THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Judge

Case No. 2022-000162

Tammy Batten West,

Appellant

v.

American Honda Motor Company, Inc.,

Respondent.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

Did the lower court err in cutting the prevailing plaintiff's fee request by more than 70% and awarding no costs under a consumer-protection statute that provides for fees and costs?

OVERVIEW

In awarding fees under a consumer-protection fee-shifting statute, the lower court erroneously reduced the requested award by more than seventy percent. It did so by ignoring the Supreme Court's opinion in *Austin v. Stokes-Craven Holding Corp.* and misconstruing that Court's decision in *Taylor v. Nix*.

BACKGROUND LAW

This is an appeal under the costs- and fees-shifting provision of the "Lemon Law," the South Carolina Enforcement of Motor Vehicle Warranty Act, S.C. Code Ann. § 56-28-10 *et seq*. That Act requires automotive manufacturers to replace or repurchase a vehicle if the manufacturer has been unable to repair the vehicle "after a reasonable number of attempts." § 56-28-40. The Act presumes a reasonable number of attempts have been made if the problem has been subject to repair "three or more times" or "the vehicle is out of service by reason of repair for a cumulative total of thirty or more calendar days" during the express warranty period. § 56-28-50(A).

However, consumers cannot enforce the Act unless they send the manufacturer a letter offering a final chance to repair the vehicle. § 56-28-50 (B)-(E). If the manufacturer has established a non-binding "arbitration" process, the consumer must go through that process as well. § 56-28-60. If a consumer prevails in an action brought under the Act, that consumer may recover costs and expenses, including attorney's fees "based on actual time expended," unless the court decides in its discretion an award of attorney's fees would be inappropriate. (*Id*. ¶ D).

STATEMENT OF THE CASE

Appellant Tammy West ("Consumer" or "Tammy") filed her Summons and Complaint on November 9, 2018. (R. pp. 45-56). It concerned a new Honda CR-V she purchased from a dealer licensed by Respondent American Honda Motor Company, Inc. ("Manufacturer" or "Honda"). She had brought the vehicle to Manufacturer's franchisee multiple times for repairs that did not fix the problem. (R. pp. 46-56). Tammy had sent a certified letter to Honda detailing the alleged problem with the vehicle and the attempts at repair, offering Honda a final opportunity to repair it. (R. pp. 416-25).

Consumer had also participated in Manufacturer's in-house non-binding "arbitration" process. (R. p. 51 ¶ 43).

The Complaint alleged Manufacturer had violated state and federal warranty law (common law warranties, the South Carolina Enforcement of Motor Vehicle Warranty Act, §56-28-10 *et seq.* ("Lemon Law") and the federal Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq*.) and two related consumer-protection statutes (the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code. Ann. §39-5-10 *et. seq*., and the South Carolina Regulation of Manufacturers, Distributors and Dealers Act ("Dealers Act"), S.C. Code. Ann. §§ 56-15-10 *et. seq*.). (R. 46-56).

Manufacturer's Answer was filed December 11, 2018 (R. pp. 57-69). The Answer repeatedly "denie[d] that the subject 2017 Honda CR-V was defective, was 'unrepaired' or had 'deficiencies.'" (*Id*. p. 61 ¶ 39; *see also* p. 62 ¶ 40 (similar); p. 61 ¶ 38 (similar)). The Answer listed twelve affirmative defenses, one of which contained 19 separate defenses, which would make a total of 30 affirmative defenses. (*Id*. pp. 66-69). Among other defenses, it maintained any alleged defects do not substantially impair the vehicle's "use, market value, or safety" (Third Defense, p. 66); that Tammy's damages were caused by herself (Fifth Defense, pp. 66-67) and by

third-parties (Sixth Defense, p. 67); "[A]ccord and satisfaction, arbitration and award, contributory negligence, comparative negligence, assumption of the risk, waiver, equitable estoppel, judicial estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, collateral estoppel, statute of frauds" and others (Eighth Defense, p. 67); and it "affirmatively alleges that Plaintiff may have waived any right she may have had to bring this action by virtue of her acts, omissions, conduct, and direct dealings" (Eleventh Defense, p. 68).

Manufacturer filed a putative "Offer of Judgment" on April 3, 2020, purportedly pursuant to Rule 68, SCRCP. (R. pp. 107-09). Manufacturer's offer purported to incorporate provisions in a release that was "attached to" and "included with" the offer (*id*. pp. 108-09), yet the release was not filed, attached, or included. Consumer's Motion to Strike the Offer of Judgment, filed November 14, 2020 (R. pp. 157-59), argued the putative offer of judgment was defective as it did not contain the terms of the offer (*id*. p. 158). Consumer further maintained that if this release was like the releases Manufacturer's counsel had been sending to her counsel, which all had contained confidentiality provisions, there would be another problem, as Rule 68 requires the court to determine whether the final verdict was more favorable to the offeree than was the offer, and it would be very difficult if not impossible for the Court to determine whether a verdict—which would not contain a confidentiality provision—was more favorable to Plaintiff than an offer containing a confidentiality provision. (*Id*. pp. 157-58).

The lower court denied the motion to strike by Form 4 order on January 27, 2021. (R. pp. 9-11).

Consumer moved for summary judgment on her Lemon Law claim on November 14, 2020. (R. pp. 227-28). The motion was at first denied by Form 4 order (R. pp. 12-14) on January 27,

2021, but following Consumer's Motion to Amend or Alter Judgment (R. pp. 446-448) and Manufacturer's Response thereto (449-53) the order was amended on March 15, 2021 to grant summary judgment only as to liability (R. p. 19).

With liability established, and a trial on damages set for that week, counsel for the parties agreed in open court on Monday, May 17, 2021, that Manufacturer would pay Consumer $34,776.51 on the Lemon Law claim; that Consumer would voluntarily dismiss her other causes of action; and that the parties would submit the issue of costs and attorney fees to the court. (R. p. 34, Order p. 4 ("this matter was on the jury roster"); R. p. 101, lines 9-10, Tr. Hr'g 5/17/2021, 3:9-10 (Manufacturer to pay $34,776.51); *id*. lines 18-19 (parties will submit the issue of fees and costs to the court); *id*. line 24 ("this week we would have been trying the damages portion"); R. p. 101, line 25-102, line 2, Tr. Hr'g 3:25-4:2 (Consumer to withdraw other claims); R. p. 102, lines 4-6, Tr. Hr'g 4:6-11 (Consumer to withdraw other claims and submit an affidavit of fees and costs)).

Consumer's Motion. Consumer moved for attorney fees and costs on May 21, 2021. She attached an affidavit of fees and costs, supporting affidavits, detailed timesheets, and a brief in support (R. pp. 696-941) and filed an amended brief two days later. (R. pp. 942-969).

She requested compensation for 182.8 hours of attorney time at $450 an hour (R. pp. 951, 968) and presented affidavits from two Horry County attorneys, Nate Fata and L. Sidney Connor, IV, attesting that the hours spent and the hourly rate were reasonable (R. pp. 934-41). She sought $82,260.00 in fees and $2,386.28 in costs. (R. p. 968).

Her amended brief explained why the offers Manufacturer had made until the final agreement reached just before trial failed in her view to provide her with all to which she was entitled. (R. pp. 950-52). She presented the factors for determining the amount of fee awards set out in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997) (R. p. 944). She urged the lower

court to use a lodestar figure as described in *Layman v. State,* 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008) and *Hensley v Eckerhart*, 461 US 424, 103 S Ct 1933, 1939, 76 L Ed 2d (1983). (R. pp. 948, 951).

She presented the process stated in *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) to be used to determine the number of compensable hours where a claim for which attorney fees are recoverable by statute is joined with other claims.

> "[W]hen an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding. *Accord, Heindel v. Southside Chrysler Plymouth, Inc.*, 476 So.2d 266 (Fla.App.1985). This approach requires the party asserting the right to attorney fees to produce an itemized affidavit of their fees that they believe are related to the statutory claim. The opposing party then has the burden of showing which of the fees are clearly unrelated."

(R. p. 944) (quoting *Nix*, 307 S.C. at 557, 416 S.E.2d at 622).

She presented her view of how *Nix* applies to her case:

> As stated in *Taylor v Nix,* 307 S.C. 551, 416 S.E.2d 619 (1992), a party asserting the right to attorney fees must produce an itemized affidavit of her fees that she believes are related to the statutory claim. The opposing party then has the burden of showing which of the fees are clearly unrelated. Here, counsel has provided a detailed itemized statement of time spent on the case as well as a detailed explanation of the events and negotiations that have taken place. These show that the work done was necessary and not duplicative. It is now up to Honda to show "which of the fees are clearly unrelated".

(R. pp. 958-59) (footnote omitted).

She also delineated $2,386.28 in costs for which she requested reimbursement. (R. p. 968).

Consumer also cited cases for the proposition that remedial measures such as the Lemon Law and its fee-shifting provision are to be liberally construed to effectuate their purpose of ensuring that pursuing the private cause of action will be economically feasible for consumers (R.

p. 945) and for the proposition that fees in such cases should be sufficiently large to ensure first class attorneys will handle these types of cases (R. p. 946).

Her counsel's affidavit supporting her motion (R. p. 754-85) stated that the hours in his timesheets related to the statutory claim, addressed Manufacturer's having accused him of "churning" the file, explained why it would have made no sense for him to do so and pointed out that he had spent "substantial" time preparing the fee affidavit in light of Manufacturer's arguments (R pp. 789-80 ¶¶ 115-21).[1]

Manufacturer's Opposition. Manufacturer filed an opposition, with **120** pages of attachments, on May 28, 2019. (R. pp. 970-1127).

