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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. 2025-000801

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.

INITIAL REPLY BRIEF

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I. Respondent does not dispute that the North Carolina Supreme Court requires attorney fee awards under the North Carolina Unfair Trade Practices Act (NCUTPA) to be sufficient to encourage private enforcement of the Act and that the award here is too low to do so. (*See* Init. Br. of Appellants ("AIB") 26-28) (citing cases). It is unclear why Respondent then bothers to argue anything regarding the fee awards. To shoot the dead horse, Appellants offer the following responses to the arguments Respondent does make.

II. OTHER ARGUMENT

Background

The circuit court's December 2, 2016 order was reversed on both attorneys' fees and election of remedies in the first appeal of this case. *O'Shields v. Columbia Auto., LLC* (*O'Shields I*), Op. No. 5845, 435 S.C. 319, 335, 867 S.E.2d 446, 455 (Ct. App. 2021), *aff'd*, 443 S.C. 29, 902 S.E.2d 375 (2024). Regarding fees, this Court reversed the apportionment of time between causes of action. *Id.* at 335, 867 S.E.2d at 455. That reversed the rationale for what the circuit court had called "the vast majority" of the pre-September 2016 cuts. (R. p. _). That also reversed the rationale for the second-largest cut, what the circuit court called "block billing" that made it difficult to apportion time between causes of action. "Many of these time entries are vague or relate to large blocks of time, *only some of which are attributable to the NCUTPA* cause of action.", the circuit court had found. (Dec. 2016 Order p. 16) (emphasis added). "Given this practice, the Court is *unable to precisely calculate the total hours spent on the NCUTPA* claim using the records submitted by Plaintiff, *and must therefore base its calculations on a percentage reduction* of the hours claimed by Plaintiff." (*Id.*) (emphasis added). The rationale for this reduction, too, was reversed. "O&W argues the circuit court erred by apportioning attorney's fees between its

NCUTPA and fraud claims. We agree." *O'Shields I,* 435 S.C. at 335, 867 S.E.2d at 455. An underlying global rationale was similarly reversed. Under "Skill Required," the circuit court had written,

> First, this case did not have to be brought in South Carolina. Plaintiff resides in North Carolina and the transaction occurred in North Carolina. North Carolina's long arm statute would have permitted Plaintiff to sue in North Carolina with a North Carolina attorney. Again, Plaintiff was free to bring suit in South Carolina, but *the Court will not make Defendant pay the extra cost* incurred because of that choice.

(Dec. 2016 Order p. 17) (emphasis added). This Court reversed that rationale, too. "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." 435 S.C. at 338, 867 S.E.2d at 456. It also reversed the denial of fees for travel time. *Id.*

If the fees incurred are large, it is not, as Midlands Honda would have it, because O&W's counsel were unreasonable. O&W's two attorneys took this case on contingency and haven't been paid a dime in more than fifteen years. It is because Midlands Honda intentionally sold a clipped car, a vehicle reconstructed from two total-loss vehicles, back into the stream of commerce and refused to accept responsibility for it by taking it back immediately after the sale when asked. It's because extensive travel was required, even to Illinois. It's because of a complex summary judgment motion (S. R. pp _-_) and a five-day trial (R. pp. 223-1070). It's because the North Carolina statute that Midlands Honda insisted on required counsel to show that the violation was willful—which O&W's counsel did by showing fraud, which is notoriously hard to prove—*and* to show that there was "an unwarranted refusal to fully resolve the matter," *and* at least until September 14, 2016, Midlands Honda litigated this case at every possible turn. It insisted on North Carolina law, rather than South Carolina law. It unsuccessfully fought to keep from the jury the unsafe nature of the car. (R. p. 254, lines 5-8, p. 255, lines 1-3, p. 310, lines 4-6, p. 470, lines 9-

10, p. 471, lines 14-15). The case involved eight post-trial motions that Appellants had to prosecute or defend even after the verdicts were rendered and entered as a judgment. Midlands Honda unsuccessfully fought to throw out the verdicts because the jury was allowed to hear about the safety issues. It fought to throw out the verdicts for many other reasons, and to make O&W choose between its entitlement to attorney fees and a punitive award.

In this appeal, Midlands Honda has many putative reasons to retain the vast majority of the earlier cuts, despite the reversal of all the major rationales. Those putative grounds are all erroneous, as described below.

A. The Circuit Court On Remand Stated Its Rationale For Dramatically Reducing The Attorneys' Fees. Respondent Makes No Attempt To Defend That Obviously Reversible Rationale.

The post-remand order on fees of January 7, 2025 (Supp. R. p. _) provides its reasoning three and only three times:

(1) It "deducts" "all of Brooks R. Fundenberg' s" [sic] work "***because***" "Mr. Fundenberg [sic] was not involved in this matter prior to or during the trial." *Id.* (emphasis added).

(2) It repeats that "Mr. Fundenberg [sic] was retained ***merely*** in preparation of ***posttrial*** motions and appeals." *Id*. (emphasis added)

(3) It "also deducts $267,969 for C. Steven Moskos' time after April 22, 2016 ***because it was posttrial.***" *Id*. (emphasis added).[1]

The circuit court could not have been clearer as to *what* it was doing. It "deducts" the post-trial fees, all the post-trial fees, and nothing else.[2] As to *why* it "deducted" the post-trial fees, it

[1] It then deducts what it thought was the amount previously awarded and adds travel expenses.

[2] The order states in full,

> This matter was remanded back to this court by the court [*sic*] of Appeals on the issues of attorney's fees and travel expenses.
>
> The original amount of attorney's fees sought by the Plaintiff is $441,480. This

provides no explanation other than post-trial fees are deducted because they are post-trial. The March 2025 order on the motion to reconsider provided no further rationale. (Supp. R. pp._). It is undisputed that it is erroneous to refuse to award post-trial fees because they are post-trial. (AIB 17-22, *see esp*. Part I.A.1.a.II on page 20) ("Governing Law Does Not Allow Fees to Be Terminated Simply Because a Verdict Has Been Reached."). The Initial Brief of Respondent ("RIB") makes no attempt to refute that. None—not a word.

