

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Honorable R. Keith Kelly, Circuit Court Judge

Supreme Court Case No. 2020-000523

Carla Denise Garrison and Clint Garrison..... Petitioners/Respondents,

v.

Target Corporation..... Respondent/Petitioner.

BRIEF OF AMICI CURIAE
DANIEL O'SHIELDS AND ROGER W. WHITLEY
IN SUPPORT OF CARLA DENISE GARRISON
AND CLINT GARRISON
ON THE ISSUE OF OFFER OF JUDGMENT INTEREST

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INTEREST OF AMICI

Amici have a case pending in the Court of Appeals that concerns offer-of-judgment interest regarding punitive damages.¹ Part IV of the Court of Appeals' opinion in the instant case rejects the "argument that prejudgment interest calculations should include the amount of a punitive damages award."² Amici write solely to address that holding.

WHAT THIS BRIEF ADDS TO THE DISCUSSION

(1) The Parties, and the Court of Appeals, write as if South Carolina had no prejudgment interest statute. The Court of Appeals even distinguishes a Connecticut case on grounds that Connecticut has a separate statute regulating prejudgment interest. But so does South Carolina, as discussed below.

(2) The Parties, and the Court of Appeals, write as if the governing rule was written on a blank slate. It wasn't. The governing rule is based on the governing statute. The governing statute was written against a long, historic, backdrop. The governing statute changed that language. The change in language is presumed to be of some effect. Without analyzing what the law was before the

¹ *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*, Case No. 2017-000902, filed 04/13/2017.

² *Garrison v. Target Corp*, 429 S.C. 324, 376-79, 838 S.E.2d 18 (Ct. App. 2020).

Legislature changed it, one cannot determine the relevance of the changes. The Parties and the Court of Appeals do not address that. This brief does.

(3) The Parties, and the Court of Appeals, do not discuss the implications for future cases of their rule (the Court of Appeals) or their proposed rules (the Parties). The Court should consider those implications, as discussed below.

ARGUMENT

A. Background Law: As the Court of Appeals Has Previously Recognized, Offer-of-Judgment Provisions Serve Very Different Purposes than Do Every-Day Pre-Judgment Interest Provisions.

Offer-of-Judgment laws serve very different purposes than do every-day Pre-Judgment Interest laws. The Court of Appeals has previously recognized this. So have other courts.

Offer-of-judgment laws operate as a sanction against those who reject a beneficial offer. They are “intended to encourage settlements and avoid protracted litigation.” *Black v. Roche Biochemical Labs.*, 315 S.C. 223, 227, 433 S.E.2d 21, 24 (Ct. App. 1993) (citing 12 Wright & Miller, *FED. PRAC. & PROC.* § 3001 (1973)).³

³ Defendant Target appears to recognize this. See Response Brief of Respondent-Petitioner (hereinafter, “Target’s Brief”) at 13 (quoting *Black* to similar effect).

Other courts interpret offer-of-judgment laws similarly. “The plain purpose of Rule 68 is to encourage settlement and avoid litigation.” *Marek v. Chesny*, 473 U.S. 1, 5 (1985). *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954 (9th Cir. 2013) (emphasis added) (noting “Rule 68’s exclusive purpose: to promote voluntary cessation of litigation by imposing costs on [litigants] who spurn certain settlement offers.”)

In contrast, plain, every-day pre-judgment interest laws serve entirely different purposes. They are designed to make the plaintiff whole for the loss of the use of his money during the time between the underlying incident and the judgment. This Court has explained, “A judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor’s money beyond the date payment was due.” *Butler Contracting v. Court Street*, 369 S.C. 121, 134, 631 S.E.2d 252, 259 (2006).⁴ The Court of Appeals has held the same. *Miller Constr. Co. v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 207, 791 S.E.2d 321, 333 (Ct. App. 2016) (quoting *Butler*).⁵

⁴ Target appears to recognize this as well. Target’s Brief, at 13 (citing *Butler*) (stating that, “prejudgment interest is compensatory, making the plaintiff whole for the lost time value of the money to which she was individually entitled”); *id.* (quoting *Ancrum v. Slone*, 29 S.C.L. (2 Speers) 594, 598 (S.C. App. L. 1844)) (“recognizing prejudgment interest as ‘a stated compensation for the use of money,’ which ‘cannot be separated, even in idea, from debt’”).

