

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Daniel O'Shields and Roger W.)
 Whitley, A Partnership d/b/a)
 O&W Cars,)
)
Plaintiff)
)
 v.)
)
 Columbia Automotive, LLC d/b/a)
 Midlands Honda,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

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 COMMON PLEAS COURT

ORDER ON POST-TRIAL MOTIONS

This case was tried from April 18-22, 2016, resulting in a jury verdict of \$6,645 in actual damages on the following causes of action asserted by Plaintiff Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars ("Plaintiff"): (1) breach of contract; (2) negligent misrepresentation; (3) the North Carolina Unfair Trade Practices Act ("NCUTPA"); and (4) fraud. The jury also returned a verdict of \$2,381,888 in punitive damages on the fraud claim.

This matter is before the Court on the post-trial motions filed by the parties, which were heard on July 27, 2016. In addition, the Court includes in this order its review of the punitive damages award reached by the jury. The motions before the Court are:

I. Plaintiff's Motion

Plaintiff filed a single motion seeking four additional measures of recovery.

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1. Trebling Plaintiff's verdict under N.C.G.S. § 75-16;
2. Awarding Plaintiff's attorney's fees and costs against the Defendant;
3. Awarding interest under S.C. Code § 15-35-400; and
4. Awarding prejudgment interest under N.C.G.S. § 24-5.

II. Defendant's Motions

1. Motion for Judgment Notwithstanding the Verdict ("JNOV"), or, in the Alternative, a New Trial, or a New Trial Nisi Remittitur;
2. Motion to Require Election of Remedies;
3. Motion to Enforce North Carolina Punitive Damages Cap; and
4. Motion for Setoff or Recoupment.

The Court will address each of these motions below with the exception of the motion for setoff or recoupment, which will be addressed in a separate order.¹

DISCUSSION

I. Defendant's Motion for JNOV or, in the Alternative, a New Trial or a New Trial Nisi Remittitur.

The motion is denied. The Court provides further discussion of some of the arguments raised in the following discussion, together with its review of the punitive damages award.

The Court notes that Defendant's motions are properly before it. Plaintiff has argued that Defendant failed to renew its directed verdict motions at the close of all evidence, and is therefore precluded from seeking JNOV. The Court finds that it was not necessary to renew any motions for directed verdict at the close of the punitive damages phase of the case. Defendant presented no evidence in the punitive damages phase of the trial which would have impacted the Court's rulings on the motions for directed verdict, and there was no passage of time sufficient for the Court to reconsider its rulings. Any renewal of the motions at that point in trial would have been futile. *See Fetter v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) ("This court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

¹ As a preliminary matter, the parties and the Court agree that North Carolina substantive law applies in this case. North Carolina is the place of the contract at issue and the location of the alleged injury. Thus, under both contract and tort conflict of law rules, North Carolina law applies to all substantive matters. *See Lister v. NationsBank of Del., N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997).

A. Due Process Review of Punitive Damages Award.

The multi-million dollar punitive damages award is the proverbial elephant in the room, and the Court will consider arguments related to the punitive damages verdict at the outset. The jury returned a verdict of \$6,645 on Plaintiff's fraud cause of action. Following the punitive damages phase of the trial, the jury returned a verdict of \$2,381,888 in punitive damages—more than 358 times the actual damages awarded. Defendant challenged the punitive damages award on multiple grounds, and the Court concludes that the punitive damages award cannot stand.

1. North Carolina Punitive Damages Review.

Following a challenge, North Carolina law mandates written judicial review of punitive damages awards. The Court elects to perform this review in connection with its ruling on the Defendant's post-trial motion. The applicable statute reads:

[w]hen reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter.

N.C.G.S. §1D-50. N.C.G.S. § 1D-35 lists the following factors to be considered in assessing a punitive damages award: (1) the reprehensibility of the defendant's motives and conduct; (2) the likelihood, at the relevant time, of serious harm; (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 claimant; (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 from the conduct; (9) the defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

a. Reprehensibility.

The conduct here is not sufficiently reprehensible to justify the jury's punitive damages award for several reasons. First, 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. Punitive damages must bear a reasonable relationship to compensatory damages. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580 (1996).

