

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

Case No. 13-CP-40-0319

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SC Court of Appeals

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

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
COUNTER STATEMENT OF FACTS	6
I. PRIOR HISTORY OF THE CIVIC.....	7
A. Before reaching Midlands, the Civic was wrecked, sold with no indication it was a salvaged vehicle on its title, and repaired.	7
B. Midlands acquired the Civic in June 2008.....	7
C. Midlands sold the Civic to Ecklund.....	8
D. Midlands sends the car to ADESA to be sold as a red light sale.	8
1. Buying and selling at ADESA.	8
2. The sale of the Civic to O&W.	9
ARGUMENT	11
I. THE TRIAL COURT’S REDUCED PUNITIVE DAMAGES AWARD OF \$46,515 COMPORTS WITH THE LAW AND DUE PROCESS. IN ADDITION, O&W WAIVED THE RIGHT TO COMPLAIN ABOUT THE PUNITIVE DAMAGES AWARD WHEN IT ELECTED ITS REMEDY UNDER THE NCUTPA.....	11
A. Because O&W did not elect punitive damages, it cannot now complain about the trial court’s review of that portion of the jury’s verdict.	11
B. The trial court conducted a complete and thorough review of the punitive damages award as required under state and federal law. The reduced award of \$46,515 comports with the law and due process.	13
1. Standard of Review.....	13
2. The jury’s punitive damages award was excessive as a matter of due process.	14
a. Reprehensibility.....	15
b. Ratio.....	18
c. Civil Penalties.....	18
3. The constitutional review is separate and distinct from the statutory punitive damages cap imposed by N.C.G.S. § 1D-25.....	19
II. THE TRIAL COURT’S ATTORNEY’S FEE AWARD REFLECTS A FAIR EXERCISE OF DISCRETION AND MUST BE AFFIRMED, PARTICULARLY IN LIGHT OF THE MATERIALS SUBMITTED BY O&W’S COUNSEL, THE REFUSAL TO SETTLE THIS MATTER AFTER TRIAL DESPITE MIDLANDS’S GOOD FAITH EFFORTS, AND THE EMPHASIS PLACED ON PUNITIVE DAMAGES WHICH ARE NOT RECOVERABLE UNDER THE NCUTPA.....	20
B. Attorney’s fees under the NCUTPA.....	21
1. The trial court’s order of November 28, 2016 awarded a reasonable fee based on the applicable case law and its view of this case and the materials submitted by the parties.	23

2. The trial court’s order of February 27, 2017 is consistent with the NCUTPA and the underlying purpose of fee awards under the NCUTPA.	28
3. The trial court’s order of August 10, 2017 is valid and should be affirmed.	31
a. The trial court had jurisdiction to enter the order.	31
b. The August 10, 2017 order is correct on its merits.	32
III. THE TRIAL COURT CORRECTLY REQUIRED O&W TO ELECT “PRIOR TO JUDGMENT, BETWEEN PUNITIVE DAMAGES AND ANY OTHER REMEDY[.]”	33
A. N.C.G.S. § 1D-20 applies and limits O&W to recovery under either its fraud claim or its NCUTPA claim.	34
B. N.C.G.S. § 1D-20 means exactly what it says.	36
IV. THE TRIAL COURT CORRECTLY DETERMINED THAT OFFER OF JUDGMENT INTEREST IS NOT APPLICABLE IN THIS CASE.	39
CONCLUSION.	40

TABLE OF AUTHORITIES

CASES

<i>Adamson v. Marianne Fabrics, Inc.</i> , 301 S.C. 204, 391 S.E.2d 249 (1990)	12
<i>Austin v. Stokes-Craven Holding Corp.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010).....	17-18
<i>Blankenship v. Town and Country Ford, Inc.</i> 622 S.E.2d 638 (N.C. Ct. App. 2005)	38
<i>Blumberg v. Nealco</i> , 310 S.C. 492, 427 S.E.2d 659 (1993)	21
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996).....	14-15, 19
<i>Boswell v. RFD-TV the Theater, LLC</i> , 498 S.W.3d 550 (Tenn. Ct. App. 2016)	20
<i>Branham v. Ford Motor Co.</i> , 390 S.C. 203, 701 S.E.2d 5 (2010).....	14
<i>Broussard v. Meineke Discount Muffler Shops</i> , 958 F.Supp 1087 (W.D.N.C. 1997), <i>rev'd on other grounds</i> by 155 F.2d 331 (4 th Cir. 1998)	38
<i>Compton v. Kirby</i> , 577 S.E.2d 905 (N.C. Ct. App. 2003)	12
<i>Di Frega v. Pugliese</i> , 596 S.E.2d 456 (N.C. Ct. App. 2004).....	36
<i>Durham v. Vinson</i> , 360 S.C. 639, 602 S.E.2d 760 (2004)	14
<i>EFCO Corp. v. Renaissance on Charleston Harbor, LLC</i> , 370 S.C. 612, 635 S.E.2d 922 (Ct. App. 2006)	21
<i>Ellis v. Northern Star Co.</i> , 388 S.E.2d 127 (N.C. 1990).....	11
<i>Evans v Full Circle Productions, Inc.</i> , 443 S.E.2d 108 (N.C. Ct. App. 1994)	22
<i>Everhart v. O'Charley's, Inc.</i> , 683 S.E.2d 728 (N.C. Ct. App. 2009).....	20
<i>GE Betz, Inc. v. Conrad</i> , 752 S.E.2d 634 (N.C. Ct. App. 2013).....	14
<i>Halley Nursery Co. v. Forrest</i> , 298 S.C. 520, 381 S.E.2d 906 (1989)	25
<i>Harris-Jenkins v. Nissan Car Mart, Inc.</i> , 348 S.C. 171, 557 S.E.2d 708 (Ct.App. 2001).....	26
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	23, 26-27
<i>Hollis v. Stonington Dev., LLC</i> , 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011)	13
<i>Horak v. Southern Real Estate Co. of Charlotte, Inc.</i> , 563 S.E.2d 47 (N.C. Ct. App. 2002)	36
<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010).....	24, 28, 33
<i>Lacey v. Kirk</i> , 767 S.E.2d 632 (N.C. Ct. App. 2014).....	21
<i>Lemons v. Old Hickory Council</i> , 367 S.E.2d 655 (N.C. 1988)	34
<i>Llera v. Sec. Credit Sys., Inc.</i> , 93 F. Supp. 2d 674 (W.D.N.C. 2000).....	22
<i>Mapp v. Toyota World, Inc.</i> , 344 S.E.2d 297 (N.C. Ct. App. 1986).....	11
<i>Marshall v. Miller</i> , 276 S.E.2d 397 (N.C. 1981)	30
<i>Martin Architectural Products, Inc. v. Meridian Constr. Co.</i> , 574 S.E.2d 189 (N.C. Ct. App. 2002)	26
<i>Maybank v. BB&T Corp.</i> , 416 S.C. 541, 787 S.E.2d 498 (2016)	25
<i>McAfee v. Boczar</i> , 738 F.3d 81 (4th Cir. 2013).....	21
<i>Mitchell v. Fortis Ins. Co.</i> , 385 S.C. 570, 686 S.E.2d 176 (2009).....	13-14
<i>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche</i> , 327 S.C. 238, 489 S.E.2d 470 (1997)	23-24
<i>Moore v. Bi-State Dev. Agency</i> , 87 S.W. 3d 279 (Mo. Ct. App. 2002)	20
<i>Morris v. Scenera Research, LLC</i> , 747 S.E.2d 362 (N.C. Ct. App. 2013), <i>aff'd in part, rev'd in part</i> , 788 S.E.2d 154 (N.C. 2016)	25-27
<i>Nakatsukasa v. Furiex Pharm., Inc.</i> , No. 14 CVS 6156, 2015 WL 4069818 (N.C. Super. July 1, 2015)	22
<i>Okwara v. Dillard Dep't Stores, Inc.</i> , 525 S.E.2d 481 (N.C. Ct. App. 2000)	25
<i>Out of the Box Developers, LLC v. Doan Law, LLP</i> , No. 10 CVS 8327, 2014 WL 4298329 (N.C. Super. Aug. 29, 2014).....	26-27

<i>Patterson v. State</i> , 359 S.C. 115, 597 S.E.2d 150 (2004)	34
<i>Perkins v. Arkansas Trucking Servs., Inc.</i> , 528 S.E.2d 902 (N.C. 2000)	35
<i>Phillip Morris, USA v. Williams</i> , 549 U.S. 346 (2007)	14
<i>Rhyne v. K-Mart Corp.</i> , 562 S.E.2d 82 (N.C. Ct. App. 2002), <i>aff'd</i> , 594 S.E.2d 1 (N.C. 2004). 19	
<i>Shepard v. Bonita Vista Properties, L.P.</i> , 664 S.E.2d 388 (N.C. Ct. App. 2008)	22
<i>Smith v. Strickland</i> , 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994)	12
<i>Southeast Air Charter, Inc. v. Stroud</i> , No. 11 CVS 946, 2015 WL 4897790 (N.C. Super. Aug. 17, 2015)	23
<i>Southwood v. Credit Card Solution</i> , No. 7:09-CV-00081-F, 2016 WL 8710985 (E.D.N.C. Feb. 26, 2016), <i>report and recommendation adopted sub nom, SouthWood v. CCDN, LLC</i> , No. 7:09-CV-183-F, 2016 WL 1389596 (E.D.N.C. Apr. 7, 2016)	38
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	passim
<i>State v. Mayo</i> , 807 S.E.2d 654 (N.C. Ct. App. 2017)	35
<i>Stilley v. Automobile Enterprises of High Point, Inc.</i> , 284 S.E.2d 684 (N.C. Ct. App. 1981)	17
<i>Taylor v. Nix</i> , 307 S.C. 551, 416 S.E.2d 619 (1992)	24
<i>Tillman v. Oakes</i> , 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012)	31-32
<i>United Laboratories, Inc. v. Kuykendall</i> , 403 S.E.2d 104, 111 (1991), <i>aff'd</i> , 437 S.E.2d 374 (N.C. 1993)	22, 36-38
<i>Whiteside Estates, Inc. v. Highlands Cove, L.L.C.</i> , 553 S.E.2d 431 (N.C. Ct. App. 2001)	24
<i>Williamson v. Middleton</i> , 374 S.C. 419, 649 S.E.2d 57 (Ct. App. 2008), <i>rev'd on other grounds</i> , 383 S.C. 490, 681 S.E.2d 867 (2009)	21

