EXHIBIT 1

Proposed 2d amended petition

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5845

(S.C. Ct. App. Filed August 11, 2021)

Appellate Case No. 2017-000902

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

Petitioners,

v.

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

Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Pursuant to Rule 242, SCACR, undersigned counsel certify that a Petition for Rehearing was made and finally ruled on by the Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in holding that $46,515 is the maximum punitive award consistent with the Constitution on these facts?

Where Respondent Dealer fraudulently sold at an auction, without disclosure, a Honda "Civic" that was actually two half-Civics poorly welded together, and Respondent's senior management testified they had done nothing wrong, and that it was no concern of Respondent's whether the vehicle would be put on the street, did the panel err in failing to follow the instructions of the United States Supreme Court to consider whether Respondent's actions evinced an indifference to the health and safety of others?

Did the panel err in failing to follow the instructions of the United States Supreme Court to consider the potential harm created by Respondent's acts?

In comparing the punitive award to a thousand dollar penalty and trebled damages, but not to awards in any cases, did the panel contradict the teaching of this Court in *Austin v. Stokes-Craven Holding Corp.* that punitive awards should be compared to awards in factually-similar cases, and/or this Court's holding in *James v. Horace Mann Ins. Co.*, that penalties of $15,000 to $30,000 are too low to be proper comparisons for a punitive award?

Did the panel err in additional aspects of its treatment of the punitive award?

II. Did the Court of Appeals err in holding that Petitioners' rejection of an assumedly unreasonable settlement offer, followed by their declining to make a counter-offer, suffices to end Petitioners' statutory right to attorney fees for their counsels' work after the unreasonable offer?

Did the Court of Appeals err in holding that the United States Supreme Court's opinion in *Hensley v. Eckerhart* might allow the trial court to reduce fees awarded on an unfair trade practices claim on grounds of "limited success," when Petitioners will have attained all actual damages sought, and the maximum punitive damages allowed under law?

Did the panel err in holding, as an additional sustaining ground re Petitioners' final fee request, that fees for work designed to increase the award through amending the judgment are not allowed?

III. Did the Court of Appeals err in holding that offer of judgment benefits were unavailable to Petitioners, when they obtained a verdict at least as favorable as the rejected offer?

OVERVIEW

This petition centrally concerns issues of federal constitutional law on which the panel's opinion conflicts with decisions of the United States Supreme Court and of this Court. It also concerns a question of North Carolina law where the panel's opinion defies North Carolina precedent and common sense; and it concerns the panel's suggestion that the low amounts at stake in consumer protection cases suffice to limit fee awards, which conflicts with decisions of this Court, the United States Supreme Court, and the North Carolina Supreme Court.

The case concerns a Honda Civic that Respondent, a Honda franchise dealership, purchased from a consumer, inspected, put up on a rack, and certified as a Honda-Certified Used Car. It was actually two half-Civics previously wrecked and poorly welded together. Respondent fraudulently sold it to its first victim, another consumer, repeatedly representing it was 100% Honda-Certified, and that Respondent had subjected it to a 159-point inspection. When the first victim discovered the fraud and returned it, Respondent shipped it to a North Carolina auction that requires disclosure of structural damage, in a state whose law requires disclosure of structural damage, and failed to disclose the damage.

The questions of federal constitutional law concern whether $46,515 is the maximum punitive award permissible under these facts. The panel declined to consider whether the tortious conduct evinced "an indifference to or a reckless disregard of the health or safety of others," despite repeated instructions from the United States Supreme Court that courts must do so when considering a due process limit on punitive awards. The panel declined to consider the potential harm caused by Respondent's actions, again despite repeated instructions from that Court to do so. The panel declined to compare the punitive damages awarded here to damages in

factually-similar cases, despite this Court's instructions to do so. Instead, it compared the punitive award here to a penalty of $1,000 and treble damages under the UTPA, thereby conflicting with prior decisions of this Court and the intermediary court's own prior decisions.

The panel further found that Respondent may not have known the vehicle was wrecked and may not have known it was violating the law, thereby contradicting the jury's verdict and the trial judge's order, each of which found Respondent's violations to be willful, and the admission of Respondent's own trial counsel before the jury that Respondent knew of the damage when it sold the vehicle to Petitioners.

This petition also concerns two questions regarding attorney fees under the North Carolina UTPA. In one, the panel relies on its misreading of a federal case to stand for the proposition that UTPA awards may be reduced due to the low amounts at stake, thereby contradicting the Supreme Court of North Carolina on a matter of North Carolina law. In another, the panel holds that a failure of a plaintiff to respond more than once to an assumedly-unreasonable settlement offer suffices to terminate the accumulation of attorney fees after the date of the offer, which is something no North Carolina appellate court has ever held, and is contrary to North Carolina appellate opinions and to common sense.

