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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 13-CP-40-0319

Daniel O’Shields and Roger W. Whitley
A Partnership d/b/a O&W Cars Appellants,

v.

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

**AMENDED RETURN IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI¹**

HAYNSWORTH SINKLER BOYD, P.A.

James Y. Becker (SC Bar No. 64991)
H. Clayton Walker, Jr. (SC Bar No. 5779)
P.O. Box 11889
Columbia, SC 29211-1189
(803) 779-3080
jbecker@hsblawfirm.com
cwalker@hsblawfirm.com

Sarah P. Spruill (SC Bar No. 68337)
P.O. Box 2048
Greenville, SC 29602
(864) 240-3200
sspruill@hsblawfirm.com

Attorneys for Respondent

¹ Amended pursuant to this Court’s order dated February 3, 2022.

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly affirm the trial court's due process analysis and reduction of the jury's punitive damages award to a 7:1 ratio based on its analysis of the factors set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)?
2. Did the Court of Appeals correctly determine that the trial court was within its discretion in finding that attorney's fees would no longer accrue after September 14, 2016 for purposes of an award under the North Carolina Unfair Trade Practices Act?
3. Did the Court of Appeals correctly remand the attorney's fees issue to the trial court for additional consideration of the degree of success obtained?
4. Did the Court of Appeals correctly determine that any consideration of entitlement to offer of judgment interest should be based on the amount of the judgment?

INTRODUCTION

This case and this appeal involve a contractual dispute between two car dealers relating to a single transaction to sell a car for \$5,200 in 2010. The trial court understood what was at issue and noted during the trial, “I mean this is a Magistrate Court case you understand. The jurisdiction’s under the Six Thousand Dollars.” (R. at 695:18-20).

The trial court and the Court of Appeals reviewed this case through that lens in performing a due process review of the punitive damages in this case. Both the trial court and the Court of Appeals considered the appropriate factors and determined a 7:1 ratio of punitive to actual damages was appropriate.

What is really driving the Petition is the desire of Daniel O’Shields and Roger W. Whitley d/b/a O&W Cars² (“O&W”) to extract a huge attorney’s fee award in this case under a North Carolina statute, notwithstanding the repeated efforts to settle by PSC Automotive Group d/b/a Midlands Honda (“Midlands”). The trial court saw through this and expressed its frustration with O&W’s counsel as follows, “construing [N.C.G.S.] § 75:16-1 to require supplemental awards of attorney’s fees in the presence of subsequent reasonable settlement efforts by a defendant would permit a plaintiff who was successful at trial to use post-trial motions and appeals as a veritable attorney’s fee printing press.” (R. at 31). The Court of Appeals found that the trial court’s ruling that attorney’s fees would no longer accrue after September 14, 2016 did not amount to an abuse of discretion.

² O&W is a used car dealership in Shelby, North Carolina owned by O’Shields and Whitley as a general partnership. (R. at 588:8-23). The contract at issue was between Midlands and O&W. (R. at 1013-14). As reflected in the trial transcript, O&W only sought one recovery in this action. (See e.g., R. at 289:24-290:6, 291:18-292:1; 750:22-23, 753:6-9, 766:19-21).

The Petition does not present any novel question of South Carolina law. There was no dissent from the Court of Appeals. There is no conflict with prior South Carolina appellate decisions. There is no controversial, substantial constitutional issue that is directly involved. And the Petition does not present a federal question. In short, the Petition does not satisfy any of the factors set forth in Rule 242, SCACR, and it should be denied.