STATUTES

N.C.G.S. § 1D-15(c)	16
N.C.G.S. § 1D-20	passim
N.C.G.S. § 1D-25	19
N.C.G.S. § 1D-50	14
N.C.G.S. § 12-3(1)	35
N.C.G.S. § 15A-1340.23(b)	19
N.C.G.S. § 20.71-4	19
N.C.G.S. § 20-348	19
N.C.G.S. § 75-16	19, 34
N.C.G.S. § 75-16.1	22
S.C. Code Ann. § 15-35-400	39-40

OTHER AUTHORITIES

Black's Law Dictionary (10 th ed. 2014)	36
1995 North Carolina Laws Ch. 514 (H.B. 729)	37

RULES

Rule 205, SCACR	32-33
Rule 208, SCACR	11
Rule 220, SCACR	11
Rule 241, SCACR	31

STATEMENT OF THE ISSUES ON APPEAL

- 1. Did O&W Cars waive any challenge to the trial court's punitive damages review by failing to elect recovery under its fraud cause of action and instead electing recovery under the North Carolina Unfair Trade Practices Act?**
- 2. Did the trial court correctly reduce the punitive damages award to a ratio of from a 358:1 ratio of punitive damages to actual damages to a ratio of 7:1 to comport with due process following a complete and thorough review of the punitive damages award as required under state and federal law?**
- 3. Was the trial court within its discretion in issuing its orders regarding an award of attorney' fees under the North Carolina Unfair Trade Practices Act in light of the materials submitted by O&W's counsel, the refusal to settle this matter after trial despite Midlands' good faith efforts, and the emphasis placed on punitive damages which are not recoverable under the NCUTPA?**
- 4. Did the trial court correctly require O&W Cars to elect, prior to judgment, between punitive damages and any other remedy?**
- 5. Did the trial court correctly determine that offer of judgment interest is not applicable when the offer of judgment amount exceeded the amount of the final judgment?**

STATEMENT OF THE CASE

Daniel O'Shields and Roger W. Whitley d/b/a O&W Cars¹ ("O&W") filed this action on January 17, 2013 against PSC Automotive Group d/b/a Midlands Honda ("Midlands") and Nationwide Mutual Insurance Company ("Nationwide"). (R. at 48-59). The original complaint included the following causes of action, all of which stem from the sale of a used car by Midlands to O&W at the ADESA automobile auction in Charlotte, North Carolina: (1) breach of contract; (2) negligence; (3) negligent misrepresentation; (4) constructive fraud; (5) fraud; (6) South Carolina Dealer's Act; and (7) South Carolina Unfair Trade Practices Act ("SCUTPA"). (*Id.*). Midlands moved to dismiss the South Carolina statutory claims. (R. at 1181-83).

In response to the motion to dismiss, O&W amended the complaint on May 9, 2013 to remove the South Carolina statutory causes of action and to add a claim under the North Carolina Unfair Trade Practices Act ("NCUTPA") against both defendants. (R. at 67-77). Nationwide settled with O&W and was dismissed as a party on April 16, 2015. (R. at 42). O&W amended the complaint again at trial to remove Nationwide as a defendant and remove a claim for constructive fraud, which had been withdrawn in response to Midlands' motion for summary judgment. (R. at 41, 92-100, 468:10-18). Midlands' final answer filed in this case listed numerous defenses, including a general denial, failure to state a claim, failure to mitigate, the economic loss rule, and election of remedies. (R. at 84-91).

This matter was tried before a jury from April 18-22, 2016. Midlands admitted liability on the breach of contract claim. (R. at 685:12-14). The trial court found the economic loss rule barred

¹ O&W is a used car dealership in Shelby, North Carolina owned by O'Shields and Whitley as a general partnership. (R. at 588:8-23). The contract at issue was between Midlands and O&W. (R. at 1013-14). As reflected repeatedly in the trial transcript, O&W only sought one recovery in this action. (*See e.g.*, R. at 289:24-290:6, 291:18-292:1 (Plaintiff's Opening); 750:22-23, 753:6-9, 766:19-21 (Plaintiff's Closing)).

the negligence claim. (R. at 709:11-14). The jury rendered a verdict of \$6,650 in actual damages on the following causes of action: (1) breach of contract; (2) negligent misrepresentation; (3) NCUTPA; and (4) fraud. (R. at 43-46). The jury also returned a verdict of \$2,381,888.00 in punitive damages on the fraud cause of action. (R. at 47). The trial court granted the parties ten days to make any post-trial motions. (R. at 935:4-9).

Within that time period, O&W filed a motion to treble the verdict, for attorney's fees for its attorney, Steven Moskos (a later submission was made as to co-counsel Brooks Fudenberg); for offer of judgment interest, and for prejudgment interest. (R. at 1301-02). Midlands filed motions for judgment notwithstanding the verdict, or, in the alternative, a new trial, or a new trial nisi remittitur, to require election of remedies, to enforce the North Carolina punitive damages cap, and for setoff or recoupment. (R. at 1277-1300).

The trial court heard the motions on July 27, 2016. At the close of that hearing, the trial court gave O&W's counsel leave to submit an affidavit on attorney's fees as to certain factual matters, but cautioned "[d]on't wait too long." (R. at 1179:15-18). The trial court also granted O&W's motion to reconsider with respect to the Court's earlier direction regarding election of remedies, ruling that O&W could elect once the trial court made its ruling on the post-trial motions. (R. at 1179:19-1180:8).

On August 29, the trial court emailed counsel with an instruction that O&W was to elect between an award of \$41,199 under the NCUTPA cause of action (treble damages plus \$21,264 in attorney's fees) or an award of \$53,160 under the fraud cause of action (damages plus \$46,515 in punitive damages). (R. at 1731). Only after that direction, O&W's counsel submitted an additional affidavit relating to the attorney's fee issue on August 30, 2016. (R. at 1732-1851). O&W elected the recovery under the NCUTPA on September 8, 2016. (R. at 1854).

The trial court issued a written order addressing the post-trial motions on November 28, 2016.² (R. at 1-23). In that order, the trial court provided the basis for the alternative remedies set forth in the August 29 email, including its due process review of the punitive damages award as required by N.C.G.S. § 1D-50 and its decision on O&W's attorney's fee request. The punitive damages review included a discussion of each of the factors listed in the applicable North Carolina statute, N.C.G.S. § 1D-35 and a due process analysis. With respect to the attorney's fee request, the trial court considered all of the facts before it on each of the elements for an award under the NCUTPA, including the parties efforts to "fully resolve the matter which constitutes the basis of [this] suit," and determined an award of \$21,264 was appropriate.

By motions dated December 15, 2016, O&W moved for supplemental attorney's fees incurred after July 20, 2017 and asked the trial court to reconsider its November 28, 2016 order in the following respects: (1) reference to O&W in the singular; (2) whether Midlands needed to renew a directed verdict motion between the actual and punitive damage phases of the trial; (3) that the trial court was not required to perform a written punitive damage award review; (4) that the trial court's civil penalties analysis was incomplete or inaccurate; (5) that O&W's closing argument was not improper; (6) an allegation that Midlands failed to make any effort to resolve the matter; (7) an allegation that there was no requirement that an affidavit be filed quickly after the hearing on the post-trial motions; (8) that the award of attorney's fees, while analytically correct, was unreasonably low; (9) that the award of attorney's fees did not include co-counsel's time; (10) that the trial court erred in not awarding offer of judgment interest; and (11) that the award of interest was not calculated correctly. (R. at 1884-1992).

² The order does not address Midlands' motion for setoff, which was later withdrawn.

Midlands submitted a memorandum in response to O&W's motions, which, among other things, provided additional information about its efforts to "fully resolve the matter" following the trial court's August 29 election instructions and argued that there was not an "unwarranted refusal to settle" after September 14 because Midlands had offered to pay "a sum reflecting actual damages plus the trial court's award of both punitive damages and attorney's fees for a total of \$81,069 (\$6,645 in actual damages + \$46,515 in punitive damages + \$21,264 in attorney's fees)."³ (R. at 1999-2010).

The trial court resolved both motions by order dated February 27, 2017. (R. at 24-29). In that order, the trial court corrected the interest award, clarified that it had considered all of the previously requested fees in making its earlier rulings, addressed O&W's supplemental attorney's fee motion, and directed that the Clerk of Court enter judgment as set forth in the order. With respect to the supplemental fee request, the trial court broke its ruling down as follows: (1) an additional \$7,020 representing 50% of the time claimed between July 21, 2016 through July 27, 2016, (2) an additional \$3,120 for the period between July 28, 2016 and September 13, 2016, reflecting the trial court's view that much of that time was spent drafting a largely improper affidavit of counsel, and (3) finding no additional fees were appropriate after September 14, 2016 based on O&W's settlement efforts.

O&W again moved for supplemental fees on March 30, 2017. (R. at 2058-82). A notice of appeal followed on April 11, 2017. (R. at 2086). After receiving an email from the trial court indicating it intended to deny the motion, O&W submitted an additional memorandum on June 28, 2017. (R. at 2087, 2093-148). It was only there that O&W raised a possible issue as to the trial

³ Due to a math error, this figure actually represents more than the amount indicated in the trial court's August 29 email.

court's jurisdiction. Midlands responded on July 25, 2017 that it did not object "to delaying a decision on the motion as [O&W] has suggested." (R. at 2149).