STATEMENT OF THE CASE

Petitioners sued on January 17, 2013, alleging claims under South Carolina law against Respondent and against Nationwide Insurance Company. (R. p. 48-59). (The insurance company settled and was dismissed from the case. (R. p. 42)). Respondent moved to dismiss on grounds that North Carolina law rather than South Carolina law applied. (R. pp. 1181-83). Petitioners amended their complaint on May 9, 2013, to allege violations of North Carolina law rather than South Carolina law. (R. pp. 67-77). The amended complaint alleged breach of contract,

negligence, negligent misrepresentation, constructive fraud, fraud, and violation of the North Carolina Unfair Trade Practices Act ("UTPA"). (*Id*.)

Petitioners filed an offer of judgment in February of 2016 for $280,000. (R. pp. 1187-88). Respondent did not accept the offer.

A bifurcated trial was held from April 18 through April 22, 2016, in the Richland County Courthouse, the Honorable R. Ferrell Cothran, Jr., presiding. Four causes of action were presented to the jury, the others having been dismissed. These were breach of contract, negligent misrepresentation, fraud, and violation of the UTPA. The jury returned the full amount of actual damages requested, $6,645, on each cause of action. (R. pp. 43-44; 764, lines 4-5).

The jury then returned a punitive verdict in the amount of $2,381,888.00. (R. p. 47).

After extensive post-trial briefing (R. pp. 1277-2155), the judge issued three post-trial orders, dated December 2, 2016, March 16, 2017, and August 14, 2017. (R. pp. 1-34). Collectively, these orders reduced the punitive award to $46,155 on grounds that any larger award would be incompatible with due process (R. p. 23); awarded Petitioners attorney's fees in the amounts of $21,264 for work from June 29, 2011 through July 20, 2016, and $10,140 for work through September 14; held that no fees would accrue for work after September 14, 2016 (R. pp. 23, 29); required Petitioners to elect between their statutory fees and their reduced punitive award (R. p. 23); and denied offer of judgment benefits to Petitioners (*id*.).

The rationale for ending accumulation of fees on September 14, 2016, is that Respondent had made an offer to settle the case on that date for either $81,069 or $74,424. (R. pp. 27-28).

Petitioners timely served notice of appeal of the first two post-trial orders on April 11, 2017, and served notice of appeal of the August 14 final order on September 5, 2017. Their appeal asked that the punitive damage award be increased to the $500,000 level set by North

Carolina statutory law; that the attorney fees be increased and not be deemed to have ceased on September 14, 2016; that they not be required to elect between statutory fees and punitive damages; and that offer of judgment interest be awarded.

Oral argument was held. The panel's opinion issued on August 11, 2021 (Op. No. 5484). Petitioners filed a petition for rehearing and suggestion of rehearing en banc, which the Court of Appeals denied on October 26, 2021.

FACTS

Petitioners are two elderly gentlemen who operate a small used-car business in Gaffney, North Carolina, obtaining cars for friends and people at church, something to keep them occupied and let them feel they are contributing to society. They bought the car with the family of a 16-year-old girl in mind, who had said they wanted something safe and reliable for the girl to drive to school. (R. p. 595, line 25-p. 596, line 2). They sold it to the family. (R. p. 613, line 25-p. 614, line 12). When the fraud was discovered for the second time, they immediately refunded all the money the family had paid them; reimbursed them for the state registration fee the family had paid; and demanded that Respondent take back the vehicle and refund their money. (R. pp. 614-19).

Respondent's Manager took down their information, including the VIN of the front half of the car, and promised to get back to them. (*Id*.) Respondent never got back to them.

Respondent is a major Honda franchise dealership. (R. p. 900, line 22-p. 901, line 3). Respondent was selling 100 vehicles a year at that North Carolina auction (R. p. 360, lines 12-23), and had been doing so for years (R. p. 355, lines 22-25; p. 362, line 17-p. 363, line 1). Respondent was also buying cars through that auction. (R. p. 362, lines 17-23; p. 378, lines 14-15). This was the only auction Respondent was dealing with. (R. p. 378, lines 14-15).

North Carolina law requires disclosure if a car is reconstructed. (R. p. 936). It also requires disclosure when a vehicle has been damaged to an extent of more than 25% of its value. (*Id.*)

The auction rules also require disclosure. The auction has three "lights," green, yellow, and red, and they *all* require disclosure of structural damage. (R. p. 169, line 7-p. 170, line 1; pp. 1004-05).

It is an obvious inference that a major dealership selling hundreds of used cars in North Carolina and buying others is aware of the law.

Trial

Petitioners' expert presented compelling testimony that the car was so dangerous it should not be on the road. (R. p. 477, line 5-p. 517, line 16). Respondent's past and present senior management first testified they had not known of the damage (*see generally* R. pp. 342-453), and that they had done nothing wrong (e.g., R. p. 342, line 18-p. 343, line 11; p. 447, lines 24-25) until, faced with overwhelming evidence, Respondent's counsel admitted in closing they had known all along (R. p. 771, lines 18-23; p. 772, lines 7-8).

Petitioners sought $6,645 in actual damages on each of four causes of action. (R. p. 764, lines 4-5.) The jury found in their favor on each, and awarded the full $6,645 requested on each. (R. p. 42-43) (verdict form).

Included was a verdict for fraud. (R. p. 47).