In this case, there is little or no evidence that the Defendant was aware of the change in auction rules. Similarly, there is no evidence that Defendant ever made a false representation directly to Plaintiff or was even aware that the auction had completed and provided a North Carolina damage disclosure form. Finally, Defendant had a good-faith basis for believing that there was no duty to disclose, as the sale was made to another dealer at a red-light sale and the contract was marked "as is." There was no evidence showing that Defendant's conduct was anything other than an isolated incident. The condition of the subject vehicle was unique, and Plaintiff presented no evidence that Defendant had ever violated the auction rules or North Carolina statutory law on any other occasion. Moreover, the harm suffered was purely economic and did not result in any personal injuries. Given this evidence, the Defendant's conduct does not justify an extraordinary punitive damages award.

b. Likelihood, at the Relevant Time, of Serious Harm.

This case did not involve personal injury, but rather concerned the sale of a high mileage used car between two dealerships. The measure of actual damages was the difference between the sales price of the car and its value at the time of sale, a difference of less than \$5,000. Moreover, Plaintiff had a duty under the auction rules and a common law duty as North Carolina

motor vehicle dealers to inspect the vehicle. These facts indicate that even if Defendant concealed information, there was little, if any, chance of harmful consequences to the Plaintiff.

c. Degree of Defendant's Awareness of the Probable Consequences of its Conduct.

The following facts were undisputed at trial: (1) Defendant sold the vehicle as a red light vehicle; (2) the contract was marked "as is;" (3) the vehicle had visible wreck damage; and (4) the vehicle had a visible change in paint scheme. Given these facts and Plaintiff's contractual and legal duties to inspect the vehicle, it would have been difficult for Defendant to foresee serious harm. This factor does not support the punitive damages award.

d. Duration of the Defendant's Conduct.

This case involves a discrete transaction that did not occur over any appreciable period of time and largely involved the conduct of a third-party, the auction. Therefore, this factor does not support the punitive damages award.

e. Actual Damages Suffered by the Plaintiff.

The jury determined that the actual damages were \$6,645. This award does not support a punitive damages award of \$ 2,381,888.

f. Any Concealment by the Defendant of the Facts or Consequences of Its Conduct.

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There was no direct communication between Plaintiff and Defendant prior to this transaction, nor was there any contact after the transaction until Plaintiff contacted Defendant after discovering the vehicle's condition. Additionally, Plaintiff's own expert explained that the vehicle's problems were immediately apparent if anyone looked under the car. The Court concludes that Defendant did not attempt to conceal the consequences of its conduct, and this factor does not support the large punitive damages award in this case.

g. Existence and Frequency of Similar Past Conduct.

This case involved a single used vehicle with a unique repair history and condition. Plaintiff introduced no evidence of misconduct of any kind involving any other vehicle, and there was no evidence of any other violations of the auction rules or North Carolina law. This factor does not support the punitive damages award.

h. Whether the Defendant Profited from the Conduct.

Defendant made a profit from the sale of this vehicle. However, the economic benefit received by Defendant was slight. At best, this factor is neutral.

i. Defendant's Ability to Pay Punitive Damages.

The Defendant's net worth exceeds the punitive damages award entered in this case. This factor is the only factor which might support the jury's punitive damages award. However, the United States Supreme Court has cautioned that a defendant's wealth alone cannot justify an otherwise unconstitutional punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003).

230/ Given the analysis of each of the factors set forth in the North Carolina statute, the applicable factors fall far short of what is needed to support the staggering punitive damages award reached by the jury.

2. Constitutionality of Punitive Damages Award.

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 three guideposts for determining the constitutionality of a punitive damages award: (1) reprehensibility of the defendant's conduct; (ii) the disparity

between the harm suffered and the punitive damages award; and (iii) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Id.* at 575; see also *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). This punitive damages award does not survive this review.

a. Reprehensibility.

The Court has previously discussed this element in connection with the North Carolina factors. In addition, the Court finds *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) instructive. *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 to 1. *Id.* at 53, 691 S.E.2d at 151.