Manufacturer addressed the *Nix* issue as follows:

> ii. Plaintiff's Counsel Has Not Shown What Work Was Actually Performed for the Warranty Act Cause of Action
>
> To recover attorney's fees when a statute authorizes the permissive or mandatory recovery of fees, Plaintiff's counsel has the burden of providing an itemized affidavit of fees that shows the work related to the claims where statutory recovery of fees is allowed. *Taylor v. Nix,* 307 S.C. 551, 557, 416 S.E.2d 619, 623 (1992). This is particularly important when there is no actual fee-paying client who will provide a check and balance to the claimed amount. Counsel filed an affidavit and time sheets with his Motion for Fees, but this affidavit presents several deficiencies in identifying what work if any, was actually related to the Warranty Act cause of action. The affidavit fails to provide the number of hours reasonably incurred on the Warranty Act cause of action, which presents significant challenges in determining any amount of reasonable attorney's fees.
>
> First, the affidavit makes no reference to whether the incurred time was spent on the Warranty Act cause of action or the other causes of action that Plaintiff voluntarily dismissed prior to trial. If Plaintiff cannot identify the portion of time directly attributable to the Warranty Act cause of action, the Court should and must proportionally decrease the amount of allowed time. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016) (affirming a reduction of attorneys' fees asserted to claims where statutory

[1] Unfortunately, he left a comment in his affidavit, "Include I was not churning the file."

recovery of fees was not permitted).

(R. p. 981).

Consumer's Reply. Consumer's reply, filed June 21, 2021, further discussed the analysis under *Jackson*. (R. pp. 1128, 1130-41). She again advocated for a lodestar figure as stated in *Layman*. (R. p. 1129). Regarding *Nix*, she argued that Manufacturer had omitted a major portion of the analysis. (R. pp. 1129-30). She again provided the block quote from *Nix* in which the Supreme Court stated the relevant procedure. (*Id*.) She then argued,

> Honda states, "Plaintiff's counsel has the burden of providing a itemized affidavit of fees that shows the work related to the claims where statutory recovery of fees is allowed". . . . Honda omits that the itemized affidavit of fees must only be for the time Plaintiff's counsel believes "are related to the statutory claim". That was done in this case. . . .
>
> Honda ignores and omits *Taylor v. Nix*'s holding that only work "totally unrelated" need be excluded from a statutorily allowed fee petition. The causes of action here are intertwined as they all relate to the defects in Tammy's vehicle. All services performed are related. There is no evidence to the contrary.
>
> A major portion of the analysis omitted by Honda is that, after Plaintiff's counsel submits his itemized affidavit, "the opposing party then has the burden of showing which of the fees are clearly unrelated." *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992). Honda has not objected to any specific fees being "clearly unrelated" to Tammy's Lemon Law claim. Instead, Honda makes conclusory statements about the time spent and suggests cutting time based on a percentage of the fee request. It must state specifically what time is "clearly unrelated". Having failed to do so, this factor must weigh in Tammy's favor.

(R. pp. 1134-35) (emphasis in original).

She requested compensation for an additional 22.5 hours of work undertaken since the submission of counsel's prior timesheets, or $10,125.00. (R. pp. 1143-45). This brought her total fee request to $92,385.00. (*Id.*).

Her reply again explained her view that Manufacturer's offers prior to the final settlement amount were insufficient as a matter of law. (R. pp. 1131-34, 1136-47).

The Order. The lower court's order issued on June 28, 2021. (R. pp. 31-40). It stated, "There is no dispute that Plaintiff is the prevailing party under this Act." (R. p. 34). It awarded Tammy $27,585. It granted that amount first as "attorney's fees" (*id.* p. 31); then stated the same amount included costs ("$27,585 for attorney's fees and costs") (*id*. p. 36); then concluded the amount was for fees only (Tammy "is entitled to an award of $27,585 for attorney's fees reasonably incurred in this matter.") (*id*. p. 39).

It thus reduced the fee award by $64,800.00 from the amount of the fee request, with no award for costs. The award was thus $67,186.28 below the combined fee-and-costs request.

The order did not state the number of hours for which it was awarding compensation, but at the $450 hourly rate referred to in the order (*id.* p. 39), that would be 61.3 hours, with no award for costs. The order referred to the 182.8 hours initially requested (R. p. 37), but did not mention the 22.5 hours incurred after the initial fee request was filed.

The order cited *Nix* for the proposition that "Plaintiff's counsel has the burden of providing an itemized affidavit of fees that shows the work related to the claims where statutory recovery of fees is allowed" (R. pp. 36-37). It made no reference to *Nix's* immediately following statement that "The opposing party then has the burden of showing which of the fees are clearly unrelated," 307 S.C. at 557, 416 S.E.2d at 622. Nor did it mention *Nix's* holding, which was quoted in both Consumer's amended brief (R. Br. p. 944) and her reply brief (R. pp. 1129-30),

> We hold when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding.

The order then stated (R. p. 37) (emphasis in original),

> In conducting this detailed review of the affidavit and time sheets, it presents several challenges in determining the time necessarily devoted to

> the case. First, there are no specific references in the timesheets to the Warranty Act cause of action, versus the other causes of action initially identified and then dismissed by counsel. It is difficult for the Court to determine the amount of time reasonably incurred in the prosecution of the Warranty Act cause of action.

In a footnote, the order cited *Maybank v. BB&T Corp*., 416 S.C. 541, 787 S.E.2d 498 (2016) for the proposition that the Supreme Court "has affirmed decisions by the trial court reducing claims for attorney's fees . . . . (affirming a reduction of attorneys' fees asserted to claims where statutory recovery of fees was not permitted)." (R. p. 37 n.2).

It found the "approximately 37 to 42.4 hours in preparing the fee motion, affidavit, and supporting materials" to be "substantial," and the "20.9 hours prior to the commencement of this lawsuit" were "necessary and reasonably incurred." (*Id*. p. 37). The order made no other findings regarding hours spent.

The order further stated that "The evidentiary record before the Court identifies that Honda made multiple offers to repurchase the 2017 CR-V prior to November 11, 2018, and that Honda's offers to repurchase the 2017 CR-V were made consistent with its obligations under the Warranty Act" (*id*. pp. 32-33; *see also id.* pp. 34-35, 37 (similar)), but did not specify whether this meant simply that the act of making an offer was consistent with the Warranty Act or that the offers themselves amounted to a full and complete offer to pay all that the Warranty Act requires.

Consumer's Motion for Reconsideration. Moving for reconsideration on July 8, 2021, Tammy asked the lower court to rule on the additional 22.5 hours incurred after the motion for fees was filed (R. 1155). She also asked the court to provide an allowance for costs. (*Id*. pp. 1160, 1161).

Tammy's motion also argued that the order's reference to *Nix* omitted a crucial aspect of that case, i.e., that Manufacturer, as the party opposing the fee request, has "'the burden of showing

which of the fees are clearly unrelated.'" (R. p. 1156) (quoting *Nix*). She additionally argued that the order misread *Maybank v. BB&T Corp.,* 416 S.C. 541, 787 S.E.2d 498 (2016) and *Mockabee v. Wakefield Buick, Inc. and First Citizens Bank*, 298 S.C. 386, 380 S.E.2d 848 (Ct. App. 1989) (*Id.* pp. 1157-58).

Tammy further pointed out that the award amounted to only 29.11% of the amount requested, and complained that was too draconian a cut, citing *Rish v. Rish*, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988) (*Id.* p. 1158).

Order on Motion to Reconsider. The motion was denied on January 18, 2022 (R. pp. 41-44.) ("Plaintiff's Motion to Amend, Alter, or Reconsider Judgment sets forth no evidence or applicable law that indicates a basis to disturb or alter this Court's well-reasoned judgment in determining the appropriate amount of attorney's fees in this matter.") (*Id.* p. 43). The order did not address the question of costs.

STATEMENT OF FACTS

Tammy purchased a new 2017 Honda CR-V on March 2, 2017 from a dealer authorized by Manufacturer. (R. p. 31). The vehicle came with a 3 year/36,000 mile bumper to bumper warranty. (R. p. 392).

A. Consumer Attempts to Get the Vehicle Fixed.

Unfortunately, as described below, the vehicle soon showed a problem. Tammy tried hard to get the problem fixed. Manufacturer was unable to fix it.

Specifically, indicator lights kept turning on for no apparent reason. These included the Collision Mitigation warning and the Road Departure warning, as well as the Adaptive Cruise Control indicator.

These lights began illuminating on April 4, 2017, barely a month after the purchase. (R. p. 374 ¶ 9, pp. 400-402). Consumer brought the vehicle in for repair of this problem on April 14, 2017. (R. p. 374 ¶ 10, p. 403). She did so again on October 4 (R. p. 374 ¶ 13, pp. 413-14). Honda's agent for warranty repairs, East Coast Honda, replaced the radar assembly. (*Id*.). She brought the vehicle back for the same problem two weeks later on October 17. (R. p. 374 ¶ 14, p. 415). East Coast Honda updated the radar software (R. p. 415) and aimed the radar (*id*.). She brought it in again on May 17, 2018 for the same problem (R. p. 426). They again updated the software and diagnosed a "faulty unit." (*Id*.) And again on June 11 because the warning light and signal kept coming up on the dash. (R. p. 427). They again replaced the radar. (*Id.*). They gave the vehicle back to her on June 12. (*Id.*). Two days later, she brought the vehicle in again for the same problem. (R. p. 428).

