THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

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

Appellants,

v.

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

Respondent.

INITIAL BRIEF OF APPELLANTS

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

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

Attorneys for Appellants

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STATEMENT OF THE ISSUES

I. Where senior managers of a Honda franchise fraudulently sold a hazardous vehicle consisting of two half-Civics joined together, without disclosing the nature of the vehicle, in violation of the North Carolina auction's rules and of North Carolina law, and the jury returned a punitive verdict of $2,381,888.00, did the lower court err in holding that $46,515.00 is the maximum punitive award allowed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

II. Did the lower court err in the amount of its award of attorneys' fees under the North Carolina Unfair Trade Practice Act?

III. Because the Supreme Courts of both North and South Carolina have held that a plaintiff entitled to statutory attorney fees and punitive damages for fraud need not elect between the two, did the lower court err in requiring Appellants to elect between the two?

IV. Where Respondent rejected Appellants' offer to settle for $280,000 pursuant to the offer of judgment statute, and the jury returned a verdict for $2.38 million, did the lower court err in denying Appellants interest under the statute?

STATEMENT OF THE CASE

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

They sued under common law and South Carolina statutory law. CAC moved to dismiss the statutory claims on grounds that South Carolina law did not apply. (MTD, p. 1). The motion was resolved by an order (Ord.) and a first amended complaint alleging violation of North Carolina rather than South Carolina law,[2] (Am. Comp.).

[1] Nationwide subsequently settled and was dismissed from the case. (Stip).

[2] The amended complaint alleged breach of contract, negligence, negligent misrepresentation, constructive fraud, fraud, and violation of the North Carolina Unfair Trade Practices Act. (Am. Comp.)

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

A bifurcated jury trial was held before the Honorable R. Ferrell Cothran, Jr., April 18-22, 2016. The jury was first presented claims for breach of contract, negligent misrepresentation, fraud, and violation of the North Carolina Unfair Trade Practices Act ("UTPA"), N.C.G.S. § 75-1.1. Two special interrogatories were also given to the jury. The jury returned an actual damages verdict of $6,645, the amount requested by Appellants, on each claim. 510:21-511:5, verd. 2-3. The trial court then conducted the punitive damages phase of the trial. The jury returned a punitive verdict against CAC for $2,381,888.00. Ver. p. 4.

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

Appellants served one post-trial motion seeking four types of relief, each with a supporting brief. (mot). These sought (1) Trebling of Appellant's UTPA verdict (Br.); (2) Interest under the Offer of Judgment Statute (Br.), on grounds the verdict was for a greater

amount than the rejected offer of judgment; (3) Prejudgment interest under N.C.G.S. § 24-5 (Br.); and (4) Attorney's fees and costs accrued from June 29, 2011 through May 1, 2016, (Br.), seeking, in the alternative under the law of either state, compensation for 452.1 hours of work by trial counsel at $390 an hour, a 50% multiplier, and costs of $14,866.62. Regarding North Carolina law, Appellants argued the requirements were met under that State's UTPA that fees may be awarded if the violation was "willful" and the violator had made an "unwarranted refusal to fully resolve the matter," (p. 6-9); and that the amount of an award under North Carolina law is determined by four factors: the time and labor extended, the skill required, the customary fee for like work, and the experience and ability of the attorney, (p. 9-10).

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

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

CAC then served its brief in opposition to the motion for a fee award. (D's Br.) It argued

that fees were inappropriate, but if fees were awarded under North Carolina law, it agreed the amount was to be determined by the factors Appellants had listed (*id.*, pp. 12-13) (listing identical factors), and did not dispute that $390 was an appropriate hourly rate. It identified up to 52.7 hours[3] it maintained should be cut from Mr. Moskos' initial fee request, Def.'s Br., pp. 15-16 & App. 5 p. 2, and did not mention the later filings. Neither party maintained that a "percentage of the recovery" or "standard contingency-fee" award would be appropriate under North Carolina law.

A hearing on the motions was held on July 27.

The Judge's clerk emailed all counsel on August 29, 2016 (email) (emphasis in original):

> Judge Cothran directs the plaintiff to elect from either of the following awards: 1. *Treble Damages and attorney's fees for the N.C. Unfair Trade Practices Cause of Action*: $6,645(actuals) X 3=$19,935 plus an award of attorney's fees of $21,264 for a total of **$41,199**. OR
>
> 2. *Actual and Punitive damages for the fraud cause of action*: $6,645(actuals) plus $46,515 in punitive damages for a total of **$53,160.**

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

Appellants elected the UTPA award. (elec.)

CAC then offered to settle the case on September 14, 2016 for $81,069. (Conf. Doc.).

CAC submitted a proposed order on October 17. (email+prop. ord.) It (1) changed the caption's designation of Plaintiffs to "Plaintiff" in the singular, (2) reduced the punitive damages under the fraud verdict to $46,515, holding this was the maximum award consistent with federal due process (6-9); (3) trebled the compensatory award under the UTPA to $19,935

[3] Included in that figure is "7.05 - 21.45 hours" CAC argued should be cut as work on punitive damages, p. 15. The figure in text uses the higher amount from the 7.05-21.45 range.

(p. 11); (4) denied Appellants' request for costs under North Carolina law and awarded instead $529.07 in costs under Rule 54, SCRCP, on grounds that costs are procedural and thus governed by forum law (18-19); (5) awarded prejudgment interest of $1,993.38, with accumulation of interest ending on October 10, 2016, p. 23, (6) denied Appellants' claim under the offer of judgement statute for interest of $236,628.01 and costs of $14,279.82, on grounds the judgment entered was for a lesser amount than the offer (p. 21); (7) held CAC's motion for a setoff to be decided later, pp. 1, 23, and (8) granted CAC's motion to require Appellants to elect between the fraud and UTPA claims. (p. 23).

It also (9) granted in part Appellants' request for attorney fees under the UTPA, holding the requirements for fees under North Carolina's UTPA were met, and awarding $21,264.00 (11-18). The proposed order recognized this was 40% of the fraud award (p. 18).

However, it stated the amount was based instead on a determination that only 54.525 hours were compensable. It reached that figure in two steps. First, "After a thorough review of the materials submitted, the Court has identified approximately 218 hours of entries that contain or could contain time spent on the NCUTPA claim." (Order, p. 16.) It added, "the Court finds a [further] reduction of 75% is appropriate," (*id.*, p. 17), in part on grounds that much of the work did not relate to the UTPA claim (*id.*, p. 16). Multiplying these approximately 218 hours that survived the first cut by 25%, the order stated that 54.525 hours were compensable. Multiplying 54.525 hours by the $390 hourly rate it found appropriate, the proposed order concluded that $21,264.00 was the proper amount of fees.

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

The judge filed the proposed order as written on December 2, 2016. (ord.)

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

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

CAC sent a proposed order to the Court and opposing counsel by email and post on January 13. (emails and attachments). It did the following. (1) It denied Appellants' requests to reconsider rulings regarding punitive damages, election of remedies, and offer of judgment interest. (2) It corrected the prejudgment interest analysis as Appellants had requested, to allow interest to accrue until entry of judgment. (3) It stated that the prior order's fee award had included Mr. Fudenberg's 56.1 hours from April 22 through July 20. (4) It awarded an additional $10,140 in fees for the work of Appellants' two counsel from July 21 to December 14, 2016, out of a requested $74,295, reduced on grounds that much the work related to claims other

than the UTPA claim, some of the work was impermissible, and that no fees would be awarded for work after September 13. On this last point, it reasoned that CAC's $81,069 settlement offer on September 14 meant there was no longer an unwarranted refusal to fully resolve the matter.

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

Appellants' February 7 Reply was filed after the January 26 email stating the Court has decided to deny the motion and a month before the March 16 filing of the order. (Reply). The Reply contested the proposed holdings. It also requested, if the prior order had included Mr. Fudenberg's 56.1-hour July submission, that the new order clarify how many of the 54.525 compensated hours were for Mr. Moskos' work and how many for Mr. Fudenberg's. (P. 4).

CAC's proposed order of January 13 and 23 was entered as the order of the Court on March 16, 2017. (Ord.) It did not address Appellants' requests for information about the 218-hour analysis, stating, "The remainder of the motion is denied without further discussion." (p. 2).