COUNTER-STATEMENT OF THE CASE³

O&W filed this action on January 17, 2013 against Midlands and Nationwide Mutual Insurance Company (“Nationwide”), alleging claims stemming from a sale between two car dealerships of a used Honda Civic (the “Civic”) through the ADESA automobile auction (“ADESA”) in Charlotte, North Carolina on April 1, 2010. (R. at 48-59). The original complaint included the following causes of action: (1) breach of contract; (2) negligence; (3) negligent misrepresentation; (4) constructive fraud; (5) fraud; (6) South Carolina Dealer’s Act; and (7) South Carolina Unfair Trade Practices Act (“SCUTPA”). (*Id.*). O&W amended the complaint on May 9, 2013 to remove the South Carolina statutory causes of action and to add a claim under the North Carolina Unfair Trade Practices Act (“NCUTPA”) against both defendants. (R. at 67-77). O&W amended the complaint again at trial to remove Nationwide as a defendant and to remove a claim for constructive fraud. (R. at 41, 92-100, 468:10-18).

This matter was tried before a jury from April 18-22, 2016. Midlands admitted liability on the breach of contract claim. (R. at 685:12-14). The trial court found the economic loss rule barred the negligence claim. (R. at 709:11-14). The jury rendered a verdict of \$6,650 in actual damages on the following causes of action: (1) breach of contract; (2) negligent misrepresentation; (3) NCUTPA; and (4) fraud. (R. at 43-46). The jury also returned a verdict of \$2,381,888.00 in

³ Midlands incorporates its Respondent’s brief in full by reference.

punitive damages on the fraud cause of action. (R. at 47). The trial court granted the parties ten days to make any post-trial motions. (R. at 935:4-9).

O&W filed a motion to treble the verdict, for attorney's fees, for offer of judgment interest, and for prejudgment interest. (R. at 1301-02). Midlands filed motions for judgment notwithstanding the verdict, or, in the alternative, a new trial, or a new trial nisi remittitur, to require election of remedies, to enforce the North Carolina punitive damages cap, and for setoff or recoupment. (R. at 1277-1300). The trial court issued a written order addressing the post-trial motions on November 28, 2016. (R. at 1-23). That order included the trial court's due process review of the punitive damages award as required by N.C.G.S. § 1D-50 and its decision on O&W's attorney's fee request.

By motions dated December 15, 2016, O&W moved for supplemental attorney's fees incurred after July 20, 2017 and asked the trial court to reconsider its November 28, 2016 order. Midlands submitted a memorandum in response to O&W's motions, which, among other things, provided additional information about its efforts to "fully resolve the matter" following the trial court's August 29 election instructions and argued that there was not an "unwarranted refusal to settle" after September 14 because Midlands had offered to pay "a sum reflecting actual damages plus the trial court's award of both punitive damages and attorney's fees for a total of \$81,069[.]"⁴ (R. at 1999-2010).

The trial court resolved both motions by order dated February 27, 2017. (R. at 24-29). In that order, the trial court corrected the interest award, clarified that it had considered all of the previously requested fees in making its earlier rulings, addressed O&W's supplemental attorney's

⁴ Due to a math error, this figure actually represents more than the amount indicated in the trial court's August 29 email with its preliminary rulings.

fee motion, and directed that the Clerk of Court enter judgment as set forth in the order. With respect to the supplemental fee request, the trial court broke its ruling down as follows: (1) an additional \$7,020 representing 50% of the time claimed between July 21, 2016 through July 27, 2016, (2) an additional \$3,120 for the period between July 28, 2016 and September 13, 2016, reflecting the trial court's view that much of that time was spent drafting a largely improper affidavit of counsel, and (3) a finding that no additional fees were appropriate after September 14, 2016 based on O&W's settlement efforts.

O&W again moved for supplemental fees on March 30, 2017. (R. at 2058-82). A notice of appeal followed on April 11, 2017. (R. at 2086). After receiving an email from the trial court indicating it intended to deny the motion, O&W submitted an additional memorandum on June 28, 2017. (R. at 2087, 2093-148). The trial court issued an order denying the supplemental fee motion on August 10, 2017. (R. at 30-34). In that order, the trial court expressed its frustration with O&W's counsel, particularly in light of the trial court's earlier ruling that fees were not recoverable after September 14, 2016. (R. at 31). O&W also appealed this order. (R. at 2158-59).