On August 4, 2017, O&W filed a motion with this Court to toll all deadlines until the trial court ruled on its outstanding motion for attorney's fees.⁴ After O&W filed its motion, Midlands sent a letter to the trial court asking for a ruling in light of O&W's motion to toll the appeal. (R. at 2150). The trial court issued an order denying the supplemental fee motion on August 10, 2017. (R. at 30-34). In that order, the trial expressed its frustration with O&W's counsel, particularly in light of the trial court's earlier ruling that fees were not recoverable after September 14, 2017 based on Midlands' efforts to settle this matter. As stated by the trial court, "construing [N.C.G.S.] § 75:16-1 to require supplemental awards of attorney's fees in the presence of subsequent reasonable settlement efforts by a defendant would permit a plaintiff who was successful at trial to use post-trial motions and appeals as a veritable attorney's fee printing press." (R. at 31). O&W also appealed this order. (R. at 2158-59).

COUNTER STATEMENT OF FACTS

This case arises from a business dispute between two car dealerships— Midlands, which wholesaled a trade-in Honda Civic (the "Civic") through the ADESA automobile auction ("ADESA") in Charlotte, North Carolina, and O&W, which purchased the Civic at the auction under a red warning light for \$5,200. (R. at 92-100 (¶¶ 1-6 and 25), 1014). That is the transaction at issue in this case, not the earlier sale of the Civic to Charles Ecklund that is the focus of much of O&W's brief.

As the trial court recognized, Ecklund's involvement with the Civic is largely irrelevant to this case. (R. at 237:14-17, 242:12-14). The alleged misconduct here involved violation of

⁴ The motion to toll was granted by order dated August 25, 2017.

ADESA's rules and a North Carolina statutory disclosure requirement, which has no South Carolina statutory counterpart. Ecklund's transaction did not involve ADESA or occur in North Carolina, and he is not a party to this case. The only relevance his testimony had was to establish Midlands' prior knowledge of the Civic's condition, a fact which Midlands conceded.

I. Prior History of the Civic.

A. Before reaching Midlands, the Civic was wrecked, sold with no indication it was a salvaged vehicle on its title, and repaired.

Long before Midlands ever saw the Civic, it was involved in an accident and declared a total loss by its owner's insurer, Nationwide. (R. at 299:3-300:4). Nationwide sold the Civic through a salvage auction, but did not cause the Civic's title to be marked as a salvage title. (R. at 300:20-301:5, 382:10-14). The Civic was purchased by a third party and repaired by an unknown third party. (R. at 485:9-17).⁵

B. Midlands acquired the Civic in June 2008.

When Midlands acquired the Civic in June of 2008, it had a clean title. (R. at 382:10-14). The Civic underwent a standard inspection for certification at Midlands Honda. (R. at 393:10-21). Midlands did not discover the prior damage in this process as far as it could ascertain from its records. (*Id.*; R. 1024-25).⁶

Midlands' used car manager, Brent Ferrell, was responsible for valuing the car when it was sold to the dealership. (R. at 347:25-348:3). It was his practice to conduct a visual inspection of

⁵ Brian Allen, O&W's expert mechanic, inspected the Civic. When he removed the rear seats, he noticed that the structural panel had been cut in half and welded back together. (R. at 488:7-10). He then removed other sections of the interior, and discovered that the vehicle was a "clipped car", or a car in which two sections of different vehicles have been welded together. (R. at 512:22-513:2). In the 70s and 80s, it was common practice to repair a car in this manner, but such repairs have since fallen out of favor. (R. at 499:4-16).

⁶ Terry Smith, the mechanic who performed the inspection, died in 2011, before notice of any dispute with O&W. (R. at 409:18-25, 554:24-555:16).

the interior and exterior and test-drive the car to make sure there were no transmission issues. (R. at 348:4-19). He would then consult the dealer's black book to put a value on the car. (*Id.*). He did not send cars to the service department or put them on a lift as part of this process. (R. at 348:5-349:4). Based on this normal practice, Farrell did not discover the prior damage. (R. at 358:20-24, 369:8-24).

C. Midlands sold the Civic to Ecklund.

Midlands later sold the Civic to Ecklund. (R. at 312:10-13). Ecklund thought it was a good car and drove it for some time with no problems. (R. at 312:10-313:10). Ecklund only discovered that the Civic was a clipped car after he was involved in an accident and took it in for repairs. (R. at 116:17-117:3, 120:7-123:23). Ecklund informed Midlands about what he had discovered, and Midlands traded him out of the Civic. (R. at 131:2-20, 136:2-5).

D. Midlands sends the car to ADESA to be sold as a red light sale.

1. Buying and selling at ADESA.

Only dealerships may buy or sell through ADESA. (R. at 145:2-19). Dealers must register to buy from or sell to ADESA. (*Id.*) In the ordinary course, a dealer must fill out and sign several ADESA forms to register, including a power of attorney, personal guaranty, and a Dealer Acknowledgement Form documenting the dealer's receipt of ADESA's rules. (R. at 145:2-146:1, 146:18-150:8). Midlands registered in 2007, and the only Dealer Acknowledgement Form signed by Midlands is dated January 9, 2007. (R. at 1033). A review of ADESA's Midlands file did not show a personal guaranty signed by Midlands. (R. at 145:2-146:1, 146:18-150:8, 990).

ADESA adopted a new set of rules in January 2010, four months before the sale of the Civic. (R. at 996-1010, 408:24-409:3, 635:6-21). The 2010 rules did not require disclosure of wreck damage if a vehicle was sold under a red light. (R. at 996-1010). The 2010 rules did,

however, contain a new requirement that unibody damage be disclosed even if a vehicle was sold under a red light. (R. at 162:7-10, 293:20-294:2, 996-1010).

Midlands did not receive written notice that the rules had changed as required by ADESA's Terms and Conditions, which provide in pertinent part:

20. Changes to Auction Terms and Conditions These Auction Terms and Conditions are subject to change *upon written notice to Dealer*. Use of the ADESA Card or completion of other business transactions through ADESA *subsequent to delivery by mail to Dealer's place of business* shall be evidence of Dealer's acceptance of changes to these Auction Terms and Conditions. Further, Dealer is subject to all other terms and conditions communicated in writing to Dealer, including, without limitation, terms and conditions posted conspicuously on bulletin boards or other signs located on the Auction premises.

(R. at 994-95) (emphasis added). No evidence was introduced at trial that ADESA mailed the 2010 rules to Midlands, O&W, or any other dealer, or that ADESA posted any notices of the rule change at the auction or on its website. As a result, Midlands was unaware ADESA had changed the rules to include a unibody disclosure requirement for red light sales. (R. at 397:8-22, 408:13-409:16, 434:3-16).

2. The sale of the Civic to O&W.

Ferrell testified that he was never personally informed that the Civic was a clipped car and that he did not know the Civic was a clipped car when he sent it to ADESA. (R. at 369:22-370:3, 404:20-405:11). He was instructed to wholesale the vehicle "under a red light." (R. at 377:19-378:6, 404:20-405:11). The Civic had visible wreck damage at that time that was not corrected prior to sending the Civic to ADESA. (R. at 557:2-10). Ferrell testified that he did not know about the then-recent change to the ADESA rules and thought he was following the rules by selling the Civic under a red warning light. (R. at 395:16-19; 397:8-22; 409:6-16).

In the automobile industry, sale under a red light is a warning that something is wrong with the vehicle and that the buyer should beware when purchasing it. (R. at 355:10-15). An auction

red light generally means that the seller is relinquishing all liability. (*Id.*; R. at 434:7-435:1). A red light sale is an “as-is” sale. (R. at 397:15-22, 1014). Joe Guyer, ADESA’s general manager, agreed that it is common knowledge that if a car goes through auction on a red light that means something is wrong with it. (R. at 142:1-13, 339:9-17). In addition, ADESA’s rules required a buyer to inspect a vehicle before purchasing. (Pl. Ex. 52 at 3(d) and 9(a); Tr. at 408:13-09:9, R. at 630:13-631:9, 996-1010 (¶¶ 3(d) and 9(a)).

The Civic was not sold during the auction. (R. at 598:10-14). Instead, Whitley approached ADESA about the Civic after the car failed to sell. (R. at 598:10-600:7). Whitley had noticed the vehicle was damaged at this time. (R. at 597:14-16). ADESA contacted Midlands, and the parties ultimately agreed on a price of \$5,200. (R. at 599:16-23).

Whitley and ADESA filled out the contract of sale for the Civic. (R. at 1013-14). Midlands was not involved in this process and did not sign the contract. (*Id.*). As part of that contract, the Civic was sold under a red light. (*Id.*; R. at 1012). The contract was also noted as an “Off the Block Sale.” (*Id.*). An ADESA representative then completed and signed the North Carolina damage disclosure form without consulting Midlands. (R. at 313:5-13, 411: 8-18, 936-37). Most of the representations made on the disclosure were not required because the Civic was more than five years old, but the disclosure completed by ADESA did not disclose that the Civic was a clipped or reconstructed car. (R. at 936-37).

ARGUMENT⁷

As discussed above, this case and this appeal involves a contractual dispute between two car dealers relating to a single transaction to sell a car for \$5,200. It was not a face-to-face interaction. Instead, O&W dealt exclusively with ADESA. ADESA filled out much of the paperwork. Neither O&W nor Midlands were aware of the recent ADESA rules change. The trial court understood what was at issue and noted during the trial, “I mean this is a Magistrate Court case you understand. The jurisdiction’s under the Six Thousand Dollars.” (R. at 695:18-20). This case should be reviewed on appeal through this same lens.

