THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

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

Appellants

v.

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

Respondent.

Petition for Rehearing

and

Suggestion for Rehearing En Banc

OVERVIEW

The opinion in this case, filed August 11, 2021, conflicts with several decisions of the South Carolina Supreme Court and this Court, including the holdings of J*ames v. Horace Mann Ins. Co.* that fines of $15,000 are set so low as not to be proper comparisons to punitive damages under the due process clause; of *Collins Entm't. Corp. v. Coats & Coats Rental Amusement* that nor are trebled damages under the UTPA proper comparisons to punitive damages, and of *Austin v. Stokes-Craven Holding Corp.* that the proper comparison for punitive damages cases concerning deceptive sales of automobiles are other punitive damages cases concerning deceptive sales of automobiles. The Court's opinion is also the first and only opinion to hold

application of the North Carolina punitive damages framework unconstitutional under the federal due process clause.

For these reasons, and others discussed below, the full Court should hear the petition en banc.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Columbia Automotive Company, LLC d/b/a Midlands Honda (Midlands) operates a Honda franchise dealership. In 2008, Midlands purchased a used "Civic" that was actually two half-Civics that had been welded together. Midlands gave the vehicle a 159-Point Honda Certification Inspection, and declared the vehicle to be a Honda-Certified PreOwned Vehicle. Midlands put a "Certified" window sticker on the vehicle (Attachment A, R. p. 954) and sold it to Charles Ecklund. This would be the first of two sales of this vehicle by Midlands.

The purchase contract stated, "certified." (R. p. 955). Midlands gave Ecklund a "Certified Pre-Owned Purchase Document." (R. p. 957). They gave him an invoice showing a "159 point" check. They told him it was "100% certified." (R. p. 33, line 20) (Testimony of Ecklund).

There was no reason for Ecklund to suspect anything was wrong with the vehicle. There was nothing showing to indicate the flaws.

Until one day, two years later, when he was backed into in a parking lot. He took the car in for repairs. It was lifted up on a rack, and from below, the damage was obvious. (*Id*., p. 120:23-124:24).

Ecklund called Midlands. (R. p. 131:6-12). He spoke with the General Manager.

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

(R. p. 132, lines 7-11).

His wife called Midlands. The receptionist took a message for the General Manager. It stated that she “wants you to call him about the car they got. She said it was 2 cars welded together and it's not safe. She said that they are going to call their lawyer." (R. p. 1034-35) (written telephone message).

With the threat of legal involvement, the General Manager arranged for a truck to pick up the car in Alabama and bring it back to Midlands. (R. p. 131:24-p. 132:4).

Midlands promptly sent the vehicle out, without disclosure, for sale in North Carolina, which mandates disclosure, via an auction there, which also requires disclosure. The auction has three “lights,” green, yellow, and red. They all require disclosure of the wreck damage in this Civic..

Midlands’ sales manager had been going to that auction for three years. (R. p. 355:22-25; p. 362:17-p. 363:1. This was the only auction Midlands was dealing with. (R. p. 378:14-15). Midlands was selling 100 vehicles a year at that auction. (R. p. 360:12-23). It was also buying from the auction. (R. p. 362:17-23; p. 378:14-15). And every one of those sales involved a damage disclosure form that required one to state whether the vehicle was reconstructed. (Attachment B, R. pp. 936-937).

If a representative of the seller is present on the day of the sale, the seller is required to make all the required disclosures. If the seller will not be present, the seller is required to make any required disclosures to the auction, which then fills out the form for them via a Power of Attorney. If they do not disclose to the auction, the auction does not disclose to the purchaser.

Midlands did not disclose. At trial, Midlands’ Senior Management claimed they had been unaware the vehicle was wrecked. But they had no convincing explanation for how they

did not know, given the 159-point inspection; nor how they did not know, after Ecklund and his wife told them.

Their intended market for wrecked cars at the auction were "Mom-and-pop," “gravel lot” dealers. (R, p. 384, lines 1-20) (testimony of Midlands then-Used Car Manager.) They expect these dealers to "turn around and re-sell these cars" (R. p. 439:21-22; p. 538:6). Once the sale is made, Midlands "doesn't care what those people do with the cars." (*Id.*, p. 541:22). It is "irrelevant" whether the cars will be sold to consumers and put back on the road. (*Id.*, line 9).

Roger Whitley and Daniel O’Shields, then gentlemen in their seventies, had a small dealership of the sort Midlands was targeting. They ran the business not so much to make money as to make themselves feel useful, buying cars for their friends and people at church. (R. p. 587:18-19). At the time, they were looking for a good small car for a 16-year-old girl. They had been asked to find her something to drive to school. (R. p. 595:25-p. 596:2)

Roger bought the Civic on behalf of their small dealership, for $5,200. Without explanation, Midlands then had the car returned to Columbia. (R. p. 607 6-p. 608:8). It only arrived at Roger and Dan’s business several days later, after the time the auction allows one to protest a sale had expired. (*Id.*)

Once it arrived, it was sold to that girl’s family. Part of the agreement was that the car would be returned for replacement of the water pump and timing belt, with the family paying for the parts and Roger and Dan paying for the labor.

Upon return, the vehicle was raised on a rack at a nearby garage, and the mechanic there saw the same thing Ecklund had seen. The garage called Roger. Roger instructed that the family was to be given back all it had paid. (614:24-625:9). Roger and Dan also refunded the fees the family had paid to register the car, approximately $345.00 (R. p. 619:4-9).

Roger went to the auction’s sales office to complain and invoke the Auction's dispute resolution process. (R. p. 615:14-p. 626:4). It was too late: The time to invoke that process had expired while they waited for Midlands to send the car. (R. p. 616:13-19). Roger waited a day or two to cool down, then called Midlands. He spoke to the Used Car Manager, and, like Ecklund before him, demanded Midlands give back his money and take back the car. (R. p. 617:13-p. 618:19). The used car manager took down all his information, including the VIN, and promised to get back to him. (*Id.*). He never did. That call was in September 2010. In 2013, Roger and Dan filed suit.

Trial was held in April of 2016. The jury was asked to award $6,645 on each of four cases of action: breach of contract, negligent misrepresentation, fraud, and violation of the North Carolina Unfair Trade Practices Act. It did so on each. In a bifurcated trial, it then awarded $2,381,888.00 in punitive damages.

