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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2023-001124
Lower Court Case No. 2020-CP-08-02455

Rita R. Greenawalt and
James M. Greenawalt,

Respondents-Appellants,

v.

Nissan North America, Inc.,

Appellant-Respondent.

INITIAL BRIEF OF RESPONDENTS-APPELLANTS

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QUESTION PRESENTED

I. Did the lower court err in the amount of its attorney fee award?

The Question includes among other things:

A. Plaintiffs prevailed on claims under four remedial acts. Each act provides for attorney fees for prevailing plaintiffs. The lower court found Defendant had engaged in improper litigation conduct. The lower court then awarded as attorney fees about half the amount that a straight hours times rate calculation produces, reasoning the awarded amount would suffice to deter Defendant from future litigation misconduct. Did the lower court err in reducing the award ?

B. In establishing the lodestar amount, the lower court overlooked 9.9 hours that had been expended by Plaintiffs' counsel. Did it err in so doing?

C. After Plaintiffs moved under Rule 59, SCRCP, to correct the above errors, the lower court denied their motion and their associated request for fees for work related to the motion on grounds the motion was improper under federal case law. But the motion was proper under South Carolina law, including the Supreme Court of South Carolina's opinion in Elam v. South Carolina Department of Transportation. Did the lower court err in applying federal case law that conflicts with the State appellate courts on a matter of State law?

OVERVIEW

This is a case under four remedial consumer-protection statutes.[1] Rita and James Greenawalt ("Greenawalts"), the Respondents-Appellants here, prevailed below as Plaintiffs on claims under each statute. Each statute provides for awards of attorney fees to prevailing plaintiffs. Two statutes explicitly state the award is to be based on the actual time expended.

[1] The South Carolina UTPA, Dealers Act, and Lemon Law, and the federal Warranty Act. The underlying case concerns an automobile the Greenawalts purchased as new that kept failing to perform as warranted. The parties settled the underlying case for $35,000 and stipulated that Plaintiffs were the prevailing parties under all claims, leaving only the question of attorney fees for the lower court to decide. The validity and amount of the underlying settlement are not at issue in this appeal.

Awards under the other two are subject to a six-factor test that leads to a lodestar figure of a reasonable number of hours multiplied by a reasonable hourly rate. The lodestar figure is presumptively correct.

The lower court found all six factors weigh in favor of the Greenawalts. It also found Appellant-Respondent, Nissan North America, Inc. ("Nissan"), the Defendant below, had engaged in improper litigation tactics. "Defendant was playing whack-a-mole." (Order p. 14).

The Order then noted most of the attorney hours the Greenawalts had submitted. It omitted 9.9 hours from its total of the requested hours. The hours it identified multiplied by the reasonable hourly rate came to $126,765.00.

The lower court then rejected both Defendant's proposed figure as "tantamount to saying no attorney's fees were awarded" and Plaintiffs' proposal to increase the award by a 1.5 multiplier as "too much."

But it did not then award the $126,765.00. Instead, it reduced the award by 41% of the calculated amount (the reduction was 43% of the actual total). It held the lesser amount was all that was necessary to deter Nissan from engaging in similar litigation tactics in the future. (Order p. 15) ("to deter the automotive dealers from the [litigation] conduct they displayed").

Neither party had proposed that any award be measured against the need to deter improper litigation tactics. Moving to amend or alter the judgment, the Greenawalts argued that the Order had employed the wrong standard, as the standard was the number of hours reasonably incurred multiplied by the reasonable rate, not the amount needed to deter improper litigation tactics. The Greenawalts further argued that since the lower court had found all the factors properly employed to determine the amount of a fee to be in their favor, a full award—

not a reduced award—was proper. The Greenawalts also asked the lower court to include the 9.9 hours it had overlooked.

Nissan's opposition to the Greenawalts' motion asked the court to justify its reduction on grounds the court had already rejected, such as what Nissan considered the small amount of the underlying $35,000 award, and to reduce the hourly rate, if the court were to reach the merits of Plaintiffs' motion, but also maintained—citing federal case law regarding the federal Rule 59—that the motion was improper, arguing that Rule 59 motions are proper only in three "highly unusual circumstances."