⁵ The Texas Supreme Court has further explained,

Cont’d

In sum, these are very different provisions, that are triggered by different events (the underlying injury versus the refusal to settle the dispute about that injury), that run from different dates (the date of the injury versus the date of the offer), and that serve very different purposes.

B. The Panel's Decision Erroneously Conflates the Two.

Although offer-of-judgment provisions serve very different purposes than do plain-vanilla pre-judgment interest statutes, the Panel interprets the offer-of-judgment rule as if it were designed to serve the same purposes as plain, every-day, pre-judgment interest provisions. This is error.

1) The Panel rejected the only case concerning **offer-of-judgment** interest that either Party presented to it.⁶ It did so on the ground that the state in question had both an offer-of-judgment interest provision and a separate, every-day, pre-judgment interest provision. This was error.

If one takes possession of the horse of another and withholds it from the owner, compensation for the value of the use of the horse during the time is a legal right and no court would hesitate to instruct the jury to so find, and we can see no difference between the right to be compensated for detaining a horse worth \$100 and the right to be compensated for the detention of \$100, the value of the horse[.]

Watkins v. Junker, 40 S.W. 11, 12 (TX 1897) (modified on other grounds, *Caynar v. Quality Control Parking*, 696 S.W. 2d 549 (Tex. 1985)).

⁶ In their briefs to this Court, the Parties have presented two additional cases regarding offer-of-judgment interest. The same analysis applies to those cases.

The Panel wrote, “The Garrisons cite a Connecticut opinion interpreting that state’s offer-of-judgment statute to allow punitive damages to be included in the computation of pre-judgment interest. ” 429 S.C. at 378. The Panel continued, “Notably, Connecticut has a separate pre-judgment interest statute in addition to the offer-of-judgment statute.” *Id.* at 379 (emphasis added).

South Carolina also has “a separate pre-judgment interest statute in addition to the offer-of-judgment statute.” S.C. Code Ann. Section 34-31-20 (pre-judgment interest statute); *id.*, Section 15-35-400 (offer-of-judgment statute).

It was error to reject the Connecticut case on the ground that Connecticut has both types of statutes, as South Carolina also has both types of statutes.

2) Because Connecticut had a separate pre-judgment interest statute, in addition to the offer-of-judgment provision, the offer-of-judgment statute there is properly considered punitive in nature, the Panel reasoned,

See Boulevard Assocs. v. Sovereign Hotels, Inc. , 861 F. Supp. 1132, 1141 (D. Conn. 1994), *supplemented on other grounds by* 868 F. Supp. 70 (S.D.N.Y. 1994) (“**Unlike § 37-3a (prejudgment interest), an award of interest under § 52-192a(b) [the offer-of-judgment statute] is punitive in nature, and is meant to serve the purpose of promoting ‘fair and reasonable compromise of litigation without trial.’**” (quoting *Crowther v. Gerber Garment Tech., Inc.* , 8 Conn. App. 254, 513 A.2d 144, 151 (1986))).

Garrison, 429 S.C. at 379 (emphasis added).

However, because South Carolina has both kinds of statutes, the offer-of-judgment statute here should similarly be considered punitive in nature.

3) The Court of Appeals erroneously limited offer-of-judgment interest to situations in which it would serve the same purposes as the pre-judgment interest statute.

The Court of Appeals relied entirely on foreign cases discussing the purposes of plain, every-day, offer-of-judgment provisions, and explained, repeatedly, how interest on punitive damages provided under the offer-of-judgment statute would not serve the purposes of a plain, every-day, pre-judgment interest provision.

To be allowable under the offer-of-judgment statute, the Panel wrote, the interest must (a) compensate the litigant for the use of money which she expected to have available during the years of litigation, and (b) be awarded on an amount knowable in advance. It held that offer-of-judgment interest based on punitive damages failed this test, because:

- i. “[The litigant] was not deprived of the use of money which she expected to have available during the years of litigation.” *Garrison*, 429 S.C. at 378 (quoting *Haskins v. Sheldon*, 558 P.2d 487,495 (Alaska 1976)).
- ii. “Because the amount of punitive damages to be awarded is not known until the judgment is rendered, . . . prejudgment interest may not be granted by a trial court on punitive damage awards.’”