Following post-trial motions, the lower court (a) reduced the punitive award to $46,515; (b) awarded attorney fees of $21,264 for the first five years of work, including travel to Illinois to depose Ecklund and a five-day trial; awarded another $10,140 for an additional two months of work by two attorneys; and held that no fees would accrue after September 13, 2016, the date Respondent made a post-trial offer to settle the case for $81,069; (c) required Appellants to elect between their punitive verdict and their award of attorney fees; and (d) denied Appellants’ claim for offer-of-judgment interest.

Appellants’ appeal challenged the punitive and attorney fees awards as representing too drastic cuts from the jury’s verdict and the reasonable fees; and requested that this Court reverse

the lower court's holdings regarding election of remedies and regarding offer-of-judgment interest. A panel of the Court of Appeals (a) affirmed the reduction of the punitive award. (b) It agreed with Appellants that the attorney fee award was too low, but invited the lower court on remand to reduce the award from the reasonable hours incurred on grounds of insufficient success. It also affirmed the lower court's holding that no fees could accrue after September 13, 2016. (c) The Panel reversed the requirement to elect, and (d) instructed the lower court to reconsider the offer-of-judgment issue after the attorney fee award was revised.

This Petition asks the Court to rehear the question of whether $46,515 is the maximum punitive award the due process clause allows on these facts; to rehear the question of whether the degree of success enjoyed by Plaintiffs justifies a reduction from the otherwise-reasonable hours; and to rehear its ruling on the offer of judgment interest.

I. The Panel's Opinion Conflicts with the North Carolina Court of Appeals on a Question of the Federal Constitutionality of a North Carolina Punitive Damages Statute. At the Least, This Is a Matter for en banc Review.

The Panel holds something that no North Carolina appellate court has ever held: That a punitive award at North Carolina's statutory cap is unconstitutional. In so doing, the Panel misapprehends or overlooks North Carolina's interpretation of its own statute.

North Carolina's legislature has enacted a comprehensive statutory scheme regulating punitive damages. North Carolina statutes allow defendants to demand a bifurcated trial when a punitive damages claim exists, N.C.G.S. 1D-30; set a high substantive bar for any award, requiring fraud, malice, or willful or wanton conduct; N.C.G.S. 1D-15(a); rejects *respondeat superior* unless "officers, directors, or managers participated in or condoned the conduct," *id.*, ¶ (c); restrict the evidence the jury may consider, N.C.G.S. 1D-35(2) ¶¶ (a)-(i); limit punitive damages to the greater of $250,000 or three times the amount of actual damages, and where the

punitive award is greater than that amount, mandate that the trial court is to enter judgement in the greater of those amounts, N.C.G.S. 1D-35(2), i.e., $250,000 when actual damage awards are less than $83,333.34.[1]

The North Carolina Supreme Court explained North Carolina's regime regulating punitive damages in *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004). In upholding North Carolina's statutory framework against a slew of attacks based on the United States and North Carolina constitution, it noted the United States Supreme Court's concern about unlimited jury and judicial discretion.

> [I]n delivering the opinion of the Court in *Haslip*, Justice Blackmun expressed "concern about punitive damages that 'run wild,'" concluding that "unlimited jury discretion--or unlimited judicial discretion for that matter--in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."

Rhyne, 594 S.E.2d at 16-17 (emphasis added) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 113 L. Ed. 2d 1, 20, 111 S. Ct. 1032 (1991)).

The North Carolina Court explained that "the monetary limits established by N.C.G.S. § 1D-25 "are not arbitrary," *id.* at __, as the interests underlying the regime include "bringing more certainty to our system of civil redress, [and] shielding North Carolina from problems encountered in other states," *id.* at __, and "to provide clear notice of possible penalty to defendants," *id*. at __.

It added that "the scheme for limiting the punitive award contained in N.C.G.S. § 1D-25, providing for three times the compensatory award, is in line with the standards suggested by the

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[1] N.C.G.S. 1D-35(2) states,

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

United States Supreme Court to prevent grossly excessive awards;" *id.* at __; and that legislatures "'enjoy broad discretion in authorizing and limiting permissible punitive damages awards,'" *id.* at _ (emphasis added) (quoting *Cooper Indus. v. Leatherman Tool Group*, *Inc.,* 532 U.S. 424, 432, 149 L. Ed. 2d 674, 684, 121 S. Ct. 1678 (2001)).

Against this backdrop, no appellate court has ever held that the statutory directive to award such judgments in the amount of the cap is unconstitutional, other than the Panel in this case. North Carolina trial judges routinely reduce such awards to the cap, and North Carolina appellate courts routinely affirm. *E.g.*, *Lacey v. Kirk*, 238 N.C. App. 376, 394-95, 767 S.E.2d 632 (N.C. Ct. App. 2014); *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82 (N.C. Ct. App. 2012).

Of particular significance, the Panel overlooks *Mace v. Pyatt*, 203 N.C. App. 245, 254, 691 S.E.2d 81 (N.C. Ct. App. 2010), in which the North Carolina Court of Appeals held that if even "nominal damages" are shown, and the requirements for a punitive award are met; and the jury awards punitive damages in an amount greater than the cap; then the judge is to award punitive damages at the cap.

In holding an award at North Carolina's statutory cap to be unconstitutional, the Panel of the South Carolina Court of Appeals went where no North Carolina appellate court has ever gone.

Its opinion conflicts with the great deference the United States and North Carolina Supreme Courts are due when authorizing criminal and punitive measures. As an outlier, its opinion removes that "certainty" and "clear notice" that the North Carolina and United States Supreme Courts have stated is needed in punitive damages law.

Whether South Carolina should be contradicting North Carolina appellate courts on the federal constitutionality of North Carolina statutes is a question for *en banc* consideration by this Court, and likely for further consideration by the Supreme Court.

At the least, unless need to depart from North Carolina precedent is clear, this Court should follow North Carolina precedent regarding the federal constitutionality of the North Carolina statutory regime.

And the need to hold differently from North Carolina statutes is far from clear. As explained below, awards of punitive damages at the North Carolina cap are required.

II. The Jury Found Fraud. The Panel Erred in Reducing the Punitive Award For Fraud on Grounds that "Willfulness" Had Not Been Shown (First *Gore* Factor, Reprehensibility).