I. The trial court’s reduced punitive damages award of \$46,515 comports with the law and due process. In addition, O&W waived the right to complain about the punitive damages award when it elected its remedy under the NCUTPA.

A. Because O&W did not elect punitive damages, it cannot now complain about the trial court’s review of that portion of the jury’s verdict.

O&W did not elect punitive damages. (R. at 1854). Therefore, O&W cannot now complain about the trial court’s review of the punitive damages award.

By statute and at common law in North Carolina, a plaintiff who obtains both a common law punitive damages award and a statutory treble damages award must elect between them. *Ellis v. Northern Star Co.*, 388 S.E.2d 127, 132 (N.C. 1990); *Mapp v. Toyota World, Inc.*, 344 S.E.2d 297, 301 (N.C. Ct. App. 1986); N.C.G.S. § 1D-20 (“A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to a statute that provides for multiple

⁷ Pursuant to Rule 208(b), SCACR, the Standard of Review will be set forth at the beginning of each argument. In addition, to the extent any argument contained in this brief was not presented to the trial court, Midlands notes that this Court may affirm for any reason appearing in the record. Rule 220, SCACR.

damages.”).⁸ The same is true in South Carolina. *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990); *Smith v. Strickland*, 314 S.C. 192, 197-98, 442 S.E.2d 207, 210 (Ct. App. 1994) (“As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages, where their recovery concerns a single wrong.”).

Because O&W elected recovery under the NCUTPA, it may not recover punitive damages. Therefore, its arguments regarding the propriety of the trial court’s review of the punitive damages award are moot. *See Compton v. Kirby*, 577 S.E.2d 905, 918 (N.C. Ct. App. 2003) (“Plaintiffs were required to elect between the treble damages and the \$90,000 punitive damages award, and chose treble damages. Defendant’s arguments regarding punitive damages are therefore moot . . .”).

Had O&W wished to preserve its right to recover a punitive damages award, the proper course of conduct would have been to elect recovery of the fraud verdict, including punitive damages, and then to appeal the trial court’s presumed denial of attorney’s fees. O&W initially took this position, but then changed its stance. (R. at 1435-37, 1854). Presumably, O&W made a calculated decision that its recovery of attorney’s fees would exceed recovery of punitive damages after the trial court reduced the award, and opted to attempt to maximize its recovery. O&W cannot now have its cake and eat it too.

⁸ As further argued below, § 1D-20 also requires affirmance of the trial court’s ruling requiring an election of remedies between punitive damages and all recovery under the NCUTPA, including attorneys’ fees, be affirmed.

B. The trial court conducted a complete and thorough review of the punitive damages award as required under state and federal law. The reduced award of \$46,515 comports with the law and due process.

This is a commercial case, not a personal injury action. It is a dispute between two car dealers over the sale of a \$5,200 used car. The jury determined that O&W's actual damages totaled \$6,650 and then awarded \$2,381,888.00 in punitive damages on the fraud cause of action. *This award is 358 times the actual damages award.* A punitive damages award of this size does not comport with due process, and the trial court was correct in reducing the award to \$46,515.

O&W focuses on Midlands' net worth in its attempt to justify the large punitive damages award. This focus on net worth, however, is not dispositive and does not compel reversal. If that analysis were to be accepted, it would mean that *as a matter of due process*, it would always be appropriate to assess higher punitive damage awards to higher net worth defendants simply because of their net worth. This is not and has never been the law. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003). As the South Carolina Supreme Court has stated:

We caution that trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth.

Mitchell v. Fortis Ins. Co., 385 S.C. 570, 588 n. 8, 686 S.E.2d 176, 185 n. 8 (2009).

1. Standard of Review.

Midlands agrees with O&W that the standard of review for the trial court's determination of the constitutionality of the punitive damages award is *de novo*. *See Mitchell*, 385 S.C. at 583, 686 S.E.2d at 183. In this role, courts may reduce excessive punitive damage verdicts to the upper limit of what would be acceptable under due process. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 405, 714 S.E.2d 904, 916 (Ct. App. 2011) (reducing jury award from 8.5:1 to 5:1 ratio of punitive to actual damages).

2. The jury's punitive damages award was excessive as a matter of due process.

There are constitutional limits on the amount of punitive damage awards. Punitive damages must bear a reasonable relationship to compensatory damages. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996) (“[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.”). In *Gore*, the Supreme Court set forth guideposts for determining the constitutionality of a punitive damages award: (1) reprehensibility of the defendant’s conduct; (2) the disparity between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Id.* at 575; *see also Mitchell*, 385 S.C. at 587-89, 686 S.E.2d at 185–86.

Here, the trial court correctly assessed these guideposts in the context of the transaction at issue in this case: the sale of the Civic by Midlands to O&W at ADESA. (R. at 11-19).⁹ It is those facts that govern this analysis, not the previous transaction with Ecklund. *See Phillip Morris, USA v. Williams*, 549 U.S. 346, 353 (2007) (“The Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially strangers to the litigation.”); *Branham v. Ford Motor Co.*, 390 S.C. 203, 238, 701 S.E.2d 5, 23–24 (2010); *Durham v. Vinson*, 360 S.C. 639, 652-53, 602 S.E.2d 760, 767 (2004); *GE Betz, Inc. v. Conrad*, 752 S.E.2d 634, 653–54 (N.C. Ct. App. 2013) (citing *Gore* and *Campbell*

⁹ The trial court complied with N.C.G.S. § 1D-50 by providing a written order discussing the factors which North Carolina requires be addressed when a trial court reviews an award of punitive damages. Because the statute does nothing more than require a written order, and because the trial court satisfied this requirement, N.C.G.S. § 1D-50 is irrelevant to this appeal, except to the extent the factors set forth therein bear on the due process analysis.

and noting “the Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts on nonparties” and “as a general rule, a [s]tate [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the [s]tate’s jurisdiction.”). O&W’s repeated attempts to justify the punitive damages award by reference to Ecklund, who was neither a party to this action nor a resident of North Carolina or South Carolina at the time of the sale to O&W, are improper.

Because review is *de novo*, each of the *Gore* guideposts is discussed below:

a. Reprehensibility.

The conduct here is not sufficiently reprehensible to justify the massive punitive damages award imposed by the jury for many reasons, including the following:

- The Civic was sold under a red light. It was undisputed at trial that a sale under red light at an auction is a warning to the buyer that something is wrong with the vehicle. The presence of an actual warning by Midlands to O&W distinguishes this case from every case cited by O&W.
- The Civic was sold “as is.” In addition to being sold under a red light, the Civic was sold “as is.” A car dealer such as O&W should be on particular alert when purchasing a vehicle “as is.”
- The Civic had visible wreck damage. The presence of visible wreck damage on the Civic served as yet another indicator that the Civic was a problem vehicle.
- This case involves an alleged non-disclosure, as opposed to an affirmative misrepresentation. The United States Supreme Court has stated that while suppression of a material fact can support tort liability and even a modest punitive damages award, this conduct is less reprehensible than a deliberate false statement, particularly where, as here, there is a good-faith basis for believing no duty to disclose exists. *BMW of North America, Inc. v. Gore*, 517 U.S.

559, 580 (1996). O&W argued that ADESA's rules required Midlands to disclose unibody damage and it failed to do so. However, O&W presented no evidence that Midlands was aware that ADESA had changed its rules to require disclosure of unibody damage even when a vehicle was sold under a red light.¹⁰

- This case involves the sale of a single used car. There is no evidence in the record that the facts relating to the sale of the Civic to O&W were anything other than an isolated incident. The sale of the Civic to Ecklund did not involve ADESA, auction rules, or North Carolina statutory disclosure forms. There is also no evidence Midlands knew of the prior damage to the Civic when it sold the Civic to Ecklund. There has been no judicial determination of wrongdoing of any kind in connection with Ecklund's transaction. He is not and has never been a party to this case. As the United States Supreme Court cautioned in *Campbell*, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

- There was little risk of serious harm to O&W. O&W mocks the trial court's conclusion that there was little risk of serious harm in the transaction between Midlands and O&W. Derision, however, falls short of actual analysis. Unlike many of the cases cited by O&W, this case did not involve personal injury. It is a commercial case over a used car purchased for \$5,200. Total actual damages were \$6,650. Additionally, Midlands provided a red light warning and sold the car "as is" with visible wreck damages, actions which should have impressed upon O&W that

¹⁰ To the extent O&W argues that ADESA's clerk made an affirmative representation on the North Carolina damage disclosure form and that Midlands is liable for this representation because Midlands had appointed ADESA as its agent under a power of attorney, it is sufficient to note that N.C.G.S. § 1D-15(c) provides that "[p]unitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another." Thus, the representations made by ADESA's clerk on the damage disclosure form cannot support a punitive damages award under North Carolina law.

care needed to be exercised in connection with the Civic. ADESA's rules also required O&W to carefully inspect the Civic. Finally, as a motor vehicle dealer which made repairs to the Civic, O&W was required by North Carolina law to inspect the Civic for defects which might make it a menace to those who might use the vehicle or come in contact with the vehicle if they undertook to repair or recondition the vehicle. *Stilley v. Automobile Enterprises of High Point, Inc.*, 284 S.E.2d 684, 688 (N.C. Ct. App. 1981). Had O&W conducted its own inspection of the Civic, as it was required to do, the prior repairs to the Civic would have been discovered. O&W's criticisms of Midlands' failure to discover the prior damage to the Civic fall flat in light of the fact the O&W also failed to inspect and discover the prior damage before reselling the car to a third party.