Id. (alteration in original) (quoting *Ramada Inns, Inc. v. Sharp*, 711 P.2d 1, 2 (Nev. 1985)).

- iii. ““Prejudgment interest is viewed as compensation for use by defendant of money to which plaintiff is entitled from the time the cause of action accrues until the time of judgment; it is not designed as a penalty.’” *Id.*
- iv. ““[T]he amount of punitive damages to be awarded cannot be ascertained until the trier of fact has heard all the evidence.’” *Id.*⁷

The Panel simply misconceives the offer-of-judgment statute and its associated rule, S.C. Code Ann. Section 15-35-400 and Rule 68, SCRPC. Under the Panel’s rationale, a defendant could **never** receive offer-of-judgment interest.⁸ A defendant who makes a successful offer-of-judgment, in the sense that she makes an offer more beneficial to the plaintiff than is the actual result, was not deprived of the use of her money during the years of the litigation. She was, instead, holding onto the other party’s money. Under the Panel’s holding, she could not recover interest.

For an example, suppose a defendant makes an offer of judgment stating it will accept judgment against itself for \$50,000. The verdict comes in at \$40,000. By all understanding, the defendant is entitled to recover interest on the verdict

⁷ Propositions (iii) and (iv) appear to be substantively the same as (i) and (ii), respectively.

⁸ Except on a cross-claim or counter-claim, on which it is in effect the plaintiff. The word “defendant” will be used in this section to indicate one defending against a claim, regardless of whether he is more broadly the defendant, the plaintiff, a cross-defendant, etc.

(that is, an offset of that interest against the award). But the defendant cannot be said to have lost the use of “its” money during the period between the offer and the trial—rather, it was holding \$40,000 worth of the **plaintiff’s** money during that period. Under the Panel’s holding that offer-of-judgment interest is to be allowed only where it compensates a party for loss of use of its money, **defendants can never receive offer-of-judgment interest.**

Similarly, the holding that offer-of-judgment interest cannot be awarded where the amount is unknowable until after trial misconceives the main point of the offer-of-judgment statute, which is precisely to encourage settlement where the amount of the damages is disputed. The statute is most important precisely where the amount of “‘damages to be awarded is not known until the judgment is rendered;’” where the amount of “‘damages to be awarded cannot be ascertained until the trier of fact has heard all the evidence.’” The Panel has it backwards.

The Panel’s opinion, if not corrected, will remove all, or virtually all, defamation cases from the possibility of offer-of-judgment statute interest. The amount of such damages to be awarded is not known until the judgment is rendered. It will remove from the interest provisions (virtually) all cases involving claims of assault and battery, false imprisonment, false arrest, malicious prosecution, excessive force, and the like. Automobile collision and medical

malpractice cases will not be subject to offer-of-judgment interest: “‘Because the amount of [pain and suffering] damages [from the automobile collision] to be awarded is not known until the judgment is rendered, . . . prejudgment interest may not be granted.’”

Because South Carolina has both an offer-of-judgment statute and a separate pre-judgment interest statute, there was no need to interpret the offer-of-judgment rule to create a *de facto* pre-judgment interest statute. The two statutes serve different purposes. It was error to trim one statute to make it fit the rationale of the other. The Panel’s holding erroneously limits that provision to offers by claimants in a tiny minority of cases and excludes all offers by those defending against a claim.

C) The History of Offer-of-Judgment Law in South Carolina Is Important to Understanding the Current Dispute.

The Parties and the Panel base their discussion almost entirely on Rule 68, SCRCP, which is the rule under which the Garrisons filed their offer of judgment. But that rule was substantially revised in 2006 to make it conform to the statute enacted in 2005. Rule 68, SCRCP, Note to 2006 Amdt. Thus, to understand the rule, one must understand the statute.