B. Respondent's Arguments That The Order Does Not Mean What It Says And Means What It Does Not Say Should Be Rejected.

1. Respondent's Argument that the Order Does Not Mean What It Says Should Be Rejected.

Respondent argues that the circuit court judge did not mean what he wrote. Respondent states, "The circuit court's ruling was not based upon apportionment or a new cutoff date" (RIB 16), thus denying that the circuit judge wrote that he was deducting "time after April 22, 2016 because it was posttrial." The judge wrote it three times, but Respondent denies he ever wrote it.

Respondent's argument should be rejected.

2. Respondent's Argument that the Order Means What It Does Not Say Should Be Rejected.

Respondent claims mainly that the fees that were cut were not incurred to obtain or protect the judgment, or that the circuit court reduced the fees due to a supposed failure to attain full

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> court first deducts $109,590 from the original amount for all of Brooks R. Fundenberg's [*sic*] submitted timesheets because, per Mr. Moskos [*sic*] breakdown, Mr. Fundenberg [*sic*] was not involved in this matter prior to or during the trial. Mr. Fundenberg [*sic*] was retained merely in preparation of posttrial motions and appeals. This court also deducts $267,969 for C. Steven Moskos' time after April 22, 2016 because it was posttrial. Lastly$21,264; reflecting the amount previously rewarded [*sic*] to plaintiff for attorneys fees, is subtracted from the total amount. After all deductions, the total amount for attorneys fees to be awarded totals $42,657.
>
> As directed by the Court of Appeals, this court awards travel expenses in the amount of $2,772.06 as demonstrated in Mr. Moskos [sic] travel expense timesheets.
>
> IT IS SO ORDERED.

success. Respondent asserts, "In short, the circuit court *found* that any additional post-verdict time that had not been previously awarded was either not incurred to protect the judgment or was not reasonable given the success achieved . . . ." (RIB 17) (emphasis added).[3] But the circuit court "found" no such things. It did not even mention them. It is simply dreaming to say the circuit court "found" such things or based the order on them. It requires a willful rejection of the circuit court's stated rationale and a replacement with what Respondent wishes the circuit court had held.

3. If the Order Secretly Relies on What It Does Not Say, and Not On What It Says, Reversal Is Mandated.

a. Reversal Is Mandated Under *Morris* and *Horton*.

If the order does not say what it means, and means what it doesn't say, it should be reversed. As stated in Appellants' opening brief, " '[T]he 'discretion' standard . . . requires the analysis be explained.' " (AIB 23) (quoting *Morris v. BB&T Corp.*, 438 S.C. 582, 588, 885 S.E.2d 394, 398 (2023). "Such a large reduction must be 'adequately explained with specific findings—as the law requires.' " (*Id.* at 24) (quoting *Horton v. Jasper Cnty. Sch. Dist*., 423 S.C. 325, 331, 815 S.E.2d 442, 445 (2018)). Respondent does not deny that a discretionary fees order must explain its reasoning.

Respondent argues simply that the rule should be overlooked because Appellants failed to inform the circuit court of the rule. But that is not so. Appellants informed the circuit court in virtually the same words and quoting the same case as in the appellate brief. "[A]n award that significantly departs downward from the requested amount is permissible only if 'adequately explained with specific findings—as the law requires.' " (Pls.' Mot. to Recons., Alter, or Am. [Jan.

[3] *See also* RIB 16, where Respondent similarly writes that the reduction here was not based on "a new cutoff date, but rather on the circuit court's determination that the fees after the verdict other than those previously awarded were not incurred to protect the verdict or were unreasonable."

2026] J., p. 2) (quoting *Horton*).

If the order below relied on the grounds Respondent attributes to it, rather than the ground it stated three times, it must be reversed on the undisputed grounds that a discretionary fees order must explain its reasoning.

It would also need to be reversed for substantive reasons, as explained immediately below.

b. If the Order Reasons as Respondent Claims, It Errs Substantively.

Respondent offers two global and three specific grounds it claims the circuit court relied on to dramatically reduce the award.

i. Respondent's Global Claims Fail. The global claims, mentioned above, are that "the circuit court found that any additional post-verdict time that had not been previously awarded was either not incurred to protect the judgment or was not reasonable given the success achieved . . . ." (*Id*. p. 17).

(I) The Time in Question Was Incurred Protecting or Obtaining a Judgment. Respondent writes, "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*.") (RIB 14-15) (quoting *Cotton v. Stanley,* 422 (N.C. Ct. App. 1989)) (emphasis is Respondent's). "Under the NCUTPA, a trial court may award attorney's fees for post-trial or appellate work by a prevailing party on an unfair trade practices claim where such work is expended in an *'effort' to 'protect the judgment.*' " (*Id*.) (quoting *Faucette v. Carmel Road, LLC*, 775 S.E.2d 316, 326 (N.C. Ct. App. 2015)) (emphasis added). The fuller quotation from *Faucette* is, "In previous Chapter 75 cases, we have held that '[u]pon a finding that [appellees] were entitled to attorney's fees in obtaining their judgment [under N.C. Gen. Stat. § 75-16.1], *any effort by [appellees] to protect that judgment* should likewise entitle them to attorney's fees.' " 775 S.E.2d

at 326 (quoting *Willen v. Hewson*, 622 S.E.2d 187, 193 (2005)) (alterations in original) (emphasis added).

