 S.C. at 325, 734 S.E.2d at 180 (“If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury.” (quoting *Chaney*, 246 S.C. at 266, 143 S.E.2d at 523)); cf. *H. L. Green Co. v. Bowen*, 223 F.2d 523, 525 (4th Cir. 1955) (reversing a judgment for the plaintiff and stating that the only evidence as to the defendant’s constructive notice of popcorn on which the plaintiff slipped and fell was the testimony of the plaintiff’s witness that she “saw the popcorn on the floor only a few minutes before [the plaintiff] entered the store and fell; that the popcorn *looked fresh, crisp and white; that the popcorn appeared not to have been walked on*, seemed to have been just dropped on the floor and *that the floor around the popcorn was clean and had the semblance of having been very recently swept*” (emphases added)); *id.* (“We cannot attribute constructive notice of the presence of this popcorn to [the defendant] on evidence proving merely that the popcorn had been there a very few minutes.”).

Target also argues that the syringe could have already been in its weathered condition when it was first abandoned in the parking lot. While this is possible, there is no evidence indicating this is likely. In contrast, the weathered condition of the debris surrounding the syringe indicates it is likely that the syringe became weathered after it was abandoned in the lot. Therefore, this case is distinguishable from *Wintersteen v. Food Lion, Inc.* (*Wintersteen I*), in which two equal possibilities made the determination of **28 how long water had been on a

grocery store’s floor nothing more than “pure speculation.” *343 336 S.C. 132, 136, 518 S.E.2d 828, 830 (Ct. App. 1999), *aff’d*, 344 S.C. 32, 542 S.E.2d 728 (2001).⁶ Further, while Target compares the weathered condition of the syringe to the description of a banana peel as “withered up” and “mushed up” in *Anderson*,⁷ the nature of a banana peel inside a grocery store does not lend itself to a valid comparison with a syringe in an outdoor parking lot.

⁶ In *Wintersteen*, the plaintiff slipped on a puddle of clear liquid in a grocery store and fell, injuring her back. 336 S.C. at 134, 518 S.E.2d at 829. Because the plaintiff’s own expert testified that ice falling from a drink machine could melt in as fast as one minute, this court concluded, “[W]hile the liquid could have been on the floor for an extended period of time, *it is just as possible* that it had been on the floor for only moments before [the plaintiff] fell” and “[A]ny determination of how long the water had been on the floor would be pure speculation.” *Id.* at 136, 518 S.E.2d at 830 (emphasis added).

⁷ 257 S.C. at 80, 184 S.E.2d at 79 (“The phrases ‘withered up’ and ‘mushed up’, which were applied to the appearance of the small bit of peeling after it has been stepped upon by [the] plaintiff, are ... insignificant.”).

In light of the foregoing, we conclude there was sufficient evidence of constructive notice to allow the jury to resolve the question of Target’s liability.

II. Punitive Damages Award

The Garrisons argue the circuit court erred by setting aside the jury’s punitive damages award because (1) there was sufficient evidence of Target’s recklessness, willfulness, or wantonness to support the award; (2) the amount of the award was not excessive; and (3) Target waived the application of the punitive damages caps in section 15-32-530. We will address these grounds in turn. But first, we will explain how the circuit court structured its rulings on these questions, given the Garrisons’ assertions that (1) the circuit court conflated evidentiary sufficiency with constitutional excessiveness and (2) the circuit court’s judgment concerning the sufficiency of the evidence to support the award was clouded by the amount of the award.

In its order addressing the parties’ post-trial motions, the

circuit court stated, “[F]inding punitive damages unconstitutional in this case, the [c]ourt finds judgment as a matter of law is appropriate as to that aspect of the award alone.” The *344 order then discussed the reasons for denying a JNOV as to liability and for granting a JNOV as to the punitive damages award. This discussion included a post-trial review of the constitutionality of the punitive damages award. See *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 52, 691 S.E.2d 135, 150 (2010) (“Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.” (quoting *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006))); *id.* at 52, 691 S.E.2d at 151 (“[A] trial judge shall review the constitutionality of a punitive damages award by determining whether the award was reasonable”); *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (“To the extent [a punitive damages] award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003))).

Within its discussion of the award’s constitutionality, the circuit court found there was no evidence that Target “engaged in a pattern of reckless, willful, or wanton conduct that is sufficiently reprehensible to justify the punitive damages award.” The circuit court also found that the ratio between the punitive damages award and the actual damages award was “in excess of 45:1.” The circuit court concluded that the award violated Target’s due process rights.

A. Supporting Evidence

[15] [16] [17] “In order for a plaintiff to recover punitive damages, there must be evidence the defendant’s conduct was willful, wanton, or in reckless disregard of the plaintiff’s rights.” *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). “A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under **29 such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff’s rights.” *Id.*⁸ “A conscious failure to exercise due care constitutes willfulness.” *Id.*

⁸ See also *Geddings v. Atl. Coast Line R. Co.*, 91 S.C. 477, 75 S.E. 284, 286 (1912) (“Not only is the conscious invasion of the rights of another, in a wanton,

willful, and reckless manner, an act of wrong, but [] the same result follows, *when the wrongdoer does not actually realize that he is invading the rights of another*, provided the act is committed in such a manner that a person of ordinary reason and prudence would say that it was a reckless disregard of another’s rights.” (emphasis added) (quoting *Tolleson v. Southern Ry. Co.*, 88 S.C. 7, 70 S.E. 311, 313 (1911))).

*345 [18] Here, the circuit court set aside the punitive damages award by way of a JNOV. The nature of a JNOV, which is “merely a renewal of [a] directed verdict motion,”⁹ requires the circuit court to determine the existence of evidence to support the award and not its weight. *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274; cf. *Fairchild v. S.C. Dep’t of Transp.*, 398 S.C. 90, 101, 727 S.E.2d 407, 413 (2012) (holding the circuit court erred in granting a directed verdict on the issue of punitive damages and stating, “It is not the duty of a trial court to weigh the evidence. Viewing the evidence and its reasonable inferences in the light most favorable to [the nonmoving party], as both the trial court and this [c]ourt are required to do, we hold there is evidence to create a jury question as to whether or not [the defendant] acted with recklessness, thus requiring submission of the issue of punitive damages to the jury”). “When considering a JNOV, ‘neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.’ ” *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 (alteration in original) (quoting *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154). “The jury’s verdict must be upheld unless no evidence reasonably supports the jury’s findings.” *Id.*

⁹ *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012).

[19] Further, both the circuit court and this court are “required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to” the Garrisons, the nonmoving parties. *Williams Carpet*, 400 S.C. at 325, 734 S.E.2d at 180; cf. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 393–94, 714 S.E.2d 904, 909–10 (Ct. App. 2011) (“When ruling on a directed verdict motion as to punitive damages, ‘the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. In reviewing the *346 denial of a motion for directed verdict ..., the appellate court applies the same standard as the circuit court.’ ” (alteration in original) (citation omitted) (quoting *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 200, 621 S.E.2d 363, 366 (Ct. App. 2005), cert. denied (Jan. 18, 2007))).

“If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt,” the verdict should be upheld. *Williams Carpet*, 400 S.C. at 325, 734 S.E.2d at 180 (quoting *Chaney*, 246 S.C. at 266, 143 S.E.2d at 523); cf. *Hollis*, 394 S.C. at 394, 714 S.E.2d at 910 (“The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant’s behavior was reckless, willful, or wanton.” (quoting *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366)).

In *Mishoe*, the plaintiff injured her left ankle and right knee while walking across the pavement near the emergency room exit of the defendant’s hospital and getting her left foot got caught in a hole. 366 S.C. at 199, 621 S.E.2d at 365. Although the hospital’s head of maintenance had prepared a written report concerning the hole’s existence approximately eleven months before the plaintiff’s injury,¹⁰ “[t]he hospital took no action to repair the hole or warn visitors and patients of the hole’s existence.” *Id.* This court concluded that this evidence was sufficient to submit the issue of the hospital’s “willful, wanton, reckless, or malicious conduct to the jury.” 366 S.C. at 202, 621 S.E.2d at 366.

¹⁰ The hospital “was required to perform regular, twice-yearly safety inspections of its premises to maintain its accreditation.” *Id.*

***30** [20] [21] [22] [23] Notably, the hospital had argued that because there was no clear and convincing evidence that its actions constituted willful, wanton, or reckless conduct, the circuit court erred in denying its JNOV motion.¹¹ 366 S.C. at 200, 621 S.E.2d at 365. In rejecting this argument, then-Chief Judge Hearn summarized the standard of review for a JNOV ruling on punitive damages as follows:

***347** On appeal from the denial of a motion for directed verdict or JNOV, *the appellate court may only reverse if there is no evidence to support the circuit court’s ruling.* Neither the circuit court nor the appellate court has the authority to decide credibility issues or resolve conflicts in testimony. In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant’s misconduct was willful, wanton, or with reckless disregard for the plaintiff’s rights.^[12] A conscious failure to exercise due care constitutes willfulness. When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, *sufficient evidence exists to create a jury issue as to*

whether there is clear and convincing evidence of willfulness. The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant’s behavior was reckless, willful, or wanton.

366 S.C. at 200–01, 621 S.E.2d at 366 (emphases added) (citations omitted).¹³

¹¹ The clear and convincing “measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt.” *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 265 n.4, 478 S.E.2d 282, 284 n.4 (1996) (quoting *Middleton v. Johnston*, 221 Va. 797, 273 S.E.2d 800, 803 (1981)).

¹² See S.C. Code Ann. § 15-33-135 (2005).

¹³ But see *Taylor*, 324 S.C. at 221–22, 479 S.E.2d at 46 (holding the circuit court properly denied the defendant’s motion for a JNOV on punitive damages because the record contained “clear and convincing evidence that [the defendant] failed to exercise due care in treating [the plaintiff]”); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009) (responding to the defendant’s argument that the jury’s punitive damages award should be “reversed” by stating that clear and convincing evidence supported the award); *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (responding to the defendant’s argument that the jury’s punitive damages award should be “reversed” by stating, “Although appellate review of an award of punitive damages is limited to the correction of errors of law, an award of punitive damages must be proven under a significant burden of proof: clear and convincing evidence”); *id.* at 564–65, 619 S.E.2d at 11 (holding the circuit court erred in submitting the issue of punitive damages to the jury because there was “no clear and convincing evidence that [the defendant’s] conduct ... was willful, wanton, or in reckless disregard of the rights of others”); *Welch*, 342 S.C. at 301–02, 536 S.E.2d at 419–20 (holding the circuit court did not err in denying the defendant’s motion for a JNOV as to punitive damages because there was clear and convincing evidence of the defendant’s reckless culpability).

***348** [24] Here, the Garrisons presented evidence showing that Target’s employees were aware of the importance of inspecting and cleaning the parking lot to keep it safe for customers and of keeping good records of these efforts. The Garrisons also presented evidence showing that Target’s employees should have been aware of the

existence of the syringe and needle in the parking lot. Yet, immediately after Denise reported the injury to Target's manager, the employee assigned to the parking lot could not be located. The Garrisons also highlight the following evidence showing the falsity of Target's claim that it had the parking lot cleaned on a regular basis: Target's manager (Shelby Brintnall) and Property Maintenance Technician (Jonathan Jackson) both testified that a third-party vendor sent a cleaning truck to sweep Target's parking lot once a week, on every Thursday night. Brintnall and Jackson also testified that cart attendants regularly checked the lot for debris. Yet, Clint testified that he camped out in Target's parking lot on a Thursday night, from 11:45 p.m. to 5:30 a.m.,¹⁴ and no one came to clean the lot.

¹⁴ Clint explained that Target's counsel had previously intimidated him that the cleaning truck regularly arrived at the parking lot after midnight. Clint also listened to Jackson testify in his deposition that the truck arrived "on Thursday night and Friday mornings."

Also belying Target's claim that it cleaned the parking lot on a regular basis were photographs ***31** of weathered trash and debris and the testimony of the Garrisons and Clint's mother that they had observed "trash everywhere" and other debris in Target's parking lot on different occasions. The Garrisons also maintain that an inspection log identifying both April 28, 2014, and April 29, 2014, as a Monday "suggested to the jury" that Jackson's testimony claiming to have conducted regular inspections was false.

[25] [26] When evaluating the above-referenced evidence of Target's failure to regularly inspect and clean its parking lot, the circuit court was charged with determining whether the circumstances were such that "a person of ordinary reason and prudence would have been conscious of [Target's conduct] as an invasion of the plaintiff's rights." *Taylor*, 324 S.C. at 221, 479 S.E.2d at 46. As we previously stated, the Garrisons assert that the circuit court conflated evidentiary sufficiency with ***349** constitutional excessiveness.¹⁵ They express the concern that the circuit court failed to articulate the standard for evaluating a motion for a JNOV as to the award of punitive damages because the court's judgment was clouded by the amount of the jury's verdict. They highlight the inconsistency between the circuit court's JNOV and its initial denial of Target's directed verdict motion as to punitive damages, when it found sufficient evidence to support such an award: "[T]he [c]ourt finds that there is at least evidence that[,] when viewed in the light most favorable to the nonmoving party[,] could lead to more than one inference or at least cause an inference

that is in doubt." We agree with this initial assessment by the circuit court. We also agree with the Garrisons' assertion that the circuit court lost sight of this principle after being confronted with the enormity of the jury's punitive damages award.

¹⁵ In *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, this court set forth the following demarcation between evidentiary sufficiency and constitutional excessiveness:

Our appellate decisions have heretofore recognized three stages for a trial court's review of punitive damages. *First, the court must determine whether the defendant's conduct rises to a sufficient level of culpability to submit the issue to the jury....* Second, the court must conduct a post trial ... review to evaluate whether the award deprives the defendant of due process. If the court concludes that the defendant's due process rights were violated, a new trial absolute or new trial *nisi remittitur* is required.

339 S.C. 285, 314, 529 S.E.2d 45, 60–61 (Ct. App. 2000) (emphasis added) (citations omitted).

Based on the foregoing, we reverse the circuit court's JNOV as to the punitive damages award.

B. Amount of Award

After finding that the ratio between the punitive damages award and the actual damages award was in excess of 45:1, the circuit court stated, "This ratio should not stand in ... light of the *Campbell* decision[] and cannot stand under the statutory cap placed on punitive damages ... in [section] 15-32-530." On appeal, the Garrisons argue that the amount of the punitive damages award was not excessive and, therefore, should not be reduced. The Garrisons also argue Target waived the application of the punitive damages caps in section 15-32-530. We will address these grounds in turn.

***350** 1. Due Process

[27] [28] [29] [30] "[W]hile states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (quoting *Campbell*, 538 U.S. at 416, 123 S.Ct. 1513). In other words, "[b]ecause punitive

damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.” *Austin*, 387 S.C. at 52, 691 S.E.2d at 150 (quoting *James*, 371 S.C. at 194, 638 S.E.2d at 670). “To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (quoting *Campbell*, 538 U.S. at 417, 123 S.Ct. 1513). To make this determination, trial courts must conduct a post-trial review of a jury’s punitive damages award:

****32** [A] trial judge shall review the constitutionality of a punitive damages award by determining whether the award was reasonable under the following guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Austin, 387 S.C. at 52, 691 S.E.2d at 151 (citing *Mitchell*, 385 S.C. at 587–88, 686 S.E.2d at 185–86).¹⁶ “[A]n appellate court reviews de novo the trial judge’s application of these guideposts.” *Id.*

¹⁶ These guideposts were first set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

In *Mitchell*, our supreme court examined a punitive damages award with a ratio of 13.9 to 1, based on the jury’s \$15 million punitive damages award and over \$1 million in potential harm to the plaintiff, and concluded that it was “grossly excessive.” 385 S.C. at 592, 686 S.E.2d at 187. The court remitted the award to \$10 million, resulting in a 9.2 to 1 ratio.¹⁷ *Id.* at 594, 686 S.E.2d at 188. We will now apply the three *Gore* guideposts to the present case.

¹⁷ The *Mitchell* opinion was issued before the punitive damages caps set forth in section 15-32-530 were enacted in 2011.

***351 a. Reprehensibility**

^[31]In terms of reprehensibility, [the court] should consider whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Austin, 387 S.C. at 53, 691 S.E.2d at 151.

Here, the harm to Denise was physical because the needle from the syringe pricked her palm and drew blood, possibly exposing her to a communicable disease and requiring her to undergo difficult medical treatment resulting in physical and emotional suffering for several months. The medications she had to take made her physically ill and caused vivid nightmares. Further, the Garrisons had financial vulnerability because they had only Clint’s modest income to support their household and Clint lost part of that income when he had to take time off from work to take care of Denise.¹⁸ As a result, Clint had to borrow money from his mother to pay for school lunches for the children. Moreover, the Garrisons presented evidence showing that Target’s parking lot was littered with trash and debris on a regular basis. Therefore, while the existence of the syringe and needle were known to happen on just one occasion, there is the potential for its recurrence or for other dangerous debris to harm customers.

¹⁸ Clint testified he was making \$16.80 per hour for sixty-four hours per week at the time of Denise’s injury.

b. Ratio

^[32] ^[33]“The ratio of actual or potential harm to the punitive damages award is ‘perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award.’ ” *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 (quoting *Gore*, 517 U.S. at 580, 116 S.Ct. 1589).

Although the [United States] Supreme Court has “been reluctant to identify concrete constitutional limits on the ***352** ratio between harm, or potential harm, to the plaintiff and the punitive damages award,” and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages[] to a

significant degree[] will satisfy due process.” Nevertheless, the Supreme Court has made clear that “there are no rigid benchmarks that a punitive damages award may not surpass,” so long as “the measurement of punishment ****33** is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered.” With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: *the likelihood that the award will deter the defendant from like conduct*; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant’s ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

Id. at 588, 686 S.E.2d at 185 (emphases added) (citations omitted) (quoting *Campbell*, 538 U.S. at 425–26, 123 S.Ct. 1513).

^[34]“In reviewing the ratio guidepost, a court need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the *potential* harm suffered by the plaintiff.” *Id.* at 590, 686 S.E.2d at 187. In *TXO Production Corporation v. Alliance Resources*, the United States Supreme Court considered not only the potential harm to the plaintiff but also “the possible harm to other victims that might have resulted if similar future behavior were not deterred.” 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (quoted in *Mitchell*, 385 S.C. at 591, 686 S.E.2d at 187).

^[35]Here, the jury awarded only \$100,000 to Denise to reflect the actual harm she experienced. However, the *potential* harm to Denise involved contracting a communicable disease such as HIV or hepatitis, along with the attendant medical costs and possible death. Further, Jonathan Jackson, Target’s Property Maintenance Technician, testified that Target ***353** had not increased the frequency of its cleaning since the day of Denise’s injury or made any improvements to its “safety scans” or its cleaning methods since the injury. Therefore, consideration should also be given to the possible harm to other customers or their children if Target is not adequately deterred.

The Garrisons point out that the ratio evaluated by our supreme court in *Mitchell* compared the plaintiff’s potential harm, rather than the actual harm, to the punitive damages award in that case. In *Mitchell*, the plaintiff was diagnosed as HIV positive after he had purchased a health insurance policy from the defendant. 385 S.C. at 577–78, 686 S.E.2d at 180. After receiving claims for the

plaintiff’s treatment and testing, the defendant rescinded the policy on the basis that he had misrepresented his HIV positive status on his insurance application. *Id.* at 578–79, 686 S.E.2d at 180–81. When a case manager at the clinic visited by the plaintiff tried to inform the defendant’s senior underwriter that the plaintiff did not test positive for HIV until after he purchased the policy, the underwriter “spurned” the case manager’s offer to send the supporting records to her and stated “that there was nothing she could do” at that time. *Id.* at 579–80, 686 S.E.2d at 181.

The plaintiff filed an action for breach of contract and bad faith rescission against the defendant, and at trial, the plaintiff presented evidence of his actual and potential harm. *Id.* at 580–82, 686 S.E.2d at 181–82. The plaintiff

presented testimony from a medical expert who testified that without medical treatment, he would contract AIDS in two years and likely die two years after that. [The plaintiff] introduced testimony from a health care expert who testified to the minimum expected costs that it would take to care for [the plaintiff] throughout his life, not including complications from HIV and AIDS. [The plaintiff] also introduced an economist who relied on the health care expert’s figures to project a total present value of \$1,081,189.40 for [the plaintiff’s] treatment and costs.

Id. at 581–82, 686 S.E.2d at 182. The jury awarded the plaintiff \$186,000 in actual damages. *Id.* at 577, 686 S.E.2d at 179. While the jury awarded \$15 million in punitive damages, ***354** the supreme court remitted this award to \$10 million. *Id.* at 577, 594, 686 S.E.2d at 179, 188.

Although the ratio between the actual damages awarded and the remitted punitive damages award was approximately 54:1, the court determined the plaintiff’s potential harm to be \$1,081,189.40, the present value of costs for the evaluation and treatment of ****34** HIV over the plaintiff’s lifetime, and compared that amount to both the \$15 million award and the remitted \$10 million award. *Id.* at 591–94, 686 S.E.2d at 187–88. The court held that the original 13.9:1 ratio was “grossly excessive” under due process standards but the ratio resulting from the remitted punitive damages award, 9.2 to 1, satisfied due process. *Id.* at 592–94, 686 S.E.2d at 187–88. The court noted that the defendant’s conduct was “reprehensible enough to merit an award towards the outer limits of the single-digit ratio.” *Id.* at 593, 686 S.E.2d at 188.

Unlike the plaintiff in *Mitchell*, Denise did not test positive for HIV, and the Garrisons did not present the testimony of a health care expert or economist to determine the economic cost to the Garrisons had Denise

actually tested positive for HIV or [hepatitis](#). Nonetheless, given the potential harm to Denise and other customers, more than just the \$100,000 awarded in compensatory damages to Denise should be considered in comparison to the amount of punitive damages awarded. Further, the single-digit ratio formulated by the supreme court in [Mitchell](#) of 9.2 to 1 was based on a remitted award of \$10 million, and the jury in the present case awarded less than half of that amount to Denise. Even after taking into account the greater reprehensibility of the defendant's conduct in [Mitchell](#) versus Target in the present case, the circuit court was incorrect in placing emphasis on the ratio of punitive damages to mere actual damages awarded (45:1). Therefore, we reverse the circuit court's conclusion stating "This ratio should not stand in ... light of the [Campbell](#) decision"

^[36]The Garrisons also contend Target's counsel admitted in closing arguments that Target was a \$73 billion dollar-a-year corporation at the time of trial and this wealth requires a punitive damages award to be large enough to have a deterrent *355 effect on Target.¹⁹ See *id.* at 588, 686 S.E.2d at 185 ("[A] court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award."). We agree that the deterrent effect of the award is an important consideration. On the other hand, courts must exercise caution when considering the wealth of a defendant as part of a punitive damages review:

trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth.

Id. at 588 n.8, 686 S.E.2d at 185 n.8 (citation omitted).

¹⁹ Target's counsel did not exactly admit to the \$73 billion figure. He stated that the Garrisons' counsel had referred to that amount "four or five times." Target's counsel then stated, "That's probably right. I don't know." The Garrisons do not cite to any evidence in the record to back up this figure. And while they also reference a federal opinion's identification of Target's net worth as \$17.633 billion, this reference is not persuasive because the opinion was signed in 2009 and the trial in the present case was conducted in 2016. [Cantrell v. Target Corp.](#), No. CV 6:06-2723-BHH,

2009 WL 10678353, at *13 (D.S.C. May 15, 2009). The court's net worth reference was actually \$15.633 billion.

c. Comparable Cases

^[37]"When identifying 'comparable cases' a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant." *Id.* at 588–89, 686 S.E.2d at 186. The Garrisons do not cite any cases that are truly comparable to the present case, and we have found none.

^[38]Based on the application of all three [Gore](#) guideposts to the record in the present case, we are compelled to conclude *356 that the **35 amount of the punitive damages award violates due process. Although the evidence supports moderate reprehensibility on Target's part, it is considerably less than the reprehensibility of the defendant's conduct in [Mitchell](#). Further, while the ratio of the punitive damages awarded to the potential harm (versus mere actual harm) is likely much less than 45:1, the evidence does not allow us to precisely determine this ratio. Finally, there is a dearth of comparable cases to support the award in this case.

Therefore, we affirm the circuit court's conclusion that the punitive damages award violated due process but reverse the circuit court's specific conclusion that the ratio of 45:1 "should not stand in the light of the [Campbell](#) decision" given that the ratio of the punitive damages awarded to the *potential* harm to Denise and other customers is likely much less than 45:1. See [TXO](#), 509 U.S. at 460, 113 S.Ct. 2711 (considering not only the potential harm to the plaintiff but also "the possible harm to other victims that might have resulted if similar future behavior were not deterred"). We remand for a remittitur of the punitive damages award to an amount reasonably consistent with the circumstances of this case.

2. Statutory Cap

Section 15-32-530 sets forth the following caps on punitive damages. It states, in part:

(A) Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.

(B) The limitation provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A), the trial court should first determine whether:

(1) the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that 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 *357 for making policy decisions on behalf of the defendant; or

(2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages;

If the trial court determines that either item (1) or (2) apply, then punitive damages must not exceed the greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars and, if necessary, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by this subsection. If the trial court determines that neither item (1) or (2) apply, then the award of punitive damages shall be subject to the maximum amount provided by subsection (A) and the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by subsection (A).

(C) However, when the trial court determines one of the following apply, there shall be no cap on punitive damages:

(1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or

(2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff and that act or

course of conduct is a proximate cause of the plaintiff's damages; or

(3) the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired. (emphases added).

a. Waiver

The Garrisons assert that by failing to raise section 15-32-530 as an affirmative defense **36 in its responsive pleadings, Target waived the application of the punitive damages caps in *358 this statute.²⁰ As set forth above, the statute designates more than one cap based on the circuit court's determination concerning the precise nature of the defendant's conduct and the underlying intent. Because the statute's language as a whole necessarily affects the proof at trial, the Garrisons argue that they would have presented more evidence concerning Target's prioritization of profits over safety had they known Target was going to invoke the punitive damages caps.

²⁰ This issue is preserved for review. Counsel extensively argued the issue in the post-trial motions hearing, and the circuit court expressly concluded in its written order that the punitive damages award could not stand under section 15-32-530. Cf. *Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) ("We hold the Court of Appeals erred in finding the issue was not preserved for appeal. The trial judge's order granted respondents' motion for summary judgment on precisely the grounds argued by respondents at the summary judgment hearing [that there existed no attorney-client relationship between respondents and petitioner; therefore, respondents owed no duty to petitioner]. While that order did not restate the ground on which petitioner opposed the motion—a duty based on the existence of a prior attorney-client relationship—the order explicitly addresses that argument by ruling respondents 'owed no duty or obligation' to petitioner. This ruling is sufficient to preserve petitioner's argument that respondents owed a duty to petitioner, and petitioner was not required to file a Rule 59(e) motion to alter or amend in order to preserve the issue for appeal."). Even if there is some doubt as to preservation, we note Target has not asserted in its brief that this question is unpreserved. See *Atl. Coast Builders & Contractors, LLC v. Lewis*,

398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012), Toal, C.J. (concurring in result in part and dissenting in part) (“[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation. When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.”). Therefore, we resolve any possible doubt as to preservation in favor of the Garrisons on this important question.

[39] [40] [41] [Rule 8\(c\) of the South Carolina Rules of Civil Procedure \(SCRPC\)](#) provides,

In pleading to a preceding pleading, a party *shall* set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, *plene administravit* or the administration of the estate is closed, recrimination, *359 release, res judicata, statute of frauds, statute of limitations, waiver, *and any other matter constituting an avoidance or affirmative defense.*

(emphases added).²¹ The note to [Rule 8\(c\)](#) states that its aim is “to avoid the ‘surprise’ defenses permissible under the old general denial answer” and it is the same as [Rule 8\(c\) of the Federal Rules of Civil Procedure](#), with the exception of “some affirmative defenses added to the list as a guide.” [Rule 8\(c\)](#), Note. Therefore, we find federal cases interpreting the federal rule to be persuasive. See [Senate by & through Leatherman v. McMaster](#), 425 S.C. 315, 323–24, 821 S.E.2d 908, 912 (2018) (citing [Unisun Ins. v. Hawkins](#), 342 S.C. 537, 542, 537 S.E.2d 559, 561–62 (Ct. App. 2000) for the proposition that when a state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

²¹ This court described the nature of an affirmative defense in [O’Neal v. Carolina Farm Supply of Johnston, Inc.](#):

An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. In other words, it assumes all elements of the plaintiff’s case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the defendant pleads special matter that denies an element of the plaintiff’s cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case.

279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983) (citation omitted). Further, an avoidance, which also falls within [Rule 8\(c\)](#)’s pleading requirement, is defined as “the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect.” [Ingraham v. United States](#), 808 F.2d 1075, 1079 (5th Cir. 1987) (quoting Black’s Law Dictionary (5th ed. 1979)).

****37** Similar to the purpose of our [Rule 8\(c\)](#), the purpose of the federal rule “is to inform the court and the parties how the case will be tried.” [Simon v. United States](#), 891 F.2d 1154, 1158 (5th Cir. 1990) (quoting [Morris v. Homco International](#), 853 F.2d 337, 342 (5th Cir. 1988)). Accordingly, some federal courts treat an issue as an affirmative defense if requiring the defendant to plead the issue is necessary to avoid unfair surprise to the plaintiff. See [In re ZAGG Inc. S’holder Derivative Action](#), 826 F.3d 1222, 1231 (10th Cir. 2016) (“[W]e agree with the Third Circuit that in determining whether an issue should be treated as an affirmative defense for purposes of ***360** pleading, the critical question (absent a contrary command by statute or rule, such as the list of affirmative defenses in [Rule 8\(c\)](#)) is whether requiring the defendant to plead the matter is necessary ‘to avoid surprise and undue prejudice by providing the plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed.’ ” (quoting [In re Sterten](#), 546 F.3d 278, 285 (3d Cir. 2008))).

[42]“Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to ‘lie behind a log’ and ambush a plaintiff with an unexpected defense.” [Ingraham](#), 808 F.2d at 1079 (quoting [Bettes v. Stonewall Ins. Co.](#), 480 F.2d 92, 94 (5th Cir. 1973)). Although [Bettes](#) is not a [Rule 8\(c\)](#) case, the court’s approach to the concept of unfair surprise is instructive. The Fifth Circuit examined an insured’s request to modify a pre-trial order to “include, as a contested issue of law,” whether his insurer had complied with a statute requiring insurers who rely on a misrepresentation defense to “show on trial that within 90 days of learning of the falsity of any such representation[,] it notified the insured that it refused to be bound by the policy.” 480 F.2d at 93. The court characterized the request as “an eleventh-hour appeal to the district court made only after other trial tactics had failed,” noting, “[t]he pleadings had been completed, the discovery concluded, the pre-trial order entered, the evidence taken, the charge conference held, the arguments to the jury finished, the jury charged, and the objections to the charge made before [the insured] sought this

modification of the pre-trial order to show his intent to rely on [the misrepresentation statute].” *Id.* (footnotes omitted). The court took a realistic approach to the concept of unfair surprise:

Although [the insurer] was aware of the existence of [the misrepresentation statute], it was entitled to be surprised, as was the district court, when [the insured] sought to inject it as a legal issue minutes before the case finally went to the jury. Any detriment to [the insured] caused by denying the proposed amendment to the pre-trial order was occasioned by his own actions. 480 F.2d at 94 (emphasis added). The court further stated,

[The insured] was promptly put on notice by [the insurer’s] answer that the [insurer] intended to rely on a misrepresentation *361 defense, but at no time subsequently was the issue of notice as an element of that defense clearly drawn. In such a case, even with the ultimate burden of proof potentially on his opponent, a litigant cannot strategically lie behind the log until after the trial and receipt of evidence, argument, and charge to the jury before raising an issue not found in the pleadings nor included in the pre-trial order and then raise it when it is too late for his opponent to do anything about it. The manifest prejudice of such tactics would make a shambles of the efficacy of pre-trial orders and a fair trial.

Id.

[43] [44] Given the concerns over unfair surprise that underlie both the state and federal rules, it logically follows that a defendant’s failure to plead an affirmative defense or avoidance as required by Rule 8(c) “is deemed a waiver of the right to assert it.” *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224 (2010) (quoting *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002)). We acknowledge that courts may overlook a defendant’s failure to plead an affirmative defense when it “is timely raised to the trial court without resulting in unfair surprise to the opposing **38 party.”²² However, courts will enforce the pleading requirement when a statutory liability limit such as section 15-32-530 affects the proof to be presented at trial. *See infra*. A plaintiff lacking notice that a defendant will rely on such a statute is unlikely to conduct the discovery or other investigation necessary to obtain proof overcoming the statutory limit. *Cf. Westfarm Assocs. Ltd. P’ship v. Int’l Fabricare Inst.*, 846 F. Supp. 439, 441 (D. Md. 1993), *aff’d sub nom. Westfarm Assocs. Ltd. P’ship v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669 (4th Cir. 1995) (discussing the plaintiff’s and third-party plaintiff’s argument that they would be prejudiced if the third-party defendant was allowed to assert the damages cap in the Maryland Local Government Tort Claims Act

after judgment was entered on a jury verdict for the plaintiff and noting as “valid considerations” the contentions that had they known the third-party defendant would assert the damages cap, they would have planned their discovery and trial presentations to address the cap). Constraints of time and money may compel *362 the plaintiff to seek out only the information that is relevant to what she knows will be an issue at trial or during post-trial motions. The extra expense for “gunfire” often cannot be justified if lesser means will do. Implicitly recognizing that a plaintiff does not know what she does not know, courts enforcing the pleading requirement quite reasonably treat the defendant’s failure to invoke a statutory liability limit in a timely manner as inherently prejudicial. *See infra*.

²² *Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007).

The Garrisons cite *James v. Lister*, 331 S.C. 277, 284, 500 S.E.2d 198, 202 (Ct. App. 1998), *cert. denied* (Mar. 5, 1999), for the proposition that South Carolina law requires any liability limits affecting the proof at trial to be pled as an affirmative defense. In *James*, this court relied on prior South Carolina opinions requiring matters to be pled when they “may prejudice the opposing party by introducing issues [that] may affect the proof at trial.” *Id.* at 283, 500 S.E.2d at 201 (emphasis added). The court referenced *Washington v. Whitaker*, in which our supreme court held that sovereign immunity must be affirmatively pled,²³ and *Niver v. South Carolina Department of Highways and Public Transportation*, in which this court held that, under the South Carolina Tort Claims Act (SCTCA), “[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense.”²⁴ *Id.* The court noted that in *Washington*, sovereign immunity was asserted as a defense to punitive damages rather than as a complete bar to the plaintiff’s claim. *Id.* at 283, 500 S.E.2d at 201–02. The court also noted, “[t]he cases requiring the SCTCA to be pled as an affirmative defense do not differentiate between claims in which the defense may act as a complete bar and claims in which the defense merely limits liability,” citing *Niver* and *Rakestraw v. South Carolina Department of Highways and Public Transportation*, 323 S.C. 227, 473 S.E.2d 890 (Ct. App. 1996). *Id.* at 283–84, 500 S.E.2d at 202.