In some ways, *Austin* is similar to this case. Both 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. 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*.

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*, 538 U.S. at 425 (2003); *Pacific Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991). 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.” *State Farm*, 538 U.S. at 425. Here, the jury’s verdict results in a ratio of 358:1 and therefore fails any ratio test.

c. Civil Penalties.

The comparable civil penalties for the conduct at issue under applicable North Carolina law are found in North Carolina’s damage disclosure statute, N.C.G.S. § 20.71-4, and NCUTPA, N.C.G.S. § 75-16. 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, “Private Civil Action.” *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.”² 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 exceeds any comparable civil penalty.

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Based on a review of the required factors, the Court therefore concludes that the punitive damages award in this case is excessive and violates due process. In deference to the jury, the Court can do no more than determine the upper limit of the range of punitive damages awards consistent with due process and set the amount of punitive damages accordingly. *Hollis v.*

² 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).

Stonington Development, LLC, 394 S.C. 383, 404, 714 S.E.2d 904, 915 (Ct. App. 2011). In the Court's view, the conduct at issue is sufficiently reprehensible to justify exceeding the 4 or 5 to 1 ratio discussed in *State Farm*. However, it is not sufficiently reprehensible to justify more than a single digit ratio. The Court therefore believes the appropriate ratio of punitive damages to actual damages is 7:1—this is less than the 8.21:1 ratio in *Austin* discussed previously because the Court finds the conduct here to be less reprehensible than the conduct at issue in *Austin*. The award of punitive damages is hereby reduced to seven times actual damages, or \$46,515.³

B. New Trial Arguments Relating to Punitive Damages.

The Court takes this opportunity to separately address Defendant's argument that it was entitled to a new trial on punitive damages because the jury should not have been permitted to consider evidence or arguments on "safety," and its argument that the Court erred in failing to provide the jury with a complete recharge on the elements of fraud.

1. Evidence of Safety.

Plaintiff's principal argument to the jury on punitive damages was that the subject vehicle was unsafe, and, by placing the vehicle back in the stream of commerce, Defendant could have harmed third parties. Defendant objected to the introduction of safety evidence on multiple occasions, including before and during the closing argument on punitive damages.

Defendant is correct that courts have cautioned against use of potential harm to third persons as a basis for awarding punitive damages. *Phillip Morris, USA v. Williams*, 549 U.S.

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³ The Court's reduction of the punitive damages award affects the outcome of certain other motions filed by Defendant. Defendant's motion to enforce North Carolina's statutory cap on punitive damages is moot because, as reduced, the punitive damages award does not exceed the statutory cap of \$250,000. Defendant's motion for a new trial based on the amount of the punitive damages verdict is also affected. The Court does not believe that the punitive damages verdict, as reduced, is so excessive as to require a new trial and therefore the motion is denied on this ground. Finally, because the punitive damages verdict has been reduced, Defendant's motion for a new trial *nisi remittitur* is denied.

346 (2007); *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010); *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004). As stated in *Phillip Morris*:

[t]he 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.

549 U.S. at 354. Yet *Phillip Morris* also states that "where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence introduced at trial or the kinds of argument the plaintiff made to the jury – a court, *upon request*, must protect against that risk." *Id.* at 357 (emphasis added). Defendant here objected to Plaintiff's use of evidence of safety and potential harm to third persons, but Defendant did not request a limiting instruction. Under these circumstances, the Court does not believe allowing Plaintiff to argue as it did rises to the level of a due process violation. Defendant's motion for a new trial based upon use of harm to third parties to award punitive damages is therefore denied.

2. Recharge on Elements of Fraud.

During the trial, the jury informed the Court that it had reached a verdict on all but one cause of action and asked the Court for additional information on an element of fraud. The Court instructed the jury to continue to deliberate. The jury submitted an additional request to be instructed again on the elements of fraud. The Court recharged Defendant's Requested Charge No. 16, a basic charge on the elements of fraud. Defendant requested that the Court also recharge Defendant's Request to Charge No. 17, which explained the reasonable reliance element of fraud in North Carolina, and, in particular instructed the jury that reliance cannot be reasonable unless the plaintiff was denied the opportunity to investigate, and the Court denied this request. Shortly after the recharge, the jury returned a verdict on all claims against Defendant, including the fraud cause of action.