In discussing reprehensibility, the trial court included a detailed discussion of *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). *Austin* involved claims for fraud and unfair trade practices based upon a car dealer's misrepresentations about wreck damage on a vehicle it sold to a consumer. *Id.* at 31, 691 S.E.2d at 139. The South Carolina Supreme Court stated that the car dealer's conduct in that case exhibited an extremely high degree of reprehensibility and affirmed a ratio of punitive damages to actual damages of 8.21:1. *Id.* at 53, 691 S.E.2d at 151. Despite this "extremely high degree of reprehensibility," the Court noted that the 8.21:1 ratio of punitive damages to actual damages was "high." *Id.*

As discussed by the trial court in noting similarities between this case and *Austin*, "[b]oth involve alleged fraud or unfair trade practices against a car dealer with respect to prior wreck damage. In addition, the plaintiff in both cases was represented by the same attorney." However, the trial court, wary of United States Supreme Court guidance, also reasoned as follows:

Yet, there are key differences. For example, in *Austin*, the sale was to a consumer who intended to use the vehicle as his primary means of transportation. The sale here was between two car dealerships and the car was sold "as is" with obvious wreck damage. In addition, *Austin* included evidence that the dealer forged the

plaintiff's signature on a buyer's guide. *Id.* There is no similar evidence of additional fraudulent or reprehensible conduct here. Given these differences, while the Court concludes the conduct in this case is somewhat reprehensible, it also concludes that the degree of reprehensibility exhibited here does not rise to the level exhibited in *Austin*.

(R. at 7). As a result, the trial court determined that the conduct here was not as reprehensible for purposes of this analysis as that in *Austin*. O&W's argument ignores all of these findings.

b. Ratio.

The United States Supreme Court has stated that, while there is no bright-line rule, an award of "more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). In most cases then, an award more than four to five times the compensatory damages is unconstitutional. For the rare case in which a greater ratio is appropriate, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Here, the jury's verdict results in a ratio of 358:1 and therefore fails any ratio test.

By way of further analogy to *Austin*, if an 8.21:1 ratio is "high" in a case which involved worse conduct in a consumer transaction as discussed above, then a similar ratio would be "high" in a transaction between sophisticated parties, particularly where the purchasing dealer chose not to inspect a vehicle being sold under a red light.¹¹ The trial court therefore found a ratio of 7:1 represented the outside limits of due process in this case.

c. Civil Penalties.

O&W does not make any specific arguments as to the civil penalties considered by the trial court. Instead, it cites to other statutes relating to punitive damages, dealer licensing provisions,

¹¹ Given the distinctions between this case and *Austin*, O&W's arguments that any ratio in excess of 8.21:1 is appropriate should be rejected.

and criminal statutes. The trial court's references relate to the specific conduct at issue in this case, and are therefore, the appropriate statutes to guide this analysis. North Carolina's damage disclosure statute requires that a transferor of a motor vehicle disclose whether the vehicle has been reconstructed. N.C.G.S. § 20-71-4. It also provides that a violation may be redressed by a civil action under N.C.G.S. § 20-348. *Id.* This section authorizes recovery of "[t]hree times the amount of actual damages sustained or one thousand five hundred dollars (\$1,500), whichever is greater."¹² The maximum recovery for a violation of the NCUTPA is treble damages. N.C.G.S. § 75-16. Thus, the jury's punitive damages award vastly exceeded any comparable civil penalty, and the trial court was correct in finding that this factor supported a lower limit for purposes of the due process analysis.

3. The constitutional review is separate and distinct from the statutory punitive damages cap imposed by N.C.G.S. § 1D-25.

O&W places great weight on N.C.G.S. § 1D-25, which caps punitive damages in North Carolina at three times actual damages or \$250,000, whichever is greater. It argues that the existence of the punitive damages cap somehow satisfies the constitutional due process analysis presented above. This argument improperly conflates the constitutionality of the punitive damages cap with the due process review of a punitive damages award. The application of the cap is separate and apart from the due process analysis presented above. *See Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 93 (N.C. Ct. App. 2002), *aff'd*, 594 S.E.2d 1 (N.C. 2004) (applying statute to reduce punitive award and then applying due process analysis required by *Gore*); *Everhart v.*

¹² Violation of the damage disclosure statute is also a class 2 misdemeanor. To the extent criminal penalties are relevant in this analysis, a class 2 misdemeanor carries a maximum fine of \$1,000. N.C.G.S. § 15A-1340.23(b).

O'Charley's, Inc., 683 S.E.2d 728, 740 (N.C. Ct. App. 2009) (considering whether punitive award satisfied due process even after reduction to statutory limit).

In the event the Court determines that the statutory cap found in N.C.G.S. § 1D-25 applies notwithstanding the due process analysis, O&W's recovery would be limited to one cap (\$250,000). O&W concedes that the statutory cap applies; however, it argues that multiple caps apply and, as a result, the punitive award should have been reduced to \$500,000. This argument lacks merit for several reasons. First, an award of \$500,000 is unconstitutionally excessive, as discussed above. Second, there is only one real plaintiff. Daniel O'Shields and Roger Whitley are partners in O&W, the buyer of the Civic. O&W repeatedly admitted at trial that it was only seeking one recovery. (*See e.g.*, R. at 289:24-290:6, 291:18-292:1 (Plaintiff's Opening); 750:22-23, 753:6-9, 766:19-21 (Plaintiff's Closing)). Based on this argument and the fact that the contract at issue was between Midlands and O&W, the trial court correctly ruled "[t]here was one buyer here, and thus, there is one recovery and one punitive damages analysis whether the buyer is described as 'plaintiff' or 'plaintiffs.'" As such, any punitive damages award is limited to an outside maximum of \$250,000.

II. The trial court's attorney's fee award reflects a fair exercise of discretion and must be affirmed, particularly in light of the materials submitted by O&W's counsel, the refusal to settle this matter after trial despite Midlands's good faith efforts, and the emphasis placed on punitive damages which are not recoverable under the NCUTPA.

A. The trial court's award of attorney's fees cannot be disturbed absent an abuse of discretion.

As an initial matter, the South Carolina standard of review will apply to the consideration of the attorney's fee award because it is a procedural matter rather than a substantive one for purposes of the conflict of laws analysis. *See e.g., Boswell v. RFD-TV the Theater, LLC*, 498 S.W.3d 550, 557 (Tenn. Ct. App. 2016) (standard of review is procedural and will governed by forum law); *Moore v. Bi-State Dev. Agency*, 87 S.W. 3d 279, 285 (Mo. Ct. App. 2002) (the standard

of review is a procedural issue and forum law governs the standard of review for uses raised on appeal). Under South Carolina law, the determination of the amount of attorney's fees awarded pursuant to a statute is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006); *Blumberg v. Nealco*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). "An appellate court will not reverse an award of attorney's fees unless it is based on an error of law or is without *any evidentiary support*." *Williamson v. Middleton*, 374 S.C. 419, 427, 649 S.E.2d 57, 62 (Ct. App. 2008), *rev'd on other grounds*, 383 S.C. 490, 681 S.E.2d. 867 (2009) (emphasis in original).¹³ In making this determination, appellate courts consider that the trial court possesses "close and intimate knowledge of the efforts expended and the value of the services rendered." *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013).

As discussed in detail below, the trial court committed no error of law and the record contains evidentiary support for its ruling. The trial court's attorney fee award must therefore be affirmed.

B. Attorney's fees under the NCUTPA.

Under the NCUTPA, attorney's fees may be awarded under the following conditions:

[i]n any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, *in his discretion*, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

¹³ North Carolina has a similarly deferential standard of review for attorney's fee awards. As set forth by the North Carolina Court of Appeals, "our review [of an order awarding attorneys' fees] is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *Lacey v. Kirk*, 767 S.E.2d 632, 648 (N.C. Ct. App. 2014).

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C.G.S. § 75-16.1 (emphasis added). The plain wording of the statute confirms that: (1) attorney's fees may not be awarded unless there was an unwarranted refusal to settle; and (2) even if such a refusal is present, an award of fees rests in the discretion of the Court and is reserved for "extreme cases." See *Evans v Full Circle Productions, Inc.*, 443 S.E.2d 108, 110 (N.C. Ct. App. 1994). As stated by O&W, the purpose of the fee award "is to encourage private enforcement" of the NCUTPA. See *Shepard v. Bonita Vista Properties, L.P.*, 664 S.E.2d 388, 396 (N.C. Ct. App. 2008). To this end, a plaintiff has the burden of establishing that there has been an unwarranted refusal to settle before any fee award can issue. *Llera v. Sec. Credit Sys., Inc.*, 93 F. Supp. 2d 674, 680 (W.D.N.C. 2000). In addition, trial courts retain the discretion to deny attorney's fees even if the elements of § 75-16.1 are met. *Id.*

North Carolina law requires that attorney's fee requests be reviewed using the following factors: (1) time and labor extended; (2) the skill required; (3) the customary fee for like work; and (4) the experience or ability of the attorney. *United Laboratories, Inc. v. Kuykendall*, 403 S.E.2d 104, 111 (1991), *aff'd*, 437 S.E.2d 374 (1993). North Carolina courts do not employ a multiplier. *Nakatsukasa v. Furiex Pharm., Inc.*, No. 14 CVS 6156, 2015 WL 4069818 at *8 (N.C. Super. July 1, 2015) ("Plaintiffs have not cited to, and this Court is unable to find, any reported case in which a North Carolina court has applied a 'multiplier' to increase the lodestar amount.").¹⁴

¹⁴ O&W references a multiplier in its brief, but does not make any argument relating to the trial court's finding that this case does not present the rare and exceptional circumstances required for the imposition of a multiplier. (R. at 13 n. 5). As such, this finding has not been appealed and is

1. **The trial court's order of November 28, 2016 awarded a reasonable fee based on the applicable case law and its view of this case and the materials submitted by the parties.**

The most useful starting point for determining the amount of a reasonable attorney's fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Southeast Air Charter, Inc. v. Stroud*, No. 11 CVS 946, 2015 WL 4897790 at * 3 (N.C. Super. Aug. 17, 2015) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Hours that are excessive, redundant, or otherwise unnecessary are removed and should not be included in the trial court's assessment of attorney's fees. *Id.*

Here, O&W has requested a total of \$476,194.12 in attorney's fees for a case resulting in a verdict on the NCUTPA claim of \$6,650. (R. at 1302-09, 1316-1433, 1529-1551, 1734-1851, 1884-1991, 1992, 2058-2082). The original submission included approximately 14 pages of vague time descriptions for Moskos. (R. at 1343-56). Given O&W's burden, Midlands only undertook to provide examples of why the request was excessive in opposition, not to list every improper or unrelated entry. (R. at 1562-1710).

