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.

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Facts. Tammy's opening brief explained the many times safety systems in her vehicle malfunctioned and her attempts to resolve the matter without requiring the assistance of an attorney. It described the many attempts her attorney then made to resolve the matter short of trial, and Manufacturer's insistence on unethical confidentiality provisions to be signed by Tammy's attorney. Manufacturer's brief does not dispute this. It simply does not mention the confidentiality provisions.

Instead, Manufacturer mischaracterizes an August 25, 2020 letter from Tammy's counsel, which complained about Manufacturer's insistence on confidentiality provisions, as a concession that Tammy's counsel "was continuing this litigation solely in the attempt to obtain more attorney's fees."

The Governing Rule of Construction: The Fee-Shifting Provision at Issue Here Is to Be Broadly Construed. Manufacturer does not dispute the points in Tammy's opening brief that statutory one-way, consumer protection, fee-shifting provisions are to be construed broadly to achieve their purpose of encouraging consumers to bring these kinds of lawsuits.

Manufacturer Cannot Escape Its Failure to Meet Its Burden Under *Nix*. Tammy quoted *Taylor v. Nix* and the burden it places on parties in Manufacturer's position. Manufacturer does not explicitly address its *Nix* burden. Instead, Manufacturer relies on a single case, *Rice v. Multimedia,* which lends Manufacturer no support. The case is doubly irrelevant. Manufacturer erroneously presents *Rice* as standing for the proposition that "a trial court is required to apportion attorney's fees" in certain situations. However, *Rice* stated *nothing* about requiring fees to be apportioned. *Rice* is irrelevant for another reason as well. The *Nix* burden

applies only where multiple claims are "based on the same transaction." *Rice* involved at least seven different transactions based on seven different contracts. It is simply inapplicable.

Other issues

Abuse of Discretion. Manufacturer's brief refers repeatedly to the lower court's discretion to decide fee awards, but concedes that an abuse of discretion occurs where the decision is based on an error of law or there is substantial disagreement with the trial court's determination of attorney's fees. Tammy's opening brief explained the lower court's error of law in misinterpreting *Nix*. Tammy's opening brief further explained why a 70.1% reduction from the requested fees is unreasonable. Manufacturer counters with two cases it mischaracterizes as affirming reductions to 10 and 15% of the requested fees. Manufacturer errs. Those cases, *Farmers and Merchants Bank v. Fargnoli* and *Assoc. Comm. Corp. v. Hammond*, have nothing to do with percentages of requested fee awards. The percentages mentioned in those cases were percentages of the **total recoveries**, not of **fees** requested.

Nor did those cases involve appellate courts affirming reductions against a claim the awards were too small. The only issue re fees before the appellate courts in those cases was whether the awards were **too large;** the appellate courts held the awards were **not** too large. Moreover, the percentage-of-the-recovery approach employed in those cases is contrary to the Lemon Law's mandate of awards based on actual time expended.

Manufacturer provides no reason to support the extraordinary reduction, other than its erroneous *Nix* and *Fargnoli/Hammond* analyses.

Premature cut-off? Manufacturer does not explicitly argue that Tammy's attorney fees should have stopped accumulating on August 25, 2020, when Consumer's attorney wrote Manufacturer's attorney complaining, *inter alia*, about Manufacturer's demand for

confidentiality provisions, but any such argument it may intend to make is based on its clearly erroneous claim regarding the August 25, 2020 letter.

Specific findings of fact. Manufacturer's brief refers repeatedly to the lower court's "specific findings of fact," but its Argument section points to one and only one specific finding: the undisputed finding from which the lower court launched its disputed *Nix* analysis; i.e., that Tammy's counsel's fees affidavit did not specify which time entries were for work related to the Lemon Law.

Summation. Tammy's opening brief explained errors in the lower court's analysis of three cases: *Nix*, *Maybank v. BB&T Corp.*, and *Mockabee v. Wakefield Buick, Inc. and First Citizens Bank*. Manufacturer does not attempt to defend the lower court's erroneous *Maybank* and *Mockabee* analyses, but retains the lower court's erroneous *Nix* analysis, and attempts to support the decision below with three new cases, *Rice*, *Fargnoli*, and *Hammond*, none of which stand for the propositions for which Manufacturer cites them. Manufacturer also relies on a clearly erroneous reading of the August 25, 2020 letter.

For the reasons stated in Tammy's opening brief, the Court should direct that Tammy's full fee request be awarded.

REPLY TO MANUFACTURER'S STATEMENT OF THE CASE

A Statement of the Case is not supposed to include contested material. Rule 208(b)(1)(C), SCACR. Yet Manufacturer's Statement of the Case presents two contested "facts" that are not actually facts. Tellingly, it omits a major fact that would demonstrate the falseness of a "fact" Manufacturer asserts.