They gave the vehicle back to her on June 20. (*Id.*).

On July 2, it was back in the shop again: the lights were coming back on again. (R. p. 429). They gave the vehicle back to her on July 19, seventeen days after she had brought it in. (*Id.*)

It was back in the shop four days later on July 23 for the same problem. (R. p. 431).

They gave the vehicle back to her on July 25. (*Id*.).

She brought it back to the shop the next day for the same problem. (R. p. 432).

She brought it back again on August 24 for the same problem. (R. p. 433).

She received the vehicle back on August 29, and brought it back again on September 7: the warning lights were back on. (R. p. 435).

Between April 14, 2017 and September 9, 2019, the vehicle was out of service 73 days, according to Matt Martin, the Service Manager of Honda's licensee. (R. p. 325, lines 14-16).

Consumer thus met the criteria under the South Carolina warranty law to compel Manufacturer to choose between repurchasing the vehicle or replacing it. That law allows consumers to require the manufacturer to select one of those options if the manufacturer has had three attempts to repair the same problem **or** the vehicle has been out of service for 30 calendar days during the express warranty period.[2] Manufacturer's authorized agent had had **eleven** repair opportunities **and** had kept the vehicle out of service **73** days.

B. Consumer Attempts to Obtain Her Lawful Remedy Without Having to Hire an Attorney.

Given all the above, Tammy tried hard to get Honda to replace or repurchase the vehicle. Honda refused.

Tammy began asking in June of 2018 that Manufacturer repurchase or replace the vehicle. Honda responded, "we just don't hand out cars." (R. pp. 374-75, ¶¶ 16-17) ("I asked American Honda to repurchase the vehicle. American Honda refused to repurchase my vehicle stating, 'we just don't hand out cars.'"); AHM Communication Records[3] June 5, 2018 at 8:09 AM, call from Consumer (R. p. 657) ("she believes she has a lemon;"); *id*. at 2:16 pm, call to Consumer ("She stated if the vehicle is not being repaired she would like another vehicle.").

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[2] The South Carolina Lemon Law requires automotive manufacturers to replace or repurchase a vehicle if the Manufacturer has been unable to repair the vehicle "after a reasonable number of attempts," § 56-28-40, and presumes a reasonable number of attempts have been made if the problem has been subject to repair "three or more times" or "the vehicle is out of service by reason of repair for a cumulative total of thirty or more calendar days" during the express warranty period. § 56-28-50(A).

The same section also requires the consumer to give the manufacturer notice and a final opportunity to fix the error. § 56-28-50 (B)-(E). Consumer did that, too. (Letter from Tammy West dated 7/25/18) (R. p. 416).

[3] "AHM Communication Records" is a document filed by Manufacturer with its motion for summary judgment. "AHM" stands for "American Honda Motors."

She asked Manufacturer again on June 27, 2018. According to Manufacturer's own records, she said this will be her seventh trip to the Dealer and she wants another vehicle.

> Mrs. West called and stated the issues have resurfaced and **she wants another vehicle.** . . . She stated **this will be her 7th time going to the dealer**. . . . She stated all she is seeking is a vehicle that works and she purchased a new vehicle to not have issues.

(AHM Communication Records June 27, 2018 at 8:13 AM) (R. p. 654) (emphasis added).

Consumer also "stated **if she cannot get a working vehicle, she may have to obtain an Attorney**. . . . She stated she has ran out of vacation behind this vehicle. She stated if the vehicle is towed to the dealer, then she is without transportation." (*Id*.) (emphasis added).

She told them again on July 11. Manufacturer's records state, "The CM received a message from the customer yesterday . . . . She stated she is **not taking the vehicle back and expects AHM to provide her another new vehicle**[.]" (*Id.* July 12, 2018 at 11:52 AM) (R. p. 653) (emphasis added). "She stated AHM needs to offer her another vehicle or AHM will be hearing from her Attorney." (*Id.* July 12, 2018 at 11:48 AM) (R. pp. 652-53). *See also id.* July 12, 2018 at 9:50 AM (R. p. 653). ("Customer/Mrs. West no longer wants the vehicle").

She told them again on July 24.

> She stated she is going to make the call to the Attorney today because she is tired of going through the same thing. . . . She stated she does not know why AHM wants to go through legal action when her vehicle has been there 8 times for the same issue.

(*Id*. July 24, 2018 at 6:35 AM) (R. p. 650).

The next day, she sent them a certified letter. (R. pp. 416). Her letter asked Manufacturer to correct the problem within 15 days, or repurchase or replace the vehicle. (*Id*.). She included an attachment listing each date the problem occurred, her notifications to Manufacturer's agents, and the results of each visit to the shop. (*Id*. pp. 417-25).

She informed them of the letter the same day she signed it. (AHM Communication Records July 25, 2018 at 11:54 AM) (R. pp. 649-50). The letter was physically received by Honda on August 2. (*Id*. August 2, 2018 at 9:24 AM) (R. p. 648). Manufacturer immediately closed the case.

> Letter received from the customer demanding her vehicle be repaired in the next 15 days. Letter dated 07/25/2018. Vehicle has been repaired and returned to the customer. CM spoke with the customer this morning. Case will remain closed.

(*Id*. August 2, 2018 at 9:38 AM).

Consumer followed up on August 23. (*Id*. August 23, 2018 at 11:13 AM). She called Manufacturer, and "was advised" that "she will be called with a decision." (*Id*.).

The next day, the vehicle malfunctioned again. She asked to have the case re-opened.

> Message received from [Consumer] today at 4:55 am stating that **her sensors have come back on** and she has called the dealer. She stated she has taken pictures of the issues this morning. She stated they are coming to pick up her vehicle. She stated **she would like the case re-opened.**

(*Id*. August 24, 2018 at 12:23 PM).

Then, Manufacturer's communications with Consumer end. Manufacturer never replied to her July letter.

Throughout the period described immediately above, June through August of 2018, while Consumer was demanding Manufacturer replace the vehicle, the Honda CR-V was repeatedly in and out of the shop.[4]

[4] From Manufacturer's records ("AHM Communication Records") (R. pp. 648-657):

Customer explained the issue happened again June 1st		June 5, 2018 at 8:09 AM
The customer stated she was a few miles from her home and the same thing occurred and she has video. She stated . . . the error message is visible. . . . She stated the message is adaptive cruise control issue, CMBS system problem Road Departure issue and they		June 14, 2018 at 8:09 AM

Continued

repeat. She stated the dealer cannot get her in until next week. She stated she cannot afford to lose anymore time from work.		
She was told the wiring harness had a break and causing a short and they will call her once the part is in.		June 15, 2018 at 8:14 AM
She stated she is under a lot of stress, taking care of her Mother since her Father passed. She stated then the issues with the vehicle just took her over to more stress.		June 25, 2018 at 10:55 AM
Mrs. West called and stated the issues have resurfaced and she wants another vehicle. She stated she was driving to work this morning and the issue occurred again. . . . . She stated this will be her 7th time going to the dealer. She stated she has 6 pages of documentation and over 50 pictures. She stated all she is seeking is a vehicle that works and she purchased a new vehicle to not have issues. . . . She stated if she cannot get a working vehicle, she may have to obtain an Attorney. . . . She stated she has been hospitalized and related to the stress from her life and this vehicle. She stated she has ran out of vacation behind this vehicle. She stated if the vehicle is towed to the dealer, then she is without transportation.		June 27, 2018 at 8:13 AM
Mrs. West stated yes, Bill Thomas from the dealer picked up her [v]ehicle and left her one.		July 2, 2018 at 9:42 AM
#Call [from Manufacturer] to dealer - . . . Kaitlyn was asked if the vehicle was currently at the dealer and she stated yes, still there. Kaitlyn stated the Technician is still working on the vehicle.		July 5, 2018 at 8:43 AM
The Factory Rep stated there was fluctuating on radar and it is not supposed to do that.		July 12, 2018 at 12:11 PM
Kaitlyn stated they found codes. She stated the codes were LKAS, Adaptive Cruise Control, braking system and the Technician is currently working on the issue. She stated they are going to be ordering a camera and re-aiming it. Kaitlyn requested to be called back if the customer has obtained an attorney.		July 17, 2018 at 6:22 AM
She stated her vehicle has been there since 07/02/2018 and here it is the 17th. She stated when will AHM stated they are just not able to repair the vehicle.		July 17, 2018 at 6:37 AM