On appeal, O&W challenged the reduction in punitive damages, the amount of the attorney's fee award, the trial court's decision as to the election of remedies, and the denial of offer of judgment interest.⁵ The Court of Appeals issued a published opinion on August 11, 2021 ("Opinion"). The Court of Appeals affirmed the trial court's reduction of the punitive damages award based on a review of the factors set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). With respect to the attorney's fee award, the Court of Appeals made the following rulings and remanded the matter:

⁵ 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. As a result, that finding is now law of the case.

1. Reversing and remanding the trial court's apportionment of fees between the NCUTPA claim and the fraud claim;
2. Affirming the trial court's determination that fees accrued after September 14, 2016 be excluded from the calculation of any attorney's fee award on two grounds: (1) that there was no unwarranted refusal to settle after this date for purposes of N.C.G.S. § 75-16.1, and (2) finding that time accrued after this date was no longer expended to "protect the judgment";
3. Reversing the trial court's exclusion of travel hours from the award; and
4. Affirming the trial court's application of a percentage reduction to effectuate a reasonable attorney's fee award and remanding the issue for further review by the trial court.

The Court of Appeals also ruled that O&W should not have been required to elect between punitive damages and attorney's fees. Lastly, the Court of Appeals found that the issue of offer of judgment interest should be based on the final post-trial award following remand.⁶

O&W filed an untimely petition for rehearing on August 27, 2021.⁷ In that petition, O&W raised the following grounds: (1) that the Opinion erred in not applying the North Carolina cap on punitive damages; (2) that the Opinion erred in its analysis of "willfulness" for purposes of the punitive damages review; (3) that the Opinion erred in its analysis of "reprehensibility;" (4) that the Panel erred in speculating about the prior condition of the vehicle; (5) that the Opinion failed to consider the potential harm; (6) that the Opinion did not correctly consider penalties in other cases; (7) that the Opinion erred in finding that attorney's fees could be reduced based on lack of success; (8) that the Opinion erred in affirming the trial court's ruling that there is no entitlement to attorney's fees accruing after September 14, 2016 on the grounds that there was only an

⁶ As part of its continuing efforts to resolve this matter in its entirety, Midlands did not cross-appeal, nor did it file a petition for rehearing or seek certiorari in this matter.

⁷ O&W's petition for rehearing was not "actually received" by the Court of Appeals until August 27, 2021, sixteen days after the Court issued the Opinion. As such, it was not timely. Rule 221(a), SCRCF. As a result, this Petition is improper. Rule 242, SCACR. The Petition may and should be dismissed for this reason.

“unreasonable post-trial offer, rather than a reasonable pre-trial offer;”⁸ and (9) that the Opinion erred in treating the offer of judgment issue based on the final, post-trial judgment rather than the jury’s verdict. The Court of Appeals denied the petition without requesting a return. This Petition followed.

COUNTER-STATEMENT OF FACTS

This case arises from a business dispute between two car dealerships— Midlands, which sold the Civic through ADESA, and O&W, which purchased the Civic at the wholesale auction under a red warning light for \$5,200 on April 1, 2010. (R. at 92-100 (¶¶ 1-6 and 25), 1014). The alleged misconduct involved a violation of ADESA’s rules and a North Carolina statutory disclosure requirement.

I. Prior History of the Civic.

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

When Midlands acquired the Civic in 2008, it had a clean title. (R. at 382:10-14). 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). Midlands later sold the Civic to a buyer. (R. at 312:10-13). The buyer returned the Civic after he learned that the Civic was a “clipped” car, in other words, a car that consisted of two cars that had been welded together. (R. at 116:17-117:3, 120:7-123:23, 131:2-20, 136:2-5).

⁸ There is no mention in the petition for rehearing of the Opinion’s alternate sustaining ground for this cut-off date for accrual of attorney’s fees. O&W did later file an amended petition for rehearing that included a footnote 6 on this point, but it did not seek leave to amend from the Court of Appeals. The order denying the petition for rehearing makes no mention of an amended petition.