²³ 317 S.C. 108, 114–15, 451 S.E.2d 894, 898 (1994).

²⁴ 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990).

The *James* court concluded the view of the majority of other jurisdictions that a statutory recovery limit affecting the proof *363 at trial constitutes an affirmative defense was consistent with South Carolina law:

only a few cases in other jurisdictions hold a statutorily mandated recovery limit [that] requires additional proof at trial does not constitute an affirmative defense. A far greater number of jurisdictions have concluded either that 1) a limit on recovery must be plead as an affirmative defense or 2) a recovery limit could constitute an affirmative defense if the limit affects proof at trial. Given the current holdings in *Washington*, *Niver*, and *Rakestraw*, we believe the view [that] requires the pleading of liability limits that affect proof at trial is consistent with South Carolina law.

331 S.C. at 284, 500 S.E.2d at 202. The court also concluded that the statute imposing a cap on recovery against a charitable organization **39 did not automatically place the plaintiff on notice that the defendant would invoke the cap as a defense:

Although charitable status is not a jury issue, the invocation of this protection triggers alternative remedies for the injured plaintiff. Section 33-55-210(A) provides a mechanism for seeking damages in excess of the charitable limitation, through an action against a charitable organization's employees.^[25] In such instances, the statute specifically requires joinder of the employee as a party, and a special finding by the jury that the employee was proved guilty of gross negligence as a proximate cause of the injury. Indirectly, then, [the defendant's] failure to raise its charitable status as an affirmative defense affected both the parties to the action and the manner in which the case was tried to the jury, including what issues were or were not presented to them for resolution.

331 S.C. at 282, 500 S.E.2d at 201 (emphasis added).²⁶ Likewise, the exceptions to the damages cap Target seeks to apply *364 to the present case, as found in section 15-32-530, require special findings relating to, *inter alia*, unreasonable financial gain as a motivation for the wrongful conduct or the defendant's intent to harm. § 15-32-530(B), (C). Evidence of these facts may or may not be introduced at trial in the absence of the defendant's pre-trial assertion of the punitive damages cap. Therefore, it is unfair and unrealistic to assume that such evidence will always be introduced in any given case even in the absence of a damages cap. It is also unfair to assume in the present case that such evidence would have been introduced had the underlying facts actually existed.

²⁵ This provision now appears in section 33-56-180 of the South Carolina Code (2006).

²⁶ In the absence of a statute's creation of an issue that may affect the proof at trial, our appellate courts have not been consistent as to whether a statute's effect on a private lawsuit must be pled as an affirmative defense. Compare *In re Estate of Hover*, 407 S.C. 194, 206-08, 754 S.E.2d 875, 881-82 (2014) (contrasting the Probate Code's nonclaim statute, which eliminates a claimant's right of action against a decedent's estate upon noncompliance and, in turn, deprives the court of the power to adjudicate the claim, with general statutes of limitations, under which a claim is barred only if the statute is raised as an affirmative defense) with *Earthscapes*, 390 S.C. at 615, 703 S.E.2d at 224 (holding that a statutory prohibition against an unlicensed construction contractor bringing an action to enforce a contract was "in the nature of an affirmative defense precluding enforcement of a contract and should be pled"); see also *Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995) (holding that statutorily mandated set-off was not an affirmative defense that had to be pled because, *inter alia*, it "was not a matter properly triable to the jury"); *Parker v. Spartanburg Sanitary Sewer District*, 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005) (holding that the Tort Claims Act's damages cap did not have to be pled as an affirmative defense because it was "self-executing").

In stark contrast to section 15-32-530, the damages cap in the Tort Claims Act does not require any special findings that would affect the proof at trial. Section 15-78-120 of the South Carolina Code (2005) simply imposes a \$300,000 recovery cap per person and a \$600,000 cap for the total sum recovered arising out of a single occurrence and prohibits the recovery of punitive damages. Hence, it comes as no surprise that this court excused the failure of the defendant in *Parker v. Spartanburg Sanitary Sewer District* to initially plead this cap. 362 S.C. 276, 280-85, 607 S.E.2d 711, 713-16 (Ct. App. 2005). Likewise, the statute governing underinsured motorist (UIM) coverage interpreted by our supreme court in *Broome v. Watts*, section 38-77-160 of the South Carolina Code (2015), does not require any special findings that would affect the proof at trial. Rather, the statute simply states that automobile insurance carriers must offer UIM coverage to their insureds "to provide coverage in the event that damages are *365 sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." *Id.*

In addition to this court's opinion in *James*, federal

opinions interpreting [Rule 8\(c\) of the Federal Rules of Civil Procedure](#) are instructive and persuasive. We rely on not only those federal opinions cited in *James* but also more recent federal opinions explaining when the failure to plead a statutory limit on damages constitutes a waiver of that limit.

****40** First, we further expound the Fifth Circuit Court of Appeals' reasoning in *Ingraham v. United States*. The court gave credence to the same argument that the Garrisons make in the present case, i.e., "had they known the [Texas statutory limit on medical malpractice damages] would be applied, they would have made greater efforts to prove" damages that "were not subject to the statutory limit." 808 F.2d at 1079. The court concluded that the statutory damages limit was an affirmative defense that had to be "pleaded timely" and that the defendant in that case had waived the defense. *Id.* The court explained,

We view the limitation on damages as an "avoidance" within the intendment of the residuary clause of 8(c). Black's Law Dictionary, 5th ed. 1979, defines an avoidance in pleadings as "the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect." Applied to the present discussion, a plaintiff pleads the traditional tort theory of malpractice and seeks full damages. The defendant responds that assuming recovery is in order under the ordinary tort principles, because of the new statutory limitation, the traditional precedents "should not have their ordinary legal effect."

Id.

Three years later, the Fifth Circuit examined a Louisiana statute limiting recovery in medical malpractice actions and held that this statutory recovery limit was an affirmative defense. *Simon*, 891 F.2d at 1157. The court recognized that the statute's applicability "involve[d] more than just a pure issue of law." *Id.* at 1159. In 2001, the Fifth Circuit once again ***366** explained the concept of waiving an affirmative defense in terms of preventing unfair surprise to the opposing party:

Although failure to raise an affirmative defense under [rule 8\(c\)](#) in a party's first responsive pleading "generally results in a waiver ..., [when] the matter is raised in the trial court in a manner that does not result in unfair surprise ... technical failure to comply precisely with [Rule 8\(c\)](#) is not fatal." Thus, a defendant does not waive an affirmative defense if he "raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond."

Giles v. Gen. Elec. Co., 245 F.3d 474, 491–92 (5th Cir. 2001) (emphasis added) (citation omitted) (alterations in original) (quoting *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855–56 (5th Cir. 1983)). In *Lucas v. United States*, the Fifth Circuit held that the defendant raised the Texas statutory cap on malpractice damages at a "pragmatically sufficient time" and the plaintiff was not prejudiced by the defendant's failure to reference the cap in its pleading because the issue was raised at trial "immediately following testimony of the economist regarding the present value of [the plaintiff's] damages" and the statute did not affect the plaintiff's proof of damages. 807 F.2d 414, 418 (5th Cir. 1986). The court noted, "the applicability of the Texas statutory cap on malpractice damages is purely a legal issue [that] can be resolved without the need for factual proof." *Id.* (emphasis added).

In *Jakobsen v. Massachusetts Port Authority*, the First Circuit held the defendant waived the application of a Massachusetts statute limiting the liability of municipal corporations to \$5,000 by waiting to invoke the statute until it made a directed verdict motion at trial. 520 F.2d 810, 813 (1st Cir. 1975). In applying [Rule 8\(c\), FRCP](#), to the statute, the court stated, "While a statutory limitation on liability is not enumerated among the listed defenses, we think it falls within the Rule's residuary clause." *Id.* The court also explained that while the failure to plead an affirmative defense waives the defense, "when there is no prejudice and when fairness dictates, the strictures of this rule may be relaxed. Under [Rule 15\[, FRCP\]](#), the district court may and should liberally allow an amendment to the pleadings if prejudice does not result." *Id.* Nonetheless, the court found the plaintiff would be prejudiced ***367** by treating the defendant's late invocation of the statute as a late amendment of its answer in that particular case:

As for treating the untimely defense as a late amendment that should have been allowed, it presented issues of such complexity ****41** and fundamental importance to the conduct of the litigation that both plaintiff and the court could not, in fairness, be forced to forego the advance notice they were entitled to under [Rule 8\(c\)](#).

Id. at 813–14. The court explained,

While the Federal Rules reflect a universal trend away from stereotyped pleading, they do not presage abandonment of the requirements that parties be given reasonable advance notice of the major issues to be raised. Issues of this magnitude are not to be tossed at one's opponent in a jury trial just before the charge ...

...

The delay undercut plaintiff's ability to develop facts and fashion his case in a manner relevant to this defense. It also prejudiced the judge's ability to focus on the facts as they unfolded so as to rule properly on the claim

Id. at 815–16.

Almost twenty years later, the First Circuit held that a defendant waived the application of a Massachusetts statute allowing for contractual limitations of remedies under the state's commercial code by failing to timely invoke the statute. See *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1226 (1st Cir. 1994). The court cited *Jakobsen* when it noted, "We have previously held that a statutory provision limiting damages to a fixed sum constituted an affirmative defense for purposes of Rule 8(c)." *Id.* The court also explained, "The reason why affirmative defenses under Rule 8(c) must be pled in the answer is to give the opposing party notice of the defense and a chance to develop evidence and offer arguments to controvert the defense." *Id.* The court noted that in the case before it, "the limitation of remedies issue was not raised until virtually the end of the liability trial, *after discovery and the submission of all of the evidence on liability.*" *Id.* at 1226–27 (emphasis added).

Moreover, the United States District Court for the District of Maryland relied on *Jakobsen* in holding that the Maryland *368 Local Government Tort Claims Act was an avoidance that the defendant "was required to plead affirmatively." *Westfarm*, 846 F. Supp. at 440. Likewise, the Tenth Circuit has treated the failure to plead a statutory damages limit as a waiver. In *Bentley v. Cleveland Cty. Bd. of Cty. Comm'rs*, the court characterized the damages cap in the Oklahoma Governmental Tort Claims Act as an affirmative defense and held that the defendant waived the cap because it first invoked it in a motion to alter or amend the judgment. 41 F.3d 600, 604 (10th Cir. 1994). The court explained,

Permitting the [defendant] to raise this issue at this stage of the proceedings would be extremely unfair to [the plaintiff], who may have been able to prove some exception to the damage cap at trial if he had notice of the defense. Thus, assuming the [Oklahoma Governmental Tort Claims Act] applied to this action, counsel for the [defendant] waived any limit on its liability afforded by that statute by failing to raise the issue in its answer, the Pre-Trial Order, or at trial.

41 F.3d at 605.

In *Taylor v. United States*, the Ninth Circuit held that a statutory limit on noneconomic damages in medical malpractice cases was not an affirmative defense. 821 F.2d 1428, 1433 (9th Cir. 1987). Yet, the court

acknowledged that application of the statute "may in some instances require resolution of factual issues" and that in such a case, a plaintiff could be prejudiced if the defendant does not invoke the statutory limitation prior to judgment.²⁷ *Id.* The court concluded that in the case before it, application of the statute required no additional factual inquiry. *Id.* The United States Supreme Court denied certiorari in this case, but Justice White wrote a brief dissent highlighting *Taylor's* conflict with the First Circuit's decision in *Jakobsen* and the Fifth Circuit's decision *369 in **42 *Ingraham*. 485 U.S. 992, 992–93, 108 S.Ct. 1300, 99 L.Ed.2d 510 (1988) (White, J., dissenting).

²⁷ In *Hernandez v. Cty. of Monterey*, the United States District Court for the Northern District of California stated, in dicta, that a defense "targeting the amount of the recovery is a limitation rather than an affirmative defense," relying on the Ninth Circuit's opinion in *Taylor* as authority without recognizing the Ninth Circuit's acknowledgement of the obligation to invoke a statutory limitation prior to judgment when application of the limitation requires resolution of factual issues. 306 F.R.D. 279, 285 (N.D. Cal. 2015).

State court opinions have likewise acknowledged that a defendant can waive the application of a statutory limitation on damages when the defendant fails to invoke the limitation in time for the plaintiff to present proof in opposition to the limitation. In *Keene v. Brigham & Women's Hosp., Inc.*, the Supreme Judicial Court of Massachusetts stated that a statutory damages cap for charitable corporations was "treated as an affirmative defense that must be pleaded" although it was "technically a limitation on liability." 439 Mass. 223, 786 N.E.2d 824, 836 (2003). The court explained, "Factual matters related to the cap may need to be determined by the fact finder, with the burden on the defendant to prove both that it is a charitable organization and that the tort complained of fell within the range of activities covered by the cap." *Id.* The court further stated, "The requirement that it be raised as an affirmative defense in such circumstances prevents unfair surprise, a key focus of the requirement of pleading affirmative defenses, and resulting prejudice to the plaintiff." *Id.* The court concluded that the defendant in that case raised the statutory cap "in a timely manner" and the plaintiff made no claim of surprise. *Id.* at 837; see also *Pressler v. Irvine Drugs, Inc.*, 169 Cal. App. 3d 1244, 1248, 215 Cal. Rptr. 807, 809 (Ct. App. 1985) (referring to California's statutory cap on noneconomic damages in medical malpractice cases as an affirmative defense and holding the defendant did not waive the defense by failing to request special interrogatories).

Target cites *Zorrilla v. Aypco Construction II, LLC*, in which the Supreme Court of Texas held that the state's single statutory cap on punitive damages did not "bear the characteristics of an affirmative defense or avoidance" because it did not "require proof of any additional fact to establish its applicability." 469 S.W.3d 143, 157 (Tex. 2015). The court emphasized that the statute applied automatically unless a case fell within the statute's exclusions for conduct described as a felony in certain sections of the state's penal code *if* the conduct was committed knowingly or intentionally. *Id.* (citing Tex. Civil Practice & Remedies Code Ann. § 41.008(c)). Although the statute was silent as to the burden of proof, the court interpreted the statute to place the burden on the *370 plaintiff to show that a case fell within one of the exclusions. *Id.* The court concluded that because the statute did not place the burden of proof on the defendant, it was not an affirmative defense or avoidance that the defendant was required to plead. *Id.* The court also stated that because the statutory cap automatically applied, there was "little concern that plaintiffs will be genuinely surprised by its application." *Id.*

While *Zorrilla* may have logical appeal, our own precedent in *James* and the above-referenced persuasive federal court opinions disregard the fiction that a plaintiff is automatically on notice that a defendant will invoke a statutory damages cap to limit a jury's award.²⁸ These opinions focus on whether a statutory damages cap affects the proof at trial rather than which party has the burden of proof under the statute—no matter who has the burden, the plaintiff must be prepared for the defendant to place the issue before the finder of fact. In fact, the *James* court acknowledged that the plaintiffs in that case would carry the burden of proving gross negligence in order to recover damages in excess of the statutory cap: "The [plaintiffs] had no notice that another party was necessary and that they would be required to prove a greater degree of negligence in order to recover damages in excess of \$200,000." 331 S.C. at 282, 500 S.E.2d at 201. To adopt the reasoning of *Zorrilla* would require us to contradict *James*, which we are unwilling to do, especially given its more realistic approach to the application of Rule 8(c).

²⁸ One exception is the Fifth Circuit's recognition that when a damages cap is an integral part of a statutory scheme under which the plaintiff seeks relief, the plaintiff cannot claim unfair surprise by the defendant's failure to plead the statutory cap. See *Giles*, 245 F.3d at 491 n.32 (citing *Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 111–12 (D. Conn. 2000)).

With these considerations in mind, we return to South Carolina's statute, which begins with a reference to

circumstances supporting **43 either a two million dollar cap or no cap at all: "Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars." (emphasis added). Two successive events trigger the application of a higher cap set forth in subsection (B), i.e., "the *371 greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars": (1) the jury returns a verdict exceeding the maximum amount specified in subsection (A) and (2) the trial court determines that one of the following two set of circumstances existed:

(1) the wrongful conduct ... 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; or

(2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages. § 15-32-530(B).

However, subsection (C) provides "there shall be no cap on punitive damages" when the trial court determines that one of the following three sets of circumstances applies to the case: (1) "the defendant had an intent to harm and ... the defendant's conduct did in fact harm" the plaintiff; (2) the defendant was convicted of a felony arising out of the same act and the act proximately caused the plaintiff's damages; or (3) the defendant was "substantially impaired" by a substance "other than lawfully prescribed drugs administered in accordance with a prescription." § 15-32-530(C). In the absence of a requirement for a separate post-trial evidentiary hearing to submit this proof, we interpret the statute's plain language to require the trial court to make these special findings based on the proof presented to the jury at trial. See *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit or expand the statute." (emphasis added)).

Similar to the *Zorrilla* court's analysis of the Texas statutory cap on punitive damages, Target argues South Carolina's \$500,000 punitive damages cap applies automatically unless the circuit court makes the above-referenced determinations required by subsection

(B) or subsection (C). However, unlike *372 the structure of the Texas statute, *Tex. Civil Practice & Remedies Code Ann. § 41.008*, which sets forth one absolute cap in subsection (b) and separately addresses exclusions from the statute's application in subsection (c), the structure of South Carolina's statute denotes from the outset the fact that the \$500,000 cap does not automatically apply: "*Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.*" § 15-32-530(A) (emphasis added). By beginning the statute with a reference to circumstances supporting either a \$2 million cap or no cap at all, the legislature made it clear that it did not intend to make the \$500,000 cap automatically applicable. See *Fox v. Moultrie*, 379 S.C. 609, 614, 666 S.E.2d 915, 917 (2008) ("In determining the plain meaning of a statute, the courts must look at the particular statutory language at issue and the language and design of the statute as a whole.").

In sum, the criteria of section 15-32-530 undoubtedly "affect [the] proof at trial,"²⁹ thus distinguishing section 15-32-530 from other South Carolina statutes that do not invoke the functions of a fact finder or affect the proof at trial.³⁰ Like the Louisiana statute **44 examined in *Simon*, section 15-32-530 involves "more than just a pure issue of law." 891 F.2d at 1159. To develop the evidence necessary to invoke one of the two alternatives to the \$500,000 cap, a plaintiff must first obtain the evidence through extra discovery or other investigative measures—measures that are less likely to unfold without prior notice that the defendant will raise the cap as an issue before the circuit court. Again, we note section 15-32-530 does not provide for a separate post-trial evidentiary hearing to *373 submit evidence pertaining to the factors set forth in subsections (B) and (C). We interpret section 15-32-530 to require the circuit court to make a determination under subsections (B) or (C) based on the evidence presented to the jury at trial.

²⁹ *James*, 331 S.C. at 284, 500 S.E.2d at 202.

³⁰ See *supra* n. 26; cf. *Parker*, 362 S.C. at 285, 607 S.E.2d at 716 (holding that the Tort Claims Act's damages cap did not have to be pled as an affirmative defense because it was "self-executing"); S.C. Code Ann. § 15-78-120(a)(1) (2005) (providing only that a person's recovery of damages in an action brought under the Tort Claims Act is limited to \$300,000 "because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved"); S.C. Code Ann. § 15-78-30(g) (2005) (defining "occurrence" as "an unfolding sequence of

events [that] proximately flow from a single act of negligence").

^[45] Therefore, we conclude that Target was required to plead the recovery limits in section 15-32-530 or, at the very least, raise the defense prior to the conclusion of discovery so that the Garrisons would have had prior notice of the additional evidence they needed to lift the punitive damages limit.³¹ Because Target failed to do so, fairness dictates that we deem the application of the statutory damages limit to this case waived. See *James*, 331 S.C. at 286, 500 S.E.2d at 203 (holding that the trial court did not abuse its discretion in denying the defendant's motion to amend its answer to assert a statutory damages limit because "allowing the amendment would have prejudiced the [plaintiffs]").

³¹ See *James*, 331 S.C. at 282–83, 500 S.E.2d at 201 (holding that the defendant's "failure to raise its charitable status as an affirmative defense affected both the parties to the action and the manner in which the case was tried to the jury, including what issues were or were not presented to them for resolution," and therefore, the statute limiting damages against a charitable organization constituted an affirmative defense that had to "be pled or waived," as required by Rule 8(c)).

Based on the foregoing, we reverse the circuit court's conclusion that the punitive damages award could not stand under section 15-32-530.

III. New Trial Absolute

^[46] Target contends the circuit court should have granted it a new trial absolute because the punitive damages award reflected the jury's passion, caprice, and prejudice. We disagree.³²

³² Target also contends the circuit court's conclusion that the punitive damages award violated Target's due process rights required the circuit court to order a new trial absolute or new trial nisi remittitur rather than simply setting aside the award. However, this argument is unpreserved. Target filed a post-trial "Motion for Judgment as a Matter of Law, New Trial Absolute, or New Trial Nisi Remittitur" indicating the primary relief sought was a JNOV as to liability and punitive damages. In this motion, Target expressed a preference for obtaining a JNOV as to liability and punitive damages on the grounds that there was insufficient evidence of constructive notice or proximate causation

and there was no evidence showing that Target was willful, wanton, or reckless. Target sought as *alternative relief* either a new trial absolute or new trial nisi remittitur. The asserted ground for a new trial absolute was that the awards of compensatory and punitive damages demonstrated “the jury’s decision was actuated by passion, prejudice[,] or caprice.” The asserted grounds for a new trial nisi remittitur were (1) the evidence did not support the amount of actual damages awarded, and (2) the evidence did not support the amount of punitive damages awarded; this amount exceeded the cap in [section 15-32-530](#); and the award violated due process.

In addressing this post-trial motion, the circuit court granted Target’s preferred relief, a JNOV, as to punitive damages and set aside that award. In ruling on Target’s alternative request for a new trial absolute or nisi, the circuit court addressed primarily the compensatory damages award. The court noted that the punitive damages award violated due process but concluded that the court had “substantially altered the overall verdict by eliminating the punitive damages award,” and did not “find compelling reasons to invade the province of the jury by granting a new trial nisi.” Because Target gave the circuit court the impression that it sought a new trial absolute or nisi only in the event the circuit court did not grant a JNOV, Target was required to file a [Rule 59\(e\), SCRPC](#), motion upon receiving the circuit court’s post-trial order to preserve its argument that the only correct relief for the due process violation was either a new trial absolute or a new trial nisi. See [Parker v. Shecut](#), 340 S.C. 460, 480, 531 S.E.2d 546, 557 (Ct. App. 2000), *rev’d on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002) (“When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review.”); [Hubbard v. Rowe](#), 192 S.C. 12, 5 S.E.2d 187, 189 (1939) (“[A]ll that this [c]ourt has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower [c]ourt and passed upon by that [c]ourt.”).

***374 **45** ^{[47] [48] [49] [50] [51] [52] [53]}“When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice.” [Allstate Ins. Co. v. Durham](#), 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). Likewise, the circuit court must avoid conflating the constitutionality of a damages award with an award motivated by passion or prejudice. Cf. [Mitchell](#), 385 S.C. at 592, 596, 686 S.E.2d at 187, 190 (finding a \$15 million punitive damages award to be “grossly excessive” such that it rose to the level of a due process violation but finding “no credible evidence anywhere in the record” to support the

defendant’s contention that the compensatory or punitive damages award resulted from passion, caprice, or prejudice).

***375** When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to reduce the verdict by the granting of a new trial nisi.^[33] However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations *not found in the evidence*, it becomes the duty of the trial judge and this [c]ourt to set aside the verdict absolutely.

[Durham](#), 314 S.C. at 531, 431 S.E.2d at 558 (second emphasis added) (citation omitted). Further, the amount of unliquidated damages that “a jury might properly award ... is largely a matter of judgment based upon the facts and circumstances of each case.” [Watson v. Wilkinson Trucking Co.](#), 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). “In determining the question, the facts must be viewed in the light most favorable to the plaintiff[,] and[] whe[n] the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive.” *Id.* Moreover, “the jury’s determination of damages is entitled to substantial deference[,]” and the circuit court’s decision on whether to grant a new trial based on the amount of the verdict “will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law.” [Welch](#), 342 S.C. at 303, 536 S.E.2d at 420.

³³ The principle underlying a new trial nisi remittitur or additur is that the circuit court “may not impose a substitute for the jury verdict on an unwilling plaintiff” or defendant, and thus, the court may give to the opposing party a new trial unless the plaintiff agrees to remit a part of the verdict or the defendant agrees to add a sum to the verdict. See [Graham v. Whitaker](#), 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984) (“[J]udges have the authority to grant to a defendant a new trial nisi remittitur. In such cases, the judge may not impose a substitute for the jury verdict on an unwilling plaintiff. He may give to the defendant the right to a new trial unless the plaintiff agrees to remit a portion of the verdict.”).

^[54]Here, the jury likely considered the potential harm to Denise, which involved possibly contracting a communicable disease such as HIV or hepatitis, along with the attendant medical costs and possible death. Cf. [Mitchell](#), 385 S.C. at 590–92, 686 S.E.2d at 187 (comparing the punitive damages award ***376** to the potential harm to the plaintiff). Further, the evidence

shows that despite Target employees' awareness of the importance of keeping the parking lot safe for customers, they did not increase the frequency of cleaning the lot after Denise's injury or do anything to improve "safety scans" or cleaning methods after the injury. Therefore, the jury likely considered the possible harm to other customers or their children if Target is not adequately deterred. Cf. *TXO*, 509 U.S. at 460, 113 S.Ct. 2711 (considering "the possible harm to other victims that might have resulted if similar future behavior were not deterred"). Because these considerations are rational inferences from the evidence presented at trial, we conclude that the punitive damages award did not result from passion, caprice, or prejudice. Therefore, the circuit court properly denied Target's motion for a new trial absolute.

****46 IV. Prejudgment Interest**

The Garrisons contend the circuit court should have awarded them prejudgment interest on the full amount of compensatory and punitive damages awarded by the jury rather than merely compensatory damages. We disagree.

Rule 68(a), SCRPC, provides, in pertinent part,

Any party in a civil action, except a domestic relations action, may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror *for a sum stated therein, or to the effect specified in the offer.* (emphasis added). In the present case, Denise made an offer of judgment in the amount of \$12,000 on February 13, 2015.

Further, Rule 68(b) states, in pertinent part,

If an offer of judgment is not accepted and the offeror obtains a verdict *or determination* at least as favorable as the rejected offer, the offeror shall recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until the entry of the judgment; (2) if the offeror is a plaintiff, eight percent interest *computed on the amount of the verdict or award* from the date of the offer to the entry of judgment[.]

*377 (emphases added). Because the circuit court granted a JNOV to Target as to the punitive damages award, the circuit court computed interest on the \$100,000 compensatory damages award only.

^[55]The Garrisons maintain that the plain language of Rule 68(a) ties prejudgment interest to the amount of the verdict or award and not to "any alteration of the jury's verdict post-judgment." However, Target contends that the use of the term "determination" in the first sentence of Rule 68(b) indicates that the final amount may be settled by the presiding judge rather than the jury. We agree. When this term is considered in combination with the last phrase of Rule 68(b), "eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment,"³⁴ the plain language of the rule contemplates that interest is to be computed on the final judgment after all post-trial motions have been resolved. See *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[The court] should not concentrate on isolated phrases within the statute."); *id.* ("Instead, [the court reads] the statute as a whole and in a manner consonant and in harmony with its purpose."); *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the [c]ourt applies the same rules of construction used to interpret statutes."); *Johnson*, 396 S.C. at 188, 720 S.E.2d at 520 ("In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit or expand the statute."); *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994) ("The intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context.").

³⁴ (emphasis added).

^[56]Target also argues that pre-judgment interest should not apply to punitive damages awards because the interest is meant to compensate the offering party rather than to punish the party who rejected an offer of judgment. Target acknowledges this is a novel issue in South Carolina and cites opinions from other jurisdictions in support of this argument. In *Haskins v. Shelden*, the Supreme Court of Alaska held that pre-judgment *378 interest should not apply to punitive damages. 558 P.2d 487, 495 (Alaska 1976). The court based its decision on the risk of a double recovery, explaining,

In making its determination of the appropriate penalty for [the defendant's] actions, the jury probably assessed the penalty it wished [the defendant] to presently pay without discounting for prejudgment interest. In addition, [the plaintiff] was not deprived of the use of money which she **47 expected to have available during the years of litigation.

Id.

Also, in *Ramada Inns, Inc. v. Sharp*, 101 Nev. 824, 711 P.2d 1, 2 (1985), the Supreme Court of Nevada interpreted Nev. Rev. Stat. Ann. § 17.130, which allowed prejudgment interest “[i]n all judgments and decrees, rendered by any court of justice, for any debt, damages or costs.”³⁵ The court held, “Because the amount of punitive damages to be awarded is not known until the judgment is rendered, ... prejudgment interest may not be granted by a trial court on punitive damage awards,” explaining,

Prejudgment interest is viewed as compensation for use by defendant of money to which plaintiff is entitled from the time the cause of action accrues until the time of judgment; it is not designed as a penalty. A plaintiff is never entitled to punitive damages as a matter of right; their allowance or denial rests entirely in the discretion of the trier of fact. Therefore, the amount of punitive damages to be awarded cannot be ascertained until the trier of fact has heard all the evidence.

711 P.2d at 2 (citations omitted).

³⁵ The statute merely provided, in pertinent part, “the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages.” Nev. Rev. Stat. Ann. § 17.130.

On the other hand, the Garrisons assert that the statutes interpreted in the opinions cited by Target are not offer-of-judgment statutes and, thus, do not have persuasive value. The Garrisons cite a Connecticut opinion interpreting that state’s offer-of-judgment statute to allow punitive damages to be included in the computation of pre-judgment interest. In *Kregos v. Stone*, 88 Conn.App. 459, 872 A.2d 901, 906 (2005), *379 the Appellate Court of Connecticut highlighted the pertinent language of the statute as it was worded when the opinion was issued: “[i]f the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain stated in the plaintiff’s ‘offer of judgment,’ the court shall add to the amount so recovered twelve per cent annual interest on said amount.” Conn. Gen. Stat. Ann. § 52-192a.³⁶ The court held that the word “recovered” in the statute included the entire verdict, both punitive and compensatory damages. 872 A.2d at 906. Notably, Connecticut has a separate pre-judgment interest statute in addition to the offer-of-judgment statute. See *Boulevard Assocs. v. Sovereign Hotels, Inc.*, 861 F. Supp. 1132, 1141 (D. Conn. 1994), supplemented on other grounds by 868 F. Supp. 70 (S.D.N.Y. 1994) (“Unlike § 37-3a (prejudgment interest), an award of interest under § 52-192a(b) [the offer-of-judgment statute] is punitive in nature, and is meant to serve the purpose of promoting

‘fair and reasonable compromise of litigation without trial.’ ” (quoting *Crowther v. Gerber Garment Tech., Inc.*, 8 Conn.App. 254, 513 A.2d 144, 151 (1986))).

³⁶ The statute was amended after the Appellate Court of Connecticut issued its opinion in *Kregos*.

We do not interpret Rule 68 as liberally as the Appellate Court of Connecticut has interpreted that state’s offer-of-judgment statute. Rather, we find persuasive the above-quoted reasoning from the opinions in *Haskins* and *Sharp*. Therefore, we reject the Garrisons’ argument that prejudgment interest calculations should include the amount of a punitive damages award.

CONCLUSION

We affirm the circuit court’s denial of Target’s JNOV motion as to liability. We reverse the circuit court’s setting aside of the punitive damages award because we find there was sufficient evidence of Target’s recklessness. Further, because Target waived the application of the punitive damages caps in section 15-32-530, we reverse the circuit court’s conclusion that the punitive damages award cannot stand under section 15-32-530. Nonetheless, we affirm the circuit court’s conclusion that the punitive damages award violated due process, *380 and we remand for a remittitur of the award to an amount reasonably consistent with the circumstances of this case. Finally, we affirm the denial of Target’s new trial motion and the calculation of prejudgment interest.

****48 AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

WILLIAMS, J., concurs.

HILL, J., concurring in part and dissenting in part:

I concur in Parts I, III, and IV of the well-crafted majority opinion. I also concur in Part II insofar as it concludes the issue of punitive damages was properly submitted to the jury. I cannot, however, join my good colleagues in the rest of their punitive damages ruling as I believe the

punitive damages cap of [S.C. Code Ann. § 15-32-530 \(Supp. 2019\)](#) applies to Garrison's award. I would therefore remand to the circuit court for a hearing on this issue. This would also entail a remand for a hearing on Garrison's argument that the cap is unconstitutional, which the Attorney General must be notified of pursuant to [Rule 24\(c\), SCRPC](#).

The majority holds the cap put in place by the legislature is an affirmative defense that disappears if not pled. There is an equally reasonable view that the cap is not an affirmative defense, and the circuit court must apply it to all punitive damages verdicts. This view is more consistent with legislative intent and more persuasive for several reasons.

First, nothing in the Act that created the cap requires it be pled at all, much less as an affirmative defense. 2011 Act No. 52. This could be shrugged off as an oversight, but the legislature had pleadings in mind, as the very first sentence of the Act as codified directs that "[a] claim for punitive damages must be specially prayed for in the complaint." § 15-32-510(A).

Second, whether a matter is an affirmative defense is controlled by [Rule 8\(c\), SCRPC](#), which lists twenty-two specific defenses. Damages caps are not listed, but the list is not exclusive, so the question becomes whether the cap is "any other matter constituting an avoidance or affirmative defense." [Rule 8\(c\), SCRPC](#). This question is one of interpretation and, ***381** as in interpreting statutes, our role is to discern legislative intent.

A cap is not a defense to a cause of action. All of the specific affirmative defenses listed in [Rule 8\(c\), SCRPC](#), share a defining characteristic: they bar liability for the cause of action. If the affirmative defense is proven, the defendant is not liable at all, even though the facts the plaintiff has alleged might otherwise entitle the plaintiff to judgment on the cause of action. See [O'Neal v. Carolina Farm Supply of Johnston, Inc.](#), 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983). The listed affirmative defenses have another common characteristic: not one of them relates to a bar or limitation on damages for the cause of action, or any other post-verdict matter.

Nor is the cap an "avoidance." At first glance, an avoidance and an affirmative defense appear to be identical twins. But a closer look reveals the distinguishing characteristic of an avoidance is that it depends upon the introduction of new facts to defeat a cause of action, whereas an affirmative defense relies on the plaintiff's own facts. This court has observed:

At common law, a pleading of confession and

avoidance is the introduction of new or special matter which admits the factual premises of the opposing party's pleading but avoids or repels his conclusions. New matter involves of necessity a new issue, or the introduction of a new ingredient as the basis of one which operates as a defense. A plea by way of confession and avoidance admits that the cause of action alleged did once exist, but avers subsequent facts which operate to destroy the cause of action and defeat a recovery. Thus, an avoidance is a defense which goes beyond the basic elements of the opposing party's cause and depends upon additional facts to defeat the claim.