On March 30, 2017, Appellants served a motion for $55,614 in supplemental attorney fees for work undertaken from December 2016 through March 2017 (Mot), followed April 11 by a Notice of Appeal of the two above orders. (NOA). In so doing, they understood they had negated any possible claim on remand that they had waived those fees by waiting too long to request them, and had effectively stayed the lower court proceedings so the motion would not be argued nor decided until a possible remand. (Mem., p. 2).

On April 20, CAC approached Appellants with a settlement offer of $150,000. The parties then engaged in further settlement discussions through June 27. (Ex.s 1-10(A) to Mot. for

Fees Dec-Mar). The highest offer by CAC was $290,212.07 on May 16. (Let).

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

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

Appellants' memorandum of law in opposition (Mem.) stated that Appellants had not expected the lower court to rule on their motion unless and until the appellate court remanded. (Mem., p. 2). It stated the motion had been filed to void any argument, on possible remand, that Appellants had waited too long to file for these fees. (*Id.*) It questioned the lower court's jurisdiction to issue the proposed order, citing Rules 205 and 241(a), SCACR. Were the Judge to nevertheless rule on the merits, it argued, the proposed new grounds to terminate the accumulation of fees were erroneous as matters of law, and incorporating the previous ruling was error for the same reasons Appellants maintained the previous ruling erred. It also argued CAC's subsequent $290,212.07 offer indicated the earlier $81,069 offer was not reasonable. Were the Judge to rule on the merits, it requested additional fees of $20,943 for Mr. Fudenberg's work between March 30 and June 28, and $13,299 for Mr. Moskos'. It also objected to the characterization of Appellants' counsels' motives.

Appellant's opposition was served June 28. CAC wrote to the Court on July 25, stating it had not known that Appellants did not seek a ruling from the lower court while the matter was on appeal, and that it had no objection to the court waiting to rule until the case returned from the appellate court. (Let.) Appellants served a motion to the appellate court on August 4, asking that the appeal be held in abeyance until the lower court ruled. On August 7, CAC submitted a second proposed order to the lower court. (2d Prop. Ord.) The revised proposed order did not address the jurisdictional issues Appellants had raised. It was identical to the first draft except for a footnote, which stated that continuing efforts to settle have no bearing on the earlier decision. (2d prop.) This order was filed by the trial judge on August 14. (Ord.)

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

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

STATEMENT OF FACTS

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

Mr. Ecklund also called. 36:6-12. The problem was with the 2003 Honda Civic that CAC had sold him on August 2, 2008, as "100 percent Honda certified," with "all of the original parts," following a 159-point inspection. Ex. 12 (Window Sticker); Ex. 13 ("certified" written on line 6); Ex. 15 (Certified Pre-Owned Purchase Document); Ex. 62 (Invoice showing "159-point check"); 38:3-21 (100% Honda-Certified); Tr. 9:3-19; 171:17-21 (159-point check). It was actually two wrecked cars cut in half. The undamaged front half of one Civic had been welded

to the undamaged back half of another.

"I told him that the vehicle is not safe to drive and I told him why." 36:23-24. *See also* 24:9-30:22 (detailing problems).

As explained at trial, a driver of the front half of the car had swerved to avoid a deer and hit a tree, causing severe damage. 77:3-5 (testimony of Nationwide Insurance Company). The repair estimate was $10,388.10. 77:24-25. Nationwide treated it as a total loss. 78:2-3. Somewhere, the front half of this car was poorly welded to the back half of another Civic, after which it was sold to Respondent, who Certified it and sold it to Mr. Ecklund.

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

37:7-11 (Ecklund) (emphasis added).

When buying the car, CAC had told him the car was "safe and reliable," which he had told CAC was required, as he was starting active duty in the Reserve in Huntsville, Alabama, and would be driving back and forth to Fort Gordon, Georgia, where his wife was on active reserve. 7:21-8:1; 8:4-6; 8:11-15; 17:21-23.

He learned of the damage after he was backed into in a parking lot. The vehicle was lifted on a rack. 23:22-24:2. From underneath, extensive damage was obvious. 23:22-33:15.

Mr. Threatt said the car had to come "back to the dealership to take a look at it," 36:13-20, and arranged for a truck to pick it up, 36:24-37:4. When Mr. Ecklund returned to Columbia, Mr. Threatt repeatedly refused to accept the Frankencar back in exchange for a full refund. 38:3-21. Over the course of at least two days, 43:3-18, they wore him down, 40:20-23, until they traded him out of the 2003 Civic, which then had 77,767 miles, Ex. 43, into a 2000 Accord with 126,403 miles, 42:14-18.

According to CAC's managers, the inspection for which Mr. Threatt said the car had to

be brought back to the Dealership never happened. 152:20-153:20, 155:8-18 (Then-Used Car Manager Brent Ferrell), 216:19-25 (Threatt). Instead CAC sent the car to the ADESA auto auction in Charlotte, North Carolina, setting a floor price of $7,200, and stating the vehicle was for the "red light" auction—but again failing to disclose the dangerous condition of the Civic. There are at least three serious problems with this:

* The auction rules require the seller to disclose unibody and frame damage.[4] Ex. 52, p. 9 (Arbitration Matrix,[5] p. 1). This vehicle had serious unibody damage. (255:7-292:8). The auction rules require disclosure of damage to pillars (Arbitration Matrix p. 2). Pillars of this car had been cut clear through. (260:2-290:4). The rules require disclosure when a vehicle has been reconstructed. (Arbitration Matrix p. 2) (requiring disclosure of "Salvage or Reconstructed/Theft Recovery/Stolen Vehicles (including history)"). This vehicle was reconstructed. (160:15-20). The "red light" means the seller is not guaranteeing anything mechanical with the car. (36:7-37:1) (Testimony of ADESA 30(b)(6) representative Joseph Richard Guyer). It does not allow one to decline to mention wreck damage. (*Id.*).[6]

* North Carolina common law requires that one with superior knowledge, selling a vehicle, disclose faults the prospective purchaser would not be able to reasonably discover before the sale. (494:1-8) (comment of CAC's counsel). Used Car Manager Brent Ferrell, who sent the vehicle to the auction, declared that he had "superior knowledge" about the vehicle compared to

[4] When the seller is present, the seller stands next to the auctioneer who makes the required disclosures while the car is on the block. (Guyer 28:10-21). When the seller will not be present, the seller is to make the required disclosures to ADESA. It may do so at the same time it informs the auction of the vehicle it will send and the required minimum bid. (Guyer 29:22-33:6). It is undisputed that CAC did not make the disclosures.

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

[6] Green light is "The best guaranty that a seller could offer." 34:8-17 (testimony of ADESA's representative). It means, "there is not a single mechanical defect that would cost in excess of $500 to repair." (*Id.*)

the bidders at the auction. (128:25-129:3).[7]

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

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

The box for Answer "No" is checked.

The final question asks, "5. Has this vehicle been reconstructed?* (ANY year)." (emphasis in original).[9] Question 5, too, is answered, "No."

The form further informs, in all capitals, boldfaced,

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

CAC's explanation for violating the auction rules was that they "didn't read'em."

This is surprising, to say the least. CAC is a major franchise dealership, 678:22-679:3; in 2010, it was selling upwards of 2,000 vehicles a year, 208:7-11; 138:10-11. Its Used Car Manager at the time, Brent Ferrell, testified it was selling 100 vehicles a year at that auction. 138:12-22. It was also buying from the auction. 140:17-23; 156:14-15. This was the only auction CAC was dealing with. 156:14-15. Mr. Ferrell had been going there on CAC's behalf

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[7] He also knows that customers want to know if a car has been wrecked and rebuilt, 136:7-11, and he intends for the buyers to believe and rely on the statements he makes about the vehicles he is selling, 130:8-11.

[8] Where, as here, the seller is not present at the auction, the form is completed by an ADESA representative, via a power of attorney, based on the information the seller has provided. Guyer 13:20-14:16; 44:1-45:16.

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

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

for three years, more or less weekly. (123:22-25; 140:17-141:1). "Q. And when you first sign up, they give you the rules, right? They give you some rules? A. Probably. I mean, I didn't read 'em, but." (134:22-25).