That statute, S.C. Code Ann. Section 15-35-400, marks a substantial departure from more than a century of South Carolina law. From 1868 through 2004, with one brief and apparently unintentional exception, South Carolina law

regarding offers of judgment did three things: (a) It allowed only those defending a claim to invoke its protections. That usually meant “defendants.” Plaintiffs could invoke it only as defendants on a cross-claim or counter-claim. (b) It made the amount of the “judgment” the triggering event—the event that determines whether the sanctions of offer-of-judgment law kicked in. (c) It allowed one to recover only costs—interest was not provided. Rule 68, SCRCP (1994 amend.); Rule 68 SCRCP (1986 amend.); S.C. Code Ann. §§ 15-21-10 to 15-21-40 (1976) (repealed 1985); 1962 Code §§ 10-1001 to 1004; 1952 Code §§ 10-1001 to 1004; 1942 Code §§ 665-67; 1932 Code §§ 665-67; Civ. P. '22 §§ 686-88; Civ. Pro., '12, §§ 424-26; Civ. Pro., '02, §§ 386-88; 870, XIV, §§ 402-04 (1873); Act No. 300 of 1868, 14 S.C. Stat. 423, 514, §§ 402-04.

Various changes were made over the years. For example, the 1893 law changed “the clerk must thereupon enter judgment accordingly” to “the Court shall direct judgment be entered thereon accordingly;” *compare* Section 386 of the Revised Statutes of 1893 *with* 1873, XV, 502, § 21; the version operative in 1952 moved to its own section the right of a plaintiff defending against a counterclaim to make offers of judgment; *compare* 1952 Code Sections 10-1001 and -1002 *with* 1942

Code Section 665; and stylistic changes were many. But the above three central aspects remained.⁹

Effective in 1985, the offer-of-judgment statute was repealed and offers-of-judgment began to be regulated by the then-new Rules of Civil Procedure. 1985 Act. No. 100, Section 1. This is where the momentary glitch occurred, as the first version of Rule 68 omitted any penalty, sanction, or remedy for rejecting an offer.¹⁰ Within a year, the Rule was amended to correct that problem. The 1986 amendment added the sentence, “If the complaining party fails to obtain a more favorable judgment he cannot recover costs but must pay the defending party’s

⁹ Throughout those years, each version of the law also contained provisions enabling defendants in contract cases to make conditional offers, i.e., to state in effect, “I am not conceding liability, but if the jury decides I am liable, I agree to pay you \$X,” in which case, depending on the result, the defendant could recover costs incurred in litigating the question of damages. Rule 68, SCRPC (b) (1994 amend.); Rule 68 SCRPC(b) (1986 amend.); S.C. Code Ann. §§ 15-21-30, 15-21-40 (1976); 1962 Code §§ 10-1003, -1004; 1952 Code §§ 10-1003, 1004; 1942 Code §§ 666-67; 1932 Code §§ 666-67; Civ. P. '22 §§ 687-88; Civ. Pro., '12, §§ 425-26; Civ. Pro., '02, §§ 387-88; 870, XIV, §§ 403-04; Act No. 300 of 1868, 14 S.C. Stat. 423, 514, §§ 403-04.

¹⁰ Rather, the original Rule 68 provided in full,

OFFER OF JUDGMENT

At any time a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

Rule 68, SCACR (1985).

costs from the time of the offer.” Thus once again the governing provision allowed only those defending a claim to invoke its protections; made the amount of the judgment the triggering event, so that the sanctions did not apply unless the rejected offer was at least as favorable to the offeree as the judgment; and remained limited to the sanction of costs, with no interest. The rule was again modified in 1994 to clarify that a defense verdict sufficed to trigger the statute’s protections. It was not again modified until after the current statute was enacted.

The text of the 1868 statute and the 1994 Rule are provided in the attached footnotes, but the point is that, when the Legislature acted in 2005, the law governing offers of judgment in South Carolina allowed only those defending a claim to invoke its protections; compared the offer to the amount of the “judgment” to determine whether the protections applied; and allowed only for costs, not for interest; and that had been the governing law for more than a hundred years. The 1868 statute stated, “The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing . . . [I]f the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant’s costs from the time of the offer.”¹¹ The Rule as it stood at the time the

¹¹ The 1868 statute provided,

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Legislature acted similarly stated, “a party defending against a claim may serve upon the adverse party an offer If the complaining party fails to obtain a

SEC. 402. **The defendant may**, at any time before the trial or verdict, **serve upon the plaintiff an offer** in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the Clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and **if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant’s costs from the time of the offer**; and in case the defendant shall set up a counter claim in his answer to an amount greater than the plaintiff’s claim, or sufficient to reduce the plaintiff’s recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counter claim to the amount specified, with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitled him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counter claim for a greater amount than is specified in said offer, he cannot recover costs, but must pay the plaintiff’s costs from the time of the offer.