Respondent never explains why it thinks the fees at issue here, incurred between April 23 and September 14, 2016, and "deducted" by the circuit court, were not incurred to obtain or protect a judgment. Its argument should be rejected on that basis alone.

Additionally, that time *was* expended to protect the judgment, or in obtaining or sustaining the status of prevailing party. The verdicts were entered, as a judgment, on April 22, 2016, the last trial day. (Supp. R. p._) (Order with verdict forms).[4] This is undisputed. (AIB 5). The circuit court's cut begins the next day, April 23, 2016. But from April 29, until well past September 14, 2016, Respondent was seeking judgment notwithstanding the verdict on three claims, including the NCUTPA claim (Mot. for J. Notwithstanding the Verdict, R. pp. _), and in the alternative, a new trial absolute. (*Id*. pp. 5-11). Respondent was also arguing that the NCUTPA judgment must be thrown out if Appellants retained their punitive award. (Mot. Require Elect., R. pp. _).

Respondent should not be allowed to have it both ways, telling the circuit court that it must revoke Appellants' status as prevailing parties, then telling this Court the time incurred was not to protect that status. If the circuit court had done what Respondent claims, and cut the fees for not being incurred to obtain or protect a judgment, it is clearly erroneous.

Also additionally, this Court limited its holding regarding fees not expended to protect the judgment to fees incurred after the circuit court's December 2016 ruling. Its holding was limited to "the final supplemental request," 435 S.C. at 337 n.11, 867 S.E.2d at 456 n. 11.[5] It did not hold

[4] Prompt entry of verdicts as judgments is required by law. Rule 54(a), SCRCP.

[5] That request was "Plaintiff's Motion for Supplemental Attorneys' Fees *for December 2016 Through March 2017*" (R. pp. 2058-2082) (emphasis added). This ground "sustains the circuit court's decision not to award *those* requested fees." 435 S.C. at 337 n.11, 867 S.E.2d at 456 n. 11 (emphasis added).

that all fees incurred after trial were not incurred to obtain or protect the judgment. It would be nonsensical to have held so. If the circuit court held on remand as Respondent claims, it again exceeded the terms of the remand and should be reversed on that basis as well. *Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011).

If the circuit court reasoned as Respondent claims, it triply erred—by not stating its real rationale and stating instead a false one; by cutting fees on grounds they were not incurred in obtaining or protecting a judgment when they were so incurred; and by misreading the remand to state in effect that all time from the beginning of the case could be cut on grounds it was not incurred to obtain or protect the judgment. Respondent's argument should be rejected.

(II) Degree of Success. Respondent quotes *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983), as stating, "In determining attorney's fees, 'the most critical factor is the degree of success obtained' " (RIB 15), but Respondent overlooks that *Hensley* explained, "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation." 461 U.S. at 435. Respondent also overlooks that any application of *Hensley* to North Carolina law must also incorporate and defer to North Carolina Supreme Court interpretations of North Carolina law.

Appellants received excellent results. They did so for both punitive and actual damages. As detailed in the October 4, 2024 letter to the circuit court ("Ltr."), Respondent itself felt the results here were so excellent, it moved to reduce the punitive damages award. (Ltr. p. 2). The circuit and appellate courts agreed. (*Id*.). That is the law of the case, and Respondent cannot be heard to argue the reverse. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 572, 776 S.E.2d 397 (Ct. App. 2015) ("In other words, '[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case.' ") (quoting *Ross*

v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997)) (alterations in original). The judge was bound by "the 'mandate rule' that binds a lower court on remand to the law of the case established on appeal." *Id.* (quoting 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 4478 (2d ed.2002)). Respondent cannot now claim Appellants had "little success" when it previously convinced the Court that the success was so significant it reached unconstitutional levels.

It would be unfair for the Court to hold this result was too good to be maintained and that it represents less than excellent results.

Were the Court to nevertheless reconsider the issue, the actual damages were also excellent: four damages verdicts, each for all the damages that could have possibly been awarded under these facts. These include the jury finding Appellants', rather than Respondent's, valuation of the market value of the clipped car; Appellants' payment to the saleslady, lost profits, and car parts Appellants replaced; auction fees; and the registration fees Appellants' customer paid to the state. (Ltr. p. 8; R. pp. 619:10-5, 623:25-624:4 (Testimony of Appellant Whitley)). Respondent points to no compensatory damages that Appellants asked for or might have asked for and did not receive. Nor could it credibly do so. Appellants also prevailed on each special interrogatory. Under *Hensley*, Appellants are entitled to full compensation.

And of course, any weight that might be given in interpreting North Carolina law to *Hensley's* interpretation of federal law would be only where its application does not conflict with a North Carolina Supreme Court interpretation of North Carolina law. These make clear that the small dollar amounts involved in cases like this are not grounds to reduce fees. It would be improper to reduce the fee award on grounds that the fees incurred are several times the recovery—

that the game was not worth the candle, as the saying goes.[6] To do so is to misunderstand North Carolina law. If this were a family law case, or a case involving contractual fee-shifting, it would likely make sense to require fees to be proportional to the stakes. But it's not. This is a case under a statute designed to encourage private parties to sue in order to advance the worthy goals of the underlying state policy. "The **obvious purpose** of this statute is to provide **relief for** a person who has sustained injury or property damage **in an amount so small** that, if he must pay his attorney out of his recovery, he may well conclude that **it is not economically feasible to bring suit**." *Hicks v. Albertson*, 200 S.E.2d 40, 42 (N.C. 1973) (analogous statute) (emphasis added). The NCUTPA is designed **so that "business interests could not proceed with impunity**, secure in the knowledge that the dimensions of their transgression would not merit" effective legal action, **"[g]iven the small dollar amounts often involved in such suits."** *Marshall v. Miller*, 276 S.E.2d 397, 404 (N.C. 1981) (emphasis added). "The purpose of attorneys fees in Chapter 75, however, is to '**encourage private enforcement**' of Chapter 75." *United Lab'ys, Inc. v. Kuykendall*, 437 S.E.2d 374, 380 (N.C. 1993) (quoting *Marshall*) (emphasis added). The North Carolina Court of Appeals has held similarly, as this Court noted in *O'Shields I*, 435 S.C. at 337, 867 S.E.2d at 456 (citing *Cotton v. Stanley*, 380 S.E.2d 419, 421 (1989)) ("The purpose of the fee award is to encourage private enforcement of the NCUTPA.").