ADESA does not let dealerships just come in and sell. To buy or sell a car at the auction, a dealer must be "[r]egistered with the company." (11:20) (Testimony of ADESA representative). It must fill out a power of attorney. (13:20-22; 14:19-20; Ex. 45G/46T[10]). It must sign an indemnity/hold-harmless agreement. (15:2-22, Ex. 46G/47T). It must verify it received the terms and conditions and policies from the auction.[11] 16:21–17:11; Ex. 48G/50T.[12]

These rules "are designed to protect both buyer and seller and ensure ethical practices." 85:23-24 (testimony of ADESA representative); Ex. 50G/52T, p. 1 (similar). ADESA's goal is "to hold an honest transaction for both parties." (62:10-14).[13] "[A]ll rules are always available on the dealer registration counter at the sale, at the auction." 89:16-18.

On the day CAC offered the Civic for sale at the auction, Appellant Roger Whitley was at the auction on behalf of himself and his partner, Appellant Daniel O'Shields. Roger and Daniel are elderly gentlemen who run a small used-car company in Shelby, North Carolina, a town of approximately 20,000. 362:11; 366:8-16, 366:17-19. Roger was 76 years old at the time of trial, 361:10. He had had a career in law enforcement, including 27 years as the Director of Criminal

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[10] Exhibit numbers ending in "G" reference the exhibit number in the Guyer deposition; Exhibit numbers ending in "T" reference the Trial Exhibit number.

[11] The Auction terms and conditions state, "By participating as purchaser or seller in any sale at the Auction, Dealer represents that it is . . . subject to the Terms and Conditions contained herein and other applicable auction rules . . . as a condition of doing business at the auction." (Ex. 49G/51T, under "2. Dealer eligibility and applicable rules"). *See* also 17:16-18:3 (Mr. Guyer reading from that rule).

[12] General Manager Threatt signed all these on CAC's behalf. 14:19-20; Ex. 45G/46T; 15:2-22, Ex. 46G/47T; 16:21–17:11; Ex. 48G/50T.

[13] "[B]y being a member of the NAAA, we have a code of ethics that we agree on fair practices for buyers and sellers and our job, as the auction, is to be a neutral party in the middle to hold an honest transaction for both parties." 62:10-14.

Justice at Gaston College, in charge of training and supervising police officer recruits. 362:13-18. Dan "lived a similar background." 366:8-16. The goal of the business is not so much to make money as to give the two elderly gentlemen something to do that makes them feel useful, buying cars for their friends and people at church.[14] They looked for good, small cars. 367:7-13; 373:23-25.

Roger had gone often to that auction, 367:14-20, over five years, 372:10-12, buying cars under the green light, and "many under the red light," 369:18-23. "[T]here's always been the same kind of announcements" making the required disclosures. 372:2-3. There might be something wrong with a red light car, but the ones they would bid on would be fixable. 370:18-371:18. "There are a lot of good cars that come out of there." 370:14-17.

He never buys from certain dealers, but he "always trusted the franchise dealers." 369:4.

On this day, they were seeking a small car for a certain 16-year old girl. 373:25-374:2. She had asked for a car she could drive to school. (*Id.*) Roger noticed a 2003 Honda Civic with an obviously damaged door in the red light sale. 375:8-25. He listened for any disclosures about that car, 375:1-2, but there were none. CAC had set a minimum price of $7,200 for the vehicle. (376:10-377:15). The bidding did not reach that level. *Id.* Roger went to the sales office and, after some back-and-forth with CAC, a price of $5,200 was set. 376:17-378:21. During these negotiations, Roger found the Civic on the lot, squeezed in with other cars, 378:9-11. He looked the car over, took it for a test drive. *Id.*:11-12. It seemed to run well. *Id.*:12-13. He did not raise it in the air to look underneath, as there are no lifts at the auction, 172:13-16 (Ferrell), no way to lift a car up to look underneath 70:25-71-9 (Guyer). CAC's corporate representative (331:8-

[14] "I bought cars for my friends. I bought cars for people at church." 365:18-19. "I don't make my living doing this." 429:14. "I really wasn't about making money so much as I was maybe helping people. And I really — I made money, but that was not the object." 365:24-366:2; *see also* 363:15-122 (he enjoyed police work for similar reasons).

332:2) and Mr. Ferrell (169:12-18) each testified that Roger had done nothing wrong in the way he went about purchasing the vehicle. *Cf.* 221:23-222:3 (Threatt) (similar). The damage disclosure form was clean. (Ex. 1; 382:15 -383:1). The deal was consummated.

Roger returned with a truck the next day to transport the Civic, but the car was absent. 385:6-386:8. It had been returned to CAC. *Id.* It arrived at O&W's lot several days later. *Id.*

Appellants sent it to a garage to replace the door and fix a few items. (387:4-24; 416:23-25). A timing belt and water pump were to be fixed later (Tr. p. 392:7-11); the agreement was the girl's family would pay for these parts, and Roger and Dan would pay for the labor. *Id.* The family brought in the car soon afterwards for that work. *Id.*:15-17. The garage raised the car on the rack, and saw major damage. 392:18-21, 399:11-16. "It was a chopped-up mess underneath". 399:13-16.

Roger was back at the auction when they discovered the damage. 392:19-23. The garage called him. *Id.* "It was a sick feeling. A very sick feeling." *Id.* He told them to tell the girl's family and return their money. 392:24-393:9. Roger and Dan also refunded the registration fees, approximately $345, that the family had paid. 397:4-9.

Roger went to ADESA's sales office to complain and invoke the Auction's dispute-resolution "arbitration" period. 393:13-394:4. It was too late: The time had run while they waited for CAC to send the car. 393:14-19. He went upstairs and spoke with another ADESA representative, but all he could get was the name and telephone number for CAC's used car manager, Mr. Ferrell. 394:21-395:11.

He waited a day or two to cool down, then called CAC and, like Mr. Ecklund before him, demanded CAC give back his money and take back the car. 395:13-396:19. Mr. Ferrell took down all his information, including the VIN, and promised to get back to him. *Id.*

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

At trial, Roger testified the vehicle was sitting in his back yard, was good for nothing except being disassembled into parts, and estimated a junkyard would pay $500 for it. (398:23-401:2). Adding all their costs, and subtracting the $500, he estimated total damages were $6,645.00. 401:25-402:4. CAC attempted to elicit testimony the car was worth $2,000 in its wrecked state (424:17-426:24); but presented no evidence the vehicle was worth anything near CAC's reservation price or its $5,200 sales price to anyone who knew it was clipped.

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

Appellants' expert, Brian Allen, testified extensively to safety problems. 255:5-295:16. "[B]ased on a reasonable degree of certainty in [his] field of expertise," 292:1-3, he concluded, "this vehicle shouldn't be driven. Shouldn't be allowed on the road," 291:16-17. The reasons were numerous:

First, to clip two half-cars together is against the manufacturer's recommendations. (273:3-5). That is important because the manufacturer did the research and engineering. 260:18-20. If a vehicle is repaired against specifications, "it's not gonna respond the way it was designed to respond in a subsequent accident." (283:18-23).

Second, the work here was shoddy. Mr. Allen identified numerous welds as poorly done. "[T]hey want their spot welds two inches apart [so] if it gets hit and it collapses between those welds it's a crumple zone. It absorbs energy. Well when one's welded solid like that its not gonna collapse the way it's designed to collapse." (281:19-23). Another weld was "just God awful to tell you the truth." (280:23-24). "[A]lmost a half to three quarters inch gap between on this structure panel here that's not even welded in this one." (267:10-11). "[Y]ou can see where

this metal is ripped apart here, and right here, it's not welded back." (269:7-9). "It's literally ripped apart." 269:22. "It's extremely poor quality work. You see holes in the welds right here." (275:20-21).[15]

He identified additional problems (e.g., 290:9-14[16]).

CAC's expert had also inspected the vehicle, 297:10-298:4, yet CAC called no one to challenge Mr. Allen's conclusions.

Evidence showed CAC's senior managers knew this was two half-cars put together into a dangerous vehicle. Mr. Ecklund had told them. His wife had told them. It did not require a mechanic to see this car is dangerous. CAC's mechanics had given it a 159-point Honda-Certified Inspection. They knew.[17] After all the evidence was in, CAC's counsel admitted in closing that CAC knew "this is two cars put together." 550:7-8.