The Panel appears to hold, incongruously, that this punitive award for fraud should be limited because "the record does not bear out a deliberate, willful, or repeated violation of the disclosure requirements." Op. p. 7. But the jury found fraud. R. p. 44 (Verdict Form). Fraud is by definition willful. The jury here was instructed they could not find unless they found, among other things, the false representation or concealment "was reasonably calculated to deceive" and "with the intent to deceive." (R. p. 836, line 24—p. 837, line 6) (emphasis added).

The Court below similarly found "willfulness," and pointed out that willfulness was implicit in the jury's fraud verdict. R. pp. 11-12.

As then-Chief Judge Few wrote for this Court in *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 405, 714 S.E.2d 904, 915 (Ct. App. 2011), "We do not conduct a de novo review of the jury's determination of the proper amount to award as punitive damages." "Both the plaintiffs and the defendant have a federal and state constitutional right to a trial by jury on the question of punitive damages." *Id.* Appellate courts are to "defer[] to the jury's constitutional

role as factfinder." *Id*. at 405, 714 S.E.2d. *See also Garrison v. Target Corp.*, 429 S.C. 324, 346, 838 S.E.2d 18, 29 (Ct. App. 2020) (*cert. granted*, S.C. Sup. Ct. Order dated October 19, 2020) (explaining that it is a matter for the jury where "more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton.")

Here, there was more than ample evidence that Respondent's actions were willful. A sampling includes:

- Respondent took the subject vehicle in as a trade-in, and gave it a 159-point inspection. Op. p. 2. A 159-point inspection could not be rationally thought to have missed the extensive damage to this vehicle.
- Respondent's inspection included raising the vehicle on a rack. *Id*. When one looks up at the underside of the vehicle, when it is raised on a rack, the damage is obvious. Respondent could not have missed seeing it.
- When the first victim, Mr. Ecklund, had the car returned to Midlands Honda, and told them the vehicle they had sold him as a Honda-Certified PreOwned Vehicle was actually two half-cars welded together, Midlands did not dispute it. Midlands did not say, "That can't be right." Midlands did not put the car up on a rack to see if Mr. Ecklund was telling the truth. R. p. 374, line 20-page 375, line 20; p. 377, lines 8-18. Conclusion: Midlands already knew when they sold the vehicle to him that it was clipped. A car dealer that accepts cars back years later when a customer says it was sold as something it's not without checking to see if the customer is telling the truth, would soon be out of business—unless the dealer regularly sells wrecked cars without disclosure.

- When Ecklund brought the car back and claimed it was two half-cars clipped together, management did not ask the mechanic who performed the 159-point inspection and certified the vehicle how he had missed such glaring damage. It is a most reasonable inference that management of a dealership that was not in the business of deceptively selling damaged cars would have immediately asked the mechanic what happened.[2]
- When Respondent Whitley called and told Midlands' Sales Manager that the car was clipped, again, he did not ask the mechanic how this happened. It is a most reasonable inference that they did not ask because they were in on it—they knew the car was clipped when it was sold to Ecklund.
- Midlands' then-Sales Manager and then-General Manager each testified they did not remember Ecklund returning the vehicle. R. p. 374, line 20-p. 375, line 20; p. 377, lines 8-18; p. 427, lines 18-25. Having a vehicle CAC had sold as a 100% Honda-Certified PreOwned Vehicle being returned as actually being two half-cars was not sufficiently unusual to be remembered. It is a reasonable inference that

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[2] The opinion in this case apparently cites the death of the mechanic before trial as a point in Midland's favor. Op., at 6 n. 7. However, Midlands represented to the jury that the mechanic died in 2011. R. p. 711 lines 7-12. This was well after Ecklund complained about the vehicle on March 11, 2010. R. p. R. p. 1034.

> We bought it from a lady and no question we had it in the service department and this guy name Terry Smith looked at it. How the heck he missed it I don't have a clue. But I got no evidence, I got nothing, because the guy died in 2011 and we didn't even know this claim [i.e., the lawsuit] was out there. So I got no evidence to give you and no way to explain it.

R. p. 711 lines 7-12 (Respondent's closing argument). In other words, they didn't ask him, had no plans to ask him, until they were sued—and then he died. The jury could reasonably infer that this is a lame excuse, and that it would not take a lawsuit to get responsible dealer to ask "[h]ow the heck he missed it."

they are lying or that they sell so many previously wrecked cars, they cannot keep up with all of them.

- It is also a reasonable inference that Midlands' senior management knew that what they were doing was wrong. It is simply obvious that selling two wrecked half-cars welded together as an actual car is wrong.
- It is also a reasonable inference that Midlands' senior management knew that North Carolina law forbids such sales without disclosure.
    - The opinion almost completely overlooks the fact that the Dealer violated North Carolina statutory law requiring disclosure of clipped and other "reconstructed" cars. (The only reference the opinion makes to that law is in the comparable penalties portion of the opinion.)
    - The opinion similarly reads as if the official North Carolina Department of Transportation document, MVR-181 (Attachment B, R. pp. 936-37), was simply an "auction form." E.g., "Midlands had failed to make disclosures on an ADESA auction form." The opinion errs, as it was not an auction form. The opinion states, "Midlands did not receive notice of the change to the disclosure form." Op. p. 7 n. 8. However, there was no change to the disclosure form, as it was a state form that had last been modified in 2002, as indicated by the text, "MVR-181 (Rev. 1/02).
    - The evidence was that Midlands was selling 100 vehicles a year at that North Carolina auction (R. p. 360, lines 12-23), and buying from that auction. (R. p. 362, lines 17-23; p. 378, lines 14-15). Each one of those sales would have been accompanied by the North Carolina damage

disclosure form. (Attachment B, R. pp. 936-37). It is an eminently reasonable inference that it knew the required form would be issued for this sale. It is further an eminently reasonable inference that knew that if it did not tell the auction the car was clipped, the auction would, as its agent, check the boxes on the form indicating there was no problem with this car.

- The required Damage Disclosure Form is a single sheet of paper. It asks,

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

  The box for Answer "No" is checked.

  The final question asks, "5. Has this vehicle been reconstructed?* (ANY year)."

  This box, too, is checked “No.”

