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. 2021-001388

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.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The petition argues that the opinion of the Court of Appeals conflicts with numerous decisions of this Court and of the federal Supreme Court. Except for the offer of judgment issue, Midlands scarcely attempts to defend the panel's reasoning. Instead, it provides arguments that, if they had any merit, would be reasons to grant certiorari, correct the errors identified in the petition, and then affirm as modified. Because Midland's arguments lack merit, the Court should grant certiorari, correct the errors, and reverse.

I. FEDERAL DUE PROCESS ISSUES IN PUNITIVE DAMAGES

This case concerns a Honda franchise dealership that intentionally put a dangerous, poorly-welded Frankencar into the stream of commerce, failed in its legal duty to disclose, and stated it was no concern of the dealership if the car was sold to a consumer and put on the road. Midlands does not have a problem putting people in danger. (E.g., R. p. 541, lines 2-22; p. 885, lines 3-22; *see also id*. p. 388, lines 2-7; p. 391, lines 19-21).

Midlands does not dispute that the panel failed to consider Midlands' reckless indifference to the community's health and safety, the potential harm its actions created, and the amounts of punitive awards in comparable cases; nor that the panel improperly compared the award to a one-thousand dollar penalty. Instead, Midlands presents arguments that are either irrelevant or, at best, grounds to grant certiorari and affirm as modified.

A. Indifference to Health and Safety. The petition for writ of certiorari shows the Court of Appeals failed to consider whether Midlands' actions evinced an indifference to the health and safety of others, as instructed by *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 576, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Midlands argues, "The Court of Appeals appropriately considered the *Gore* factors" (Ret. at 9), but simply ignores the point: the reckless

indifference to the health and safety of others. The concept is not addressed. And while magic words may not be required, it is telling that the word "safety" does not appear in the return—nor do "indifference" nor "reckless"—as if Midlands is wishing the safety issue would simply go away.

B. Potential Harm. The petition demonstrates the Court of Appeals further erred in failing to consider the potential harm caused by Midlands' actions, against the clear instructions of *Gore* and *State Farm.* Midlands argues that Petitioners are wrong—but points to nothing indicating the Court of Appeals did consider the potential harm. (In fact, the word "potential" appears in the return only once—in its counter-statement of the case). (Ret. p. 8.)

C. Comparable Cases. The petition shows the Court of Appeals further erred in comparing the punitive award to fines of a thousand dollars and trebled UTPA damages, and not to any comparable cases, contradicting this Court's holdings in *James v. Horace Mann Ins. Co*., 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006) that such penalties are too low to serve as comparisons for punitive awards, and in *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22,54, 691 S.E.2d 135, 152 (2004), that a court considering punitive damages against a franchise car dealership for deceptively selling a previously-wrecked vehicle is "compelled" to compare the punitive award to other cases awarding punitive damages against a franchise car dealership for deceptively selling a previously-wrecked vehicle. Midlands simply repeats the thousand-dollar fine and trebled damages[1]—and complains that Petitioners did "not make any specific arguments as to the civil penalties considered by the trial court or the Court of Appeals." Ret. p. 13. It's true. Petitioners did not analyze the penalties this Court has instructed are not to be considered—other than to state they are not be considered. Midlands does not, because it cannot,

[1] Technically, Midlands cites a different statute than did the Court of Appeals, one that apparently has a limit of $1,500 rather than $1,000. *Compare* Ret. p. 14 *with* Op. p. 8.

point to a punitive award in a single comparable case cited by the Court of Appeals in its analysis of "civil penalties authorized or imposed in comparable cases."

In sum, Midlands—like the Court of Appeals—does not consider crucial factors that the United States Supreme Court has twice instructed courts to consider, and contradicts holdings of this Court that punitive awards are not properly compared to penalties so low and that punitive damages awards should instead be compared to awards in factually similar cases.

Failure to follow the Supreme Courts of the United States and of South Carolina on important matters of federal constitutional law cries out for certiorari review.