Senior Management knew, but did not care. CAC's past and present Senior Management—its former Used Car Manager, former General Manager, and current General Manager—all testified CAC had done nothing wrong. Mr. Ferrell testified CAC did nothing wrong in either sale, not the sale to the Ecklunds, 120:18-121:3, nor the sale to Roger and Dan: "You don't think you did anything wrong there? A. No, sir." (121:11). Mr. Threatt similarly testified, "[W]e did nothing wrong." 225:24-25.

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[15] CAC repeatedly argued outside the jury's presence that the safety of the vehicle could not be considered by the jury or Court: It "isn't relevant" (32:5-8); (33:1-3) (similar); (88:46) (similar). "There's a Bill of Sale that goes with it; the word safety isn't in there anywhere. I've said that over and over." (248:9-10). *See also* 249:14-15 ("MR. MOSKOS: The damage disclosure statement and - - MR. WALKER: Where is the word safety?").

[16] E.g., "They cut your brake lines" and simply "sectioned your brake lines back together." (Tr. p. 290, lines 9-14.) "[I]t's a safety issue." *Id.*

[17] CAC had additional information putting it on notice it should investigate. Two Carfaxes, one from 2008 and one from 2010 each reported accident damage and recommended inspection. Ex.s 67, p. 2, 68, p. 2; 150:10-19; 201:18-204:2. Had the Carfaxes not spelled it out, when a Carfax shows accident damage, it puts one on notice the vehicle needs to be inspected, and CAC knew it puts one on notice, as Mr. Threatt testified (196:22-25)—although when confronted with a Carfax CAC possessed in 2008, showing accident damage to this vehicle, he changed his mind (201:18-203:10).

Mr. Ferrell also testified that his only interest in cars is "for the metal and being able to sell it." 121:21-23. He doesn't think about the consequences when selling these cars, 166:5-7. He maintains CAC has no responsibility to protect the public by letting people know the kind of cars they are buying. 169:19-22.

Current General Manager Greg Nalewaja was also CAC's 30(b)(b) representative.[18] He had not called the prior Managers to ask what had happened.[19] After listening to the testimony of the others, he, too, said CAC had done the right thing: "Did Midlands Honda sell this car properly in April of 2010, when it sold the car at the auction? Yes or no, did it do the right thing? A. Yes." 321:17-20. Offered repeated opportunities to condemn the actions of his predecessors, he instead offered praise. "Randy did the right thing." 305:4-6. They "dispose[d] of it the way they should." 313:18-20. They handled it "the best way." 314:6-14. "[E]xactly what we would do." 323:19-20.[20]

Senior Management testified that a vehicle CAC had sold as Honda-Certified PreOwned being returned as actually two half-vehicles was not sufficiently unusual to be remembered. 152:20-153:20, 155:8-18 (Ferrell), 216:19-25 (Threatt). Nor would it justify an inspection to learn how they missed the damage. 152:20-153:20, 155:8-18 (Ferrell); 323:21-24 (Nalewaja).

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[18] His testimony has to be read to be believed. He bobbed and weaved throughout his initial examination by Appellant's counsel. *See generally* 299-332. He was suddenly clear when questioned by Defense Counsel. 332-41. He was the last witness called other than Appellant Roger Whitley, and had sat through the earlier testimony. 300:24-301:1. Yet he would not say that he believes the Frankencar is unsafe, 301:12-19; nor that it has no value as a retail piece, 301:19-303:9; 305:1-4, 9-20; nor whether this car should have been sent to a salvage auction ("I can't say"), 345:23-346:1; he evaded answering whether CAC should have looked to see how the damage evaded detection in its Honda Authorized Certification, 323:4-12, finally concluding there was no need to do so, 323:23-24.

[19] Yet he is "the person who is responsible for handling this case," and has been since he arrived at CAC in 2013. 306:21-24; 307:18-20. He had not bothered to get the auction rules until they were given to him by Appellants' counsel. 343:14-25. Nor did he change any CAC policy or procedure because of this suit. 332:14-17.

[20] He had been in the car business in North Carolina for twenty years, always at a franchise dealership. 299:25-300:2; 304:13-14; 308 7-9. The five years immediately prior to taking over at CAC were at the sister dealership in North Carolina owned by CAC's owner. 307:21-308:1; 316:23-25. He knows one cannot register an unsafe vehicle for use on the road in North Carolina. 331:5-7.

Senior Management also testified it made no difference whether they knew the extent of damage, they would do the same thing either way, 215:24-216:2; 155:2-3. The sale of this car was treated exactly like any other sale. 139:4-8.

Like Mr. Threatt before him (217:21-22), Mr. Nalewaja testified that he expects the dealers who buy CAC's cars at auction to "turn around and re-sell these cars." 316:6. Once they are sold at the auction, CAC "doesn't care what those people do with the cars." 319:22. "We're just disposing of a vehicle." 319:5. Whether it will be sold to a consumer and put back on the road is "irrelevant." 319:9.

Closings, Jury Charges, And Verdicts–Actual Damages Phase

1. Closings In his closing on actual damages (517:7-545:15), Appellants' counsel generally summarized the evidence; and requested the jury award $6,645.00, 545:9:15. This amount reflected the sales price of the car, less its $500 value at the time of the sale, the auction fee, the fees for which Appellants had reimbursed the family of the 16-year old girl, and other expenses. (537:12-19).

In CAC's closing, confronted by overwhelming evidence, counsel conceded breach of contract, arguing it was a simple mistake, 546:6-7, and contended the Appellants should have discovered the unibody damage before buying the vehicle, 554:3-6. He suggested Roger and Daniel were the deceptive ones ("The first thing I want to touch on is just who sneaked in to deceive") (546:13-14), because unlike with the Ecklunds, there was no documentary evidence that Appellants had called CAC to complain, 547:21-548:4. Therefore, he argued, Appellants had not called, but instead had waited to sue because they "really wanted to wait until everybody forgot everything." 548:8-9.

Counsel then vouched for his own credibility to the jury, stating, "I don't mislead

people." 552:7. He set forth that he was unlike other trial lawyers, who he suggested were dishonest, stating, "I just tell the truth," "I do it different [than other trial attorneys]." 552:14-5.

He ended by stressing the jury could not find for Appellants on any claim except the contract action if "they didn't do a careful inspection." 560:9-16.

2. Jury Charges. The trial judge charged the jury on breach of contract, negligent misrepresentation, fraud, and unfair trade practices. 601:7-624:15.[21] The fraud charge (614:12-616:8) instructed the jury it could find for Appellants only if, among other requirements, it found the false representation or concealment "was reasonably calculated to deceive" (614:24); and was "with the intent to deceive and with the intent to be acted upon" (615:5-6), and that Appellants' "reliance upon the false representation or concealment was reasonable" (615:9-10). The UTPA charge similarly instructed that Appellants must prove "they actually relied" on the misrepresentation and "the reliance was reasonable." 620: 5-8.

3. Verdicts. The jury returned verdicts on each cause of action for $6,645, the amount requested by Appellants. Verd. pp. 1-2. They also answered in favor of Appellants' position special interrogatories, requested by CAC (510:21-511:5), by stating that the North Carolina Damage Disclosure Form was provided to Appellants at the time of the transaction, and that none of their verdicts were based only on that form (Verdict form p. 3).

Punitive Damages Phase

Over Appellants' objection, 357:6-358:10, CAC successfully argued that North Carolina law, rather than South Carolina's, controls punitive damages issues in this case. On CAC's motion, 44:1-24, punitive damage issues were tried separately. The only testimony in the

[21] On grounds that North Carolina's economic loss doctrine precluded such a charge, he did not charge on the cause of action for simple negligence. (487:11-491:25).

punitive damages phase was by Mr. Nalewaja. Testifying as CAC's corporate representative, 662:16-18, he stated that CAC is not concerned with the consequences when it sells a car at auction (663:12-16). He reiterated that in selling the cars, CAC owed no duty to anybody (663:17-2).

He testified that CAC had profited from the vehicle when all was done. 674:18-20.[22] Although he was responsible for handling CAC's response to the suit, Mr. Nalewaja had not previously learned who sent the car to the auction; he learned at trial. 668:17-669:9.

No judgment against a car dealership in South Carolina has been sufficiently large that he would have heard of it. 676:22-677:15. Nor has any award out of South Carolina been large enough to be talked about at the retreats he goes to. *Id.*

He testified the financial statement provided to Honda for calendar year 2015 showed CAC had revenues of $2,381,888 and a net worth of $10,969,318. 678:13-681:8; Ex. 96.