Defendant argues that the Court erred in failing to recharge the jury fully. When the jury requests additional charges, it is sufficient for the Court to charge only the parts of the initial charge which are necessary to answer the jury's request. *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985). "Its failure to charge in greater detail is not error if the details were fully covered in the original charge." *Id.* Here, the Court believes the recharge was a correct statement of law and properly addressed the jury's question. Defendant's motion for a new trial on this ground is therefore denied.

II. Recovery under the NCUTPA.

A. Treble Damages.

North Carolina law mandates that the Court treble the actual damages verdict rendered by the jury on the NCUTPA claim. N.C.G.S. § 75-16. Accordingly, the Court trebles the actual damages award of \$6,450 to \$19,350.

B. Attorney's Fees.

In this case, only one claim gives rise to the possibility of an attorney's fee award for a prevailing plaintiff—the NCUTPA claim. Under the NCUTPA, attorney's fees may be awarded to a prevailing plaintiff 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:

(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

N.C.G.S. § 75-16.1. To recover attorney's fees under this statute, "a plaintiff must prove the following: (1) that the plaintiff is a prevailing party; (2) that the defendant willfully engaged in the prohibited act; and (3) that the defendant's refusal to fully resolve the matter was

unwarranted. A plaintiff must prove these factors by a preponderance of the evidence.” *Llera v. Sec. Credit Sys., Inc.*, 93 F. Supp. 2d 674, 676 (W.D.N.C. 2000).

The parties extensively briefed entitlement to fees under this statute. After reviewing all of the materials submitted, the Court has determined that a reasonable attorney fee in the amount of \$21,264 should be awarded.⁴

The Court finds that Plaintiff was the prevailing party under the NCUTPA as the jury returned a full award of \$6,645. Moreover, the jury was also charged with assessing willfulness, which the Court assumes was implicit in the fraud verdict. Thus, the Court finds the prevailing party and willfulness elements are met.

In analyzing the materials submitted by the parties, the Court finds that Defendant’s settlement efforts were directed to the NCUTPA claim and were reasonable with respect to the resolution of that claim, but were not tailored “to fully resolve the matter which constitutes the basis of [this] suit.” As shown in the affidavits presented by counsel, the sticking point with respect to settlement rested on punitive damages. On the one hand, Plaintiff did not make any offer below \$280,000, and on the other hand, Defendant’s highest offer was \$15,000 “plus a reasonable attorney’s fee.” On this basis, the Court finds there was an unwarranted refusal to settle the entire claim prior to trial.

The purpose of attorney’s fees under the NCUTPA is to encourage private enforcement of the NCUTPA. *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614, 625, 664 S.E.2d

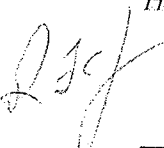
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⁴ At the hearing, Plaintiff asked for leave to submit an additional affidavit in support of the request for attorney’s fees. The Court agreed, but asked that any affidavit be filed quickly. More than thirty days later and after the Court has issued 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.

388, 396 (2008), *aff'd*, 363 N.C. 252, 675 S.E.2d 332 (2009). They were not meant to, and do not, allow for recovery of time spent in pursuing punitive damages, which are not available under the NCUTPA. As shown in the settlement correspondence and in the affidavits of Plaintiff's counsel, the vast majority of the effort expended in this case was devoted to the recovery of a large punitive damages award and not the pursuit of a claim under the NCUTPA.