Even after these verdicts, and the admission by counsel that Respondent had known about the damage, Respondent's Corporate Representative reiterated the next day, in the bifurcated punitive damages proceeding, that Respondent had done nothing wrong. He testified it was no concern of Respondent's that wrecked cars it sells without disclosure would be put back on the

road. (R p. 885, lines 12-20).

The jury awarded $2,381,888 in punitive damages. (R. p. 47). The jury clearly desired to punish this company as they awarded one year of its revenue. (R. p. 901, line 23–p. 902, line 1). (The company's net worth at the time was almost eleven million dollars. (R. p. 903, lines 1-4).)

Post-Trial Proceedings

North Carolina Law. At Respondent's insistence (R. pp. 67-77, 1181-85), the case was tried under North Carolina rather than South Carolina causes of action, and, again at Respondent's insistence (R. p. 579, line 6-p. 580, line 10) the trial judge applied North Carolina rather than South Carolina law of punitive damages.

Two aspects of North Carolina law are relevant. First, North Carolina, like South Carolina, has a statutory cap on punitive damages. The two laws are similar in many ways. The differences are, first, that N.C. G.S. § 1D-25 has a cap of three times the actual damages or $250,000, whichever is greater, and the cap is per plaintiff, *Rhyne v. K-Mart Corp.,* 594 S.E.2d 1, 20 (N.C. 2004), so in this case the combined cap would be $500,000, whereas S.C. Code Ann. § 15-32-530 allows for a $500,000 award for a single plaintiff; and the South Carolina statute allows for even larger awards for certain types of acts. The more important difference for present purposes is that, while South Carolina's law merely sets a ceiling, North Carolina's sets both a ceiling and a floor. "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*." N.C. G.S. § 1D-25 (emphasis added).

Second, North Carolina, like South Carolina, has an Unfair Trade Practices Act. The difference is that under South Carolina's UTPA, an award of attorney's fees is mandatory, and

treble damages apply only if the plaintiff proves the violation is willful, while under North Carolina's law, it is reversed: treble damages apply automatically, and attorney fees are to be awarded only if the plaintiff proves the violation was willful. *Compare* S.C. Code § 39-5-140(a) *with* N.C. G.S. § 75-16 (treble damages) and N.C. G.S. § 75-16.1 (attorney fees). Additionally, to be awarded attorney fees under North Carolina's statutes, a plaintiff must prove "there was an unwarranted refusal by [the non-prevailing] party to fully resolve the matter which constitutes the basis of such suit." N.C. G.S. § 75-16.1.

The Trial Court's Rulings

Punitive Damages. The trial court held that on these facts, the maximum punitive damages award consistent with due process was $46,515. (R. pp. 6-9, 23). This overrode the statutory mandate to enter awards in the amount of the cap. The trial court reduced the jury's verdict by 98%. The statute would have reduced the verdict by 79%. Put another way, the trial court left Petitioners with 1.95% of what the jury intended. The statute contemplated that Petitioners receive 21%.

Attorney Fees. The trial court found that Respondent's acts were willful and that there had been an unwarranted refusal to settle the claim before trial. "[T]he Court finds the prevailing party and willfulness elements are met." (R. p. 12.) "[T]he Court finds there was an unwarranted refusal to settle the entire claim prior to trial." (*Id*.) Yet the trial court awarded fees for only 54.525 hours (R. p. 17) for a case that spanned five years, required travel to Illinois to depose Respondent's first victim, travel to Charlotte to depose the auction, involved multiple pre-trial hearings, and a five-day trial, as well as extensive work on multiple post-trial motions from both sides, and a trip to Manning for a hearing on those motions. (The agreed-upon hourly rate was $390; the trial court awarded $21,264 in fees.) The vast majority of the 92% reduction from the

un-multiplied request of $258,180.00 was based on the idea that only UTPA work should be compensated. (R. pp. 16-17).

Election of Remedies. The trial court ordered Petitioners to elect between their UTPA claim, with its trebled damages and attorney's fees, totaling $41,199, or the fraud verdict, with its associated punitive damages, totaling $53,160. (R. pp. 20, 1731).

Offer of Judgment Interest. The trial judge declined to award Petitioners offer of judgment interest, on grounds the judgment entered by the court was less than Petitioners' pre-trial offer of judgment for $280,000, even if the jury's $2.38 million verdict was not. (R. p. 21).

The Trial Court also denied Respondent's motions for Judgment Notwithstanding the Verdict, for a New Trial, and for a New Trial Nisi Remittitur. (R. p. 23).

Later Orders.

Petitioners filed two later motions. First, in December of 2016, they moved to reconsider. (R. pp. 1884-97). The motion asked the court to reconsider its rulings on the election of remedies issue, the amount of punitive damages, offer of judgment interest, post-judgment interest, and the amount of attorney fees earned through July 20, 2016. It also requested an award of attorney fees for work performed after July 20. The order on that motion issued in March of 2017. (R. pp. 24-29). The order denied reconsideration of the issues ruled on in its prior order, other than post-judgment interest, which it adjusted, and it provided a fee award of $10,140 for work performed between July 21 and September 14. It reasoned that Mr. Moskos had spent excessive time on a counter-affidavit responding to an affidavit that Respondent had filed after its due date (R. pp. 26-27), that much of the time was spent on claims other than the UTPA claim (*id*.), and that a September 14, 2016, offer by Respondent to settle the case for either $81,069 or $74,424 (the offer contained conflicting figures) meant "there was not an

unwarranted refusal 'to fully resolve the matter which constitutes the basis of such suit'" (R. pp. 27-28) and therefore Petitioners could receive no award of fees after that date.