In closing, Appellants' counsel talked about the purposes of punitive damages as stated in North Carolina law and the evidence the jury could consider. He told the jury, "we are not asking you to put them out of business. That is not the purpose of today. We are trying to change conduct. We are trying to deter conduct." 700:22-24. Referencing the ten-million-plus dollar net worth, he asked them to consider "Fifteen percent to twenty-five percent. That's one point five to two point seven five million dollars." 700:25-701:4.

CAC's counsel emphasized the clear and convincing evidence standard. 702:1-23; 705:7-14. He declined to suggest the amount of any appropriate award. 705:16-18.

He then urged the jury to put their trust in Mr. Nalewaja. (703:4-7; 704:24-705:2; 705:17-

[22] This included the price CAC paid for it, the amount obtained from Mr. Ecklund, the value of the older vehicle CAC swapped Mr. Ecklund into, and the funds received from the auction. 669:23-674:21. "So, at the end of the day, this rebuilt, wrecked, unsafe, dangerous car made a Four hundred and twenty-nine dollar profit for Midland, right? A. Yes." 674:18-21.

21).[23]

The jury was charged (706:3-707:23) per CAC's proposed instructions (708:19-25). It returned a verdict for $2,381,888, within Appellants' requested range. (Ver. p. 5.)

ARGUMENT

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

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

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

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

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

B. Argument

There is no constitutional problem with the jury's award. If there were, a reduction to the

[23] He urged the jury to believe "we've done what we're supposed to do to try to remedy that problem." (703:8-9). He presented Mr. Nalewaja as the solution. "You've seen Mr. Nalewaja. He . . . sat here today and told you we make sure our used car people know the rules. That's what we're supposed to do." (703:4-7). "And we've got new leadership. Mr. Nalewaja's been there awhile." (704:24-25). But the jury was entitled to see Mr. Nalewaja as part of the problem, as discussed on pages 18-19 and 21 above.

South Carolina statutory cap of two million dollars, SC Code Section 15-32-530(B), would cure it. North Carolina statutory law limits awards in cases like the present to $250,000 per plaintiff, far below the constitutional maximum. Awards at the relevant statutory cap would be permissible under the Constitution.

The jury's verdict of $2,381,888 was less than 25% (21.71%) of CAC's net worth. Two awards of $250,000 each, totaling $500,000, would still be less than 5% (4.56%).[24] The order erroneously reduced the verdict to one award of $46.515, less than one-half of one percent of CAC's net worth (0.42%). This does not reflect the outrageousness of CAC actions nor provide sufficient deterrence.

1. North Carolina Statutory Law

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

Further constraints regard the amount of any award. The statutes restrict the evidence the jury may consider in that regard, and require the jury to be instructed that the purpose of any award is "to punish a defendant for egregiously wrongful acts and to deter the defendant and

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

others from committing similar wrongful acts." 1D-35(1); 1D-1.

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

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

Per charges CAC proposed, the jury was instructed that in making its award it could consider only: [1] "The reprehensibility of the defendant's motives and conduct," [2] "A likelihood at the relevant time of serious harm to the plaintiff or others similarly situated," [3] "The degree of the defendant's awareness of the probable consequences of its conduct," [4] "The duration of the defendant's conduct," [5] "The actual damages suffered by the plaintiff," [6] "Any concealment by the defendant of the facts or consequences of its conduct," [7] "The existence and frequency of any similar past conduct by the defendant," [8] "Whether the defendant profited by the conduct," and [9] "The defendant's ability to pay punitive damages, as evidenced by his revenue or its revenues or net worth." 706:23-707:17. The jury was twice instructed, once just before and once just after the above, that "any amount you award must bear a rational relationship to the sum reasonably needed to punish the defendant for any egregiously

[25] § 1D-25(b) provides:

> (b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($ 250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

wrongful acts committed against the plaintiffs, or plaintiff; and to deter the defendant and others from committing similar wrongful acts." 706:18-22, 707:19-23 (almost identical).

The jury properly returned a verdict meant to punish CAC and deter similar wrongful acts. Selling a rolling death-trap once without disclosure is extremely reprehensible. Selling it twice, more so. The likelihood of serious harm was substantial. The consequences were obvious even to a layperson like Mr. Ecklund. CAC was completely aware the car was unsafe, but the only consequence that mattered to CAC was that CAC made money. The conduct lasted more than two years from CAC's affixing a "Certified" label to the windshield to its refusal to reimburse Mr. Ecklund, through its sending the car to the auction without disclosure, and its negotiations in bad faith with Appellants, and another two years as it hoped Appellants would simply go away. CAC twice concealed the true nature of the vehicle. Past conduct includes selling the exact same vehicle without disclosure and shipping wrecked vehicles to the auction without disclosure, as a matter of course. CAC profited from the conduct. While the actual damages were low, CAC's net worth was almost eleven million dollars; the jury's entire verdict was less than 25% of that, and awards at the statutory cap would equal 2.3% each.

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

The order's analysis errs in stating otherwise. It contains additional errors too numerous

to list. Some are described in the attached note,[26] but one error alone makes the order's analysis irreparably flawed: it states, p. 5, "[I]t would have been difficult for Defendant to foresee serious harm." How hard is it to foresee serious harm in selling this Frankencar without disclosure?

3. North Carolina Case Law

North Carolina courts routinely reduce verdicts above the statutory cap to the statutorily-mandated amount, and just as routinely find awards so reduced to be permissible under the statutes and state and federal constitutional law. *E.g., Mace v. Pyatt*, 203 N.C. App. 245, 244, 691 S.E.2d 81 (N.C. Ct. App. 2010) (punitive damages award properly reduced by trial court to the statutory cap of $250,000; actual damage award vacated by appellate court and remanded for new trial on actual damages only; however, "as plaintiff has conclusively shown that she has suffered at least nominal damages," the punitive damage award stands) (conversion of trailer and its contents); *Lacey v. Kirk*, 238 N.C. App. 376, 394-95, 767 S.E.2d 632 (N.C. Ct. App. 2014) (punitive damage award properly reduced by the trial judge to the statutory cap of $250,000 for each Plaintiff; compensatory damage award of $6,569.02, slightly less than in the present case) (executrix refused to disburse and defamed beneficiaries of will); *id.* at 396 (citing *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004) as "upholding awards involving ratios of punitive damages to compensatory damages of 30 to 1 and 23 to 1 and describing these ratios as 'relatively low'").

> [G]iven that the ratio of compensatory damages to punitive damages present in this case is fully consistent with ratios that have been held not to be excessive in other cases, we find no basis for overturning the punitive damages award in

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

> this case based on the relative levels of compensatory and punitive damages awarded by the trial court.[27]

Id.

North Carolina case law is sound, given the statutory directive that when a verdict exceeds the cap, the trial court "shall reduce the award and enter judgment for punitive damages in the maximum amount," § 1D-25(b) (emphasis added); the North Carolina Supreme Court's holding that the statutes are constitutional, *Rhyne*; and opinions of United States Supreme Court Justices emphasizing the relationship between the process afforded by a state's punitive damages law and the degree of deference afforded the substantive result.[28]

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

4. Federal Case Law

It is only when an award is "grossly excessive" that constitutional concerns arise. *TXO Prod. Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 454 (1993). "A violation of a state law

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

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

'reasonableness' requirement'" does not suffice. *Id.* at 458 n.24. Three guideposts determine whether "a person receive[s] fair notice . . . of the severity of the penalty that a State may impose." *BMW v. Gore*, 517 U.S. 559, 574 (1996). These are: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm [and the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 574-75.

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

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

"[A] single factor can provide justification for a substantial award of punitive damages." *Saunders v. Branch Banking & Tr. Co.*, 526 F.3d 142, 152 (4th Cir. 2008) (quoting *Bach v. First Union Nat. Bank,* 486 F.3d 150, 157 (6th Cir. 2007)) ("allowing punitive damages award of $400,000" where "'only one'" factor was present, "'a vulnerable victim'")).