The Greenawalts' reply rebutted Nissan's arguments regarding the merits, and maintained—citing the Supreme Court of South Carolina's opinion in Elam v. South Carolina Department of Transportation—that whatever the standards might be under federal law for motions under the federal Rule 59, the standards under South Carolina law for motions under South Carolina Rule of Civil Procedure 59 allow their motion. Their reply also sought additional fees for the work on the motion and the reply.

The lower court denied their requests on grounds that Rule 59 motions are proper only in the same three highly unusual circumstances Nissan had listed, a proposition for which it cited only federal cases.

When all the time submitted to the lower court is considered, the reduction from an hours times rate calculation is 54.44%.

In their appeal, the Greenawalts, as Cross-Appellants, do not seek to increase the underlying damages award. They do not seek to reverse the lower court's denial of their request for a multiplier. They seek to have their fee award be based on the actual time expended, as mandated by statute.

More narrowly, the Greenawalts maintain Nissan's abusive litigation tactics were, if anything, a reason to increase the fee award beyond an hours times rates calculation, not a reason to decrease the fee award.

The Greenawalts also maintain it was reversible error to fail to include all the hours requested prior to the first order in the total of hours requested, and to deny the Greenawalts the fees requested in connection with the Rule 59 motion on grounds that their motion did not meet requirements imposed by federal law.

STATEMENT OF THE CASE

This is a case under four consumer-protection statutes. One is federal and three are State. These are:

(1) the federal Magnuson-Moss Warranty Act, 15 U.S.C. 2301 et seq.,

(2) the Enforcement of Motor Vehicle Express Warranties Act ("Lemon Law"), S.C. Code Ann. § 56-28-10 et seq.,

(3) the Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. § 39-5-10 et seq., and

(4) the Regulation of Manufacturers, Distributors and Dealers Act ("Dealers Act"), S.C. Code Ann. § 56-15-10 et seq.

The Greenawalts filed suit on November 13, 2020. (Compl.) Their complaint alleged violations of each of these statutes, as well as a general breach of warranty claim under common law. Nissan's answer denied all liability and raised thirteen "affirmative defenses." (Answer). Among these were that "Plaintiffs have failed to state a claim upon which relief can be granted;" "that Plaintiffs' claimed damages are solely the result of acts and omissions of third parties;" that "Plaintiffs' claims are barred, in whole or in part, to the extent Plaintiffs have failed to mitigate their damages;" that "When the Subject Vehicle was allegedly placed

into the stream of commerce, it comported to the technical state-of-the-art then existing and all applicable standards;" that "Any alleged implied warranties were modified, limited, or disclaimed;" that "Plaintiff did not rely on any alleged express or implied warranties;" and that "Plaintiffs' Complaint is barred by the misuse, abuse, and/or failure to properly maintain the Subject Vehicle." (Answer pp. 8-9).

Plaintiffs prevailed on each cause of action, as stated at the fees hearing on April 5, 2023. (Order re Pls' Mot. for Att'y's Fees p. 2). In fact, the parties had agreed to settle the underlying case, leaving only the issue of attorney's fees for the trial court, and stipulating that "The Greenawalts are considered the prevailing parties as to all claims." (Order pp. 1-2).[2]

Each statute provides for attorney fees.[3]

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[2] The settlement was agreed to orally on March 8, 2023 (Tr. Hr'g 3:15-16, 14:9), and placed on the record in open court by counsel for both parties on April 5, 2023. The agreement was:

> 1. Nissan is to pay the Greenawalts $35,000;
>
> **2. The Greenawalts are considered the prevailing parties as to all claims;**
>
> 3. Nissan will not contest the Greenawalts' costs;
>
> 4. The Parties will sign a Release as to all claims;
>
> 5. At turn in, the Greenawalts will provide Nissan with a copy of their current registration;
>
> 6. After turn in, Nissan, or its agent, shall overnight to the Greenawalts' counsel the $35,000 funds for the Greenawalts; and
>
> 7. **The attorney's fees issue shall be submitted to a judge for determination.**

(Order pp. 1-2) (emphasis added).