D. Midlands' Arguments Are Irrelevant to the Current Questions or Actually Support a Grant of Certiorari.

If Midlands' return does not attempt to show that the Court of Appeals considered the disregard for health and safety, the potential harm, or awards in similar cases, what does it argue? It has a procedural argument addressed in Part IV below and some purportedly substantive arguments addressed here.

a) Midlands does not dispute that it violated "a North Carolina statutory disclosure requirement." (Ret. p. 7.) Midlands makes no attempt to argue it was unaware of law of the state where it was selling 100 vehicles a year, but asks the Court to deny certiorari on grounds it was unaware the auction rules also required disclosure. (E.g., Ret. pp. 8 & n.8, 11). The argument makes no sense. Even if Midlands was truly and innocently unaware of the auction's requirement, [2] the panel should have considered the reckless indifference to the health and safety

[2] And it is not true that Midlands was innocently unaware of the auction's disclosure requirements. Midlands' contention is that "new" rules established a few months before the sale to Petitioners established disclosure as an auction requirement. It is undisputed that a revised set of rules were established in 2010, a few months before that sale. But that is all that Midlands' references to the Record show. None of Midlands' references establish that the disclosure

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of others shown by Midlands' violation of state law.[3]

b) Midland's desperation is shown by presenting N.C.G.S. § 1D-15(c) as prohibiting enhancement of the punitive award based on vicarious liability for ADESA having signed a form (*id*. p. 11 n.9). Midlands omits the next sentence of the statute, which makes clear that punitive damages are appropriate if the managers of the business "participated" in the conduct, as did Midlands' then-General and Used Car Managers, or "condoned" the conduct, as did Midland's current General Manager at trial (R. p. 543, lines 17-20; p. 545, lines 9-10). Even if the claim had merit, it would not excuse the failures to consider the reckless indifference, the potential harm, and comparable cases.

c) Even were Midlands correct that *Phillip Morris, USA v. Williams*, 549 U.S. 346, 353 (2007) exempts its sale to Ecklund from the analysis (Ret. p. 10), the appellate panel should have considered Midlands' reckless disregard of the health and safety of the people in the community and the potential harm created by Midlands' sale to Petitioners. And Midlands' argument is not correct: *Phillip Morris* states that actions such as the sale to Ecklund are properly considered in the reprehensibility prong. "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id*. at 355 (emphasis added). Thus, *Phillip Morris* does not exclude the sale to Ecklund from the analysis, and even if it did, the questions of disregard of health

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requirements were a "new" addition in 2010.

Nor does it make common sense to think that complying with North Carolina law would be a new requirement.

[3] In fact, the panel should have done so regardless of any rule or statute explicitly requiring disclosure. A franchise dealership does not need to know it is violating the law to know that selling this car without disclosure of its true state risks serious injury to the public. That is common sense. And as noted in the petition, Midlands' officers testified that they were completely indifferent to the harm they were potentially creating.

and safety and potential harm would remain.

d) Similarly for the return's harping on a supposed failure of Petitioners to adequately inspect the vehicle. (E.g. pp. 9, 10-11, 15). Even were Petitioners and Respondents both at fault, it would not allow reduction of the punitive award without considering the reckless indifference showed by Respondent or the potential harm it caused. Moreover, whether Petitioners properly inspected the vehicle was a jury issue emphatically decided in Petitioners' favor. (R. p. 681 lines 6-14) (Midlands' counsel stating this is a jury issue); (p. 854, line 10-16) (jury instructions); (p. 855, lines 8-15) (same); (p. 44) (verdict). Midlands' argument was not adopted by the Court of Appeals, so if this claim had any merit, it would be grounds to grant the petition, correct the constitutional errors, and affirm as modified.

e) Midlands' statement on page 9 that "An ADESA representative then completed and signed the North Carolina damage disclosure form without consulting Midlands," **misleads in three ways**.

First, because ADESA signed the form pursuant to a power of attorney signed by Midlands.