- Thus, it was an eminently reasonable inference that Midlands knew it was fraudulently breaking the law when it sold the reconstructed vehicle without disclosure.

- It was also an eminently reasonable inference that Midlands knew it was breaking the auction rules.

  - The Panel writes that the “disclosure requirement had only been added at the auction several months prior without notice to Midlands.” Op., p. 6. However, there is nothing in the record to support the proposition that the disclosure requirement had been added “only” several months prior. Despite the repeated statements to that effect in the Final Brief of Respondent, it cited to only “R. at 996-1010, 408:24-409:3, 635:6-21” as

supposedly proving the auction's disclosure requirements were new. However, as pointed out in the Final Reply Brief, p. 1, n.1, "The exhibit and other testimony that CAC references . . . state nothing more than that the rules were updated in 2010. None say the disclosure requirements were new."

- Pages 996-1010 of the Record are simply the 2010 rules. They do not state what had been changed from the former rules.
- Pages 408:24-409:3 simply state:

  Q. Would you flip back to the first page with me? Up at the top, is there a date?

  A. January 2010 .

  Q. And this car got sold at the auction April 1 of 2010?

  A. Yeah, I assume. Yeah.

  That is all there is. Nothing about the prior rules lacking a disclosure requirement.

- Similarly, page 635:6-21 merely establishes that the rules were updated in 2010. It does not say that the former rules allowed one to violate North Carolina by failing to disclose this kind of damage.

  Q. Got it. And the upper right-hand corner -- excuse me, I keep calling it right -- the upper left-hand corner of these rules, first page, the date on there is January 2010 , right?

  A. I suppose it is.

  Q. And this sale was April 1 of 2010. Right?

  A. It was in 2010.

  Q. So, from January 1 to April 1 , that' s three months of time, right?

  A. Okay.

Q. And that' s the period that these rules would have been in effect.

A. Say that again.

Q. That' s the period of time these rules had been in effect before your purchase.

A. Okay.

- The case should be decided on the evidence—not on speculation about what the former rules said.
- Appellants introduced into evidence the governing rules at the time of the sale. If Respondent thought the prior rules were different, Respondent should have moved those prior rules into evidence.
- It is an eminently reasonable inference for a juror to conclude that the party who shows the rules he advocates for has rules that support what he says, and the party who does not show the rules he advocates for has rules that do not support his position.

The Panel also writes that "no direct evidence established the harm to O&W was intentional." Op., p 6 (emphasis added). The Panel overlooks the fact that fraud is almost never proved by direct evidence. It is the rare defendant indeed who admits, "I intended to defraud my victim," and then still goes to trial. Rather, fraud "usually must be proved circumstantially." M*ylin v. Allen-White Pontiac, Inc.,* 314 S.E.2d 354, 281 S.C. 174 (Ct. App. 1984) (case concerning fraud in the sale of a previously-wrecked automobile).

There was ample evidence supporting the jury's finding of fraud and the lower court's finding of willfulness.

III. The Panel Erred in Overlooking Evidence that the Tortious Conduct Evinced an Indifference to or a Reckless Disregard of the Health or Safety of Others. (First *Gore* Factor, Reprehensibility).

Gore instructed courts, in deciding reprehensibility, to consider whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others." Op. p. 5 (quoting *State Farm,* 538 U.S. at 419). However, the Panel makes no mention of the extensive evidence showing that this vehicle was unsafe, and that Respondent was indifferent to the threat it posed to the safety of others.

Exhibits 20-42 and 71-89 (R. pp. 965-987, 1036-1054), demonstrate the massive problems with this car. These include spot welds "welded solid like that its not gonna collapse the way it's designed to collapse." (Testimony of Plaintiff's expert Brian Allen, R. p. 503:19-23). In contrast, spot welds should be "two inches apart [so] if it gets hit and it collapses between those welds it's a crumple zone. It absorbs energy." *(Id.)* "[A]lmost a half to three quarters inch gap" within a weld. (*Id*., p. 489: 10-11). "Metal . . . ripped apart [and] not welded back." (*Id*., p. 491: 7-9). "It's literally ripped apart." (*Id*., line 22). "It's extremely poor quality work. You see holes in the welds right here." (*Id.* p. 497:20-21). Brake lines cut and put back together with cheap plastic. (*Id.* p. 512:9-14); *see also* Attachment D (R. p. 980) (showing cut brake and fuel lines and the flimsy connectors installed to connect them). "'[T]his vehicle shouldn't be driven. Shouldn't be allowed on the road." (*Id.* p. 513:16-17).

Respondent's Senior Management admitted that they expected the "Mom-and-pop" dealers who buy these cars at auction (*id*., p. 384, lines 1-20) to "turn around and re-sell these cars" (R. p. 439:21-22; p. 538:6). Once they are sold at the auction, Midlands "doesn't care what those people do with the cars." (*Id*., p. 541:22). To them, whether it will be sold to a consumer and put back on the road is "irrelevant." (*Id*., line 9).[3]

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[3] After all the evidence was in, and Senior Management had repeatedly disclaimed knowing that the car had been damaged, Midlands' counsel finally admitted in closing that Midlands knew "this is two cars put together." (R. p. 772:7-8).

If this is not indifference to or a reckless disregard of the health or safety of others, it is hard to think of what is.

In fact, even without their damning testimony, their very actions in repeatedly selling this clipped car without disclosure show an indifference to or a reckless disregard of the safety of others.

The Panel erred in overlooking this factor in its analysis of *Gore* factors.

IV. The Panel Erred in Speculating About The Prior Condition of the Car.

The Panel recognizes that Appellants maintain the damage would have been obvious once the vehicle was placed on a rack. Op., p. 6. Appellants do so, for reasons described in Part III above.

The undisputed testimony was that the "car" was unsafe and that the damage was obvious when one raises the car on a rack and looks from underneath. Respondent's expert examined the vehicle, but was not called at trial. (R. p. 519:10-p. 520:4). Nevertheless, the Panel speculates that perhaps the damage was not obvious at the time Respondent did its 159-point inspection. The opinion states, "However, O&A's examination of the vehicle was two years and approximately 30,000 miles after Midlands' original inspection." Op., p. 6. The panel appears to be speculating that perhaps the damage would not have been obvious when Midlands inspected the vehicle. Perhaps the damage became worse as the car was driven: holes in the welds grew bigger or the like. If so, if the car was getting more dangerous by the mile, that is hardly a reason to lower the punitive award. Further, it is not reasonable to think that a 159-point certification inspection would have missed the fact that this Frankencar was two half-cars poorly welded together.