Finally, on April 3, 2017, Petitioners moved for supplemental fees for work performed between December 2016 and March 2017 (R. pp. 2058-64), and then served notice of appeal. Petitioners expected any substantive ruling on that motion to wait until after remand. They reasoned that by timely filing the motion, they would avoid any argument on remand that they had waited too long to seek these additional fees. Yet even after Petitioners informed the trial court of their view that the trial court lacked jurisdiction, given that the matter was under appeal, and that the purpose of the motion was simply to avoid any argument on remand that these fees were not timely requested (R. pp. 2093-94), the trial court issued an order (R. pp. 2151-56) stating it was "perplexed" as to why this motion was filed, given the previous ruling that fees stopped accruing on September 14, 2016 (R. p. 2152).

THE OPINION OF THE COURT OF APPEALS

A panel of the Court of Appeals issued its opinion August 11, 2021. (Op. No. 5845, 2021 WL 3520840). It agreed with Petitioners that election between the punitive damage remedy and the attorney's fees should not be required. It disagreed with Petitioners regarding punitive damages and offer of judgment interest. It agreed partially with Petitioners regarding attorney fees. The holdings are discussed below in the order in which the panel addressed each issue.

Punitive Damages.

The panel began its discussion of punitive damages by setting forth the three-factor test established by *BMW of N. Am., Inc. v. Gore.* Op. at 5 (citing *Gore*, 517 U.S. 559, 568, 574-75, (1996)). These factors are the degree of reprehensibility, the disparity between the punitive award and the actual or potential harm, and the difference between this remedy and the civil

penalties authorized or imposed in comparable cases. *Id.*

Reprehensibility

The panel began its discussion of the reprehensibility factor by stating the law governing this factor. "'We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; *the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others*. . .'" *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419 (2003)) (emphasis added).

However, the panel's analysis of the reprehensibility factor does not address whether repeatedly selling an unsafe car without disclosure, and claiming to have "no concern" about the impact on the motoring public, amounts to an indifference to the health or safety others. The opinion is silent on the question.

The panel next suggests that Respondent had not known the vehicle was wrecked and that there was not a "deliberate or willful" violation. *Id* at 6-7.

Disparity Between the Harm or Potential Harm and the Punitive Damages Award

In setting forth the governing law on this factor, the panel quotes *Gore*: courts are to consider "'the disparity between the harm *or potential harm* suffered by [the plaintiff] and his punitive damages award.'" *Id*. at 5 (emphasis added) (alteration in original). However, its discussion of this factor provided no analysis of, or even reference to, the potential for harm in this case. *Id.* at 7-8. Its section heading makes this clear: "B. Amount of Actual Harm v. Punitive Damages Amount." *Id.* at 7.

Comparable Cases

While the panel quotes *Gore* for the proposition that courts are to consider "'the difference between this remedy and the civil penalties authorized or imposed in comparable cases,'"

id. at 5 (quoting *Gore* at 574-75), the panel's analysis of this prong cites not a single case, *id*. at 8-9. Rather, the panel compares the punitive award to penalties peaking at $1,000, and to trebled damages under the unfair trade practices act.

Attorney Fees

The panel agreed with Petitioners that North Carolina law does not allow "apportioning" fees among causes of action that stem from a common nucleus of operative fact. *Id*. at 10-11. It also agreed with Petitioners that travel time should not be excluded. *Id*. at 12. It remanded for a re-determination of fees based on these holdings.

However, the panel affirmed the lower court's holding that fees stopped accruing on September 14, 2016 because of an offer made on that date. *Id*. at 11. The Court of Appeals did *not* find Respondent's offer to be reasonable. Relying on a federal court decision that had appeared after the briefs in the appeal were filed, *DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020), the panel held that courts may evaluate both parties' conduct during settlement negotiations when determining whether the defendant unreasonably refused to resolve the matter. *Id.* It held that Petitioners' disinclination to make a counter-offer doomed their entitlement to any award of fees beyond the date of Respondent's offer. *Id*.

In a footnote, the panel held, as an additional sustaining ground, that fees sought in Petitioners' final request could be denied because Petitioners were attempting increase the judgment, not to protect the judgment. *Id.* n.11.

The panel next held *Hensley v. Eckerhart*, 461 U.S. 424 (1983) to be the touchstone for all fee awards under North Carolina law. "In North Carolina cases discussing reasonable attorney's fees, no matter the outcome, the touchstone is *Hensley*." *Id*. at 12. It read *Hensley* as authorizing reduction in fee awards based on the degree of success enjoyed by the plaintiff, *id*. at 12-14, and

stated that on remand, "the circuit court may—or may not—reduce the remaining amount of requested fees . . . based on the success of the litigation." *Id*. at 14-15.

