

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2013-CP-40-0319

*Plaintiff*

v.

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

*Defendant.*

**RECEIVED**  
APR 18 2017  
SC Court of Appeals

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JEANETTE M. HOBRIE  
C.P. & G.S.  
RICHLAND COUNTY  
FILED

**ORDER ON PLAINTIFF'S MOTION PURSUANT TO RULE 59 AND MOTION FOR SUPPLEMENTAL ATTORNEY'S FEES**

Having considered the motion of Daniel O'Shields and Roger W. Whitley, a Partnership d/b/a O&W Cars ("O&W") pursuant to Rule 59, SCRPC and motion for supplemental attorney's fees, the Court makes the following rulings.<sup>1</sup> The Court further directs the Clerk of Court to enter judgment consistent with this order. In the interim since the Court's order was filed Columbia Automotive, LLC d/b/a Midlands Honda ("Midlands Honda") has withdrawn its motion for setoff; therefore, judgment is appropriate at this time as itemized in the Conclusion of this Order.

**I. Rule 59, SCRPC Motion**

As an initial note, this action stems from one transaction: the sale of one used car by Midlands Honda to O&W Cars. O&W is a partnership, and Daniel O'Shields and Roger W. Whitley are the partners ("O&W"). There was one buyer here, and thus, there is one recovery

<sup>1</sup> Pursuant to Rule 59(f), SCRPC, the Court hereby exercises its discretion to rule on this matter on the briefs without further hearing. O&W submitted these requests in one filing, and the Court addresses them in one order.

and one punitive damages analysis whether the buyer is described as “plaintiff” or “plaintiffs.” O&W’s argument on this point is therefore denied.

In addition, the Court provides additional discussion on two matters raised by O&W:

**1. Interest.**

The prejudgment interest award should be adjusted upward to reflect the time until judgment is entered in this case. The Court directs the Clerk of Court to make that calculation on the date of entry as follows:  $\$1993.38 + (\text{number of days since October 10, 2016} * \$1.46)$ .

**2. Attorney’s Fees.**

O&W had the burden of establishing the amount of its attorney’s fees relating to its claim under the North Carolina Unfair Trade Practices Act (“NCUTPA”). The Court previously concluded that O&W had failed to do so in a number of respects, including by block billing time related to the NCUTPA claim together with time which was unrelated. O&W cannot correct this failure at the Rule 59 stage by providing new affidavits which purport to divide time between recoverable and non-recoverable claims. The Court declines to revisit its rulings on this point.

O&W also presents new time records seeking additional time from May 2, 2016 to July 20, 2016. O&W could have filed a supplemental affidavit or request seeking these fees prior to the hearing. It did not do so, and never sought leave to supplement the record prior to the Court’s decision. The Court declines to revisit its rulings on this point.

Finally, O&W seeks to increase the Court’s attorney’s fee award by arguing that the Court forgot or failed to award fees for time spent by Brooks Fudenberg. The Court disagrees with this contention and clarifies that it did consider Mr. Fudenberg’s time in its original fee award.

The remainder of the motion is denied without further discussion.

**II. Supplemental Motion for Attorney’s Fees after July 20, 2016.**

The Court addresses these arguments by time period.

**1. July 21, 2016 through July 27, 2016.**

O & W's counsel have submitted claims for an additional 36 hours (or \$14,040) for the period immediately prior to the hearing in this matter on July, 27, 2016. Based on the same analysis applied in its earlier order which is incorporated by reference here, the Court finds that this figure does not represent a reasonable reflection of the time devoted to the NCUTPA claim. The Court was present at the hearing and notes that much of the parties' time and energy was devoted to the analysis of the punitive damages award. There were also other arguments that were unrelated to the NCUTPA. Additionally, some of the time entries submitted by O&W for this period show that time claimed to have been spent on the NCUTPA was spent on some other aspect of the case or it cannot be ascertained whether the NCUTPA was involved or not. For example, Mr. Moskos's July 22 and July 24 time entries do not contain enough detail to determine whether they involved NCUTPA work. Other entries, asserting that 100% of the time claimed was spent on the NCUTPA, are undercut by the entries themselves that state that some portion of the time was spent on issues such as punitive damages, election of remedies, and offers of judgment. As a result the Court finds a reasonable attorney's fee for this period is \$7,020, representing 50% of the time claimed.