The trial court reduced the number of hours claimed for several reasons: (1) all paralegal time was removed as unrecoverable under North Carolina law; (2) some time was excluded as excessive based on the description provided; (3) time relating to pursuing claims against Nationwide was excluded; (4) the inclusion of travel time was not reasonable to the extent it was necessitated by O&W's choice of an out-of-state, out-of-area attorney and (5) some time was excluded as unrelated to the NCUTPA claim, the only claim for which a fee award was available. The trial court is not required to itemize its findings.

the law of the case. See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding unappealed ruling is law of the case).

O&W has not appealed the first four reasons for reducing the amount of the fee award claimed, and it is now law of the case. *ML-Lee Acquisition Fund, L.P.*, 327 S.C. at 241, 489 S.E.2d at 472. To the extent these rulings serve as an additional basis for the trial court's attorney's fee award, the two-issue rule applies and will prevent reversal. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

O&W argues that the trial court erred in apportioning fees between the NCUTPA cause of action, which authorizes recovery of attorney's fees, and all of the other claims raised by O&W.¹⁵ To the contrary, the better practice is to exclude fees for non-statutory claims. *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) ("[t]he defendant's attorney argued fees related to the nonstatutory cause of action should have been excluded. We agree."); see *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 553 S.E.2d 431, 443 (N.C. Ct. App. 2001) ("Defendant correctly argues that fees are not recoverable for plaintiff's common law nuisance and trespass claim nor in defending against a counterclaim for abuse of process) (emphasis added).

To be fair, this apportionment is not required. "[W]hen an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made." *Taylor*, 307 S.C. at 557, 416 S.E.2d at 619; *Whiteside*, 553 S.E.2d at 443 ("where all of plaintiff's claims arise from the same nucleus of operative facts and each claim was "inextricably interwoven" with the other claims, apportionment of fees is unnecessary.") Importantly, however, trial courts are generally not

¹⁵ The trial court appears to have been particularly troubled by the prospect of awarding fees for O&W's pursuit of a punitive damages award, which is not recoverable under the NCUTPA. (See R. at 11-13).

prohibited from apportionment, when, in the trial court's discretion, it is appropriate to do so. *See, e.g. Maybank v. BB&T Corp.*, 416 S.C. 541, 581–82, 787 S.E.2d 498, 519 (2016) (affirming reduction of attorney's fees by 20% to account for time not spent on UTPA claim even where all claims shared common facts); *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 524, 381 S.E.2d 906, 909 (1989) (affirming trial court's award of less than 50% the amount of attorney's fees requested to account for time which was not spent on statutory UTPA claim).

O&W relies heavily on *Morris v. Scenera Research, LLC*, 747 S.E.2d 362 (N.C. Ct. App. 2013), *aff'd in part, rev'd in part*, 788 S.E.2d 154 (N.C. 2016) to argue that the trial court lacked the authority to limit recovery of attorney's fees to work on the only claim for which they are authorized. *Morris* is not a NCUTPA case. O&W's reliance on it is misplaced for a number of reasons.

First, O&W's reading of *Morris* stands apart from other North Carolina appellate decisions on this issue, which have held only that where all of a plaintiff's claims arise from the same nucleus of operative facts and each claim was 'inextricably interwoven' with the other claims, apportionment is unnecessary, not that apportionment is prohibited. Apportionment is instead left to the discretion of the trial court. *See Okwara v. Dillard Dep't Stores, Inc.*, 525 S.E.2d 481, 486–87 (N.C. Ct. App. 2000) (finding determination as to whether the fee should be reduced on a claim by claim basis is "left largely to the discretion of the trial courts.").

In addition, *Morris* did not reverse the trial court's award of attorney's fees because the trial court had apportioned between claims. Instead, it remanded the matter to the trial court for further findings on the issue. *Morris*, 747 S.E.2d at 379. Although parts of the *Morris* decision were later appealed, the attorney's fee award was not. North Carolina's Supreme Court did not therefore have the opportunity to address what appears to be an atypical ruling from the North

Carolina Court of Appeals. The North Carolina Supreme Court has never held that apportionment of fees among statutory and non-statutory claims is prohibited.

Additionally, while permitting the trial court to forego segregation of fees by claim could serve the interest of judicial economy, prohibiting a trial court from doing so would be incongruous with the general principle that attorney's fees may not be recovered unless such recovery is expressly authorized by statute or contract. Both North and South Carolina follow this rule. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct.App. 2001) ("In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees"); *Martin Architectural Products, Inc. v. Meridian Constr. Co.*, 574 S.E.2d 189, 192 (N.C. Ct. App. 2002) ("the general rule in North Carolina is that a party may not recover its attorney's fees unless authorized by statute").

Even if *Morris* can be construed to apply here as O&W suggests, the trial court's decision does not conflict with *Morris*. The case cited by the trial court here, *Out of the Box Developers, LLC v. Doan Law, LLP*, No. 10 CVS 8327, 2014 WL 4298329 at *9 (N.C. Super. Aug. 29, 2014), provides the following discussion of *Morris*:

The court must consider these factors in a way that accounts for OTB's limited success. If a plaintiff brings multiple claims arising from a common nucleus of facts, and succeeds on some claims but not others, the court is not necessarily required to allocate fees between the successful and unsuccessful claims. *Morris v. Scenera Research, LLC*, — N.C.App. —, 747 S.E.2d 362, 378 (2013). At the same time, where the fee requested and the success achieved are incongruous, an adjustment must be made to assure that the fee awarded is reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Thus, *Morris* stands for the proposition that the trial court is not required to allocate, not for the proposition that the trial court cannot allocate as argued by O&W. As noted in *Out of the Box*, "[h]owever, in stating that the trial court is not required to allocate fees, the Court of Appeals did

not further hold that the trial court should never adjust to recognize any partial success. *Out of the Box Developers, LLC* at *10. Indeed, *Hensley* instructs to the contrary: “the most critical factor is the degree of success obtained.” *Id.* (quoting *Hensley*, 461 U.S. at 436). As stated in *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.” *Morris*, 747 S.E.2d at 378. Stated differently, trial courts retain the authority to adjust attorney’s fees awards to ensure that such awards are reasonable in relation to the results obtained.

Where, as here, a party has not obtained “substantial relief” as to all claims raised, any alleged prohibition on apportionment of fees would not apply. O&W asserted eight claims in this action, but either abandoned or was unsuccessful on four of them. Thus, the trial court was free to adjust the award to reflect the degree of success obtained. The trial court specifically concluded that O&W’s initial attorney’s fees request was “not reflective of the fees reasonably expended” to achieve the NCUTPA verdict. (R. at 14).

Furthermore, as discussed above, this case was one in which the maximum recovery under the NCUTPA, even after treble damages, could *never* have exceeded \$20,000. The amount awarded certainly does not operate as a direct limit on the amount of attorney’s fees which may be recovered, but at some point, the amount of attorney time devoted to recovery of less than \$20,000 can become *unreasonable*. O&W requested close to one-half million dollars in attorney’s fees before appeal.¹⁶ At some point, as noted by the trial court, “Plaintiff’s counsel’s primary incentive here [became] attorney compensation rather than recovery for their client.” (R. at 31).

¹⁶ O&W’s initial fee request totaled \$370,543.12. (R. at 14). Its first motion for supplemental attorney’s fees sought an additional \$50,000 in attorney’s fees. (R. at 1894). Its second supplemental motion for fees sought an additional \$55,614.00. (R. at 2058). In total, O&W sought attorney’s fees of \$476,194.12 before any notice of appeal was filed.

For all of these reasons, the trial court was within its discretion in issuing its original attorney's fee award of \$21,264. The award does not contain an error of law and is supported by the evidence.

2. The trial court's order of February 27, 2017 is consistent with the NCUTPA and the underlying purpose of fee awards under the NCUTPA.

O&W filed a motion to reconsider the November 28, 2016 order together with a supplemental fee request. (R. at 1884-98). In its order ruling on the Rule 59(e) motion, the trial court clarified that it had considered Fudenberg's submitted time in making its earlier ruling. The trial court further declined to consider O&W's new affidavits submitted to clarify or detail its earlier submissions to the trial court in order to correct the deficiencies in the descriptions of the time claimed. It also declined to consider time from May 2, 2016 through July 20, 2016 that had not been submitted previously because O&W had every opportunity to submit that time prior to the hearing. O&W raises the question of Fudenberg's time in this period in its brief, but does not challenge the other findings on these points.

With respect to the timeliness of the request for fees from May 2, 2016 through July 20, 2016,¹⁷ O&W has not appealed the trial court's finding that the request was not timely. As a result, the trial court's denial of that part of O&W's fee petition is barred by application of the two issue rule and must be affirmed. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

With respect to the request for fees after July 20, 2016, the trial court divided its analysis by time period. For hearing preparation time (July 21, 2016 through July 27, 2016), the trial court awarded 50% of the fees claimed on the basis that the time should be allocated between the

¹⁷ O&W sought recovery for 153.8 hours of attorney time from May 2 through July 20, totaling \$59,982 (exclusive of any multiplier). (R. at 1529-36 (¶¶ 2-6 and 24-27)).