Here, four factors support awards at or above the statutory maximum; only one factor, whether the harm caused was physical, supports reducing the award. The *second* factor, whether the conduct evinced an indifference to or a reckless disregard of the health and safety of others, is massively present. *Third*, the targets of the conduct had financial vulnerability–Appellants

have a little business, buying and selling used cars, mostly small; CAC knew the purchasers of similar cars at the auction were "lower-end," "gravel lots," "Mom-and-pop" 142:10-20 (testimony of Mr. Ferrell). Similarly, Mr. Ecklund was active duty reserve, driving back and forth from Alabama. This factor supports awards at or above the statutory cap. *Fourth*, this incident was not isolated. CAC had passed off the exact same Frankencar to another customer. Its managers testified that the sale to Appellants was treated exactly like every other sale. CAC discloses no damage in any car it red-lights. CAC sees no duty to anyone else when selling a dangerous car. *Fifth*, the jury found fraud, not mere accident. Four out of five support awards above the statutory caps, factors two, four, and five markedly so.

Even if believed, the managers' story sustains allows no due process concerns with awards at the statutory caps: they bought and sold hundreds of cars in North Carolina without knowing the state's law; did so via ADESA without reading ADESA's rules; sold a clipped car as "Certified" and did not bother to determine how that happened; sent it to the auction without disclosure; stated they did not care if the vehicle was put on the highway.

But the jury was entitled to disbelieve them. The story that Mr. Ecklund was happy to be traded out, 153:6-7, is not credible, as Mr. Ecklund testified he was deeply unhappy (43:6-8). The story that managers did not know of the damage until Mr. Ecklund told them two years after the sale, and then simply took his word for it, is similarly incredible. Automotive dealerships do not do that. If they accepted return whenever a customer said there was something wrong, they would go out of business. The story that best fits the facts is that CAC's managers knew the nature of the "Honda Certified" vehicle when they sold it to Mr. Ecklund. That is why they took it back when he said it was two half-cars put together and unsafe, and did not even inspect to see if he was telling the truth. That is why they did not ask the mechanic who had certified it how it

passed his inspection. That is why they shipped it to a red light sale. That is why they sold it without disclosing it as a reconstructed, "clipped" car. They knew that if they disclosed, no one would pay anything near $7,200 for it.

b. Ratio between "the actual or potential harm suffered by the plaintiff and the punitive damages award." *State Farm,* 538 U.S. at 424 (2003) (emphasis added). Here, there simply is no problem: The potential harm was serious injury and/or death. "'While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents.'" *Gore*, 517 US at 581 n.34 (quoting *TXO*, 509 U.S. at 462).

If the Court desires further discussion, awards here at the statutory cap of $250,000 would be at a ratio of 37.62 to 1 to actual damages (excluding potential harm). This is well within precedent. Cases involving deceptions related to automotive sales include *Parrott v Carr*, 17 P. 3d 473 (Or. 2001) ($11,496 compensatory, $1 million punitive, 87:1); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N. LLC.*, 361 S.W. 3d 364 (Mo 2012) ($4,500 compensatory, $500,000 punitive, 111:1) (deceptive financial acts in automobile sale) (reduced from $1 million due to state statutory cap); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) ($50,000 award against wholesaler, 99:1, and $100,000 award against its associated retailer, 55:1) (deceptive sale of previously-wrecked vehicle).

Ratios may be much greater where, as here, actual damages are small and purely economic.[29] "The Supreme Court has long recognized that greater ratios may comport with due process, however, when reprehensible conduct results '"in only a small amount of economic

[29] The actual damages here are purely economic, and the amount–$6,645.00–is low, as the Order recognizes, p. 15 ("the small amount of actual damages").

damages."'" [30] *Saunders,* 526 F.3d at 154 (quoting *State Farm,* 538 U.S. at 425). *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456 (1993) ($19,000 compensatory, $1 million punitive, 526:1); *Saunders,* ($1,000 compensatory, $80,000 punitive, 80:1); *id.* at 154 (citing, *e.g.*, *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354 (11th Cir. 2004) ($115 compensatory, $250,000 punitive, 2,172:1); *Abner v. Kan. City S. R.R.*, 513 F.3d 154, 165 (5th Cir. 2008) ($1 compensatory, $125,000 punitive, 125,000:1)).[31] "[R]atios *greater* than those we have previously upheld"–and the Court had previously upheld the 526.3:1 ratio in *TXO*–may be constitutional in such situations. *State Farm,* 538 U.S. at 425 (emphasis added).

c. "Civil penalties authorized or imposed in comparable cases." *Gore,* 517 U.S. at 575. As the North Carolina Supreme Court has held, one worthy reason for the cap in 1D-25 is "to provide clear notice of possible penalty to defendants" of the potential punitive damage liability. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004). This directly addresses the concern the federal Supreme Court had with common law regimes which lack a statutory limit, leaving a need to look to analogous statutes for notice of the amount of a possible penalty. Here, the legislature has spelled it out: if a malfeasor's mental state rises to the level of fraud, willful and wanton, or malice, he faces punitive liability to each plaintiff for $250,000 if he inflicts actual damage of $83,333.33 or less. If he inflicts greater harm, he is liable for three times that harm as a punitive award. The legislature directly filled the need the Supreme Court identified to provide "fair notice . . . of the severity of the penalty that a State may impose."

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

[31] The Fourth Circuit recently addressed the issue in *Daugherty v. Ocwen Loan Servicing, LLC*, No. 16-2243, 701 F. App'x 246, 259, 2017 WL 3172422 (4th Cir. Jul. 26, 2017) (unpublished) (finding, on a compensatory award slightly smaller than the award here, $6,128.39, and a slightly larger punitive verdict, $2.5 million, with no intentional wrongdoing, no potential profit for the wrongdoer, and no significant threat to health or safety, that $600,000 is the proper punitive damage award).

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

If the Court wishes to look at other statutorily-authorized penalties for similar conduct, N.C.G.S. § 20-294 authorizes revocation of a dealer's license for conduct such as this, ¶ 4. It does so again in ¶ 6. Again in ¶ 7.[32] Criminal penalties under N.C.G.S. § 14-100 for "obtaining property by false pretenses," which is similar to fraud, are ten to 30 months.[33]

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

5. Additional Errors in the Order's Analysis

The order misreads *Austin v. Stokes-Craven Ford Holding Co.*, 387 S.C. 22, 691 S.E.2d 135 (2010). *Austin* found it particularly reprehensible that the dealer "evinced an indifference to or a reckless disregard of the health and safety of Austin and the general public that would share the road with the potentially unsafe vehicle." *Id.* at 52, 691 S.E.2d at 151. So too here, with a

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

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

vengeance: the previously-wrecked pickup truck with an alignment problem in *Austin* was not nearly as hazardous as the two half-Civics improperly combined here.[34]

Nor did *Austin* hold that potential harm is excluded from the ratio; rather, it noted the "high" ratio between the punitive and compensatory awards, and then affirmed the jury's verdict, due in part to "a potential for Austin or his passengers to be subjected to serious injury." *Id.* at 53, 691 S.E.2d at 151. Even more so here. The other factors were, first, "evidence of Stokes–Craven's ability to pay," *id.*, an award equal to 15% of that dealer's net worth. This would equal an award of $1,645,397.70 here.[35] Second was the deterrent effect of the award. The $216,000 awarded by the *Austin* jury ten years ago was not sufficiently large to have been heard of by automobile dealers in South Carolina, let alone stop them from fraudulently selling dangerous, wrecked vehicles. A significantly larger amount is required.

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

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

Three orders deal with attorney fees, the order on post-trial motions, the order on

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

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

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

A. Law

Purposes of the Statutes. In North Carolina, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." G.S. 75-1.1. "The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce." *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 319-20, 339 S.E.2d 90, 93 (N.C. Ct. App. 1986).

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

Requirements for fee awards. To receive fees under North Carolina's UTPA, one must show a UTPA violation and that (a) the act complained of was done "willfully," § 75-16.1(1), and (b) "there was an unwarranted refusal" by the party who violated the law "to fully resolve the matter which constitutes the basis of such suit," *id.* A "failure to promptly offer the

unconditional return of the money" suffices for (b). *Faucette v. 6303 Carmel Rd., LLC,* 242 N.C. App. 267, 275, 775 S.E.2d 316, 323 (N.C. Ct. App. 2015). If these are met, the court may in its discretion award fees.