The Vehicle Was Never Fixed. Tammy's opening brief detailed her attempts to get the vehicle fixed, and failing that, to obtain her lawful remedy without engaging an Attorney

(Statement of Facts, Sections A and B, pages 10-16). Manufacturer no longer claims that these safety defects do not substantially impair the vehicle's "use, market value, or safety" (R. p. 66), but maintains these were all repaired. (Manufacturer's Br. p. 2). Not so. The defects were never successfully "repaired;" the safety issues continued to recur after Manufacturer's repair efforts ceased. Tammy's affidavit so states. "The defects in my vehicle have not been repaired. . . . These issues are still present." (West Aff. ¶ 20 January 1, 2021) (R. p. 375). Accompanying photographs taken after the repair attempts ended show the safety features malfunctioning. (R. pp. 439-41).[1]

Manufacturer Ignores Its Insistence on Improper Confidentiality Provisions. Tammy's opening brief detailed, for five pages, Manufacturer's repeated insistence on improper and unethical confidentiality provisions that Manufacturer required both Tammy and her counsel to sign in order to settle the case. It did so in its Statement of Facts. (Consumer's Br. pp. 19-24). Her brief further argued the issue for two pages in its Argument. (Argument Section III.B.2, entitled "Premature cut-off?", pages 38-40). Manufacturer's brief simply ignores this. While magic words are not needed, neither the word "confidentiality" nor the concept appear anywhere in Manufacturer's brief.

[1] Manufacturer may have meant simply that Tammy was not charged for the unsuccessful repair efforts. But Manufacturer inaccurately states that the issues were "repaired." Manufacturer states, "Plaintiff experienced various issues with the Subject Vehicle, all of which were repaired at no charge." (Manufacturer's Br. p. 2 (citing Honda's Opposition to Plaintiff's Motion for Attorney's Fees, Ex. 1 at ¶¶ 9–10)). Manufacturer's "source" for this claim is the affidavit of its own attorney. (*Id*.) (citing Ex. 1 to Manufacturer's opposition). Manufacturer itself provided no such sworn affidavit. The paragraphs Manufacturer cites from its counsel's affidavit, paragraphs 9 and 10, state only that the attorney reviewed repair orders and saw no charges. Manufacturer's current claim that the issues were all repaired is not supported by the source it now cites, which in any case is trumped by Tammy's sworn affidavit and the accompanying photographic proof.

Manufacturer also ignores the fact that it did not state an amount it would pay until January 2019, by which point it was insisting on confidentiality. (R. p. 763 ¶ 42; Manufacturer's proposed release, heading 14, R. p. 836).

Manufacturer Misrepresents the August 2020 letter. Tammy's opening brief pointed out a misrepresentation Manufacturer had made to the lower court. (Consumer's Br. pp. 38-40). Nevertheless, Manufacturer now repeats and expands upon that representation in its brief to this Court.

Manufacturer now erroneously claims that "Plaintiff's counsel even acknowledged in August 2020 that Honda made settlement offers which would fully repurchase the Subject Vehicle, but that he was continuing this litigation solely in the attempt to obtain more attorney's fees. [*Id*. at ¶ 21]." (Manufacturer's Br. p. 3). Manufacturer's assertion is objectively false.

Manufacturer's source for its claim is an August 25, 2020 letter from Consumer's counsel to Manufacturer's counsel. It takes a bit of work to dig out Manufacturer's actual source, because Manufacturer's reference on page 3 of its brief to "*Id*. at ¶ 21" is a reference to Exhibit 1 of Honda's Opposition to Plaintiff's Motion for Attorney's Fees ("Honda's Opposition Exh. 1") at ¶ 21. Exhibit 1 to Honda's Opposition is an affidavit of Manufacturer's counsel. (R. pp. 988-995). Paragraph 21 of that affidavit makes the false assertion that "Plaintiff's counsel acknowledged on August 25, 2020, that AHM [American Honda Motors] offered a full repurchase amount to Plaintiff." (R. p. 994 ¶ 21). It provides only one reference to support its false assertion: "*See* Letter from Steven Moskos, August 25, 2020, attached as Exhibit N." (*Id.*). But that August 25, 2020 letter actually stated,

> 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).

This letter did not say that Consumer's counsel was litigating solely to obtain more attorney's fees. It did not even say that Manufacturer had made offers that would "fully repurchase the vehicle." There is an important difference between "may have" and did. There is an important difference between "solely to obtain fees" and "to refuse an onerous and improper provision."

Manufacturer's opposition in the lower court asserted based on that same letter that Tammy's counsel had conceded by August 25, 2020, that Manufacturer "had offered a full recovery to the Plaintiff." (Consumer's Br. pp. 38-40). Tammy's opening brief explained why Manufacturer's representation was not true. (*Id.*). Manufacturer now doubles down on its misrepresentation. The letter simply did not say what Manufacturer claims it states.