[3] The Magnuson-Moss Warranty Act provides in 15 U.S.C. § 2310(d)(2) (emphasis added),

> If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he 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 attorneys' fees based on actual time expended**) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement

Cont'd

The Order Regarding Attorney Fees

The lower court issued its Order Regarding Plaintiffs' Motion for Attorney's Fees on June 12, 2013. (Order). It rejected Nissan's argument (Nissan's Resp. in Opp. pp. 2-7) that no fees should be allowed because the case was settled rather than tried. It set forth the six factors courts were instructed to consider in determining the amount of fee awards. (Order pp. 6-7) (citing Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997)). The Order then went through

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> and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

The South Carolina Lemon Law provides in § 56-28-50(D) (emphasis added),

> 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.

The South Carolina Unfair Trade Practices Act provides in § 39-5-140(a) (emphasis added),

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39 5 20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court **shall award** to the person bringing such action under this section reasonable **attorney's fees** and costs.

The South Carolina Dealers Act provides in § 56-15-110(1) (emphasis added),

> In addition to temporary or permanent injunctive relief as provided in Section 56 15 40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and **shall recover** double the actual damages by him sustained, and the cost of suit, including **a reasonable attorney's fee**.

the six Jackson factors, one by one, and found that each weighed in favor of the Greenawalts. (Order pp. 7-11).

The Order noted 281.7 hours of work related to the statutory claims by C. Steven Moskos, the Greenawalts' sole counsel at that time, from May 14, 2020 through March 30, 2023. (Order p. 14) (noting hours of 215.4, 30.4, and 35.9 incurred during various stages of work) (see also R. pp. (Time Records, 1st Supp. Time Records, 2d Supp. Time Records)). The Order did not mention the additional 9.9 hours of Mr. Moskos' work that had been presented to the lower court on May 23, 2023 for work from May 1 through May 23, which were primarily incurred to force Nissan to fulfill the terms of the settlement that had been stated in open court on April 5, 2023. (Aff. Att'y's Fees; Ex.: Mot. Compel Settlement).

At $450 an hour, which the court found was a reasonable rate (Order p. 11), the 281.7 hours worked out to $126,765.00. (281.7 hours times $450 per hour=$126,765.00). Yet the lower court awarded only $75,000. (Id. p. 14).

First, the lower court rejected both a suggested low amount and the Greenawalts' request for a multiplier.[4]

> There is no doubt, at least to this Court, that Defendant was playing whack-a-mole when it came to settling this case and its position on attorney's fees. They claim Plaintiffs could have settled this case with less incurred in attorney's fees. However, the record seems to indicate Defendant did not make settling the case as easy as they now claim. They overlook they only agreed to more than a token offer until Plaintiffs were forced to hire an attorney who had to aggressively pursue that outcome. To say $4,000 would be reasonable would be tantamount to saying no attorney's fees were awarded. Indeed, that is the amount Defendants concede as costs. However, the Plaintiffs' total attorney's fee request comes in at around $195,000. ($126,000 multiplied by a 1.5 multiplier). This seems "too much," all things considered.

[4] "[A] court may consider . . . an enhancement of the lodestar figure with a 'multiplier.'" Layman v. State, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008).

(Order pp. 14-15). The order continued,

> a fee of $75,000 is reasonable and necessary to achieve the outcome and to deter the automotive dealers from the conduct they displayed in refusing to settle until after protracted efforts by the Plaintiffs' attorney forced them to settle. At the same time, an award of $75,000 is a lot less than the amount Plaintiffs claim, but it is still reasonable and generous and should send a message to auto dealers to resolve these cases sooner rather than later.

(Id. at 15).

This amounted to a 41% reduction from the amount the lower court had calculated, and a 43% reduction in the pre-multiplier amount that had actually been requested.

The Order Denying the Greenawalts' Motion To Alter or Amend the Judgment

The Greenawalts timely moved on June 22, 2023, to alter or amend the June 12 judgment. (Mot.) Citing Rules 52 and 59, SCRCP, they asked the court to undo the reduction from the lodestar amount or at least to further explain its rationale for departing from the lodestar (id. passim), and to include the additional 9.9 hours that had been presented to the Court (Supp. Request) and yet not included in the court's calculation (id. p. 4).