NCUTPA claim and the other issues being argued. This allocation is borne out by the time entries and the time spent on punitive damages at the post-trial motion hearing. (R. at 1960-1971, 1981-91). For purposes of this hearing, the facts underlying the punitive damages analysis were not the same as the underlying facts giving rise to the NCUTPA claim. Midlands incorporates its arguments above as to the merits of this allocation.

For the post-hearing period until September 14, 2016, the Court determined the fees claimed by Moskos for an affidavit were grossly excessive. At that time, the trial court had already provided the following comment about the affidavit in the November 28 order:

At the hearing, Plaintiff asked for leave to submit an additional affidavit in support of the request for attorney's fees. The Court agreed, but asked that any affidavit be filed quickly. More than thirty days later and after the Court has issued guidance to the parties about its rulings, Plaintiff submitted a lengthy affidavit. Defendant objected, citing, among other things, the lateness of the affidavit and the fact that the affidavit contained legal arguments and opinions rather than additional facts. The Court notes that much of the affidavit is improper as it contains legal arguments and speculation about which the Affiant lacked personal knowledge, but it has considered the factual representations as part of its analysis.

(R. at 12 n. 4). Consistent with this ruling, the trial court only awarded fees for two hours in connection with the affidavit. This is consistent with the trial court's discretion not to award any fees it deems excessive, redundant, or otherwise unnecessary. The trial court awarded all other fees claimed in this period.

The trial court declined to award any fees after September 14, 2016. This request for fees incurred in this period was a separate and new request. Before making a new fee award, the trial court reviewed the requirements of N.C.G.S. § 75-16.1(1), including its requirement that there be an unwarranted refusal to settle. In response to O&W's request, Midlands submitted evidence that it had made offers to settle the entire case based on the trial court's previous guidance. It increased its prior offer to \$81,069, a sum which provided O&W with: (1) the complete fraud judgment,

including punitive damages as reduced by the trial court; and (2) the complete unfair trade practices act judgment, including attorney's fees as awarded by the trial court. Based on its review of the materials submitted by the parties, the trial court at that point determined that N.C.G.S. § 75-16.1(1) was no longer met because Midlands had made a good faith effort to settle the entire case.

Midlands 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, nor has O&W. Instead, O&W points to cases where additional awards have been made for post-trial activities. Those cases do not, however, consider additional settlement efforts by the parties. Consideration of post-trial settlement is consistent with the purposes of the statute, which are: (1) to encourage private enforcement; and (2) to increase the prospects for settlement. *Marshall v. Miller*, 276 S.E.2d 397, 403–04 (N.C. 1981). A plaintiff's pre-trial and trial fees are not impacted by consideration of post-trial settlement efforts, and private enforcement is therefore not discouraged. Additionally, prospects for settlement dramatically increase if post-trial settlement offers may be considered in subsequent fee applications. The defendant has an incentive to increase its offer so that it will not be exposed to additional fee requests, and the plaintiff has an incentive to accept a reasonable offer, or risk not recovering for fees for post-trial or appellate work. Given the trial court's discretion in these matters and the underlying purpose behind fee awards, this approach is perfectly consistent with North Carolina law and the NCUTPA.

The construction urged by O&W runs counter to these goals and gives a plaintiff a motive to reject settlement. If, as O&W contends, no post-trial settlement activities may be considered, then a plaintiff who obtains an initial award of fees under the NCUTPA may then simply ignore a defendant's settlement offers. It would allow a plaintiff to accrue huge additional attorney's fee awards, and would require appellate courts to address unnecessarily disputes that should be settled.

For these reasons, the February 27 order is supported by the law and the evidence and should be affirmed.

3. The trial court's order of August 10, 2017 is valid and should be affirmed.

a. The trial court had jurisdiction to enter the order.

O&W spends a single paragraph arguing that its appeal of the trial court's March 16, 2017 order on its first supplemental fee petition deprived the trial court of jurisdiction to enter its subsequent order on O&W's second supplemental fee petition. O&W relies on Rules 241(a) and 205, SCACR. This argument is flawed as neither of these rules applies. Moreover, even if Rule 205 were applicable, the trial court retained jurisdiction to address the second supplemental fee petition because it was not affected by the appeal.

This Court addressed Rule 241 in *Tillman v. Oakes*, 398 S.C. 245, 254–55, 728 S.E.2d 45, 50–51 (Ct. App. 2012), as follows:

When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of the order; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241. If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal. That is the purpose of a stay under Rule 241 – to determine whether the appealed *order* may be carried out or enforced – not to determine whether the *action* may proceed in the lower court while the appeal is pending.

(emphasis in original).

The March 16, 2017 order was an order on an attorney's fee petition. It addressed the trial court's award of additional fees. While it is true that under Rule 241(a), the March 16, 2017 order could not be carried out or enforced after O&W filed its notice of appeal, there was never an attempt to carry out or enforce that order. Instead, the trial court ruled on a *second* supplemental

fee petition which was not addressed in the March 2017 order. It is this distinction that takes the second order out of the scenario contemplated in Rule 241.

Generally, the question of whether the trial court has continuing jurisdiction over a particular matter while a case is on appeal answered by Rule 205. *See Tillman*, 398 S.C. at 255, 728 S.E.2d at 51 (whether a court can proceed during the pendency of the action is governed by Rule 205, SCACR). However, Rule 205 was not triggered under the specific facts of this case.

Here, O&W specifically sought permission from this Court to allow the trial court to rule on the remaining fee petition so that O&W could appeal all of these issues at once. O&W there argued that it would promote judicial economy if the trial court's order on the remaining fee petition "were to be consolidated for appeal with the prior orders in this case." Having sought and obtained permission from this Court to allow the trial court to rule on remaining fee petition during the pendency of this appeal, O&W cannot now complain that the trial court acted on the remaining fee petition.

Even if O&W could properly invoke Rule 205, the rule would not deprive the trial court of jurisdiction to enter the August 10, 2017 order. The rule specifically provides that "[n]othing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. The remaining fee petition was not affected by the appeal to the extent it was an additional request for fees that had not been previously sought.

b. The August 10, 2017 order is correct on its merits.

As argued previously, the trial court had the discretion to assess entitlement to fees under the NCUTPA and to determine fees would no longer accrue once Midlands made an effort "to fully resolve the matter." The trial court expressed its exasperation with O&W's counsel, particularly given the trial court's earlier rulings relating to attorney's fees. (R. at 30-33).

In addition to its earlier rulings based on the statute and the settlement posture of the case, the trial court included an additional ruling denying fees as a matter of its general discretion. The trial court also denied the award because it found that the time spent in this period was not to protect O&W's status as prevailing party. In this period, there were no pending motions by Midlands and Midlands did not cross-appeal; thus, O&W's prevailing party status was not in jeopardy. O&W has not appealed these alternate rulings, and as such, the two issue rule provides an additional basis for affirming the August 10, 2017 order. *Jones*, 387 S.C. at 346, 692 S.E.2d at 903.

III. The trial court correctly required O&W to elect “prior to judgment, between punitive damages and any other remedy[.]”

O&W does not dispute that it is not entitled to recover damages on both its fraud claim and its NCUTPA claim.¹⁸ Rather, it seeks to recover actual and punitive damages under its fraud claim and attorney's fees under its NCUTPA claim. O&W asserts the trial court erred in requiring it to elect between recovery of actual and punitive damages and recovery of attorney's fees. This argument lacks merit for two reasons. First, it is moot based on O&W's election for recovery under the NCUTPA as discussed above. Second, the trial court's ruling is consistent with the applicable North Carolina statutory scheme.

As set forth in N.C.G. S. § 1D-20, “[a] claimant must elect, prior to judgment, between punitive damages and *any other remedy* pursuant to another statute that provides for multiple damages.” (emphasis added). The italicized text indicates that in cases in which a plaintiff recovers both punitive damages and a verdict under a statute which awards multiple damages, such as the

¹⁸ In fact, O&W argued election to the jury. (R. at 753:1-754:8). This section of argument again reflects that there was only one plaintiff in this action and includes repeated references to what “Mr. Whitley” and/ or “Roger” will receive.

NCUTPA, the plaintiff must choose between the punitive damages award and “any other remedy” authorized by the statute.

The words “any other remedy” are not vague or ambiguous. They are broad. Attorney’s fees are another remedy provided by the NCUTPA, which authorizes multiple damages, and they fall within the scope of § 1D-20. This statute is clear and unambiguous, and its language must be given its plain and literal meaning. *Lemons v. Old Hickory Council*, 367 S.E.2d 655, 658 (N.C. 1988) (“[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning”); *Patterson v. State*, 359 S.C. 115, 119, 597 S.E.2d 150, 152 (2004) (when the terms of a statute are clear, the court must apply those terms according to their literal meaning). The trial court therefore correctly ruled that N.C.G.S. § 1D-20 required O&W to elect between recovery for fraud and all remedies for violation of the NCUTPA.

O&W makes two arguments to escape the effect of N.C.G.S. § 1D-20. It argues that the statute does not apply. It also argues that the statute does not mean what it says. According to O&W, §1D-20 does not actually require election between punitive damages and “any other remedy,” but only requires an election between punitive damages and treble or multiple damages. Both arguments are flawed.

A. N.C.G.S. § 1D-20 applies and limits O&W to recovery under either its fraud claim or its NCUTPA claim.

In its attempt to avoid the operation of § 1D-20, O&W focuses on the word “statute.” It argues that because the word “statute” is singular rather than plural, it refers only to individual code sections and not to the NCUTPA as a whole. Under this construction, O&W could be forced to elect between punitive damages and the remedies provided in N.C.G.S. § 75-16, which

authorizes treble damages, but not between punitive damages and attorney's fees, which O&W argues are authorized by a separate statute, N.C.G.S. § 75-16.1.