The Court therefore limits the award to the realm of a reasonable award on the NCUTPA claim and the work expended by Plaintiff's counsel on that claim. Plaintiff bears the burden of proving a reasonable attorney's fee for this cause of action. North Carolina law requires that attorney's fee requests be reviewed using the following factors: (1) time and labor expended; (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 Pharmaceuticals, Inc.*, 2015 WL 4069818 (N.C.Sup.Ct. 2015) (“[p]laintiffs 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.”).⁵

I. Time and Labor Expended.

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*, 2015 WL 4897790 at * 3 (N.C. Sup. Ct. 2015) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Hours that are excessive, redundant, or


⁵ In any event, a multiplier increasing the fee award would be inappropriate. Plaintiff bears the burden of establishing that a multiplier should be used, and the burden is a heavy one. Multipliers should be used only in rare and exceptional circumstances. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). The Court finds that this is not such a case.

otherwise unnecessary are removed and should not be included in the trial court's assessment of attorney's fees. *Id.*

Here, Plaintiff has made no effort to delineate the number of hours expended on the NCUTPA cause of action (other than removing a few hours attributable to a settling co-defendant). Instead, Plaintiff has chosen to ask the Court for an award of nearly all of its fees, seeking an award of attorney's fees and costs totaling \$370,543.12 for a claim under which the maximum recovery was \$19,935. The Court does not believe this approach is appropriate as it is not reflective of the fees reasonably expended on this cause of action.

As an initial matter, Plaintiff has not discounted the total time spent in this case to reflect the claims on which it was not successful. Plaintiff initially asserted claims for violation of the South Carolina Unfair Trade Practices statute, S.C. Code Ann. § 39-5-10 *et seq.* and violation of the South Carolina Dealer's Act, S.C. Code Ann. § 56-15-10 *et seq.* These claims were abandoned after Defendant sought to dismiss them. In addition, Plaintiff withdrew a claim for constructive fraud after Defendant filed a motion for summary judgment. Lastly, the Court found the economic loss rule barred Plaintiff's negligence claim and granted Defendant's motion for directed verdict. Thus, Plaintiff abandoned or was unsuccessful on half the claims asserted against this Defendant (4 of 8).

Nor does the Court believe attorney's fees should be awarded for time spent pursuing punitive damages, which are not recoverable under the NCUTPA. Indeed, the evidence and the arguments of counsel make it clear that the majority of Plaintiff's efforts were aimed at recovery of punitive damages, rather than recovery under the NCUTPA. For example, the first settlement demand from Plaintiff came in a letter dated January 23, 2015. That letter demanded \$350,000 and stated "your clients have exposure of \$250,000 in punitive damages under North Carolina

law. I am sure a jury will reach that number easily.” The question of admissibility of evidence on punitive damages was discussed extensively in pre-trial motions before the Court and at directed verdict in connection with the economic loss rule arguments. When the Court commented on the small amount of actual damages in the case, Plaintiff’s counsel agreed that damages were small “until you get to the punitive damage phase.” By way of further illustration, Plaintiff included the entire punitive damages phase of the trial, which could not possibly have been attributable to the NCUTPA claim. The emphasis on punitive damages is also reflected in the Plaintiff’s post-trial submissions and arguments at the hearing on the post-trial motions.

Additionally, although Plaintiff excluded some of the time spent on claims against the original co-defendant, it appears to the Court that the materials submitted by Plaintiff did not exclude all of that time. Plaintiff should not recover from Defendant for time spent in pursuing claims against another party.

Furthermore, the Court finds that any paralegal time should be excluded for two reasons: (1) it does not appear to relate to the NCUTPA claim; and (2) the NCUTPA does not allow recovery of attorney’s fees for time spent by non-lawyers. The NCUTPA provides that a court may allow a reasonable attorney fee “to the duly licensed attorney representing the prevailing party.” N.C.G.S. § 75-16.1. Time for paralegals and assistants is considered an element of overhead and is not recoverable. *Irwin Indus. Tool Co. v. Worthington Cylinders Wisconsin, LLC*, 747 F.Supp.2d 568, 591 (W.D.N.C. 2010).

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The Court also notes that certain time entries submitted by Plaintiff appear excessive. For example, time records indicate that Plaintiff’s counsel spent 5.4 hours reviewing the deposition transcript of Mr. Ferrell, which he took, in preparation for summary judgment.

Plaintiff's counsel also attempts to claim between 15.1 and 23.20 hours for review of the deposition of Mr. Nalewaja, whom he deposed.

Finally, a significant portion of the travel time claimed was necessitated solely by the 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 Court will not impose the extra cost of this decision on the Defendant.