Nissan's response in opposition was filed July 11, 2022 (Resp.), one day after the deadline the Court had set for its response (June 27, 2023 email). Substantively, it argued that further explanation of the circuit court's reasoning was unneeded (Response pp. 1, 3); that the lodestar amount is but a "starting point" (id. pp. 1, 3-5); that adherence to the lodestar is "inappropriate in a case of this scale" (id.); and therefore, "this Court's Order properly reduced the calculated lodestar amount" (id. p. 4). Nissan also requested the court revisit and reduce the hourly rate the fees order had found to be reasonable. (Id. pp. 5-8). In support of its request to amend the hourly rate, Nissan presented several new cases it had not previously raised. (Id.)

Under a separate heading, Nissan again asked that the rate be amended in light of what Nissan claimed to see as the small amount of the underlying recovery. (Id. p. 8-9).

Nissan also argued that Plaintiffs' motion was improper. Citing federal case law, Nissan argued that motions to reconsider are granted only in three "'highly unusual circumstances,'" specifically, "'(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.'" (Id. p. 2) (quoting U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002); and citing Clemons v. Home Telecom Co., 2022 S.C. C.P. LEXIS 1062;[5] Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993)). It argued that none of these circumstances were present, and the Court should therefore reject the motion. (Id., pages 2-3, 9).

Nissan served and filed its Notice of Appeal of the Order re fees the next day, July 12, 2023, while the motion to amend was still before the lower court.

The Greenawalts' reply in support of their motion (Reply) argued that Nissan's requests for reductions in the amount of the fee award and the rate were improper, as Nissan had not filed a Rule 59 motion requesting that relief (id. p. 3); and that the reply itself was filed after the deadline the court had set (id. p. 2; email from clerk of Jun 27, 2023, at 9:27 AM); and thus Nissan's requests to amend the order should be denied.

On the merits, as to the rate, the reply addressed Nissan's claim that the Greenawalts had not provided enough evidence to allow the court to find a reasonable rate, noting the

[5] Nissan cited this case only as "Clemons v. Home Telecom Co., 2022 S.C. C.P. LEXIS 1062, 1" without stating the court or year. Nissan provided no copy of the case. It is not available on Westlaw or Fastcase. It is another order by Judge Young denying another Rule 59 motion on the same grounds.

Greenawalts had provided timesheets, and affidavits from their counsel and from other experienced attorneys attesting that the rate was reasonable and the time incurred was proper (id. pp. 4-5), provided prior orders from other South Carolina cases awarding that rate to the Greenawalts' counsel (id. p. 5 n.6), and argued that Nissan had presented no evidence—neither in its response to the original fee motion nor in its response to the motion to amend—that the rate was unreasonable (id.).

The reply extensively analyzed Nissan's newly-presented cases, none of which were South Carolina State court cases and all of which were from eight to 37 years old. (Id. pp. 4, 6, 11-16).

Plaintiffs' reply further stated that Nissan had offered no evidence to oppose Plaintiffs' affidavits as to the nature, extent, and difficulty of the case, nor to the reasonableness of the time spent. (Id. p. 5).

The reply argued that Nissan's opposition contradicts itself: that on the one hand, it acknowledges that South Carolina courts do not employ a rule of proportionality between the fee request and the damages award, and on the other hand, it repeatedly contends the fee award should be reduced due to what Nissan claimed to be the humble amount of recovery. (Id. pp. 11-12).

The reply stated that "Nissan is needlessly prolonging this matter and increasing Plaintiffs' fees" by "refus[ing] to communicate with counsel so the Rogue can be returned to Nissan" to complete the underlying settlement; by improperly seeking relief for which it filed no Rule 59 motion; by effectively re-arguing the entire case; by introducing numerous cases from other jurisdictions; and by filing a notice of appeal while a Rule 59 motion was pending" (id. pp. 10-11). It argued that Nissan had also needlessly dragged the matter out before settling

(id. p. 11), that "The fees would have been lower had Nissan paid what was owed" at any time during the Parties' negotiations (id.), and thus Nissan should not be heard to complain about the amount of the fees, quoting Judge Bell's concurrence in Rish v. Rish By & Through Barry, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988), "One who intends to build a tower should first count the cost, whether he has sufficient to finish it. Luke 14:28. This court does not sit to relieve self-inflicted wounds."

As for the propriety of moving to amend, the Greenawalts' reply argued that South Carolina case law, in contrast to Nissan's federal case law, does not so narrowly limit Rule 59 motions. It quoted Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E.2d 772, 778-79 (2004) for the proposition that "'[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments.'" (Id. p. 2). "That is what Jim and Rita did here." (Id.).