Second, because the way it works, the seller is supposed to inform the auction of anything that must be disclosed. The auction does not call each seller about each vehicle and say, "You wouldn't be selling a car with frame damage, would you?" "How about unibody damage?" "Not two half-cars welded together?"

Third, because Midlands' then-Used Car Manager admits that he spoke to the auction about this car (R. p. 385, lines 16-18), that he did so during the negotiations with Petitioners (R. p. 386, line 23-p. 387, line 22), and that "It was [his] choice as to whether to tell the auction about the prior wreck damage" (R. p. 386, lines 13-15).

Midlands similarly argues the **trial court** cited *Austin* for the proposition that the ratio of

punitive damages to **actual** damages there was "high" (Ret. p. 12). Even were the claim not misleading it would have no bearing on whether the appellate court should have considered the reckless disregard and **potential** harm. (The return also omits that on the same page it cites, *Austin* considered the potential harm. 691 S.E.2d at 151.) If this claim had any merit, it would be grounds to grant the petition, correct the constitutional errors, and affirm as modified.

In short, Midlands relies on meritless arguments that would not excuse the failures to follow the Supreme Courts' instructions even if the arguments had merit, and which the Court of Appeals declined to adopt. If these arguments had any worth, they would be grounds to grant certiorari, and after briefing on the issues, affirm as modified.

f) Finally, the return provides two consecutive sentences that prove Petitioners' point. "The Civic underwent a standard inspection for certification. (R. at 393:10-21). Midlands did not discover the prior damage in this process as far as it could ascertain from its records. (*Id.;* R. 1024-25)." (Ret. p. 7). The first sentence is misleading—it was a 159-point inspection that included putting the vehicle up on a rack, which makes the damage obvious to anyone underneath. The reason for the second sentence demonstrates a reckless indifference to the public's health and safety. Why are Midlands' records lacking on this issue? Midlands claims it was because the mechanic who inspected the vehicle died in 2011 before this suit was filed, so they could not ask him. (R. p. 771, lines 7-12) (Midlands' closing argument). When the first victim returned the Civic in 2010 and said it was two half-cars clipped together, Midlands did not ask the mechanic who certified the car how he missed it. When Petitioners called four months later and said it was two half-cars clipped together, Midlands did not ask the mechanic how he missed it. It took a lawsuit to make Midlands want to find out why it was repeatedly putting a dangerous vehicle on the street. Otherwise, Midlands had no interest in discovering

why it was endangering the public. This evinces a wanton and reckless disregard for the health and safety of the public, the very point the United States Supreme Court has directed courts to include in their analysis to protect the public.

Midlands admits it knew the nature of the Frankencar when it sold the vehicle to Petitioners. Midlands made no attempt to determine how it missed the damage until it got sued. Midlands stated it was no concern to Midlands whether dangerous cars it sells without disclosure are placed on the road. (E.g., R. p. 541, lines 2-22; p. 885, lines 3-22; *see also id*. p. 388, lines 2-7; p. 391, lines 19-21). The case cries out for analysis of the potential harm and the deliberate indifference to the public's health and safety. None of Midlands' arguments would justify ignoring the established constitutional law on these issues, and would not do so even were the arguments otherwise accurate.

II. ATTORNEY FEES

Midlands continues its head-in-the-sand approach in discussing attorney fees. It never even mentions *DENC*, the sole case on which the panel relied for its holding that fees stopped accruing in September of 2016. Nor does it directly address the concern with the panel's analysis of *Hensley*.

A. The *DENC* Issue

1. The sole case on which the panel relied for its holding that fees stopped accruing on September 16, 2016, is *DENC, LLC v. Phila. Indem. Ins. Co.,* 454 F. Supp. 3d 552 (M.D.N.C. 2020). The return avoids all mention of the case.

Instead, Midlands cites *Williamson v. Middleton*, 374 S.C. 419, 427, 649 S.E.2d 57, 61 (Ct. App. 2008), *rev'd on other grounds,* 383 S.C. 490, 681 S.E.2d. 867 (2009) (italics in original) (bolding added), for the proposition that "[A]n appellate court will not reverse an award

of attorney's fees unless **it is based on an error of law or** is without *any evidentiary support*," (Ret. p. 18), but overlooks that the panel's holding here is both based on an error law and without any evidentiary support.