Continued

[Consumer] was also left a message to call the dealer, her vehicle is ready for pick up.		July 19, 2018 at 7:43 AM
#Call from customer - . . . . She stated she was on Highway 31 and the warning lights came back on. She stated she has not turned the vehicle off. . . . She stated she has it on video of the lights illuminated this morning.		July 20, 2018 at 6:23 AM
She stated [dealer's employee] is driving her vehicle back to East Coast Honda.. . . She stated she has been extremely patient and this is the 8th time she has gone in for the warning lights illuminating. Mrs. West stated she is aware of 3 attempted repairs, it is now under the Lemon Law. She stated she does have an Attorney on standby and she does not want to go that route.		July 20, 2018 at 6:58 AM
He [franchisee's employee] stated they swapped out the radar from another new vehicle and no lights. He stated they installed the customer's radar back the lights illuminated again.		July 20, 2018 at 1:05 PM
Guy stated there was parts swapped from another]v]ehicle and Tech Line advised them to remove the Radar Unit and Camera they installed from the PM's vehicle and order those parts for the customer.		July 23, 2018 at 10:41 AM
Tech swapped the customer's radar and camera for the PM's demo and PM's demo began to have warning lights like the customers.		July 23, 2018 at 10:55 AM
#Call from customer - . . . Mrs. West called the CM this morning and stated the following: Vehicle Lane departure, adaptive cruise and the CMBS illuminated this mornining [*sic*] while the customer was on her way to work.		July 26, 2018 at 6:46 AM
[T]he vehicle is back at the dealer this morning, 07/26/2018. The same lights illuminated on the vehicle[.]		July 26, 2018 at 7:30 AM
Message received from Tammy West today at 4:55 am stating that her sensors have come back on and she has called the dealer. She stated she has taken pictures of the issues this morning. She stated they are coming to pick up her vehicle.		August 24, 2018 at 12:23 PM

On September 6, she consulted with a lawyer. (R. p. 786).[5]

C. Consumer's Attorney Obtains for Consumer Her Lawful Remedy.

Consumer was referred to C. Steven Moskos due to his reputation for handling Lemon Law cases. (R. p. 931). Mr. Moskos began by discussing the facts and strategy for the case (2.2 hours) (R. p. 768) (Moskos Timesheets p. 1). If a consumer is to invoke the repurchase/replacement provisions of the South Carolina Lemon Law, she must first go through the non-binding arbitration procedure established by the manufacturer, if, as Honda did, the manufacturer has established such a procedure.

> If a manufacturer has established an informal dispute settlement procedure which substantially complies with Title 16 of the Code of Federal Regulations, Part 703, or if the manufacturer participates in a consumer-industry appeals, arbitration, or mediation panel or board, whose decisions are binding on the manufacturer, **the provisions of Section 56-28-40 concerning refunds or replacement do not apply to any consumer who has not first resorted to those procedures or to the alternate procedure provided in Section 56-28-90.**[6]

S.C. Code Ann. § 56-28-60 (emphasis added).

Accordingly, Mr. Moskos filed for non-binding arbitration as required by the Act. (R. p. 757). He prepared for that hearing. (R. pp. 786-87). Manufacturer made its first offer to settle on the Thursday before the Monday hearing, but Manufacturer did not state an amount it would pay. (Letter of 10/18/18) (R. p. 123). Accepting that offer could lead to extensive litigation as to the proper amount. (R. pp. 19, 520). Negotiations led to Manufacturer offering only $1,750 for

[5] The vehicle continued to malfunction. "The defects in my vehicle have not been repaired. (Exhibits 34, 35, and 36 - Photographs taken February 21, 2020.) These issues are still present in the vehicle." (West Aff. ¶ 20 January 22, 2021 and photographs showing the warning lights on) (R. pp. 375, 439-41).

[6] S.C. Code Ann. § 56-28-90, mentioned in the above excerpt, allows the Administrator of the Department of Consumer Affairs to establish by regulation a state arbitration board to hear such disputes.

attorney's fees. (R. p. 758 ¶ 21). By that point, Tammy's counsel had 11.1 hours invested in the case, and reasonably expected to incur more time reviewing the documents Manufacturer would require Consumer to sign, arguing over the deduction for "wear and tear," and supervising the turn-in process. (R. pp. 774 ¶ 8, p. 779 ¶¶ 116, 117). He had already incurred $4,995.00 in fees and expected to incur more. He cannot make a living at the rates Manufacturer offered, and Consumer should not be compelled to pay for attorney time made necessary only by Manufacturer's refusal to repurchase the vehicle.[7]

The Friday before the Monday arbitration proceeding, Manufacturer informed the arbitrator by letter it "does not contest" its obligation to repurchase, but made no attempt to waive its right to require the arbitration; rather, Manufacturer's letter insisted on proceeding with the now-meaningless arbitration. (Letter of 10-19-18) (R. p. 665) ("American Honda does not contest to [*sic*] the customer's request and defers the decision in this matter to the arbitration panel.")

At the arbitration proceeding in Horry County, Manufacturer, appearing by telephone while Tammy and her counsel appeared in person, reminded the arbitrator he was not permitted to award attorney's fees. (R. p. 758 ¶ 23). Nor was the arbitrator permitted to state the amount Manufacturer must pay. Rather, he was limited to stating that Manufacturer must repurchase the vehicle at an unstated price and that Consumer must pay a "mileage usage fee,"[8] leaving all the questions about

[7] Manufacturer offered $2,500 the next day towards fees, when Consumer's counsel's hours were 11.9 and her fees were $5,335.00, and again did not state how much it would pay Consumer for her vehicle.

[8] The statute requires a deduction for mileage and provides the formula. The arbitrator's decision paraphrased the statute. The statute states the deduction is "calculated by multiplying the full purchase price of the vehicle by a fraction having as its denominator one hundred twenty thousand and having as its numerator the number of miles that the vehicle traveled before the first report of nonconformity." S.C. Code Ann. § 56-28-40. The arbitrator's decision similarly stated, "The Customer shall pay a mileage usage fee as follows: Purchase price multiplied by 1,705 miles driven divided by 120,000." (R. p. 370).

what constitutes the "purchase price" to be decided in Manufacturer's sole discretion if Consumer were to accept the decision.[9]

Consumer did not, and obviously should not be compelled to, accept this result. Suit was filed the next month on November 9. (R. p. 46). The month after that, Consumer's counsel wrote Manufacturer's counsel with detailed terms of settlement. (Email of December 5, 2018 2:27 PM & attached draft release) (R. pp. 819-25). He proposed agreeing on the amount for Consumer first and deciding the attorney fees after the amount Manufacturer would pay Consumer was agreed to and terms of the release were agreed to. (*Id.*)

Manufacturer's response came two days later. (R. pp. 160-65, 191). Although the Lemon Law contains no provision for confidentiality, Manufacturer's response consisted of a release that contained a confidentiality provision. (12-07-18 release ¶ 4.4) (R. pp. 163-64). The provision applied to both Consumer and her counsel. (*Id*.) It stated neither Consumer nor her "counsel shall directly or indirectly, explicitly or implicitly, orally or in writing, or in any manner whatsoever publish or publicize, reveal or disclose, or describe or characterize Such Information [i.e., financial terms] including the amounts of any offers to any persons other than themselves, appropriate courts, and governmental agencies as necessary pursuant to court order." (*Id*.) It also imposed a requirement on Tammy to notify American Honda before disclosing said information to courts or pursuant to court order. (*Id*.) "[T]hey [Tammy and her counsel] agree they will not reveal any attempt to settle." (*Id*.)

[9] When a repurchase is mandated, the statute requires the manufacturer to "refund to the consumer the full purchase price as delivered including applicable finance charges, sales taxes, license fees, registration fees, and any other similar governmental charges," S.C. Code Ann. § 56-28-40, leaving the parties to dispute whether extended warranties, negative equity, dealer service charges, and the like are part of the "full purchase price as delivered."

(The statute also allows a deduction for mileage, as discussed in footnote 8).

Neither Consumer nor her attorney could properly agree to such terms.

The Lemon Law is a *consumer-protection* statute. Other consumers may benefit from knowing how Honda treated Tammy. Yet the confidentiality provision stated that Tammy and her counsel "will not reveal any attempt to settle." (R. p. 164). It would have precluded her telling people how hard it was to get Honda to live up to its statutory obligations.

Agreeing to a confidentiality provision would impose a tax liability on Consumer, *see, e.g.*, *Amos v. Commissioner*, 86 T.C.M. (CCH) 663 (T.C. 2003).

Consumer would have to live under a threat of a lawsuit if she let information about her settlement or her negotiations slip out. Nor did she want to have her ability to speak freely be limited. If Consumer was understandably angry and wanting to tell people, she would not want to have to stifle herself. The provision would bar her from telling even her spouse or her parents. Further, Tammy would have spoken to her husband about the settlement amount before signing the Release. He is not a party to this action or the Release. Should he disclose to others what Tammy agreed to accept, Tammy might have to defend a breach of contract action for violating the confidentiality provision. She should succeed in her defense, but she would incur substantial legal fees in doing so. Ultimately, she would lose.

The requirement that the attorney agree to silence himself raises a host of ethical issues. A settlement agreement is an agreement between the parties. It is not an agreement between one party and the opposing attorney. If the attorney's promise is part of the agreement, he or she becomes a joint and several obligor. Moreover, the South Carolina Bar has explicitly condemned

as unethical settlement agreements requiring attorneys to promise confidentiality under the terms in Honda's proposed settlement.[10] Ethics Advisory Opinion 10-04.