Election of Remedies

Citing *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 691 S.E.2d 135 (2010), and *United Laboratories, Inc. v. Kuykendall,* 437 S.E.2d 374 (N.C. 1993), in which the Supreme Courts of South Carolina and North Carolina, respectively, held that a plaintiff need not elect between punitive damages for fraud and statutory fees from another cause of action, the panel reversed the lower court and held that Petitioners need not elect. *Id*. at 15-17.

Offer of Judgment

The Court of Appeals affirmed the trial court's holding it is the post-trial judgment, not the actual verdict, which determines whether offer of judgment interest is to be awarded. *Id*. at 18-19. In so holding, it relied on its own opinion in *Garrison v. Target Corp*., 429 S.C. 324, 377, 838 S.E.2d 18, 46 (2020), a case on which this Court has granted certiorari, and for which oral argument was held on May 26, 2021.

The panel instructed the lower court to reconsider whether offer of judgment interest is to be awarded as the final judgment amount, after the attorney fees are adjusted, might be larger than the amount in Petitioners' offer of judgment. *Id*. at 19.

THE PETITION FOR REHEARING

Punitive Damages. Petitioning for rehearing, and suggesting rehearing *en banc,* Petitioners argued, among other things, that *Gore* required consideration of "whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others'" (Am. Pet. Reh'g & Suggest. of Reh'g en banc, hereinafter "Pet. Reh'g," pp. 16-17); and that the panel erred in failing to consider the potential harm created by Respondent's acts (*id*. at 18-19).

Petitioners further argued that in considering no comparable cases, the opinion contradicts the holding in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22,54, 691 S.E.2d 135, 152 (2004) that a court considering a punitive damages claim against a dealership for deceptively selling a wrecked vehicle is "compelled to review factually-similar cases," and the related holding that the proper comparison group for cases involving a deceptive sale by a dealership of a previously-wrecked vehicle are cases imposing punitive awards of $500,000 to one million dollars. (Pet Reh'g pp. 21-22.)

Petitioners additionally argued that in comparing the punitive award here to a penalty of $1,000 and to treble damages, the opinion conflicted with this Court's holding in *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006) (internal quotation marks omitted) that penalties of $15,000 to $30,000 "are set at such a low level, there is little basis for comparing it with any meaningful punitive damage award," as well as with the Court of Appeals' own similar holdings in *Duncan v. Ford Motor Co*., 385 S.C. 119, 147-48, 682 S.E.2d 877, 892 (Ct. App. 2009) and in *Collins Entm't. Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 141, 584 S.E.2d 120, 129 (Ct. App. 2003), and with the *Collins* court's holding that trebled UTPA damages are not an appropriate comparison to a punitive damages award. (Pet Reh'g pp. 20-21).

Petitioners also asked the Court of Appeals to reconsider its holdings that there was no evidence that Respondent knew of the damage to the car or of willful or intentional conduct, because the jury found intentional wrongdoing, the judge found willful wrongdoing, Defense counsel conceded to the jury that Respondent had known of the damage, because the evidence was massive (Pet. Reh'g pp. 9-15, 17), and to acknowledge that Respondent had violated North Carolina law, not merely the auction's rules (*Id*. pp. 12-13). They also asked the Court not to put

much weight on its observation that "no direct evidence established the harm . . . was intentional," as intent to defraud is rarely shown by direct evidence. (*Id*. p. 15).

Attorney's Fees. Petitioners asked the Court of Appeals to look more closely at *DENC, LLC v. Phila. Indem. Ins. Co*., 454 F. Supp. 3d 552 (M.D.N.C. 2020), the federal case on which the panel based its decision that fees stopped accruing in September of 2016. Petitioners pointed out that *DENC* requires a settlement offer from a defendant be reasonable if it is to impact plaintiff's entitlement to fees, and the offer here was not reasonable; that *DENC* deals with *pre*-trial offers, and lends no support to the strange contention that a *post*-trial offer can terminate the opposing party's claim to fees, a proposition for which neither Respondent nor the panel cited a single case. Petitioners also asked that because the court based its decision on *DENC*, it follow *DENC's* explanation that the reasonableness of a settlement offer must be determined in light of "what was ultimately awarded," 454 F. Supp. 3d at 562, and, at a minimum, direct the lower court to evaluate Respondent's 2016 offer in light of what is ultimately awarded. (Pet. Reh'g pp. 31-32).

