THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

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S.C. SUPREME COURT

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.

PETITIONERS' REPLY TO RESPONDENT'S RETURN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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With one significant exception,[1] Midlands scarcely attempts to defend the panel's reasoning. Instead, Midlands presents arguments that, if they had any worth, would be reasons to grant certiorari and affirm as modified, and contends the Court is barred from reaching the issues, based on Midlands' misunderstanding of error preservation.

I. THE COURT SHOULD CORRECT THE PANEL'S FAILURE TO FOLLOW PRECEDENT ON FEDERAL DUE PROCESS ISSUES

Midlands knowingly risked lives. The Honda franchise dealership 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 driven 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).

A. Indifference to Health and Safety. The petition for writ of certiorari establishes that the Court of Appeals failed to consider whether Midlands' actions evinced an indifference to the health and safety of others, as mandated by *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 576, (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). Midlands argues, "The Court of Appeals appropriately considered the *Gore* factors" (Ret. p. 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

[1] That exception is the offer of judgment issue, on which Midlands does attempt to support the panel's reasoning. But this Court rejected that reasoning during the pendency of this petition. *Garrison v. Target Corp.*, Op. No. 28080 (S.C. Sup. Ct. filed Jan. 26, 2022) (Howard Adv. Sh. No. 4 at 10, 25) (2022 WL 222553 at *9).

failing to consider the potential harm caused by Midlands' actions, against the clear instructions of *Gore* and *State Farm.* Midlands states 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. 6).

C. Comparable Cases. The petition shows the Court of Appeals further erred in comparing the punitive award to fines of a thousand dollars, and not to awards in any comparable cases, contradicting *James v. Horace Mann Ins. Co*., 371 S.C. 187, 197, 638 S.E.2d 667, 672 (2006) (holding such penalties are too low to serve as comparisons for punitive awards), and *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22,54, 691 S.E.2d 135, 152 (2004) (holding that punitive awards against a franchise car dealership for deceptively selling a previously-wrecked vehicle are to be compared to punitive awards in other factually-similar cases.) Midlands does not and cannot 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." Instead, Midlands repeats the thousand-dollar fine and trebled damages[2]—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). That is true: Petitioners did not analyze the penalties this Honorable Court has instructed are not to be considered—other than to state they are not to be considered.

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

Midlands' arguments regarding punitive damages amount to a claim that the Court of Appeals was right for the wrong reasons. If Midlands' arguments were valid, they would be grounds to grant certiorari, correct the constitutional errors, and affirm as modified. But they are

[2] 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. pp. 8-9.

without merit.

1) 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 (*see* Pet. p. 5), but asks the Court to deny certiorari on grounds it was unaware the auction rules also required disclosure. (E.g., Ret. pp. 8 & n.9, 11). The argument makes no sense. Even if Midlands was truly and innocently unaware of the auction's requirement,[3] the panel should have considered the reckless indifference to health and safety shown by Midlands' violation of state law.[4]

2) Midlands presents N.C.G.S. § 1D-15(c) as immunizing Midlands from a heightened punitive award due to the "affirmative misrepresentation" made on a state form. (Ret. p. 11 n.10). This is misleading[5] and has nothing to do with whether the panel should have considered Midlands' reckless indifference to safety and the potential harm it created.

3) Midlands erroneously argues its sale of the Frankencar to Ecklund is exempted

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[3] 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 was 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 requirements were a "new" addition in 2010.

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

[4] 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 above, Midlands' officers were unconcerned about the potential harm.

[5] Midlands quotes the portion of the statute that states punitive damages may not be awarded against a **person, solely** on vicarious liability, yet omits the next sentence, which makes clear that punitive damages may be awarded against a **corporation** if its managers "participated in" or "condoned" the relevant conduct—as Midlands' managers did here (R. p. 543, lines 17-20; p. 545, lines 9-10).

from the due process analysis by *Phillip Morris, USA v. Williams*, 549 U.S. 346 (2007) (Ret. p. 10). Not so: *Phillip Morris* states, "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 [is] **particularly reprehensible.**" 549 U.S. at 355 (emphasis added). Moreover, exempting Midlands' sale of the Frankencar to Ecklund would not excuse the failure to consider the reckless disregard for health and safety and the potential harm created by Midlands' sale to Petitioners.[6]

4) Similarly for Midlands' repeated reliance on a supposed failure of Petitioners to adequately inspect the vehicle. (E.g., Ret. pp. 9-11). The jury emphatically rejected Midlands' argument that Petitioners failed to properly inspect.[7] Even were Petitioners and Respondent both at fault, it would not allow reduction of the punitive award without considering the reckless indifference evinced by Respondent or the potential harm it caused.