Rather, the requirement is to provide enough to encourage this sort of litigation. As a result, North Carolina courts routinely award fees that are many multiples of the recovery. For example,

[6] "The saying alludes to a game of cards in which the stakes are smaller than the cost of burning a candle for light by which to play." https://www.dictionary.com/browse/the-game-is-not- worth-the-candle (last visited Apr. 17 2026).

the *Out of the Box Developers* case[7] the circuit court relied on in its 2016 fees order (Order p. 17), provided 18.2 times the amount of damages as an attorney fee award. That ratio here would produce a fee award of **$967,512.00.** That is more than *triple* the amount Appellants request. Under controlling interpretations of the Supreme Court of North Carolina, the statute is designed to make the game worth the candle to the injured party, because it is worth the candle to society to deter the acts the statute targets. While a North Carolina or South Carolina Court of Appeals judge may disagree with the policy, it is not proper to refuse to apply the legislative intent as found by the State's highest Court.[8]

Here is not the poor lawyering or partial rejection by a jury of the sort that justifies a reduction for limited success.

Respondent presents only two "reasons" for its belief that the success was so small that fees must be reduced. First, it tries to get away with misrepresenting what this Court said about *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). This Court quoted *Hensley* as holding that "two questions must be addressed. First, did the plaintiff fail to prevail on claims **that were unrelated to the claims on which he succeeded**?" 435 S.C. at 338, 867 S.E.2d at 456 (emphasis added). Respondent's Initial Brief presents what this Court held about that first question as "(1) did the plaintiff fail to prevail on other claims[?]" It simply omits the "that were unrelated" modifier. Respondent then tries to argue that "O&W asserted eight claims, but either abandoned or was unsuccessful on four of them." But under *Hensley*, and under this Court's

[7] *Out of the Box Developers, LLC v. Doan Law, LLP,* No. 10 CVS 8327, 2014 WL 4298329, at *10-11 (N.C. Super. Aug. 29, 2014).

[8] South Carolina also considers it "both illogical and erroneous" to award "fees based on a percentage of the prevailing party's recovery" where a "statute shifts the source of the prevailing party's attorneys' fees to the losing party." *Layman v. State,* 376 S.C. 434, 455, 658 S.E.2d 320, 330-331 (2008).

quotation of *Hensley*, failure to succeed on other, related, claims is not ground to reduce a fee award from the requested amount. It is improper for Respondent to misrepresent this point to the Court. Here, all the claims were obviously related, not unrelated.[9] Respondent's attempt to argue that related causes of action should reduce the award errs.

Additionally, even if the circuit court *had* written that it was reducing the award due to these related claims, it would have made no sense to reduce the award by almost 80% when four of eight claims succeeded.[10] It would have made no sense to reduce the award by even half, because, as the December 2016 order recognizes, Mr. Moskos was already familiar with South Carolina law, and so would have spent scarcely any time on the three South Carolina claims that were withdrawn when Respondent demanded North Carolina law. (Dec. 2016 Order p. 17) ("Plaintiffs counsel primarily handles 'auto fraud and unfair trade practice type cases.' He makes similar claims in many cases . . . ."). That leaves one claim out of eight, negligence, under North Carolina law, which would justify a reduction of no more than twelve-point-five percent *if* the time had been spent solely researching and writing about the law. But all the fact-finding for that claim was needed for the negligent misrepresentation claim, on which Appellants succeeded. A 79-to-80 % reduction on that basis would be unsupported by the evidence, even if this Court had authorized a reduction for related claims and the circuit court had so found.

Moreover, victory on any of those claims would have made no difference to the ultimate success, as Appellants would have been allowed only one actual damages award and only one

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[9] The circuit court even held that "Plaintiff's claims all arose from the same transaction, involved the same injury, and the jury returned a verdict for the same amount of actual damages on each claim." (Dec. 2016 Order p. 20). The claims here are so closely related that, if not for the difference in purposes served by awards of punitive damages and of attorney's fees, Appellants would have had to elect one and only one cause of action to recover on *in toto*. (*Id*.) (requiring election); 435 S.C. at 340-43, 867 S.E.2d at 457-59 (reversing on that ground).

[10] The "deductions" amount to exactly 79.25% of the request. (AIB 12).

punitive award. And Appellants had maxed out both types of damages.

Respondent's other argument about degree of success, that the time cut was spent pursuing punitive damages, sits awkwardly with this Court's instruction that time was not to be cut because it was spent on punitive damages. "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." 435 S.C. at 336, 867 S.E.2d at 455. It is also inconceivable that 79% of the time from June 29, 2011 through September 14, 2016—or that all of the post-trial time—was spent purely on pursuing punitive damages.[11] There was work on establishing the willful nature of the violation, the refusal to fully resolve the matter, and the unwarranted nature of the refusal—all of which was essential to the NCUTPA claim. There was work on election of remedies. There was work in successfully fighting Respondent's motion for judgment notwithstanding the verdict, and its alternate request for a new trial absolute. There was work in opposing an election of remedies that would imperil the UTPA verdict. It again defies logic to claim that anything approaching 79% of the time, and all the time between the trial and the September offer, was devoted to the pursuit of punitive damages. Nor was it unreasonable, between April 23 and September 14, for Appellants to argue for a larger portion of the jury's punitive verdict than Respondent was urging, which was zero.