"Midlands has not located any North Carolina case addressing the issue of whether continued efforts to settle post-trial can cut off a continuing entitlement to fees," Midlands writes (p. 17), but apparently the Court of Appeals thinks it at least found a federal case so stating: *DENC*. But as discussed in the petition (p. 22), *DENC* requires the offer be evaluated in light of what is ultimately awarded. 454 F. Supp. 3d at 562 (stating that a court should evaluate "whether any settlement offers made were reasonable relative to what was ultimately awarded to the prevailing party.") The Court should at a minimum instruct the trial court on remand to re-evaluate the eighty-one thousand dollar offer in light of what is ultimately awarded to Petitioners.[4]

2. Implicitly recognizing the panel's rationale is not justifiable, Midlands presents a series of arguments that were not accepted by the Court of Appeals. Primarily, the return assumes or argues that the eighty-one thousand dollar offer was reasonable—a question the Court of Appeals declined to address. A "plaintiff has an incentive to accept a **reasonable** offer," Midlands states on page 18 (emphasis added); *see also id.* p. 2 (emphasis added) (referencing "subsequent **reasonable** settlement efforts"). In short, Midlands recognizes that cutting off fees after the date of an offer cannot be justified unless the offer itself was reasonable in amount. The Court should grant certiorari, correct this error, and instruct the Court of Appeals

[4] Nor does Midlands attempt to support the Court of Appeal's implicit holding that under *DENC*, whether the offer was reasonable is irrelevant. *See* petition pp 12, 15, 21-22 (discussing the panel's refusal to deem the offer reasonable).

to consider whether the offer was reasonable or instruct the trial court to revisit the question after the other awards are determined ("relative to what is ultimately awarded)," per *DENC*.[5]

Second, Midlands argues attorneys' fee awards under the NCUPTA are reserved for "extreme cases." (Ret. p. 16). But if deceptively selling a dangerous vehicle without disclosure, and then turning around and re-selling it without disclosure, in violation of statutory law, is not an "extreme case" for UTPA purposes, it is difficult to conceive what is. Finally, and similarly, for Midlands' claim that trial courts have discretion to deny attorney fees–they may do so only in non-extreme cases. *See Llera v. Sec. Credit Sys., Inc.*, 93 F. Supp. 2d 674, 680 (W.D.N.C. 2000)).

There is a reason the Court of Appeals did not rely on any of these arguments. The arguments are unpersuasive.

B. The *Hensley* Issue

Midlands asks this Court to overlook the panel's misreading of *Hensley v. Eckerhart,* 461

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[5] To the extent, if any, that the Court may wish to consider the reasonableness of the offer at this stage, it was obvious at the time Midlands made the offer that appellate courts would reverse the 90% reduction of the fee request that was based on "apportioning" fees. The trial court had issued a directive that Petitioners were to receive an amount in fees ($21,264) that equaled 40% of the other recovery the trial court authorized at the same time. It did so via an email from the trial judge's clerk (R. p. 1731) that also instructed Midlands to come up with a rationale, *id*. Because North Carolina law does not allow statutory fee awards to be based on a percentage-of-the-recovery, Midlands constructed the convoluted scheme in which the fees were first reduced by 67% due to "apportionment" and then the remaining 25% reduced by three-quarters, again mostly due to "apportionment." But Midlands boxed itself in, because North Carolina law does not allow for such apportionment. The panel recognized this, opinion at 10.

There is a related point here. Midlands knew its 90% reduction for apportionment would not stand. It then attempted to in effect lock in that incorrect ruling by offering an amount that made sense only if one were sure the fee award would not be increased on appeal. Midlands in effect attempted to make Petitioners' counsel choose between an almost complete lack of compensation for their work until the date of the offer, on the one hand, and working without compensation to get that compensation, on the other. That is improper. The court should not let this attempt become an actuality.