5) 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, it omits that ADESA signed the form as power of attorney for Midlands.

Second, because the way it works, the seller is supposed to inform the auction of anything that must be disclosed before the sale. Op. p. 3. 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

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[6] *See also Garrison v. Target Corp.*, Op. No. 28080 (S.C. Sup. Ct. filed Jan. 26, 2022) (Howard Adv. Sh. No. 4 at 10, 23-24) (2022 WL 222553 at *8) (discussing the constitutional importance of considering potential harm to the public as a supporting factor for a large punitive award).

[7] 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**).

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) (emphasis added). Midlands' statement (Ret. p. 8) that "Midlands was not involved in this process" misrepresents the Record.

6) 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.[8]

Conclusion to Section

The Court of Appeals failed to follow repeated instructions of the Supreme Courts on federal constitutional questions. Midlands' red herrings do not justify the Panel's refusal to undertake the federal constitutional analysis as directed by those Courts. The Court should grant the petition.

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[8] 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 Honda certified preowned inspection that included putting the vehicle up on a rack, which makes the damage obvious to anyone underneath. The second sentence reveals 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 claims it did not ask its mechanic how he missed it. When Petitioners called four months later and said it was two half-cars clipped together, Midlands claims it 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.

II. THE COURT SHOULD GRANT CERTIORARI ON THE ISSUE OF ATTORNEY FEES

Midlands recognizes that a fee award may be reversed "if it is based on an error of law" or is without supporting evidence. (Ret. p. 16). However, as the panel recognizes, the amount of a fee award pursuant to a statute may also be reversed if it amounts to an abuse of discretion. Op. p. 9 n.10 (citing *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006)). Further, both South Carolina and North Carolina require fee awards to be reasonable. *Rish v. Rish,* 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988) (inadequate fee award held to be abuse of discretion). "Whether to award or deny attorneys' fees is within the sound discretion of the trial judge. Once the trial court decides to award attorneys' fees, however, it must award a reasonable fee." *Custom Molders, Inc. v. Am. Yard Prod., Inc.,* 463 S.E.2d 199, 204 (N.C. 1995) (citations omitted).

A. The "Double-Bind" Holdings

1. Brief Summary of Facts Going to the Termination of Fees

For five years of work (R. pp. 1343-57), the trial court announced a fee award of $21,264. (R. p. 1731). It did so via an email from the judge's clerk. (*Id*.) That email directed Midlands' counsel to draft the order; it offered no indication as to how the $21,264 figure was chosen. (*Id*.) The amount was exactly 40 percent of the recovery indicated by that same email. (*Id*.) However, North Carolina does not allow UTPA fee awards based on a percentage-of-the-recovery; like South Carolina, it "requires" the award be based on a reasonable hourly rate for hours reasonably incurred. Midlands knew this. (R. pp. 1573-74).

Midlands' counsel accepted Petitioners' counsels' hourly rates of $390. (R. p. 1873) (proposed order). Midlands' counsel thus had to come up with a way to make the compensable hours equal 54.252 (R. p. 1872) (proposed order). ($21,264 divided by $390 per hour equals 54.252

hours).

Midlands drafted a proposed order that first eliminated all but "approximately" 218 hours (R. p. 1871) out of more than 600 hours requested (R. pp. 1331, 1540, 1548). The stated ground was that the other hours were properly "apportioned" to other causes of action. (R. pp. 1871). This was a cut of approximately two-thirds. (Approximately, because the proposed order referred to "approximately" 218 hours that survived the first cut.) The one-third of the hours that survived that first cut were then reduced by another three-quarters (R. pp. 1871-72), again largely on grounds that still more time had to be apportioned to other causes of action (*id.*). That left one-quarter of one-third, which is approximately eight percent.[9] Ninety-two percent of the requested hours were cut, virtually all on grounds of "apportionment."

The Judge signed the proposed order unchanged.

This was not going to survive appeal. *First*, because, as the panel held, North Carolina law does not allow apportionment among claims stemming from a common nucleus of operative fact. *Second*, because even if North Carolina law did allow apportionment, there was no way that 92% of counsel's time was devoted to matters unrelated to the NCUPTA claim. *Third*, because it was obvious that limiting the initial fee award to 54.525 hours for five years' work, including travel to Illinois (R. p. 102) and Charlotte (R. p. 140), multiple hearings and a five-day trial, would not stand. *Rish* (inadequate fee award held to be abuse of discretion); *Custom Molders, Inc.,* 463 at 204 ("Once the trial court decides to award attorneys' fees, however, it must award a reasonable fee.")