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. That said, 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. For example, on August 1, 2015, Plaintiff's counsel devoted 6.8 hours to "Prepare for Mediation. Prepare Pretrial Brief. Legal research regarding North Carolina Unfair Trade Practices Statute." Other entries are unrelated in any way to the NCUTPA claim. For example, on April 12, 2016, Plaintiff's counsel spent 5.1 hours as follows:

Review email from Jamie Flynn. Telephone conference with Jamie Flynn regarding testimony of Nationwide. Telephone conference with Kevin Ivey. Legal research regarding proof of punitive damages. Legal research regarding post trial analysis of punitive damages. Legal research involving procedural aspect of punitive damages. Review of objections and counter-designations of video testimony of Ecklund and Guyer. Begin review of evidence law regarding video depositions.

Ref
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. To account for block billing and the

other issues the Court has identified above, the Court finds a reduction of 75% is appropriate.⁶ This approach is consistent with that taken by the Superior Court of North Carolina, Business Court in *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) (removing certain hours from lodestar and applying percentage discount to account for claims other than the NCUTPA). Therefore, the Court determines that 54.525 hours reflects a reasonable amount of time and labor devoted by Plaintiff's counsel to the NCUTPA claim.

2. Skill Required.

This case was not complex for Plaintiff's counsel. Plaintiff's counsel primarily handles "auto fraud and unfair trade practice type cases." He makes similar claims in many cases, using form complaints and form discovery. The Court has accounted for this experience in accepting the hourly rate presented by Plaintiff's counsel as discussed below.

This case required the application of North Carolina law, but this factor does not justify the enormous attorney's fee sought for two reasons. 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. Second, while North Carolina law varies from South Carolina in certain respects, there is no significant difference between North Carolina law and South Carolina on the basic elements

⁶ The Court notes that this percentage reduction is also consistent with the number of claims submitted to the jury (of the four claims submitted, only one carried an entitlement to an award of reasonable attorney's fees).

of a claim for unfair trade practices. Thus, the Court finds that this case was not exceptionally complicated for Plaintiff's counsel.

3. Experience or Ability of the Attorney.

The Court accepts the affidavits of Plaintiff's attorneys with respect to the recitation of their experience or ability in cases such as this one.

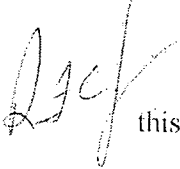
4. Customary Fee for Like Work.

The Court accepts the affidavits presented by Plaintiff's counsel that indicate a rate of \$400/hour is consistent with the market rate for similar work performed by attorneys with skill and experience in this area. For that reason, the Court accepts Plaintiff's proposed rate of \$390/hour and will apply that rate to the number of hours identified above, resulting in a total fee award of \$21,264.

The Court further notes that it is customary for Plaintiff's attorneys to accept cases such as this one on a contingency basis under which the attorney will receive 40% of any verdict. In this case, 40% of the fraud verdict (including punitive damages) as adjusted by the Court earlier in this order results in a total of \$21,264. In addition, this award is consistent with the trebled award under the NCUTPA.

Given the above analysis, the Court finds a reasonable attorney's fee award in this case is \$21,264.

C. Costs.

 Plaintiff also seeks an award of costs in the amount of \$14,866.62. The vast majority of this amount is not recoverable. Unlike most issues in the case, the award of costs is governed by South Carolina law. *Restatement (Second) of Conflicts* § 122, cmt. a (noting that a court applies its own rules to matters of judicial administration, such as costs).

Under Rule 54, SCRCP, only the following costs are recoverable:

- (1) Costs authorized by statute and sanctions imposed in favor of the prevailing party;
- (2) Fees of the clerk;
- (3) Fees of the sheriff;
- (4) Fees incurred in service of process;
- (5) Witnesses' Fees;
- (6) Fees for exemplification of copies of papers necessarily obtained for trial.