U.S. 424 (1983), Ret. p. 13, on grounds it is a North Carolina matter.[6] But *Hensley* is a **federal** opinion concerning **federal** law. To the extent the panel's opinion indicates a reduction in the fee award may be appropriate here due to the "limited success" of obtaining all the actual damages sought and the maximum punitive damages allowed by law, the panel's opinion conflicts with **federal** Supreme Court holdings rejecting that argument. *See, e.g., Riverside v. Rivera,* 477 U.S. 561, 577-78 (1986) (plurality) (rejecting that reading of *Hensley*); *id.* at 585 (Powell, J., concurring) (similar). It also conflicts with holdings of this Court and of the North Carolina Supreme Court, as discussed in the petition at 23-24.

This is actually very simple, because *Hensley* states that reduction of fees based on the degree of success are appropriate only where a plaintiff failed to obtain "essentially complete relief." 461 U.S. at 431. Here, Petitioners received all the actual damages they asked for, and will ultimately receive the maximum punitive award the law allows. It is not as if the jury could have awarded more on these facts, and declined to do so. While the return argues that *Hensley* allows reductions from fee requests based on the degree of success obtained by a plaintiff, which is an undisputed proposition, it simply avoids discussing whether *Hensley* allows a UTPA claimant who has obtained complete relief to suffer a fee reduction on grounds the amounts at stake are small. Such a position would undo fee-shifting statutes.

Because the errors here are obvious, and Midlands does not attempt to justify them, the

[6] Midlands insinuates that the Court should simply walk away from its fraudulent conduct as it is not important to our people. Midlands ignores its own statements that it uses the Charlotte auction to sell cars to others. That it buys cars from North Carolina. Charlotte is on the border with Rock Hill and Fort Mill. People in North Carolina buy cars in South Carolina and vice-versa. South Carolina buyers and dealers go to Charlotte to buy from auctions and resell in South Carolina. This will continue to be a problem as the population is exploding in the Rock Hill, Fort Mill, and Indian Land areas. Consumer protection laws include provisions for costs and fees to encourage qualified attorneys to take cases with lower values, especially cases like this one, with great potential to deter significant harm to the public. The Court should grant the petition to protect the public.

Court should grant certiorari.

III. OFFER OF JUDGMENT

Midlands concedes this issue at the outset of its discussion: "[Petitioners] sought interest and costs under S.C. Code Ann. § 15-35-400. **This statute permits a party who makes an unaccepted offer of judgment and obtains a verdict or determination at least as favorable as the rejected offer to recover interest and costs**." (Ret. p. 19) (emphasis added). That's what happened here. Petitioners made an unaccepted offer and obtained a verdict at least as favorable as the rejected offer. They are to recover interest and costs.

Nevertheless, Midlands argues the statute "contemplates comparison of the offer amount to the 'verdict' *or* the 'determination.'" (*Id*., p. 20) (emphasis in original). To the extent the contention may have merit, it should be considered by this Court on certiorari review: What factors should a trial court consider in choosing between the "verdict" or the "determination"? What is the difference between the "verdict" and the "determination"? How are both different from a "judgment"?

IV. RESPONDENT'S GAMESMANSHIP

Because it has nothing worthwhile to argue regarding the substance of the petition, Midlands attempts a series of procedural moves that amount to gamesmanship.

First, Midlands imagines a holding that it claims was not appealed. Midlands writes (Ret. p. 5 n.4), "With respect to the timeliness of O&W's request for fees from May 2, 2016 through July 20, 2016, O&W did not appeal the trial court's finding that the request for fees in that period was not timely." There was no such ruling. The Order that Midlands drafted and the Judge signed on the Motion to Reconsider referred to additional time timesheets for May 2 through July 20, 2016, that Petitioners had filed to supplement their previously-filed and previously-ruled

on time for that period. (R. p. 25). The purpose of those additional sheets was to demonstrate to the judge that the amount of time spent by Petitioners' counsel on work not related to the UTPA claim was minimal. The goal was to persuade the Court to reconsider the massive 90% cut of time that was stated to be of time not related to the UTPA claim. The trial court declined to consider these timesheets. But Midlands **misleads** in writing as if the fee request for May 2 through July 20, 2016, was not ruled on. It was ruled on in the original order on pre-trial motions. (R. pp. 14, 17).