In subsequent attempts to settle, Manufacturer repeatedly insisted on a confidentiality provision. E.g., "As I mentioned as well in the voice mail, we need the confidentiality clause in the release." (January 31, 2019 1:36 PM email from Manufacturer's counsel to Consumer's counsel) (R. p. 841). "If you want to make a counter-offer, we would entertain that as well. But it would need to include the following: . . . 6. Confidentiality language that states:" (with two paragraphs of provisions). (February 06, 2019 6:22 PM email from Manufacturer's counsel to Consumer's counsel) (R. p. 842). Similar terms were in the proposed release incorporated into the "Offer of Judgment" Manufacturer served on February 26, 2019. (R. pp. 157-184, 765 ¶ 49, 830-32, 859-60).[11] "I have informed you on multiple occasions that [Manufacturer] . . . does require

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[10] While it might be apparent from the above that the settlement would restrict Tammy's counsel's ability to advertise regarding this case, Honda's release further stated (R. p. 164 ¶ 4.4),

> Further,830 Plaintiff and his attorneys shall refrain from making, causing to be made, or participating in the making of any public announcement concerning Such Information, and shall refrain from contacting, causing another to contact, or participating in the dissemination of Such Information to the news media, any attorney or organization of attorneys, or any consumer organization.

Ethics Advisory Opinion 10-04 condemned settlement agreements that require attorneys to limit their advertising re the matter being settled.

[11] Manufacturer actually served four "offers of judgment."

Manufacturer's counsel first mailed in January of 2019 to Consumer's counsel what Manufacturer titled an "Offer of Judgment," ostensibly "[p]ursuant to Rule 68 of the South Carolina Rules of Civil Procedure." (R. p. 830). Strangely, the document stated, "**This Offer of Judgment shall not be filed with the Court** unless it is (a) accepted, or (b) in a proceeding after trial to fix costs, interest, attorney's fees, and other recoverable monies." (*Id*. p. 831) (emphasis added). Rule 68, of course, requires filing with the Court at or before the time of service.

The offer incorporated an attachment, which incorporated a confidentiality provision. (R. pp. 833-837).

Continued

confidentiality provisions in the settlement agreement and release." (October 29, 2019 5:35 PM email from Manufacturer's counsel to Consumer's counsel) (R. p. 213). Similar terms were apparently incorporated into the Offer of Judgment Manufacturer filed on April 3, 2020 (R. pp.107-08). "Our objective is to reach a fair settlement that ensures all the open issues are resolved. To me, that includes a settlement that . . . . 3) addresses my client's reasonable request for confidentiality." (October 1, 2020 4:54 PM email from Manufacturer's counsel to Consumer's counsel) (R. pp. 217-18).

Manufacturer's counsel mailed Consumer's counsel a similar "offer of judgment" incorporating a similar confidentiality provision on February 26, 2019. (R. pp. 859-60). This too contained language stating it would not be filed unless accepted or after trial to fix costs and the like. (*Id*. p. 860; *see also* R. p. 765 ¶ 49).

Those two releases and accompanying "offers of judgment" were filed with the lower court by Consumer, as she sought guidance on whether the filed "Offer of Judgment" was valid. *See* Pl.'s Mot. to Strike and Exs. 1-4 thereto; Moskos Aff. ¶ 83 and Exs. 8 and 17 thereto (R. pp. 157-184, 772 ¶ 83; 830-32, 859-60).

A year later, on April 3, 2020, Manufacturer made another "Offer of Judgment" and filed this one with the Court. (R. pp. 107-09). It stated the amount offered, but also repeatedly incorporated by reference terms not stated in the offer itself but stated only in the Release "attached to" and "included with" this offer (*id*. p. 108), yet the Release was not filed.

Consumer moved to strike Manufacturer's offers of judgment on November 14, 2020. (R. p. 157-59). With the Release not filed, she argued, it would be difficult if not impossible for the court to determine if a verdict for Consumer with no other terms was more or less favorable for Consumer than was the offer. (*Id*. p. 158). Moreover, as confidentiality was likely one of the terms in the unfiled release (*id.* pp.158-59), this offer too was unacceptable.

She explained her opposition to the confidentiality requirements (*id*. p. 157), questioned whether offers of judgment containing unfiled terms were valid (*id*. p. 158), questioned whether a verdict—which obviously could not contain a confidentiality requirement—could be properly compared to an offer that required confidentiality as required under SCRCP Rule 68(b) (*id*.), and pointed out a problem with Manufacturer posting an offer stating the amount of the proposed settlement in the public record while demanding confidentiality from Consumer as to the amount (*id*.)

Her motion was denied by order filed January 27, 2021. (R. pp. 9-11).

In the interim, on January 15, 2021, Manufacturer had filed another Offer of Judgment. (R. pp. 284-87). Manufacturer's filed offer referred to a Release for its non-financial terms (R. pp. 284, 285); again, the Release accompanying the offer required Tammy's counsel to sign. (R. p. 292).

Finally, in October of 2020, Manufacturer's counsel stated that he might consider asking Manufacturer to consider an agreement without a confidentiality provision, provided there was consideration offered to Manufacturer for this "concession." "If you want to propose **a non-confidential settlement** and returning the vehicle as-is, if the other issues are fully addressed **and there is consideration provided back to Honda for those concessions,** we can discuss." (October 2, 2020 9:16 AM email from Manufacturer's counsel to Consumer's counsel) (emphasis added) (R. pp. 220-21).

Through all this, Consumer's counsel was informing Manufacturer's counsel that Consumer would not accept the confidentiality provision. E.g., December 11, 2018 10:55 AM email from Consumer's counsel to Manufacturer's counsel ("As I said, we will not agree to a confidentiality clause.") with attached release, *inter alia*, striking the confidentiality provision (R. pp. 169-70, 191); December 18, 2018 4:33 PM email from Consumer's counsel to Manufacturer's counsel ("We are not interested in signing a confidentiality agreement for a number of reasons. To keep it short, Ms. West does not want a tax consequence and she does not want this hanging over her head for the rest of her life.") (R. p. 195); January 23, 2019 12:17 PM email from Consumer's counsel to Manufacturer's counsel ("7. . . . The confidentiality provision and any claim to attorney's fees for enforcing the Release must be deleted. My client will not sign any Release containing these provisions. Furthermore, the last paragraph where Honda wishes for me to sign must be deleted. I do not sign Releases.") (R. p. 205). He added on January 31, 2019,

> As for confidentiality, Ms. West refuses to sign a Release containing one. I have eight different reasons why we consider confidentiality off the table. Most defendants do not care about seven of those reasons. The one that they do seem to care about is that confidentiality creates a tax consequence to my client. It is not fair to Ms. West to cause her to incur such a penalty for buying a defective car from [Manufacturer]. If you feel that we need to present this issue to a judge, please let me know when we can set up a status conference or hearing.

(R. p. 206).

Consumer's counsel continued to press to settle without a confidentiality agreement. E.g., February 15, 2019 4:22 PM email from Consumer's counsel to Manufacturer's counsel ("Sixth, Ms. West will not sign a confidentiality agreement. Seventh, ... Even if I was inclined to sign the Release, I believe it is unethical for me to agree to some of the terms listed.") (R. pp. 850-51); August 10, 2019 1:48 PM email from Consumer's counsel to Manufacturer's counsel ("the confidentiality issue is a deal breaker. Please let me know if [Manufacturer] will settle the case without that provision.") (R. p. 212); Plaintiff's Offer of Judgment to Defendant, filed April 1, 2020 (proposing terms not including a confidentiality provision) (R. pp. 105-06); August 25, 2020 Letter from Consumer's counsel to Manufacturer's counsel, p. 1 (explaining that even if Manufacturer's offer included the bare repurchase price, the lack of appropriate amounts for legal fees and the existence of the confidentiality requirement were unacceptable) (R. p. 887).

On October 2, 2020, Consumer's counsel emailed Manufacturer's counsel, "I take it by your and Honda's insistence on a confidentiality agreement that Honda will not settle the case without one. In other words, it is a deal breaker. Is that correct?" (R. p. 217). This led to Manufacturer's counsel's statement above, that if Consumer would not agree to a confidentiality provision, she would have to yield other valuable consideration. (October 2, 2020 9:16 AM email from Manufacturer's counsel to Consumer's counsel) (R. pp. 220-21). Consumer's counsel then asked Manufacturer's counsel to "Please define the amount of value that Honda assigns to" the confidentiality provision. (October 28, 2020 9:50 AM email from Consumer's counsel to Manufacturer's counsel) (R. p. 219).

Manufacturer never did so.

Consumer's counsel also informed the Court of Consumer's position re the confidentiality provision. (R. pp. 157-59). He first did so in his client's November 14, 2020 Motion to Strike Manufacturer's "offers of judgment." (*Id*.)

Consumer then moved for summary judgment on her Lemon Law claim on November 14, 2020, which motion was first denied, then granted as to liability only on March 15, 2021. (R. pp. 12-14, 18-20, 157-59).

With liability established and a trial set for later that week, counsel for the parties agreed in open court on Monday, May 17, 2021, as to the other terms—which did not include confidentiality or that Consumer's counsel would sign—and that the parties would submit the issue of costs and attorney's fees to the court. (R. pp. 34; R. p. 101 line 9-p. 102 line 11).

As stated above in the Statement of the Case, Tammy accordingly filed her motion for attorney fees (R. pp. 696-97), and her amended brief in support (R. pp. 942-69), in which she set out the requirements established by *Nix* and how they apply (R. pp. 944, 958-59); Manufacturer filed its Opposition, setting forth its position re *Nix* (R. pp. 970-87); the lower court issued its order (R. pp. 31-40); Tammy moved for reconsideration (R. pp. 1154-61) and the court denied reconsideration (R. pp. 41-44).

