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.

REPLY BRIEF

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

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

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

Amended and Repealed Statutes

RULES

Prior Versions of Rules

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

C. Ample Evidence Shows that CAC Defrauded Ecklund.

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

disagrees: It relied on these cases in *Morris*. 747 S.E.2d at 378-79.[8] CAC also cites three cases for the proposition that South Carolina law allows apportionment, which is of marginal relevance at most. CAC's reliance on one of those cases, *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992), is completely inapposite, given the refusal to follow the procedure that case sets forth for apportioning fees.

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Issues in the Final Order

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

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

---

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

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

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

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

---

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

> In an area of law such as this, we would be remiss if we failed to consider also the *overall purpose* for which this statute was enacted. The commentators agree that state statutes such as ours were enacted to supplement federal legislation, *so that local business interests could not proceed with impunity*, secure in the knowledge that the dimensions of their transgression would not merit federal action. *Given the small dollar amounts often involved in such suits*, statutory provision for **treble damages** found in G.S. 75-16 serves two purposes. First, it makes more economically feasible the bringing of an action where the possible money damages are limited, and thus encourages private enforcement. Second, it **increases the incentive for reaching a settlement.** Further provison for attorney fees, found in G.S. 75-16.1, also encourages private enforcement in the marketplace. The dissimilarity in language used by our Legislature in G.S. 75-1.1 and G.S. 75-16.1 [is noted].

opposite: it "encourages private enforcement." *Id.*

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

III. ELECTION ISSUES

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

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

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

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

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

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

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

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

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

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

under another).

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

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

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

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

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

---

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

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

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

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

[18] In fact, the statute is entitled (emphasis added), "Election of extracompensatory remedies."

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

> Although it may seem illogical that respondent will be treated as a juvenile in family court for the CSC and burglary charges, while being treated as an adult in general sessions court for the murder charges, it is beyond this Court's power to effect a change in the statutes enacted by the Legislature.

State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000) (citing *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996)). "We have no legislative authority and cannot vary a statutory scheme and this is true no matter how logical the basis of the variance." *Benat v. State Farm Mut. Ins. Co.*, 286 S.C. 132, 134, 333 S.E.2d 57, 58 (Ct. App. 1985).

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

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

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

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

Conclusion

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

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

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

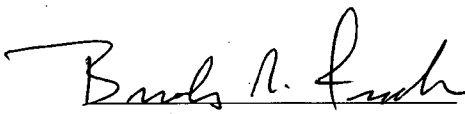
[22] Nor does it matter if the underlying verdict was for more than a constitutional amount. As long as the total award, including interest, is not above the constitutional maximum, there is no problem. Here, $750,000 or $1,000,000 is not above the constitutional maximum, given the enormity of the wrong,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

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

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

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

Respectfully submitted,



August 27, 2019

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

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.

CERTIFICATE PURSUANT TO RULE 211(b), SCACR

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

August 27, 2019

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