Petitioners previously refuted this claim in their reply brief (p. 11 & n.11) so it is surprising that Midlands would again make the same misleading claim, especially as the Court of Appeals declined to base any part of its decision on that claim.

Next, Midlands maintains that because the Court of Appeals received the petition for rehearing three minutes past the date stated by the rule—i.e., at 12:03 a.m.—that Court lacked jurisdiction to consider the petition for rehearing, and therefore this Court lacks jurisdiction to consider the current petition. (Ret. p. 6 n.6). However, Appellate Court Rule 221 is not jurisdictional. The appellate court gained jurisdiction with service of the Notice of Appeal, and retains jurisdiction until the remittitur issues. *See, e.g.,* Toal et al., APPELLATE PRACTICE IN SOUTH CAROLINA (3rd ed. 2016) at 292, 393.

Midlands next argues an additional sustaining ground the Court of Appeals put in a footnote cannot be considered by this Court because it was raised in the amended petition for rehearing rather than in the petition and Petitioners did not file a motion to amend. (Ret. p. 7 n.7). However, as shown on C-Track, the amended petition was accepted by that Court. Moreover, the undersigned represents he was in communication with the Office of the Clerk of the Court of Appeals, and followed its directions. Those directions were to file the amended

petition without a motion to amend, and that were the Court to consider a motion to amend to be required, it would inform the parties.

Midlands then claims Petitioners "did not appeal this alternate ruling of the trial court nor did [Petitioners] include the ruling in its petition for rehearing or its Petition. As such, Rule 242(d)(2), SCACR bars further consideration of attorneys' fees in this period as a matter of procedure." (Ret. p. 18 n.12). None of that is true. Petitioners did appeal this ruling. It is on page 45 of their final brief to the Court of Appeals. They did include it in the amended petition for rehearing that was accepted by that Court. (Pet. Reh. p. 31 n.6) (challenging the additional sustaining ground in the opinion's footnote). This Court is not barred from considering it.

Conclusion

This is not a case where one business short-changed another regarding the amount of the product. This is not a case where one business fraudulently sold the other a shipment of counterfeit Levi jeans. Nor is this a case where a dealership fraudulently claimed the paint on a car was of special quality, or even a case where a dealership changed an odometer reading. This is a case about endangering anyone who bought the car, their passengers, other motorists, and even bystanders who might have been injured had this car come apart upon impact. Midlands risked lives by knowingly selling a dangerous instrumentality with a hidden danger.

Midlands' arguments regarding punitive damages and attorney fees are disguised arguments that the Court of Appeals was right for the wrong reasons. The punitive damage award was properly eviscerated, Midlands implies, even if the Court of Appeals did not consider Midlands' reckless disregard for the health and safety of others. Similarly for the failure to consider the potential harm. Similarly for the failure to consider the amount of a single punitive award on similar facts. None of Midlands' arguments are a reason to deny certiorari. Rather, if

Midlands' arguments had any merit—which they do not—they would be reasons for this Court to grant certiorari, correct the failures of the Court of Appeals to follow the directives of the United States Supreme Court and of this Court, and then to affirm as modified.

Because Midlands cannot show the panel considered the required factors regarding the punitive award, cannot show that any case except *DENC* arguably supports the termination of fees after September 2016 or that the panel properly followed *DENC*, and cannot show that reading *Hensley* to allow reduction of fees in UTPA cases due to the low amounts sought in those cases does not conflict with decisions of the United States Supreme Court, and suggests affirming the panel's ruling on offer of judgment relief via an argument that makes Supreme Court guidance even more relevant, the Court should grant the petition and allow briefing,

Respectfully submitted,

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