STANDARD OF REVIEW

The lower court's holding was based on an error of law. The standard of review is thus de novo. *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (questions of law regarding fee awards are reviewed de novo). Alternatively, the lower court abused its discretion in making an inadequate award. *Rish v. Rish*, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988) (an

inadequate fee award is an abuse of discretion);[12] *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000) ("The term 'abuse of discretion' has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support.").

ARGUMENT

The lower court erred in cutting the prevailing Plaintiff's attorney's fee request by more than 70% and awarding no costs under a consumer-protection statute that provides for fees and costs.

I. The Lemon Law's Fee-Shifting Provision Is a One-Way Consumer Protection Fee-Shifting Provision.[13]

The Lemon Law's fee-shifting provision states,

> Any **consumer** who finally prevails in any action brought under this chapter, may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorney's fees based on actual time expended) and other such costs which are directly attributable to the nonconformity of the motor vehicle determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion determines that such an award of attorney's fees would be inappropriate.

S.C. Code Ann. § 56-28-50(D) (emphasis added.).

As the plain language of the provision makes clear, this is a **consumer** protection provision. It is also a "one-way" provision: It shifts fees in favor of successful consumers, but does not equally provide fees for manufacturers that successfully defend a Lemon Law claim.

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[12] Other jurisdictions agree. *See, e.g., Custom Molders, Inc. v. Am. Yard Prod., Inc.,* 463 S.E.2d 199, 204 (N.C. 1995) (citations omitted) ("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.")

[13] In South Carolina, attorney's fees may be awarded only per a statute or contractual provision. *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238–39, 616 S.E.2d 431, 434 (Ct. App. 2005).

II. Law Governing One-Way Consumer Protection Fee-Shifting Provisions

A. The Purpose of the Lemon Law's Fee-Shifting Provision Is to Encourage Consumers to Bring Lemon Law Cases.

The Supreme Court has noted the importance of considering the theory and purpose of a fee-shifting provision in evaluating an award of fees. *Layman v. State,* 376 S.C. 434, 658 S.E.2d 320 (2008) (passim).

The purposes of the statutory provision here differ from the purposes of more typical fee-shifting provisions. Parties to a contract who agree to mutual fee-shifting may do so not to encourage litigation, but simply to ensure that whoever is in the right in a dispute receives the full benefit of his bargain without reduction by legal fees. A legislature may enact two-way fee-shifting statutes in certain contexts, such as those concerning mechanics' liens, not to encourage litigation, but similarly, to ensure that the party in the right receives the full benefit of her bargain. These in effect change the "American rule," in which each party bears its own fees and costs, to the "English rule," in which the losing party pays the prevailing party's fees. Fee-shifting in domestic relations may be ordered primarily to balance the overall interests of the parties, in light of their assets, income, and other concerns, rather than to encourage divorcing parties to litigate further.

Provisions in consumer-protection legislation that shift fees only in favor of successful plaintiff are different. As our Supreme Court has held, these provisions "epitomize[] the definition of a remedy." "[A]n award of attorney's fees and costs would merely serve to fully compensate [Consumer] for pursuing his statutorily-authorized private right of action under the [statute], which we believe epitomizes the definition of a remedy." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010).

The Supreme Court further stated, "[A] decision in favor of [Consumer] facilitates the purpose of the Act which is to provide buyers a private right of action against dealers who engage in deceptive practices." *Id*. Here, the intent behind the fee-shifting statute is actually to increase litigation, to have cases filed and prosecuted that otherwise would not be. Such "attorney's fees are intended to make such claims economically viable for private citizens." *Id.* at 56, 691 S.E.2d at 153.

The Supreme Court has similarly stated multiple times. "'[R]equiring the unsuccessful defendant to pay the plaintiff's attorney's fees is a legitimate tool in enforcing the underlying public policy of the [securities] statute.'" *Taylor v. Medenica*, 331 S.C. 575, 578, 503 S.E.2d 458, 460 (1998) (quoting *Bradley v. Hullander,* 277 S.C. 327, 287 S.E.2d 140 (1982)) (alteration in original). "Allowing plaintiffs who successfully pursue an action under the UTPA to recover their attorney's fees encourages individuals to pursue litigation to protect the public interest." *Id.* at 579, 503 S.E.2d at 460.

Courts around the country agree. "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so[.]" *Riverside v. Rivera,* 477 U.S. 561, 577 (1986) (plurality); *id*. at 586 (Powell, J., concurring) (same). Such laws are enacted so that "business interests could not proceed with impunity . . . . [g]iven the small dollar amounts often involved in such suits[.]" *Marshall v. Miller,* 276 S.E.2d 397, 403 (N.C. 1981). *See also Covenant Mut. Ins. Co. v. Young,* 179 Cal. App. 3d 318, 325-27, 225 Cal. Rptr. 861, 865-67 (Cal. App. 2d Dist. 1986) (surveying the academic literature on one-way fee-shifting provisions and concluding, not surprisingly, that "where the Legislature wants to encourage litigation it can intervene to alter the decision-making equation by instituting unilateral fee-shifting." Thus, "more injured parties will be able to file

more lawsuits and the public policy behind the substantive statute . . . will be enforced more broadly and more effectively.")

In sum, unlike most fee-shifting provisions, the fee-shifting provision here is intended to encourage consumers to vigorously litigate these cases.

B. The Lemon Law and Its Fee-Shifting Provision Are to Be Broadly Construed to Fulfill Their Purpose.

Moreover, the statute is to be broadly construed to fulfill its purpose.

> Because the provision affords the innocent owner a remedy not recognized previously, it should be classified as remedial. Remedial statutes are to be construed liberally in order to effectuate their purpose.

Ducworth v. Neely, 319 S.C. 158, 163 & n.3, 459 S.E.2d 896, 899 & n.3 (Ct. App. 1995) (citing *South Carolina State Law Enforcement Div. v. Crook*, 273 S.C. 285, 255 S.E.2d 846 (1979)). "This is a remedial statute, and as such should receive . . . a construction 'giving the words the largest, the fullest, the most extensive meaning of which they are susceptible.'" *Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 577, 38 S.E. 274, 276 (1901) (quoting *Endlich on Int. Stat.*, sec. 107).

See also South Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) (similar); *Inabinet v. Royal Exch. Assur. of London,* 165 S.C. 33, 36, 162 S.E. 599, 600 (1932)) (citing numerous authorities) ("A statute remedial in nature should be liberally construed in order to accomplish the object sought.")

Because the Lemon Law provides an innocent owner a remedy not recognized previously, the Act is remedial and is to be construed broadly to fulfill its purposes.

Fee-shifting provisions within remedial acts are doubly-remedial. Statutes such as the Dealers Act, the UTPA, and the Lemon Law are obviously designed, solely or in substantial part, to remedy the problem of certain sellers not treating their customers fairly. But the right to sue could be illusory without fee-shifting, because the amounts typically at stake would be dwarfed by

the expected fees. The fee-shifting provisions are designed to give teeth to the statutory right to sue, to remedy the problem that suits brought under the remedial statutes would often be implausible due to the great disparity between the fees and the amounts usually at stake. Such provisions "epitomize[] the definition of a remedy." *Austin,* 387 S.C. at 57, 691 S.E.2d at 153.

Because the fee-shifting provision epitomizes the definition of a remedy, it is to be construed broadly "in favor of [Consumer, because doing so] facilitates the purpose of the Act which is to provide buyers a private right of action." *See id.*

C. Against This Backdrop, Our Supreme Court Has Repeatedly Held that Fees Are Not Apportioned Between a Statutory Cause of Action and Other Claims in the Same Lawsuit, with Certain Limited Exceptions.[14]

Against this backdrop, our Supreme Court has repeatedly held that fees are not apportioned between a statutory cause of action and other claims in the same lawsuit, with certain limited exceptions. *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992); *Austin*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010). The exceptions are if counsel admits a portion of the services were "totally unrelated" to the statutory cause of action or if it is shown that the services were clearly beyond the scope of the statutory proceeding. *Nix*, 307 S.C. at 557, 416 S.E.2d at 622.

The Supreme Court stated in *Nix*,

> The defendant's attorney argued fees related to the nonstatutory cause of action should have been excluded. We agree. However, precisely what fees were unrelated to the statutory action were not presented to the lower court. The defendants merely estimated $2,500 would be a reasonable sum for the prosecution of the claim under § 56–15–10, *et seq.* **We hold this is not adequate.** The breach of warranty and strict liability claims were related and intertwined with the statutory claim. The conduct of the breach of warranty was the same conduct which was deemed to be a violation of the statute. **We hold when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to**

[14] As explained below, pages 31-33, those exceptions are not applicable here.

> **issues which were clearly beyond the scope of the statutory claim proceeding.** *Accord, Heindel v. Southside Chrysler–Plymouth, Inc.,* 476 So.2d 266 (Fla. App. 1985). This approach requires the party asserting the right to attorney fees to produce an itemized affidavit of their fees that they believe are related to the statutory claim. The opposing party then has the burden of showing which of the fees are clearly unrelated.

Nix, 307 S.C. at 557, 416 S.E.2d at 622 (emphasis added).

In *Austin*, the Court held,

> [W]e find **it would be difficult to dissect Austin's counsel's fee affidavit to ascertain how much time was spent on this particular claim** given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud. Furthermore, **to award Austin his claim in its entirety would be consistent with the precedent of this Court**. *Cf. Taylor v. Nix,* 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) (finding award of attorney fees under the Dealer's Act was warranted even though fee affidavit was not itemized for time spent for claim under the Act and that spent for the nonstatutory cause of action).