Defense counsel knew, or should have known, this 92% reduction would not survive appeal. And it did not survive appeal.

[9] Petitioners repeatedly requested to see the timesheets showing which hours had been cut. (R. pp. 1888-89, 2041). Their requests were not granted.

So what did Midlands' counsel do in the interim? They made an offer to settle the entire case for $81,069, an amount that makes sense only if the 92% cut in the fee request was expected to survive.[10] And they convinced the trial Judge to sign off on ending fees incurred after the date of that offer. In other words, they presented Petitioners' with a wrongful choice: accept the erroneous denial of virtually all compensation already earned—or incur uncompensated fees to obtain compensation that had already been earned.

That is just not right. It also violates governing law, as described below.

Not stopping there, Midlands also proposed, and the trial Judge signed, a final order directly prohibiting fees for work performed to correct his errors. Only fees incurred to obtain or sustain a plaintiff's status as the prevailing party are compensable, he held, not fees incurred to correct his errors. This second double-bind is entirely opposite to the purpose of fee-shifting. Moreover, the effect here, as with the other holding, is to improperly put Petitioners in a double-bind (accept the erroneous denial of compensation, or incur uncompensated fees to obtain that wrongfully-denied compensation), and to also deny compensation for counsel's ultimately-successful work in reversing the requirement to elect.

The Court of Appeals erred in accepting this double-bind. It would make no sense to have a fee-shifting statute, designed to provide UTPA claimants with compensation for their attorney's work, only to require the attorneys to work without compensation to obtain that compensation. Nor should a trial court be allowed to insulate its erroneous holdings from review by placing plaintiffs in such a double-bind.

Especially where, as here, the holdings are contrary to law for additional reasons.

[10] One would also have to expect the 98% cut to the punitive award to survive for the offer to be reasonable.

2. The First Double-Bind Fails.

The panel relied on a single case for the proposition that a post-verdict offer may suffice to terminate the accrual of fees. Op. p. 11. That case is *DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020). Midlands does not mention *DENC*. Nor does Midlands dispute *DENC's* requirements that the offer be reasonable and that the reasonableness be determined in light of what is ultimately awarded. *See* Pet. pp. 21-22 (quoting *DENC*). Midlands does not argue that the Court of Appeals addressed whether the offer was reasonable.[11] Midlands does not rebut Petitioners' demonstration that the offer was unreasonable. (*Id*. n.5). The Court should reverse on the undisputed ground that *DENC* requires an offer to be reasonable and the unrebutted ground that this offer was unreasonable.

More broadly, the Court should hold that the attempt to place Petitioners in a double-bind of having to choose between an almost total denial of compensation for their attorneys' previous work or incurring uncompensated fees to gain that compensation, *see id.* n.6, is unreasonable.[12]

2. The Second Double-Bind Fails.

Midlands' second double-bind states that only time spent obtaining or sustaining the status of a prevailing party is compensable—meaning, time spent correcting the trial court's errors is

[11] 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). Rather, Midlands implicitly concedes that a settlement offer must be reasonable if it is to serve to terminate fees, *see* Ret. p. 18 (arguing that a "plaintiff has an incentive to accept a reasonable offer" (Ret. p. 18); *id.* p. 2 (referencing "subsequent reasonable settlement efforts").

[12] The Court should also reverse on the grounds that post-verdict offers cannot terminate fees. Midlands admits it has found no case supporting that proposition ("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") (Ret. p. 18) and the sole case the Court of Appeals cited in support is to the contrary ("[C]ourts may look to a defendant's efforts to settle a matter before trial"), *DENC*, 454 F. Supp. 3d at 562 (emphasis added).

not.[13] That is contrary to all logic and to common sense:

Contrary to logic: The panel mistakes a sufficient condition for a necessary condition.[14] This logical error is so common it has its own name, the fallacy of denying the antecedent.[15]

Contrary to the purposes of fee-shifting provisions, generally: Unless a fee-shifting provision explicitly excludes work performed to correct trial court errors, a court should not exclude that work. *Renaissance Enters. v. Ocean Resort*s, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) *rev'd in part on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999) (contractual fee-shifting) (finding "no reason" such fees would not be recoverable).