[Oyler v. Oyler](#), 293 S.C. 4, 6–7, 358 S.E.2d 170, 172 (Ct. App. 1987) (internal citations omitted). In my view, the plain reading of [Rule 8\(c\), SCRPC](#), results in the conclusion that the punitive damages cap is neither an avoidance nor an affirmative defense, for it does not affect the defendant's liability on the cause of action (only the damages), and it depends upon the straightforward application of a statute, not new facts ***382** (other than the return of the triggering punitive damages verdict).

****49** The majority is quite correct that [James v. Lister](#) held a damages cap on recovery against charitable organizations was an affirmative defense that was waived if not pled. 331 S.C. 277, 282-83, 500 S.E.2d 198, 201 (Ct. App. 1998). One difference between [James](#) and our facts is, as the majority points out, the statutory caps there specifically required the joinder of another party (the employee of the charity) and a special verdict of the jury that the employee's gross negligence proximately caused the injury. These procedural requirements fundamentally affected both the parties and the proof at trial. By contrast, the punitive damages cap here is not an issue for the jury and does not require adding a new party.

This contrast aligns our facts more with [Parker v. Spartanburg Sanitary Sewer Dist.](#), which was decided after [Lister](#) and held the statutory damages cap codified in the Tort Claims Act was "self-executing" and not an affirmative defense that had to be pled. 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005); see also [Broome v. Watts](#), 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995) (statutory right to setoff not an affirmative defense falling within residuary clause of [Rule 8\(c\), SCRPC](#), because setoff was required by statute and not issue for jury).

The majority's thorough opinion acknowledges that the question of whether statutory damages caps are affirmative defenses has split the federal circuits. No circuit has provided any useful analytical model. In addition to [Zorilla](#), the Texas supreme court decision the majority cites, several other states have decided caps are

not affirmative defenses. *McGinnes v. Wesley Med. Ctr.*, 43 Kan.App.2d 227, 224 P.3d 581, 591 (2010); *Anderson v. City of Milwaukee*, 208 Wis.2d 18, 559 N.W.2d 563, 569 (1997); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989).

Frustrated in their search for a coherent approach to deciding what counts as an affirmative defense under the residuary clause of Rule 8(c), the leading commentators on the federal rules have thrown up their hands and acknowledged they can find no objective waypoint, noting “resort must often be had to considerations of policy, fairness, and, in some cases, probability.” C. Wright & A. Miller, *Federal Practice and Procedure: *383 Federal Rules of Civil Procedure* § 1271 (3rd Ed.). Their attempt to reconcile these three broad subjective criteria with the rule and what happens in courtrooms fares no better, for there are only two practical, interlocking questions: whether the matter claimed to be an affirmative defense unfairly surprised the other party, and whether the party asserting the matter has unique access or control to the facts comprising the defense. Looking at Target’s assertion of the cap, the answer to both questions is no.

Which leads to my next point: even if the cap is an affirmative defense that must be pled, I would not find waiver here because Garrison has not demonstrated unfair surprise or other prejudice. *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (holding because the goal of Rule 8(c), SCRCp, is to avoid surprise, technical failure to plead immunity as an affirmative defense did not waive it where defendant timely raised it to trial court and plaintiff was not prejudiced or unfairly surprised). The cap is a matter for the court, not the jury. It would be remarkable for Garrison to claim she was blindsided by the cap because she was unaware of basic statutes governing punitive damages, and she does not make such a claim. Her prejudice argument is had she known Target would rely on the cap, she would have focused her evidence more on the financial motivations for Target’s conduct. This alludes to an exception to the cap relevant here, which raises the cap to either four times the compensatory damages award or two million dollars if the circuit court determines (1) Target’s wrongful conduct was motivated primarily by unreasonable financial gain, and (2) Target’s managing agent, director, officer, or the person responsible for making Target’s policy decisions knew or approved of the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct. See S.C. Code Ann. § 15-32-530(B)(1) (Supp. 2019).

If Garrison had additional evidence meeting this criteria, it is doubtful the only thing holding her back from presenting it to the **50 jury was Target’s failure to allege the cap as an affirmative defense. Lawyers who have smoking guns use them.

***384** Calling a matter an affirmative defense has an important consequence: it shifts the burden of proof to the defendant. *O’Neal*, 279 S.C. at 494, 309 S.E.2d at 779 (describing that upon assertion of affirmative defense, “the burden of proof shifts to the defendant to show he is not liable”). Yet, the legislature did not assign the burden of proving the cap to any party. It simply directed the trial judge to determine which level of the cap applies. The practical effect of the majority opinion will be to place the burden on a defendant to prove the cap (and which level) applies. The awkwardness of trying to fit the concept of burden-shifting—a concept designed for determining liability—onto a damages cap is a good clue the cap does not resemble an affirmative defense. One is reminded of Abraham Lincoln’s story about how many legs a sheep would have if you counted the tail a leg. When told the answer was five, the response was that calling the tail a leg did not make it one. See Rice, ed., *Reminiscences of Abraham Lincoln by Distinguished Men of his Time* at 241-42 (Harper & Bros., 1909).

There is yet another reason to conclude the legislature intended the cap procedure to be self-executing, one that promotes symmetry and predictability in the law’s design. Public policy debate has swirled around punitive damages for decades, with some claiming the awards are arbitrary. As the legislature well knew when it passed the cap, ever since *Gamble v. Stevenson* circuit courts in our state have had the mandatory duty to conduct post-trial review of a punitive damages award to ensure it comports with due process. 305 S.C. 104, 111–12, 406 S.E.2d 350, 354 (1991). This duty does not depend on a party’s pleading or request. *Id.* To hold the statutory cap on punitive damages lives or dies by the whims of pleading creates an unwarranted dichotomy in the judicial treatment of punitive damages awards. Some may now claim the caps are as arbitrary as the awards they are designed to control.

With great respect for the majority, I respectfully dissent.

All Citations

429 S.C. 324, 838 S.E.2d 18

70 S.C. 254
Supreme Court of South Carolina.

DENNIS
v.
ATLANTIC COAST LINE R. R.

Nov. 28, 1904.

Synopsis

Appeal from Common Pleas Circuit Court of Florence County; Gage, Judge.

Action by Cornelia A. Dennis, administratrix of Frank McGowan, against the Atlantic Coast Line Railroad. From judgment sustaining demurrer to complaint, plaintiff appeals. Affirmed.

West Headnotes (3)

[1] **Death** What Law Governs

The provision in Lord Campbell's act of North Carolina, Code N. C. § 1498, that a failure to commence an action of wrongful death in one year should extinguish the right conferred by the statute applies to an action under the act brought in South Carolina.

[18 Cases that cite this headnote](#)

[2] **Death** Constitutional and Statutory Provisions

The act of North Carolina of 1897, Priv.Laws N.C.1897, p. 83, c. 56, giving a remedy for death by wrongful act to any employee of a railroad company operated in the state is only an enlargement of the Lord Campbell act, Code N.C. §§ 1498-1500, and must be construed with it.

[6 Cases that cite this headnote](#)

[3] **Action** What Law Governs

An action will lie in the state under a statute of a foreign state where its provisions are not contrary to those of the state, but, as to the extent of the remedy, plaintiff will be governed by the limitations of such foreign state.

[3 Cases that cite this headnote](#)

Attorneys and Law Firms

***869** W. F. Clayton, for appellant. Willcox & Willcox, for respondent.

Opinion

GARY, A. J.

Frank McGowan, a resident of South Carolina, was an engineer in the employment of the defendant, and was killed in North Carolina by the wreck of an engine he was running on the 10th November, 1900, more than one year before this action was commenced by his administratrix. It is alleged that the death of the intestate was caused by defects in the machinery and appliances he was operating, and that the defendant had notice of such defects.

An agreement between counsel is set out in the record, in which appears the following statement: "The issue is as to whether the plaintiff was barred of her right of action in this state, it being admitted that, under the Lord Campbell act of North Carolina, the action must be brought within one year, while in the state of South Carolina the limitation was two years, and that this action was brought after the lapse of one year and within two years; the object being to bring all matters before this court on this one appeal, and to save several appeals." The reason for the agreement was because this question would not otherwise at this time have been properly before the court.

The appellant contends that her action was brought under the statute of North Carolina passed in 1897; that it was

independent of the Lord Campbell act (Code N. C. §§ 1498, 1500); that its provisions were comprehensive enough to afford relief in this action; that the statute of limitations pertains merely to the remedy, and is governed by the *lex fori*. That statute is as follows: "Section 1. That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any servant or employee who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness or incapacity of any servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company." Priv. Laws N. C. 1897, p. 83, c. 56. The other section has no application to this case. The respondent contends that this statute is but an enlargement of the provisions of the Lord Campbell act; that they are in *pari materia*, and must be construed together; that the time within which the action must be brought under the Lord Campbell act is in no sense a statute of limitations; and that any facts that would have destroyed the right of recovery if the suit had been instituted in North Carolina will defeat the action in this state.

The Lord Campbell act of North Carolina is as follows: "Whenever the death of a person is caused by the wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executors, administrators, or collectors, and this notwithstanding the death, and although the wrongful act or neglect causing death, amount in law to felony." Code N. C. § 1498. The statute of 1897 has been declared by the Supreme Court of North Carolina, in the case of [Hancock v. N. & W. R. R.](#), 124 N. C. 222, 32 S. E. 679, to be constitutional. Our construction of the statute of 1897 is that it was merely intended to enlarge the provisions of the Lord Campbell act, that it was in the nature of an amendment to that act, and that they must be construed together.

This action could not have been maintained in North Carolina after more than one year had elapsed from the death of the person suffering the injury. In [Huntington v. Attrill](#), 146 U. S. 657, 670, 13 Sup. Ct. 224, 228, 36 L. Ed. 1123, the court says: "In order to maintain an action for an injury, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. *** But such is not

*870 the law of this court. By our law a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought." See, also, 16 Harv. L. Rev., No. 1, p. 63 (Nov., 1902). As we have a statute which gives an action for wrongfully causing death, it is not against public policy to enforce such a liability here, although it arose in another jurisdiction. [Stewart v. B. & O. R. R.](#), 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. When such a liability is enforced in a jurisdiction other than the place of the wrongful act, it does not mean that the act, in any degree, is subject to the *lex fori*, with regard either to its quality or its consequences. [Slater v. R. Co.](#), 194 U. S. 120, 126, 24 Sup. Ct. 581, 582, 48 L. Ed. 900. In the case last mentioned the court uses this language: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation—an obligation which, like other obligations, follows the person, and may be enforced wherever the person may be found. [Stout v. Wood](#), 1 Blackf. 71; [Dennick v. Central R. Co.](#), 103 U. S. 11, 18, 26 L. Ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation ([Smith v. Condry](#), 1 How. 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here, absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In [Northern P. R. Co. v. Babcock](#), 154 U. S. 190, 199, 38 L. Ed. 958, 961, 14 Sup. Ct. 978, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side, as quite inadmissible, the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

The two statutes of North Carolina must be construed together in determining the consequences of the wrongful act. The action in this state is incumbered with all the burdens arising out of either of said statutes. In [Taylor v. Cranberry Iron & Coal Co.](#), 94 N. C. 525, 526, the court thus construes the provision of the Lord Campbell act limiting the time within which the action must be brought: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be

lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun. The nature of the cause of action, when it occurred, and when this action began, plainly appeared from the complaint and summons; and, as more than a year elapsed after the death of the intestate, and before the bringing of the action, it is clear it cannot be maintained, and the judgment must therefore be affirmed.”

It is well settled in this state that the statute of limitations relates to the remedy, and is enforced according to the *lex fori*. [Sawyer v. Macaulay](#), 18 S. C. 543. But the requirement that the action shall be commenced within one year after the party is killed is not a statute of limitations. At common law there was no right of action for death caused by wrongful act. The requirement as to the time of commencing the action is a part of the statute creating this right. It is incumbent on those seeking the benefit of the statute to show that their action conforms to all the requirements thereof, one of which is that the suit must be instituted within a certain time. In North Carolina the failure to commence the action within one year did not simply extinguish the remedy, but was an extinction of the right conferred by the statute. When such is the case the action cannot be maintained in this state. [Sawyer v. Macaulay](#), 18 S. C. 543. The North Carolina decision is in

harmony with the principle announced in [Walker v. Chester County](#), 40 S. C. 342, 18 S. E. 936. That case was an action under the statute which gave a right of action for damages caused by a defect in the repair of a highway. The statute contained a proviso limiting the right of action to cases, *inter alia*, where the plaintiff had not brought about his injury by his own act or negligently contributed thereto. There was a demurrer to the complaint on the ground that it failed to allege that the plaintiff did not in any way bring about her injury by her own act, or negligently contribute thereto. A county was not liable at common law in an action for injuries received from defects in the repair of a highway. This court held that the demurrer was properly sustained. Mr. Chief Justice McIver concurred on the ground that the conditions upon which the right is conferred must appear in the complaint, as otherwise no right of action is stated. These authorities are conclusive of the question under consideration.

It is the judgment of this court that the judgment of the circuit court be affirmed.

All Citations

70 S.C. 254, 49 S.E. 869, 106 Am.St.Rep. 746

[West's North Carolina General Statutes Annotated](#)

[Chapter 6. Liability for Court Costs](#)

[Article 3. Civil Actions and Proceedings](#)

N.C.G.S.A. § 6-21.1

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases

Effective: October 1, 2011

[Currentness](#)

(a) In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company in which the insured or beneficiary is the plaintiff, instituted in a court of record, upon findings by the court (i) that there was an unwarranted refusal by the defendant to negotiate or pay the claim which constitutes the basis of such suit, (ii) that the amount of damages recovered is twenty-five thousand dollars (\$25,000) or less, and (iii) that the amount of damages recovered exceeded the highest offer made by the defendant no later than 90 days before the commencement of trial, the presiding judge may, in the judge's discretion, allow a reasonable attorneys' fees to the duly licensed attorneys representing the litigant obtaining a judgment for damages in said suit, said attorneys' fees to be taxed as a part of the court costs. The attorneys' fees so awarded shall not exceed ten thousand dollars (\$10,000).

(b) When the presiding judge determines that an award of attorneys' fees is to be made under this statute, the judge shall issue a written order including findings of fact detailing the factual basis for the finding of an unwarranted refusal to negotiate or pay the claim, and setting forth the amount of the highest offer made 90 days or more before the commencement of trial, and the amount of damages recovered, as well as the factual basis and amount of any such attorneys' fees to be awarded.

Credits

Added by Laws 1959, c. 688. Amended by Laws 1963, c. 1193; Laws 1967, c. 927; Laws 1969, c. 786; Laws 1979, c. 401; Laws 1985 (Reg.Sess. 1986), c. 976; [S.L. 2011-283, § 3.1, eff. Oct. 1, 2011](#); [S.L. 2013-159, § 5, eff. Aug. 1, 2013](#).

[Notes of Decisions \(183\)](#)

N.C.G.S.A. § 6-21.1, NC ST § 6-21.1

The statutes and Constitution are current through the end of the 2020 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

LAW OFFICE OF BROOKS R. FUDENBERG, LLC

14 Ashe Street
Charleston, South Carolina 29403
BRF@Fudenberglaw.com
Tel. 843-696-8911
eFax: 1-910-401-1242

RECEIVED

Mar 04 2021

SC Court of Appeals

March 4, 2021

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Dear Ms. Kitchings,

RE: Daniel O'Shields and Roger W. Whitley A Partnership d/b/a O&W Cars, Appellants, v. Columbia Automotive Company, LLC d/b/a Midlands Honda, Respondent
Appellate Case No. 2017-000902

Pursuant to Rule 208(b)(7), SCACR, Appellants, Daniel O'Shields and Roger Whitley, respectfully bring the following four supplemental authorities to the attention of the Court:

Artis v. Murphy-Brown, LLC, No. 7:14-CV-00237-BR, at *6 (E.D.N.C. Mar. 8, 2019) (punitive awards of 9 to 12 million dollars each for six plaintiffs, after reduction to the statutory cap from 75 million dollars each).

The case pertains to Issue I of the Brief of Appellant and I.F of the Reply Brief.

Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (A "party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings").

The case pertains to page 20 of the Brief of Respondent and Record page 84 (admitting paragraphs 1-4 of the 2d Am. Compl.), Record page 67 (2d Am. Compl. stating there are two Plaintiffs).

Honeywell v. Sterling Furniture Co., 310 Or. 206, 213 (Or. 1990) (explaining that attorney fee awards in an unlawful trade practices case assure that wronged consumers can obtain counsel where such claims "require an expenditure of attorney time the value of which greatly exceeded the value of the goods or services in question.")

The case pertains to page 37 of the Brief of Appellant and page 10 of the Reply Brief.

Dennis v. Atl. Coast Line R. R., 70 S.C. 254, 259, 49 S.E. 869, 870 (1904) (citing *Sawyer v. Macaulay*, 18 S. C. 543 (1883)) (explaining that it is “well settled” in South Carolina that matters “relating to the remedy” are enforced according to the law of the forum, not according to the law of the state in which the tort was committed).

The case pertains to Issue III of the Brief of Appellant and III.B.1 of the Reply Brief.

Sawyer v. Macaulay, 18 S. C. 543, 549 (1883) (stating, “[T]he *lex fori* shall govern as to the remedy and its enforcement.”)

The case pertains to Issue III of the Brief of Appellant and III.B.1 of the Reply Brief.

Driskell v. Summit Contracting Grp., No. 19-1456, 828 Fed.Appx. 858 at * 871 (2020) (4th Cir. Sep. 24, 2020) (unpublished) (“Driskell also insists that he shouldn't have been required to choose between the punitive-damages verdict (which arose from his wrongful-discharge claim) and the award of attorney's fees (which arose from his REDA claim). We agree.”); *id.*, n.8 (finding it “doubtful” that the North Carolina Supreme Court would bring attorney fees within the ambit of N.C. G.S. § 1D-20).

The case pertains to Issue III of the Brief of Appellant and III.B.2 of the Reply Brief.

Copies of the cases are attached.

Yours very truly,

LAW OFFICE OF BROOKS R. FUDENBERG,
LLC



Brooks R. Fudenberg
Attorney for Appellant

cc: Robert Reibold, Esq. (w/enclosures)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:14-CV-00237-BR

BEN ARTIS, et al.,

Plaintiffs,

v.

MURPHY-BROWN, LLC, d/b/a
SMITHFIELD HOG PRODUCTION
DIVISION,

Defendant.

ORDER

This matter is before the court on the parties' post-trial motions following the entry of final judgment on the jury verdict awarding the six trial plaintiffs in this case compensatory and punitive damages on their nuisance claims. (DE ## 275, 277, 281, 285.)

I. DEFENDANT'S MOTION TO ALTER OR AMEND

Pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, defendant requests that the court vacate the judgment. "A Rule 59(e) motion may only be granted in three situations: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.' It is an extraordinary remedy that should be applied sparingly." Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 378 (4th Cir. 2012) (citations omitted). Because defendant filed its motion within 28 days of entry of the judgment, the court considers it only under this standard, rather than under the Rule 60(b) standard. See Robinson v. Wix Filtration Corp., 599 F.3d 403, 412 (4th Cir. 2010) ("We have squarely held, however, that a motion filed under both Rule 59(e) and Rule 60(b) should be analyzed only under Rule 59(e) if it was filed no

later than [28] days after entry of the adverse judgment and seeks to correct that judgment.” (citations omitted)).

Defendant argues that the judgment should be vacated for the failure to join Greenwood Livestock LLC (“Greenwood Livestock”) and the Pagle Corporation (“Pagle”), owners of the subject farms, as necessary and indispensable parties. Defendant filed a similar motion in the related case of McKiver v. Murphy-Brown, LLC, No. 7:14-CV-180-BR, and for the reasons stated in the court’s 17 December 2018 order in that case, (DE # 346, at 5-7), the motion will be denied.

II. DEFENDANT’S MOTION FOR JUDGMENT AS A MATTER OF LAW

Based on Rule 50(b) of the Federal Rules of Civil Procedure, defendant renews its earlier motions for judgment as a matter of law. In considering a Rule 50(b) motion, “the question is whether a jury, viewing the evidence in the light most favorable to [the non-movant], could have properly reached the conclusion reached by th[e] jury. If reasonable minds could differ about the result in this case, [the court] must affirm the jury’s verdict.” Bryant v. Aiken Reg’l Med. Ctrs. Inc., 333 F.3d 536, 543 (4th Cir. 2003) (citation and internal quotation marks omitted).

Defendant argues that it is entitled to judgment as a matter of law because (1) plaintiffs failed to present sufficient evidence to support punitive damages; (2) plaintiffs presented no evidence to support compensatory damages as limited by an amendment to North Carolina’s Right to Farm Act (“RFA”); (3) plaintiffs’ claims are barred by an amendment to the RFA; and (4) Greenwood Livestock and Pagle are indispensable parties.

As for the first ground, defendant contends it is entitled to judgment as a matter of law because plaintiffs failed to present sufficient evidence to support punitive damages. Considering the evidence developed at trial in the light most favorable to plaintiffs, a reasonable jury could

have found defendant liable for punitive damages. As for the second and third ground, because plaintiffs brought this action prior to the effective dates of the subject amendments to the RFA, see McKiver (DE # 346) at 2-5; McGowan v. Murphy-Brown, LLC, No. 7:14-CV-182-BR (DE # 472) at 2-5, those amendments do not limit the compensatory damages plaintiffs may recover or bar their claims. As for the fourth ground, defendant relies on its motion to alter or amend the judgment. As addressed above, for the reasons stated in McKiver (DE # 346), the court concludes Greenwood Livestock and Pagle are not indispensable parties.

The court will deny defendant's motion for judgment as a matter of law.

III. DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant moves for a new trial under Rule 59(a) of the Federal Rules of Civil Procedure. "In considering a motion for a new trial, a trial judge may weigh the evidence and consider the credibility of witnesses, and if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial." King v. McMillan, 594 F.3d 301, 314 (4th Cir. 2010) (citation and internal quotation marks omitted).

Defendant asks the court to revisit a number of its prior rulings, covering pretrial cross-motions for summary judgment through jury instructions. The court declines to disturb these rulings. The only issues defendant raises that merit further discussion are its allegations of misrepresentations by plaintiffs' counsel regarding the measure of damages and its request for remittitur.

A. Alleged Misrepresentations by Plaintiffs' Counsel

Defendant moves for a new trial based on certain statements made by plaintiffs' counsel during his opening statement and closing argument.

In the interests of justice and efficiency, a new trial should not be lightly granted. To begin with, a new trial should be granted only if prejudicial statements are so egregious that they prevent the complaining party from receiving a fair trial. See *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 519 (4th Cir. 1985). If a party fails to object to an error at trial, a new trial will not be granted unless “exceptional circumstances exist such as when the error is so obvious or so serious that the public reputation and integrity of the judicial proceeding is impaired.” *Hafner v. Brown*, 983 F.2d 570, 578 (4th Cir. 1992) (internal quotation marks omitted). Finally, a curative instruction may render prejudicial remarks harmless. See *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 983-84 (4th Cir. 1987).

Just Wood Indus., Inc. v. Centex Const. Co., No. 98-1855, 1999 WL 606859, at *7 (4th Cir. Aug. 12, 1999) (unpublished table decision).

First, defendant contends plaintiffs’ counsel misstated the law in his opening statement and closing argument by suggesting that the jury should award compensatory damages based on the costs to prevent the harm, that being the amount to install and run an alternative waste management system known as “Super Soils.” (Def.’s Mem. Supp., DE # 284, at 2-3.) Defendant contends such argument is not in accordance with North Carolina law, which provides that “compensatory damages are measured by the amount of money necessary ‘to restore the plaintiff to his original condition or to make the plaintiff whole.’” (*Id.* at 3 (quoting Watson v. Dixon, 532 S.E.2d 175, 177-78 (N.C. 2000)).) While defendant’s statement of law is accurate, it fails to acknowledge that North Carolina law also recognizes that a purpose of compensatory damages is to deter conduct that causes harm. See Haarhuis v. Cheek, 805 S.E.2d 720, 728 (N.C. Ct. App. 2017), writ denied, review denied, appeal dismissed, 814 S.E.2d 103 (N.C. 2018). As such, counsel may make a general deterrence argument in reference to compensatory damages, provided counsel does not refer to those aggravating factors necessary for an award of punitive damages “or urge the trier of fact to punish the defendant.” *Id.* Plaintiffs’ counsel’s argument did not exceed this standard. However, even if it did, the court finds that the statement was not egregious enough to have prevented defendant from receiving a fair trial.

Second, defendant argues plaintiffs' counsel failed to heed the court's instructions not to discuss "'salaries, net worth, [or the] financial condition of the defendant'" when referencing compensatory damages. (Def.'s Mem. Supp., DE # 284, at 3 (quoting 8/2/18 Tr., DE # 252, at 3).) Before closing arguments, the court instructed plaintiffs' counsel to address punitive damages "last" in his argument, not to discuss defendant's financial numbers before his punitive damages argument, and that he must fully open. (8/2/18 Tr., DE # 252, at 3-4, 9-10.) Defendant contends plaintiffs' counsel violated these instructions in his rebuttal by arguing the jury should award as compensatory damages "'what it takes to prevent the harm,'" which "'Smithfield can afford [to fix] and you know that because of the revenue numbers.'" (*Id.* (quoting 8/2/18 Tr., DE # 252, at 128-29).) Notably, defendant did not contemporaneously object to this portion of argument, but at any rate, the court concludes plaintiffs' counsel did not violate the court's instructions.

Third, defendant argues plaintiffs' counsel made an inappropriate argument regarding punitive damages. Defendant contends that, in his rebuttal argument, plaintiffs' counsel conflated a concept related to compensatory damages with a concept related to punitive damages, when he "told the jury that it must 'consider the interest of the community' in assessing 'the degree of the defendant's awareness of the probable consequences of its conduct.'" (Def.'s Mem. Supp., DE # 284, at 4 (quoting 8/2/18 Tr., DE # 252, at 115).) Defendant did not contemporaneously object to this argument. Reviewing plaintiffs' counsel's rebuttal as a whole, he does not conflate these concepts, rather, he concludes his thoughts about the interest of the community relative to compensatory damages and then moves to argument regarding evidence relevant to punitive damages. (*See* 8/2/18 Tr., DE # 252, at 115-17.) As such, plaintiffs' counsel's argument was not improper.

Alternatively, defendant requests a new trial based on the court's failure to provide defendant's requested limiting instruction to correct plaintiffs' counsels' purported misstatements. Having concluded that the statements and arguments to which defendant refers were not improper, there was no reason for the court to give the jury the requested limiting instruction. Furthermore, the court instructed the jury regarding what it should consider during deliberations:

As stated earlier, it is your duty to determine the facts, and in so doing, you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in this case.

(8/2/18 Tr., DE # 252, at 133.) The court also instructed the jurors that it was their duty to follow the law. (*Id.* at 131.) The court's instructions cured any potential prejudice resulting from plaintiffs' counsel's statements. A new trial is not warranted.

B. Defendant's Request for Remittitur

Absent a new trial, defendant moves this court to remit the jury verdict on the ground that the damages awarded were excessive. The jury awarded each of the six trial plaintiffs compensatory damages ranging from \$3 million to \$5 million and punitive damages of \$75 million. Pursuant to North Carolina's cap on punitive damages, N.C. Gen. Stat. § 1D-25(b), the court reduced the jury's punitive damages awards, resulting in such awards ranging from \$9 million to \$15 million per plaintiff.

1. Compensatory Damages

The court applies North Carolina law to determine whether the compensatory damages awards should be remitted for excessiveness. See Konkel v. Bob Evans Farms Inc., 165 F.3d 275, 280 (4th Cir. 1999) ("[A] district court sitting in diversity must apply state law standards

when it considers a Rule 59(a) motion for a new trial based upon the alleged excessiveness of the jury's compensatory damage award." (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438-39 (1996))).

While classic remittitur is not permitted in North Carolina, the concept is governed by Rule 59 of the North Carolina Rules of Civil Procedure in which a new trial may be granted to a party for excessive . . . damages appearing to have been awarded under the influence of passion or prejudice.

Rhyne v. K-Mart Corp., 562 S.E.2d 82, 89 (N.C. Ct. App. 2002) (citing N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (1999)), aff'd, 594 S.E.2d 1 (N.C. 2004).

Defendant contends that the compensatory damages awards are excessive because the plaintiffs' loss of the use and enjoyment of their properties should be measured by the values of their properties, which purportedly range from "\$12,000 to \$71,000." (Def.'s Mem. Supp., DE # 284, at 30 (citing N.C. Gen. Stat. § 106-702(a)(2) (2017) (limiting compensatory damages for a temporary nuisance emanating from an agricultural operation to diminution of fair rental value of the plaintiff's property)).) Plaintiffs' compensatory damages are not so limited. See McGowan (DE # 472) at 5 (holding that the effective date of N.C. Gen. Stat. § 106-702(a)—11 May 2017—controls the statute's application).

Furthermore, the court has considered the consequences of adopting such an approach. It would, in essence, grant a private actor the right to take the property of a private citizen, akin to the power of eminent domain. Cf. N.C. State Hwy Comm'n v. Farm Equip. Co. Inc., 189 S.E.2d 272, 278 (N.C. 1972) ("Private property can be taken by the exercise of the power of eminent domain *only* where the taking is for a public use." (emphasis added) (citation omitted)); Carlos A. Ball, The Curious Intersection of Nuisance and Takings Law, 86 B.U. L. Rev. 819, 857-58 n.220 (2006) ("There are also important remedial differences between a takings claim and a nuisance action. The plaintiff in a takings case is only entitled to compensation for the loss in

the property's fair market value. A plaintiff in a nuisance case, on the other hand, may be entitled to an injunction. If an injunction is not requested, or if one is not deemed appropriate, a plaintiff in a nuisance action may nonetheless be entitled to not only damages that reflect the loss in fair market value, but also to damages that address additional harms such as the effects on the plaintiff's health caused by the defendant's conduct." (citations omitted)). The purpose of eminent domain is to compensate the individual for the economic value of the property right taken, see Richardson, 817 S.E.2d at 887-88, while the purpose of nuisance law, is to compensate the individual for the *lost use and enjoyment* of his or her property, see Hanna v. Brady, 327 S.E.2d 22, 25 (N.C. Ct. App. 1985). These distinct purposes warrant distinct valuation. See Brown v. Legal Found. of Wash., 538 U.S. 216, 236-37 (2003) ("[G]iven 'the liability of all property to condemnation for the common good,' an owner's nonpecuniary losses attributable to 'his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.'" (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949))).

Accordingly, the plaintiffs in this nuisance action properly pled compensatory damages to redress their discomfort and annoyance. In re NC Swine Farm Nuisance Litig., No. 5:15-CV-0013-BR, 2017 WL 5178038, at *10 (E.D.N.C. Nov. 8, 2017). This harm is not capable of precise calculation. See Hanna, 327 S.E.2d at 25 (recognizing in a nuisance action, "[t]he type of injuries suffered by the plaintiff—physical pain, annoyance, stress, deprivation of the use and comforts of one's home—are intrinsically not susceptible of exact pecuniary calculation" (internal quotation marks and citations omitted)). The court instructed the jury as much:

The plaintiff[s] claim that the interference with the use and enjoyment of his or her property has caused him or her anger, embarrassment, annoyance, inconvenience, decreased quality of life, and/or physical and mental discomfort. There is no fixed formula for placing a

value on these alleged harms. You will determine what is fair compensation by applying logic and common sense to the evidence.

(8/2/18 Tr., DE # 252, at 141.) What the jury determines those damages to be is a particular and peculiar function of the jury. Hanna, 327 S.E.2d at 25 (“The determination of such damages is left to the sound judgment and discretion of the trier of fact.”).

Defendant also claims the compensatory damages awards are excessive when compared to the amounts awarded in (1) related cases where plaintiffs’ counsel did not make purportedly improper argument regarding the measure of damages and (2) other North Carolina nuisance cases. The awards here are higher than awards in the trials of McKiver (\$75,000 per trial plaintiff) and McGowan (\$65,000 per trial plaintiff). However, those cases involve different plaintiffs, hog farms, and facts from those at issue here, and as discussed previously, plaintiffs’ counsel’s arguments at this trial were not improper. As for the other North Carolina nuisance cases to which defendant cites, the court has considered them but concludes they alone do not justify remittitur.

Considering the record as a whole, including the difference in the trial plaintiffs’ awards demonstrating that the jury considered the parties individually, there is no indication that the jury’s decision was made under the influence of passion or prejudice. As such, the court will not remit the jury’s compensatory damages awards in this case.

2. Punitive Damages

Defendant contends the court should remit the punitive damages awards because they too are excessive. “The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). The Supreme Court has identified “guideposts” this court must consider in an analysis of such a challenge: “(1) the degree of reprehensibility of the

defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id. at 418 (citation omitted). The first guidepost is the most important, id. at 419, and is the only one upon which defendant relies.

"[T]o determine the reprehensibility of a defendant," the court consider[s] whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. (citation omitted).

Here, plaintiffs testified that defendant's conduct affected their physical and mental well-being. In addition to the type of harm suffered, the jury was required to consider the existence of malice or willful or wanton conduct determining whether to award punitive damages in the first instance. (See 8/2/18 Tr., DE # 252, at 143.) Under North Carolina law, and as the court instructed the jury,

[m]alice means a sense of personal ill will toward the plaintiff that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the plaintiff.

Willful or wanton conduct means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.

(Id.) Consequently, the jury found that defendant's conduct evinced an indifference to and reckless disregard of the safety of others and/or the trial plaintiffs' harm resulted from intentional malice. Furthermore, the nuisance was not an isolated event but occurred with frequency over the seven-year damages period. These factors collectively indicate defendant's misconduct was sufficiently reprehensible to support the punitive damages awarded.

Defendant cites to three reasons as to why its conduct was not reprehensible. First, it relies on the lawfulness of hog operations. It is true that the subject hog farm operates lawfully under its State permit. However, plaintiffs presented evidence that defendant's predecessor company vigorously opposed the efforts of local boards of health, county commissioners, and state legislators to hold the hog industry to any regulatory standard beyond what is required by the State permit. The company was successful in its efforts until 20 years ago when a moratorium went into effect banning new or expanded industrial hog operations from using the open lagoon and spray field waste management systems. That moratorium remains today. The fact that the subject hog farm complies with its permit, even with defendant's assistance, carries little weight.