If the order below relied on any of the global grounds Respondent claims it relied on, it should be REVERSED.

ii. Respondent's Specific Claims Fail. Respondent has three more specific

[11] Even were one to accept Respondent's argument that the court removed $10,140 from its January 2025 award for work through April 22, 2016, and moved it back to the April through September period, and attributed that solely to things other than punitive damages, that would mean that 96% of the time was devoted to maintaining the size of the punitive award. The circuit court did not hold anything so crazy, and if it had, Appellants' briefs would have a very different focus.

complaints. It mentions only two specific things it claims should be deducted from the fee request. These are for 153.8 hours, $59,982; and 58.9 hours, $22,971. It also argues another item should be "address[ed]," of 23.2 hours. These are nonsense.

Respondent argues that Appellants' "request for additional fees for work performed from May 2, 2016-July 20, 2016 made by way of Plaintiff's Motion Pursuant to Rule 59 and Motion for Supplemental Attorney's Fees filed on December 20, 2016" should have been excluded from the post-remand fee request. (AIB 18). It argues this justifies cutting the request by $59,982. (*Id.* n.9). But *these hours were already excluded* from the post-remand fee request. (Ltr. passim). It makes no sense to both exclude hours from a request and then deduct them.

Respondent argues that, before the remand, 58.9 hours were cut from 60.9 requested for work on an affidavit and that this reduction should carry over post-remand. (AIB 18-19 & n. 10). But the circuit court's finding on this in its March 2017 order—and on this, the circuit court did make a finding—was "the Court finds that the vast majority of this time [spent on the affidavit] does was [*sic*] *not reasonably expended in connection with the NCUTPA claim.*" (Mar 2017 Order pp. 3-4) (emphasis added). Because this Court reversed the circuit court's rationale that it could exclude time not related to the NCUTPA claim, this finding has been reversed. As the Court held in the first appeal of this case, "On remand, the circuit court should not seek to apportion requested fees between the fraud and the NCUTPA claims." 435 S.C. at 340, 867 at 458.

Finally, the circuit court's 2016 order did not find that 23.2 hours should be cut. All it stated is that claims totaling "between 15.1 and 23.20 hours," without explaining how the order derived those figures, "appear[s] excessive." (Dec. 2017 Order, pp. 3-4). It made no finding that some, all, or none of this 15.1 to 23.20 hours should be cut.

Because the reasons Respondent claims the circuit court relied on for the undisputedly

drastic (AIB 2) cut were not the reasons the circuit judge relied on, and would be errors if he had relied on them, Respondent's contentions should be rejected.

C. Appellants Provided the Circuit Court Ample Assistance.

Respondent cites the above, along with the inclusion of post-September 14 time as evidence that Appellants offered the circuit court "no assistance." But that is silly. As discussed just above, the 153.8 hours Respondent complains about was not included in the post-remand request, and the rationale for the 58.9 hour cut was reversed. Whether the circuit court should cut some, all, or none of the 15.1 to 23.2 hours, after it more fully understood the framework governing NCUTPA fees, was for the court to decide. Nor was Respondent required to pre-emptively cut time after September 14, 2016. In "summariz[ing]" the "remand [of] the issue of attorney's fees," this Court issued three "should"s and two "may"s. 435 S.C. at 340, 867 S.E.2d at 457. The "should"s are that "the circuit court **should not seek to apportion** requested fees between the fraud and the NCUTPA claims." *Id.* (emphasis added). It "**should** eliminate any redundant fees, improper cost, and paralegal fees as it had in the previous award, " but "**should not exclude** fees for **travel**." *Id.* (emphasis added). In contrast, "The circuit court **may** exclude fees incurred after the date of the September 2016 settlement offer." *Id.* (emphasis added). It "**may**—or may not—reduce the remaining amount of requested fees by a percentage it finds is appropriate to reflect reasonable attorney's fees based on the success of the litigation. This percentage **may** be impacted by the decision of the court regarding the election of remedies . . . ." *Id.* (emphasis added). In context, it appears the Court was directing some actions as required (the "should"s) and others as options (the "mays"). The letter Respondent complains about informed the circuit court that this Court had ruled, "The circuit court may exclude fees incurred after the date of the September 2016 settlement offer" (Ltr. p. 2) (quoting *O'Shields I*). Given that it was at least ambiguous whether the circuit court must or "may" exclude fees incurred after the September 2016 settlement offer,

there was nothing amiss about Appellants alerting the circuit court to the option, requesting those fees on remand, and then dropping the issue after the circuit court ruled against them. Respondent's suggestion to the contrary is without merit.

More generally, Respondent's claim (RIB 11, 19) that Appellants offered the circuit court no assistance is nonsense. Respondent's Brief concedes that the remand expected that "the circuit court **would revisit the issue** and reach a reasonable fee award" (RIB 11) (emphasis added); and Appellants' October 4 letter and its attachments offered ample assistance. (Supp. R. _-_). It provided all the relevant time sheets so the circuit court would not need to dig through the filings to find them. (Supp. R. pp. __). Respondent incongruously complains about this assistance while claiming the circuit court was provided no assistance. Appellants explained that the rationale for the largest and second-largest reductions had been reversed (Ltr. p. 2) (explaining that "the vast majority" of the pre-remand cut had been based on the erroneous apportionment); as had another ground for reducing the award, "travel time" (Ltr. p. 2), and it explained the importance and extent of that travel (*id*. pp. 5, 8). It reminded him of the North Carolina rule requiring a liberal approach to remedial statutes. (Ltr. p. 4) (quoting North Carolina precedent). It reminded the circuit judge that fee awards based on a percentage-of-the-recovery such as the 40 percent of recovery in the original fee award are impermissible under North Carolina law (Ltr. p. 3); and that if he were nevertheless inclined to base the award on the recovery, the *Out of the Box Developers* case the circuit court relied on in its 2016 fees order (R. p. _) provided 18.2 times the amount of damages as an attorney fee award, more than double the ratio requested here (Ltr. pp. 3-4 n. 8).