II. Midlands sends the Civic to ADESA to be sold as a red light sale.

Only dealerships may buy or sell through ADESA. (R. at 145:2-19). ADESA adopted a new set of rules in January 2010, four months before the sale of the Civic. (R. at 996-1010, 408:24-409:3, 635:6-21). The 2010 rules did not require disclosure of wreck damage if a vehicle was sold under a red light. (R. at 996-1010). The 2010 rules did, however, contain a new requirement that unibody damage, such as a clipped car, be disclosed even if a vehicle was sold under a red light. (R. at 162:7-10, 293:20-294:2, 996-1010).

Midlands did not receive written notice that the rules had changed as required by ADESA's Terms and Conditions. (R. at 994-95). No evidence was introduced at trial that ADESA mailed the 2010 rules to Midlands, O&W, or any other dealer, or that ADESA posted any notices of the rule change at the auction or on its website. As a result, Midlands was unaware of this rule change. (R. at 397:8-22, 408:13-409:16, 434:3-16).

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

Brent Ferrell, the used car manager at Midlands, testified that he was never personally informed that the Civic was a clipped car, and that he did not know the Civic was a clipped car when he sent it to ADESA. (R. at 369:22-370:3, 404:20-405:11). He was instructed to wholesale the vehicle "under a red light." (R. at 377:19-378:6, 404:20-405:11).⁹ The Civic had visible wreck damage that was not corrected prior to the ADESA auction. (R. at 557:2-10). In the automobile industry, sale under a red light is "as is" and is a warning that something is wrong with the vehicle and that the buyer should beware when purchasing it. (R. at 355:10-15, 397:15-22, 1014). In

⁹ Ferrell testified that he did not know about the then-recent change to the ADESA rules and thought he was following the rules by selling the Civic under a red warning light. (R. at 395:16-19; 397:8-22; 409:6-16).

addition, ADESA's rules required a buyer to inspect a vehicle before purchasing. (R. at 630:13-631:9, 996-1010 (¶¶ 3(d) and 9(a)).

The Civic was not sold during the auction. (R. at 598:10-14). Instead, Whitley approached ADESA about the Civic after the car failed to sell. (R. at 598:10-600:7). Whitley had noticed the vehicle was damaged. (R. at 597:14-16). ADESA contacted Midlands, and the parties ultimately agreed on a price of \$5,200. (R. at 599:16-23). Whitley and ADESA filled out the contract of sale for the Civic. (R. at 1013-14). Midlands was not involved in this process and did not sign the contract. (*Id.*). An ADESA representative then completed and signed the North Carolina damage disclosure form without consulting Midlands. (R. at 313:5-13, 411: 8-18, 936-37).

ARGUMENT

I. The Court of Appeals appropriately considered the *Gore* factors, especially in light of the trial court's order.

This is a commercial case, not a personal injury action. It is a dispute between two car dealers over the sale of a \$5,200 used car. The jury determined that O&W's actual damages totaled \$6,650 and then awarded \$2,381,888.00 in punitive damages on the fraud cause of action. *This award is 358 times the actual damages award.* A punitive damages award of this size does not comport with due process, and the trial court was correct in reducing the award to \$46,515, a 7:1 ratio. The Court of Appeals correctly affirmed the trial court's ruling.

There are constitutional limits on the amount of punitive damage awards. Punitive damages must bear a reasonable relationship to compensatory damages. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996) (“[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.”). In *Gore*, the Supreme Court set forth guideposts for determining the constitutionality of a punitive damages award: (1) reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered

and the punitive damages award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Id.* at 575; *see also Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587-89, 686 S.E.2d 176, 185-86 (2009). O&W disagrees with the Court of Appeals as to each of these elements. It does not, however, disagree that the *Gore* factors apply.

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

As set forth in the decisions of the trial court and the Court of Appeals and as more fully briefed by Midlands in its Respondent’s Brief, this is a basic punitive damages analysis in a commercial case. No new law has been made and no precedent has been ignored. As a result, there is no basis for granting further review on this issue pursuant to Rule 242, SCACR.