REPLY TO MANUFACTURER'S ERRONEOUS ARGUMENTS

I. Manufacturer's Attempt to Escape Its *Nix* Burden Fails.

Tammy's opening brief twice quoted the lower court's finding that "there are no specific references in the timesheets to the Warranty Act cause of action, versus the other causes of action." (Consumer's Br. p. 9 (quoting June 28, 2021 order p. 7); *id*. p. 32 (same)). Manufacturer's Brief repeatedly paraphrases this finding. (Manufacturer's Br. pp. 6 (paraphrasing this finding), 11 (same)). The finding is not in dispute. The Parties dispute what flows from that finding as a matter of law under the Supreme Court's opinion in *Nix*.

Nix held,

> 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. *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.**

Taylor v. Nix, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) (emphasis added).

Tammy's initial filings in the lower court in support of her fee request alerted Manufacturer that her attorney had provided an itemized affidavit of his fees he believes are related to the statutory claim, and the burden was then on Manufacturer to show which of the fees, if any, are clearly unrelated. (Am. Br. in Support of Fees Motion pp. 3, 17-18) (R. pp. 944, 958-9) (citing *Nix*).[2] Manufacturer refused to shoulder its burden, or even to attempt to shoulder it.

Instead, Manufacturer asks this Court to reverse the directive of the Supreme Court. (Manufacturer's Br. passim). Obviously, this Court cannot do that.

Additionally, while the Supreme Court's directive makes sense, Manufacturer's reversal of the directive does not. Under the Supreme Court's directive, the party seeking fees presents an itemized affidavit of fees it believes are related to the statutory claim. The opposing party can then challenge those fees. That makes sense.

Under Manufacturer's proposed rule, apparently the party seeking fees would present an itemized affidavit of fees it believes are related to the statutory claim, and would include a statement in each entry, "I believe this entry relates to the statutory claim." That would only add

[2] Tammy also raised the point in her Reply in Support of her fee request, in her Motion for Reconsideration, and throughout her opening brief to this Court. (Reply pp. 2-3, 7-8; Mot. Recon. p. 3; Consumer's Br. passim) (R. pp. 1129-30; p. 1155-56; Consumer's Br. passim).

redundant verbiage throughout the affidavit, because all the entries that made it into the affidavit are for "fees that they believe are related to the statutory claim."

Were Manufacturer to suggest that, instead, or in addition, the party seeking fees identify in the affidavit each entry that it believes **does not** relate to the statutory claim, there would be nothing to so identify—again, because the affidavit is only of fees the requesting party believes **do** relate to the statutory claim.

Manufacturer's position is contrary to the Supreme Court's holding and makes no sense.

Manufacturer also attempts to persuade this Court to create a major, major exception to the Supreme Court's *Nix* doctrine. Manufacturer mistakenly presents *Rice v. Multimedia, Inc*., 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995) as standing for a proposition almost the opposite of *Nix*. In Manufacturer's telling, *Rice* stands for the proposition that "a trial court is *required* to apportion attorney's fees between causes of action on which a party prevails, and those causes of action to which a plaintiff is not entitled to fees." (Manufacturer's Br. p. 10) (emphasis is Manufacturer's). *Rice* stands for nothing of the sort. *Rice* stated nothing about requiring fees to be apportioned. Nothing—not a word.

The same conclusion is reached via a different approach: *Rice* is not contrary to *Nix.* The Supreme Court in *Rice* gave no indication that it was overturning *Nix*, creating an exception to *Nix*, or the like. The Supreme Court in *Rice* did not even mention *Nix*. There is a reason for that: *Rice* simply does not come within the *Nix* doctrine. *Nix* applies where alternative theories of recovery are "based on the **same** transaction." *Nix*, 307 S.C. at 557, 416 S.E.2d at 622 (emphasis added).[3] *Rice* involved at least seven **separate** transactions. *Rice*, 318 S.C. at 97, 456

[3] *Nix* stated, in especially pertinent part,

Continued

S.E.2d at 382. (Or more: it also involved seven contracts and three entities. *Id.*[4]) Because the *Nix* doctrine applies only where two or more claims are "based on the same transaction," not on "seven different transactions," *Rice* is irrelevant. The case provides Manufacturer no support.