SEC. 403. In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing that, if he fail in his defense, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

SEC. 404. If the plaintiff do not accept the offer, he shall prove his damages as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages. Such expense shall be ascertained at the trial.

Act No. 300 of 1868, 14 S.C. Stat. 423, 513-14, Sections 402-04 (emphasis added).

judgment or a more favorable judgment he cannot recover costs but must pay the defending party's costs from the time of the offer.”¹²

In sum, at the time the Legislature acted, in 2005, South Carolina’s governing offer-of-judgment provision was a one-sided (pro-defendant) and relatively toothless measure. And the law governing offers of judgment in South Carolina had been one-sided and relatively toothless for more than a hundred years.

¹² Rule 68, SCRCF, as it stood in 2005, read as follows,

Offer of judgment

68(a). At any time a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. **If the complaining party fails to obtain a judgment or a more favorable judgment he cannot recover costs but must pay the defending party's costs from the time of the offer.**

68(b). In an action on contract the defending party may serve upon the complaining party an offer in writing that, if he fails in his defense, the damages be assessed at a specified sum. If the complaining party accepts the offer in writing before trial and on the trial has a favorable verdict, the damages shall be assessed accordingly. If the complaining party does not accept the offer he shall prove his damages as if the offer had not been made and no evidence of the offer shall be admissible. If no damages are assessed or the damages assessed in his favor do not exceed the offer the defending party shall recover his costs incurred in necessary preparation and defense in respect of the question of damages.

Rule 68, SCRCF (1994 amend.) (emphasis added).

D) In 2005, The Legislature Changed All That.

1) In 2005, the Legislature changed all that. The new statute, S.C. Code

Ann. Section 15-35-400, changed the law in three important ways:

A) It allows plaintiffs to invoke the benefit of the law. 15-35-400(B).

B) It enables the offeror to receive the benefit of the law if the offer is rejected and the offeror receives a “verdict or determination” that is at least as favorable as the rejected offer, rather than requiring her to receive a judgment at least as favorable as the rejected offer. *Id.*

C) It allows one to recover both interest on the rejected offer and costs.

Id.

Paragraph (A) of the new law sets forth in great detail the requirements for making an offer. It also extends the period for accepting an offer from ten days to twenty in most cases.¹³ Perhaps the time frame was extended due to the more serious consequences of non-acceptance as stated in Paragraph (B).

¹³ Paragraph (A) provides,

(A) Offer of Judgment. Except in domestic relations actions, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, any party may, at any time more than twenty days before the actual trial date, file with the clerk of the court a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror’s favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein, for property, or to the effect specified in the offer. The offeror shall give notice of the offer of judgment to the offeree’s attorney, or if the offeree is not represented by an attorney, to the offeree

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Paragraph (B) of the new law is the most important paragraph for present purposes. (Paragraph (C) states simply that the statute abrogates no contractual rights).

Paragraph (B) of the statute states in full (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 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

himself, in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure. **Within twenty days after notification, or at least ten days prior to the trial date**, whichever date is earlier, the offeree or his attorney may file with the clerk of the court a written acceptance of the offer of judgment. Upon the filing, the clerk shall enter immediately judgment of the stipulation. If the offer of judgment is not accepted within twenty days after notification or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not to be admissible except in a proceeding after the trial to fix costs, interests, attorney's fees, and other recoverable monies. Any offeror may withdraw an offer of judgment prior to its acceptance or prior to the date on which it would be considered rejected by giving notice to the offeree or his attorney in accordance with the service rules for motions and other pleadings outlined in the South Carolina Rules of Civil Procedure. Any offeror may file a subsequent offer of judgment in any amount provided that the subsequent offer supersedes any earlier offer that was rejected by the offeree or withdrawn by the offeror, and, on filing, terminates any rights of interest or costs that may have been applicable to the superseded offer. Notwithstanding this provision, an offer is not considered rejected upon the making of a counteroffer by the offeree, but shall remain effective until accepted, rejected, or withdrawn as provided in this subsection. Any and all offers of judgment and any acceptance of offers of judgment must be included by the clerk in the record of the case.