This argument ignores the requirements of N.C.G.S. § 12-3, which statutorily codifies the manner in which North Carolina statutes are to be construed. This statute provides in pertinent part as follows:

In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:

(1) Singular and Plural Number, Masculine Gender, etc. - Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

N.C.G.S. § 12-3(1). This statute requires that a reference to a singular subject or thing should also be construed as a reference to multiple subjects or things. Stated differently, North Carolina law does not permit the word "statute" as used in §1D-20 to be construed as purely singular, and, in the absence of this narrow construction, O&W's argument collapses. Moreover, generally, different parts of the same act are to be construed together to achieve the intent of the legislature. *State v. Mayo*, 807 S.E.2d 654, 657 (N.C. Ct. App. 2017) ("In discerning the intent of the legislature, statutes in *pari materia* should be construed together and harmonized whenever possible. In *pari materia* is defined as upon the same matter or subject.") (internal quotations omitted).

This is also consistent with the ordinary meaning of the term used, "statute." See *Perkins v. Arkansas Trucking Servs., Inc.*, 528 S.E.2d 902, 904 (N.C. 2000) ("Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural

and ordinary meaning.”); *Hughes v. Western Carolina Regional Sewer Authority*, 386 S.C. 641, 646, 689 S.E.2d 638, 641 (Ct. App. 2010) (“When confronted with an undefined term in a statute, a court must interpret it in accordance with its usual and customary meaning.”). “Statute” is ordinarily synonymous with “Act.” Indeed, Black’s Law Dictionary provides that “*act* or *legislation* is sometimes substituted for *statute*.” Black’s Law Dictionary (10th ed. 2014) (emphasis in original). North Carolina courts routinely refer collectively to the code sections in Chapter 75 as the North Carolina Unfair Trade Practices Act. *E.g.*, *Di Frega v. Pugliese*, 596 S.E.2d 456, 462 (N.C. Ct. App. 2004) (“Even a party who intentionally breaches a contract is not, without more, liable for such conduct under the North Carolina Unfair Trade Practices Act.”); *Horak v. Southern Real Estate Co. of Charlotte, Inc.*, 563 S.E.2d 47, 51 (N.C. Ct. App. 2002) (discussing a claim for violation of the “Unfair and Deceptive Trade Practices Act” or, simply, the “Act” and stating that “Chapter 75 of our statutes establishes an action for unfair or deceptive practices or acts in or affecting commerce”). O&W’s attempt to distinguish between a single statute and the NCUTPA as a whole is inconsistent with general usage and North Carolina statutory requirements.

B. N.C.G.S. § 1D-20 means exactly what it says.

Section 1D-20 states that a claimant must elect between punitive damages and “any other remedy” pursuant to another statute that provides for multiple damages. It means just that. O&W argues that §1D-20 should be construed in a manner that differs from its text. It argues that §1D-20 does not require election between punitive damages and “any other remedy,” but only requires an election between punitive damages and the single remedy of multiple damages.

O&W bases this argument on *United Laboratories, Inc. v. Kuykendall*, 437 S.E.2d 374 (N.C. 1993). In *Kuykendall*, the North Carolina Supreme Court permitted a claimant to recover punitive damages on a tort claim and attorney’s fees on an NCUTPA claim. *Id.* at 381. However,

O&W's reliance upon *Kuykendall* is misplaced. It ignores the history of North Carolina's election of remedies rule and events that have unfolded subsequent to the *Kuykendall* decision. Notably, §1D-20 did not exist when *Kuykendall* was decided, and rather than codifying the result in *Kuykendall*, §1D-20 partially repudiated *Kuykendall*.

Before *Kuykendall*, North Carolina required claimants to elect between punitive damages and any and all of remedies under the NCUTPA. *Id.* at 382 (Meyer, J., dissenting). The majority opinion in *Kuykendall* abandoned this long-standing common law rule. *Id.* at 381. North Carolina's legislature enacted N.C.G.S. § 1D-20 less than two years later.¹⁹ Section 1D-20 does not require claimants to elect solely between punitive damages and treble damages. It could easily have so stated if that were its purpose. Section 1D-20 instead requires claimants to elect between punitive damages and *any other remedy* pursuant to another statute that provides for multiple damages. Section 1D-20 cannot be viewed as codifying the *Kuykendall* decision. Its language is contrary to that decision. Section 1D-20 repudiates the *Kuykendall* decision in part and reinstates the prior common law rule.

To the extent there is any doubt that the words "any other remedy" are intended to include more than just the remedy of treble or multiple damages, the legislative history of N.C.G.S. § 1D-20 is instructive. Version 1 of House Bill 729 ("An act to establish standards and procedures for the recovery of punitive damages in civil actions"), which was a broad package addressing punitive damages as part of general tort reform, contained different text for proposed §1D-20. CIVIL ACTIONS—PUNITIVE DAMAGES—RECOVERY STANDARDS AND PROCEDURES, 1995 North Carolina Laws Ch. 514 (H.B. 729). Version 1 of House Bill 729 provided, "[p]unitive damages shall not be awarded to a claimant pursuant to G.S. 1D-45, who elects a remedy pursuant

¹⁹ Section 1D-20 was enacted in 1995 and became effective on January 1, 1996.

to another statute that provides for multiple damages.” *Id.* This language is consistent with O&W’s arguments and *Kuykendall*; however, the original text was amended prior to its enactment. As quoted above, the enacted version of §1D-20 reads, “[a] claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.”

The original version’s reference to “*a remedy*” was stricken and replaced with “*any other remedy*.” This amendment to pending legislation makes it clear the North Carolina General Assembly intended to broaden the scope of §1D-20 beyond the single remedy of multiple or treble damages to include other remedies pursuant to a statute that provides for multiple damages.

O&W is correct when it states that §1D-20’s partial abrogation of *Kuykendall* has not been addressed by subsequent courts. This issue has received little to no attention in North Carolina.²⁰ In fact, no published case has cited §1D-20 since its enactment. The plain language and legislative history of §1D-20 strongly suggest that *Kuykendall* has been partially abrogated to the extent it holds a party can recover punitive damages and attorney’s fees pursuant to the NCUTPA. Accordingly, the trial court correctly applied §1D-20 in requiring O&W to elect between recovery of punitive damages and any all remedies under the NCUTPA, including attorney’s fees.

²⁰ None of the cases cited by O&W mentions § 1D-20. In *Blankenship v. Town and Country Ford, Inc.* 622 S.E.2d 638 (N.C. Ct. App. 2005), the North Carolina Court of Appeals noted that the defendant had cited to *Kuykendall*, but the court distinguished it and applied a different election of remedies case. *Broussard v. Meineke Discount Muffler Shops*, 958 F.Supp 1087, 1106-07 (W.D.N.C. 1997), *rev’d on other grounds* by 155 F.2d 331 (4th Cir. 1998), did not involve attorney’s fees. *Southwood v. Credit Card Solution*, No. 7:09-CV-00081-F, 2016 WL 8710985 at *1 (E.D.N.C. Feb. 26, 2016), *report and recommendation adopted sub nom, SouthWood v. CCDN, LLC*, No. 7:09-CV-183-F, 2016 WL 1389596 (E.D.N.C. Apr. 7, 2016), also did not involve attorney’s fees, but instead discussed whether punitive damages are available when treble damages are *not* awarded under the NCUTPA.

IV. The trial court correctly determined that offer of judgment interest is not applicable in this case.

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. S.C. Code Ann. § 15-35-400(B). Conversely, a party who does not obtain a verdict or determination at least as favorable as the rejected offer is not entitled to such an award. *See id.*

The trial court here determined that no award could be made because the actual judgment amount of \$43,721.45 fell far below O&W's \$280,000 offer of judgment. (R. at 21). O&W contends that because § 15-35-400(B) uses the term "verdict," the trial court was required to compare the offer of judgment to the initial jury verdict of \$2,381,888 rather than final judgment amount.

O&W's argument ignores the actual text of § 15-35-400(B), which provides in pertinent part:

If any 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 date of the offer; or (3) if the offeror is a defendant, a reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer.

(emphasis added). The statute does not limit comparison of the offer to the "verdict." It contemplates comparison of the offer amount to the "verdict" *or* the "determination." It also uses the terms "verdict" and "award" interchangeably. The statute's use of the terms "determination" and "award" indicates that offer of judgment amount should be compared to the amount of the final determination or award. As a result, the trial court correctly rejected O&W's claim for interest and costs in connection with its offer of judgment.

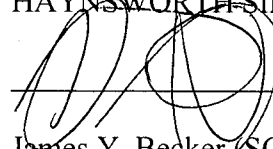
O&W cites no cases in support of its statutory interpretation of the offer of judgment rule, and its interpretation produces an absurd result. Excessive jury verdicts and unconstitutional punitive damage awards may of course be reduced by trial courts. Section 15-35-400(B) could not have been intended to impose penalties upon a defendant for failing to accept an offer of judgment where, as here, the offer exceeded the upper limit of constitutionally recoverable damages as determined by the trial court. A defendant should not be bound to accept an offer of judgment that is excessive as a matter of law simply because of the possibility that a jury may render an excessive verdict. O&W's construction provides an incentive for a plaintiff to make an offer of judgment far in excess of what the law would deem reasonable, an incentive that works counter to the statute's purpose of promoting settlement of claims. For these reasons, the trial court's ruling that O&W is not entitled to interest or costs in connection with its offer of judgment should be affirmed.

CONCLUSION

For these reasons, the trial court's orders should be affirmed.

Respectfully submitted,

HAYNSWORTH-SINKLER BOYD, P.A.

A handwritten signature in black ink, appearing to be "JYB", is written over a horizontal line.

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Dated: August 21, 2019

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

Case No. 13-CP-40-0319

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 OF COMPLIANCE

I certify that the Final Brief of Respondent Columbia Automotive Company, LLC, d/b/a
Midlands Honda, in this matter complies with Rule 211(b), SCACR.

(Signature Page Follows)

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Respectfully submitted,

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