A. Reprehensibility.

O&W again seeks to focus this analysis away from the transaction between O&W and Midlands. The Civic was sold under a red light with visible wreck damage. ADESA’s rules

required O&W to carefully inspect the Civic. Finally, as a motor vehicle dealer which made repairs to the Civic, O&W was required by North Carolina law to inspect the Civic for defects which might make it a menace to those who might use the vehicle or come in contact with the vehicle. *Stilley v. Automobile Enterprises of High Point, Inc.*, 284 S.E.2d 684, 688 (N.C. Ct. App. 1981). Had O&W conducted its own inspection of the Civic, as it was required to do, the prior repairs to the Civic would have been discovered. As a result, there was little risk of serious harm to O&W.

This is not a case of a deliberate false statement, but rather a non-disclosure. The United States Supreme Court has stated that while suppression of a material fact can support tort liability and even a modest punitive damages award, this conduct is less reprehensible than a deliberate false statement, particularly where, as here, there is a good-faith basis for believing no duty to disclose existed, and the fact that wreck damage to the vehicle was visible and known to O&W. *Gore*, 517 U.S. at 580. O&W argued that ADESA's rules required Midlands to disclose unibody damage and it failed to do so. However, O&W presented no evidence that Midlands was aware that ADESA had changed its rules to require disclosure of unibody damage even when a vehicle was sold under a red light.¹⁰

In addition, this case involves the sale of one car. There is no evidence in the record that the facts relating to the sale of the Civic to O&W were anything other than an isolated incident. The prior sale of the Civic did not involve ADESA, auction rules, or North Carolina statutory disclosure forms. There is also no evidence Midlands knew of the prior damage to the Civic in

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

the earlier sale. There has been no judicial determination of wrongdoing of any kind in connection with the earlier sale of the Civic. As the United States Supreme Court cautioned, “[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

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

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

Yet, there are key differences. For example, in *Austin*, the sale was to a consumer who intended to use the vehicle as his primary means of transportation. The sale here was between two car dealerships and the car was sold “as is” with obvious wreck damage. In addition, *Austin* included evidence that the dealer forged the plaintiff’s signature on a buyer’s guide. *Id.* There is no similar evidence of additional fraudulent or reprehensible conduct here. Given these differences, while the Court concludes the conduct in this case is somewhat reprehensible, it also concludes that the degree of reprehensibility exhibited here does not rise to the level exhibited in *Austin*.

(R. at 7). Although the Court of Appeals did not include the same analysis of *Austin*, it affirmed the trial court's ruling that "the reprehensibility of Midlands' conduct is less than that required for such a large punitive award."

B. Disparity between the harm suffered and the punitive damages award.

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

By way of further analogy to *Austin*, if an 8.21:1 ratio is "high" in a case which involved worse conduct in a consumer transaction as discussed above, then a similar ratio would be "high" in a transaction between sophisticated parties, particularly where the purchasing dealer chose not to inspect a vehicle being sold under a red light warning. The trial court therefore found a ratio of 7:1 represented the outside limits of due process in this case. The Court of Appeals agreed with the trial court's assessment after distinguishing numerous North Carolina cases with more egregious facts for which higher ratios were approved. Again, the Opinion does not ignore any issue with respect to the possibility of harm but it does view the case through the appropriate lens of a commercial transaction between two businesses.

C. The difference between the punitive damages award and civil penalties authorized or imposed in comparable cases.

O&W does not make any specific arguments as to the civil penalties considered by the trial court or the Court of Appeals. Instead, it cites to other statutes and cases. The trial court's

references related to the specific conduct at issue in this case, and are therefore, the appropriate statutes to guide this analysis. The Court of Appeals followed the trial court's lead.