It preempted any reduction for "lack of success" by substantively addressing that factor, and the circuit court's decision not to reduce on that ground reflects as much. (Ltr. pp. 2-3) (pointing out that Appellants receive all the actual damages potentially recoverable and all the

punitive damages permissible on these facts; and gets both fees and costs under the NCUTPA while also receiving punitive damages for fraud); p. 8 (similar).

It presented numerous North Carolina appellate decisions stating that the purpose of the NCUTPA is to encourage suit, especially where the amounts at stake are low. (*Id.* 2-3).

Turning to the factors for fee awards, it reminded Judge Cothran that an extensive and complicated summary judgment motion (R. pp. 1190-1205) had been heard by the Honorable Tanya Gee (R. p. 41) before the case was assigned to Judge Cothran, and that it was necessary to travel, to Chicago to depose the prior victim, and elsewhere, to coordinate photographs of the damage from two witnesses; to work around the fact that a key witness, the mechanic who certified the car on behalf of Respondent, had died and so was unavailable to be deposed or testify; to coordinate with Appellants' expert witness to bring a devastating tale to the jury of danger to the motoring public; to assemble not merely persuasive facts but clear and convincing evidence of intentional deception. (Ltr. pp. 4-5).

North Carolina has slightly different factors for fee awards than does South Carolina. (Dec. 2016 Order p. 13). One North Carolina factor is the "Skill Required." (*Id*. p. 14). The letter pointed out that the rationale for the pre-remand holding on the skill required—that Appellants had been free to bring suit in North Carolina—had been overruled by *O'Shields I.*[12] (Ltr. p. 6). It reminded the judge of his findings that Counsel is experienced and capable and his requested rate was reasonable, were unchanged on appeal.[13] It told him of the difficulty in the election issue (Ltr. p. 7)

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[12] The circuit court had written,

> First, this case did not have to be brought in South Carolina. . . . . Again, Plaintiff was free to bring suit in South Carolina, but *the Court will not make Defendant pay the extra cost* incurred because of that choice.

(Dec. 16 Order 16) (emphasis added). This Court reversed that rationale: "*O&W* was free to use counsel of its choice and *should not be penalized* . . . ." 435 S.C. at 338, 867 S.E.2d at 456.

[13] The assistance also included,

that he had not appreciated the first time around, but that the Court of Appeals had (435 S.C. at 341-42, 867 S.E.2d at 458) (noting that in the most recent decision, which issued after the briefs were filed in the first appeal, the Fourth Circuit issued a split decision; and providing substantial analysis from that decision).

The letter offered to further "explain all the time spent establishing the unfair and deceptive conduct of Defendant" (Ltr. p. 5) (which was required for NCUTPA purposes); and ended by offering to provide more assistance (*id*. at 10).

It simply makes no sense to maintain that Appellants offered the circuit court no assistance.

D. Math Errors[14]

The January 2025 order "deducted" $95,000 more for work requested between April 23 and September 14, 2016 than was actually requested. Respondent makes the astounding claim that "There has not been any 'mistake, inadvertence, surprise, or excusable neglect,' " but makes no attempt to explain: If this wasn't a mistake, what was it?

It seems clear that this was a clerical error, as Respondent defines the term. "A clerical error 'is a mistake or omission by a . . . judge which is not the result of exercise of judicial function.' " (RIB 19) (discussing Rule 60(a), SCCRP). Is Respondent claiming the judge intended to take off $95,000 more for a period than was requested for that period? The $95,000 error also comes within Rule 60(b)(1)'s allowance for "(1) mistake, inadvertence, surprise, or excusable neglect." All Respondent has is a strange preservation-like argument wherein

1. A breakdown of fees by attorney and time period in a summary table;
2. An explicit exclusion of all Nationwide Insurance time on page 1;
3. A verbatim quotation of the Court of Appeal's remand instructions in footnote 3;
4. A factor-by-factor analysis of all eight attorneys' fee factors under North Carolina law per *United Laboratories v. Kuykendall*, 437 S.E.2d 374 (N.C. 1993); and
5. A preemptive response to Respondent's abandoned-claims argument in footnote 11.

[14] If the Court reverses the termination of fees at the end of trial, it moots this issue.

Respondent maintains the motion was made too late. But Rule 60 contains its own rule on time. It states that "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment . . . was entered . . . ." Here, the Rule 60 motion was filed April 10, 2025, less than three weeks after the circuit court denied Appellants' motion to amend, which would have mooted the relief requested in the Rule 60 motion. It was well within the one-year time frame.

Further, the circuit court did not base its denial of the motion on any supposed lateness. If it had, and had explained why it considered the motion too late, Appellants could have argued the issue to the circuit court, and if that did not work, could have argued to this Court that the circuit court's reason was mistaken. But it did not. It provided not a word as to why it was denying the motion. Appellants moved to reconsider, asking, among other things, that the circuit court explain its reasoning. (Supp. R. p. _). It declined to do so. (R. pp. _).

Conclusion to Fees Issue

The Court should reverse the deductions from the requested fees for four main reasons. It is undisputed that the award is insufficient under governing law, which requires fee awards to be sufficient to encourage private litigation to enforce the statute; the mathematical impossibility of deducting 968.1 hours from a period for which Appellants only requested 701.1 hours; the erroneous assumption that ending all fees after trial is supported by governing law and the terms of the remand (AIB 17-23); and the failure to cite any authority in support, after being chided in the first appeal for doing the same (*Id.* 47).