Nor was this issue ever raised in the orders below nor in the briefs of the parties. This speculation is sua sponte by the Court. If Respondent had thought such an argument was sustainable, that these were types of damage that might not have been easily-discernable two years earlier, Respondent should have called its expert to so testify. He would have then been subjected to cross-examination. Plaintiffs should then have been able to counter with rebuttal testimony from their expert. So honed, the resolution could have been decided by the jury. The case should be decided by evidence honed through the litigation process.

The Panel erred in basing its finding that the actions at issue here were only mildly reprehensible on the basis of speculation about a defense that Respondent did not raise.

V. The Panel Erred in Its Application of the Second *Gore* Factor by Overlooking the Potential Harm.

The Panel accurately quotes the second *Gore* factor, "'the disparity between the harm *or potential harm* suffered by [the plaintiff] and his punitive damages award,'" Op. p. 5 (emphasis added) (quoting *BMW v. Gore,* 517 U.S. at 574), but then inexplicably switched terms in its analysis of this factor, as shown in its heading, "B. Amount of Actual Harm v. Punitive Damages Amount," Op. p. 7. Its heading overlooks the potential harm, and its analysis does not mention it. Instead, the Panel compares the ratio of punitive damages to actual damages, in conflict with the teaching of *BMW v. Gore*. The undisputed testimony was that this "car" was extremely dangerous, and should not be on the road. The panel erred in overlooking the potential harm.

Respondent will likely contend that any error is harmless. Respondent will likely further contend that any risk is Roger's and Dan's own fault, that they should have better inspected the car to detect Respondent's fraud before driving it. But that puts the burden where it does not belong. Roger has "always trusted the franchise dealers." (R. p. 591:4). The jury has already found that Roger made a reasonable inspection of the vehicle at the auction, *see* R. p. 782, lines

9-16 (Midlands ending its closing argument by stressing the jury could not find for Appellants on any cause of action except contract if "they didn't do a careful inspection") and R. pp. 43-45 (jury finding for Appellants on every cause of action). There are no lifts at the auction to raise a vehicle, as Respondent's Senior Management knew (R. p. 394:13-16).

Moreover, Respondent must have intended the vehicle to be driven without a significantly further inspection by the purchasers, as that is the only way their fraud could work. A buyer who put the vehicle on the rack the first day would be able to invoke the auction's arbitration rights to return the vehicle.[4]

Moreover, the central focus in punitive damages is on the wrongdoer, not his victim. Regardless of whether Roger and Dan are good people, regardless of whether they could have, should have, done a full up-on-the-rack inspection at a neighboring garage immediately upon receiving the vehicle, there was a *potential* for serious harm.

In overlooking the potential for serious harm, the Panel employed the wrong standard in its analysis of the second *Gore* factor, the ratio between punitive damages and the actual or potential harm.

[do I need to put in, for each of these, that the error was prejudicial? I can save it for the end.]

Undisputed testimony was that this "car" was extremely dangerous, and should not be on the road.

[4] Alternatively, perhaps the reason Respondent inexplicably took the car back to Columbia after selling it to Appellants, and returned it to the purchasers only after the arbitration period had ended (R. p. 615:14-p. 626:4), was to avoid the fraud being discovered in time for the purchasers to exercise their arbitration rights. If so, that only deepens the reprehensibility of Respondent's actions.

IV. In Holding that Comparable Penalties Under the Third *Gore* Factor Are One Thousand Dollars or Triple Damages under the UTPA, the Opinion Overlooks and Conflicts with Supreme Court Decisions in *James v. Horace Mann Ins. Co.* and *Austin v. Stokes–Craven Holding Corp.,* This Court's Decisions in *Collins Entm't. Corp. v. Coats* and *Duncan v. Ford Motor Co.,* and the Text of N.C.G.S. Section 1D-25.

Gore's third prong requires a comparison of the award to penalties authorized or imposed in comparable cases. Op., p. 8. The Panel's analysis of the third *Gore* factor holds that comparable penalties are $1,000 or "three times the amount of actual damages" under the North Carolina Unfair Trade Practices Act. *Id.,* pp. 8-9.

A. The Panel erred in overlooking the Supreme Court holding in *James v. Horace Mann* that fines of $15,000 and $30,000 "are set at such a low level, there is little basis for comparing it with any meaningful punitive damage award," and this Court's similar holdings in *Collins Entertainment v. Coats* and *Duncan v. Ford Motor Co.*

The Supreme Court has held that fines of $15,000 and $30,000 are so low there is little basis for comparing them with any meaningful punitive damage award. It follows, even more strongly, that a fine of $1,000 is not a basis for comparison with a punitive damage award.

> Pursuant to S.C. Code Ann. § 38-2-10 (2002), the director of the Department of Insurance may impose the following administrative penalties on an insurer for each violation of the insurance laws: (1) a fine not to exceed $15,000 if the conduct was not willful or a fine not to exceed $30,000 if the conduct was willful; (2) suspend or revoke the violator's authority to do business in the state; or (3) both. We find the statutory penalties are set at "such a low level, there is little basis for comparing it with any meaningful punitive damage award."

James v. Horace Mann Ins. Co., 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006) (quoting *Collins Entm't. Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 141, 584 S.E.2d 120, 129 (Ct. App. 2003). *See also Duncan v. Ford Motor Co*., 385 S.C. 119, 147-48, 682 S.E.2d 877, 892 (Ct. App. 2009) (following *James* and *Collins*).

The Panel erred in considering a thousand dollar fine to be a comparable penalty.

B. The Panel erred in overlooking this Court's holding in *Collins Entertainment* that "we reject [the] argument that the sanctions provided in the South Carolina Antitrust Act . . . are for 'comparable misconduct.'"

This Court has rejected the contention that the trebled damages available in the South Carolina Unfair Trade Practices Act are for "comparable misconduct" under *Gore's* third prong. *See* S.C. Code Ann. § 39-5-140(a) (treble damages). It follows that the treble damages available in North Carolina's Unfair Trade Practices are similarly not "comparable misconduct." *See* N.C.G.S. 75-16 (treble damages).