Second, defendant suggests its conduct is less reprehensible because plaintiffs did not complain prior to filing suit. The majority of the trial plaintiffs acknowledged they had not complained before the lawsuit about the conditions they were experiencing. Even so, prior to the filing of this action, defendant was well aware of reports of offensive odors associated with industrial hog operations in eastern North Carolina and of the effects of those operations on the people in the surrounding communities. Also, it has long been aware that persons in those communities have complained about hog odors and associated truck traffic interfering with their daily activities and quality of life. Furthermore, prior to this action, it became aware that counties in North Carolina were concerned about the impact of industrial hog operations on the health and welfare of their citizenry including impacts due to odor, traffic, and noise. More important, however, is the fact that with the filing of this action—four years prior to trial—defendant learned of these plaintiffs' complaints, yet it did nothing to lessen the effects of the nuisance, making defendant's conduct more reprehensible.

Finally, defendant cites its lack of profit during the relevant time period. Defendant's profit margin does not minimize the reprehensibility of its conduct. Defendant is part of a vertically integrated business. Under this structure, defendant sells its hogs to its parent company. The parent company then processes and sells the resulting products for profit. Because of this business structure, if defendant wanted to purchase lagoon covers (which could reduce odor from the hog operation), it would be funded by its parent or grandparent company. Defendant, however, has chosen not to implement this technology. Instead, it has attempted to shift that responsibility onto the owner of the farm, even though it effectively controls every aspect of the operation, including the supply of hogs, their feed, their transportation, and the operating procedures, and provides frequent technical assistance. In nearly every aspect, defendant dictates the activities at the farm.

Additionally, although not argued by defendant, the court considers the second State Farm guidepost—the disparity between actual and punitive damages. The Supreme Court refuses to adopt a bright-line ratio in this regard, State Farm, 538 U.S. at 425; however, the Court has recognized that “[s]ingle-digit multipliers are more likely to comport with due process,” *id.* The ratio here is 3:1. See N.C. Gen. Stat. § 1D-25(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.*” (emphasis added)).

For these reasons, the court concludes the punitive damages awards do not offend due process. Accordingly, they will not be remitted.

IV. PLAINTIFFS’ MOTION TO AMEND

Plaintiffs move to amend the judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure. (See DE # 281, at 2.) Under Rule 60(b)(6), “[o]n motion and just terms, the court

may relieve a party or its legal representative from a final judgment, order, or proceeding for. . . any other reason that justifies relief.” To grant relief under this provision of Rule 60, the circumstances must be “extraordinary.” Aikens v. Ingram, 652 F.3d 496, 500 (4th Cir. 2011). “The decision to grant or deny a Rule 60(b)(6) motion, as with all Rule 60 motions, is committed to a district court’s sound discretion.” Brunson v. Colvin, No. 5:11-CV-591-FL, 2013 WL 3761305, at *1 (E.D.N.C. July 16, 2013) (citations omitted).

Specifically, plaintiffs request that the court set aside its reduction of the jury’s punitive damages awards on the ground that North Carolina’s statutory punitive damages cap is unconstitutional as applied. The court has previously considered plaintiffs’ arguments and does not find that extraordinary circumstances exist to grant relief under Rule 60(b)(6). Accordingly, the court stands by its earlier decision reducing the punitive damages awards in this case. (DE # 265.)

V. CONCLUSION

For the foregoing reasons, defendant’s motions to alter or amend the judgment (DE # 275), for judgment as a matter of law (DE # 277), and for a new trial (DE # 285) are DENIED. Plaintiffs’ motion to amend the judgment (DE # 281) is DENIED. Additionally, defendant’s 3 August 2018 oral motion to set aside the verdict is DENIED.

This 8 March 2019.



W. Earl Britt
Senior U.S. District Judge

308 S.C. 385
Court of Appeals of South Carolina.

Peter W. POSTAL, Appellant,
v.
Edward C. MANN, III, Respondent,
v.
Bud KINNIE, Third-Party Defendant.

No. 1812.

|
Heard April 6, 1992.

|
Decided May 11, 1992.

Synopsis

In action to recover for breach of real estate sale contract, the Circuit Court, Richland County, [Joseph M. Strickland](#), Master-In-Equity, denied recovery on lost note, holding that there was insufficient evidence of note's existence. Plaintiff appealed. The Court of Appeals, Shaw, J., held that defendant was bound by admission in his answer that note existed.

Reversed and remanded.

West Headnotes (4)

[1] **Pleading** [Conclusiveness of Allegations or Admissions on Party Pleading](#)

Pleading [Pleadings abandoned or withdrawn, or to which demurrer has been sustained](#)

Parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.

[10 Cases that cite this headnote](#)

[2] **Pleading** [Conclusiveness of Allegations or Admissions on Party Pleading](#)

Allegations, statements, or admissions contained in pleading are conclusive as against pleader and party cannot subsequently take position

contradictory of, or inconsistent with, his pleadings.

[9 Cases that cite this headnote](#)

[3] **Pleading** [Conclusiveness of Allegations or Admissions on Party Pleading](#)

Facts which are admitted by pleadings are taken as true against pleader for purpose of action.

[6 Cases that cite this headnote](#)

[4] **Commercial Paper** [Traverses or denials and admissions in general](#)

In action to recover on lost note, defendant was bound by his admission in his answer that note existed, as he failed to amend his answer to deny existence of note.

Attorneys and Law Firms

****322** ***385** [Robert F. McMahan, Jr.](#), of Glenn, Irvin, Murphy, Gray & Stepp, Columbia, for appellant.

[Louis H. Lang](#), of Callison, Tighe, Robinson & Anastasion, Columbia, for respondent.

[Carlos W. Gibbons, Jr.](#), of Ashley & Gibbons, Columbia, for third-party defendant.

Opinion

SHAW, Judge:

Appellant, Peter W. Postal, instituted this action against respondent, Edward C. Mann, III, alleging breach of contract associated ****323** with the sale of real estate. From the final order of the master-in-equity, Postal appeals only the denial of recovery ***386** on a lost note in the amount of \$8,000. We reverse and remand.

The only issue before us is whether the master erred in finding there was insufficient evidence of the existence of the note in question. We find that he did.

The record before us reveals the following. Postal entered into a contract with Mann for the purchase of certain real

estate. Bud Kinnie, named as a third-party defendant by Mann, was the listing real estate agent.¹ In his complaint, Postal asserted several breaches of contract involved with the sale. He further sought recovery of an \$8,000 note allegedly tendered by Mann to Kinnie which Kinnie subsequently assigned to Postal. At trial, Kinnie testified he received an \$8,000 commission on the sale but, to facilitate Mann's cash flow, he lent the \$8,000 commission to Mann, taking back a note. Both Kinnie and Postal testified he assigned the note to Postal. However, neither Postal nor Kinnie could produce the note at trial. Kinnie stated the last time he saw the note it was in a file he had left at Mann's office and, although he had looked, he was unable to find the note.

Kinnie grounded one of his trial objections to Mann's cross-examination questions on the admitted existence of the note in Mann's answer. Mann's attorney responded he had always assumed the note would reappear, but now felt it did not exist. He added, "If it becomes an issue, I'll ask to amend my answer." Postal continued to assert the existence of the note was admitted by Mann in the pleading and made a directed verdict motion on the \$8,000 note based on the admission in Mann's answer. There is no indication Mann asked to amend his answer.²

Despite the testimony and the admission in the pleading, the master found there was "insufficient evidence to determine that Kinnie actually took a note back for his sales commission." The master, thus, made no findings on the terms of the note. Postal made a motion for an amendment of this

finding *387 based on the admission in Mann's answer. The master summarily denied the motion.

[1] [2] [3] It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action. *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410 (1964).

[4] In his complaint, Postal alleged in paragraph 19 that "As a part of the closing on the property, Mann tendered a note to Kinnie in the amount of Eight Thousand (\$8,000.00) Dollars ..." Paragraph 15 of Mann's answer states "Paragraph 19 of the Complaint is admitted." Further, Mann asserted several defenses to the note in his answer, but never denied its existence. Having failed to amend his answer, Mann was bound by that admission. Accordingly, we hold the trial judge erred in finding the evidence insufficient as to the existence of the note and remand for consideration the terms of the note.

REVERSED AND REMANDED.

SANDERS, C.J., and GARDNER, J., concur.

All Citations

308 S.C. 385, 418 S.E.2d 322

Footnotes

¹ Kinnie was subsequently granted a non-suit in a separate order. No appeal has been taken from that order.

² Mann apparently attempted to amend his answer by way of motion to alter or amend the master's judgment following issuance of his order. Even if we were to consider his motion to amend his answer timely, the master denied the motion to alter or amend judgment and no appeal has been taken from that order.



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Blanks v. Fluor Corp.](#), Mo.App. E.D., September 16, 2014

310 Or. 206

Supreme Court of Oregon.

A.R. (Buck) HONEYWELL and Sally
Honeywell, Petitioners on Review,

v.

STERLING FURNITURE CO.,
dba M. Jacobs Fine Furniture,
Respondent on Review.

TC 16–87–09481; CA A50296; SC S36688.

|
Argued and Submitted March 6, 1990.|
Decided Aug. 9, 1990.**Synopsis**

Plaintiffs brought conversion and Unlawful Trade Practices Act suit against seller from which they had purchased furniture. [The Lane County Circuit Court, Douglas R. Spencer, J., entered judgment in favor of plaintiffs, and the Court of Appeals, 99 Or.App. 94, 781 P.2d 379](#), reversed. Review was allowed. The Supreme Court, Gillette, J., held that: (1) trial court erred in instructing jury as to how law required any award of punitive damages to be distributed, and the error was reversible, and (2) fact that punitive damages award was large enough to satisfy plaintiffs' attorney fees did not mean that further fees could not be awarded under the attorney fees provision of Oregon's Unlawful Trade Practices Act.

Affirmed in part, reversed in part, and remanded.

Unis, J., concurred in part and dissented in part, and filed opinion.

West Headnotes (6)

[1] **Damages** 🔑 Nature and Theory of Damages
Additional to Compensation

Punitive damages are allowed to punish willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in future.

[8 Cases that cite this headnote](#)

[2] **Damages** 🔑 Nature and Theory of Damages
Additional to Compensation

Punitive damages are not substitute for compensatory awards nor offset against litigation expense.

[2 Cases that cite this headnote](#)

[3] **Damages** 🔑 Exemplary Damages

Trial court erred by instructing that any punitive damages award would be used to pay plaintiffs' attorney or to pay criminal injuries compensation account.

[8 Cases that cite this headnote](#)

[4] **Appeal and Error** 🔑 Damages and amount of recovery

Error by trial court in instructing that any punitive damages award would be used to pay plaintiffs' attorney or criminal injuries compensation account was reversible, as potential effect was to permit jury to consider that plaintiffs should receive a certain amount and to add additional amounts to insure that they did, and as it encouraged jury to award punitive damages for a purpose, enhancement of criminal injuries compensation account, that is not recognized under Oregon law.

[17 Cases that cite this headnote](#)

[5] **Antitrust and Trade Regulation** 🔑 Attorney fees

That punitive damages award is large enough to pay prevailing party's attorney fees, thereby satisfying statute providing that punitive damages award must first be used to pay his or her attorney fees, does not mean that further fees may not be awarded under attorney fees portion

of Oregon's Unlawful Trade Practices Act. [ORS 18.540](#), [646.638\(3\)](#).

[2 Cases that cite this headnote](#)

[6] Appeal and Error [Damages or other relief](#)

Where error affected only availability and amount of punitive damages, it was appropriate to remand case for retrial only on those issues.

[6 Cases that cite this headnote](#)

Attorneys and Law Firms

****1019 *207** [Gary E. Norman](#), Albany, argued the cause and filed the petition, on behalf of petitioners on review.

[Bruce C. Moore](#), Eugene, argued the cause, on behalf of the respondent on review.

Before [PETERSON](#), C.J., and [CARSON](#), JONES, *GILLETTE, VAN HOOMISSEN, [FADELEY](#) and UNIS, JJ.

Opinion

****1020 *208** GILLETTE, Justice.

The questions in this case concern how much a jury should be told concerning to whom the distribution of an award of punitive damages will be made¹ and whether a plaintiff's attorney's share of a jury's award of punitive damages may be used to offset a court's award of attorney fees that a plaintiff may receive under the Oregon Unlawful Trade Practices Act (UTPA). We hold that a jury should be told nothing concerning the distribution of an award of punitive damages, and that no part of such an award may be used to offset attorney fees otherwise awardable under the Oregon UTPA.

FACTS

In July, 1979, plaintiffs purchased a new dining room set from defendant on a "layaway" plan. Because of family illnesses and employment problems, plaintiffs made their monthly payments only sporadically, and did not finish paying for the dining room set until August, 1987. Throughout this entire

eight-year period, both parties expected that plaintiffs would eventually finish paying for the furniture and take it home.

Upon completion of payment, however, defendant delivered the wrong furniture. Instead of the furniture ordered by plaintiffs, defendant substituted a used or shopworn table and much cheaper and lower quality chairs. Testimony by former employees of defendant revealed that most of plaintiffs' furniture had been missing for a number of years and this fact was well known to defendant and its employees. The decision to substitute other furniture was made by defendant's owner.

***209** Plaintiffs initiated this action against defendant alleging both conversion and unlawful trade practices and seeking compensatory damages, punitive damages in the amount of \$250,000, and attorney fees.² The trial court instructed the jury pursuant to the uniform civil jury instruction on punitive damages, UCJI No. 35.01A, but added the following paragraph:

"[i]f punitive damages are awarded by you, Oregon law requires that they be distributed as follows: First, the attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party; secondly, one-half of the remainder shall be paid to the prevailing party; third, the other half of the remainder shall be paid to the Criminal Injury [sic] Compensation Account to be used for the purposes set forth in the law."

Defendant timely excepted to this instruction:

"When you look at the remainder of the instructions to the jury on punitive damages, the use of where the money's going to go is never mentioned. It's not one of the factors the jury's to consider. I believe what that statute does is it tells the Court administratively how it's supposed to structure the judgment against the defendant, how he's supposed to pay, who it's going to go to. That's going to be an administrative position, the Court is going to have to look at the statute, decide how much to pay [counsel], and then split up and form the judgment according to that. The jury's not going to be required to make the—the jury's not going to be asked, 'Okay, we want you to decide how much [counsel] ought to be paid,' and then take half of this and ****1021** apply it to there, take half of this and apply it over there. It doesn't seem to me the policy behind the statute has anything to do with the jury's consideration of whether to award it or not.

“ * * * * *

“I’m asking the Court to look at how are punitive damages to be decided by this jury? They’re to be decided by looking at the defendant’s conduct, and as a punitive measure against the defendant. There’s nothing mentioned about for anybody. And I think we’ll open a Pandora’s box on closing argument with an instruction that specifically says, ‘Well, once you get done, let me tell you what the judge is going to do with what *210 you’ve done’. I’m going to give some money to [counsel] and I’m going to turn around and give half to these plaintiffs.’ I don’t see how that helps the jury at all reach a determination as to whether or not punitive damages ought to be awarded in this case.”

A jury awarded plaintiff \$1795 in compensatory damages and \$20,000 in punitive damages. The award did not purport to distinguish between plaintiff’s two theories of recovery; so far as appears from the verdict, both compensatory and punitive damages were awarded under both theories.

On appeal, the Court of Appeals reversed, holding that “[t]o instruct the jury how its award will be distributed injects into its deliberation factors that are not proper considerations in deciding whether to award punitive damages and, if they are awarded, the amount.” *Honeywell v. Sterling Furniture Co.*, 99 Or.App. 94, 97, 781 P.2d 379 (1989). However, the Court of Appeals did not then instruct the trial court as to how to proceed on retrial. It was not made clear whether the trial court should tell the jury that it is not to consider who receives the punitive damage award or simply should not mention the subject to the jury at all. Equally unclear was the question of what issues are to be retried. Does the award of compensatory damages, which was not challenged on appeal, remain intact? Finally, the Court of Appeals declined to consider defendant’s second assignment of error relating to an alleged double award of attorney fees. We allowed review to address these issues, in addition to reviewing the propriety of the trial court’s instruction.

PUNITIVE DAMAGES

[1] [2] “Punitive damages are allowed in Oregon to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future. *Martin v. Cambas*, 134 Or. 257, 293 P. 601 (1930); accord *Noe v. Kaiser Foundation Hospitals*, 248 Or. 420, 435 P.2d 306 (1967).” *State ex rel Young v. Crookham*,

290 Or. 61, 65, 618 P.2d 1268 (1980). Punitive damages “are not a substitute for compensatory awards nor an offset against litigation expense.” *Id.*; see also *Andor v. United Air Lines*, 303 Or. 505, 511–513, 516–517, 739 P.2d 18 (1987). There is nothing that we have found in the language or the legislative history of *211 ORS 18.540 indicating the legislature intended to change the purposes behind punitive damage awards when it enacted a new mandate for distribution of the proceeds of such awards.

[3] We agree with the Court of Appeals that instructing a jury that a portion of any punitive damage award will be used to pay the plaintiff’s attorney or to contribute to a worthy cause, such as help for victims of crime, does nothing to further or even to inform the jury as to the proper goals of punitive damage awards. Instead, the instruction distracts the jury from the appropriate line of analysis that this Court has said a jury should follow in cases involving potential awards of punitive damages:

“[t]he finder of fact must determine what punitive damages, if any, to award based on the proper premise of deterring future similar misconduct by the defendant or others. To this end, a number of factors may be relevant, including the seriousness of the hazard to the public, the attitude and conduct of the wrongdoer upon learning of the hazard, the number and position of employees involved in causing or covering up the misconduct, **1022 the duration of the misconduct and/or its cover-up, the financial condition of the wrongdoer, and prior and potential punishment from similarly situated plaintiffs or other sources.”

State ex rel Young v. Crookham, *supra*, 290 Or. at 72, 618 P.2d 1268. The trial court erred in instructing the jury as to how the law required any award of punitive damages to be distributed.³

[4] The fact that it was error to give the instruction does not complete our inquiry, however. There still remains the question whether the error was reversible error. We hold that it was. We agree with the Court of Appeals that the potential effect of the instruction was to “[permit] a jury to consider as a part of its deliberations on punitive damages that a plaintiff should receive a certain amount of money and, in order to ensure that he does, to add additional amounts to pay for attorney fees and contributions to the Criminal Injuries Compensation Account.” *Honeywell v. Sterling Furniture Co.*, *supra*, 99 Or.App. at 98, 781 P.2d 379. We also think there is another, perhaps even more serious problem with the instruction: It encouraged the jury to award punitive damages

for a purpose, *212 viz., enhancement of the Criminal Injuries Compensation Account, that is not a reason for awarding punitive damages under Oregon law. So construed, the instruction was erroneous.

It is true, as the plaintiffs argue in their petition for review, that the assumption made by the Court of Appeals as to the effect of the instruction is somewhat speculative—there could be other, more benign uses the jury might make of the information provided in the instruction, although we think the result posited by the Court of Appeals is a likely result. Our separate reading of the instruction is not so speculative, however. Offering a jury an additional, inappropriate basis for awarding punitive damages harmed the defendant. The trial judge was specifically warned that giving the instruction would be error. The Court of Appeals was correct in so holding. *See State ex rel Redden v. Discount Fabrics*, 289 Or. 375, 388–89, 615 P.2d 1034 (1980).

THE ATTORNEY FEE AWARD

Because its ruling eliminated a purported double award of attorney fees to plaintiff, the Court of Appeals declined to consider defendant's second assignment of error. We, however, elect to consider this issue because it may recur upon remand.

[5] Plaintiff sought and was awarded attorney fees in the trial court pursuant to [ORS 646.638\(3\)](#), the attorney fees provision of the Oregon UTPA.⁴ Defendant contends that “once an award of punitive damages is rendered, and that award is sufficiently large to cover plaintiff's contractual obligation to pay their attorney, the mandatory distribution satisfies the attorney fees portion of plaintiff's damages, and further fees cannot be awarded at the cost bill stage.” We reject that interpretation of the relationship between [ORS 18.540](#) and [646.638\(3\)](#).

Punitive damages are intended to punish and deter wrongdoers. The attorney fees distribution provision of [ORS 18.540](#) is merely a legislative recognition that attorneys often are contractually entitled to a share of a punitive damage award, should there be such an award. *213 [ORS 18.540](#) clarifies that the attorney gets his share before the money is split between the state and plaintiff. In other words, the state must bear its share of the cost of compensating the attorney who obtained the judgment, if a contractual obligation exists to compensate the attorney.

****1023** On the other hand, attorney fees awarded in an unlawful trade practices case pursuant to [ORS 646.638\(3\)](#) serve an entirely different function: Their availability assures that wronged consumers can obtain counsel to prosecute claims that otherwise might be impractical to pursue because such claims would require an expenditure of attorney time the value of which greatly exceeded the value of the goods or services in question. The availability of punitive damages in a particular case may be problematical. The availability of basic compensation to counsel, however, cannot be problematical if consumers are going to be able to bring UTPA actions against dishonest and unscrupulous merchants.

The different aims of the two statutes show that defendant's “double recovery” argument is chimerical. Allowing the attorney to be compensated under each statute furthers the statutory purpose of that statute; allowing recovery under only one partially thwarts the object of the other. We note particularly that, even within the UTPA itself, there is no requirement of any offset of fee earned under [ORS 646.638\(1\)](#) (punitive damages) against those earned under [646.638\(3\)](#) (reasonable attorney fees for compensatory or punitive damages).

Because we are remanding this case for a partial retrial, we must vacate the award of attorney fees as it relates to the award of punitive damages. (Plaintiffs are entitled to a discretionary award of their attorney fees for the judgment for compensatory damages under the UTPA.) After the retrial, plaintiffs may once again request costs and attorney fees in connection with any award of punitive damages and the trial court may consider an appropriate award at that time.

SCOPE OF RETRIAL

[6] The sole remaining issue is the scope of retrial. As *214 noted, the Court of Appeals did not address this point. As also noted, the jury's finding of liability and its ensuing award of compensatory damages in this case was not challenged on appeal. Because the error that occurred in this case affects only the availability and amount of punitive damages, it is appropriate to remand the case for retrial only on those issues. *See Wolf v. Nordstrom*, 291 Or. 828, 835–836, 637 P.2d 1280 (1981).

CONCLUSION

The decision of the Court of Appeals is affirmed. The judgment of the circuit court awarding compensatory damages is affirmed. The award of punitive damages is reversed and the case is remanded to the circuit court for a new trial on the issue of punitive damages. The award of attorney fees and costs is vacated and remanded for further proceedings consistent with this opinion.

UNIS, Justice, concurring in part and dissenting in part.

Today, this court reverses a jury award of punitive damages, because the trial judge in his instructions to the jury correctly stated how Oregon law requires an award of punitive damages, if made, to be distributed.¹ I agree with the majority that the trial judge should not have given the instruction. I believe, however, that the error was harmless when the instructions are considered as a whole in the context of the circumstances of this case. I would, therefore, reverse the decision of the Court of Appeals and affirm the judgment of the circuit court.

The standard that this court ought to apply in evaluating an alleged error in a jury instruction in a civil case should be the same standard that we employ in evaluating ****1024** an evidentiary error. That standard is (1) whether error was committed and, if so, (2) whether that error requires reversal. The ***215** decision whether evidentiary error requires reversal is made without presuming that the error is prejudicial.² Similarly, this court should not presume that an error in an instruction was prejudicial to the party against whom it was committed. Prior expressions by this court to that effect, *see, e.g., State ex rel Redden v. Discount Fabrics*, 289 Or. 375, 388, 615 P.2d 1034 (1980), cited with approval in the majority opinion, should be disapproved.

ORS 19.125(2) establishes that not every error is “reversible” or “prejudicial” error. *See also State v. Moore*, 124 Or. 61, 66, 262 P. 859 (1928) (ORS 19.125(2), formerly Oregon Laws Section 556, prohibits this court from disposing of cases on mere technical errors). In order to be a basis for reversal of the judgment of the trial court in a civil case, then, the error in instruction must substantially affect the rights of the party against whom it was committed.³

***216** In the present case, the trial court erred when it instructed the jury on how punitive damages, if awarded, are to be distributed. The proper inquiry is whether that error requires reversal. In deciding that question, we should consider the instruction in context. The judge told the jury that plaintiff must prove punitive damages by clear and convincing evidence. He then charged the jury:

“Punitive damages *may be awarded* or may be assessed in addition to compensatory damages, *to punish the wrongdoer and to discourage the defendant and others from engaging in wanton misconduct*. In considering punitive damages, you must first determine whether the defendant was guilty of wanton misconduct that caused damage to the plaintiffs. Wanton misconduct is conduct amounting to a particularly aggravated, deliberate disregard of the rights of others. If you decide this issue against the defendant, you may award punitive damages, although you are not required to do so, because punitive damages are discretionary. In the exercise of that discretion, you may consider the importance to society in deterring similar misconduct in the future.” (Emphasis added.)

****1025** That instruction is consistent with numerous statements by this court that the purpose of punitive damages is to punish a defendant and deter others who are similarly situated. *See, e.g., Andor v. United Air Lines, Inc.*, 303 Or. 505, 517, 739 P.2d 18, 35 (1987); *Noe v. Kaiser Found. Hosp.*, 248 Or. 420, 425, 435 P.2d 306, 308 (1967); *Martin v. Cambas*, 134 Or. 257, 261, 293 P. 601, 603 (1930).

The trial judge also instructed the jury:

“If you decide to award punitive damages, you may properly consider the following items in fixing the amount: The character of the defendant's conduct; the defendant's motive; the sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and the income and assets of the defendant. The amount of punitive damages may not exceed the sum of \$250,000.”

That instruction is likewise in harmony with the guidelines ***217** that this court has established for determining the appropriate size of a punitive damages award in a non-products liability case.⁴ *State ex rel Young v. Crookham*, 290 Or. 61, 72, 618 P.2d 1268 (1980).

Finally, the court added this language in its charge to the jury:

“If punitive damages are awarded by you, Oregon law requires that they be distributed as follows: First, the

attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party; secondly, one-half of the remainder shall be paid to the prevailing party; third, the other half of the remainder shall be paid to the criminal injury compensation account to be used for purposes set forth in the law.”

It is that passage that is the basis for the majority's conclusion that a retrial in this case is necessary on the availability and amount of punitive damages. Although the majority recognizes that “the effect of the instruction is somewhat speculative” and that “there could be *** benign uses the jury might make of the information provided in the instruction,” Maj. op. at 1022, it nevertheless concludes that the instruction harmed the defendant by “[o]ffering a jury an additional, inappropriate basis for awarding punitive damages * * *.” Maj. op. at 1022. According to the majority, “the potential effect of the instruction was to ‘[permit] a jury to consider as a part of its deliberations on punitive damages that a plaintiff should receive a certain amount of money and, in order to ensure that he does, to add additional amounts to pay for attorney fees and contributions to the Criminal Injuries Compensation Account.’” Maj. op. at 1022. The instruction, the majority states, “encouraged the jury to award punitive damages for a purpose, viz., enhancement of the Criminal Injuries Compensation Account, that is not a reason for awarding punitive damages under Oregon law.” Maj. op. at 1022.

I disagree. The minds of jurors are not like empty tablets upon which the judges and lawyers record all of the *218 data that the jury may use in deciding the case. The jury is permitted to use its store of accumulated experience and knowledge in deciding issues of fact. Wright and Graham, 21 Federal Practice and Procedure 460, § 5102. As Justice Metcalf wrote in *Commonwealth v. Peckham*, 68 Mass (2 Gray) 514, 515 (1854): “Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters.” See *Rostad v. Portland Railway, Light & Power Co.*, 101 Or. 569, 581, 201 P. 184 (1921) (“[t]riers of fact cannot, in the nature of things, be divested of general knowledge of practical affairs.”); 9 Wigmore on Evidence, § 2569 (Chadbourn rev 1970). The jurors in this case, like other people, know that litigants incur attorney fees. It seems reasonable to assume that they were aware that plaintiff must compensate **1026 her counsel for representing her in this action and may well have taken that knowledge into consideration in determining the appropriate

amount of punitive damages, with or without the challenged instruction.⁵

Recognizing that the jury is under oath to follow the law given them by the trial judge, this court has stated on several occasions that it assumes that the jury followed the instructions. See *Chopp v. Miller*, 264 Or. 138, 144, 504 P.2d 106, 109 (1972); *Despain v. Bohlke*, 259 Or. 320, 328, 486 P.2d 545, 549 (1971); *Sedillo v. City of Portland*, 234 Or. 28, 33–34, 380 P.2d 115 (1963). See also OEC 311(1)(j) and (x).⁶ We should assume, therefore, that the jury's award of punitive damages to plaintiff was properly imposed to punish defendant and deter others who are similarly situated. Absent a reason to assume otherwise, we should not assume, as the majority does, that the jury disregarded the trial judge's instructions as to when it *219 could award punitive damages and instead awarded them on an inappropriate basis. Moreover, we should assume that the jury did apply the criteria given it by the trial judge in fixing the amount of punitive damages awarded plaintiff.

Instructions are to be considered in their entirety, not piecemeal, and it is immaterial that one or more of them considered separately may be subject to criticism, if from the instructions as a whole the jury was correctly charged as to the law in its application to the facts. See *Klebaum v. Mitchell*, 246 Or. 196, 198, 424 P.2d 219 (1967); *Parmentier v. Ransom*, 179 Or. 17, 24, 169 P.2d 883 (1946); *Hornby v. Wiper*, 155 Or. 203, 211, 63 P.2d 204 (1936). See also *Anderson v. White*, 264 Or. 607, 611, 506 P.2d 690, 692 (1973). The instruction concerning the distribution of an award of punitive damages was a correct statement of law. See ORS 18.540. “In 1987, the Oregon Legislature recognized the nature of punitive damages as punishment of wrongdoers for the public good and decided that the public should share in the bounty.” Comment, *Constitutional Challenges to Punitive Damages in Oregon: Let the Punishment Fit (Not Exceed) the Crime*, 26 Willamette L Rev 749, 755 (1990), citing ORS 18.540. See Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 Willamette L Rev 283, 298 (1988):

“ORS 18.540 is most significant; it ‘distributes’ the award of punitive damages. This section allows the attorney for the plaintiff awarded punitive damages to retain the ‘amount agreed upon’ pursuant to the contract of the attorney and client. [ORS 18.540(1)] The ‘prevailing party’ receives one-half of the remainder, as does the Criminal Injuries Compensation Account, unless the party

awarded punitive damages is a ‘public entity.’ [ORS 18.540(2) and (3).]”

This court has stated on more than one occasion that an unnecessary instruction that is a correct statement of the law is not the basis for reversal unless it did mislead, or may have misled, the jury to the prejudice of the appellant. *See, e.g., State v. Cortman*, 251 Or. 566, 573, 446 P.2d 681 (1968); *State v. Townsend*, 237 Or. 527, 530, 392 P.2d 459 (1964). *See also State v. Morris*, 248 Or. 480, 483, 435 P.2d 1018 (1967) (surplusage language which does not mislead the jury in view of other instructions is not reversible error); *Waterway Terminals Company v. P.S. Lord Mechanical Contractors*, 256 Or. 361, 370, 474 P.2d 309, 313 (1970) (“* * * cases should not be *220 reversed upon instructions, despite technical imperfections, unless the appellate court can fairly say that the instruction probably created an erroneous impression **1027 of the law in the minds of the jurors which affected the outcome of the case”). The challenged instruction did not create an erroneous impression of the law in the minds of the jurors. It was a correct statement of the law. In my judgment, the trial record does not reflect that the instruction affected the outcome of the case.

It is important to note that neither plaintiff's attorney nor defendant's attorney mentioned in argument to the jury how punitive damages would be distributed, if awarded. The only reference to how punitive damages would be distributed, if awarded, was in the challenged instruction. The absence of

argument minimizes the possibility that the jury misused or unduly focused on that one passage.

In sum, the instruction concerning to whom the distribution of an award of punitive damages will be made is unnecessary and should not have been given. It cannot be said from the record in this case, however, that the instruction substantially affected the rights of the defendant. In the light of the instructions on punitive damages, considered as a whole, the trial court's giving the instruction was harmless error and does not warrant reversal of the verdict. The parties to a lawsuit are not entitled to a perfect trial. They are entitled to fair trial. Nothing in the trial record demonstrated that the verdict in this case was the result of prejudice or passion. No good purpose would be served by sending it back for a new trial. I would put an end to this costly litigation by reversing the decision of the Court of Appeals and affirming the verdict of the jury and the judgment of the trial court. That conclusion is consistent with [Article VII \(Amend\), section 3, of the Oregon Constitution](#) which provides, in essence, that no judgment should be reversed for technical error when *substantial* justice had been done by a jury verdict and judgment.⁷

I concur in the majority opinion with respect to attorney fees.

All Citations

310 Or. 206, 797 P.2d 1019

Footnotes

* JONES, J., resigned April 30, 1990.

1 Distribution of an award of punitive damages is required by Or. Laws 1987, Ch. 774, section 3, now codified as [ORS 18.540](#) (effective September 27, 1987), which provides:

“The punitive damage portion of an award shall be distributed as follows:

“(1) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.

“(2) One-half of the remainder shall be paid to the prevailing party.

“(3) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.”

2 Punitive damages may be awarded under the Oregon Unlawful Trade Practices Act. [ORS 646.638](#). Plaintiffs also sought punitive damages under their conversion claim.

3 Our holding suggests that the Oregon State Bar's Civil Jury Instruction Committee take a fresh look at UCJI No. 35.01A and related instructions.

4 [ORS 646.638\(3\)](#) provides:

“In any action brought by a person under this section, the court may award, in addition to the relief provided in this section, reasonable attorney fees at trial and on appeal and costs. If the defendant prevails, the court may award reasonable attorney fees at trial and on appeal and costs if it finds the action to be frivolous.”

1 [ORS 18.540](#) provides:

"The punitive damage portion of an award shall be distributed as follows:

"(1) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.

"(2) One-half of the remainder shall be paid to the prevailing party.

"(3) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity."

2 With the adoption of the Oregon Evidence Code, "[e]videntiary error is not presumed to be prejudicial. [OEC 103](#)." *Powers v. Officer Cheeley*, 307 Or. 585, 597, 771 P.2d 622 (1989); *State v. Carr*, 302 Or. 20, 27, 725 P.2d 1287 (1986); *State v. Miller*, 300 Or. 203, 220, 709 P.2d 225 (1985), or harmless, *Van Gordon v. PGE Co.*, 295 Or. 811, 813, 670 P.2d 1026 (1983); *Powers v. Officer Cheeley*, *supra*, 307 Or. at 597 n 13, 771 P.2d 622. See also Kirkpatrick, Oregon Evidence 16–17 (2d ed 1989).

3 [ORS 19.125\(2\)](#) provides:

"No judgment shall be reversed or modified except for error substantially affecting the rights of a party."

Compare [ORS 19.125\(2\)](#) with [OEC 103\(1\)](#), codified in [ORS 40.025\(1\)](#). [OEC 103\(1\)](#), which deals with evidentiary error occurring in the trial of a case, reads:

"Evidentiary error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a *substantial right of the party is affected*." (Emphasis added.)