**2. July 28, 2016 through September 13, 2016.**

RJC / Mr. Moskos claims 65.2 hours on NCUTPA related activity during this period. 60.9 of these hours relate to the August 30, 2016 affidavit filed by O&W after the Court's preliminary ruling. The Court has already ruled that "much of the affidavit is improper as it contains legal arguments and speculation about which the Affiant lacked personal knowledge." Based on this finding, the Court finds that the vast majority of this time does was not reasonably expended in

connection with the NCUTPA claim. The Court finds that an appropriate fee for the preparation of an affidavit to respond to the chronology contained in Midlands Honda's response to the request for attorney's fees is \$780, representing two hours of work at the previously approved rate (\$390/hr).

The remaining time in this period not spent on the affidavit is minimal, 4.3 hours by Mr. Moskos and 1.7 hours by Mr. Fudenberg, producing a total fee amount of \$2,340 (6 hours \* \$390/hr). The Court finds an award of these fees is appropriate.

The total attorney's fees awarded for this time period is \$3,120.

### **3. September 14, 2016 through the Present.**

Before attorney's fees may be awarded under the NCUTPA, there must be an unwarranted refusal to settle on the part of the defendant. N.C.G.S. § 75-16.1; *Llera v. Security Credit Systems, Inc.*, 93 F.Supp.2d 674 (W.D.N.C. 2000). The Court previously concluded that Midlands Honda's pre-trial offer of judgment was a reasonable effort to resolve the NCUTPA exposure, but still found an unwarranted refusal to settle because Midlands Honda had not attempted to resolve the entire case.

As shown in the Affidavit of James Y. Becker attached to Midland's Honda's response to O&W's motion, Midlands Honda made another settlement attempt in response to the Court's order that amounted to an effort "to fully resolve the matter which constitutes the basis of [this suit]." On September 14, 2016, Midlands Honda, through counsel, hand delivered a settlement offer to Mr. Moskos offering to pay O&W "a sum reflecting actual damages plus the trial court's award of both punitive damages and attorney's fees for a total of \$81,069 (\$6,645 in actual damages + \$46,515 in punitive damages + \$21,264 in attorney's fees)." In other words, Midlands Honda offered to pay O&W all of the relief approved by the Court, including alternative relief which would have been foreclosed by O&W's election of remedies. In fact,

Midlands Honda made a slight math error in its settlement offer and, as a result, the offer was greater than the total amount of relief approved by the Court.

On September 16, O&W rejected the settlement offer, stating "I have reviewed Midlands Honda's confidential settlement offer with my clients. While the offer is confusing since it offered \$81,069 but the numbers totaled only \$74,424, my clients have decided to decline both offers." Midlands Honda twice asked for a counter offer (on September 16 and October 3), but O&W had not responded as of the date of Mr. Becker's affidavit.

As a result, the Court finds that there is no entitlement to any additional attorney's fee award after September 14, 2016 as there was not an unwarranted refusal "to fully resolve the matter which constitutes the basis of such suit" as required by the NCUTPA in N.C.G.S. § 75-16.1.

### CONCLUSION

For the reasons stated above, individually and collectively and as provided in the Court's earlier order, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. The prejudgment interest award will be adjusted upward to reflect the time until judgment is entered in this case. The Court directs the Clerk of Court to make that calculation on the date of entry as follows:  $\$1993.38 + (\text{number of days since October 10, 2016} * \$1.46)$ .

2. The Attorney's Fee award will be adjusted to include an additional \$10,140.

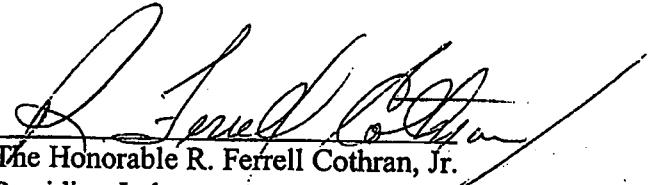
3. As a result, the Court directs that judgment be entered as follows:

Treble Damages under the NCUTPA \$19,935  
Attorney's Fees \$31,404 ( $\$21,264 + \$10,140$ )  
Costs \$529.07  
Prejudgment Interest  $\$1993.38 + (\text{number of days since October 10, 2016} * \$1.46)$   
 **$\$51,868.07 + \text{Prejudgment Interest as calculated by the Clerk's office pursuant to the formula above}$**

AJC

4. O&W's motions are otherwise denied.

**IT IS SO ORDERED.**



The Honorable R. Ferrell Cothran, Jr.  
Presiding Judge

Feb. 27, 2017