Austin, 387 S.C. at 57, 691 S.E.2d at 153 (emphasis added). **"[W]e hold: (1) [Consumer] is entitled to the entire amount of his request for attorney's fees and costs** under the South Carolina Dealer's Act." *Id*. at 59, 691 S.E.2d at 154 (emphasis added).

III. Application

A. The Lower Court Erred in Misapplying *Nix* and Ignoring *Austin*.

Nix allows allocation of fees only where one of two exceptions exist, i.e., where "counsel admits that a portion of the services was totally unrelated to the statutory claim" or "it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding." 307 S.C. at 557, 416 S.E.2d at 622. Here, neither exception exists. The lower court erred in allocating fees.

Moreover, Consumer produced an itemized affidavit of fees she believes are related to the statutory claim. The main order states, "It is difficult for the Court to determine the amount of time reasonably incurred in the prosecution of the Warranty Act cause of action." (R. p. 37). Under

the Supreme Court's holding in *Austin*, it should have stopped. "[W]e find it would be difficult to dissect Austin's counsel's fee affidavit to ascertain how much time was spent on this particular claim; *id* at 57, 691 S.E.2d at 153; "we hold: (1) [Consumer] is entitled to the entire amount of his request for attorney's fees and costs under the South Carolina Dealer's Act." *Id*. at 59, 691 S.E.2d at 154.

Instead, the order appears to estimate that a 70.1% cut is appropriate. It contradicts *Nix* as well as *Austin*. "The defendants merely estimated [what] would be a reasonable sum for the prosecution of the [statutory] claim. We hold this is not adequate." *Nix*, 307 S.C. at 557, 416 S.E.2d at 622.[15]

The order's related complaint that counsel's time entries did not state which cause of action each time entry was for also runs afoul of both *Austin* and *Nix*. *Compare* Order p. 7 (R. p.37), "[T]here are no specific references in the timesheets to the Warranty Act cause of action, versus the other causes of action," *with Austin*, 387 S.C. at 57, 691 S.E.2d at 153 (citing *Nix*) (emphasis added),

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[15] To the extent the order provides any authority for its 70.1% reduction of the fee request, it does so in a footnote. (R. p. 37 n.2). There, it cites *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016). *Maybank* affirmed that a "base attorney fee award of $1,769,530 was proper, along with applying the 1.5 multiplier to reach $2,654,295." *Id.* at 581, 787 S.E.2d at 519.

The order incorrectly presents *Maybank* as also "affirming a reduction of attorneys' fees asserted to claims where statutory recovery of fees was not permitted." (R. p. 37 n.2). The order misreads *Maybank.* The "Issue[] Presented" in *Maybank* regarding attorney fees was, "V. Whether the trial court abused its discretion in awarding attorneys' fees and costs to Maybank under the UTPA." *Id*. at 564, 787 S.E.2d at 509–10.

The reduction was not challenged in *Maybank*. Therefore, **it could not have been "affirmed."** (Plaintiff there did not complain that the **reduction** was improper or too large. Rather, the **defendant** there claimed the **award** was too large. The Supreme Court disagreed with that defendant.)

Finally, the unchallenged reduction in *Maybank* was of 20%. *Id.* at 563, 787 S.E.2d at 509. Here, the reduction is 70.1%. The lower court abused its discretion in cutting the fee request so drastically, and further erred as a matter of law in reading *Maybank* to allow such a large reduction.

> Furthermore, **to award Austin his claim in its entirety would be consistent with the precedent of this** Court. *Cf. Taylor v. Nix,* 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) (finding award of attorney fees under the Dealer's Act was warranted **even though fee affidavit was not itemized for time spent for claim under the Act and that spent for the nonstatutory cause of action**).

"[W]e hold: (1) [Consumer] is entitled to the entire amount of his request for attorney's fees and costs under the South Carolina Dealer's Act." *Id*. at 59, 691 S.E.2d at 154. This Court should similarly hold that Consumer is entitled to the entire amount of her request for attorney's fees and costs under the South Carolina Lemon Law.

Manufacturer relied on arguments that have been rejected by our Supreme Court. The lower court erred in accepting them. The Court should remand with instructions to grant Appellant's entire fee request, as stated in *Austin* and *Nix*, and to award costs as argued below.

B. Other Points of Law

1. Fee awards are to be based on actual time expended.

Although the incorrect *Nix* analysis (had it been correct) is the only statement in the order's discussion of the hours reasonably incurred that could justify a large reduction of the fee request, two other possibilities should be addressed.

The order provided for fees. Therefore, whether the lower court *could have* declined to award fees is not relevant.

However, in an abundance of caution, to avoid any claim by Manufacturer that Consumer has waived the issue, Consumer contests the order's bald statement that SC Code §56-28-50 "provides for the discretionary award of attorney's fees to a prevailing party" (R. p. 31) and similar statements.[16] The statement is not exactly wrong, but requires qualification. As the plain language

[16] The order similarly states on page 5 (R. p. 35),

Continued

of the statute makes clear, that discretion is limited to cases in which an award of fees would be "inappropriate." And there has been no suggestion, let alone a determination, that an award of fees would be inappropriate in this case. In fact, the finding that fees are warranted negates any argument that an award of fees would be "inappropriate."

The section states,

> (D) Any consumer who finally prevails in any action brought under this chapter, may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorney's fees based on actual time expended) and other such costs which are directly attributable to the nonconformity of the motor vehicle determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, **unless the court <u>in its discretion</u> determines that such an award of attorney's fees would be inappropriate.**

SC Code §56-28-50 (emphasis added).

The Supreme Court of the United States reads an analogous federal statute to mandate fees except in narrowly limited situations. *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968) (per curiam). It does so because of the purposes behind the statute, which are the same purposes behind the South Carolina Lemon Law. (*Id*.) As the Supreme Court explained, 42 U.S.C. s 2000a—3(b) provides, "'In any action commenced pursuant to this subchapter, the court, **in its discretion, may allow** the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.'" 390 U.S. at 401 n.1, 88 S. Ct. at 966 n.1 (quoting 42 U.S.C. s 2000a—3(b)) (emphasis added).

> First, the Court has the discretionary authority to determine whether to award any attorney's fees to a prevailing plaintiff. Second, there is no requirement under the statute that a prevailing plaintiff automatically receive an award of attorney's fees, regardless of the amount. . . . Finally, even if the Court determines an amount of reasonably incurred fees, the Court has the discretion not to make an award of attorney's fees.

The Supreme Court reasoned,

> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.
>
> **It follows that one who succeeds** in obtaining an injunction under that Title **should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust**.

390 U.S. at 402, 88 S. Ct. at 966 (emphasis added) (footnote omitted).

The Supreme Court of South Carolina has held similarly regarding federal law. "The United States Supreme Court has held that ordinarily, a party who prevails on a claim pursuant to the Civil Rights Act should recover attorneys' fees unless special circumstances would make an award unjust." *Hueble v. S.C. Dep't of Nat. Res.*, 416 S.C. 220, 232, 785 S.E.2d 461, 467 (2016) (citing *Newman*, 390 U.S. 400 at 402, 88 S.Ct. 964, and *Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933 (1983)). The "special circumstances exception is very narrowly limited," to be used "only in rare occasions . . . . few and far between." *Id.* (citations omitted) (internal quotation marks omitted). Denying fees is permissible only where an attorney "fail[ed] to maintain reliable contemporaneous time records," "made an untimely application," or the like. *Id.* at 232 n.7, 785 S.E.2d at 467 n.7 (citation omitted). None of these special circumstances apply here.

Our Supreme Court has held similarly regarding South Carolina law. *McDowell v. S.C. Dep't of Soc. Servs*., 304 S.C. 539, 405 S.E.2d 830 (1991). Interpreting S.C. Code § 15–77–300 (Supp. 1990), which provides "the court may allow the prevailing party" to recover attorney fees if certain conditions are met, *id*. at 541–42, 405 S.E.2d at 83,[17] the Court found those conditions

[17] The *McDowell* Court presented the statute thusly,

Continued

were met, and directed that fees were therefore to be awarded. "Having determined that appellant has shown DSS acted without substantial justification as provided in § 15–77–300 and finding no special circumstances that would make an award of attorney's fees unjust, we conclude the trial judge abused his discretion in denying appellant's petition" for a fee award. *Id*. at 543, 405 S.E.2d at 833.[18]

Were the Court to reach this issue, it should follow *Newman*, *Hueble*, and *McDowell*.

If the Court were to look beyond those cases, it should afford the statute a liberal construction in order to fulfill its purpose of protecting consumers, because this is a remedial statute, and the fee-shifting provision is doubly-remedial. A provision that shifts fees in favor of successful plaintiffs who sue under a remedial statute "epitomizes the definition of a remedy." *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010). Thus, "[A] decision in favor of [Consumer] facilitates the purpose of the Act which is to provide buyers a private right of action against dealers who engage in deceptive practices." *Id*. So too here. A

Section 15–77–300 provides in pertinent part:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

Id. at 541–42, 405 S.E.2d at 832.