Costs for such items as deposition fees, expert witness fees, mailings, publications, and travel expenses such as meals, lodging, car rental and mileage are not recoverable. *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 433 S.E.2d 21, 25 (Ct.App. 1993). Applying these standards to the itemization of costs submitted by Plaintiff yields the following list of recoverable costs:

	<u>Date</u>	<u>Item</u>	<u>Amount</u>
1.	1/14/13	Filing fee to Richland County	\$150.00
2.	9/22/15	Motions filing fees	\$125.00
3.	4/2/15	Richland County Sheriff, service of deposition subpoenas	\$30.00
4.	5/22/15	Payment to SW Process Service	\$10.00 ⁷
5.	4/4/16	Trial check for Brent Farrell	\$31.80
6.	4/4/16	Trial check for Randy Threatt	\$31.80
7.	4/7/16	Payment to SWS Process Service for trial subpoenas	\$20.00
8.	4/7/16	Payment to James Ruopoli for service of trial subpoena	\$10.00
9.	4/17/16	FedEx office printing costs	\$85.47
10.	4/18/16	Richland County jury roster	\$10.00
11.	4/28/16	Post-trial motion filing fee	\$25.00
		Total:	\$529.07

Thus, the Court awards \$529.07 in costs.

III. Defendant's Motion to Require Election of Remedies.

Defendant moved to require Plaintiff to elect remedies. Election of remedies involves a choice between two or more different and coexisting modes or procedure or forms of relief afforded by the law for the same injury. *Save Charleston Foundation v. Murray*, 286 S.C. 170,

⁷ In all cases, the service of process fee has been reduced to \$10, the amount charged by the sheriff. Rule 54(e)(4), SCRPC.

333 S.E.2d 60 (Ct.App. 1985). Stated differently, “[e]lection of remedies is the act of choosing between different remedies allowed by law *on the same state of facts.*” *Boardman v. Lovett Enterprises, Inc.*, 283 S.C. 425, 428, 323 S.E.2d 784, 785 (Ct. App. 194), *rev’d on other grounds*, 287 S.C. 303, 338 S.E.2d 323 (1985). Courts must ensure that litigants do not receive a double recovery. *See Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998); *MRD Motorsports v. Trail Motorsports, LLC*, 694 S.E.2d 517 (N.C. App. 2010) (plaintiff is entitled to only one redress for a single wrong); *see also* 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.”).

In this case, 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. The Court concluded initially, and still concludes, that election of remedies is required.⁸ Permitting Plaintiff to recover actual damages on more than one claim would amount to more than one recovery for a single injury.

After consideration of the post-trial motions, and as set forth herein, the Court reduced the punitive damages award to \$46,515, and awarded reasonable attorney’s fees of \$21,264. The Court then required Plaintiff to elect between the following options: (1) NCUTPA actual damages of \$6,645 trebled to \$19,935 plus reasonable attorney’s fees of \$21,264; or (2) fraud actual damages of \$6,645 plus punitive damages of \$46,515. Plaintiff elected the first option, foregoing the fraud claim, and taking recovery under the NCUTPA.

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⁸ The Court originally required Plaintiff to elect soon after the verdict was returned, and Plaintiff elected actual damages for fraud, punitive damages for fraud, and attorney’s fees under the NCUTPA. Defendant objected to this election, and Plaintiff moved to reconsider, asking that it be permitted to delay election until after the Court ruled on post-trial motions. The Court granted this request.

IV. Prejudgment Interest.

A. Offer of Judgment.


Plaintiff seeks an award of more than \$236,628.01 in interest and costs of \$14,279.82 pursuant to S.C. Code Ann. § 15-35-400, South Carolina's statute governing offers of judgment. Plaintiff argues that recovery of these amounts is authorized because the verdict in this case exceeded the \$280,000 offer of judgment made before trial.⁹

The Court need not address the conflicts of law issue because interest under an offer of judgment is not available under either North or South Carolina law. If North Carolina law applies, only defendants may make offers of judgment. Rule 68, NCRCP. If South Carolina law applies, interest under an offer of judgment is not awarded unless the Plaintiff received a recovery at least as favorable as the rejected offer of judgment. S.C. Code Ann. § 15-35-400(b). Plaintiff made an offer of judgment of \$280,000 and the elected recovery is well below that amount, making interest and other costs unavailable.