Before an error can be the basis for appellate reversal or modification of a judgment under [ORS 19.125\(2\)](#), it must substantially affect the rights of the party against whom it was committed. On the other hand, [OEC 103\(1\)](#) provides that evidentiary errors at trial are not grounds for setting aside the verdict or reversing the judgment on appeal "unless a substantial right of the party is affected."

[Article VII \(Amend\), section 3, of the Oregon Constitution](#) provides in pertinent part:

" * * * If the Supreme Court shall be of the opinion, after careful consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court. * * * "

Although limited generally to trial courts by [ORCP 1 A](#), [ORCP 12 B](#) provides in pertinent part:

"The court shall, in every stage of an action, disregard any error or defect in the * * * proceedings which does not affect the *substantial rights of the adverse party*." (Emphasis added.)

4 Under [ORS 30.925\(1\)](#), a plaintiff in a products liability action may recover punitive damages when he or she proves the defendant acted with "wanton disregard for the health, safety and welfare of others." [ORS 30.925\(3\)](#) sets forth criteria to be used in determining the amount of punitive damages to be awarded to a prevailing plaintiff in a products liability action.

5 Although in theory jurors are not to award fees for counsel as part of plaintiffs' compensation, several studies suggest jurors apparently often discuss fees in their deliberations and occasionally adjust their damage awards with this factor in mind. Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law and Contemporary Problems 224, 241–42 (1989).

6 [OEC 311](#) provides in pertinent part:

"(1) The following are presumptions:

" * * * * *

"(j) Official duty as been regularly performed.

" * * * * *

"(x) The law has been obeyed."

7 See note 3, *supra*.

70 S.C. 254
Supreme Court of South Carolina.

DENNIS
v.
ATLANTIC COAST LINE R. R.

Nov. 28, 1904.

Synopsis

Appeal from Common Pleas Circuit Court of Florence County; Gage, Judge.

Action by Cornelia A. Dennis, administratrix of Frank McGowan, against the Atlantic Coast Line Railroad. From judgment sustaining demurrer to complaint, plaintiff appeals. Affirmed.

West Headnotes (3)

[1] **Death** What Law Governs

The provision in Lord Campbell's act of North Carolina, Code N. C. § 1498, that a failure to commence an action of wrongful death in one year should extinguish the right conferred by the statute applies to an action under the act brought in South Carolina.

[18 Cases that cite this headnote](#)

[2] **Death** Constitutional and Statutory Provisions

The act of North Carolina of 1897, Priv.Laws N.C.1897, p. 83, c. 56, giving a remedy for death by wrongful act to any employee of a railroad company operated in the state is only an enlargement of the Lord Campbell act, Code N.C. §§ 1498-1500, and must be construed with it.

[6 Cases that cite this headnote](#)

[3] **Action** What Law Governs

An action will lie in the state under a statute of a foreign state where its provisions are not contrary to those of the state, but, as to the extent of the remedy, plaintiff will be governed by the limitations of such foreign state.

[3 Cases that cite this headnote](#)

Attorneys and Law Firms

***869** W. F. Clayton, for appellant. Willcox & Willcox, for respondent.

Opinion

GARY, A. J.

Frank McGowan, a resident of South Carolina, was an engineer in the employment of the defendant, and was killed in North Carolina by the wreck of an engine he was running on the 10th November, 1900, more than one year before this action was commenced by his administratrix. It is alleged that the death of the intestate was caused by defects in the machinery and appliances he was operating, and that the defendant had notice of such defects.

An agreement between counsel is set out in the record, in which appears the following statement: "The issue is as to whether the plaintiff was barred of her right of action in this state, it being admitted that, under the Lord Campbell act of North Carolina, the action must be brought within one year, while in the state of South Carolina the limitation was two years, and that this action was brought after the lapse of one year and within two years; the object being to bring all matters before this court on this one appeal, and to save several appeals." The reason for the agreement was because this question would not otherwise at this time have been properly before the court.

The appellant contends that her action was brought under the statute of North Carolina passed in 1897; that it was

independent of the Lord Campbell act (Code N. C. §§ 1498, 1500); that its provisions were comprehensive enough to afford relief in this action; that the statute of limitations pertains merely to the remedy, and is governed by the *lex fori*. That statute is as follows: "Section 1. That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any servant or employee who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness or incapacity of any servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company." Priv. Laws N. C. 1897, p. 83, c. 56. The other section has no application to this case. The respondent contends that this statute is but an enlargement of the provisions of the Lord Campbell act; that they are *in pari materia*, and must be construed together; that the time within which the action must be brought under the Lord Campbell act is in no sense a statute of limitations; and that any facts that would have destroyed the right of recovery if the suit had been instituted in North Carolina will defeat the action in this state.

The Lord Campbell act of North Carolina is as follows: "Whenever the death of a person is caused by the wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executors, administrators, or collectors, and this notwithstanding the death, and although the wrongful act or neglect causing death, amount in law to felony." Code N. C. § 1498. The statute of 1897 has been declared by the Supreme Court of North Carolina, in the case of [Hancock v. N. & W. R. R.](#), 124 N. C. 222, 32 S. E. 679, to be constitutional. Our construction of the statute of 1897 is that it was merely intended to enlarge the provisions of the Lord Campbell act, that it was in the nature of an amendment to that act, and that they must be construed together.

This action could not have been maintained in North Carolina after more than one year had elapsed from the death of the person suffering the injury. In [Huntington v. Attrill](#), 146 U. S. 657, 670, 13 Sup. Ct. 224, 228, 36 L. Ed. 1123, the court says: "In order to maintain an action for an injury, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. *** But such is not

*870 the law of this court. By our law a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought." See, also, 16 Harv. L. Rev., No. 1, p. 63 (Nov., 1902). As we have a statute which gives an action for wrongfully causing death, it is not against public policy to enforce such a liability here, although it arose in another jurisdiction. [Stewart v. B. & O. R. R.](#), 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. When such a liability is enforced in a jurisdiction other than the place of the wrongful act, it does not mean that the act, in any degree, is subject to the *lex fori*, with regard either to its quality or its consequences. [Slater v. R. Co.](#), 194 U. S. 120, 126, 24 Sup. Ct. 581, 582, 48 L. Ed. 900. In the case last mentioned the court uses this language: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation—an obligation which, like other obligations, follows the person, and may be enforced wherever the person may be found. [Stout v. Wood](#), 1 Blackf. 71; [Dennick v. Central R. Co.](#), 103 U. S. 11, 18, 26 L. Ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation ([Smith v. Condry](#), 1 How. 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here, absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In [Northern P. R. Co. v. Babcock](#), 154 U. S. 190, 199, 38 L. Ed. 958, 961, 14 Sup. Ct. 978, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side, as quite inadmissible, the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

The two statutes of North Carolina must be construed together in determining the consequences of the wrongful act. The action in this state is incumbered with all the burdens arising out of either of said statutes. In [Taylor v. Cranberry Iron & Coal Co.](#), 94 N. C. 525, 526, the court thus construes the provision of the Lord Campbell act limiting the time within which the action must be brought: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be

lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun. The nature of the cause of action, when it occurred, and when this action began, plainly appeared from the complaint and summons; and, as more than a year elapsed after the death of the intestate, and before the bringing of the action, it is clear it cannot be maintained, and the judgment must therefore be affirmed.”

It is well settled in this state that the statute of limitations relates to the remedy, and is enforced according to the *lex fori*. *Sawyer v. Macaulay*, 18 S. C. 543. But the requirement that the action shall be commenced within one year after the party is killed is not a statute of limitations. At common law there was no right of action for death caused by wrongful act. The requirement as to the time of commencing the action is a part of the statute creating this right. It is incumbent on those seeking the benefit of the statute to show that their action conforms to all the requirements thereof, one of which is that the suit must be instituted within a certain time. In North Carolina the failure to commence the action within one year did not simply extinguish the remedy, but was an extinction of the right conferred by the statute. When such is the case the action cannot be maintained in this state. *Sawyer v. Macaulay*, 18 S. C. 543. The North Carolina decision is in

harmony with the principle announced in *Walker v. Chester County*, 40 S. C. 342, 18 S. E. 936. That case was an action under the statute which gave a right of action for damages caused by a defect in the repair of a highway. The statute contained a proviso limiting the right of action to cases, *inter alia*, where the plaintiff had not brought about his injury by his own act or negligently contributed thereto. There was a demurrer to the complaint on the ground that it failed to allege that the plaintiff did not in any way bring about her injury by her own act, or negligently contribute thereto. A county was not liable at common law in an action for injuries received from defects in the repair of a highway. This court held that the demurrer was properly sustained. Mr. Chief Justice McIver concurred on the ground that the conditions upon which the right is conferred must appear in the complaint, as otherwise no right of action is stated. These authorities are conclusive of the question under consideration.

It is the judgment of this court that the judgment of the circuit court be affirmed.

All Citations

70 S.C. 254, 49 S.E. 869, 106 Am.St.Rep. 746

18 S.C. 543
Supreme Court of South Carolina.

SAWYER, WALLACE & CO.

v.

MACAULAY.

Feb. 16th, 1883.

Synopsis

1. To permit this court to consider alleged errors of the Circuit judge in omissions to charge, it is absolutely necessary that the "Case" should show that he was requested so to charge.

2. The "Case" is the source of information for this court, and alleged errors which are not there disclosed cannot be considered.

3. Under the law of North Carolina, which makes an endorser a surety, unless it be otherwise clearly expressed, an endorsement for collection only, without change of ownership, does not make such endorser co-sureties with their prior endorser for value.

4. It is too sweeping a proposition that notes are illegal if they "arose directly or indirectly out of transactions in futures," and the Circuit judge committed no error in refusing so to charge.

5. Where the brief does not give the judge's charge to the jury, a detached fragment of the charge separated from its context cannot be held by this court to be erroneous.

6. Action on a note executed and payable in North Carolina is not barred in this State within the six years here allowed, although the limitation of actions as there prescribed is for a shorter period. The statute of limitations is applied according to the *lex fori*.

7. Ownership of a note alleged in the complaint and admitted in the answer, could not at the trial be questioned upon proof of an endorsement by plaintiffs to their attorneys for collection.

West Headnotes (8)

[1] **Contracts** 🔑 What law governs

The interpretation of contracts is governed by the *lex loci contractus*; remedies, by the *lex fori*.

3 Cases that cite this headnote

[2] **Gaming and Lotteries** 🔑 Investments; futures and options; bets on rise or fall of prices

It is too sweeping a proposition that notes are illegal, if they "arose directly or indirectly out of transactions in futures," and the Circuit judge committed no error in refusing so to charge.

[3] **Limitation of Actions** 🔑 What Law Governs

Action on a note executed and payable in North Carolina is not barred in this State within the six years here allowed, although the limitation of actions as there prescribed is for a shorter period. The statute of limitations is applied according to the *lex fori*.

5 Cases that cite this headnote

[4] **Commercial Paper** 🔑 As surety

Under the law of North Carolina, which makes an indorser a surety, unless it be otherwise clearly expressed, an endorsement for collection only, without change of ownership, does not make such endorser co-sureties with their prior endorser for value.

[5] **Commercial Paper** 🔑 Variance between pleadings and proof

Ownership of a note alleged in the complaint and admitted in the answer, could not at the trial be questioned upon proof of an endorsement by plaintiffs to their attorneys for collection.

[6] **Trial** 🔑 Necessity in General

To permit this court to consider alleged errors of the Circuit judge in omissions to charge, it is absolutely necessary that the “Case” should show that he was requested so to charge.

[1 Cases that cite this headnote](#)

[7] **Appeal and Error** 🔑 **Limitation by Scope of Record in General**

The “Case” is the source of information for this court, and alleged errors which are not there disclosed cannot be considered.

[1 Cases that cite this headnote](#)

[8] **Appeal and Error** 🔑 **Setting out instructions**

Where the brief does not give the judge's charge to the jury, a detached fragment of the charge separated from its context cannot be held by this court to be erroneous.

****1** Before COTHRAN, J., March, 1882.

***543** Action commenced February 5th, 1881. The opinion states the case.

Attorneys and Law Firms

Mr. S. P. Hamilton, for appellant.

Mr. T. C. Gaston, contra.

Opinion

The opinion of the court was delivered by

***544** MR. CHIEF JUSTICE SIMPSON.

This was an action on three notes executed by Stenhouse, Macaulay & Co., merchants doing business in Charlotte, N. C. The first was executed on July 28th, 1876, to the plaintiffs and payable at Merchants and Farmers National Bank, Charlotte, eighteen months after date. The second was dated October 24th, 1877, executed by the same parties and payable at the same bank, and the third bore date October 25th, 1877, executed by same parties and payable at same bank. All three of the notes were endorsed by the defendant by simply placing his name, “D. Macaulay,” on the back of each. Each note also

had the following endorsement by the plaintiffs: “Pay to J. H. McAden, president, or order. Sawyer, Wallace & Co.” This endorsement, at the trial, had on each been canceled by pen marks drawn through them; also on each was found at the trial, “Pay Patterson & Gaston, or order, for collection. Sawyer, Wallace & Co.” Patterson & Gaston were the attorneys who brought the action in the name of the plaintiffs.

At the close of plaintiffs' testimony, the defendant moved for a non-suit on the ground that, it appearing that the notes had been endorsed to Patterson & Gaston, the plaintiffs were not entitled to sue. The judge refused this motion, holding that plaintiffs having alleged ownership in their complaint, and this not being denied in the answer, the ownership must be taken as admitted. The verdict was for the plaintiffs, the amount of the notes, to wit, \$1,720.62.

The defendant is now before this court upon six exceptions, four of which assign error in the refusal of the judge to charge certain propositions; the fifth, because his Honor did not allow J. E. Stenhouse, one of the firm, to testify as to the character and business of buying and selling futures and the custom of trade in connection with such transactions generally, and the sixth, because his Honor erred in not deciding that the note for \$645.10 (the first note mentioned), being barred in North Carolina before the commencement of this action, the plaintiffs could not recover; and, also, in arrest of judgment, because the three notes being endorsed by Sawyer, Wallace & Co., the plaintiffs, ***545** to Patterson & Gaston, for collection, the plaintiffs could not maintain an action in their own names as owners and holders.

As to the first four and sixth exceptions, which involve errors of omission to charge, we do not find anywhere in the “Case” or “Brief” that the questions there raised were brought to the attention of the judge by request to charge. This, under our decisions, was absolutely necessary so as to permit this court to consider them, and especially does it become the duty of the court to deny consideration when the objection is interposed by the respondent claiming his legal rights. In *Madsden v. Phoenix Fire Ins. Co.*, 1 S. C. 29, Mr. Justice Willard said: “The third ground of appeal is insufficient so far as it is based upon the failure of the judge to charge certain propositions therein set forth for want of a request to charge, as was the case in reference to the second ground. If counsel desire to bring any view of the law of a case to the attention of the jury, they must make such view the subject of a request to charge, and, failing in this, they cannot allege error. The maintenance of this rule is essential to a correct and careful administration of justice when the appellate court is limited to a consideration

of exceptions on points of law, and cannot look into the whole case to see that substantial justice has been done between the parties.”

****2** In *Abrahams v. Kelly and Barrett*, 2 S. C. 238, the same justice, speaking for the court, said: “It does not appear that the second proposition was brought to the notice of the Circuit judge at the trial. It was not touched upon in the charge, nor was there any request to charge made in respect to it. The presiding judge is not bound to submit any particular proposition of law unless his attention is called to it and a request made to that effect. However important to the case such a proposition may be, error cannot be alleged unless, after request, he has refused to submit it. Nor is a misstatement of the law error unless his attention is called to it and he neglects or refuses to correct it. It is the office of exceptions to bring before this court only such matters of law as were the subject of contest upon the trial.”

In *Fox v. Railroad Co.*, 4 S. C. 543, it was held that a failure ***546** to charge a particular proposition of law could not be assigned as error unless the judge on request declines so to charge, and the court said, when such an objection is insisted upon on behalf of the respondent, the court must necessarily regard it.

The same principle was held and enforced in the late case of *Sullivan v. Jones*, 14 S. C. 365, where Mr. Justice McIver said: “All of these grounds except the first, second and third complain of omission to charge upon points which, so far as the ‘Case’ discloses, were not brought to the attention of the judge during the trial, either by request to charge or otherwise, and therefore are not properly before us.”

Neither do we find anything in the “Case” to sustain the fifth exception. If the presiding judge limited or curtailed J. E. Stenhouse “in his testimony as to the character and business of buying and selling futures, or the custom of trade in connection with such transactions generally,” the “Case” submitted fails to show it and it is not admitted by respondent. In fact it is denied in respondent's argument. The only statement we have is found in the exception raising the question. This the court cannot regard. The “Case” is the source of our information as to what occurred below; its very object is to inform the court authoritatively of the legal questions contested below, and of the facts pertaining thereto. This court has held that as to these matters it confines itself to the “Case.” *Sheriff v. Welborn*, 14 S. C. 480. And it cannot consider statements in exceptions not found in the “Case.” The defects in an appeal herein are fatal, especially

where the respondent not only fails to admit the statements in exceptions, but denies their existence and demands the legal consequences applicable.

The court, however, could not but regret that an appeal should terminate in this way if there was merit therein which, if otherwise presented and in accordance with the rules in such cases, might have been successful. We have therefore, *ex gratia*, considered the exceptions so far as to be satisfied that no injustice will be done, or the rights of parties lost or defeated by enforcing the principles which the cases cited require.

****3** The first two exceptions complain that the presiding judge failed to charge that under the law of North Carolina, where ***547** the notes were executed, D. Macaulay, the defendant, and Sawyer, Wallace & Co. were joint sureties by virtue of the endorsements made respectively on said notes, and therefore no action could be sustained by the plaintiffs against defendant, except for his aliquot portion of the amount paid by plaintiffs. The statute of North Carolina referred to, provides that “whenever any bill or negotiable bond or promissory note shall be endorsed, such endorsement, unless it shall be otherwise plainly expressed therein, shall render the endorser liable as surety to any holder of such bill, bond or promissory note, and no demand on the maker shall be necessary previous to an action against the endorser; provided, that nothing herein shall in any respect apply to bills of exchange, inland or foreign.” The character of the endorsements by these parties has already been stated. The endorsement of the defendant was his name on the back without more; that of the plaintiffs was a direction to pay the president of the bank at which the notes were made payable, which was afterwards canceled.

While no doubt the act above referred to made the defendant a surety to the makers, dispensing with notice of demand, we do not think it had this effect upon the plaintiffs. The character of their endorsement excludes this idea, and, in the language of the act, “otherwise plainly expresses” its purpose. The notes were payable at the bank of which McAden was president, and the object of the plaintiffs' endorsement was to enable Mr. McAden to collect them. There was no evidence that they were discounted by the bank, or that the ownership was ever changed. It would have been error therefore for the judge to have charged as suggested.

The third exception assigns error, “because his Honor refused to charge that if the jury believes the cause of the losses which are the consideration of the notes, arose directly or

indirectly from the transactions in futures, such transactions are illegal and the plaintiffs cannot recover, and that he did charge that contracts in futures, so called, may be legitimate.” Even upon the assumption that contracts in what are known in commercial circles as “futures” are illegal, as gambling transactions or against public policy, or violative of the North Carolina act of *548 1788, yet the judge could not have legally charged in the broad terms indicated in this exception, that if the notes arose “directly or indirectly,” &c. This would cover any and all connection, the most immediate as well as the most remote, the guilty as well as the innocent. This would have been too sweeping.

As to the latter part of this exception, “that the judge did charge, that contracts in futures, so called, may be legitimate,” we do not know in what connection this was said. The charge of the judge is not set out in the case, either in whole or in part, and in the absence of explanation or connection, and all information as to its application, it would be unjust to the Circuit judge for this court to attempt to pass upon a detached fragment of his charge like this. Besides, the necessary information is not before us. We do not intend, however, to intimate that contracts based on the sale or purchase of futures, would be legal. But we do not think that this distinct question has been sufficiently raised in this case to authorize us to consider it, and therefore it has not been adjudged.

****4** The fourth exception involves a question of fact, to wit, the force and effect of testimony, which was a matter for the jury and not the judge.

As to the fifth, as has been stated, we are not informed of the precise ruling of the judge upon this subject; nor does the “Case” show what connection a general history “of the character and business of buying and selling futures, and the custom of trade in connection with such transactions,” had with the case at bar. The object of testimony is to evolve facts pertinent to the issue in contest, and within the knowledge of the witness as applicable thereto. How far the general business of buying futures was involved in this case, we can not tell, and, if involved, whether Mr. Stenhouse was a sufficient expert to be authorized to speak generally upon the subject, we are not informed. We must leave this exception, therefore, as we find it. Any special fact bearing on the case and within the knowledge of Mr. Stenhouse, he was competent to prove, but testimony by him on the subject of futures and the usage and custom of trade therein “generally,” it appears to us would have been irrelevant.

***549** Sixth. “Because his Honor erred in not deciding that the note for \$645.10, being barred in the statutes of North Carolina before the commencement of this action, the plaintiffs could not recover on the third cause of action.” Even if the proposition of law contained in this exception was correct, yet the judge before charging it was required to assume that the facts upon which it rested had been proved. This he could not do, as the facts are alone for the jury. But is the proposition a sound one? In *Levy v. Boas*, 2 Bail. 217, the court held generally, that the limitation of actions is of the *lex fori*, not of the *lex loci contractus*, and in that case where the debt had not been barred in Pennsylvania, the place of the contract, yet in this State where the period of limitation was shorter, that period having elapsed, it was held barred. We can see no reason, where the facts are reversed, why the same rule should not prevail. The underlying principle is that the *lex fori* shall govern as to the remedy and its enforcement, and if in either case the *lex fori* is invoked, the same principle should control.

If the statute paid or destroyed the debt, then when once barred in any State, it would be gone forever and in all places; but this is not the theory of the statute of limitations. It does not pay the debt; it only suspends the remedy. This may take place in one State, while in another the active energy of the remedy may not be impaired in the least. The case of *Morton & Co. v. Naylor*, 1 Hill 439, does not touch the question. There the point was as to the effect of a judgment in another State, whether it could be regarded in this State as a debt of record, and, like judgments here, not subject to the plea of the statute. The court held that it would rank here in that respect as in the State where obtained, and if the statute could not be pleaded there it could not here.

****5** Mr. Angell on Limitations, page 69, section 65, says: “Equally well settled is the doctrine that remedies on contracts are to be regarded and pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made.” He states further that upon the question being made before Lord Ellenborough, in *Williams v. Jones*, 13 East 439, that learned jurist said: “It is said that parties who have contracted abroad return to this country with the same rights only which they had in the country where they are contracted, and, generally speaking, that is so—that is, if the rights of the contracting parties be extinguished by the foreign law by the happening of certain events. But here there is only an extinction of the remedy in the foreign court according to the law stated to be received there, but no extinction of the right; and there is no law

or authority that where there is an extinction of the remedy only in the foreign court, that shall operate by comity as an extinction of the remedy here also. If it go to the extinction of the right itself, the case may be different.”

Mr. Justice Story, in *Leroy v. Crowninshield*, 2 Mason 151, stated the inclination of his mind to be the other way, on the supposition that where the debt was barred by the *lex loci*, this amounted to a virtual extinction of the right in that place, which ought to be recognized in every other tribunal as of equal validity; but this learned judge admitted that the current of authority was too strong against him to be resisted. In *Townsend v. Jemison*, 9 How. 407, found cited in a note to Angell, page 76, the question underwent thorough examination, with the inclination of Judge Story's mind above referred to before the court, and pressed upon it, the direct question being, whether the cause of action having accrued in Mississippi and been completely barred there, the bar of the Mississippi statute might not be pleaded in a court of Louisiana. The court said: “The rule in the courts of the United

States in respect to pleas of the statute of limitations has always been that they strictly affect the remedy and not the merits.” See, also, *McElmoyle v. Cohen*, 13 Pet. 312. Under these authorities it would have been error for the Circuit judge to have charged as suggested in this exception.

As to the matter relied on in arrest of judgment, we are satisfied with the reasoning of the Circuit judge when he refused the motion of non-suit made on the same ground at the trial. The ownership of the note was a question of fact; this was alleged in the complaint to be in the plaintiffs and not denied in the *551 answer; this, we think, was sufficient, and could not be over-thrown by the qualified endorsement to the attorneys for collection.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

All Citations

18 S.C. 543, 1883 WL 4841

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

828 Fed.Appx. 858

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1. United States Court of Appeals, Fourth Circuit.

Justin DRISKELL, Plaintiff – Appellee,

v.

SUMMIT CONTRACTING GROUP,
INC., Defendant – Appellant.

Justin Driskell, Plaintiff – Appellant,

v.

Summit Contracting Group,
Inc., Defendant – Appellee.

No. 19-1456, No. 19-1497

|

Argued: May 28, 2020

|

Decided: September 24, 2020

Synopsis

Background: Employee, a former assistant superintendent for construction projects, brought action against employer, a general contractor, for retaliatory termination in violation of North Carolina's Retaliatory Employment Discrimination Act (REDA) and wrongful discharge under North Carolina common law. Following jury trial, at which jury found in favor of employee on both claims, the United States District Court for the Western District of North Carolina, [Frank D. Whitney](#), Chief Judge, [325 F.Supp.3d 665](#), denied employer's motions for judgment as a matter of law (JMOL) and new trial, and, subsequently, [2019 WL 1412948](#), entered judgment in favor of employee, awarding him \$195,000 in trebled compensatory damages and \$441,600 in attorney fees under REDA. Employer appealed and employee cross-appealed.

Holdings: The Court of Appeals, [Diaz](#), Circuit Judge, held that:

[1] sufficient evidence supported finding that employer fired employee;

[2] REDA protected employee's internal complaints about workplace safety violations;

[3] employer's belief employee would file workers' compensation claim was prohibited motivation for termination under REDA;

[4] employee sufficiently exhausted administrative remedies for REDA claim;

[5] sufficient evidence supported finding that employer's decision to fire employee was caused by employee's protected conduct;

[6] sufficient evidence supported finding that employer's executives acted with malice or conscious disregard for employee's right to engage in protected activity; and

[7] punitive damages for common-law wrongful discharge were not duplicative of attorney fee award under REDA.

Affirmed in part, reversed in part, vacated in part, and remanded.

[Traxler](#), Senior Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes (8)

[1] **Labor and Employment** 🔑 Exercise of rights or duties; retaliation

Sufficient evidence supported finding, in employee's action against employer for retaliatory discharge in violation of North Carolina's Retaliatory Employment Discrimination Act (REDA), that employer terminated employee's employment, where employer deactivated employee's work-issued devices, employer's president and project manager failed to respond to employee's attempts to contact them after project manager asked employee to return his work tools, no one directed employee to continue working for

employer when he returned his work-issued devices, employer's internal emails showed it intended to terminate employee, and employee never communicated present intent to quit. *N.C. Gen. Stat. Ann. § 95-241(a)*.

[2] Labor and Employment 🔑 Protected activities

Employee's internal communications to his employer about workplace safety were protected from retaliation under North Carolina's Retaliatory Employment Discrimination Act (REDA), where employee's statements that coworker assaulted employee and was present at work site while intoxicated constituted allegations of violations of Occupational Safety and Health Act of North Carolina (OSHANC), employee's statements led to internal investigation into coworker's drinking, employee's complaints focused on workplace safety, and employee made complaints to employer's president and chief executive officer (CEO) rather than to mere supervisor or manager. *N.C. Gen. Stat. Ann. §§ 95-129(1), 95-241(a)*.

[3] Labor and Employment 🔑 Motive and intent; pretext

Employer's belief that employee would file workers' compensation claim was prohibited motivation for terminating employee under North Carolina's Retaliatory Employment Discrimination Act (REDA), even if employee did not actually file or threaten to file workers' compensation claim; REDA's language, protecting any employee who "threatens to file" a workers' compensation claim, broadly prohibited employer from firing employee based on its subjective anticipation or belief that employee would file workers' compensation claim. *N.C. Gen. Stat. Ann. § 95-241(a)*.

[4] Labor and Employment 🔑 Exhaustion

Employee's filing of written complaint with Commissioner of Labor alleging that he was discharged in retaliation for reporting violations

of Occupational Safety and Health Act of North Carolina (OSHANC) was sufficient to exhaust his administrative remedies for his subsequent claims that employer terminated him in violation of North Carolina's Retaliatory Employment Discharge Act (REDA) as retaliation for filing workers' compensation claim, as well as in retaliation for reporting OSHANC violations; REDA administrative exhaustion provisions did not require REDA action to be based upon same theory of retaliation supporting administrative complaint. *N.C. Gen. Stat. Ann. §§ 95-241(a), 95-242(a), 95-243*.

1 Cases that cite this headnote

[5] Labor and Employment 🔑 Exercise of rights or duties; retaliation

Sufficient evidence supported finding that employer's decision to terminate employee was caused by employee's workplace safety complaints and employer's belief employee would file workers' compensation claim, as necessary to support employee's retaliation claims under North Carolina's Retaliatory Employment Discrimination Act (REDA), where internal emails showed employer's strategizing about how to fire employee so as to avoid appearance of illegality, employer's officers characterized employee's complaints as a "scam," employer's investigation of workplace safety complaint was lackluster, employer failed to punish coworker for assaulting employee, and chief administrative officer was generally hostile to workplace accident reports and workers' compensation claims. *N.C. Gen. Stat. Ann. § 95-241(a)*.

[6] Labor and Employment 🔑 Particular cases in general

Employer's termination of employee for internally complaining about violations of Occupational Safety and Health Act of North Carolina (OSHANC) constituted wrongful termination under North Carolina common law, where employer's conduct also constituted retaliation for employee's protected activity

under North Carolina's Retaliatory Employment Discrimination Act (REDA). [N.C. Gen. Stat. Ann. §§ 95-129\(1\), 95-241\(a\)](#).

1 Cases that cite this headnote

[7] **Labor and Employment** 🔑 Exercise of rights or duties; retaliation

Sufficient evidence supported finding that, in firing employee in retaliation for his workplace safety complaints and possible workers' compensation claim, employer's executives acted with malice toward employee or with conscious disregard for his right to engage in activity protected under North Carolina's Retaliatory Employment Discrimination Act (REDA), as necessary to support punitive discharges for employee's wrongful discharge claim under North Carolina common law, where executives refused to seriously investigate employee's allegations that coworker assaulted him or to punish coworker, executive was hostile toward accident reports and workers' compensation claims, and executives were on email chain in which internal investigator said he had personal motivations to fire employee. [N.C. Gen. Stat. Ann. §§ 1D-5\(5\), 1D-5\(7\), 1D-15\(c\), 95-241\(a\)](#).

[8] **Election of Remedies** 🔑 Causes of action and remedies subject to election

Labor and Employment 🔑 Exemplary or punitive damages

Labor and Employment 🔑 Attorney fees

Award to employee of punitive damages on his wrongful discharge claim under North Carolina common law served wholly different interests and was based on different conduct than award to employee of attorney fees for his retaliation claim under North Carolina's Retaliatory Employment Discrimination Act (REDA), and, thus, doctrine of election of remedies did not preclude employee from recovering both punitive damages and attorney fees; punitive damages were designed to punish willful misconduct and deter others from committing similar acts, whereas REDA's

attorney fee provision served to encourage private enforcement of its ban on discrimination and retaliation rather than to punish employers, and REDA authorized reasonable attorney fees regardless of employer's conduct. [N.C. Gen. Stat. Ann. §§ 1D-15\(a\), 95-243\(c\)](#).

***860** Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. [Frank D. Whitney](#), District Judge. (3:16-cv-00819-FDW-DCK)

Attorneys and Law Firms

ARGUED: [Reginald Wayne Belcher](#), Columbia, South Carolina, [Richard Taylor Speer](#), TURNER, PADGET, GRAHAM & LANEY, PA, Greenville, South Carolina, for Appellant/Cross-Appellee. [Joshua Reed Van Kampen](#), [Nicole Katherine Haynes](#), VAN KAMPEN LAW, PC, Charlotte, North Carolina, for Appellee/Cross-Appellant. ON BRIEF: [Laura J. Wetsch](#), WINSLOW & WETSCH, PLLC, Raleigh, North Carolina, for Appellee/Cross-Appellant.

Before [DIAZ](#) and [THACKER](#), Circuit Judges, and [TRAXLER](#), Senior Circuit Judge.

Opinion

Affirmed in part, reversed in part, vacated in part, and remanded by unpublished opinion. Judge [Diaz](#) wrote the majority opinion, in which Judge [Thacker](#) joined. Senior Judge [Traxler](#) wrote a separate opinion concurring in part and dissenting in part.

Unpublished opinions are not binding precedent in this circuit.

[DIAZ](#), Circuit Judge:

In this case, a jury found that Summit Contracting Group violated North Carolina law by firing Justin Driskell as retaliation, either (1) for his complaints about workplace safety or (2) because Summit believed that he would file a workers' compensation claim. Summit appeals, arguing that it was entitled to judgment as a matter of law or a new trial, and that the ***861** jury's punitive-damages award wasn't supported by the evidence. Driskell cross-appeals, contending that the district court erred by not increasing the jury's compensatory damages award to reflect the full amount

of back pay that he's owed and by requiring him to elect between punitive damages and attorney's fees.

We affirm with respect to Summit's appeal because a reasonable jury could have found for Driskell on the merits and awarded him punitive damages. With respect to Driskell's cross-appeal, we hold that he failed to preserve his back-pay request for appellate review by not raising it before the district court in a timely fashion. However, we reverse the district court's order requiring Driskell to elect between punitive damages and attorney's fees, as the two awards serve different interests and aren't based on the same conduct. We vacate that portion of the judgment, and remand for the district court to enter judgment for Driskell for punitive damages, attorney's fees, and untrebled compensatory damages.

I.

This appeal arises from a motion for judgment as a matter of law, so we recite the facts with all reasonable inferences drawn in favor of the non-movant, Driskell. See *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727 (4th Cir. 1999).

A.

Summit is a general contractor that manages construction projects. On June 4, 2015, Summit hired Driskell as an Assistant Superintendent and promptly assigned him to a project in Charlotte, North Carolina. He reported to Superintendent Daniel Rhyner, who in turn reported to the Project Manager, Steve Fudge. Driskell's father, Tom Driskell, had been a senior Summit employee for years.

In June and July 2015, Driskell noticed that Rhyner frequently drank alcohol at lunch and returned to work intoxicated, occasionally acting belligerently. One day, Rhyner drunkenly brandished a handgun at the job site. Summit's policies prohibit visiting a job site after drinking or while carrying a gun.

Driskell reported Rhyner's drinking to more senior employees several times. During his first week at the Charlotte project, he complained to Fudge that it was a safety issue. Fudge relayed this complaint to Marc Padgett, Summit's president and chief executive officer. Tom Driskell also relayed his son's complaints to Padgett's wife, Nicole Padgett, who was Summit's chief administrative officer. The Padgetts, however,

suspected that the Driskells were scheming to file a "bogus lawsuit" against Summit. J.A. 1648.