> Moreover, we reject ABG's argument that the sanctions provided in the South Carolina Antitrust Act and the South Carolina Unfair Trade Practices Act are for "comparable misconduct." Historically, the availability of these sanctions has not precluded punitive damages awards for related causes of action even when the plaintiff has also recovered under one of these acts in the same lawsuit. In our view, then, these statutory penalties are not necessarily for "similar misconduct" to the extent that they would restrict the right of a finder of fact to determine an aggrieved litigant's entitlement to a well-established form of redress.

Collins Entm't. Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 142-43, 584 S.E.2d 120 (Ct. App. 2003) (footnotes omitted).

The Panel erred in overlooking this holding of *Collins*.

C. The Supreme Court held in *Austin v. Stokes-Craven Holding Corp.*, "Because the jury awarded punitive damages pursuant to Austin's fraud cause of action, we are compelled to review factually-similar cases," and therefore compared Austin's award to other cases involving fraud by automobile dealers. The Panel erred in overlooking that teaching of *Austin*.

The Supreme Court explained in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2004) (footnote omitted), that when considering punitive damages in a case involving fraud by an automotive dealer, the proper comparison is to other cases involving fraud by an automotive dealer.

> Finally, we must consider the difference between the punitive damages awarded to Austin and the civil penalties authorized or imposed in

> comparable cases. Because the jury awarded punitive damages pursuant to Austin's fraud cause of action, we are compelled to review factually-similar cases. Based on our review of these cases, we conclude the award of punitive damages in the instant case is consistent with those of comparable cases. *See, e.g., Krysa v. Payne,* 176 S.W.3d 150 (Mo. Ct. App. 2005) (affirming jury verdict of $18,449.53 in compensatory damages and $500,000 in punitive damages awarded to purchasers of a used vehicle against dealership where dealership: did not provide title to purchasers at the time of purchase; failed to disclose that the vehicle had thirteen prior owners; affirmatively misrepresented the condition of the vehicle; and failed to disclose that the vehicle had sustained significant wreck damage); *Parrott v. Carr Chevrolet, Inc.,* 331 Or. 537, 17 P. 3d 473 (2001) (affirming award of $11,496 in compensatory damages and $1 million in punitive damages where the defendant car dealership sold the plaintiff a vehicle that had been previously involved in a serious accident and was missing several pieces of emission control equipment).

Id. at 54-55, 691 S.E.2d at 152. By overlooking *Austin*, and comparing the present case to a thousand dollar fine, rather than to the $500,000 and $1 million punitive awards that are the appropriate comparison, the Panel erred.

D. North Carolina General Statute 1D-25 directs that when a punitive verdict is greater than $250,000, and the actual damages awarded are less than $83,333.34, the punitive award is to be $250,000 per plaintiff. The Panel erred in overlooking that the Legislature has set the penalties for similar cases at $250,000 per plaintiff, and that the penalties imposed in similar cases are $250,000 per plaintiff.

This Court has explained that in reviewing punitive awards, a court must give "substantial deference" to the Legislature.

> Finally, in *Gore*, the Supreme Court held that state courts, when reviewing punitive damages awards for excessiveness, must "compar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." Justice Stevens, writing for the Court in *Gore*, stated that "a reviewing court engaged in determining whether an award of punitive damages is excessive should `accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'

Collins, 355 S.C. at 142 n.30 (footnote omitted).

The North Carolina Court of Appeals has held similarly, as the Panel implicitly notes,

> The third *BMW* guidepost requires consideration of civil or criminal penalties that could be imposed for comparable misconduct, giving substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.

Op., p. 8 (quoting *Rhyne v. K-mart Corp.*, 562 S.E.2d 82, 94 (N.C. Ct. App. 2002) (quotation marks omitted)).

Here, the Legislature has set the penalties for similar cases at $250,000 per plaintiff. N.C.G.S. 1D-25 provides (emphasis added),

> **(a)** In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.
>
> **(b)** Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($ 250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.
>
> **(c)** The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

By overlooking this legislative judgment in its analysis of the third prong, the Panel erred.

The third prong of *Gore* also contemplates a comparison to penalties actually imposed in similar cases. North Carolina appellate courts have consistently given deference to this legislative judgment, and have ordered or affirmed that punitive awards be entered as stated in the statute, at $250,000 per plaintiff. E.g., *Rhyne v. K-mart Corp.,* 594 S.E.2d 1, 20 (N.C. 2004) ($250,000 per plaintiff, total of $500,000); *GE Betz, Inc. v. Conrad,* 752 S.E.2d 634, 653 (N.C. Ct. App. 2013) (limit is per plaintiff); *Mace v. Pyatt,* 691 S.E.2d 81 (N.C. Ct. App. 2010) (remanding for finding of amount of actual damages, affirming $250,000 punitive award for

individual plaintiff, on grounds that even nominal damages suffice); *Lacey v. Kirk*, 767 S.E.2d 632 (N.C. Ct. App. 2014) ($250,000 punitive award per plaintiff, $500,000 total).

Whether one follows the North Carolina appellate decisions, awarding $500,000 where there are two plaintiffs and a punitive verdict above the cap, or the South Carolina Supreme Court's holding in *Austin*, finding punitive awards of $500,000 and $1 million to be proper benchmarks, appears not to matter much to the result in this case. The Court should follow one or the other.

Conclusion to Part IV.

The Panel erred in finding a $1,000 fine and trebled UTPA damages to be proper benchmarks, as this Court and the Supreme Court have previously stated these are not proper benchmarks. The Panel further erred in failing to follow the guidance of *Austin*, the holdings of the North Carolina appellate courts, and the legislative judgment of the North Carolina legislature.

CONCLUSION AS TO PUNITIVE DAMAGES

The Court should afford "substantial deference" to the legislative judgment of the North Carolina legislature, as directed by *Gore*, and decline to hold the statute unconstitutional as applied in this case. In the alternative, the Court should closely follow the various provisions of *Gore*, and the holdings of the South Carolina Supreme Court and of this Court, and defer to the judgment of the jury that the fraud was willfully committed, the Respondent, through its management, evinced an indifference to or a reckless disregard of the safety of the motoring public, compare a punitive award at the statutory cap to the potential harm, not to the minor price of the car, and should compare this case to other cases involving deceptive sales of previously-wrecked vehicles, and reach a similar result.