Respondent does not deny that the 79.25% reduction here is "drastic" (AIB 2), but attempts to justify the dramatic reduction on grounds that the circuit judge did not write what he meant, and that what he meant was to reduce the request by 153.8 hours that were not even requested on

remand and the like; and to nonsensically deny fees for work that was spent in obtaining or protecting the judgment on grounds it was not incurred in those efforts.

The Court should reverse the circuit court's January 2025 fee order and its denial of the motion to reconsider that order.

III. POST-JUDGMENT INTEREST ISSUES

A. Start Date

Interest on the actual and punitive damages awards began to run the day after the punitive verdict was rendered and entered as a judgment, i.e., it began on April 23, 2016. (R. pp. _). "A money decree or judgment of a court enrolled or entered must draw interest according to law." South Carolina Code Ann. 34–31–20(B). "A claimant is *entitled to interest from the date of the rendition of the verdict*, or post-judgment interest, *as a matter of course." Hunting v. Elders,* 359 S.C. 217, 229, 597 S.E.2d 803, 809 (Ct. App. 2004) (emphasis added). It was also improper for Defendant to have delayed entry of the judgment on attorney's fees. However, upon review of Respondent's Brief, Appellants accept that they may not have sufficiently raised the issue to the circuit court. Appellants thus concede the point.

B. End Date

1. Respondent takes Appellants to task for referring to the statement in *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895, 896 (1995), that the order relies on as "dicta." As Respondent writes, *Russo* states, "we hold." But "[a]s a legal term, a dictum is any statement or opinion made by a judge that is not required as part of the legal reasoning to make a judgment in a case." LII Online Dictionary, https://www.law.cornell.edu/wex/dictum (last visited April 11, 2026). In *Russo*, the result was that post-judgment interest did not stop. In that sense, any statement that post-judgment interest may cease is dicta. Further, the statement to which Respondent refers, "we hold that to stop accrual of interest, a debtor must comply with the plain language of Rule

67," established a necessary condition, not a sufficient condition, for interest to cease. To drive a car, it must have an engine (necessary condition). But it must also have gas or a battery charge (an engine is not sufficient). Complying with the statute is not sufficient absent a good reason for the court to grant leave.

Moreover, any "holding" in *Russo* that would have supported Respondent's point has been overridden by the Legislature. *Russo* relied on *Sears v. Fowler,* 293 S.C. 43, 358 S.E.2d 574 (1987). "In a related context, we recognized the majority rule that a judgment creditor is not entitled to interest on the judgment obtained during the pendency of an unsuccessful appeal." *Russo*, 317 S.C. at 443, 454 S.E.2d at 896 (citing *Sears*). When *Sears* and *Russo* were decided, Section 34-31-20(B) of the South Carolina Code stated, "All money decrees and judgments of courts enrolled or entered *shall* draw interest according to law." (*Id*.) (quoting S.C. Code Ann. § 34–31–20(B) (1987) (emphasis added). The code section stated the same when *Sears* was decided. 293 S.C. at 45, 358 S.E.2d at 575 (quoting S.C. Code Ann. § 34–31–20(B) (1976, as amended)). *Sears* held that the word "shall" was not mandatory in this context. The word provided merely a "mandatory tenor," not a mandate. "Despite the mandatory tenor of the statutory language, the statute does not automatically apply in every case." *Id*. Although rare, the Supreme Court has at other times found the word "shall" in a statute is not mandatory, due to an ambiguity in the word. "The word 'shall' may be construed as permissive to effect legislative intent," *State v. Blair*, 275 S.C. 529, 538, 273 S.E.2d 536 (1981) (citing 82 C.J.S. Statutes, § 380, at p. 881 (1953)); *May v. Cavender*, 29 S.C. 498, 7 S.E. 489, 490 (1888) (holding the word "shall" in a certain statute "is not 'mandatory' "); *cf*. *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 123-24 (1991). Because of this arguable ambiguity, many modern authorities recommend against the use of "shall" to indicate a mandatory requirement. For example, the Federal Plain Language Guidelines, available

at https://digital.gov/guides/writing-understanding/familiar-terms (last visited Apr. 17, 2026), recommend that drafters "[u]se 'must" to state requirements" because " 'shall' is imprecise. It can indicate either an obligation or a prediction." The Federal Guidelines point out that the federal courts "are eliminating 'shall' in favor of 'must' in their Rules of Procedure."[15] In short, the word "shall" is sometimes held to allow wiggle-room. But the Legislature has removed that wiggle-room. The statute now reads, in pertinent part, "A money decree or judgment of a court enrolled or entered *must* draw interest according to law." (Emphasis added). By changing the statute's language from the apparently mushy "shall" to the unambiguous "must," the Legislature effectively reversed both *Sears* and *Russo* if *Russo's* language is taken as a holding. "Must" means "must."

Regardless of whether the statement in *Russo* was holding or dicta, superseded by the Legislature or not, Respondent has only one response to the point that later Supreme Court opinions, by what are clearly holdings, contradict the circuit court's reading of *Russo.* (AIB 37-41). Respondent states, "The cases cited by O&W address interest generally and do not have any bearing on the holding in *Russo* and the implications of a deposit under Rule 67." (RIB 28). Respondent errs. The holdings of *Bakala* are not about "interest generally," as Respondent claims. They are specifically about "the implications of a deposit under Rule 67." "Rule 67 may not be used as a means of altering the legal duties of the parties." *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 167 (2003).[16] "The deposit of *uncontested* funds with the court does

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[15] *See* also *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 432-33 n.9 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' "); The Law Dictionary (the word "shall" "is generally imperative or mandatory; but it may be construed as . . . as equivalent to 'may,' " available at https://thelawdictionary.org/shall/ (last visited Apr. 17, 2026).