On the night of July 16, 2015, Justin Driskell ran into Rhyner, who was drunk, in the parking lot of a hotel where many employees were staying. They argued about a workplace safety issue, at which point Rhyner angrily told Driskell to pack his things and leave the job site.

Later that night, Driskell spoke with Mr. Padgett on the phone and complained again about Rhyner's drinking on the job. Padgett told Driskell to disregard what Rhyner had said about leaving the job site and that he would send a senior employee, Tom Born, to Charlotte to investigate Driskell's complaints. After the call, Rhyner apologized to Driskell. Mr. Padgett also alerted Rhyner that Born was coming to investigate the Driskells' allegations about his drinking.

On July 18, Born met with Rhyner and told him that the Driskells had complained about him. Born also asked a few employees whether they had seen Rhyner drink at the job site, which none of them had. He *862 didn't test Rhyner for drugs or alcohol, check his company credit card receipts (which reflected purchases of alcohol), or ask anyone if they had seen Rhyner drink at lunch, as Driskell had alleged.

Born then met with Driskell. He asked no questions about Rhyner's drinking. Instead, he told Driskell to stop telling people what was going on at the job site, and that whatever happened at the job site should stay there. Born then took Rhyner and other employees (but not Driskell) out to lunch, buying Rhyner two beers. This wasn't a violation of company rules because Rhyner wasn't going back to work after lunch.

The next day, Born sent a report to Mr. Padgett, concluding that Driskell was "a good kid" but needed to "grow a pair of balls." J.A. 2585. Mr. Padgett agreed.

The day after that (July 20), Driskell saw Rhyner, who appeared drunk, in the hotel parking lot. At Rhyner's insistence, the two had a beer together. Rhyner then said that he was removing some employees from the team that Driskell supervised, and that Driskell's team needed to increase its production (even though it would have fewer members). In response, Driskell said that pushing his team any harder would create safety issues. The two argued about this and cursed each other.

According to Driskell and an eyewitness, Driskell then turned toward his truck to leave. Rhyner followed him and punched him in the face repeatedly. Driskell didn't throw a punch, but wrestled with Rhyner, threw him over his head, and put him in a headlock. Neither party was hurt seriously, although Rhyner had to wear a neck brace for two weeks. During the fight, Rhyner told Driskell, "You're fired." J.A. 1073.

Later that evening, Driskell spoke to Mr. Padgett on the phone. Padgett told Driskell that he wasn't fired and that Rhyner lacked the authority to fire him. Driskell replied that he would quit if Rhyner remained at Summit.¹ Padgett didn't respond to that threat. Driskell also met with Fudge that night, who asked Driskell to return his work tools. Driskell expressed confusion about why he had to do that, as he planned to continue working at Summit, but he ultimately complied.

That same night, Driskell filed a criminal complaint against Rhyner—even though Fudge and Padgett had discouraged him from doing so—which led the police to charge Rhyner with assault.² Driskell also visited the emergency room for medical treatment. The doctor examining him said that he could return to work three days later (July 23).

The next morning, Mrs. Padgett emailed her husband and several other employees, writing: "We need to find out what steps to take next because Tom and Justin [Driskell] are plotting a bogus lawsuit that I sniffed out almost two weeks ago. This whole thing was planned." J.A. 2699. She later followed up to write that Tom Driskell "orchestrated this entire scam" with "the intent to screw Marc [Padgett] out of 5 MIL...." J.A. 2698.

Driskell took the next two days off and drove to Columbia, South Carolina, where his father lived and where Summit had another work site. He planned to return to work on July 23, but wasn't sure which work site he should report to, as he had *863 been receiving "conflicting information" (presumably from his father) on this point. J.A. 1095. Driskell had no paid or unpaid leave time available, so if he was still employed by Summit on July 21 and 22, he was breaking the company's rules by missing work.

Over those two days, Driskell called and texted Fudge repeatedly, seeking clarity on where he should report to work. Fudge didn't answer. On July 22 at 3:37 p.m., Driskell emailed Fudge and Mr. Padgett, saying: "Steve you have refused my calls and text message[s.] [A]fter tomorrow my [doctor] has

cleared me to go back to work[,] please advise what I'm suppose[d] to do." J.A. 2703 (cleaned up). Padgett promptly forwarded this message to his wife, who started a group email thread that included her husband, Born, and Zach Graham (another employee).

At 4:23 p.m. on July 22, Mrs. Padgett explained in the group thread that she told Fudge not to respond to Driskell "before we knew the plan from the attorney." J.A. 2702. The next day, the group debated via email which of them should "give [Driskell] the boot." J.A. 2702. Born wrote, "I think Zach was the designated terminator because Steve and I would have personal motivations to Fire [sic] him ..." J.A. 2701. Fudge also noted that Driskell still had his company phone and iPad, and asked Graham to collect Driskell's devices. But notwithstanding this conversation, no Summit employee (except for Rhyner back on July 20) ever told Driskell that he was fired.

Driskell's company-issued phone and iPad were deactivated on July 22, shortly after he had emailed Fudge and Mr. Padgett. At trial, he testified that he "knew at that point that [he] had been terminated and that it was not going to be reversed." J.A. 1216. Nevertheless, he texted Fudge the following message from his personal phone later that evening: "Still haven't heard any word as to what you need me to do. Please give me a call." J.A. 2706. Fudge never responded.

The next afternoon (July 23), Driskell turned in his company-issued devices at the Columbia job site. He explained at trial that he did so because he "knew ... that [he] had been fired and that if [he] kept company property that [he] could be prosecuted for theft." J.A. 1098.

About a month later, Driskell applied for a new job at another company. On the application, he checked a box indicating that he had never been "fired from a job." J.A. 1204. At trial, Driskell explained that this was a lie to improve his chances of getting the new job.

B.

In January 2016, Driskell filed a complaint with the North Carolina Department of Labor. He alleged that he was fired because of his complaints about Rhyner and his refusal (for safety reasons) to follow Rhyner's instructions to increase his team's production, and because he "became a threat, risk or liability to the Company after Mr. Rhyner attacked [him]."

J.A. 78. After the Labor Department declined to investigate his complaint, Driskell asked for and received a right-to-sue letter.

Driskell then filed this suit, bringing claims for, as relevant here, retaliatory termination in violation of North Carolina's Retaliatory Employment Discrimination Act ("REDA") and wrongful discharge in violation of North Carolina common law. He alleged two theories for why Summit fired him: (1) because of his complaints about Rhyner's drinking and their fight, and (2) because Summit believed that he would file a workers' compensation claim *864 due to his injuries from his fight with Rhyner.

Discovery yielded evidence that Summit has exhibited hostility toward other workplace safety reports and workers' compensation claims. For example, Mrs. Padgett once complained about having to document a workplace accident; she instructed employees to put medical bills on company credit cards rather than open workers' compensation claims; and Summit would screen potential employees for their workers' compensation claim history.

A jury trial ensued. The jury found that Summit had fired Driskell and, in doing so, violated REDA and North Carolina common law. The jury didn't specify which of Driskell's two theories of retaliation it accepted. It also awarded Driskell \$65,000 in compensatory damages (representing his lost wages and benefits) for his two claims (which he could collect only once) and \$681,000 in punitive damages on the wrongful-discharge claim.

The district court denied Summit's motions for judgment as a matter of law and for a new trial, in which Summit argued that the verdict was unsupported by the evidence and criticized the court's jury instructions regarding the types of activity that REDA protects. Further, the court denied Driskell's motion to amend the judgment without addressing Driskell's request that the court increase his compensatory award to reflect additional lost back pay. Driskell hadn't included this request in his motion to amend the judgment (which he had filed in a timely fashion), but rather in a response to one of Summit's motions, which Driskell filed 38 days after the judgment was entered.

Later, the court held that Driskell was required to choose between a \$250,000 punitive-damages award³ for the wrongful-discharge claim and attorney's fees under REDA.⁴ The court reasoned that North Carolina law prevents

duplicative remedies, *see United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374, 379 (1993), and that the award of punitive damages and attorney's fees were based on the same conduct (namely, Summit's retaliatory firing). Driskell then chose to forgo punitive damages, collecting \$195,000 in trebled compensatory damages⁵ and \$441,600 in attorney's fees.

Both parties appealed.

II.

We first address Summit's appeal, which raises several issues of North Carolina *865 law. In ruling on these issues, we must predict how the Supreme Court of North Carolina would rule, *Stahle v. CTS Corp.*, 817 F.3d 96, 100 (4th Cir. 2016), and follow any "fully reasoned holding" by the North Carolina Court of Appeals unless we are "convinced that the state's highest court would not follow that holding," *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003 (4th Cir. 1998) (cleaned up).

A.

First, Summit insists that it was entitled to judgment as a matter of law on Driskell's REDA and wrongful-discharge claims because it never fired him; rather, he quit. We must affirm the district court unless no reasonable jury could have ruled for Driskell. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002).

As relevant here, REDA provides that:

No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to ... [f]ile a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to [the Occupational Safety and Health Act of North Carolina ("OSHANC") or the North Carolina Workers' Compensation Act].

N.C. Gen. Stat. § 95-241(a). To prevail on a REDA claim, a plaintiff must show that (1) he exercised his right to engage in protected activity; (2) he suffered an adverse employment action; and (3) a causal connection exists between his exercise of the protected activity and the retaliatory action. *Edwards v. PCS Phosphate Co., Inc.*, 812 F. Supp. 2d 689, 693 (E.D.N.C.

2011) (citing *Brckett v. SGL Carbon Corp.*, 158 N.C.App. 252, 580 S.E.2d 757, 762 (2003)). And a wrongful-discharge claim requires a plaintiff to “identify a specified North Carolina public policy”—here, the policy against retaliation codified in REDA—“that was violated by an employer in discharging the employee.” *McDonnell v. Guilford County Tradewind Airlines, Inc.*, 194 N.C.App. 674, 670 S.E.2d 302, 305 (2009) (cleaned up).

As an initial matter, we note that North Carolina law provides no legal standard for determining whether an employee was fired or quit. Relatedly, we have found no authority requiring that an employer expressly tell an employee that he's been fired.

[1] With that in mind, we conclude that the evidence supports a finding that Summit fired Driskell on either July 22 or July 23, 2015. Most significantly, Summit deactivated Driskell's work-issued devices on July 22. Fudge and Padgett also didn't respond to Driskell's attempts to contact them on July 21 or 22, and Fudge had asked Driskell to return his work tools on the night of July 20. And when Driskell returned his work-issued devices on July 23, no one directed him to continue working at Summit or told him that Summit mistakenly deactivated his devices. A reasonable person in Driskell's position would have understood that he had been terminated, and Summit's internal emails on July 22 and 23 prove that it did in fact intend to terminate Driskell, despite Padgett's statement on July 20 that Driskell wasn't fired.

At no point did Driskell quit his job. While he did tell Mr. Padgett on July 20 that he *would* quit if Rhyner remained employed by Summit, threatening to quit and actually doing it are two different things. And while he also broke Summit's rules by missing work on July 21 and 22, he did so only because his doctor told him to, and in any event, breaking an employer's rules doesn't necessarily signify an *866 intent to quit. Indeed, Rhyner violated Summit's rules by taking two weeks off from work after his fight with Driskell, and yet he received no punishment and continues to work for Summit.

Nor does Driskell's statement on a job application that he had never been fired doom his claims. To the contrary, a reasonable jury could credit his explanation that he lied to help his chances of getting a new job. Statements on job applications aren't binding admissions, contrary to what Summit argues. The case Summit points to, *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510 (4th Cir. 2006), doesn't support that proposition. There, in ruling against a plaintiff, we relied

on the plaintiff's “fail[ure] to present any evidence genuinely disputing” the fact that he had admitted in a job application. *Id.* at 519. Here, Driskell did present such evidence.

B.

Next, Summit contends that REDA doesn't protect internal complaints to one's own employer. So, Summit argues that it is entitled to judgment as a matter of law because, even if Summit did fire Driskell for his complaints to Mr. Padgett, that couldn't support a REDA claim.

Whether REDA protects Driskell's complaints is a question of law, see *Pierce v. Atlantic Grp., Inc.*, 219 N.C.App. 19, 724 S.E.2d 568, 573–75 (2012) (treating as a legal question whether REDA protected a plaintiff's communications with his supervisors regarding work safety issues), which we review de novo, see *Equinor USA Onshore Properties Inc. v. Pine Res., LLC*, 917 F.3d 807, 813 (4th Cir. 2019). We agree with the district court that, while REDA doesn't protect *every* internal complaint about workplace safety, it does protect Driskell's complaints to Mr. Padgett.

By its terms, REDA protects employees who “initiate any inquiry [or] investigation ... or provide information to any person with respect to” OSHANC. N.C. Gen. Stat. § 95-241(a). “The Supreme Court of North Carolina has not ruled whether an internal complaint is a protected activity under REDA.” *Hadley v. Duke Energy Progress, LLC*, 677 F. App'x 859, 861 (4th Cir. 2017) (per curiam).

The Court of Appeals of North Carolina, however, has indicated that some internal complaints *are* protected. In *Pierce*, the court found “persuasive” a district court holding that REDA protected a plaintiff's communications to an internal auditor about an ongoing investigation into health and safety practices. 724 S.E.2d at 574–75 (citing *Jurrisen v. Keystone Foods, LLC*, No. 1:08-CV-128, 2008 WL 3925086, at *5–6 (M.D.N.C. Aug. 20, 2008)).

And in a later case, the Court of Appeals found that REDA would protect plaintiffs who were allegedly fired for photographing unsafe working conditions and complaining about those conditions to their boss, who replied that he wasn't interested in such complaints. *Bigelow v. Town of Chapel Hill*, 227 N.C.App. 1, 745 S.E.2d 316, 324 (2013). The court reasoned that REDA's “primary purpose ... is to ensure that

employees are not discouraged from reporting violations of OSHANC.” *Id.* at 325 (cleaned up).

On the flip side, the Court of Appeals has also recognized “that merely talking to an internal supervisor about potential safety concerns is not a ‘protected activity’ under REDA.” *Pierce*, 724 S.E.2d at 574 (quoting *Jurrissen*, 2008 WL 3925086, at *5). For instance, the plaintiff in *Pierce* proposed to his supervisors a process by which the company might comply with new safety regulations, raising it on a weekly basis for about a month without ever getting a response. *Id.* at 571.

***867** The Court of Appeals found that such activity was not protected because the plaintiff “spoke only to his supervisors” and “there was no evidence of an investigation” into the defendant’s practices. *See id.* at 575; *see also Hadley*, 677 F. App’x at 862 (noting *Pierce*’s recognition that “while REDA does not require filing a formal claim, it does require more than simply complaining to a manager”). While the Court of Appeals didn’t explain why it mattered that the plaintiff spoke only to his supervisors, we suspect that it’s because employees do that in the ordinary course. An employee who mentions an OSHANC issue to a supervisor won’t typically be seeking to assist or initiate an “inquiry” or “investigation,” which is what REDA protects, N.C. Gen. Stat. § 95-241(a). In contrast, an employee who goes over a supervisor’s head and complains to the company president or an internal auditor will typically intend to assist or initiate an inquiry or investigation. *See Jurrissen*, 2008 WL 3925086, at *6 (finding that the plaintiff’s communication with an internal auditor was protected by REDA, even though “merely commenting to a supervisor about alleged unsafe conditions” would not be).

The Court of Appeals also cited approvingly a district court’s holding “that a plaintiff’s criticism of his supervisor to a division manager” wasn’t protected. *Pierce*, 724 S.E.2d at 575 (citing *Delon v. McLaurin Parking Co.*, 367 F. Supp. 2d 893, 902 (M.D.N.C. 2005), *aff’d*, 146 F. App’x 655 (4th Cir. 2005)). In that case, the plaintiff’s criticism of his supervisor was largely unrelated to workplace safety. *See Delon*, 367 F. Supp. 2d at 896–98 (noting that the plaintiff kept a notebook of complaints that “cover[ed] a wide range of topics,” most of which didn’t concern safety, and that his criticism was focused on the supervisor’s management and not any “concern over safety issues”).

We deduce from these authorities the following principles. Internal complaints alleging ongoing OSHANC violations,

like the ones in *Bigelow* and *Jurrissen* (and unlike the one in *Pierce*, where the plaintiff proposed a way to comply with new safety rules but didn’t allege any ongoing violations), can be protected. In assessing whether a particular complaint is protected, we should also consider: whether it relates or leads to an investigation, *see Pierce*, 724 S.E.2d at 575; whether it’s made to someone other than the plaintiff’s “supervisors or managers,” *see id.*; and whether workplace safety is a primary focus of the complaint, *see Delon*, 367 F. Supp. 2d at 902 (finding that criticism of a supervisor that was mostly unrelated to workplace safety issues wasn’t protected by REDA).

[2] Driskell’s complaints about Rhyner meet these criteria. Driskell alleged OSHANC violations: namely, Rhyner’s presence at the work site while intoxicated and his assault on Driskell. *See N.C. Gen. Stat. § 95–129(1)* (requiring employees to furnish “a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to [] employees”). These allegations led to Born’s investigation into Rhyner’s drinking. Driskell complained frequently to Mr. Padgett, who is Summit’s president and chief executive officer, not a mere supervisor or manager. And workplace safety was the focus of Driskell’s complaints. Thus, REDA protects Driskell’s complaints to Mr. Padgett.

C.

Summit also makes two arguments that are specific to Driskell’s second theory of retaliation: namely, that Summit expected Driskell to file a workers’ compensation claim. While Driskell’s first theory suffices ***868** to support the jury’s verdict on the merits (and its compensatory-damages award), we address the second theory as well because it’s relevant to evaluating Summit’s challenge to the punitive-damages award.

1.

First, Summit assails the district court’s jury instruction that “[i]t is against the law for an employer to terminate an employee because the employer *believes* the employee will file a workers’ compensation claim against the employer.” J.A. 1932 (emphasis added). In Summit’s view, REDA’s text requires an employee to actually file or “threaten[] to” file a workers’ compensation claim, *see N.C. Gen. Stat. §*

95-241(a). Because Driskell never explicitly threatened to file a claim, Summit insists, his second theory of retaliation shouldn't have been submitted to the jury. Whether the jury instruction was correct is another question of law that we review de novo.

[3] We conclude that the jury instruction was correct, as no explicit threat by the plaintiff is required. In *Abels v. Renfro Corp.*, the Supreme Court of North Carolina construed REDA's predecessor statute—whose language was much narrower than REDA's⁶—to prohibit an employer from firing someone because the employer “anticipated her good-faith filing of a workers’ compensation claim.” 335 N.C. 209, 436 S.E.2d 822, 826 (1993).

The plaintiff in *Abels* didn't threaten to file a claim. See *id.*, 335 N.C. 209, 436 S.E.2d at 826. Rather, the employer was aware that she had suffered an injury and that her doctor had requested that she be given a leave of absence. Upon learning that, the employer discharged her “to forestall the anticipated filing of a workers’ compensation claim.” *Id.* That was enough, the Supreme Court held, to support the jury's verdict for the plaintiff. *Id.*

The only difference between the *Abels* standard and the jury instruction in this case is that the district court substituted “believe” for “anticipate.” This difference is immaterial. The two words are analogous in that (1) they relate to the defendant's subjective expectation and (2) neither requires the plaintiff to have explicitly threatened to file a claim. And REDA was meant to expand its predecessor's protections, not narrow them. Cf. *Johnson v. Trs. of Durham Tech. Cmty. Coll.*, 139 N.C.App. 676, 535 S.E.2d 357, 361 (2000) (explaining that REDA replaced the statute at issue in *Abels* and “expanded the definition of retaliation to include” many types of adverse employment actions, not just discharge and demotion). So, we must interpret REDA to prevent an employer from firing an individual because it anticipates (or believes) that she will file a workers’ compensation claim. The jury instruction was therefore proper.

2.

Additionally, Summit asserts that Driskell failed to exhaust his administrative remedies as to his workers’ compensation theory because he didn't raise that theory in his complaint to the North Carolina Department of Labor, relying instead on his OSHANC theory. We disagree.

[4] Before bringing a REDA claim, a plaintiff must: “file a written complaint *869 with the Commissioner of Labor alleging [a REDA] violation,” N.C. Gen. Stat. § 95-242(a); obtain a right-to-sue letter, *id.* §§ 95-242(a), 95-243(a); and commence a civil action within ninety days of the letter's issuance, *id.* § 95-243(b). Driskell did that, so he exhausted his administrative remedies. Since North Carolina law doesn't require that a REDA suit be based on the same theory of retaliation that supported the plaintiff's administrative complaint, Summit's argument misses the mark. See *id.* § 95-243 (containing no such requirement).⁷

D.

Next, Summit maintains that no reasonable jury could have found causation, i.e., that Summit fired Driskell because of his complaints or because it believed that he would file a worker's compensation claim. Instead, Summit posits, it fired Driskell for a legitimate reason: his violations of company policy, including insubordination, cursing and fighting his supervisor, and taking two days off when he had no leave available.

[5] Summit is wrong. There was ample evidence to support causation with respect to both of Driskell's retaliation theories, including: Summit's internal emails strategizing about how to fire Driskell so as to avoid the appearance of illegality; the Padgetts’ characterization of his complaints as a “scam,” J.A. 2698, and as preparation for a “bogus lawsuit,” J.A. 2699; Born's lackluster investigation of Driskell's complaints and comment that he needed to “grow a pair of balls,” with which Mr. Padgett agreed, J.A. 2585; Summit's failure to punish Rhyner for fighting with Driskell; and Mrs. Padgett's general hostility toward OSHANC accident reports and workers’ compensation claims.

Indeed, the evidence of causation here is stronger than in *Abels*, where the Supreme Court of North Carolina held that the record supported an inference of retaliation. 436 S.E.2d at 826. There, the plaintiff showed only that she was a good employee and that she was discharged shortly after her employer learned of her injury. See *Abels v. Renfro Corp.*, 108 N.C.App. 135, 423 S.E.2d 479, 483–84 (1992) (summarizing the plaintiff's evidence), *aff'd in part and rev'd in part on other grounds*, 335 N.C. 209, 436 S.E.2d 822 (1993). In contrast, Driskell presented direct evidence of retaliatory animus.

There's also no contemporaneous evidence corroborating Summit's explanation for why it fired Driskell. Thus, a reasonable jury "could infer from the late appearance of [Summit's] current justification that it is a post-hoc rationale, not a legitimate explanation for [its adverse employment] decision." *EEOC v. Sears Roebuck and Co.*, 243 F.3d 846, 853 (4th Cir. 2001).

E.

Next, Summit asserts that it was entitled to judgment on Driskell's wrongful-discharge claim because Driskell never filed or threatened to file an OSHA or workers' compensation claim. Summit is mistaken.

[6] As Summit recognizes, Driskell's "wrongful termination claim rises or falls on the viability of [his] REDA-based claim." *Lockie v. Staples Contract & Com., Inc.*, No. 3:14-CV-521, 2015 WL 93643, at *3 (W.D.N.C. Jan. 7, 2015). This is because "wrongful discharge claims have been recognized in North Carolina where the employee *870 was discharged ... for engaging in a legally protected activity," like complaining about OSHANC violations. *Combs v. City Elec. Supply Co.*, 203 N.C.App. 75, 690 S.E.2d 719, 723 (2010) (cleaned up). Thus, just as we affirm the verdict for Driskell on his REDA claim, so too do we affirm the verdict on his wrongful-discharge claim.

F.

Finally, Summit asserts that the jury's award of punitive damages for Driskell's wrongful-discharge claim wasn't supported by the record. We disagree.

Punitive damages are available in wrongful-discharge claims under North Carolina law. See *Roberts v. First-Citizens Bank and Trust Co.*, 124 N.C.App. 713, 478 S.E.2d 809, 810, 815 (1996) (affirming punitive-damages award). They're only proper, however, where there's "clear and convincing evidence" that the defendant's conduct involved fraud, malice, or willful or wanton conduct. *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640, 644 (2009) (citing N.C. Gen. Stat. § 1D-15(a)).

"Malice" in this context means "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in

harm to the claimant." N.C. Gen. Stat. § 1D-5(5). "Willful or wanton conduct" is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." *Id.* § 1D-5(7). It "means more than gross negligence." *Id.* And, "[w]hen punitive damages are sought against a corporation, the claimant must further show that 'the officers, directors, or managers of the corporation participated in or condoned the conduct [involving fraud, malice, or willful or wanton conduct] giving rise to punitive damages.'" *Id.* (citing N.C. Gen. Stat. § 1D-15(c)).

"The clear and convincing standard requires evidence that should fully convince." *Scarborough*, 693 S.E.2d at 643 (cleaned up). "This burden is more exacting than the 'preponderance of the evidence' standard generally applied in civil cases, but less than the 'beyond a reasonable doubt' standard applied in criminal matters." *Id.* In reviewing a jury's punitive damages award, we must determine whether "a jury could reasonably find" that the claimant met this exacting burden. *Id.*, 363 N.C. 715, 693 S.E.2d at 644.

[7] Here, a reasonable jury could be fully convinced that, in firing Driskell, Summit's executives (namely, the Padgetts) acted with malice toward Driskell or with a conscious disregard for his right to engage in activity protected by REDA. As for malice, Mrs. Padgett's emails about Driskell bespeak ill will toward him. She referred to his injuries as a "joke," J.A. 1631, and repeatedly accused him and his father of orchestrating a "scam," J.A. 2698, and a "bogus lawsuit," J.A. 2699. A jury could also find that the Padgetts' refusal to seriously investigate Driskell's allegations or punish Rhyner for assaulting Driskell reflected animus toward Driskell. Further, both of the Padgetts were on an email chain in which Born acknowledged that he and Fudge "would have personal motivations to [f]ire" Driskell, J.A. 2701, suggesting that the Padgetts may have "condoned [] conduct" involving malice, see N.C. Gen. Stat. § 1D-15(c).

The same evidence supports a finding of willful or wanton conduct. So too does Mr. Padgett's agreement with Born's view that Driskell needed to "grow a pair of balls" and stop complaining about Rhyner's drinking. J.A. 2585. That statement shows a conscious disregard for Driskell's right *871 to allege an OSHANC violation. Similarly, Mrs. Padgett's hostility toward accident reports and workers' compensation claims indicates an indifference to the rights and safety of others.

In sum, while the clear-and-convincing standard is “exacting,” *Scarborough*, 693 S.E.2d at 643, a reasonable jury could find that Driskell met it.

III.

We turn now to Driskell's cross-appeal, which raises two issues.

A.

First, Driskell argues that the district court erred by not amending the jury's award of \$65,000 in compensatory damages. In his view, the award should have been \$134,038 (before trebling), reflecting the full amount of back pay that he was owed.

Driskell failed to preserve this issue in the district court, however. Motions to amend a judgment “must be filed no later than 28 days after the entry of the judgment,” *Fed. R. Civ. P. 59(e)*, and a court may not extend that deadline, *Fed. R. Civ. P. 6(b)(2)*. Driskell filed his back-pay request 38 days after the judgment was entered (in a response to one of Summit's motions) rendering the request untimely and thereby forfeiting appellate review of this issue. *See Alston v. MCI Commc'ns Corp.*, 84 F.3d 705, 706 (4th Cir. 1996) (dismissing an appeal because the appellant had failed to file a post-trial motion within the requisite time period); *see also Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 160 (4th Cir. 2012) (“Belk's failure to move pursuant to Rule 50(b) forfeits the sufficiency of the evidence challenge on appeal.”).

B.

Driskell also insists that he shouldn't have been required to choose between the punitive-damages verdict (which arose from his wrongful-discharge claim) and the award of attorney's fees (which arose from his REDA claim). We agree.

Under North Carolina's “doctrine of election of remedies,” “a plaintiff may not recover inconsistent remedies” or ones that would provide “double redress for a single wrong.” *United Labs.*, 437 S.E.2d at 379, 335 N.C. 183 (cleaned up). Punitive damages and attorney's fees are not inconsistent remedies. *Id.* Whether they are duplicative turns on whether they “serve

different interests and are not based on the same conduct.” *Id.*, 335 N.C. 183, 437 S.E.2d at 380.⁸

[8] Without question, the two awards serve “wholly different” interests. *Id.*; accord *872 *Lacey v. Kirk*, 238 N.C.App. 376, 767 S.E.2d 632, 650 (2014). “Punitive damages are designed to punish willful conduct and to deter others from committing similar acts,” *United Labs.*, 437 S.E.2d at 380, while “an award of attorneys' fees is intended to address costs that arise in the course of the litigation of a particular case,” *Lacey*, 767 S.E.2d at 650. And although REDA doesn't explain *why* it authorizes fee awards for plaintiffs, we infer that it does so “to encourage private enforcement of” its ban on discriminatory and retaliatory employment practices, not to punish defendants. *See United Labs.*, 437 S.E.2d at 380 (explaining why a statute banning unfair methods of competition authorized awards of attorney's fees for successful plaintiffs) (cleaned up).

Further, (and contrary to the dissent's view) the two awards “are not based on the same conduct.” *Id.* To recover punitive damages, Driskell had to prove that Summit's conduct involved fraud, malice, or willful or wanton conduct. *See N.C. Gen. Stat. § 1D–15(a)*. In contrast, REDA gives the trial court discretion to award fees and costs to a prevailing plaintiff—irrespective of the defendant's conduct—provided the plaintiff can show that such fees and costs are reasonable. *N.C. Gen. Stat. § 95-243(c)*. And while North Carolina courts have had little occasion to apply this standard in the context of REDA claims, we think the familiar test for reasonableness applied elsewhere governs here.⁹ *See United Labs.*, 437 S.E.2d at 381-82 (directing trial court, in considering the reasonableness of a fee award for a plaintiff prevailing on a unfair competition claim, to make findings “as to the time and labor expended, the skill required, the customary fee for like work, the experience or ability of the attorney, the novelty and difficulty of the questions of law, the adequacy of the representation, the difficulty of the problems faced by the attorney, especially any unusual difficulties, and the kind of case for which the fees are sought and the result obtained.”) (cleaned up).

In sum, because recovery of attorney's fees under REDA requires proof different from that which gives rise to punitive damages, and the awards don't arise from the same course of conduct, Driskell can collect both. The district court erred in holding otherwise.

IV.

For the reasons given, we reverse that portion of the district court's order (and vacate the related judgment) requiring Driskell to choose between punitive damages and attorney's fees, and remand for the district court to enter judgment for Driskell for punitive damages, attorney's fees, and untrebled compensatory damages.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED

TRAXLER, Senior Circuit Judge, concurring in part and dissenting in part:

*873 I concur in the majority's rejection of the issues raised by Summit in its appeal. As to Driskell's cross-appeal, I agree that Driskell failed to preserve for appeal his challenge to the amount of back-pay awarded by the district court, and I concur in that portion of the majority's opinion as well. In my view, however, the district court did not err in requiring Driskell to choose between the remedies available on his common-law wrongful-discharge cause of action and the remedies available on his statutory retaliatory-discharge claim. I therefore dissent from that aspect of the majority's decision.

I.

The jury awarded Driskell \$65,000 in actual damages on his REDA claim and on his wrongful-discharge claim, and \$681,000 (reduced to the statutory maximum of \$250,000) in punitive damages on the wrongful-discharge claim. On the election-of-remedies question, Driskell contended that under *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993) ("*United Labs*"), he was entitled to recover the punitive damages awarded on the wrongful-discharge claim, along with untrebled actual damages and attorney's fees under REDA. The district court rejected that approach and accepted Driskell's second choice of recovering the remedies available under REDA -- \$65,000 actual damages trebled to \$195,000, plus attorney's fees. The district court awarded attorney's fees of just over \$441,000, giving Driskell a total award of \$636,000. If the district court had accepted Driskell's first choice, Driskell would have received \$756,000.

On appeal, Driskell continues to pursue his first choice, arguing that he is entitled to \$756,000 under the approach set out in *United Labs*. The majority, concluding that punitive damages and the fee award were based on different conduct and serve different interests, holds that the district court erred under *United Labs* by requiring Driskell to elect between punitive damages and attorney's fees. I believe the district court correctly resolved the issue.

II.

A.

One of the purposes of the doctrine of election of remedies is to prevent "double redress for a single wrong." *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 79 S.E.2d 880, 885 (1954). In cases where a single set of facts supports a common-law claim and a statutory claim, North Carolina courts have applied the doctrine to hold that the plaintiff may recover under one cause of action or the other, but not both. *See Ellis v. N. Star Co.*, 326 N.C. 219, 388 S.E.2d 127, 132 (1990) ("The company contends that it should be entitled to both punitive damages for the libel and the treble damages automatically assessed under N.C.G.S. § 75-16. We disagree. The libel and unfair trade claims both arose from the defendants' letter. Plaintiffs may in proper cases elect to recover either punitive damages under a common law claim or treble damages under N.C.G.S. § 75-16, but they may not recover both."); *Wilder v. Hodges*, 80 N.C.App. 333, 342 S.E.2d 57, 58 (1986) ("When the same course of conduct supports claims for fraud and for an unfair or deceptive trade practice under Chapter 75, recovery can be had on either claim, but not on both."); *Marshall v. Miller*, 47 N.C.App. 530, 268 S.E.2d 97, 103 (1980) ("Where the same course of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of *874 G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both."). These cases thus require a plaintiff to choose which cause of action or path to recovery on which he will proceed and permit him to recover only those remedies available on the chosen path.

In *United Labs*, however, the North Carolina Supreme Court departed from the approach outlined above and allowed a plaintiff to pick and choose from the remedies available on his common-law and statutory causes of action. *See*

United Labs, 437 S.E.2d at 382 (“Heretofore, it has been the practice in this state to require the plaintiff to recover either the Chapter 75 statutory group of remedies (trebled compensatory damages and discretionary attorneys’ fees) or the group of remedies available in the common law claim (compensatory and punitive damages).”) (Meyer, J., concurring in part and dissenting in part).

In *United Labs*, the court permitted the plaintiff to recover punitive damages available under his common-law cause of action, as well as additional remedies available under N.C. Gen. Stat. § 75–1.1(a), a statutory treble-damages scheme prohibiting unfair or deceptive acts and practices affecting commerce, as long as the remedies were neither inconsistent nor duplicitous. Under that approach, the court held that the plaintiff could recover punitive damages on his tort claim along with actual (untrebled) damages and attorney’s fees under the unfair-practices statute. The court held that the untrebled actual-damage award and punitive-damage award were not duplicitous because they did not redress the same wrong. See *United Labs*, 437 S.E.2d at 381. As to attorney’s fees, the court held they were not duplicitous because the punitive-damage award and fee award were based on different conduct:

[The] conduct which gives rise to an award of attorneys fees is not the same conduct that gives rise to an award of punitive damages. To recover punitive damages at common law a plaintiff must show that the defendant acted in a willful or oppressive manner. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342. To recover attorneys fees for unfair practices, however, the plaintiff must also show that “there was an unwarranted refusal by [the defendant] to fully resolve the matter which constitutes the basis of ... the suit.” N.C.G.S. § 75–16.1(1). Since recovery of attorneys fees requires proof different from that which gives rise to punitive damages, the claims do not arise from “the same course of conduct.” *Marshall*, 47 N.C. App. at 542, 268 S.E.2d at 103.