North Carolina's damage disclosure statute requires that a transferor of a motor vehicle disclose whether the vehicle has been reconstructed. N.C.G.S. § 20.71-4. It also provides that a violation may be redressed by a civil action under N.C.G.S. § 20-348. *Id.* This section authorizes recovery of "[t]hree times the amount of actual damages sustained or one thousand five hundred dollars (\$1,500), whichever is greater."¹¹ The maximum recovery for a violation of the NCUTPA is treble damages. N.C.G.S. § 75-16. Thus, the jury's punitive damages award vastly exceeded any comparable civil penalty, and the trial court was correct in finding that this factor supported a lower limit for purposes of the due process analysis. As discussed above, the trial court performed a detailed review of the analysis in *Austin* and set a ratio consistent with that ruling and its full *Gore* review. The Court of Appeals affirmed that assessment.

As shown in the record, the trial court performed a full *Gore* analysis and the Court of Appeals considered each of the *Gore* factors in affirming the ruling from the trial court reducing the punitive damages award to reflect a 7:1 ratio. Accordingly, this ruling does not merit further consideration by this Court.

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

O&W places great weight on N.C.G.S. § 1D-25, which caps punitive damages in North Carolina at three times actual damages or \$250,000, whichever is greater. It argues that the existence of the punitive damages cap somehow satisfies the constitutional due process analysis

¹¹ Violation of the damage disclosure statute is also a class 2 misdemeanor. To the extent criminal penalties are relevant in this analysis, a class 2 misdemeanor carries a maximum fine of \$1,000. N.C.G.S. § 15A-1340.23(b).

presented above. This argument improperly conflates the constitutionality of the punitive damages cap with the due process review of a punitive damages award. The application of the cap is separate and apart from the due process analysis presented above. *See Rhyne v. K-Mart Corp.*, 562 S.E.2d 82, 93 (N.C. Ct. App. 2002), *aff'd*, 594 S.E.2d 1 (N.C. 2004) (applying statute to reduce punitive award and then applying due process analysis required by *Gore*); *Everhart v. O'Charley's, Inc.*, 683 S.E.2d 728, 740 (N.C. Ct. App. 2009) (considering whether punitive award satisfied due process even after reduction to statutory limit).¹²

II. No further review is warranted as to the portion of the Opinion addressing attorney's fees to be awarded pursuant to the NCUTPA.

The Court of Appeals remanded the attorney's fee determination in this matter with the following instructions:

To summarize, we remand the issue of attorney's fees to the circuit court. (1) On remand, the circuit court should not seek to apportion requested fees between the fraud and the NCUTPA claims. (2) The circuit court may exclude fees incurred after the date of the September 2016 settlement offer. (3) The circuit court should eliminate any redundant fees, improper cost, and paralegal fees as it had in the previous award. However, the court should not exclude fees for travel. (4) Finally, the circuit court may—or may not—reduce the remaining amount of requested fees by a percentage it finds is appropriate to reflect reasonable attorney's fees based on the success of the litigation. This percentage may be impacted by the decision of the court regarding the election of remedies, which will be addressed in the next section.

(numbering added). O&W's Petition is limited to items 2 and 4.

¹² In the event the Court determines that the statutory cap found in N.C.G.S. § 1D-25 applies notwithstanding the due process analysis, O&W's recovery would be limited to one cap (\$250,000). There is only one real plaintiff. Daniel O'Shields and Roger Whitley are partners in O&W, the buyer of the Civic. O&W repeatedly admitted at trial that it was only seeking one recovery. (*See e.g.*, R. at 289:24-290:6, 291:18-292:1 (Plaintiff's Opening); 750:22-23, 753:6-9, 766:19-21 (Plaintiff's Closing)).

A. The Court of Appeals correctly affirmed the trial court’s discretionary ruling that there was no further entitlement to an attorney’s fee award pursuant to N.C.G.S. § 75-16.1 after September 14, 2021.