Nevertheless, apparently based on *Rice*, Manufacturer asks this Court to carve out a major exception to the *Nix* doctrine. (Manufacturer's Br. pp. 10-11). It asks this Court to limit *Nix* to cases where a plaintiff is successful on multiple claims. (*Id.*) Other than its erroneous reading of *Rice*, Manufacturer presents no authority for this proposition. It may be rejected for this reason alone. An appellate court may reject arguments without supporting authority. "[A]rguments without supporting authority are abandoned." *Encore Tech. Grp., LLC v. Trask*, 436 S.C. 289, 304, 871 S.E.2d 608, 617 (Ct. App. 2021), *reh'g denied* (Jan. 11, 2022) (Pet. Cert. pending). It would seem to be even more so where the litigant cites only authority that clearly does not support the proposition. Moreover, since the decimation of *Nix* Manufacturer asks this Court to produce was not relied on by the lower court, was neither raised to the lower court nor ruled on, it would properly be considered only under Rule 220(c), SCACR (which Manufacturer does not mention) and should be rejected for that reason as well.

> 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.

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

[4] "Rice filed suit, demanding payment for commissions due on seven contracts." *Rice v. Multimedia, Inc.*, 318 S.C. 95, 97, 456 S.E.2d 381, 382 (1995). Rice recovered on four contracts against one entity and failed to recover on three contracts against another entity owned by the same conglomerate. (*Id.*) If each contract concerned only one transaction, there were seven transactions. If any contract concerned more than one transaction, there were eight or more transactions.

> While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000).

Further, there is nothing in *Nix* that definitively states what happened with the other causes of action. Certainly the Supreme Court did not find that important enough to mention. Had the Supreme Court meant to limit its holding to successful related claims it would have been easy for the Supreme Court to so state. But it didn't. It held, 307 S.C. at 557, 416 S.E.2d at 622 (emphasis added),

> 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 Supreme Court did **not** state, "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, **or if those other claims were unsuccessful**."

Nor would it make sense to limit *Nix* to cases where all claims are "successful." Suppose a consumer has a strong claim under three causes of action: the Lemon Law, the Magnuson-Moss Warranty Act, and an U.C.C. breach of warranty claim. All are based on the same transaction; all provide a consumer relief. She may decide to settle her claims under only the Lemon Law as it provides the greatest relief. Under Manufacturer's proposed re-writing of *Nix*,

she would be reluctant to do so, lest the fees for the intertwined related causes of action be denied. This would result in a consumer having to try this case to determine which claims are "successful" so she can properly request her attorney's fees. This would waste resources of courts and parties.[5]

Nor would such a reading be consistent with the policy behind one-way consumer protection fee-shifting provisions. "'[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. These provisions "epitomize[] the definition of a remedy." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010). *See also Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (explaining that it is only when other claims are both unsuccessful and unrelated to the statutory claim that apportioning fees among claims is proper). Remedial measures are broadly construed to achieve their purposes. E.g., *Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 577, 38 S.E. 274, 276 (1901). If there were any doubt, the Court should interpret *Nix* in accordance with the purpose of the Lemon Law's fee-shifting provision.

[5] It also raises the thorny question of how a "successful" cause of action is defined. Indeed, sometimes the threat of one cause of action helps persuade a defendant to settle another. If her dismissal of the one claim results in a successful resolution of the other, even the dismissed action was successful. Under Manufacturer's rewriting of *Nix*, courts would spend hours resolving whether such claims were "successful."

This Court should reject Manufacturer's request to decimate the Supreme Court's *Nix* holding based on an erroneous argument that Manufacturer did not present to the lower court and for which the only supposed supporting authority it presents lends it no support.

Summation. The lower court's interpretation of *Nix* was erroneous, as discussed in Tammy's opening brief, and Manufacturer's attempt to rewrite *Nix* fails.

II. Manufacturer's Remaining Arguments Fail.

A. Manufacturer Misunderstands Consumer's Argument.

Manufacturer asserts that Tammy contends a "trial court [is] required to accept the amount of attorney's fees requested" by a plaintiff unless the amount requested is unreasonable. (Manufacturer's Br. pp. 9-10). Not exactly. Once a court decides to award fees, the court must award a reasonable fee. And when the only grounds for reducing a fee award are unreasonable, the lower court on remand must award the full fee. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 57, 59, 691 S.E.2d 135, 154 (2010) (remanding for entry of the fee "claim in its entirety," i.e., "the entire amount of his request for attorney's fees and costs" where the only reason for denying fees was improper).

> It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. . . . By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

Moreno v. City of Sacramento, 534 F.3d 1106, 1112 (9th Cir. 2008). More generally, if a circuit court cuts a statutory consumer-protection one-way fee-shifting fee request by more than 70

percent, it must state valid grounds for doing so.[6] If its grounds are invalid, the appellate court should require the full request be granted. Misreading *Nix* is not a reasonable ground.