United Labs, 437 S.E.2d at 379–80.

Driskell relies on *United Labs* when seeking to mix and match the remedies available on his separate causes of action. In my view, however, *United Labs*’ mix-and-match approach was legislatively overruled by N.C. Gen. Stat. § 1D-20, which was enacted a few years after the case was decided.¹

Section 1D-20 is part of an act passed in 1995 that limited the circumstances under which punitive damages could be

awarded and placed a cap on the amount of punitive damages that could be awarded. See 1995 North Carolina Laws Ch. 514 (H.B. 729). The provisions of the 1995 act “appl[y] to *875 every claim for punitive damages, regardless of whether the claim for relief is based on a statutory or a common-law right of action or based in equity,” and “prevail over any other law to the contrary.” N.C. Gen. Stat. § 1D-10. Because Driskell sought punitive damages on his common-law wrongful-discharge claim, that punitive-damage claim is governed by the 1995 act, including § 1D-20.

Section 1D-20 provides that “[a] claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.” N.C. Gen. Stat. § 1D-20. In my view, the import of this language is clear. A plaintiff with a claim that supports an award of punitive damages on one cause of action as well as recovery under a multiple-damages statute must choose his path of recovery – he must “elect ... between” either punitive damages or “any other remedy” available under the multiple-damages statute. *Id.* A plaintiff who chooses to recover any of the remedies available on the statutory multiple-damages claim cannot also recover punitive damages on a different claim based on the same facts. The statute thus returns to the pre-*United Labs* approach applied in *Ellis* and *Marshall*. The plaintiff must choose one path of recovery, either the statutory multiple-damages claim or the claim that includes punitive damages, and the plaintiff’s recovery is limited to the remedies authorized for the chosen cause of action. If he wants to collect the award of punitive damages, he cannot collect any of the remedies available under the multiple-damages statute.

Although § 1D-20 is titled “Election of extracompensatory remedies,” its reach is not strictly limited to the kinds of remedies that might be classified as “extracompensatory.” An award of punitive damages is extracompensatory, as is an award of statutorily multiplied actual damages. However, § 1D-20 does not say that a plaintiff choosing a punitive-damages award may not recover extracompensatory remedies under a multiple-damages statute; § 1D-20 says that a plaintiff choosing a punitive-damages award may not recover any of the remedies available under a multiple-damages statute, including the purely compensatory (unmultiplied) actual-damage award.

“In North Carolina, a trial court may award attorney’s fees only as authorized by statute.” *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 843 S.E.2d 207, 210 (2020). Whether an award of attorney’s fees might be characterized

as compensatory or extracompensatory, there is little question that an award of attorney's fees authorized by statute is a remedy pursuant to that statute, as required under § 1D-20. See, e.g., *Buford v. Gen. Motors Corp.*, 339 N.C. 396, 451 S.E.2d 293, 298 (1994) ("Attorney's fees are available as a remedy under N.C.G.S. § 20-351.8(3)..."); *Minneman v. Martin*, 114 N.C.App. 616, 442 S.E.2d 564, 566 (1994) ("The Act goes beyond merely allowing suit, however, and provides various remedies for the injured employee, including injunctive relief, damages, attorney's fees, and, in some cases, treble damages.") (citing N.C. Gen. Stat. § 126-87). Thus, if a multiple-damage statute authorizes an award of attorney's fees, that is one of the remedies that a plaintiff must forgo if he chooses to recover on his punitive-damage claim.

North Carolina courts have given scant attention to § 1D-20, and neither of the State's appellate courts have considered the operation of the statute.² In my view, *876 however, the language of the statute is clear and unambiguous and prohibits a plaintiff from recovering punitive damages while also recovering any of the remedies available under a multiple-damages statute. Applied to this case, my reading of § 1D-20 leads to same conclusion reached by the district court. Driskell is entitled to proceed under his wrongful-discharge claim, which permits punitive damages but not attorney's fees, or to proceed under his REDA claim, which permits attorney's fees but not punitive damages. He cannot, however, mix and match the remedies available under the separate claims.

B.

In any event, even if § 1D-20 has no effect on *United Labs*, I do not believe *United Labs* controls the disposition of this case.

As discussed above, the court in *United Labs* held that the punitive-damage award and fee award in that case were not duplicitous because the "conduct which gives rise to an award of attorneys fees is not the same conduct that gives rise to an award of punitive damages." *United Labs*, 437 S.E.2d at 379. The punitive-damages claim required the plaintiff to prove that "the defendant acted in a willful or oppressive manner," while the statutory attorney-fee award required further proof "that there was an unwarranted refusal by [the defendant] to fully resolve the matter which constitutes the basis of ... the suit." *Id.*, 335 N.C. 183, 437 S.E.2d at 379-80 (quoting N.C. Gen. Stat. § 75-16.1(1)). As this portion of the opinion makes clear, *United Labs* did not hold that punitive-damage awards

and fee awards are *always* based on different conduct for election-of-remedies purposes. Instead, the court explicitly grounded its different-conduct decision on the additional fact the defendant's unwarranted refusal to fully resolve the claim -- that was statutorily required *in that case* to establish a claim for attorney's fees.

In this case, however, there is no additional statutory factor required to support a fee award. REDA simply provides that "[t]he court may award to the plaintiff and assess against the defendant the reasonable costs and expenses, including attorneys' fees, of the plaintiff in bringing an action pursuant to this section." N.C. Gen. Stat. Ann. § 95-243. Because attorney's fees may be awarded in *any* case where a REDA violation is established, it seems clear to me that, as the district court held, the conduct giving rise to the punitive-damages claim in this case is the very same conduct that gave rise to the fee award.

Although the award of punitive damages required Driskell to prove fraud, malice, or willful or wanton conduct, the evidence proving the wrongful discharge and establishing Summit's liability for punitive damages was the same evidence that proved the REDA violation and authorized the award of attorney's fees. Driskell was also required to show the reasonableness of the fee award sought, which required the court to consider the traditional factors, such as the time expended by counsel and the customary fees for similar cases. Those factors, however, are not relevant to the election-of-remedies question. As the court made clear in *United Labs*, the question is whether the "conduct which gives rise to an award of attorneys fees is ... the same conduct that gives rise to an award of punitive damages." *United Labs*, 437 S.E.2d at 379 (emphasis added). The court thus considered whether the conduct of the defendant that triggered liability for punitive *877 damages was the same conduct that triggered liability for attorney's fees. The factors showing the reasonableness of the requested fees do not focus on the conduct of the defendant and have nothing to with the threshold question of whether the defendant engaged in conduct that gave rise to an award of attorney's fees. Accordingly, the factual predicate for the *United Labs* approach -- different conduct supporting the fee award -- is absent in this case.

In reaching its conclusion, the *United Labs* court noted that punitive damages and fee awards serve different interests, see 437 S.E.2d at 380, an observation that can likewise be made in this case. That the awards serve different interests, however, is not sufficient; under *United Labs*, the awards

must also involve different conduct. See *Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225, 229 (1995) (describing *United Labs* as permitting the recovery of punitive damages under a common-law cause of action and attorney's fees under a statutory unfair-practices claim “where [the] recoveries serve different interests *and* are not based on the same conduct”) (emphasis added); *United Labs*, 437 S.E.2d at 380 (holding that election of remedies was not required because the “recoveries serve different interests *and* are not based on the same conduct”) (emphasis added).

Because the same conduct that gave rise to Summit's liability for punitive damages on Driskell's wrongful-discharge claim also gave rise to the REDA violation and triggered the award of attorney's fees under REDA, I do not believe that *United Labs* governs the disposition of this case. Absent the factual basis justifying application of *United Labs*' approach, this case should be governed by North Carolina's traditional approach to election-of-remedies questions set out in *Ellis*, *Wilder*, and *Marshall*. Under that approach, Driskell was required to pick a single path to recovery, either wrongful discharge or REDA, and was entitled to receive only the remedies available on the chosen path. Punitive damages

are available on Driskell's common-law wrongful-discharge claim, but attorney's fees are not. Conversely, attorney's fees are available under REDA, but punitive damages are not. Under the circumstances of this case, I do not believe the district court erred by requiring Driskell to choose between the total recovery permitted under the wrongful-discharge claim or the total recovery permitted under REDA.

III.

Because I believe the district court properly resolved all of the issues raised in Summit's appeal and Driskell's cross-appeal, I would affirm the district court's judgment in its entirety. Accordingly, while I concur in sections I, II, and III.A of the majority opinion, I respectfully dissent from the majority's conclusion in section III.B that under *United Labs*, Driskell is entitled to recover punitive damages on his wrongful-discharge claim and attorney's fees on his REDA claim.

All Citations

828 Fed.Appx. 858

Footnotes

- 1 Rhyner drove to his home in Tennessee that night and told his superiors that he was taking two weeks of paid time off. He remained employed by Summit when this lawsuit was filed.
- 2 The charges against Rhyner were eventually dismissed at Driskell's request.
- 3 The court reduced the punitive-damages award to \$250,000 because, as Driskell conceded, that was the maximum that he could collect under N.C. Gen. Stat. § 1D-25(b), which provides that “[p]unitive 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.”
- 4 REDA provides that a “court may award to the plaintiff and assess against the defendant the reasonable costs and expenses, including attorney's fees, of the plaintiff in bringing an action pursuant to this section.” N.C. Gen. Stat. § 95-243(c).
- 5 REDA requires a court to treble a plaintiff's compensatory damages if the defendant's violation was “willful,” i.e., if it involved “knowledge or reckless disregard of whether [the defendant's] action violated the statute.” *Morris v. Scenera Research, LLC*, 368 N.C. 857, 788 S.E.2d 154, 161 (N.C. 2016) (citing N.C. Gen. Stat. § 95-243(c)). The district court, not a jury, must make this determination. See *id.* Driskell conceded that he was required to choose between punitive and trebled damages. He sought to recover \$250,000 in punitive damages, \$65,000 in untrebled compensatory damages, and \$441,600 in attorney's fees. But after the district court held that he couldn't collect both punitive damages and attorney's fees, he elected to recover treble damages and attorney's fees in lieu of punitive damages.
- 6 The predecessor statute read in pertinent part: “(a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.” N.C. Gen. Stat. § 97-6.1 (1991). REDA's text is much broader, covering anyone who “threatens to” file a workers' compensation claim. N.C. Gen. Stat. § 95-241(a).
- 7 In any event, Driskell arguably raised his workers' compensation theory in his complaint by stating that he was fired because he “became a threat, risk or liability to the company after Mr. Rhyner attacked [him].” J.A. 78.
- 8 Our dissenting colleague would hold that N.C. Gen. Stat. § 1D-20 effectively overruled *United Labs*' “mix-and-match approach” and thus blocks Driskell from recovering both awards. Dissent at 31. But that provision—which was enacted

in 1995 in an act establishing standards for punitive damages, N.C. Sess. Laws 1995-514, H.B. 729, and has never been construed to apply to attorney's fees—requires claimants to elect “between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.” [N.C. Gen. Stat. § 1D-20](#). It's true that Driskell's request for attorney's fees is “pursuant to” REDA, which provides for treble damages. But we think it doubtful that the Supreme Court of North Carolina would hold that REDA's separate allowance for an award of attorney's fees is a “remedy” in the way that [§ 1D-20](#) uses that term. After all, [§ 1D-20](#)'s title is “Election of extracompensatory remedies,” and attorney's fees are strictly compensatory in that they reimburse a prevailing plaintiff's costs. The title of a statutory subsection, while “not controlling, [] does shed some light on the legislative intent underlying the enactment of that provision.” [State v. Fletcher](#), 370 N.C. 313, 807 S.E.2d 528, 539 (2017). And that light is (we think) sufficient here to reject the dissent's view.

9 The district court mistakenly applied the federal lodestar standard in calculating a fee award. We have held (albeit in an unpublished opinion) that state law, not the federal lodestar test, should control in in this circumstance. See [Peter Farrell Supercars, Inc. v. Monsen](#), 82 F. App'x 293, 300 (4th Cir. 2003) (“Because the district court granted fees pursuant to a Virginia statute, we look to Virginia's standards for determining if the fee award is reasonable.”). Other circuits agree that when state law supplies the law of decision in a diversity case, state law also controls both whether to award reasonable attorney's fees and what standard to apply in calculating that award. See 17A Moore's Federal Practice-Civil § 124.07(3) (b) (2020) (citing opinions from the 1st, 2d, 3d, 5th, 6th, 7th, 8th, 9th, 10th, and 11th Circuits standing for this proposition). But because Summit raises no issue on appeal as to the reasonableness of the attorney's fee award, we do not address it further.

1 Although [§ 1D-20](#) was not raised by the parties, we may affirm the district court on any reason appearing in the record. See [McMahan v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers](#), 964 F.2d 1462, 1467 (4th Cir. 1992) (“We of course have the power to affirm a judgment for any reason appearing on the record, notwithstanding that the reason was not addressed below.”).

2 Although North Carolina courts have applied [United Labs](#) in cases that I believe could have been resolved under [§ 1D-20](#), there is no indication the statute was raised in those cases. See, e.g., [Waldon v. Burris](#), 2007 WL 91657 at *3 (N.C. Ct. App. 2007) (unpublished); [Brown v. King](#), 166 N.C.App. 267, 601 S.E.2d 296, 298-99 (2004).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED

Aug 30 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

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

Appellants

v.

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

Respondent.

Amended Petition for Rehearing
and
Suggestion for Rehearing En Banc

OVERVIEW

The opinion in this case, filed August 11, 2021, conflicts with several decisions of the South Carolina Supreme Court and this Court, including the holdings of *James v. Horace Mann Ins. Co.* that fines of \$15,000 are set so low as not to be proper comparisons to punitive damages under the due process clause, of *Collins Entm't. Corp. v. Coats & Coats Rental Amusement* that nor are trebled damages under the UTPA proper comparisons to punitive damages, and of *Austin v. Stokes-Craven Holding Corp.* that the proper comparison for punitive damages cases concerning deceptive sales of automobiles are other punitive damages cases concerning deceptive sales of automobiles. The Court's opinion is also the first and only opinion to hold

application of the North Carolina punitive damages framework unconstitutional under the federal due process clause.

For these reasons, and others discussed below, the full Court should hear the petition en banc.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Columbia Automotive Company, LLC d/b/a Midlands Honda (Midlands) operates a Honda franchise dealership. In 2008, Midlands purchased a used “Civic” that was actually two half-Civics that had been welded together. Midlands gave the vehicle a 159-Point Honda Certification Inspection, and declared the vehicle to be a Honda-Certified PreOwned Vehicle. Midlands put a “Certified” window sticker on the vehicle (Attachment A, R. p. 954) and sold it to Charles Ecklund. This would be the first of two sales of this vehicle by Midlands.

The purchase contract stated, “certified.” (R. p. 955). Midlands gave Ecklund a “Certified Pre-Owned Purchase Document.” (R. p. 957). They gave him an invoice showing a “159 point” check. They told him it was “100% certified.” (R. p. 33, line 20) (Testimony of Ecklund).

There was no reason for Ecklund to suspect anything was wrong with the vehicle. There was nothing showing to indicate the flaws.

Until one day, two years later, when he was backed into in a parking lot. He took the car in for repairs. It was lifted up on a rack, and from below, the damage was obvious. (*Id.*, p. 120:23-124:24).

Ecklund called Midlands. (R. p. 131:6-12). He spoke with the General Manager.

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

(R. p. 132, lines 7-11).

His wife called Midlands. The receptionist took a message for the General Manager. It stated that she "wants you to call him about the car they got. She said it was 2 cars welded together and it's not safe. She said that they are going to call their lawyer." (R. p. 1034-35) (written telephone message).

With the threat of legal involvement, the General Manager arranged for a truck to pick up the car in Alabama and bring it back to Midlands. (R. p. 131:24-p. 132:4).

Midlands promptly sent the vehicle out, without disclosure, for sale in North Carolina, which mandates disclosure, via an auction there, which also requires disclosure. The auction has three "lights," green, yellow, and red. They all require disclosure of the wreck damage in this Civic.

Midlands' sales manager had been going to that auction for three years. (R. p. 355:22-25; p. 362:17-p. 363:1). This was the only auction Midlands was dealing with. (R. p. 378:14-15). Midlands was selling 100 vehicles a year at that auction. (R. p. 360:12-23). It was also buying from the auction. (R. p. 362:17-23; p. 378:14-15). And every one of those sales involved a damage disclosure form that required one to state whether the vehicle was reconstructed. (Attachment B, R. pp. 936-937).

If a representative of the seller is present on the day of the sale, the seller is required to make all the required disclosures. If the seller will not be present, the seller is required to make any required disclosures to the auction, which then fills out the form for them via a Power of Attorney. If they do not disclose to the auction, the auction does not disclose to the purchaser.

Midlands did not disclose. At trial, Midlands' Senior Management claimed they had been unaware the vehicle was wrecked. But they had no convincing explanation for how they

did not know, given the 159-point inspection; nor how they did not know, after Ecklund and his wife told them.

Their intended market for wrecked cars at the auction were "Mom-and-pop," "gravel lot" dealers. (R. p. 384, lines 1-20) (testimony of Midlands then-Used Car Manager.) They expect these dealers to "turn around and re-sell these cars" (R. p. 439:21-22; p. 538:6). Once the sale is made, Midlands "doesn't care what those people do with the cars." (*Id.*, p. 541:22). It is "irrelevant" whether the cars will be sold to consumers and put back on the road. (*Id.*, line 9).

Roger Whitley and Daniel O'Shields, then gentlemen in their seventies, had a small dealership of the sort Midlands was targeting. They ran the business not so much to make money as to make themselves feel useful, buying cars for their friends and people at church. (R. p. 587:18-19). At the time, they were looking for a good small car for a 16-year-old girl. They had been asked to find her something to drive to school. (R. p. 595:25-p. 596:2).

Roger bought the Civic on behalf of their small dealership, for \$5,200. Without explanation, Midlands then had the car returned to Columbia. (R. p. 607:6-p. 608:8). It only arrived at Roger and Dan's business several days later, after the time the auction allows one to protest a sale had expired. (*Id.*)

Once it arrived, it was sold to that girl's family. Part of the agreement was that the car would be returned for replacement of the water pump and timing belt, with the family paying for the parts and Roger and Dan paying for the labor.

Upon return, the vehicle was raised on a rack at a nearby garage, and the mechanic there saw the same thing Ecklund had seen. The garage called Roger. Roger instructed that the family was to be given back all it had paid. (614:24-625:9). Roger and Dan also refunded the fees the family had paid to register the car, approximately \$345.00 (R. p. 619:4-9).

Roger went to the auction's sales office to complain and invoke the Auction's dispute resolution process. (R. p. 615:14-p. 626:4). It was too late: The time to invoke that process had expired while they waited for Midlands to send the car. (R. p. 616:13-19). Roger waited a day or two to cool down, then called Midlands. He spoke to the Used Car Manager, and, like Ecklund before him, demanded Midlands give back his money and take back the car. (R. p. 617:13-p. 618:19). The used car manager took down all his information, including the VIN, and promised to get back to him. (*Id.*). He never did. That call was in September 2010. In 2013, Roger and Dan filed suit.

Trial was held in April of 2016. The jury was asked to award \$6,645 on each of four cases of action: breach of contract, negligent misrepresentation, fraud, and violation of the North Carolina Unfair Trade Practices Act. It did so on each. In a bifurcated trial, it then awarded \$2,381,888.00 in punitive damages.

Following post-trial motions, the lower court (a) reduced the punitive award to \$46,515; (b) awarded attorney fees of \$21,264 for the first five years of work, including travel to Illinois to depose Ecklund and a five-day trial; awarded another \$10,140 for an additional two months of work by two attorneys; and held that no fees would accrue after September 13, 2016, the date Respondent made a post-trial offer to settle the case for \$81,069; (c) required Appellants to elect between their punitive verdict and their award of attorney fees; and (d) denied Appellants' claim for offer-of-judgment interest.

Appellants' appeal challenged the punitive and attorney fees awards as representing too drastic cuts from the jury's verdict and the reasonable fees; and requested that this Court reverse

the lower court's holdings regarding election of remedies and regarding offer-of-judgment interest. A panel of the Court of Appeals (a) affirmed the reduction of the punitive award. (b) It agreed with Appellants that the attorney fee award was too low, but invited the lower court on remand to reduce the award from the reasonable hours incurred on grounds of insufficient success. It also affirmed the lower court's holding that no fees could accrue after September 13, 2016. (c) The Panel reversed the requirement to elect, and (d) instructed the lower court to reconsider the offer-of-judgment issue after the attorney fee award was revised.

This Petition asks the Court to rehear the question of whether \$46,515 is the maximum punitive award the due process clause allows on these facts; to rehear the questions of whether the degree of success enjoyed by Plaintiffs justifies a reduction from the otherwise-reasonable hours and whether the accrual of fees should properly have ended in September of 2016; and to rehear its ruling on the offer of judgment interest.

I. The Panel's Opinion Conflicts with the North Carolina Court of Appeals on a Question of the Federal Constitutionality of a North Carolina Punitive Damages Statute. At the Least, This Is a Matter for en banc Review.

The Panel holds something that no North Carolina appellate court has ever held: That a punitive award at North Carolina's statutory cap is unconstitutional. In so doing, the Panel misapprehends or overlooks North Carolina's interpretation of its own statute.

North Carolina's legislature has enacted a comprehensive statutory scheme regulating punitive damages. North Carolina statutes allow defendants to demand a bifurcated trial when a punitive damages claim exists, N.C.G.S. 1D-30; set a high substantive bar for any award, requiring fraud, malice, or willful or wanton conduct, N.C.G.S. 1D-15(a); reject *respondeat superior* unless "officers, directors, or managers participated in or condoned the conduct," *id.*, ¶ (c); restrict the evidence the jury may consider, N.C.G.S. 1D-35(2) ¶¶ (a)-(i); limit punitive

damages to the greater of \$250,000 or three times the amount of actual damages, and where the punitive award is greater than that amount, mandate that the trial court is to enter judgement in the greater of those amounts, N.C.G.S. 1D-35(2), i.e., \$250,000 when actual damage awards are less than \$83,333.34.¹

The North Carolina Supreme Court explained North Carolina's regime regulating punitive damages in *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004). In upholding North Carolina's statutory framework against a slew of attacks based on the United States and North Carolina constitution, it noted the United States Supreme Court's concern about unlimited jury and judicial discretion.

[I]n delivering the opinion of the Court in *Haslip*, Justice Blackmun expressed "concern about punitive damages that 'run wild,'" concluding that "unlimited jury discretion--or unlimited judicial discretion for that matter--in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."

Rhyne, 594 S.E.2d at 16-17 (emphasis added) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 113 L. Ed. 2d 1, 20, 111 S. Ct. 1032 (1991)).

The North Carolina Court explained that "the monetary limits established by N.C.G.S. § 1D-25 are not arbitrary," *id.* at 17, as the interests underlying the regime include "bringing more certainty to our system of civil redress, [and] shielding North Carolina from problems encountered in other states," *id.*, and "to provide clear notice of possible penalty to defendants," *id.* at 16.

¹ N.C.G.S. 1D-35(2) states,

(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.

It added that “the scheme for limiting the punitive award contained in N.C.G.S. § 1D-25, providing for three times the compensatory award, is in line with the standards suggested by the United States Supreme Court to prevent grossly excessive awards;” *id.* at 18; and that legislatures ““enjoy broad discretion in authorizing and limiting permissible punitive damages awards,”” *id.* at 10 (emphasis added) (quoting *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 149 L. Ed. 2d 674, 684, 121 S. Ct. 1678 (2001)).

Against this backdrop, no appellate court has ever held that the statutory directive to award such judgments in the amount of the cap is unconstitutional, other than the Panel in this case. North Carolina trial judges routinely reduce such awards to the cap, and North Carolina appellate courts routinely affirm. *E.g., Lacey v. Kirk*, 767 S.E.2d 632, 645-47 (N.C. Ct. App. 2014); *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82 (N.C. Ct. App. 2012).

Of particular significance, the Panel overlooks *Mace v. Pyatt*, 691 S.E.2d 81, 89-90 (N.C. Ct. App. 2010), in which the North Carolina Court of Appeals held that if even “nominal damages” are shown, and the requirements for a punitive award are met; and the jury awards punitive damages in an amount greater than the cap; then the judge is to award punitive damages at the cap.

In holding an award at North Carolina’s statutory cap to be unconstitutional, the Panel of the South Carolina Court of Appeals went where no North Carolina appellate court has ever gone.

Its opinion conflicts with the great deference the United States and North Carolina Supreme Courts state are due to legislatures authorizing criminal and punitive measures. As an outlier, its opinion removes that “certainty” and “clear notice” that the North Carolina and United States Supreme Courts have stated is needed in punitive damages law.

Whether South Carolina should be contradicting North Carolina appellate courts on the federal constitutionality of North Carolina statutes is a question for en banc consideration by this Court, and likely for further consideration by the Supreme Court.

At the least, unless the need to depart from North Carolina precedent is clear, this Court should follow North Carolina precedent regarding the federal constitutionality of the North Carolina statutory regime.

And the need to hold differently from North Carolina statutes is far from clear. As explained below, awards of punitive damages at the North Carolina cap are required.

II. The Jury Found Fraud. The Panel Erred in Reducing the Punitive Award For Fraud on Grounds that “Willfulness” Had Not Been Shown (First *Gore* Factor, Reprehensibility).

The Panel appears to hold, incongruously, that this punitive award for fraud should be limited because “the record does not bear out a deliberate, willful, or repeated violation of the disclosure requirements.” Op. p. 7. But the jury found fraud. R. p. 44 (Verdict Form). Fraud is by definition willful. The jury here was instructed they could not find fraud unless they found, among other things, the false representation or concealment “was reasonably calculated to deceive” and “with the intent to deceive.” (R. p. 836, line 24—p. 837, line 6) (emphasis added).

The Court below similarly found “willfulness,” and pointed out that willfulness was implicit in the jury’s fraud verdict. (R. pp. 11-12).

As then-Chief Judge Few wrote for this Court in *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 405, 714 S.E.2d 904, 915 (Ct. App. 2011), “We do not conduct a de novo review of the jury's determination of the proper amount to award as punitive damages.” “Both the plaintiffs and the defendant have a federal and state constitutional right to a trial by jury on the question of punitive damages.” *Id.* Appellate courts are to “defer[] to the jury's constitutional

role as factfinder.” *Id.* at 405, 714 S.E.2d at 915. *See also Garrison v. Target Corp.*, 429 S.C. 324, 346, 838 S.E.2d 18, 29 (Ct. App. 2020) (*cert. granted*, S.C. Sup. Ct. Order dated October 19, 2020) (explaining that it is a matter for the jury where “more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton.”)

Here, there was more than ample evidence that Respondent’s actions were willful. A sampling includes:

- Respondent took the subject vehicle in as a trade-in, and gave it a 159-point inspection. Op. p. 2. A 159-point inspection could not be rationally thought to have missed the extensive damage to this vehicle.
- Respondent’s inspection included raising the vehicle on a rack. *Id.* When one looks up at the underside of the vehicle, when it is raised on a rack, the damage is obvious. Respondent could not have missed seeing it.
- When the first victim, Mr. Ecklund, had the car returned to Midlands Honda, and told them the vehicle they had sold him as a Honda-Certified PreOwned Vehicle was actually two half-cars welded together, Midlands did not dispute it. Midlands did not say, “That can’t be right.” Midlands did not put the car up on a rack to see if Mr. Ecklund was telling the truth. (R. p. 374, line 20-page 375, line 20; p. 377, lines 8-18). Conclusion: Midlands already knew when they sold the vehicle to him that it was clipped. A car dealer that accepts cars back years later when a customer says it was sold as something it’s not without checking to see if the customer is telling the truth, would soon be out of business—unless the dealer regularly sells wrecked cars without disclosure.

- When Ecklund brought the car back and claimed it was two half-cars clipped together, management did not ask the mechanic who performed the 159-point inspection and certified the vehicle how he had missed such glaring damage. It is a most reasonable inference that management of a dealership that was not in the business of deceptively selling damaged cars would have immediately asked the mechanic what happened.²
- When Respondent Whitley called and told Midlands' Sales Manager that the car was clipped, again, he did not ask the mechanic how this happened. It is a most reasonable inference that they did not ask because they were in on it—they knew the car was clipped when it was sold to Ecklund.
- Midlands' then-Sales Manager and then-General Manager each testified they did not remember Ecklund returning the vehicle. (R. p. 374, line 20-p. 375, line 20; p. 377, lines 8-18; p. 427, lines 18-25). Having a vehicle Midlands had sold as a 100% Honda-Certified PreOwned Vehicle being returned as actually being two half-cars was not sufficiently unusual to be remembered. It is a reasonable

² The opinion in this case apparently cites the death of the mechanic before trial as a point in Midland's favor. Op., at 6 n. 7. However, Midlands represented to the jury that the mechanic died in 2011. (R. p. 771 lines 7-12). This was well after Ecklund complained about the vehicle on March 11, 2010. (R. p. R. p. 1034).

We bought it from a lady and no question we had it in the service department and this guy name Terry Smith looked at it. How the heck he missed it I don't have a clue. But I got no evidence, I got nothing, because the guy died in 2011 and we didn't even know this claim [i.e., the lawsuit] was out there. So I got no evidence to give you and no way to explain it.

R. p. 771 lines 7-12 (Respondent's closing argument). In other words, they didn't ask him, had no plans to ask him, until they were sued—and then he died. The jury could reasonably infer that this is a lame excuse, and that it would not take a lawsuit to get responsible dealer to ask “[h]ow the heck he missed it.”

inference that they are lying or that they sell so many previously wrecked cars, they cannot keep up with all of them.

- It is also a reasonable inference that Midlands' senior management knew that what they were doing was wrong. It is simply obvious that selling two wrecked half-cars welded together as an actual car is wrong.
- It is also a reasonable inference that Midlands' senior management knew that North Carolina law forbids such sales without disclosure.
 - The opinion almost completely overlooks the fact that the Dealer violated North Carolina statutory law requiring disclosure of clipped and other "reconstructed" cars. (The only reference the opinion makes to that law is in the comparable penalties portion of the opinion.)
 - The opinion similarly reads as if the official North Carolina Department of Transportation document, MVR-181 (Attachment B, R. pp. 936-37), was simply an "auction form." E.g., "Midlands had failed to make disclosures on an ADESA auction form." The opinion errs, as it was not an auction form. The opinion states, "Midlands did not receive notice of the change to the disclosure form." Op. p. 7 n. 8. However, there was no change to the disclosure form, as it was a state form that had last been modified in 2002, as indicated by the text, "MVR-181 (Rev. 1/02)".
 - The evidence was that Midlands was selling 100 vehicles a year at that North Carolina auction (R. p. 360, lines 12-23), and buying from that auction. (R. p. 362, lines 17-23; p. 378, lines 14-15). Each one of those sales would have been accompanied by the North Carolina damage

disclosure form. (Attachment B, R. pp. 936-37). It is an eminently reasonable inference that it knew the required form would be issued for this sale. It is further an eminently reasonable inference that it knew that if it did not tell the auction the car was clipped, the auction would, as its agent, check the boxes on the form indicating there was no problem with this car.

- The required Damage Disclosure Form is a single sheet of paper. It asks,
 - 1. Has this vehicle been damaged by collision or other occurrence to the extent that damages exceed 25 % of its value at the time of the collision or other occurrence?

The box for Answer "No" is checked.

The final question asks, "5. Has this vehicle been reconstructed?* (ANY year)."

This box, too, is checked "No."

- Thus, it was an eminently reasonable inference that Midlands knew it was fraudulently breaking the law when it sold the reconstructed vehicle without disclosure.
- It was also an eminently reasonable inference that Midlands knew it was breaking the auction rules.

- The Panel writes that the "disclosure requirement had only been added at the auction several months prior without notice to Midlands." Op., p. 6. However, there is nothing in the record to support the proposition that the disclosure requirement had been added "only" several months prior.

Despite the repeated statements to that effect in the Final Brief of Respondent, it cited to only "R. at 996-1010, 408:24-409:3, 635:6-21" as

supposedly proving the auction's disclosure requirements were new.

However, as pointed out in the Final Reply Brief, p. 1, n.1, "The exhibit and other testimony that [Midlands] references . . . state nothing more than that the rules were updated in 2010. None say the disclosure requirements were new."

- Pages 996-1010 of the Record are simply the 2010 rules. They do not state what had been changed from the former rules.

- Pages 408:24-409:3 simply state:

Q. Would you flip back to the first page with me? Up at the top, is there a date?

A. January 2010.

Q. And this car got sold at the auction April 1 of 2010?

A. Yeah, I assume. Yeah.

That is all there is. Nothing about the prior rules lacking a disclosure requirement.

- Similarly, page 635:6-21 merely establishes that the rules were updated in 2010. It does not say that the former rules allowed one to violate North Carolina by failing to disclose this kind of damage.

Q. Got it. And the upper right-hand corner -- excuse me, I keep calling it right -- the upper left-hand corner of these rules, first page, the date on there is January 2010, right?

A. I suppose it is.

Q. And this sale was April 1 of 2010. Right?

A. It was in 2010.

Q. So, from January 1 to April 1, that's three months of time, right?

A. Okay.

Q. And that's the period that these rules would have been in effect.

A. Say that again.

Q. That's the period of time these rules had been in effect before your purchase.

A. Okay.

- The case should be decided on the evidence—not on speculation about what the former rules said.
- Appellants introduced into evidence the governing rules at the time of the sale. If Respondent thought the prior rules were different, Respondent should have moved those prior rules into evidence.
- It is an eminently reasonable inference for a juror to conclude that the party who shows the rules he advocates for has rules that support what he says, and the party who does not show the rules he advocates for has rules that do not support his position.

The Panel also writes that “no direct evidence established the harm to O&W was intentional.” Op., p 6 (emphasis added). The Panel overlooks the fact that fraud is almost never proved by direct evidence. It is the rare defendant indeed who admits, “I intended to defraud my victim,” and then still goes to trial. Rather, fraud “usually must be proved circumstantially.” *Mylin v. Allen-White Pontiac, Inc.*, 314 S.E.2d 354, 281 S.C. 174 (Ct. App. 1984) (case concerning fraud in the sale of a previously-wrecked automobile).

There was ample evidence supporting the jury’s finding of fraud and the lower court’s finding of willfulness.

III. The Panel Erred in Overlooking Evidence that the Tortious Conduct Evinced an Indifference to or a Reckless Disregard of the Health or Safety of Others. (First *Gore* Factor, Reprehensibility).

Gore instructed courts, in deciding reprehensibility, to consider whether “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.” Op. p. 5 (quoting *State Farm*, 538 U.S. at 419). However, the Panel makes no mention of the extensive evidence showing that this vehicle was unsafe, and that Respondent was indifferent to the threat it posed to the safety of others.