While the motion to alter or amend was pending, the Greenawalts requested fees for the work related to that motion. (Mot. p. 6 n.3; see also Moskos 4th Supp. Request; Reply p. 16; see also Moskos' 5th request and supporting materials, Fudenberg Aff. and supporting materials).[6] This brought the total unmultiplied fee request up to $164,610, making the amount at issue on the Greenawalt's cross-appeal $89,610.00.

The Order denying the motion was filed July 25, 2023. (Order Den. Pls' Rule 59 Mot. Alter or Am.). It held motions for reconsideration should be granted only in the same three

[6] They filed on July 5, 2023 for 9.5 hours for work by C. Steven Moskos from May 24, 2023 through July 5, 2023 (4th Supp. Request and exhibits), and on July 19, 2023, they filed for 51.6 hours for Mr. Moskos' work from July 11 through July 19, 2023 (5th Supp. Request with Affs.), and 13.1 hours for work by Brooks R. Fudenberg (Affs. and timesheets). This was the only request for fees for Mr. Fudenberg's work, as he joined the case after the April 5 hearing.

situations Nissan had urged in its return. (Id. pp. 1-2). The Rule 59 Order cited only federal cases for this proposition. (Id.).

It added to what Nissan had argued about the requirements for Rule 59 motions. Again citing only a federal case, it stated, "Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues" (id. p. 1) (citing Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010)). It also held, again citing a federal case, "Nor does '[a] party's mere disagreement with the court's ruling . . . warrant a Rule 59(e) motion.'" (Id. p. 2) (alteration in original) (quoting In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F. Supp. 3d 685, 691 (D.S.C. 2017)).[7]

Citing both federal and state cases, the Rule 59 Order held that it is improper in a motion to reconsider "to raise argument or present evidence that could have been presented prior to the entry of judgment" (id.) (quoting Dash, *2), and similarly that "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not" (id.) (alteration in original) (quoting Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) and citing Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995)); Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

[7] The Rule 59 Order's "see also" reference to Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015) at the end of the paragraph quoting In Re Pella Corp. for the proposition that "mere disagreement" is not proper grounds for a Rule 59 motion is physically adjacent to that discussion, but appears to be substantively in support of the point that new issues may not be raised. Lyons holds, on the page cited, that "a party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment."

The Rule 59 Order cited Elam only in a footnote and only for the proposition that Rule 59, SCRCP, is substantially the same as the federal Rule. (Id. p. 1 n.1). It did not separately address the motion's request under Rule 52.

When the fees sought for work on the motion are included, the request was reduced by 54.44%.

The Greenawalts timely served and filed their notice of appeal on August 23, 2023.

ARGUMENT

I. Initial Matters

A. The Greenawalts' Appeal May Be Decided Very Easily.

The appeal may be decided very easily. Where the plain language of a statute is clear, statutory construction is not needed. E.g., Odom v. Town of McBee Election Comm'n, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019). The plain language of two statutes here requires fees be awarded. The UTPA states, "Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." § 39-5-140(a). The Dealers Act states that a prevailing plaintiff "shall recover . . . a reasonable attorney's fee." § 56-15-110(1). The plain language of another two statutes here, S.C. Code § 56-28-50(D) and 15 U.S.C. § 2310(d)(2), require any attorney's fee award to be "based on actual time expended"—not on the amount needed to deter litigation misconduct. Although the lower court did not need to issue four separate fee awards, the award must comply with each statute. The June 12, 2023 Order erred as a matter of law in reducing the award to the amount needed to deter litigation misconduct. The reduction should be reversed.

The finding that the request totaled 281.7 hours rather than the 291.6 actually requested is an unsupported factual conclusion and thus an abuse of discretion, e.g., Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008), as well as clearly erroneous.