Regarding the panel's discussion of the United States Supreme Court decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40, Petitioners pointed out both that *Hensley* is not the "touchstone" for North Carolina attorney fees determinations, and that *Hensley* did not stand for the proposition that the small amounts at stake in consumer litigation justify a reduction in fees. Rather, Petitioners argued, as the North Carolina Supreme Court made clear in *Marshall v. Miller*, 276 S.E.2d 397, 403-04 (N.C. 1981), the North Carolina unfair trade practices act anticipates "small dollar amounts" to be at stake, and awards fees

nevertheless. (Pet. Reh'g p. 27).[1]

Offer of Judgment. Petitioners pointed out that *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020), on which the panel based its decision on the offer-of-judgment issue, is pending in the Supreme Court on petition for writ of certiorari. Petitioners asked that, were this Court to rule in *Garrison* during the pendency of the petition for rehearing, the Court of Appeals revise its ruling accordingly. Petitioners also argued that the plain meaning of the term "verdict" in the offer-of-judgment statute, S.C. Code. Ann. § 15-35-400(b) ("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") is verdict, not final judgment; and that in reading the phrase as if it stated, "obtains *final judgment* at least as favorable as the rejected offer," the panel was re-instituting the prior law that the Legislature had changed. Before 2005, South Carolina law made the final judgment the determinative figure for deciding whether offer-of-judgment remedies applied. (Pet Reh'g p. 32).

The Court of Appeals denied the Petition for Rehearing by order dated October 26, 2021 and notified counsel on the same date that the request for en banc review was rejected.

ARGUMENT

Punitive Damages

The United States Supreme Court, in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), instructed courts considering a due process challenge to an award of punitive damages to consider "indifference to or reckless disregard for the health

[1] In a footnote, Petitioners also asked the panel to reconsider the additional sustaining ground that fees sought in Petitioners' final request could be denied because Petitioners were attempting to increase the judgment, not to protect the judgment. (Pet. Reh'g p. 31 n.6).

and safety of others" as an "aggravating factor" that raises the constitutional cap on the amount of an award. The Supreme Court reiterated, in S*tate Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585, "We have instructed courts to determine the reprehensibility of a defendant by considering whether: . . . the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others." Yet despite the massive evidence and Respondent's admission that it knew the car was two half-cars welded together, and the obvious indifference to the health and safety of others in selling this car without disclosure, and even explicit testimony from Respondent's top managers that the company was indifferent to the risk, e.g., R. p. 541, lines 3-22, the Panel simply refused to consider that risk. Although Petitioners emphasized the issue of indifference to health and safety in both their main and reply briefs, the opinion simply never addresses it.[2] (Br. of Appellant pp. 17-18, 26, 29-30; Reply Br. Heading D, p. 3; *see also* Pet. Reh'g pp. 15-17). A court considering an issue of federal constitutional law may not properly disregard United States Supreme Court instruction on the issue. Because the opinion conflicts with United States Supreme Court precedent on a substantial question of federal constitutional law, the Court should grant the writ.

The United States Supreme Court, in *Gore*, 517 U.S. at 575, further instructed courts considering the constitutionality of a punitive damages award to consider not merely the actual harm, but the "potential harm." It reiterated this, too, in *State Farm*: "[W]e instructed courts reviewing punitive damages to consider . . . (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." 538 U.S. at 418. Given that Respondent sold a dangerous car that should not be on the road the panel should have included

[2] More precisely, the operative portion of the opinion never mentions it. The panel does note the requirement where it sets forth the governing law, but never discusses its application to the present case.

the potential harm in its analysis. The panel again contradicted United States Supreme Court precedent by failing to consider the potential harm.[3] Because the opinion conflicts with United States Supreme Court precedent on a substantial question of federal constitutional law, the Court should grant the writ.

The opinion further contradicts the precedent of this Court and the Court of Appeals' own prior opinions, most notably in its discussion of comparable penalties. *See Gore*, 517 U.S. at 575 ("the difference between this remedy and the civil penalties authorized or imposed in comparable cases"); *State Farm*, 538 U.S. at 419 ("the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.") The panel holds that comparable penalties range from a low of a $1,000 fine to a maximum of three times the actual damages under the relevant Unfair Trade Practices Act. Op. at 8-9. But this Court has explained that "statutory penalties [set] at such a low level [provide] 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) (internal quotation marks omitted) (holding fines of $15,000 to $30,000 to be too low to serve as comparisons for punitive awards). The panel's holding on this issue also contradicts the Court of Appeals' own opinions in *Duncan v. Ford Motor Co*., 385 S.C. 119, 147-48, 682 S.E.2d 877, 892 (Ct. App. 2009) and *Collins Entm't. Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 142, 584 S.E.2d 120, 129 (Ct. App. 2003) (holding that low statutory penalties do not properly serve as comparisons to meaningful punitive damages awards). The panel's holding that trebled damages under an unfair trade practices claim are appropriate comparable penalties contradicts the Court of

[3] Here, too, the panel notes the Supreme Court instruction in its setting forth of the law. But then it ignores the instruction.

Appeals' own prior holding in *Collins Entm't. Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 142-43, 584 S.E.2d 120, 129–30 (Ct. App. 2003). *Collins Entm't Corp.* held that trebled damages under a UTPA claim are inappropriate as a comparison to punitive damages, because the trebled damages are not for comparable misconduct.[4]

The panel's opinion regarding this issue further conflicts, perhaps most notably, with this Court's opinion in *Austin v. Stokes-Craven Holding Corp.,* 387 S.C. 22, 691 S.E.2d 135 (2010). *Austin*, like the present case, concerned the fraudulent sale of a previously-wrecked vehicle without disclosure of the wreck damage. This Court explained, "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*." *Id.* at 54, 691 S.E.2d at 152 (emphasis added). Yet the panel considered no factually-similar cases. It reviewed no cases in discussing this issue.