The trial court declined to award any fees after September 14, 2016 for three reasons: (1) there was no longer an unwarranted refusal to settle after that date; (2) the trial court in its discretion did not find a fee was appropriate after that date; and (3) attorney’s fees incurred after that date were not incurred to protect the judgment. (R. at 30-34).¹³ The Court of Appeals expressly affirmed the trial court’s ruling as to the settlement negotiations and found that the ruling with respect to protection of the judgment was an alternate sustaining ground in footnote 11 of its Opinion.

The determination of the amount of attorney’s fees awarded pursuant to a statute is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Blumberg v. Nealco*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). “[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*.” *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) (emphasis in original).

Here, the statute at issue is not a South Carolina statute, and as a result, no further review is warranted by this Court. Moreover, the ruling was within the trial court’s discretion and the Court of Appeals correctly found no abuse of that discretion.

¹³ O&W does not include the second basis for the trial court’s ruling, discretion, in its Petition. Nor was it included in the petition for rehearing before the Court of Appeals. Nor was it addressed in O&W’s brief before the Court of Appeals aside from one conclusory sentence on page 45. As such, Rule 242(d)(2), SCACR bars further consideration of attorney’s fees in this period as a matter of procedure, and the two issue rule provides an additional basis for affirming the August 10, 2017 order as a matter of law. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

1. The Court of Appeals correctly ruled that the trial court was within its discretion in finding that there was not an unwarranted refusal by Midlands to fully resolve this matter after September 14, 2016.

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

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

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

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

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

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

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

The construction urged by O&W runs counter to these goals and gives a plaintiff a motive to reject settlement. If, as O&W contends, no post-trial settlement activities may be considered, then a plaintiff who obtains an initial award of fees under the NCUTPA may then simply ignore a defendant's settlement offers as was the case here. It would allow a plaintiff to accrue huge

additional attorney's fee awards, and would require appellate courts to address disputes that would otherwise be settled. Given these reasons and the limited applicability of this North Carolina statute in South Carolina, this issue does not warrant further review by this Court.

2. The Court of Appeals correctly ruled that the trial court was within its discretion in finding that O&W could not recover fees after September 14, 2016 because those fees were not incurred to protect O&W's status as a prevailing party.

Under the NCUTPA, a trial court may award attorney's fees for post-trial or appellate work by a prevailing party on an unfair trade practices claim where such work is expended in an "effort to protect the judgment." *See Faucette v. Carmel Road, LLC*, 775 S.E.2d 316, 326 (N.C.App. 2015); *Cotton v. Stanley*, 380 S.E.2d 419, 422 (N.C.App. 1989) ("[f]ees are authorized for the prevailing party and may be awarded for all time, including appeal, *reasonably expended in obtaining or sustaining the status of prevailing party.*") (emphasis added). After September 14, 2016, there were no pending motions by Midlands and Midlands did not cross-appeal; thus, O&W's prevailing party status for purposes of the NCUTPA claim was not in jeopardy. Thus, the work done after that date was not to protect the judgment under the NCUTPA. As such, the trial court was within its discretion in declining to award attorney's fees after that date and the Court of Appeals correctly found that this ruling presents an alternate sustaining ground.¹⁴

¹⁴ The preservation of this argument is questionable at best. The discussion in O&W's brief before the Court of Appeals is limited to one paragraph on page 45. It is not separately set out as an issue on appeal. As such, it should be deemed conclusory and abandoned. *See South Carolina Dep't of Soc. Servs. v. Sims*, 359 S.C. 601, 606, 598 S.E.2d 303, 306 (Ct. App. 2004) (conclusory nature of arguments and lack of supporting authority could lead to finding that issues on appeal have been abandoned); *Hunt v. South Carolina Forestry Comm'n*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal). In addition, this issue was not addressed in the petition for rehearing, and was only added with the filing of an amended petition for rehearing. As such, it was not timely presented to the Court of Appeals and is not properly before this Court per Rule 242(d)(2), SCACR.

B. No further review of the attorney’s fees analysis is warranted given the limited applicability of that analysis in this state.