S.C. Code Ann. Section 15-35-400(A) (emphasis added). *Compare id. with* Rule 68(a) (1994 amend.) (“ten days”); Act No. 300 of 1868, 14 S.C. Stat. 423, 514, §402 (“ten days”).

interest computed on the amount of the verdict or award from the date of the offer.

2) The Panel's Order Gets Each of These Changes Wrong.

A) The Legislature obviously intended for plaintiffs, generally, to be able to invoke the benefits of making an offer of judgment. It lessened the burden on courts by enabling plaintiffs, not just defendants, to employ the law to push the opposing parties to settle cases. Under the Panel's reading, however, only a small minority of plaintiffs may invoke the statute's interest provision. Those would be cases where only liability is disputed, and the amount of damages is definite.

Statutory interest would not apply to cases involving allegations of mental pain and suffering or physical injury, such as from a vehicular accident or medical malpractice, or to claims of injuries stemming from defamation, false arrest, undue force, violation of free speech or other or federal or state constitutional rights, assault, defamation, fraudulent sales of defective products, etc., etc. The Legislature did not exclude any of these types of cases from the operation of the statute, and the Court of Appeals should not have done so, either.

The Panel's opinion also excludes defendants from offer-of-judgment interest. No party defending against a claim could ever meet the Panel's requirement that offer-of-judgment interest may go only to compensating one for the loss of use of one's money.

There is no indication the Legislature meant to limit offer-of-judgment interest to such a small group of cases. There is no indication the Legislature meant to deny defendants that interest. The Panel erred in reading requirements into the statute that the statute itself does not contain, and that make no sense in an offer-of-judgment law.

It may, or may not, be good policy to have a one-sided offer-of-judgment statute that operates only in favor of plaintiffs and only in a small subset of civil cases. But that is a question for the Legislature, not for the Courts.

B) The statute states, in Paragraph (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” There is nothing ambiguous about this. If the offeror obtains either a verdict or a determination that is at least as favorable as the rejected offer, she is entitled to recover.

If a statute stated that one who “obtains money or items of value” by deceit is guilty, a court could not properly refuse to convict on grounds that the culprit obtained only items of value and did not obtain money. If a treasure hunt required players to stand in front of City Hall in either Pittsburgh or Denver, it would be

unfair to say one has not completed the course because he stood in front of the City Hall in Pittsburgh, and not the one in Denver.

Moreover, the statute uses the word “shall” — “the offeror **shall be allowed** to recover from the offeree” Not “may in the court’s discretion be allowed.” As this Court has repeatedly instructed, “The term ‘shall’ in a statute means that the action is mandatory.” *Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). “Both the UAA and the FAA use the words ‘shall’ or ‘must’ . . . and such language is mandatory.” *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 454, 748 S.E.2d 221, 228 (2013). “Under the rules of statutory interpretation, use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a mandatory requirement.” *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002).

The statutory language is clear. One who obtains either a verdict or a determination at least as favorable as his offer shall be allowed to recover.

Moreover, if the language were ambiguous—it is not ambiguous, but if it were—the history of South Carolina’s offer-of-judgment laws conclusively refutes the Panel’s reading. The Panel in effect replaces the statute’s phrase, “the offeror obtains a **verdict or determination** at least as favorable as the rejected

offer” he shall recover, with the phrase, “If the complaining party fails to obtain a **judgment or a more favorable judgment**” he cannot recover.

The Panel’s preferred reading is how the law used to read before the Legislature changed it. Immediately prior to the Legislature’s enactment of the statute, the governing law stated, in then-current paragraph (a), “If the complaining party fails to obtain a judgment or a more favorable judgment he cannot recover costs but must pay the defending party’s costs from the time of the offer.”

It may—or may not—be a better policy to have the triggering event be the amount of the judgment, rather than the amount of the verdict. The Panel clearly prefers the old policy. However, that is not a question for courts to decide. It is a question for the Legislature.