Exhibits 20-42 and 71-89 (R. pp. 965-987, 1036-1054), demonstrate the massive problems with this car. These include spot welds “welded solid like that its not gonna collapse the way it's designed to collapse.” (Testimony of Plaintiff’s expert Brian Allen, R. p. 503:19-23). In contrast, spot welds should be “two inches apart [so] if it gets hit and it collapses between those welds it's a crumple zone. It absorbs energy.” (*Id.*) “[A]lmost a half to three quarters inch gap” within a weld. (*Id.*, p. 489: 10-11). “Metal . . . ripped apart [and] not welded back.” (*Id.*, p. 491: 7-9). “It's literally ripped apart.” (*Id.*, line 22). “It's extremely poor quality work. You see holes in the welds right here.” (*Id.* p. 497:20-21). Brake lines cut and put back together with cheap plastic. (*Id.* p. 512:9-14); *see also* R. p. 1054 (showing cut brake and fuel lines and the flimsy connectors installed to connect them). “[T]his vehicle shouldn't be driven. Shouldn't be allowed on the road.” (*Id.* p. 513:16-17).

Respondent’s Senior Management admitted that they expected the “Mom-and-pop” dealers who buy these cars at auction (*id.*, p. 384, lines 1-20) to “turn around and re-sell these cars” (R. p. 439:21-22; p. 538:6). Once they are sold at the auction, Midlands “doesn't care what

those people do with the cars." (*Id.*, p. 541:22). To them, whether it will be sold to a consumer and put back on the road is "irrelevant." (*Id.*, line 9).³

If this is not indifference to or a reckless disregard of the health or safety of others, it is hard to think of what is.

In fact, even without their damning testimony, their very actions in repeatedly selling this clipped car without disclosure show an indifference to or a reckless disregard of the safety of others.

The Panel erred in overlooking this factor in its analysis of *Gore* factors.

IV. The Panel Erred in Speculating About The Prior Condition of the Car.

The Panel recognizes that Appellants maintain the damage would have been obvious once the vehicle was placed on a rack. Op., p. 6. Appellants do so, for reasons described in Part III above.

The undisputed testimony was that the "car" was unsafe and that the damage was obvious when one raises the car on a rack and looks from underneath. Respondent's expert examined the vehicle, but was not called at trial. (R. p. 519:10-p. 520:4). Nevertheless, the Panel speculates that perhaps the damage was not obvious at the time Respondent did its 159-point inspection. The opinion states, "However, O&A's examination of the vehicle was two years and approximately 30,000 miles after Midlands' original inspection." Op., p. 6. The panel appears to be speculating that perhaps the damage would not have been obvious when Midlands inspected the vehicle. Perhaps the damage became worse as the car was driven: holes in the welds grew bigger or the like. If so, if the car was getting more dangerous by the mile, that is hardly a reason

³ After all the evidence was in, and Senior Management had repeatedly disclaimed knowing that the car had been damaged, Midlands' counsel finally admitted in closing that Midlands knew "this is two cars put together." (R. p. 772:7-8).

to lower the punitive award. Further, it is not reasonable to think that a 159-point certification inspection would have missed the fact that this Frankencar was two half-cars poorly welded together.

Nor was this issue ever raised in the orders below nor in the briefs of the parties. This speculation is sua sponte by the Court. If Respondent had thought such an argument was sustainable, that these were types of damage that might not have been easily-discernable two years earlier, Respondent should have called its expert to so testify. He would have then been subjected to cross-examination. Plaintiffs should then have been able to counter with rebuttal testimony from their expert. So honed, the resolution could have been decided by the jury. The case should be decided by evidence honed through the litigation process.

The Panel erred in basing its finding that the actions at issue here were only mildly reprehensible on the basis of speculation about a defense that Respondent did not raise.

V. The Panel Erred in Its Application of the Second *Gore* Factor by Overlooking the Potential Harm.

The Panel accurately quotes the second *Gore* factor, “the disparity between the harm *or potential harm* suffered by [the plaintiff] and his punitive damages award,” Op. p. 5 (emphasis added) (quoting *BMW v. Gore*, 517 U.S. at 574), but then inexplicably switched terms in its analysis of this factor, as shown in its heading, “B. Amount of Actual Harm v. Punitive Damages Amount,” Op. p. 7. Its heading overlooks the potential harm, and its analysis does not mention it. Instead, the Panel compares the ratio of punitive damages to actual damages, in conflict with the teaching of *BMW v. Gore*. The undisputed testimony was that this “car” was extremely dangerous, and should not be on the road. The panel erred in overlooking the potential harm.

Respondent will likely contend that any error is harmless. Respondent will likely further contend that any risk is Roger’s and Dan’s own fault, that they should have better inspected the

car to detect Respondent's fraud before driving it. But that puts the burden where it does not belong. Roger has "always trusted the franchise dealers." (R. p. 591:4). The jury has already found that Roger made a reasonable inspection of the vehicle at the auction, *see* R. p. 782, lines 9-16 (Midlands ending its closing argument by stressing the jury could not find for Appellants on any cause of action except contract if "they didn't do a careful inspection") and R. pp. 43-45 (jury finding for Appellants on every cause of action). There are no lifts at the auction to raise a vehicle, as Respondent's Senior Management knew (R. p. 394:13-16).

Moreover, Respondent must have intended the vehicle to be driven without a significantly further inspection by the purchasers, as that is the only way their fraud could work. A buyer who put the vehicle on the rack the first day would be able to invoke the auction's arbitration rights to return the vehicle.⁴

Moreover, the central focus in punitive damages is on the wrongdoer, not his victim. Regardless of whether Roger and Dan are good people, regardless of whether they could have, should have, done a full up-on-the-rack inspection at a neighboring garage immediately upon receiving the vehicle, there was a *potential* for serious harm.

In overlooking the potential for serious harm, the Panel employed the wrong standard in its analysis of the second *Gore* factor, the ratio between punitive damages and the actual or potential harm.

⁴ Alternatively, perhaps the reason Respondent inexplicably took the car back to Columbia after selling it to Appellants, and returned it to the purchasers only after the arbitration period had ended (R. p. 615:14-p. 626:4), was to avoid the fraud being discovered in time for the purchasers to exercise their arbitration rights. If so, that only deepens the reprehensibility of Respondent's actions.

IV. In Holding that Comparable Penalties Under the Third *Gore* Factor Are One Thousand Dollars or Triple Damages under the UTPA, the Opinion Overlooks and Conflicts with Supreme Court Decisions in *James v. Horace Mann Ins. Co.* and *Austin v. Stokes–Craven Holding Corp.*, This Court’s Decisions in *Collins Entm’t Corp. v. Coats* and *Duncan v. Ford Motor Co.*, and the Text of N.C.G.S. Section 1D-25.

Gore’s third prong requires a comparison of the award to penalties authorized or imposed in comparable cases. Op., p. 8. The Panel’s analysis of the third *Gore* factor holds that comparable penalties are \$1,000 or “three times the amount of actual damages” under the North Carolina Unfair Trade Practices Act. *Id.*, pp. 8-9.

A. The Panel erred in overlooking the Supreme Court’s holding in *James v. Horace Mann* that fines of \$15,000 and \$30,000 “are set at such a low level, there is little basis for comparing it with any meaningful punitive damage award,” and this Court’s similar holdings in *Collins Entertainment v. Coats* and *Duncan v. Ford Motor Co.*

The Supreme Court has held that fines of \$15,000 and \$30,000 are so low there is little basis for comparing them with any meaningful punitive damage award. It follows, even more strongly, that a fine of \$1,000 is not a basis for comparison with a punitive damage award.

Pursuant to S.C. Code Ann. § 38-2-10 (2002), the director of the Department of Insurance may impose the following administrative penalties on an insurer for each violation of the insurance laws: (1) 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; (2) suspend or revoke the violator's authority to do business in the state; or (3) both. 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."

James v. Horace Mann Ins. Co., 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006) (quoting *Collins Entm’t Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 141, 584 S.E.2d 120, 129 (Ct. App. 2003)). See also *Duncan v. Ford Motor Co.*, 385 S.C. 119, 147-48, 682 S.E.2d 877, 892 (Ct. App. 2009) (following *James* and *Collins*).

The Panel erred in considering a thousand dollar fine to be a comparable penalty.

B. The Panel erred in overlooking this Court’s holding in *Collins Entertainment* that “we reject [the] argument that the sanctions provided in the South Carolina Antitrust Act . . . are for ‘comparable misconduct.’”

This Court has rejected the contention that the trebled damages available in the South Carolina Unfair Trade Practices Act are for “comparable misconduct” under *Gore*’s third prong. *See* S.C. Code Ann. § 39-5-140(a) (treble damages). It follows that the treble damages available in North Carolina’s Unfair Trade Practices are similarly not “comparable misconduct.” *See* N.C.G.S. 75-16 (treble damages).

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

Collins Entm't. Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 142-43, 584 S.E.2d 120 (Ct. App. 2003) (footnotes omitted).

The Panel erred in overlooking this holding of *Collins*.

C. The Supreme Court held in *Austin v. Stokes-Craven Holding Corp.*, “Because the jury awarded punitive damages pursuant to Austin's fraud cause of action, we are compelled to review factually-similar cases,” and therefore compared Austin’s award to other cases involving fraud by automobile dealers. The Panel erred in overlooking that teaching of *Austin*.

The Supreme Court explained in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2004) (footnote omitted), that when considering punitive damages in a case involving fraud by an automotive dealer, the proper comparison is to other cases involving fraud by an automotive dealer.

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).

Id. at 54-55, 691 S.E.2d at 152. By overlooking *Austin*, and comparing the present case to a thousand dollar fine, rather than to the \$500,000 and \$1 million punitive awards that are the appropriate comparison, the Panel erred.

D. North Carolina General Statute 1D-25 directs that when a punitive verdict is greater than \$250,000, and the actual damages awarded are less than \$83,333.34, the punitive award is to be \$250,000 per plaintiff. The Panel erred in overlooking that the Legislature has set the penalties for similar cases at \$250,000 per plaintiff, and that the penalties imposed in similar cases are \$250,000 per plaintiff.

This Court has explained that in reviewing punitive awards, a court must give "substantial deference" to the Legislature.

Finally, in *Gore*, the Supreme Court held that state courts, when reviewing punitive damages awards for excessiveness, must "compar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." Justice Stevens, writing for the Court in *Gore*, stated that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'

Collins, 355 S.C. at 142 (footnote omitted).

The North Carolina Court of Appeals has held similarly, as the Panel implicitly notes,

The third *BMW* guidepost requires consideration of civil or criminal penalties that could be imposed for comparable misconduct, giving substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.

Op., p. 8 (quoting *Rhyne v. K-mart Corp.*, 562 S.E.2d 82, 94 (N.C. Ct. App. 2002) (quotation marks omitted)).

Here, the Legislature has set the penalties for similar cases at \$250,000 per plaintiff.

N.C.G.S. 1D-25 provides (emphasis added),

- (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.

By overlooking this legislative judgment in its analysis of the third prong, the Panel erred.

The third prong of *Gore* also contemplates a comparison to penalties actually imposed in similar cases. North Carolina appellate courts have consistently given deference to this legislative judgment, and have ordered or affirmed that punitive awards be entered as stated in the statute, at \$250,000 per plaintiff. E.g., *Rhyne v. K-mart Corp.*, 594 S.E.2d 1, 20 (N.C. 2004) (\$250,000 per plaintiff, total of \$500,000); *GE Betz, Inc. v. Conrad*, 752 S.E.2d 634, 653 (N.C. Ct. App. 2013) (limit is per plaintiff); *Mace v. Pyatt*, 691 S.E.2d 81 (N.C. Ct. App. 2010) (remanding for finding of amount of actual damages, affirming \$250,000 punitive award for

individual plaintiff, on grounds that even nominal damages suffice); *Lacey v. Kirk*, 767 S.E.2d 632 (N.C. Ct. App. 2014) (\$250,000 punitive award per plaintiff, \$500,000 total).

Whether one follows the North Carolina appellate decisions, awarding \$500,000 where there are two plaintiffs and a punitive verdict above the cap, or the South Carolina Supreme Court's holding in *Austin*, finding punitive awards of \$500,000 and \$1 million to be proper benchmarks, appears not to matter much to the result in this case. The Court should follow one or the other.

Conclusion to Part IV.

The Panel erred in finding a \$1,000 fine and trebled UTPA damages to be proper benchmarks, as this Court and the Supreme Court have previously stated these are not proper benchmarks. The Panel further erred in failing to follow the guidance of *Austin*, the holdings of the North Carolina appellate courts, and the legislative judgment of the North Carolina legislature.

CONCLUSION AS TO PUNITIVE DAMAGES

The Court should afford “substantial deference” to the legislative judgment of the North Carolina legislature, as directed by *Gore*, and decline to hold the statute unconstitutional as applied in this case. In the alternative, the Court should closely follow the various provisions of *Gore*, and the holdings of the South Carolina Supreme Court and of this Court, and defer to the judgment of the jury that the fraud was willfully committed, the Respondent, through its management, evinced an indifference to or a reckless disregard of the safety of the motoring public, compare a punitive award at the statutory cap to the potential harm, not to the minor price of the car, and should compare this case to other cases involving deceptive sales of previously-wrecked vehicles, and reach a similar result.

V. The Order Misapprehends *Hensley*, on which It Heavily Relies to Suggest A Reduction in the Fee Award.

The Panel held that the trial judge erred in “apportioning” fees among causes of action, in contravention of North Carolina law. This “apportionment” had accounted for the great bulk of the reduction of the requested amounts of fees.⁵ The order further directed that attorney travel time be compensated.

Yet Appellants are concerned about two holdings which have a negative effect. First, the opinion suggested that the restored hours could be reduced on grounds of a lack of sufficient success by Plaintiff’s attorneys, and second, the order affirms the lower court’s absolute cut-off of fees incurred after September 13, 2016.

As a minor initial matter, the Panel overstates in writing, “In North Carolina cases discussing reasonable attorney’s fees, no matter the outcome, the touchstone is *Hensley* [v. *Eckerhart*, 461 U.S. 424 (1983)].” Op. p. 12. As the authority it quotes for that proposition makes clear, federal courts “routinely” cite *Hensley*, while North Carolina courts have merely applied *Hensley* “in a number of cases.” *Id.* n.12.

As the opinion notes, under *Hensley*, the lodestar amount may be adjusted upward or downward, depending on the degree of success Plaintiff enjoyed. “There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the ‘results obtained.’” Op. p. 12 (quoting *Hensley*, at 433-37). “If . . . a plaintiff has achieved only partial or limited success,” the fee award may be adjusted downward. *Id.* (alteration in original).

Plaintiff does not contest these general propositions.

⁵ By Appellants’ calculations, at least 67.5% and as much as 91.4% of the hours cut were cut on grounds of apportionment. The exact number is unclear; despite Appellants’ repeated requests (R. pp. 1888-89, 2041), the court below declined to clarify (R. p. 25, Order p. 2).

However, the order implies that the lower court may properly reduce the fees based on Plaintiff supposedly having achieved “only partial or limited success.” Here, the jury awarded every dollar of actual damages that Plaintiff requested. (R. p. 759:10-19; 542:1-5). It awarded the full purchase price of the vehicle, minus the \$500 Appellants conceded the vehicle was worth in its wrecked state. It did so despite Midlands’ attempt to elicit testimony that the vehicle in its damaged state was worth \$2000. (R. p. 646:17-p. 648:24). It awarded damages for the amount of the fee the auction charged for facilitating the sale. It awarded damages for the registration fee, which the family of the 16-year-old girl that bought the car had paid to the State, and for which Appellants reimbursed the family. It awarded damages for the commission that Appellants had paid to a part-time worker who sold the car. It awarded damages for the lost profits Appellants would have enjoyed had the vehicle been as represented.

Plaintiffs’ trial attorney obtained every conceivable dollar of actual damages. He did so on each of the four causes of action. The order errs in stating the jury issued verdicts on only two claims. Op. p. 2 & n.2. He requested \$6,645.00 in actual damages, and received four verdicts for \$6,645.00 in actual damages. (Attachment C) (verdict form) (R. pp. 42-46).

On punitive damages, he busted the cap. He obtained a punitive verdict of \$2,381,888.00, several times the statutory cap of \$250,000 per plaintiff.

If the Court directs the lower court to follow N.C.G.S. 1D-25 and award punitive damages at the cap, Plaintiff’s attorneys will have obtained the maximum amount of damages allowed by law. If, conversely, the Court ultimately affirms that \$46,515 is the maximum allowed by the due process clause, Plaintiff’s attorneys will still have obtained the maximum allowed by law.

Plaintiff will receive 100% of the damages, actual and punitive, to which he could possibly be entitled. How is that anything less than 100% success?

As *Hensley* states, “Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” 461 U.S. at 435.

If anything, the trial court should be instructed to consider raising the fee award on remand due to the high degree of success.

This is not a case where a plaintiff sought injunctions in six areas, but prevailed in only one. Nor is it a case where a plaintiff sought \$10,000 in damages, and received only \$5,000. The Panel’s view appears to be that the stakes involved—\$6,645 in actual damages, and \$46,515 in punitive damages—are too small to justify the hours Plaintiffs’ attorneys invested in the case. Such a view is contrary to the holdings of the North Carolina Supreme Court and other appellate courts.

Fee-shifting provisions in favor of successful plaintiffs under statutes such as the North Carolina UTPA are designed for situations in which the fees required are out of proportion to the stakes involved. As explained by the North Carolina Supreme Court, the North Carolina UTPA was enacted “so that local business interests could not proceed with impunity,” “given the small dollar amounts often involved in such suits.” *Marshall v. Miller*, 276 S.E.2d 397, 403-04 (N.C. 1981).

In 1986, subsequent to its 1983 decision in *Hensley*, the United States Supreme Court explained that a fee-shifting statute in favor of successful plaintiffs was enacted precisely because the expected hours of attorney time were not proportional to the stakes. *Riverside v. Rivera*, 477 U.S. 561, 586 (1986) (Powell, J., concurring); *id.* at 579–80 (plurality) (similar)

(civil rights law). Indeed, there would be no reason to enact such provisions if the fees were proportional to the stakes, as lawyers would then accept such cases on a contingency basis. *Id.*

Other courts hold similarly. The purpose of the fee-shifting provision in North Carolina's UTPA is to ensure that such cases are "economically feasible," *Cotton v. Stanley*, 380 S.E.2d 419, 421 (N.C. Ct. App. 1989). Our Supreme Court has also stated that such provisions for "attorney's fees are intended to make such claims economically viable for private citizens" as otherwise, "costly attorney fees may deter private citizens from bringing a claim under the [analogous] Dealer's Act." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56-57, 691 S.E.2d 135, 153 (2010).

The scholarly literature concerning fee-shifting provisions was gathered in *Covenant Mutual Ins. Co. v. Young*, 179 Cal. App. 3d 318, 324–328, 225 Cal. Rptr. 861, 864–68 (Cal. App. 1986), which concludes, not surprisingly, that statutes shifting fees only in favor of successful plaintiffs "are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy," *id.* at 324, 225 Cal. Rptr. at 865. "[W]here the Legislature wants to encourage litigation it can intervene to alter the decision-making equation by instituting unilateral fee-shifting. Then the injured person knows he will not have to absorb his own lawyer's legal fees, at least if he wins." *Id.* at 325, 225 Cal. Rptr. at 865.

See also Layman v. State, 376 S.C. 434, 442–58, 658 S.E.2d 320 (2008) (instructing that in determining the amount of a fee award, a court should consider the purposes of the specific fee-shifting provision pursuant to which fees are to be awarded, *id.* at 442–58, 658 S.E.2d at 324–33, and to apply a method of calculating fees that "embraces the theory of fee shifting embodied in the [relevant] statute," *id.* at 457–58, 658 S.E.2d at 332).

Fees are not be lowered based on the degree of success where “the plaintiffs obtained essentially complete relief.” *Hensley*, 461 U.S. 431 (noting “three cases [wherein] the plaintiffs obtained essentially complete relief” and explaining that these differ from cases where only incomplete relief was obtained). Here, the Appellants obtained essentially complete relief. The opinion in the present case should be modified to remove the directives to the contrary.

VI. The Order Errs in Holding that Attorney Fees Stopped Accruing on September 13, 2016.

The Panel relies solely on *DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020) for its proposition that Plaintiff stopped accruing attorney fees on September 13, 2016 as the result of a post-trial offer of \$81,069 made the next day. Op. p. 11. *DENC*, obviously, is not a North Carolina appellate case.

More important, *DENC* offers no support for the proposition that a post-trial settlement offer may cut off the entitlement to fees. *DENC* states that “courts may look to a defendant's efforts to settle a matter before trial and the reasonableness of those efforts, including whether any settlement offers made were reasonable relative to what was ultimately awarded to the prevailing party.” 454 F. Supp. 3d at 562 (emphasis added). As stated by the North Carolina Court of Appeals in *Cotton*, “Since the trial court had already found in the previous order that defendants' conduct was wilful and that their refusal to settle the dispute was unwarranted, plaintiffs were, in our opinion, entitled to legal fees for prosecuting the appeal as well as for the preparation for retrial.” 380 S.E.2d at 422.

Second, *DENC* requires a reasonable offer before its analysis even begins. *Id.* Respondent’s \$81,069 offer was not reasonable. It was obvious that limiting the initial fee award to 54.525 hours (R. p. 17) for five years' work, including travel to Illinois (R. p. 102), and a

five-day trial, was not going to stand, *Rish v. Rish*, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988) (inadequate fee award held to be abuse of discretion).

This is especially so because the bulk of the reduction from the requested fee award was based on a theory that the North Carolina Court of Appeals had strongly rejected. That theory was that fees should be apportioned among causes of action that all arose from the same nucleus of operative fact. *Morris v. Scenera Research, LLC*, 747 S.E.2d 362, 377-78 (N.C. Ct. App. 2013) (emphasis added) held,

On appeal, Morris argues that the business court erred by allocating among legal claims — and thereby reducing his award of attorneys' fees — because (1) claims that arise from a common nucleus of operative fact should not be allocated; . . . We agree with Morris's first two arguments[.]

The fees requested here were obviously from claims that shared a common nucleus of operative fact.

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

Appellants' counsel reasoned that the best negotiating strategy was to decline to counter-offer, in hope that doing so would spur Respondent to make a reasonable offer. Had Appellants'

counsel responded, and been drawn into extended negotiations with an opposing party that clearly was not going to make a reasonable offer, a Client paying hourly would justifiably complain that counsel was wasting her money. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (internal quotation marks omitted) (emphasis in original) (“Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority”).

Because the offer in question was an unreasonable post-trial offer, rather than a reasonable pre-trial offer, the Court should reverse the holding that Counsel are to work without pay after September 13, 2016.⁶

In the alternative, it should be noted that *DENC* was decided in 2020, after the briefs in this case were filed, so the parties did not have a chance to incorporate the case into their analysis. *DENC* states, as quoted above, that a court may look to reasonableness of offers, “including whether any settlement offers made were reasonable relative to what was ultimately awarded to

⁶ The panel’s additional sustaining ground, that the fees after the trial were not expended to protect, obtain, or sustain a judgment erroneously excludes fees sustained to enlarge a judgment. No North Carolina case holds that fees incurred to enlarge a judgment are excluded. Here, significant portions of that time were incurred to increase the attorneys’ fee award under the UTPA. That time clearly relates to the UTPA claim, and Appellants were obviously successful, as this Court’s directive to recalculate the fees makes clear. The panel’s additional sustaining ground conflicts with the very purpose of consumer-protection fee-shifting statutes, as it would make no sense to provide fees to compensate attorneys for their work, only to then require them to work without compensation to obtain those fees. A reasonable attorneys’ fee necessarily implies all work that is reasonable; it would not be “reasonable” to deny payment for work reasonably necessary. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 201,750 S.E.2d 78 (2013) (*Austin II*) (directing that “appellate and post-appellate fees should be awarded” under an analogous statute); *Renaissance Enters. v. Ocean Resorts*, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) (finding “no reason” that attorney fees for supplemental proceedings would be excluded), *rev’d in part on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999); *Parker v. I&F Insulation Co.*, 730 N.E. 2d 972, 975 (Ohio 2000) (quotation marks omitted) (“The work of the attorney on appeal is part of the legal process of achieving and maintaining the judgment for the consumer. Disallowing attorney fees for appellate work undermines the purpose of the Act.”). Under the Panel’s reading, an attorney who obtains a \$10 judgment for a client, increased to \$10,000 on appeal, could not receive a fee award for that work, because he had already obtained a judgment. That is an obviously unreasonable reading of the statute.

the prevailing party.” 454 F. Supp. 3d at 562. If the Court is going to follow DENC, it should neither affirm nor reverse the lower court’s holding on this issue, and instead instruct the lower court, after it finishes awarding fees for the period up to September 14, and determines whether post-judgment interest will be awarded, to evaluate the reasonableness of the offer in light of what is ultimately awarded.

VII. The Court Should Rehear the Offer of Judgment Issue.

First, because *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (2020), on which the Panel bases its decision on the offer-of-judgment issue, is currently pending in the Supreme Court on petition for writ of certiorari, if the Supreme Court reverses or modifies that opinion during the pendency of this petition, Appellants would ask that this Court reverse or modify its decision here.

Second, the panel does not directly address Appellants’ argument that the phrase “verdict or determination” means just that, and that when the offer-of judgment-statute, Section 15-35-400(B) of the South Carolina Code (Supp. 2020), states “If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover,” it means exactly that, not “If an offer of judgment is not accepted and the offeror obtains *final judgment* at least as favorable as the rejected offer, the offeror shall be allowed to recover.”

The opinion overlooks Appellants’ argument that South Carolina law governing offers of judgment used to state that the offerer needed to obtain a more favorable “final judgment” in order to recover; that the law had so stated for more than a hundred years; and that because the legislature changed the wording to the present form, the implication is that the legislature meant to accomplish something by the change. If the Supreme Court has not ruled on *Garrison* by the time this appeal ends, Appellants would request that this Court rehear on these grounds.

CONCLUSION

For the reasons above stated, and such other grounds as may be apparent to the Court, Appellants respectfully ask that the Court rehear the decision in this case.

Respectfully submitted,

s/Brooks R. Fudenberg

Brooks R. Fudenberg
Law Offices of Brooks R. Fudenberg, LLC
14 Ashe Street
Charleston, SC 29403
Tel.: (843) 416-2558
BRF@Fudenberglaw.com

August 30, 2021

s/C. Steven Moskos

C. Steven Moskos
C. STEVEN MOSKOS, P.A.
4000 Faber Place Drive, Suite 300
N. Charleston, SC 29405
Tel. (843) 763-5297
steve@moskoslawfirm.com

Attorneys for Applicants Daniel O'Shields and Roger W. Whitley

MIDLANDSHONDA

www.midlandshonda.com

124 Killian Commons Pkwy
Columbia, SC 29203
PH: 803-691-8500



2003 HONDA CIVIC

LX SEDAN



Certified
Used Cars



Mileage: 46,311

Engine: 1.7L L4 PFI SOHC 16V

Transmission: Automatic

Drivetrain: Front Wheel Drive

VIN: 2HGES16543H577916

Stock #: D8139

EXT / INT COLOR

Satin Silver Metallic
Other Color

LUXURY FEATURES

Air Conditioning
Cruise Control
Tilt Steering Wheel
Tachometer
Tinted Windows

POWER EQUIPMENT

Power Steering
Power Windows
Power Locks

SAFETY FEATURES

Security System
Driver's & Passenger Air Bag
Fog Lights
Intermittent Wipers
Rear Defogger

INTERIOR

SOUND SYSTEM

Factory System - AM/FM - CD Player
- Anti-Theft - Separate Tweeters.

ADDITIONAL/NOTES

Driver Air Bag, Front Disc/Rear Drum
Brakes, Child Safety Locks, Power
Driver Mirror, Pass-Through Rear
Seat, Bucket Seats, Adjustable
Steering Wheel, Tires - Front
All-Season, Tires - Rear All-Season

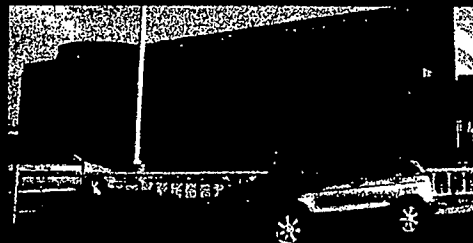
MIDLANDSHONDA

Phone: 803-691-8500

\$12,991

Hours of Operation

Monday:	9 a.m. - 9 p.m.
Tuesday:	9 a.m. - 9 p.m.
Wednesday:	9 a.m. - 9 p.m.
Thursday:	9 a.m. - 9 p.m.
Friday:	9 a.m. - 9 p.m.
Saturday:	9 a.m. - 7 p.m.
Sunday:	1 p.m. - 6 p.m.

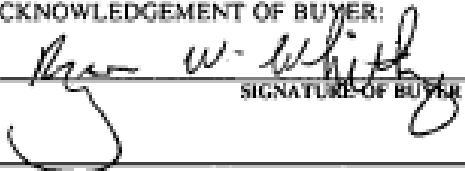


0285
0954

PENGAD 800-631-6889
PLAINTIFF'S
EXHIBIT
12
4-12-16

DAMAGE DISCLOSURE STATEMENT
VEHICLES FIVE (5) YEARS OLD AND NEWER (Applies to Numbers 1 and 4)
Alterations or erasures void this form.

STATE LAW REQUIRES THAT EVERY SELLER DISCLOSE TO THE BUYER IF HE KNOWS OR REASONABLY SHOULD KNOW, THE INFORMATION LISTED BELOW. FAILURE TO DO SO WILL RESULT IN CIVIL LIABILITY.

MAKE	BODY STYLE	YEAR MODEL	VEHICLE IDENTIFICATION NUMBER
Honda	45	2003	2HGE516543H577914
1. Has this vehicle been damaged by collision or other occurrence to the extent that damages exceed 25% of its value at the time of the collision or other occurrence? Yes ☐ No ☒			
If yes, list parts that were damaged. _____			
2. Was this vehicle a salvage motor vehicle?* (ANY Year) Yes ☐ No ☒			
If yes, in which state was it titled? _____			
3. Is this vehicle a flood vehicle?* (ANY Year) Yes ☐ No ☒			
4. Is this vehicle a recovered theft vehicle? Yes ☐ No ☒			
If yes, list parts that were damaged. _____			
5. Has this vehicle been reconstructed?* (ANY Year) Yes ☐ No ☒			
I declare that the above information is true to the best of my knowledge.		ACKNOWLEDGEMENT OF BUYER:	
 SIGNATURE OF SELLER		 SIGNATURE OF BUYER	
Address of Seller _____			



NOTICE TO BUYER: RETAIN THIS INFORMATION. STATE LAW REQUIRES YOU TO DISCLOSE SIMILAR DAMAGE INFORMATION WHEN YOU SELL OR TRANSFER TITLE TO THIS VEHICLE.

*See definitions on reverse side.

Damage Disclosure Definitions

Flood Vehicle—A motor vehicle that has been submerged or partially submerged in water in the extent that damage to the body, engine, transmission, or differential has occurred.

Non-U.S.A. Vehicle—A motor vehicle manufactured outside of the United States and not intended by the manufacturer for sale in the United States.

Reconstructed Vehicle—A motor vehicle of a type required to be registered hereunder that has been materially altered from original construction due to removal, addition or substitution of new or used essential parts; and includes glider kits and custom assembled vehicles.

Salvage Motor Vehicle—Any motor vehicle damaged by collision or other occurrence to the extent that the cost of repairs to the vehicle and rendering the vehicle safe for use on the public streets and highways would exceed seventy-five percent (75%) of its fair retail market value, whether or not the motor vehicle has been declared a total loss by an insurer. Repairs shall include the cost of parts and labor; or a vehicle for which an insurance company has paid a claim that exceeds 75% of the fair market retail value. Fair market retail values shall be as found in the NADA Pricing Guide Book or other publications approved by the Commissioner.

Salvage Rebuilt Vehicle—A salvage vehicle that has been rebuilt for title and registration.

Junk Vehicle—A motor vehicle which is incapable of operation or use upon the highways and has no resale value except as a source of parts or scrap, and shall not be titled or registered.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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

Plaintiffs)

v.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

VERDICT FORM

2016 APR 22 AM 11:47
FILED
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

1. BREACH OF CONTRACT

On the count of breach of contract, please state the amount of actual damages below:

\$ 6,645.00 Actual Damages

Please proceed to Question No. 2.

2. NEGLIGENT MISREPRESENTATION

On the count of negligent misrepresentation, how do you find:

☒

For the Plaintiff

☐

For the Defendant

If you find of favor of the Plaintiff, please state the amount of actual damages below.

\$ 6,645.00 Actual Damages

Please proceed to Question 3.

3. FRAUD

On the count of fraud, how do you find:

☒

For the Plaintiff

☐

For the Defendant

If you find of favor of the Plaintiff, please state the amount of actual damages below.

\$ 6,645.00 Actual Damages

Please proceed to Question 4.

4. UNFAIR TRADE PRACTICES

Do you find that a violation of the North Carolina Unfair and Deceptive

Trade Practices occurred:

☒

YES

☐

NO

If you find that a violation of the North Carolina Unfair and Deceptive Trade

Practices occurred, please state the amount of actual damages:

\$ 6,645.00 Actual Damages

Please proceed to Question 5

5. When do you find the North Carolina damage disclosure statement was provided to the Plaintiffs?

☒ _____

AT THE TIME OF THE TRANSACTION

SOMETIME AFTER PLAINTIFFS PAID FOR THE CAR

Please proceed to Question 6

6. If you found in favor of the Defendant on Plaintiffs' claims for negligent misrepresentation, fraud, and unfair trade practices, your deliberations are complete. However, if you found in favor of the Plaintiffs on all or any of these claims, please answer the following question for any of these claims on which you found in favor of the Plaintiffs:

- a. NEGLIGENT MISREPRESENTATION (answer if you found in favor of the Plaintiffs on this claim)

Was your verdict based only on the North Carolina damage disclosure?

_____ YES

☒ _____ NO

- b. FRAUD (answer if you found in favor of the Plaintiffs on this claim)

Was your verdict based only on the North Carolina damage disclosure?

_____ YES

☒ _____ NO

- c. UNFAIR TRADE PRACTICES (answer if you found in favor of the Plaintiffs on this claim)

Was your verdict based only on the North Carolina damage disclosure?

_____ YES

✓ NO

This is the true verdict of the jury

Keith Brown
Jury Foreperson

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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

Plaintiffs)

v.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

VERDICT FORM

FILED
2016 APR 22 AM 11:47
JEANETTE W. MCBRIDE
C.C.P. & G.S.

1. PUNITIVE DAMAGES

\$ 2,381,888.00

This is the true verdict of the jury

Kirsta Brown
Jury Foreperson



PENGAD 800-631-6889
PLAINTIFF'S
EXHIBIT
35
4-18-16 evd

0293
0980