O&W also contends that the Court of Appeals gave undue weight to and misread *Hensley v. Eckerhart*, 461 U.S. 424 (1983). However, the Opinion only cites *Hensley* for the unremarkable proposition that in determining attorney’s fees, “the most critical factor is the degree of success obtained.” *Id.* at 436. In furtherance of that goal and as quoted in the Opinion, a fee award may be adjusted downward in the trial court’s discretion based on an analysis of the following: (1) did the plaintiff fail to prevail on other claims and (2) “did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?” This is consistent with North Carolina and Fourth Circuit law. *See Okwara v. Dillard Dep’t Stores, Inc.*, 525 S.E.2d 481, 486–87 (N.C. Ct. App. 2000) (finding determination as to whether the fee should be reduced is “left largely to the discretion of the trial judge, who has ‘intimate knowledge’ of the facts and circumstances of the case.”); *Johnson v. City of Aiken*, 278 F.3d 333, 336-37 (4th Cir. 2002).

Stated differently, trial courts retain the authority to adjust attorney’s fees awards to ensure that such awards are reasonable in relation to the results obtained. Thus, the Court of Appeals correctly directed the trial court on remand to consider “success of the litigation” in determining a reasonable attorney’s fee, and that the trial court “may—or may not—reduce the remaining amount of the requested fees by a percentage it finds appropriate.” This ruling is consistent with state and federal law and does not warrant further review by this Court.

III. The Court of Appeals correctly determined that entitlement to offer of judgment interest should be assessed based on the judgment to be entered on remand.

O&W sought interest and costs under S.C. Code Ann. § 15-35-400. This statute permits a party who makes an unaccepted offer of judgment and obtains a verdict or determination at least as favorable as the rejected offer to recover interest and costs. S.C. Code Ann. § 15-35-400(B).

Conversely, a party who does not obtain a verdict or determination at least as favorable as the rejected offer is not entitled to such an award. *See id.*

The trial court here determined that no award could be made because the actual judgment amount of \$43,721.45 fell far below O&W's \$280,000 offer of judgment. (R. at 21). The Court of Appeals found that the actual judgment amount is the proper focus, but remanded the question based on its other rulings. O&W seeks review by this Court as to whether the focus is on the verdict or the judgment ultimately entered.

As an initial matter, this Court has already granted certiorari to address this issue in another case. *Garrison v. Target Corp.*, 429 S.C. 324, 377, 838 S.E.2d 18, 46 (Ct. App. 2020) (cert. granted October 19, 2020). Moreover, on the merits, O&W's argument ignores the actual text of § 15-35-400(B), which provides in pertinent part:

If any offer of judgment is not accepted and the offeror obtains a *verdict or determination* at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of *the verdict or award* from date of the offer; or (3) if the offeror is a defendant, a reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer.

(emphasis added). The statute does not limit comparison of the offer to the "verdict." It contemplates comparison of the offer amount to the "verdict" *or* the "determination." It also uses the terms "verdict" and "award" interchangeably. The statute's use of the terms "determination" and "award" indicates that offer of judgment amount should be compared to the amount of the final determination or award. As a result, the Court of Appeals correctly decided that the applicable comparison is between the offer and the final post-trial award.

CONCLUSION

O&W has failed to present any argument that implicates the considerations listed in Rule 242(b), SCACR. The Opinion of the Court of Appeals is fully consistent with binding precedent and does not present any question of exceptional importance, especially given the application of North Carolina law and the factual peculiarities of this case. Therefore, the Petition must be denied or, alternatively, dismissed.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Sarah P. Spruill

James Y. Becker (SC Bar No. 64991)
H. Clayton Walker, Jr. (SC Bar No. 5779)
P.O. Box 11889
Columbia, SC 29211-1189
(803) 779-3080
jbecker@hsblawfirm.com
cwalker@hsblawfirm.com

Sarah P. Spruill (SC Bar No. 68337)
P.O. Box 2042
Greenville, SC 29602
(864) 240-3200
sspruill@hsblawfirm.com

Attorneys for Respondent

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