This Court in *Austin, id.* at 54, 691 S.E.2d at 152, showed what factually-similar cases are:

> 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

[4] *Collins Entm't. Corp. v. Coats & Coats Rental Amusement* held,

> 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.

355 S.C. 125, 142-43, 584 S.E.2d 120, 129–30 (Ct. App. 2003), *aff'd*, 368 S.C. 410, 629 S.E.2d 635 (2006) (footnotes omitted).

> 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).

Comparable cases are cases involving deceptive sales of vehicles, and range from five hundred thousand to one million dollars. On this basis alone, the panel should have restored the punitive award to the $500,000 allowed under North Carolina's statutory cap.

Because the panel's opinion conflicts with repeated United States Supreme Court instructions on substantial questions of federal constitutional law, and with this Court's decisions on substantial questions of federal constitutional law, and even with the intermediate court's own opinions on substantial questions of federal constitutional law, this Court should grant certiorari and reverse the holdings on punitive damages. When this Court accepts jurisdiction, it should also reverse on grounds that the panel's discussion of reprehensibility ignores Respondent's violation of state law, and its evidentiary finding that there was no evidence that Respondent knew of the damage to the car and acted willfully to deceive contradicts the jury's findings, the trial judge's findings, the Respondent's admission, and the overwhelming evidence, and is therefore an abuse of discretion and/or contrary to law.

Attorney Fees

The September 14 Issue. Must a party counter-offer an unreasonable offer from the opposing side? The panel implicitly holds that it must.

Under the North Carolina fee-shifting statute, N.C. G.S. 75-16.1, a plaintiff who proves an unfair trade practices claim must also show that "there was an unwarranted refusal by

[defendant] to fully resolve the matter" to receive a fee award. Here, the trial court found there *was* such an unwarranted refusal. (R. p. 12). That should have settled the matter.

However, the panel affirmed the trial judge's ruling that a post-verdict offer made by Respondent sufficed to terminate the accrual of fees. Despite Petitioners' arguments in their briefs and petition for rehearing that the offer was unreasonable in amount (Br. of Appellant p. 42; Reply Br. of Appellant p. 14, Pet. Reh'g pp. 29-30), the panel declined to justify the offer on grounds of reasonableness or to find it to be unreasonable. It did not matter whether the offer was reasonable, the panel held. After Petitioners rejected the offer, Respondent "twice asked" for a counteroffer. Petitioners did not respond. Op. at 11. On that basis, the panel affirms the lower court. *Id*.

However, there is no duty to respond to an unreasonable offer, and the panel cites no such authority.

The panel further cites no North Carolina state or federal case stating that a post-trial offer can stem the accumulation of fees. North Carolina appellate cases hold the reverse. E.g., *Cotton v. Stanley*, 380 S.E.2d 419, 422 (N.C. Ct. App. 1989) ("Since the trial court had already found in the previous order that defendants' conduct was willful 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."). *United Labs. v. Kuykendall,* 403 S.E. 2d 104, 110-12 (N.C. Ct. App. 1991) (similar).

The federal case on which the panel relies, *DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020) requires a *pre*-trial offer, which is not present here; a *reasonable* offer, which is not present here;[5] and then requires the offer be evaluated in light of

[5] Before the offer at issue here was made, the Judge's clerk had emailed that Appellants could

the ultimate award—which at present is unknown in this case. "[C]ourts 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). The panel's misreading of *DENC* does not support its "overturning" of North Carolina appellate opinions on a matter of North Carolina law.

For this reason, the Court should grant the petition.[6]

The *Hensley* Issue. "In North Carolina cases discussing reasonable attorney's fees, no matter the outcome, the touchstone is *Hensley*," the panel writes, Op. at 12 (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). This is simply not true, if Casetext and FastCase are to be trusted. These services agree that *Hensley* has been cited only four times in North Carolina

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elect an award of $53,160 (R. p. 1731). Using the higher of Respondent's two conflicting figures, 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 between July 20 and September 14, 2016, and post-judgment interest.) That is less than three cents on the dollar. A request that Appellants sacrifice 97% of their reasonably-expected gains is not a reasonable offer.

[6] The Court should also reverse the additional sustaining ground that fees can be denied because counsel were working to enlarge the judgment. (This was an effort in which they succeeded, as the panel reversed the requirement to elect between punitive damages and fees, and directed the lower court to increase the fee award.) That ground is contrary to the very purpose of statutes that shift fees in favor of prevailing plaintiffs. It makes no sense to say that counsel are entitled to fees for obtaining a judgment, but not to fees for increasing the judgment. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 201,750 S.E.2d 78 (2013) (*Austin II*) (directing that "appellate and post-appellate fees should be awarded" under an analogous statute); *Renaissance Enters. v. Ocean Resort*s, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) (finding "no reason" that attorney fees for supplemental proceedings would be excluded), *rev'd in part on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999). Counsel here worked to correct errors of law that the trial court made at the urging of the opposing party. This work should not be excluded from a fee award.

appellate cases in the almost four decades since it was decided. The panel relies on *DENC* for this proposition, *id*. n.12, but misreads *DENC*. That court stated that federal courts "routinely" cite *Hensley*, while North Carolina courts have merely applied *Hensley* "in a number of cases." 454 F. Supp. 3d at 563. It then listed the four cases, which are the same four cases found by counsel's citators.