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

Determining the proper award. Whether to award fees may be in the discretion of the trial court, but "Once the trial court decides to award attorneys' fees, however, it must award a reasonable fee." *Custom Molders v. Am. Yard Prods.*, 342 N.C. 133, 142, 463 S.E.2d 199, 204 (N.C. 1995). *Cotton*, 94 N.C. App. at 369, 380 S.E.2d at 421 (same). North Carolina specifies the method to determine a reasonable fee. North Carolina does not base UTPA fee awards on a percentage-of-the-recovery.[36] The stakes in such cases are often too small for a standard contingency fee to be reasonable.[37] Instead, courts are to employ a set of factors that include "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton,* 94 N.C. App. at 369, 380 S.E.2d at 421.[38]

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

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

[38] Additional factors may include "'the novelty and difficulty of the questions of law'; 'the adequacy of the representation,' the 'difficulty of the problems faced by the attorney,' especially any 'unusual difficulties,' and 'the Cont'd

Fees are not to be apportioned among claims where multiple claims arise from a common nucleus of facts. "[A]ll three claims arose from a common nucleus of facts making apportionment of the fees unnecessary and unrealistic." *Whiteside Estates, Inc. v. Highland Cove LLC*, 146 N.C. App. 449, 467, 553 S.E.2d 431, 443 (N.C. Ct. App. 2001). Even fees for failed claims are apportioned only where one "'failed to prevail on a claim that is distinct in all respects'" from the statutory claim. *Morris v. Scenera, 2*29 N.C. App. 31, 58, 747 S.E.2d 362, 378 (N.C. Ct. App. 2013) (emphasis added), *aff'd in part and rev'd in part on other grounds*, 368 N.C. 857, 788 S.E.2d 154 (2016).[39] It is an abuse of discretion to require allocation of fees where claims are not distinct in all respects. *Morris, 2*29 N.C. App at 56-59, 747 S.E.2d at 377-79.

B. Application

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

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

The amount stated for fees in the August 29, 2016 email from the Judge's clerk, and awarded by the first order, equals 40.00% of the larger of the two judgments offered to Appellants. Perhaps the judge's intent then was to award a standard contingency fee. If so, that would be error under the authorities above. North Carolina bases UTPA fee awards instead on

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kind of case . . . for which the fees are sought and the result obtained." *Kuykendall*, 335 N.C. at 195, 437 S.E.2d at 381-82.

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

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

the factors listed above, as each party recognized in its post-trial briefs.[41] Nor does the order claim to be based on a percentage-of-the recovery.

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

Each step of the reduction is based in whole or in part on a supposed allocation of fees among Appellants' claims. The first step reduced the pool of potentially compensable hours to 218. It did so on grounds that the other entries contained no work related to the UTPA claim.[42] The second step reduced the hours that survived the first cut by an additional 75%, on similar grounds.[43]

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

> The business court's 14 May 2012 judgment provided no authority for its determination that Morris's award of attorneys' fees "should, in part, be allocated among the claims on which he was successful and those on which he was not." . . . Accordingly, we reverse the business court's award of attorneys' fees and remand to the trial court for further findings of fact and conclusions of

[41] Pl.s' Br. in Supp. Pl.'s Req. for Att'y's Fees, 9-10; Def.'s Br. in Opp. to Pls.' Mot. for Att'y's Fees, 12-13.

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

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

law regarding whether Morris's claims arose from a common nucleus of operative fact and, thus, whether he is entitled to all of his attorneys' fees.

Thus, one possibility would be for the Court to remand this matter for the trial court to determine whether Appellants' "claims arose from a common nucleus of operative fact and, thus, whether [they are] entitled to all of [their] attorneys' fees." However, it is obvious the claims[44] here all arose from the same nucleus of operative fact. Indeed, the lower court has already ruled, in another part of its order, "Plaintiffs claims all arose from the same transaction [and] involved the same injury." P. 20.[45] Rather than remand for that determination, the Court could spare resources of the lower court and counsel, and likely of this Court when the party unsuccessful on remand appeals, and declare that Appellants are entitled to all their attorneys' fees.[46]

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

However, despite their requests, Appellants have not been allowed to see the list of entries totaling 218 hours that the order deemed to contain potentially UTPA-related work or the list of hours that were deemed not to contain any such work. The Order provides but a single

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

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

[46] *See also Whiteside Estates, Inc.*, 146 N.C. App. at 467, 553 S.E.2d at 443 ("[A]ll three claims arose from a common nucleus of facts making apportionment of the fees unnecessary and unrealistic.").

example of an entry it considers "unrelated in any way to the NCUTPA claim." (p. 16). It quotes that entry, which includes "Telephone conference with Jamie Flynn regarding [the upcoming] testimony of Nationwide," and "Review or objections and counter-designations of video testimony of Ecklund and Guyer." Nationwide's testimony established the front half of the Frankencar was from a wrecked vehicle. Ecklund's testimony established that CAC had previously sold the same car without disclosure, and that CAC had been directly told of the vehicle's nature. Guyer testified to the auction rules and the many steps the auction employs to ensure sellers know the rules. These go to all claims, including the UTPA claim, and/or to the willfulness required for UTPA fee awards.

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

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

Appellants timely filed a Motion Pursuant to Rule 59, alleging errors in numerous aspects of the first order. They simultaneously filed a Motion for Supplemental Fees from the date of their July 20 fee requests until just prior to service of these motions.[47] Because it appeared to Appellants that the original finding that only 218 hours of entries potentially related to the UTPA claim included no time for Mr. Fudenberg's work,[48] they requested that an award be made for his

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

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

work through July 20. The second order (ord.) "clarifie[d]" that Mr. Fudenberg's previous request for work through July 20 was included in the previous award of 54.525 hours (p. 2). However, it ignored Appellants' request in their Reply (p. 4) that if Mr. Fudenberg's 56.1 hour request was included in the prior award, the new order specify how many of the 54.525 hours were for Mr. Fudenberg's work and how many for Mr. Moskos'.

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

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

(b) The order errs in reducing the award for time spent on Mr. Moskos' affidavit to two hours from 65.2 during the period July 28 through September 13. Mr. Moskos' affidavit was in response to affidavits served by CAC's counsel which alleged Mr. Moskos was difficult to settle with, here and in prior cases they had had. Mr. Moskos thus had to review the entire file, including interactions from years prior, in the present case and the closed files in prior cases to ensure his recollection was correct. To provide context for why offers were made or rejected, Mr. Moskos presented his understanding of the law in the affidavit. This required hours of work for which he deserves to be compensated. It was an abuse of discretion to cut his time so markedly.

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

(c) The order errs in holding no fees accrue after September 13. The second order erroneously halts all fees after September 13 on grounds that CAC made a settlement offer of $81,069 on that date. It errs as a matter of law. It conflicts with the plain language of the statute,

because later "reasonable" offers cannot change the fact that "there was an unwarranted refusal" to settle. The order cites no authority for its proposition that the past can be changed. It conflicts with controlling precedent. "Since the trial court had already found in the previous order that defendants' conduct was wilful and that their refusal to settle the dispute was unwarranted, plaintiffs were, in our opinion, entitled to legal fees for prosecuting the appeal as well as for the preparation for retrial." *Cotton,* 94 N.C. App. at 370, 380 S.E.2d at 422 (emphasis added). So too here. The trial court had found in its previous order that CAC's conduct was willful and the refusal to settle unwarranted.[49]

The order errs again as $81,069 was not a reasonable offer to settle the entire matter. CAC later implicitly acknowledged as much in raising its offer to $290,212.07. (let. 5/16).

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

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

Substantively, the order errs as a matter of fact in finding, p. 2, that Appellants refused to negotiate, ignoring the voluminous evidence attached to Appellants' memorandum

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

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

demonstrating their negotiating and repeated attempts to obtain clarification from CAC regarding its offers. (exs. 1-20 of Pls.' Mem.). It also errs by incorporating the second order for the same reasons the second order errs.

While the second order presented no authority for the proposition that a post-verdict offer can stop the accumulation of fees, the third order cites *United Labs. v. Kuykendall*, 403 S.E. 2d 104 (N.C. App. 1991). The case stands for a proposition almost directly the opposite. That opinion concerned, *inter alia*, an offer made after conclusion of a first set of appeals, and before a re-trial. The offer was held insufficient. The order reads that opinion as establishing that a post-trial offer can stop fees from accumulating. (Ord. p. 3) It does so because the trial court had initially issued an award of fees and costs totaling $47,522.23. *Id.* (citing 403 S.E. 2d at 106). The order reasons that the discussion in the cited opinion regarding attorney fees concerned whether additional fees would be awarded, or whether instead the offer would stop the accumulation of fees. (Ord. at 3) (citing 403 S.E. 2d at 111) (reading the issue as whether "further attorneys fees" should be awarded and the holding as "Additional attorney fees were awarded").