V. The Order Misapprehends *Hensley*, on which It Heavily Relies to Suggest A Reduction in the Fee Award.

The Panel held that the trial judge erred in "apportioning" fees among causes of action, in contravention of North Carolina law. This "apportionment" had accounted for the great bulk of the reduction of the requested amounts of fees.[5] The order further directed that attorney travel time be compensated.

Yet Appellants are concerned about two holdings which have a negative effect. First, the suggested that the restored hours could be reduced on grounds of a lack of sufficient success by Plaintiff's attorneys, and second, the order affirms the lower court's absolute cut-off of fees incurred after September 13, 2016.

As a minor initial matter, the Panel overstates in writing, "In North Carolina cases discussing reasonable attorney's fees, no matter the outcome, the touchstone is *Hensley* [*v. Eckerhart*, 461 U.S. 424 (1983)]." Op. p. 12. As the authority it quotes for that proposition makes clear, federal courts "routinely" cite *Hensley*, while North Carolina courts have merely applied *Hensley* "in a number of cases." *Id.* n.12.

As the opinion notes, under Hensley, the lodestar amount may be adjusted upward or downward, depending on the degree of success Plaintiff enjoyed. "There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Op. p. 12 (quoting *Hensley,* at 433-37). "If . . . a plaintiff has achieved only partial or limited success," the fee award may be adjusted downward. *Id*. (alteration in original).

[5] By Appellants' calculations, at least 67.5% and as much as 91.4% of the hours cut were cut on grounds of apportionment. The exact number is unclear; despite Appellants' repeated requests (R. pp. 1888-89, 2041), the court below declined to clarify (R. p. 25, Order p. 2).

Plaintiff does not contest these general propositions.

However, the order implies that the lower court may properly reduce the fees based on Plaintiff supposedly having achieved "only partial or limited success." Here, the jury awarded every dollar of actual damages that Plaintiff requested. It awarded the full purchase price of the vehicle, minus the $500 Appellants conceded the vehicle was worth in its wrecked. It did so despite Midlands' attempt to elicit testimony that the vehicle in its damaged state was worth $2000. (R. p. 646:17-p. 648:24). It awarded damages for the amount of the fee the auction charged for facilitating the sale. It awarded damages for the registration fee, which the family of the 16-year-old girl that bought the car had paid to the State, and for which Appellants reimbursed the family. It awarded damages for the commission that Appellants had paid to a part-time worker who sold the car. It awarded damages for the lost profits Appellants would have enjoyed had the vehicle been as represented.

Plaintiffs' trial attorney obtained every conceivable dollar of actual damages. He did so on each of the four causes of action. The order errs in stating the jury issued verdicts on only two claims. Op. p. 2 & n.2. He requested $6,645.00 in actual damages, and received four verdicts for $6,645.00 in actual damages. (Attachment C) (verdict form) (R. pp. 42-46).

On punitive damages, he busted the cap. He obtained a punitive verdict of $2,381,888.00, several times the statutory cap of $250,000 per plaintiff.

If the Court directs the lower court to follow N.C.G.S. 1D-25 and award punitive damages at the cap, Plaintiff's attorneys will have obtained the maximum amount of damages allowed by law. If, conversely, the Court ultimately affirms that $46,515 is the maximum allowed by the due process clause, Plaintiff's attorneys will still have obtained the maximum allowed by law.

Plaintiff will receive 100% of the damages, actual and punitive, to which he could possibly be entitled. How is that anything less than 100% success?

As *Hensley* states, "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." 461 U.S. at 435.

If anything, the trial court should be instructed to consider raising the fee award on remand due to the high degree of success.

This is not a case where a plaintiff sought injunctions in six areas, but prevailed in only one. Nor is it a case where a Plaintiff sought $10,000 in damages, and received only $5,000. The Panel's view appears to be that the stakes involved—$6,645 in actual damages, and $46,515 in punitive damages—are too small to justify the hours Plaintiffs' attorneys invested in the case. Such a view is contrary to the holdings of the North Carolina Supreme Court and other appellate courts.

Fee-shifting provisions in favor of successful plaintiffs under statutes such as the North Carolina UTPA are <u>designed</u> for situations in which the fees required are out of proportion to the stakes involved. As explained by the North Carolina Supreme Court, the North Carolina UTPA was enacted "so that local business interests could not proceed with impunity," "given the small dollar amounts often involved in such suits." *Marshall v. Miller*, 276 S.E.2d 397, 403-04 (N.C. 1981).

In 1986, subsequent to its 1983 decision in *Hensley*, the United States Supreme Court has explained that a fee-shifting statute in favor of successful plaintiffs was enacted precisely because the expected hours of attorney time were not proportional to the stakes. *Riverside v. Rivera*, 477 U.S. 561, 586 (1986) (Powell, J., concurring); *id*. at 579–80 (plurality) (similar)

(civil rights law). Indeed, there would be no reason to enact such provisions if the fees were proportional to the stakes, as lawyers would then accept such cases on a contingency basis. *Id.*

Other courts hold similarly. The purpose of the fee-shifting provision in North Carolina's UTPA is to ensure that such cases are "economically feasible," *Cotton v. Stanley,* 380 S.E.2d 419, 421 (N.C. Ct. App. 1989). Our Supreme Court has also stated that such provisions for "attorney's fees are intended to make such claims economically viable for private citizens" as otherwise, "costly attorney fees may deter private citizens from bringing a claim under the [analogous] Dealer's Act." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56-57, 691 S.E.2d 135, 153 (2010).

The scholarly literature concerning fee-shifting provisions was gathered in *Covenant Mutual Ins. Co. v. Young,* 179 Cal. App. 3d 318, 324–328, 225 Cal. Rptr. 861, 864–68 (Cal. App. 1986), which concludes, not surprisingly, that statutes shifting fees only in favor of successful plaintiffs "are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy," *id*. at 324, 225 Cal. Rptr. at 865. "[W]here the Legislature wants to encourage litigation it can intervene to alter the decision-making equation by instituting unilateral fee-shifting. Then the injured person knows he will not have to absorb his own lawyer's legal fees, at least if he wins." *Id*. at 325, 225 Cal. Rptr. at 865.