Contrary to the acknowledged purposes of the statute, as shown elsewhere in the panel's opinion: The panel recognizes "The purpose of attorney's fees in Chapter 75, however, is to 'encourage private enforcement' of Chapter 75," Op. p. 15 (quoting *United Laboratories, Inc. v. Kuykendall,* 437 S.E.2d 374, 379 (N.C. 1993)), "'by making such actions economically feasible,'" Op. 12 (quoting *Cotton v. Stanley*, 380 S.E.2d 419, 421 (N.C. Ct. App. 1989).[16] Unfortunately, these quotations were in the panel's discussions of travel time and the election issue, not in the holdings challenged here. Disallowing fees for work performed correcting trial court errors is

[13] The trial court so held, and the panel placed this point in a footnote as an additional sustaining ground.

[14] The panel quotes the North Carolina Court of Appeals, Op. p. 11 n. 11, "Fees 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." It concludes that therefore fees are not available for work correcting trial court errors.

[15] *See, e.g*., http://changingminds.org/disciplines/argument/fallacies/denying_antecedent.htm

[16] This Court has held similarly, as the panel recognizes: "[A]ttorney's fees are intended to make such claims economically viable for private citizens;" this "epitomizes the definition of a remedy." *Id*. pp. 16-17 (quoting *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56-57, 691 S.E.2d 135, 153 (2010)).

contrary to the acknowledged purpose of the statute.

Contrary to proper jurisprudence: A trial court should not be able to effectively immunize its holdings from appeals by essentially stating, "If you want proper compensation for your prior work, you need to work without compensation to obtain it."

Double-bind: The attempt to place Petitioners in a double-bind of having to choose between an almost total denial of compensation for their attorneys' previous work or incurring uncompensated fees to gain that compensation should be rejected.

3. Midlands' Counter-Factual Arguments, Which Were Not Accepted by the Court of Appeals, Fail

Midlands' counter-factual arguments, on which the Court of Appeals did not rely, also fail. Midlands asks the Court to consider what the law would be in a situation where no fee award was made. (Ret. p. 17). Attorney fees are reserved for extreme cases, Midlands writes, because a judge may refuse to make a fee award even where the requirements of NCGS elements of § 75-16.1 are met. But none of that matters, because here, the trial judge did award fees, and "Once the trial court decides to award attorneys' fees, however, it must award a reasonable fee." *Custom Molders, Inc. v. Am. Yard Prod., Inc.,* 463 S.E.2d 199, 204 (N.C. 1995). *See also United Labs. v. Kuykendall,* 403 S.E.2d 104, 111 (N.C. App. 1991), *aff'd*, 437 S.E.2d 374 (1993) (same); *Morris v. Bailey*, 358 S.E.2d 120, 125 (N.C. App. 1987) ("[I]f an award is made, the statute requires the award be reasonable.").

Further, if risking lives by deceptively selling a such a dangerous vehicle is not an "extreme case" for UTPA purposes, it is difficult to conceive of what is.

D. The Panel's Misreading of *Hensley* Should Be Corrected.

Midlands asks this Court to overlook the panel's misreading of the United States Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) on grounds it is a North Carolina

matter. But *Hensley* is a **federal** opinion about **federal** law. As the petition showed, the panel's reading of *Hensley* has already been rejected by the United States Supreme Court (Pet. p. 24) (quoting *Riverside v. Rivera,* 477 U.S. 561 (1986)).[17] And on general principles, the Court of Appeals should not be contradicting the United States Supreme Court on matters of federal law.

Moreover, the panel's holding that fees in UTPA cases may be reduced due to the limited stakes typically at issue in those cases is bound to cause problems in lower court decisions going forward if not corrected by this Court.[18]

The panel's holding is also contrary to North Carolina law.[19]

Petitioners were awarded 100% of the actual damages sought and will receive the maximum punitive award allowed by law. Yet the panel writes that the lower court "may—or may not" reduce the fees based on the degree of success. While an obvious option is for the Court to

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[17] Midlands ignores the point. It simply avoids discussing whether the panel erred in holding that *Hensley* allows a UTPA claimant who has obtained complete relief to suffer a fee reduction on grounds the amounts at stake are small.

[18] Further, Midlands uses the Charlotte auction to sell cars to others and 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 buy from Charlotte 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.