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

Supreme Court took the case, and again remanded on various grounds, including that a retrial was required on the UTPA claim. 322 N.C. 643, 665-66, 370 S.E.2d 375, 389 (N.C. 1988).

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

It held the opposite: an unwarranted refusal to settle the entire case operated both backwards and forwards, to require fees for all previous and future events. Its only reservation was that the judge had not provided findings on the factors ("the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney") that determine the amount of fees. *Id.* at 111. Once these were established, the unwarranted refusal between the two appeals would justify "making a 'full award of attorneys' fees for the first trial and the two appeals despite the two reversals and the need for a second trial.'" *Id.* at 111. Lest there be any doubt, it added, "We also note that plaintiff's attorneys are entitled to fees for post-trial motions and this appeal," *id.*, and reiterated, "[W]e remand this cause for entry of findings of fact consistent with this opinion on the attorneys' fee award including an award of attorneys' fees for post-trial motions and this appeal." *Id.* at 112.

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

The Order's Roman III, holding as matter of law that "post-trial fees or appellate fees" may accrue only to "protect the judgment" (p. 4), rips out of context language stating that

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

The Order's disparagement of the motives of Appellants' counsel ("[T]hese repeated motions for attorneys' fees illustrate that Plaintiff's counsel's primary incentive here is attorney compensation rather than recovery for their client." (first proposed order, p. 2; second proposed order, p. 2; filed order, p. 2) are inappropriate and erroneous. "The fee award is made to the party, not to his lawyer." *Prevatte v. Asbury Arms,* 302 S.C. 413, 418, 396 S.E.2d 642, 645 (Ct. App. 1990). Nor does the author of the order have any knowledge of the fee or other agreements between Appellants and their counsel.

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

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

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

16.1, on the one hand, and their fraud verdict and an award of punitive damages, on the other.

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

Here, Appellants do not seek to recover the same actual damages twice, nor the same punitive damages twice, nor the same attorney fees twice. They do not seek a "double recovery." They seek only to recover punitive damages under their fraud claim and attorney fees under 75-16.1 associated with their UTPA claim. They are entitled to do so under North Carolina law, *Kuykendall*, 335 N.C. at 192-95, 437 S.E.2d at 379-81 (so holding).

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

Nor does North Carolina statute 1D-20, cited in the order, mandate the reverse result. Enacted in 1995, 1D-20 codified *Kuykendall's* holding, *id.* at 191, 437 S.E.2d at 379, that one could not recover both multiple damages under a statute and punitive damages based on the same

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

conduct. *Kuykendall* remains good law. No North Carolina case has held that *Kuykendall* has been superseded, nor cast doubt on its continuing validity, nor does Shepard's Citations list it as superseded. Rather, North Carolina state and federal courts continue to cite the case as good law. *Blankenship v. Town and Country Ford, Inc.*, 174 N.C. App. 764, 769-70, 622 S.E.2d 638, 642 (N.C. Ct. App. 2005); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 958 F. Supp. 1087 (W.D.N.C., 1997), *rev'd on other grounds*, 155 F.3d 331 (1998).[52]

Nor has any North Carolina case since 1D-20 was enacted held that a fee award under North Carolina Statute 75-16.1 precludes an award of punitive damages. Rather, North Carolina state and federal courts have held, subsequent to both *Kuykendall* and the statute, that plaintiffs are entitled to both. *E.g., Brown v. King,* 166 N.C. App. 267, 271, 601 S.E.2d 296, 298 (N.C. Ct. App. 2004) ("Defendant next argues that the court erred in awarding attorney fees pursuant to N.C. Gen. Stat. § 75-16.1 when the plaintiff had elected to seek punitive damages and an equitable remedy. [W]e disagree."); *Southwood v. Credit Card Sol.*, No. 7:09-CV-00081-F, 2016 U.S. Dist. LEXIS 48039, at *127-44, 2016 WL 8710985 (E.D.N.C. Feb. 26, 2016) (unpublished) (repeatedly granting punitive damages and attorney fees in favor of each of multiple plaintiffs against several defendants).

This makes sense. First, "'Since recovery of attorneys fees requires proof different from that which gives rise to punitive damages, the claims do not arise from the same course of conduct.'" *Brown v. King*, 166 N.C. App. at 271, 601 S.E.2d at 299 (quoting *Kuykendall*, 335 N.C. at 192, 437 S.E.2d at 379-80). "'Furthermore, the policies behind recovering attorneys fees and recovering punitive damages are wholly different.'" *Id.* (quoting *Kuykendall*, 335 N.C. at

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

192, 437 S.E.2d at 380). "Permitting recovery of punitive damages on the common law claim in addition to attorneys fees on the unfair practices claim best serves Chapter 75's policy of encouraging private enforcement of the Act." *Kuykendall*, 335 N.C. at 193, 437 S.E.2d at 380.

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

> The second issue is whether the trial court erred in denying defendants' motion for directed verdict at the close of all evidence on the fraud claim pursuant to N.C. Gen. Stat. §§ 75-1.1 and 75-16 (1994). A claim pursuant to these statutes is typically known as an unfair and deceptive trade practice claim.

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

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

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

South Carolina Offer of Judgment statute 15-35-400 provides a detailed procedure to

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

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

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

(emphasis added).

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

The order erroneously substituted the word "recovery," p. 21, in place of the statute's word, "verdict." It then held that because the "recovery," after the Court's reduction of the punitive damage verdict, was less than the offer, the statute did not apply. This, the lower court had no power to do. "A basic rule of statutory construction is that the words must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute's operation." *Adkins v. Varn*, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993)

(citing, e.g., *Berkebile v. Outen,* 426 S.E.2d 760 (1993)). "Where a statute contains terms which are clear and unambiguous, a court must apply those terms according to their literal meaning." *Id.* (citing *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)).

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

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

Conclusion

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

offer of judgment statute, and for such other relief as the Court may see fit.

Respectfully submitted,

February 27, 2018

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

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

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

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

Appellants,

v.

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

Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants and their Designation of Matter to Be Included in the Record on Appeal on Columbia Automotive Company, LLC d/b/a Midlands Honda by depositing a copy of it in the United States Mail, postage prepaid, on today's date, addressed to its attorney of record Harry Clayton Walker Jr., Esq., Haynsworth Sinkler Boyd, PA, PO Box 11889, Columbia, SC 29211-1889.

2/28/2018

Brooks R. Fudenberg
Law Office of Brooks R. Fudenberg LLC
171 Church Street, Suite 160
Charleston SC 29401
843-416-2558

LAW OFFICE OF BROOKS R. FUDENBERG, LLC

171 Church Street, Suite 160
Charleston, South Carolina 29401
BRF@Fudenberglaw.com
Tel. 843-416-2558
eFax: 1-910-401-1242

February 27, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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

Dear Ms. Kitchings:

Please find enclosed:

* an original and seven (7) copies of a Motion to File our of Time in this case,
* an original proof of service regarding the same,
* a check in the amount of $25.00 as the filing fee, and
* an original of the Initial Brief of Appellants in this case;
* an original Designation of Matter;
* an original proof of service regarding the Brief and Designation;
* a copy of this letter; and
* a self-addressed, stamped envelope.

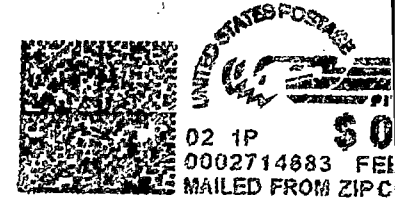
I ask that you return a stamped copy of this letter in the enclosed self-addressed envelope.

Sincerely,

Brooks R. Fudenberg
Law Office of Brooks R. Fudenberg LLC
Attorney for Appellants

cc: Harry Clayton Walker Jr., Esq. Robert Reibold, Esq. James Y. Becker, Esq.
Sarah P. Spruill, Esq. C. Steven Moskos, Esq

Law office of B.R. Fudenberg
171 Church St, #160
Charleston SC 29401



The Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211