B. Discretion/*Rish*/*Fargnoli*/*Hammond*

Manufacturer's brief is replete with references to the trial court's discretion in determining the amount of a fee award. (Manufacturer's Br. passim). However, as Manufacturer recognizes, an abuse of discretion occurs when the conclusions of the circuit court are controlled by an error of law (*id.* p. 7), or there is "substantial" disagreement with the trial court's decision (*id*. p. 11). As detailed in Tammy's opening brief, and to a more limited extent in the current brief, the trial court's decision was controlled by an error of law, and there should be substantial disagreement with the trial court's cutting a consumer-protection fee request by more than 70% without providing a valid reason.[7]

1. Manufacturer ignores Tammy's arguments.

Tammy's opening brief argued that in *Rish v. Rish,* 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988), this Court held an inadequate fee award to be an abuse of discretion. Manufacturer does not dispute this. Instead, after acknowledging that *Rish* applies where there is substantial disagreement with the amount of the fee award (Manufacturer's Br. p. 11), Manufacturer erroneously states, "Plaintiff presents no argument or evidence to support such a conclusion" (*id*. p. 11). But Tammy's brief was replete with argument and evidence to support that conclusion. (Consumer's Br. passim). The amount of the fees award—a total of 29.11% of

[6] If anything, this is even more so under a statute that specifically calls for fee awards based on "actual time expended," as does the statute here.

[7] Manufacturer's brief also refers more than once to what Manufacturer sees as the lower court's ability to have denied fees altogether, but Manufacturer does not now argue that therefore the lower court could award as small a fee award as it likes. To the extent, if any, that this is a concern of the Court, Tammy rests on the analysis on pages 33-38 of her opening brief.

the amount requested—is simply too draconian a cut under any standard, at least without any valid explanation of the exceptional circumstances that would justify such an exceptional reduction. Manufacturer simply ignores those arguments and the evidence Tammy presented.

Instead, Manufacturer presents two cases. Neither case supports Manufacturer's propositions.

2. *Fargnoli* does not support Manufacturer's proposition. It does not stand for any proposition re a percentage of a fee request.

Manufacturer presents *Farmers and Merchants Bank v. Fargnoli*, 274 S.C. 23, 26, 260 S.E.2d 185, 187 (1979) as "holding the trial court's order awarding 10% of attorney's fees demanded was not an abuse of discretion." (Manufacturer's Br. p. 11). Manufacturer misstates the case. The ten percent figure was **not** ten percent of the **fee request**. It was ten percent of the **total recovery**. "The endorsers assert that, even if summary judgment was proper, the judge erred in awarding attorney fees of ten percent without receiving evidence as to the value of the services rendered." *Fargnoli*, at 25–26, 260 S.E.2d at 187. The opinion states nothing about a percentage of a fee request. Nothing—not a word.[8]

3. *Hammond* does not support Manufacturer's proposition. It does not stand for any proposition re a percentage of a fee request.

Manufacturer similarly presents *Assoc. Comm. Corp. v. Hammond,* 285 S.C. 277, 279, 330 S.E.2d 82, 83 (Ct. App. 1985) as "affirming a trial court's determination to award 15% of

[8] In fact, in *Fargnoli*, the full fee request was apparently granted and affirmed. The *Fargnoli* defendants had endorsed thirteen promissory notes executed by their son. The plaintiff Bank sought to collect. The lower court granted summary judgment for the plaintiff. The Bank was awarded as attorney's fees ten percent of the value of the notes it could enforce against the unsuccessful defendants. "The endorsers [unsuccessful defendants] assert that, even if summary judgment was proper, the judge erred in awarding attorney fees of ten percent without receiving evidence as to the value of the services rendered." *Fargnoli*, 274 S.C. at 25–26, 260 S.E.2d at 187. This was not ten percent of the requested fees; it was ten percent of the value of the notes. Manufacturer misreads the case. *Fargnoli* does not stand for any proposition re a percentage of a fee request.

the amount of attorney's fees requested by the prevailing party." (Manufacturer's Br. p. 11). That is not what the case says. The fifteen percent figure was not fifteen percent of the fee request. It was fifteen percent of the total recovery. *Hammond*, 285 S.C. at 279, 330 S.E.2d at 83 ("Associates is entitled to reasonable attorneys fees under its security agreement. Counsel for Associates testified a reasonable fee would be 15% of the $206,731.40 sum demanded.")

Additionally, both cases—*Fargnoli* and *Hammond*—concerned appellate courts affirming awards against claims the awards were too **large**. In neither was the appellate court called upon to determine whether an award was too **small**.

Both cases also concerned contractual fee-shifting provisions, which do not arrive with the same rules of interpretation that require the statutory, remedial, provision at issue here to be interpreted broadly to achieve its aim.