See also Layman v. State, 376 S.C. 434, 442–58, 658 S.E.2d 320 (2008) (instructing that in determining the amount of a fee award, a court should consider the purposes of the specific fee-shifting provision pursuant to which fees are to be awarded, *id*. at 442–58, 658 S.E.2d at 324–33, and to apply a method of calculating fees that "embraces the theory of fee shifting embodied in the [relevant] statute," *id.* at 457–58, 658 S.E.2d at 332.

Fees are not be lowered based on the degree of success where "the plaintiffs obtained essentially complete relief." *Hensley*, 461 U.S. 431 (noting "three cases [wherein] the plaintiffs obtained essentially complete relief" and explaining that these differ from cases where only incomplete relief was obtained). Here, the Appellants obtained essentially complete relief. The opinion in the present case should be modified to remove the directives to the contrary.

VI. The Order Errs in Holding that Attorney Fees Stopped Accruing on September 13, 2016.

The Panel relies solely on *DENC, LLC v. Phila. Indem. Ins. Co*., 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020) for its proposition that Plaintiff stopped accruing attorney fees on September 13, 2016 as the result of a post-trial offer of $81,069 made the next day. Op. p. 11. *DENC*, obviously, is not a North Carolina appellate case.

More important, *DENC* offers no support for the proposition that a post-trial settlement offer may cut off the entitlement to fees. *DENC* states that "courts may look to a defendant's efforts to settle a matter before trial and the reasonableness of those efforts, including whether any settlement offers made were reasonable relative to what was ultimately awarded to the prevailing party." 454 F. Supp. 3d at 562 (emphasis added). As stated by the North Carolina Court of Appeals in *Cotton*, "Since the trial court had already found in the previous order that defendants' conduct was wilful and that their refusal to settle the dispute was unwarranted, plaintiffs were, in our opinion, entitled to legal fees for prosecuting the appeal as well as for the preparation for retrial."

Second, *DENC* requires a reasonable offer before its analysis even begins. *Id.* Respondents $81,069 offer was not reasonable. It was obvious that limiting the initial fee award to 54.525 hours (R. p. 17) for five years' work, including travel to Illinois (R. p. 102), and a

five-day trial, was not going to stand, *Rish v. Rish*, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988) (inadequate fee award held to be abuse of discretion).

This is especially so because the bulk of the reduction from the requested fee award was based on a theory that the North Carolina Court of Appeals had strongly rejected. That theory was that fees should be apportioned among causes of action that all obviously arose from the same nucleus of operative fact. *Morris v. Scenera Research, LLC,* 747 S.E.2d 362, 377-78 (N.C. Ct. App. 2013) (emphasis added) held,

> On appeal, Morris argues that the business court erred by allocating among legal claims — and thereby reducing his award of attorneys' fees — because (1) claims that arise from a common nucleus of operative fact should not be allocated; . . . We agree with Morris's first two arguments[.]

Before then, the Judge's clerk had emailed that Appellants could elect an award of $53,160 (R. p. 1731). Respondent was actually offering only $27,909. ($81,069 minus $53,160). In exchange for that $27,909, Respondent would escape potential liability of more than a million dollars. ($500,000 in punitive damages at $250,000 per plaintiff, $236,628.01 in offer of judgment interest, $6,645 in actual damages, $1,993.38 in pre-judgment interest, and $258,180.00 in unmultiplied fees for the first five years of work through July 20, 2016, totaling $1,003,446.39, in addition to fees incurred after between July 20 and September 14, 2016, and post-judgment interest.) That is less than three cents on the dollar. Certainly an offer of something less than the maximum possible award would have been reasonable, but not a request that Appellants sacrifice 97% of their reasonably-expected gains.

Appellants' counsel reasoned that the best negotiating strategy was to decline to counter-offer, in hope that doing so would spur Respondent to make a reasonable offer. Had Appellants' counsel responded, and been drawn into extended negotiations with an opposing party that clearly was going to make a reasonable offer, a Client paying hourly would justifiably complain

that counsel was wasting her money. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (internal quotation marks omitted) (emphasis in original) ("Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority").

Because the offer in question was an unreasonable post-trial offer, rather than a reasonable pre-trial offer, the Court should reverse the holding that Counsel are to work without pay after September 13, 2016.

In the alternative, it should be noted that *DENC* was decided in 2020, after the briefs in this case were filed, so the parties did not have a chance to incorporate the case into their analysis. *DENC* states, as quoted above, that a court may look to reasonableness of offers, "including whether any settlement offers made were reasonable relative to what was ultimately awarded to the prevailing party." 454 F. Supp. 3d at 562. If the Court is going to follow DENC, it should neither affirm nor reverse the lower court's holding on this issue, and instead instruct the lower court, after it finishes awarding fees for the period up to September 14, and determines whether post-judgment interest will be awarded, to evaluate the reasonableness of the offer in light of what is ultimately awarded.

VII. The Court Should Rehear the Offer of Judgment Issue.

First, because *Garrison v. Target Corp.*, 429 S.C. 324, 377, 838 S.E.2d 18, 46 (2020), on which the Panel bases its decision on the offer-of-judgment issue is currently pending in the Supreme Court on petition for writ of certiorari, if the Supreme Court reverses or modifies that opinion during the pendency of this petition, Appellants would ask that this Court reverse or modify its decision here.

Second, the panel does not directly address Appellants' argument that the phrase "verdict or determination" means just that, and that when the offer-of judgment-statute, Section 15-35-

400(B) of the South Carolina Code (Supp. 2020), states "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," it means exactly that, not "If an offer of judgment is not accepted and the offeror obtains *final judgment* at least as favorable as the rejected offer, the offeror shall be allowed to recover."

The opinion overlooks Appellants' argument that South Carolina law governing offers of judgment used to state that the offerer needed to obtain a more favorable "final judgment" in order to recover; that the law had so stated for more than a hundred years; and that because the legislature changed the wording to the present form, the implication is that the legislature meant to accomplish something by the change. If the Supreme Court has not ruled on *Garrison* by the time this appeal ends, Appellants would request that this Court rehear on these grounds.

CONCLUSION

For the reasons above stated, and such other grounds as may be apparent to the Court, Appellants respectfully ask that the Court rehear the decision in this case.

Respectfully submitted,

s/Brooks R. Fudenberg August 26, 2021

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