Having erroneously determined that *Hensley* is the touchstone for North Carolina cases, the panel then misreads *Hensley*. *Hensley* did state that the degree of success is important. But *Hensley* was talking about a plaintiff who brings several unrelated claims, and succeeds on only one claim; or who brings a claim for both injunctive and monetary relief, and gains only one or the other; or who seeks a million dollars in damages, and receives only a thousand dollars. *Hensley* was not talking about a party who asks for a small amount, and receives all of it. The panel's misreading of the United States Supreme Court's opinion on a matter of federal law should be corrected.

Petitioners here requested $6,645 in actual damages, and were awarded all of what they asked. They asked for punitive damages, and—whether this Court reverses or affirms on that issue—will receive the maximum award allowed by the Constitution or the North Carolina statutory cap. They achieved all potential success. It makes no sense to suggest that their fee award should be reduced for "limited success."

The Court can correct this error without analyzing *Hensley*. The North Carolina statute was created to encourage plaintiffs to litigate these cases precisely when the fees are out of proportion to the stakes. *Marshall v. Miller,* 276 S.E.2d 397, 403 (N.C. 1981) (emphasis added),

> In an area of law such as this, we would be remiss if we failed to consider also the *overall purpose* for which this statute was enacted. . . . *so that local business interests could not proceed with impunity, . . . [g]iven the small dollar amounts often involved in such suits[.]*

The Supreme Court of the United States and this Court have held similarly in interpreting analogous statutes. **"**Congress enacted *§ 1988 specifically to enable plaintiffs* to enforce the civil rights laws even *where the amount of damages at stake would not otherwise make it feasible for them to do so*[.]" *Riverside v. Rivera*, 477 U.S. 561, 577 (1986) (plurality) (rejecting the proposition that *Hensley* allows fees to be reduced due to the small amounts at stake) (emphasis added); *id*. at 586 (Powell, J., concurring) (same); "[A]ttorney's fees are intended to make such claims economically viable for private citizens," *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 56, 691 S.E.2d 135, 153 (2010); "Because costly attorney fees may deter private citizens from bringing a claim under the Dealer's Act, a decision in favor of Austin facilitates the purpose of the Act which is to provide buyers a private right of action against dealers who engage in deceptive practices," *id*. at 57, 691 S.E.2d at 153.

Because the panel's holding contradicts the Supreme Court of the United States on a matter of federal law, and contradicts the Supreme Court of North Carolina on a matter of North Carolina law, the Court should grant certiorari and correct the errors.

Offer of Judgment

The plain meaning of "verdict" is a decision rendered by a jury. The plain meaning of the offer-of-judgment statute, S.C. Code. Ann. § 15-35-400(b), that "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" is that where plaintiff receives a verdict greater than the amount of his offer, the plaintiff is entitled to recover reimbursement of administrative, filing, and court costs as stated in subparagraph 1. He need not obtain a "final judgment" more favorable than the offer. He is similarly entitled to recover interest under subparagraph 2.

Before 2004, South Carolina law required one to obtain a "judgment" more favorable than the offer, to obtain offer-of-judgment benefits. Rule 68, SCRCP (1994 Am.) ("If the complaining party fails to obtain a judgment or a more favorable judgment he cannot recover.") In enacting the current statute, the Legislature changed this. It makes no sense to say that what the Legislature meant was "obtains a more favorable judgment" than the offer, when the Legislature explicitly replaced that wording with the current language.

The statute should be enforced as written. *State v. Corey D.,* 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000) (citing *Keyserling v. Beasley*, 322 S.C. 83, 86,470 S.E.2d 100, 101 (1996)) (holding that the language of statutes is controlling).

And if the Court's forthcoming decision in *Garrison* sheds light on the offer of judgment issue here, Petitioners would ask the Court to consider applying that decision.

Conclusion

On a substantial question of federal constitutional law, the panel's opinion contradicts the directives of the United States Supreme Court in *Gore* and *State Farm,* and the instructions of this Court in *Austin*. It then overrides the North Carolina Legislature and that state's appellate courts on a matter of state law, based on a federal decision that the panel clearly misreads. On the basis of that federal decision, the panel attempts to apply the United States Supreme Court's decision in *Hensley*, which it then misreads, and attempts to apply its misreading in a manner that conflicts with the opinion of the Supreme Court of North Carolina on a matter of state law.

It also reads the offer of judgment statute to impermissibly reimpose the prior law which the Legislature has changed.

For the reasons discussed above, Petitioners request that the Court grant the writ and thereby allow fuller briefing on these issues.

Respectfully submitted,

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