Finally, both of Manufacturer's cases concerned percentage-of-the-recovery awards, which the Lemon Law explicitly forbids. The Lemon Law mandates that fee awards be based on the "actual time expended." *See Layman v. State,* 376 S.C. 434, 453-58, 658 S.E.2d 320, 330-33 (2008) (explaining the importance of employing the theory of fee-shifting embodied in a fee-shifting statute in determining the amount of a fee award); *id*. at 442, 455, 658 S.E.2d, at 324, 331 (distinguishing fee-shifting "based on the hourly fee of plaintiffs' counsel" from fee-shifting as a "percentage of the prevailing party's recovery").

These appellate decisions, which did not concern awards based on hours incurred, did not concern any challenges based on any supposed insufficiency of the awards, and most importantly did not have anything to do with percentages of fee requests, lend Manufacturer no support.

In sum, Manufacturer ignores the arguments Tammy's opening brief raised re the inadequacy of the award; presents two cases that do not stand for the propositions Manufacturer

cites them for; and provides no reason that a 70+% reduction from the actual time expended is proper.

C. Premature Cut-off?

Tammy's brief argued that any cessation of compensation prior to the conclusion of the case would be erroneous. Manufacturer does not dispute this.

Manufacturer does, however, make vague gestures in that direction, most notably, in its misrepresentation that Tammy's counsel supposedly conceded in August 2020 that he was litigating this case solely to obtain fees. *See* pages 5 - 6 above (discussing the falsity of that claim); Consumer's opening brief pp. 38-40 (similar). In an abundance of caution, Tammy addresses those concerns here.

As noted above, Tammy's counsel neither conceded that Manufacturer had made a fair offer nor limited Tammy's refusal to a matter of the fees; he specifically rejected Manufacturer's insistence on confidentiality provisions.[9]

Manufacturer also points to the lower court's finding that its offers before suit was filed "were made consistent [sic] with its obligations under the Warranty Act." (Manufacturer's Br. p. 5). If the lower court meant more by this than that the act of conducting arbitration and making pre- and post-arbitration offers were consistent with its obligations, it is clearly

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[9] Again, that letter stated,

> 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).

erroneous, as Manufacturer did not even state an amount it would pay until well after suit was filed.

Moreover, by the time Manufacturer finally agreed to state the amount it was offering Tammy, Manufacturer was already insisting that both she and her attorney sign confidentiality provisions. (In fact, there was a period in which Manufacturer was both refusing to state an amount it would pay and insisting on confidentiality. (Manufacturer's proposed release of December 7, 2018, ¶¶ 2.1-2.3, 4.4. (R. pp. 161 ¶¶ 2.1-2.3, 163-64 ¶ 4.4; *see also* email from Manufacturer's counsel to Tammy's counsel of December 07, 2018 12:25 PM) (R. p. 191) (sending proposed release)). Making the manufacturer state the amount it would pay, and making it withdraw its demand for Tammy to pledge confidentiality, are of obvious benefit to Tammy, indeed, necessary, if one is going to waive his client's right to trial and settle the matter. The requirement that Tammy's counsel sign was also unethical. Plaintiffs' counsel in statutory one-way fee-shifting cases should not have to commit malpractice nor violate the Rules of Professional Conduct to be paid for their work. Finally, the lower court clearly did not accept Manufacturer's position that fees should have been cut off after the November 11, 2018 filing of the lawsuit.[10] Nor should this court.

More generally, Manufacturer's argument that Plaintiff's counsel was only seeking fees—he was not, but if he were—seems based on the erroneous idea that there is something

[10] The 20.9 hours Tammy's counsel incurred by the filing of the lawsuit (Opp'n p. 8) (R. p. 977) would have yielded an award of $9,405 at the $450 hourly rate requested. It is only the 61.3 hours incurred through August 25, 2020, which yields an award of $27,585, exactly the amount awarded, that could possibly (although erroneously) be the intended cut-off date chosen by the lower court. Cutting off the fees at that date due to a misrepresentation of the contents of Consumer's counsel's letter errs as matters of both fact and law, as discussed in pages 38 through 40 of Consumer's opening brief. Such a cutoff also errs as a matter of law, as it would include no award for costs.

wrong about an attorney seeking fair compensation under the statute. That an attorney should be required to accept an offer that provides everything the client wanted except the fees incurred in obtaining it. That the attorney should be willing to work without fair compensation, or that his client be required to pay him the portion of a reasonable fee that the defendant would not.

That is completely contrary to the law: "The award of attorney's fees is made to the party, not his lawyer." *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997) (citing *Prevatte v. Asbury Arms*, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990)). The main order below recognizes this. (R. p. 36).