[16] Respondent does not and could not credibly dispute that, as stated on page 15 of Appellants' Initial Brief, "South Carolina Code Ann. § 34–31–20(B) (2025) creates a legal duty on the part of

nothing but delay payment of funds that are legally due. This is not the intent of Rule 67." *Id.* at 632-33, 576 S.E.2d at 167 (emphasis added).

The rule recognized in *Austin II* is a hard-and-fast rule. It applies to the implications of a deposit under Rule 67, specifically, whether the discretionary Rule can trump the statutory mandate. "[A] discretionary rule cannot eliminate a statutory mandate." *Austin v. Stokes-Craven Holding Corp*. (*Austin II*), 406 S.C. 187, 199–200, 750 S.E.2d 78, 84 (2013). This is not some new rule pulled out of thin air: It "is a is a fundamental distinction . . . ." *Id.* This is undisputed. Respondent's Initial Brief simply has no recognition of the fundamental rule about mandatory statutes trumping discretionary rules.

Nor does Respondent dispute that Rule 67 says nothing—not a word—about post-judgment interest ceasing, stopping, or tolling (AIB 36, 40-41); nor that many, many Supreme Court opinions, post-*Russo*, have decried the practice of inserting words or phrases into statutes and rules (AIB 37-39) (quoting cases).

Nor does Respondent dispute that *Calhoun*, a case decided after *Russo*, set a " 'bright line rule,' " i.e., " 'that interest . . . runs from the date of the original judgment.' "; and that " '[t]o the extent this new rule is inconsistent with prior case law, that case law is overruled.' " (AIB 37) (quoting *Calhoun v. Calhoun,* 339 S.C. 96, 104, 529 S.E.2d 14, 19 (2000)).

Rather than convert *Russo's* holding/statement[17] that compliance with the statute is a

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a judgment-debtor to pay post-judgment interest to a judgment-creditor for the time the funds are withheld from the creditor."

[17] Respondent cites only two other sources for its position that deposit into court may stop post-judgment interest, a 2020 treatise by James F. Flanagan, which itself relies solely on *Russo*, and *TCC of Charleston, Inc. v. Concord & Cumberland, LLC*, 446 S.C. 202, 918 S.E.2d 699 (Ct. App. 2025), which, like *Russo*, holds interest did not stop ("Thus, we hol*d the master erred in finding* that the HPR's *deposit* of the arbitration award into the court *would stop interest from accruing pursuant* to Rule 67, SCRCP.") (emphasis added).

necessary condition into a holding that it is a sufficient condition, and have it trump all the later holdings that contradict that reading, and trump the Legislature's replacement of the language on which that reading was based with clearer language that directly excludes that ruling, the Court should apply well-established jurisprudence and hold that deposit of uncontested funds with the Court does not trump the statutory mandate.

2. Discretion

As stated on page 44 of the Initial Brief of Appellants, "What is the interest of Respondent in denying Appellants access to those uncontested funds, once the funds are out of Respondent's hands? If Respondent deposits admittedly owed money, why does it care whether Appellants can use it? The order does not say . . . ." Nor does Respondent's brief. It provides not one word about any interest Respondent has in denying Appellants access to the undisputed funds once those funds are no longer in Respondent's possession. Like the order, Respondent's brief "fails to explain why, in its judgment, Respondent's desire to end its obligation to pay interest and its desire to delay Appellants' receipt of the uncontested funds outweighs the justified longing of the 85-year-old fraud victims to obtain some recompense while they still live." (AIB 44). It is undisputed that "On the merits, there is no reason to prefer Respondent's interest in denying compensation to Appellants over Appellants' interest in being paid for the time the funds are not available to them." (AIB 45).

It is undisputed that "Appellants proposed ways to meet both Respondent's desire to avoid further interest charges on those funds and Appellants' desire not to be denied statutory interest on funds unavailable to them." (AIB 15) *(id*. 34) (similar).[18]

[18] Appellants clearly appealed to the judge's discretion by discussing the unfairness of Respondent's proposition, and Respondent does not claim that the overall discretion issue was not properly raised below. Rather, it concedes that "Orders made pursuant to this rule are subject to an abuse of discretion standard." (RIB 22). It does claim that the sub-argument about the judge potentially not exercising his discretion if he read *Russo* as mandating, not merely allowing,

If Rule 67 allowed deposits to be made in the court's discretion *and* for statutory interest to then cease, the circuit court abused its discretion in allowing deposit, cessation of interest, and denial of Appellants' possession of the undisputed funds.

Conclusion to Interest Issue

Respondent relies solely on a statement from one case—*Russo*—that is not part of the ratio decidendi and on lesser authorities in turn relying solely on that case. That case relied on an earlier version of the statute. The Legislature has amended the statute to replace the word that enabled *Russo's* conclusion with a stronger word that does not allow for *Russo's* interpretation to continue into the present. A host of Supreme Court cases decided after *Russo* have implicitly or explicitly overturned that statement. Alternatively, the circuit court abused its discretion in placing Respondent's desire to keep funds out of Appellants' hands without the statutory interest once the funds were no longer in Respondent's possession over Daniel O'Shields' and Roger Whitley's desire to receive some recompense while they are still alive for the fraud committed against them.

The Court should REVERSE the holding that post-judgment interest ceased.

Conclusion

For the reasons above, and the reasons in the Brief of Appellants, the Court should REVERSE the "deductions" the circuit court made and REVERSE the holding that Appellants are not entitled to either possession of the funds or interest for the loss of use of those funds regardless of whether the funds have been deposited with the court.

Respectfully submitted,

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cessation of interest is not preserved. (RIB 24 n.1). It is true that Appellants did not write, "You have to exercise your discretion if you have it," but that should be known to a judge and was implicit in Appellants' response to Respondent's motion (Supp. R._-_) (passim).

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