[19] As noted in the petition, the North Carolina UTPA was designed with "small dollar amounts" in mind. (Pet. p. 23) (quoting *Marshall v. Miller,* 276 S.E.2d 397, 403 (N.C. 1981)). The North Carolina appellate courts have repeatedly held that the purpose of fee-shifting in the NCUTPA is to encourage private enforcement and make such cases economically feasible. *Miller* at 403; *United Laboratories, Inc. v. Kuykendall,* 437 S.E.2d 374, 380 (N.C. 1993); *Cotton v. Stanley*, 380 S.E.2d 419, 421 (N.C. Ct. App. 1989); *Morris v. Bailey*, 358 S.E.2d 120, 125 (N.C. App. 1987). (The panel recognizes this in other portions of its opinion, but not here).

Reducing fee awards due to the "small dollar amount[]" in a UTPA case is directly contrary to these purposes.

wait and see how the lower court rules, and address the issue if the case comes back to the Court on a second appeal, Petitioners believe it more efficient to resolve the question now while the case is before the Court, and not leave standing this misinterpretation of federal law and misdirection to lower courts.

III. OFFER OF JUDGMENT

The Court decided this issue during the pendency of the petition. *Garrison v. Target Corp.*, Op. No. 28080 (S.C. Sup. Ct. filed Jan. 26, 2022) (Howard Adv. Sh. No. 4 at 10, 25) (2022 WL 222553 at *9). "We find the language of both the rule and the statute clearly and unambiguously provides that Denise is entitled to eight percent interest on the entire amount of the verdict, including punitive damages."[20] The Court should grant certiorari to apply its *Garrison* holding to this case. It would be unfair to deny Petitioners relief when they have made the correct argument all along.

IV. THIS COURT IS NOT BARRED FROM CORRECTING THE ERRORS IN THE PANEL'S OPINION.

The Court May Consider the Petition. Midlands claims 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.—the current petition is therefore "improper." 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.

[20] *See also* Ret. p. 21 ("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).").

The Court May Consider All the Issues.

1) Midlands imagines a holding it claims was not appealed. Midlands writes (Ret. p. 5 n.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." There was no such finding or ruling. The Order on the Motion to Reconsider referred to additional 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 further demonstrate to the judge that the time spent by Petitioners' counsel on work not related to the UTPA claim was minimal. (R. pp. 1889-96). 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).

2) Midlands argues that all discussion of fees incurred after December 15, 2016, is barred on grounds Petitioners have not sufficiently preserved their objections to the Judge's abuse of discretion. (Ret. p. 16 n.13). But the fees discussions in the briefs and petitions are all about abuse of discretion, including the failure to follow the law that guides the discretion.

3) Finally, Midlands presents three reasons it maintains preservation of the objection to the additional sustaining ground is "questionable." Midlands claims that Petitioners' brief to the intermediate court arguably "abandoned" the underlying issue. (1) Midlands cites two cases standing for the proposition that an argument with a "lack of supporting authority" or "not supported by authority" may be deemed abandoned,(R. p. 18 n.14), which may leave the Court with the misimpression that Petitioners' brief failed to cite authority on the issue. However, **Petitioners' brief did cite supporting authority** on the issue (Br. of Appellants p. 45). The brief

explicitly cited controlling authority in its discussion of the issue. (It also implicitly provided many authorities in the preceding discussion.) (*Id*. pp. 35-45).

Midlands argues (2) the ground should be declared abandoned because it was not separately listed in the statement of issues on appeal but cites no authority for the position that each sub-issue needs to be separately stated in the statement of issues under threat of being deemed abandoned, a position that is contrary to law. *See, e.g., Gibson v. Ameris Bank*, 420 S.C. 536, 542 n.2, 804 S.E.2d 276, 279 n.2 (Ct. App. 2017) (issues are preserved when they are reasonably clear from appellants' arguments); *Swentor v. Swentor*, 336 S.C. 472, 488 n.8, 520 S.E.2d 330, 339 n.8 (Ct. App. 1999) (similar).

Midlands then argues (3) the additional sustaining ground was challenged only in the amended petition for rehearing to the Court of Appeals, and is therefore not properly before this Court. However, as shown on C-Track, the amended petition was accepted.[21] Midlands' argument makes no sense.

Conclusion

All the arguments are properly before the Court for its consideration. Because the Court of Appeals' opinion contradicts holdings of the United States Supreme Court and this Court on federal issues, contradicts itself, contradicts common sense, and contradicts this Court's recent holding regarding offer of judgment benefits, the Court should grant certiorari and correct these errors.

[21] Midlands argues it was somehow improper for that Court to accept the amended motion without a motion to amend. However, that is not a decision for Midlands to make. That Court's clerk instructed the undersigned to simply file the amended petition, and stated that Court would request a motion if it considered one to be needed.

Respectfully submitted,

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