Manufacturer's position is entirely contrary to the purpose of the one-way consumer protection fee-shifting provision at issue here. As discussed in more detail in Tammy's opening brief, on pages 28-29, these statutes are designed to encourage consumers to sue companies that do not treat the consumer fairly. *See, e.g.*, *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010); *Taylor v. Medenica*, 331 S.C. 575, 578, 503 S.E.2d 458, 460 (1998); *Riverside v. Rivera,* 477 U.S. 561, 577 (1986) (plurality); *id*. at 586 (Powell, J., concurring) (same); *Marshall v. Miller,* 276 S.E.2d 397, 403 (N.C. 1981); *Covenant Mut. Ins. Co. v. Young,* 179 Cal. App. 3d 318, 325-27, 225 Cal. Rptr. 861, 865-67 (Cal. App. 2d Dist. 1986). Provisions like these are to be interpreted broadly to achieve their purposes, as they "epitomize[] the definition of a remedy." *Austin*, 387 S.C. at 57, 691 S.E.2d at 153.

Other jurisdictions agree. *See*, *e.g., Parker v. I&F Insulation Co*., 730 N.E.2d 972, 975 n.1 (Ohio 2000) (internal quotation marks omitted) ("The work of the attorney on appeal is part of the legal process of achieving and maintaining the judgment for the consumer. Disallowing attorney fees for appellate work undermines the purpose of the Act."); *id*. (this is especially so because the statute at issue there "is a remedial law designed to compensate for traditional

consumer remedies and must be liberally construed"); *Balark v. Curtin*, 655 F.2d 798, 803 (7th Cir. 1981) (disallowing fees for subsequent work necessary to collect on the underlying award would "dilute[]" and "undermine[]" the "compensatory goals" of a fee-shifting provision designed to "transfer[] the costs of litigation" to the wrongdoer, leaving plaintiffs with a "hollow" victory).

Finally, if Manufacturer means to suggest that "fees-about-fees" are improper, our Supreme Court strongly disagrees. *Layman v. State*, 376 S.C. 434, 463 & n.3, 658 S.E.2d 320, 334 & n.3 (2008) (awarding $1,029,375.63 in fees, of which more than half was for fees-about-fees); *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991) (reversible error for the circuit court to refuse to award fees incurred in seeking an award of fees).[11]

Summation: Any termination of attorney's fees prior to the conclusion of the case would be error.

D. "Specific Factual Findings"

Manufacturer's brief repeatedly refers to supposed "specific factual findings" made by the lower court. However, its Argument section points to only one, the finding from which it launches its erroneous *Nix* analysis.

Manufacturer's Argument section contains a subheading that would seem, at first glance, to be supported by specific factual findings. This is subheading "a" on page 9 of Manufacturer's

[11]Moreover, in both *Layman* and *McDowell*, fees incurred in litigating the issue of fees were awarded pursuant to a statute that stated fees "may," not "must" or "shall," be awarded. Each was brought under S.C. Code Ann. Section 15-77-300, which provided that "'the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs,'" *McDowell*, 304 S.C. at 542, 405 S.E.2d at 833 (quoting § 15-77-300) (emphasis added). The Supreme Court found it reversible error to refuse to award such fees in *McDowell*, and applied a multiplier to such fees in *Layman*.

brief. It states, "The trial court correctly applied the six factors from *Baron* when determining Plaintiff's attorney's fees award, and included sufficiently detailed factual findings and conclusions of law." Yet the supporting text presents not a single specific "finding" or "conclusion of law." Rather, its first paragraph merely states the background law. (*Id.*) The second and final paragraph lists the documents the Parties filed and upon which the lower court presumably based its decision. (*Id.*) It then states, "Applying all six factors, the trial court articulated specific factual findings and conclusions of law for each and issued Plaintiff an award of $27,585 consistent with the Warranty Act, well-settled case law, and the facts of this case." (*Id.*) Asserting that the trial court made specific factual findings is an altogether different thing than pointing to a specific factual finding.

The final sentence of that final paragraph merely asserts Manufacturer's claim that the lower court did not err. Under that heading, Manufacturer simply does not present a single "specific factual finding" that it argues justifies any reduction of the fee request.

If one were to look for findings argued elsewhere in the "Argument" portion of Manufacturer's brief, one sees no other findings except the finding from which Manufacturer launches its erroneous argument re *Nix,* i.e., the finding that Tammy's counsel's fee affidavit did not state which of the fees related to the Lemon Law claim.

Were the Court to attempt to search elsewhere in Manufacturer's brief, which the Court need not and should not do, in its statement of the case, in a footnote, Manufacturer points to a stray remark in Tammy's counsel's fee affidavit. Tammy's counsel's fee affidavit stated in paragraph 121, "I have not 'churned the file.'" (R. p. 780 ¶ 121). The affidavit inadvertently contained a note from counsel to himself on its first page, instructing himself to make that point. Manufacturer notes that the court below stated that the inadvertent note warranted "a more

detailed look at every entry submitted by [Plaintiff's] counsel." (Manufacturer's Br. p. 6 n.4 (quoting June 28 Order at 7)). But a stray comment like that can in no way justify a 70% reduction from the requested fees—it would be an abuse of discretion if the lower court so held—and at any rate, that "more detailed look" that the remark might justify is nowhere apparent in the orders.