Finally, were the Court to consider policy reasons—which it should not, but if it were to do so—there are many reasons the Legislature could have chosen to make the triggering event the amount of the (jury) “verdict” or other “determination” (such as in bench trials, which do not have verdicts). The very unknowability of verdicts, the greater variability compared to a final judgment that the judge has tinkered with, makes an offerree have to anticipate a wider range of potential outcomes, a wider range of possible interest amounts he will have to pay.

This can make risk-averse litigants more inclined to accept an offer of judgment, and thus help reduce the burdens on the courts.

A notable example is the interaction between the punitive damages statute and the offer-of-judgment statute. *See* S.C. Code Ann. § 15-32-530 (punitive damages). A wrongdoer counting on the punitive damages statute to limit his damages—who believes, for example, that his wrongdoing may well spur a jury to a punitive award in the million dollar range, but hopes to escape punitive liability altogether, and expects the statutory cap to limit his damages in the worst case—will now have to think carefully if he receives a reasonable offer, because he might be liable not only for punitive damages, but for interest on the million dollars from the date of the offer.

The statute as written puts more power in the hands of average people, i.e., the jury, a cross-section of the community, and less in the hands of trial court judges. The Panel’s opinion snatches back that power for the judges. Under the Panel’s reading, all a judge need do is reduce the jury’s award below the amount of the offer, and, poof!—the entitlement to offer-of-judgment interest and costs disappears. Under the Panel’s reading, conversely, all a judge need do is provide sufficient attorney fees to get the recovery above the amount of the offer and, poof!—an entitlement to interest and costs magically appears.

Moreover, if the triggering event is to be, as the Panel holds, the amount of the final judgment, a verdict below the amount of the offer can be pushed above the amount of the offer by the simple operation of routine, every-day pre-judgment interest.

For a variety of reasons, a simple rule—compare the offer to the amount of the jury’s verdict or other determination if there is no verdict—works better than any of the alternatives.

C) The new statute and corresponding rule allow both claimants and defendants to recover both interest on the rejected offer and costs. The Panel’s opinion gets this wrong, too. As discussed above, the Panel’s holding completely excludes those defending a claim from obtaining a reduction in the award based on interest. It further limits interest to those prosecuting only a small subset of claims.

In sum, the Legislature took a one-sided, relatively ineffective, offer-of-judgment provision and turned it into a highly effective, two-sided provision. The Panel’s decision, if allowed to stand, changes it back.

Doing so is not within the province of the courts.

This Court has repeatedly explained the importance of following the words of a statute. It has repeatedly explained that it is not for courts to make policy contrary to legislative policy. “[I]f the language of a statute is plain, unambiguous,

and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.’” *Odom v. Town of McBee Election Comm’n*, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “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.” *State v. Corey D.*, 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000) (requiring that seemingly “illogical” result).

The Court of Appeals has held similarly in other cases.¹⁴ It purports to have followed this precept in the current case, but obviously did not do so.

The Court should follow the plain meaning of the statute. “If an offer of judgment is not accepted and the offeror obtains a verdict or determination” at least as favorable as the rejected offer means just that, not if “the offeror obtains a final judgment” at least as favorable as the rejected offer. “[T]he offeror shall be allowed to recover” means just that: not “if the court so chooses” or “if the court

¹⁴ “Where the language of a statute is clear and unambiguous, it requires no construction and must be literally applied. In other words, it means what it says.” *State v. Carrigan*, 284 S.C. 610, 616, 328 S.E.2d 119, 122 (Ct. App. 1985) (citing *Jones v. South Carolina State Highway Department*, 247 S.C. 132, 146 S.E. (2d) 166 (1966)) (emphasis added). “It is the duty of this court to interpret the law. 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) (citing *State v. Carrigan*, 328 S.E. (2d) 119 (Ct. App. 1985)).

lards up the award with attorney fees.” “[E]ight percent interest” means just that: not “eight percent interest if the claimant had been without his money and if the amount is reasonably determinable in advance of the trial.”

Conclusion

Contrary to the Court of Appeals, this Court should hold that prejudgment interest calculations should include the amount of a punitive damages award, and therefore reverse Part IV of the Panel’s opinion.

Respectfully submitted,

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