B. General Statutes

Plaintiff sought an award of prejudgment interest under both North Carolina and South Carolina law. The claim for prejudgment interest under North Carolina law is governed by N.C.G.S. 24-5, which provides that:

(b) Other Actions. – In action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.


⁹ As a preliminary matter, § 15-35-400 may not apply. Authorities are split as to whether recovery pursuant to a statute governing offers of judgment is substantive or procedural. *E.g.*, *Southeast Floating Docks, Inc.*, 82 So.3d 73 (Fla. 2012); *but see Paine Webber Jackson and Curtis, Inc. v. Winters*, 579 A.2d 545 (Conn. App. 1990).

Plaintiff argues that it is entitled to prejudgment interest on the award of actual damages of \$6,445 at North Carolina's legal rate of interest of eight percent. N.C.G.S. § 24-1 (legal rate of interest). Given the actual damages award of \$6,645 is \$531.60, the per diem interest accrued is \$1.46. Plaintiff seeks prejudgment interest through May 2, 2016 of \$1,751.02. Additional interest through October 10, 2016 is \$242.36. The Court therefore awards total prejudgment interest of \$1,993.38.

Plaintiff has also sought prejudgment interest under South Carolina law. Defendant contends that South Carolina law regarding prejudgment interest does not apply. However, the Court does not need to resolve the question of conflicts of law because, even if South Carolina law applied, prejudgment interest is not available. Prejudgment interest is only available on an unliquidated claim. *Dibble v. Sumter Ice & Fuel Co.*, 283 S.C. 278, 322 S.E.2d 674 (Ct.App. 1984). The Court determines that Plaintiff's damages were not liquidated because the amount of damages rested on evidence of the retail value of the vehicle, which would not be presented until trial. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). In *Austin*, The South Carolina Supreme Court addressed an almost identical claim. It stated:

[a]lthough [plaintiff] is correct that prejudgment interest is statutorily authorized by the provisions of section 34-31-20 of the South Carolina Code, we find [Plaintiff's] damages were not liquidated at the time his claim arose. [Plaintiff's] lawsuit arose out of his dissatisfaction with the purchase of a used vehicle. Because [Plaintiff] alleged claims of fraud, constructive fraud, negligence, and violations of state and federal motor vehicle acts his prospective damages were unliquidated and could not have been ascertained without evidence of the retail value of the truck. Given [Plaintiff's] monetary recovery could not have been reduced to certainty, the trial judge correctly denied

[Plaintiff's] request for prejudgment interest.

Id. at 58, 691 S.E.2d at 154. Thus, the Court denies this request.

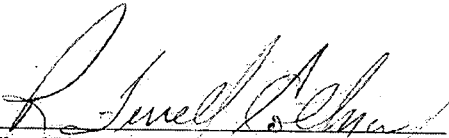
CONCLUSION

For the reasons stated above, individually and collectively, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Defendant's motion for JNOV is denied.
2. Defendant's motions for new-trial, including its motion for new trial under the thirteenth juror doctrine and a new trial *nisi remittitur*, are denied.
3. The punitive damages award is reduced to \$46,515.
4. Defendant's motion for enforce the North Carolina punitive damages is cap is denied as moot.
5. Plaintiff's motion for attorney's fees and costs is granted in part. Plaintiff is awarded \$21,264 in reasonable attorney's fees and costs of \$529.07.
6. Plaintiff's motion for interest and costs under its offer of judgment is denied.
7. Plaintiff's motion for prejudgment interest is granted in the amount of \$1,993.38.
8. Defendant's motion to require Plaintiff to elect remedies is granted.
9. As a result of this Order and Plaintiff's election, the Court enters the following findings with respect to the amount of Plaintiff's recovery. Entry of final judgment shall take place after the Court rules on Defendant's motion for setoff, as the amount of the final judgment may be affected by that ruling.

Treble Damages under the NCUTPA	\$19,935
Attorney's Fees	\$21,264
Costs	\$529.07
Prejudgment interest	<u>\$1,993.38</u>
	\$43,721.45

IT IS SO ORDERED.


The Honorable R. Ferrell Cothran, Jr.
Presiding Judge

Nov. 28, 2016