The only other "specific factual findings" the lower court made have already been discussed above—the findings re Manufacturer's offers to settle, and the finding re *Nix*. There are no others. There simply are no specific factual findings in Manufacturer's "Argument," no findings on which Manufacturer attempts to base an argument, other than the finding from which it launches its erroneous argument re *Nix*.

CONCLUSION

As explained in her opening brief, Tammy Batten West put up with repeated malfunctions of the safety systems in the CR-V Manufacturer had sold her. She tried and tried to get it permanently fixed. She tried and tried to get Manufacturer to take back the vehicle without her having to hire an attorney. Her attorney then took her through the "arbitration" process that Manufacturer demanded, then tried and tried to get Manufacturer to pay her what she was owed without requiring her to be subjected to suit if she let word of the agreement slip out and without requiring her attorney to unethically sign a confidentiality agreement. Only after her attorney prepared for trial was a settlement achieved. The lower court cut her attorney's hours incurred by more than 70.1%, based on an erroneous reading of *Taylor v. Nix*.

In opposition, Manufacturer retains the lower court's erroneous *Nix* analysis. Manufacturer makes no defense of the lower court's erroneous readings of *Maybank* and *Mockabee*, and replaces those cases with three others—*Rice*, *Fargnoli*, and *Hammond*—which

lend no support to the propositions for which Manufacturer cites them. Manufacturer makes no reference to its improper and unethical demands that Consumer and her attorney sign confidentiality provisions. Instead, Manufacturer affirmatively misrepresents that these provisions were not a concern of Tammy and her counsel.

Manufacturer states that the lower court made specific factual findings, but the only finding it bases any argument on goes to its erroneous reading of *Nix*.

Manufacturer concedes that an abuse of discretion occurs where an error of law controls the decision or where there is substantial disagreement with the amount of the award, but presents nothing, other than its erroneous reading of *Nix*, that could possibly justify the 70+% reduction of the compensable hours sought.

Manufacturer also presents a "fact"—but makes no argument from it—that might support a large reduction in the fee request *if* one were to disagree with the Supreme Court's repeated statements that time spent litigating the question of fees under one-way fee-shifting statutes is compensable and *if* one were also to accept Manufacturer's claim that a letter opposing Manufacturer's requirement for unethical confidentiality provisions was actually a statement that nothing remained to be negotiated except fees.

More generally, in her opening brief, Tammy argued that the Lemon Law's fee-shifting provision is a remedial measure that should be interpreted broadly to achieve its aims. Manufacturer does not dispute this.

She argued that the Lemon Law's fee-shifting provision, S.C. Code Ann. § 56-28-50(D), is a one-way consumer protection provision. Manufacturer does not dispute this.

She argued that one-way consumer protection fee-shifting provisions "epitomize the definition of a remedy" (quoting *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010)). Manufacturer does not dispute this.

She argued that Manufacturer kept insisting on a confidentiality clause, to be signed by the Consumer and her attorney. Manufacturer does not dispute this.

She argued that a consumer does not receive all the benefit the Lemon Law intends for her if she is bound by a confidentiality agreement and the threat of being sued if she violates the provision. Manufacturer does not dispute this.

She argued that requiring an attorney to sign a confidentiality agreement such as the agreements Manufacturer insisted upon violate the ethical rules policed by the South Carolina Supreme Court. Manufacturer does not dispute this.

She argued that in *Rish v. Rish,* this Court held an inadequate fee award to be abuse of discretion. Manufacturer does not dispute this. Instead, after acknowledging that *Rish* applies where there is "substantial" disagreement with the amount of the fee award, Manufacturer argues "Plaintiff presents no argument or evidence to support such a conclusion." But Consumer's brief was replete with argument and evidence to support that conclusion. Manufacturer simply ignores those arguments and the evidence presented by Consumer.

Consumer argued that *Taylor v. Nix* put the burden on Manufacturer to show which time entries were unrelated to the Lemon Law claim, and that Manufacturer failed to do so. Manufacturer does not dispute this; instead, it asks the Court to hold that *Nix* applies to cases involving multiple transactions, which is contrary to the Supreme Court's holding, and to reverse the burden *Nix* places on defendants. Doing so would create an unworkable framework for litigants and would result in more litigation over fees.

Rather than remand for the lower court to review the issue again, and then deal with another likely appeal, the Court should resolve the matter now and instruct that Tammy is to receive her full fee request.

Respectfully submitted,

s/Brooks R. Fudenberg December 8, 2022 s/C. Steven Moskos

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

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