[18] The Supreme Court added, "Appellant is therefore entitled to attorney's fees for the judicial review action in circuit court. . . . [A]ppellant is [also] entitled to attorney's fees under § 15–77–300 for fees incurred on appeal." *Id*.

decision in favor of Consumer facilitates the purpose of the Act which is to provide buyers a private right of action against vehicle manufacturers who cannot or will not fix a "Lemon."[19]

The order's reliance on dicta in *Mockabee v. Wakefield Buick, Inc. and First Citizens Bank,* 298 S.C. 386, 380 S.E.2d 848 (Ct. App. 1989) (R. p. 36) is misplaced. *Mockabee* is especially inapposite, as there, the plaintiff had not complied with the requirements of the warranty act and so was not entitled to fees. "The [trial] court also held that even if the case came within the Magnuson-Moss Warranty Act there should be no recovery of fees because Mockabee never gave Wakefield a reasonable opportunity to cure the alleged breach of warranty."[20] *Id*. at 389, 380 S.E.2d at 850. That case simply held there was no **prejudice** resulting from the trial court's failure to explicitly **state** that an award of fees would be inappropriate **where the inappropriateness of fees was obvious.** The situation here is exactly the opposite, because here the lower court found an award of fees **is** appropriate.

In *Mockabee*, this Court stated,

> **Mockabee argues** in his Petition for Rehearing that **the trial court was required** under the Magnuson–Moss Act **to specifically find that an award of attorney fees "would be inappropriate." We find no prejudice to Mockabee. The trial court's order makes it clear that attorney fees are inappropriate[.]**

298 S.C. at 390, 380 S.E.2d at 850 (emphasis added).

Therefore, because the lower court here did not have the discretion to arbitrarily deny fees, and even if it had that discretion, it chose to award fees, the order's reference to a supposed ability to decline to award fees is irrelevant.

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[19] Consumer incorporates by reference her argument in Sections IA through C above.

[20] That Act requires the consumer to provide the dealer an opportunity to repair. 15 U.S.C. 2310(e). Thus, there is a condition precedent to the formation of the claim that was not fulfilled. Thus, it would be inappropriate to award fees when the statute was not followed.

Nor does it follow that because the lower court (supposedly) had the power to deny fees entirely, it had the power to give as little fees as it chose. The statute is clear that if fees are awarded, the award is to be "based on actual time expended," S.C. Code Ann. § 56-28-50, not "actual time expended or such other criterion as the judge may choose."

If the Court reaches this issue, it should follow *Newman, Hueble, McDowell, Austin, Allen, Ducworth, Hannah*, *Inabinet*, and the plain words of the statute.

2. Premature cut-off?

Manufacturer argued that fees should be limited to time incurred before Tammy filed suit. It contended that it offered Consumer all she was entitled to once she hired an attorney but before he filed suit. (R. pp. 985-86). It ignored the fact that it never stated what amount it would pay, providing rather that it would pay whatever the statute required, and that it expected Consumer to incur a $4,000 cost for the attorney fees Manufacturer would not cover, and to submit to a confidentiality requirement. (*Id*.)

The lower court disagreed, at least in part. While it found that Manufacturer had offered a repurchase consistent with the statute to Consumer in October 2018, one month prior to filing suit, and that the 20.9 hours incurred prior to filing of the complaint were "a reasonable and necessary amount of time incurred in this matter for the benefit of the [Consumer]" (R. pp. 37-38), which, if it stood alone, might be read to imply that time thereafter was of no benefit to Consumer, the lower court did not stop there. Instead, it may have adopted an erroneous argument from Manufacturer's Opposition, which states, "As an alternative, the Court could find that by August 25, 2020, counsel himself had conceded in writing that AHM had offered a full recovery to the Plaintiff. As of that date, counsel reported he had incurred 61.3 hours of work." (R. p. 986).

Sixty-one point three hours at the $450 rate Consumer's counsel requested comes to $27,585, which is the amount awarded.

If so, the lower court again erred. Manufacturer was circuitous about exactly on what it based its claim that Consumer's counsel had conceded that Manufacturer had offered a full recovery to Plaintiff by August 25, 2020. To find its source requires extensive tracking. The language quoted above is from page 17 of the opposition (R. p. 986) and is not accompanied by a citation. However, if one tracks up eleven pages in the document one finds (Opp'n p. 6, R. p. 975) a citation to an August 25, 2020, writing by Consumer's counsel that is supported by a cite of "*Id*." If one keeps tracking up in the document, it leads to a citation of "*Id*. at ¶ 21." If one keeps tracking up through a series of "*Id*."s, one comes at last to page one (R. p. 970), and a citation apparently to the document on which Manufacturer relies.

That document is an affidavit of Manufacturer's counsel. "Affidavit of Patrick J. Cleary." (R. p. 970).

That affidavit is attached as an exhibit to Manufacturer's opposition. If one then turns to that affidavit and finds paragraph 21 (R. p. 994), one learns that Manufacturer is relying on "Letter from Steven Moskos, August 25, 2020, attached as Exhibit N."

If one then finally turns to Exhibit N, the letter from Mr. Moskos, one finds it stating,

> First, while American Honda **may** have offered a full repurchase amount to Ms. West for the repurchase of her car, **it has not agreed to compensate her fully for her attorney's fees as required under the Lemon Law statute. Furthermore, American Honda has continually demanded that confidentiality be a part of any settlement. It is not entitled to this under any law of which I am aware.**

(R. p. 1101) (emphasis added). To read this as an admission by Consumer's counsel that Manufacturer had fully complied with the Lemon Law, or that no gain was had by Consumer after this date, would err as both a matter of fact and a question of law. The letter stated, "may have,"

not "did." It was obviously meant in the sense of assuming, for the sake of argument, that Manufacturer did offer the full purchase price, with a confidentiality requirement, and a requirement that she pay most of her attorney fees, there is still a problem. Reading "may" as "did" is clearly erroneous. *Cf. City of Chester v. Addison*, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981) (clearly erroneous factual findings are reversible) (pre-trial motions).

If the order relied on Manufacturer's argument, it further erred as a matter of law. It requires a conclusion of law that Consumers and their attorney may rightfully be required to agree to confidentiality provisions in order to obtain what the statute promises the consumer without any confidentiality provision.[21]

Because the lower court obviously erred as a matter of law, the Court should remand with instructions to grant Consumer's entire fee request, as stated in *Austin* and *Nix*, and to award costs as argued below.

C. A Seventy-Percent Reduction Is Unreasonable.

Even if the lower court had not erred as a matter of law as described above, the amount of the reduction from the request, a 70.1% reduction, is either an error or law or an abuse of discretion. In *Rish v. Rish,* 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988), a family law case, this court held an inadequate fee award to be abuse of discretion. The same principles apply here, even more strongly: Seventy-percent reductions in fees will not encourage first-rate attorneys to take

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[21] To make the same point from a different angle, if Consumer's counsel had actually written,

> First, while American Honda **[did offer]** a full repurchase amount to Ms. West for the repurchase of her car, **it has not agreed to compensate her fully for her attorney's fees as required under the Lemon Law statute. Furthermore, American Honda has continually demanded that confidentiality be a part of any settlement. It is not entitled to this under any law of which I am aware**

it would still be an error of law to read such a statement as indicating Manufacturer had properly offered to satisfy all its obligations under the statute and that removing the confidentiality provision and obtaining a higher percentage of the attorneys' fees is of no benefit to a consumer.

Lemon Law cases. Rather, it will encourage manufacturers to do as the Manufacturer did here: deny consumers' requests to repurchase or replace the vehicle, hope they give up; if they do not give up, make them send a certified letter, then hire an attorney to go through the "arbitration" procedure, then stiff the attorney on fees and demand confidentiality, with the goal of running the attorney into the ground and gagging the consumer. The apparent goal, and the likely effect, will be to leave consumers like Ms. West unable to find quality counsel, at the mercy of manufacturers, and unable to enforce the Act.

This would be directly opposite to the purposes of the Lemon Law – a remedial statute – and to the purpose of its doubly-remedial fee-shifting provision, which "epitomizes the definition of a remedy."

D. The Lower Court Erred in Failing to Award Costs

The above discussion assumes the award was only for attorney fees, as stated on pages 1 and 9 of the main order (R. pp. 31, 39) and not for both attorney fees and other costs, as stated on page 6 (R. p. 36). Consumer delineated $2,386.28 in costs for which she requested reimbursement. (R. p. 968). If the award was for both fees and costs, then the cut was approximately one percentage point (0.75%) larger than stated above, a cut of 70.89% rather than 70.14%, and is thus more wrongful.

The lower court should have specified whether it meant to award costs as part of the "fee" award; whether it declined to award costs; or whether it was doing something else. Consumer requested that the lower court clarify its ruling regarding costs (R. pp. 1160-61) (Mot. Am. pp. 7-8), but the order on the motion to amend (R. pp. 41-44) provided no clarification.

This Court should direct that a separate award for costs be made, or should direct that an additional amount be awarded for "fees" so as to include the other costs.

CONCLUSION

Consumer was more than patient in trying to get her vehicle to operate safely. She then tried repeatedly to get Manufacturer to live up to its obligations without getting an attorney involved.

After she hired an attorney, Manufacturer offered to compensate her, but not her attorney, provided she and he sign a confidentiality agreement.

The stated reason for the draconian reduction of the fee award is a patently erroneous reading of the Supreme Court's decision in *Taylor v. Nix.* The order similarly erred in ignoring the Supreme Court's decision in *Austin v. Stokes-Craven Holding Corp*. The Court should direct the lower court to award the full request.

Respectfully submitted,

s/Brooks R. Fudenberg December 7, 2022 s/C. Steven Moskos

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I certify that this final Brief of Appellant complies with Rule 211, SCACR.

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