The lower court again erred as a matter of law in rejecting the fees requested for the Rule 59 work based on federal standards governing motions under the federal Rule 59 that are utterly incompatible with the standards the Supreme Court of South Carolina has set for motions under Rule 59, SCRCP. See Elam, 361 S.C. at 22, 602 S.E.2d at 779 (stating South Carolina standards); Johnson v. Fankell, 520 U.S. 911, 916, 117 S. Ct. 1800, 1803–04 (1997) (State Supreme Courts' interpretations of state law trump any federal court's interpretation). Denying fees for that work also erred as an additional matter of law, as the statutes mandate fees for work after an award is made. E.g., Austin v. Stokes-Craven Holding Corp. (Austin II), 406 S.C. 187, 201, 750 S.E.2d 78, 85 (2013) (directing that post-trial fees be awarded under the Dealer's Act).

These errors should be reversed and the lower court instructed to direct the Clerk to enter a supplemental judgment for an additional $89,610.00, to make the award equal the lodestar amount.

B. Some Basic Principles Relevant Here

The Greenawalts note some basic principles at the outset.

1. Unambiguous Statutes Are to Be Read Literally.

"Where the language of a statute is clear and unambiguous, it requires no construction and must be literally applied. In other words, it means what it says." State v. Carrigan, 284 S.C. 610, 616, 328 S.E.2d 119, 122 (Ct. App. 1985) (emphasis added) (citing Jones v. South Carolina State Highway Depar't, 247 S.C. 132, 146 S.E. (2d) 166 (1966)). "[I]f the language of a statute is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory

interpretation are not needed and the court has no right to impose another meaning.'" Odom v. Town of McBee Election Comm'n, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

2. Corollary—"Shall" Means "Shall."

Arguably a corollary to the above, the word "shall" in a statute is mandatory. "The term 'shall' in a statute means that the action is mandatory." Henderson v. Summerville Ford-Mercury Inc., 405 S.C. 440, 453, 748 S.E.2d 221, 228 (2013) (quoting Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)). See also id. ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.") (quoting Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002)); id. ("Both the UAA and the FAA use the words 'shall' or 'must' . . . and such language is mandatory.")

3. State Law Controls State Law Issues.

State Supreme Courts' interpretation of their State's law is binding. "Even if the Idaho and federal statutes contained identical language . . . [n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." Johnson v. Fankell, 520 U.S. 911, 916, 117 S. Ct. 1800, 1803–04 (1997) (citing cases). "This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules." Id. (citing Wardius v. Oregon, 412 U.S. 470, 477, 93 S. Ct. 2208, 2213 (1973)).

South Carolina similarly recognizes that its appellate courts, not federal courts, control the meaning of South Carolina law. E.g., Rule 244, SCACR allows federal courts to request a "controlling" opinion from the Supreme Court of South Carolina on matters of State law.

South Carolina Law on Fee-Shifting

II. The Purpose of the Fee-Shifting Provisions

A. The Importance of Discerning and Applying the Theory and Purpose of the Specific Fee-Shifting Provisions at Issue.

Fee-shifting provisions are not all alike. Each has a specific purpose. See generally Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). Each is to be applied in light of its specific purpose. Id. at 442–58, 658 S.E.2d at 324–33. A court is to determine the nature and purpose of the fee-shifting provision and its theory. "In our view, utilizing common fund methodology when awarding attorneys' fees pursuant to a fee-shifting statute is wholly inappropriate in light of the underlying theoretical distinction between a common fund source of attorneys' fees and a statutory source of attorneys' fees." Id. at 453, 658 S.E.2d at 330 (emphasis added). "[W]here, as here, a fee-shifting statute shifts the source of reasonable attorneys' fees entirely to the losing party, we find it both illogical and erroneous to calculate fees using the methodology justified under a [different] theory." Id. (emphasis added).

The Supreme Court reiterated in South Carolina Department of Transportation v. Revels, 411 S.C. 1, 10, 766 S.E.2d 700, 704–05 (2014), "Layman provides general guidance . . . the Court's analysis must focus on the express terms of [the statute before the Court]. Fee-shifting statutes are interpreted according to their own terms." Id. (cleaned).

B. Fee-Shifting Has Different Purposes than Do Punitive Damages.

Fee-shifting statutes obviously have different purposes than do punitive damages. "[A]ttorneys fees are intended to make such claims economically viable for private citizens whereas an award of punitive damages is designed to punish wrongful conduct and deter future misconduct." Austin v. Stokes-Craven Holding Corp. (Austin II), 406 S.C. 187, 192, 750 S.E.2d 78, 80 (2013) (quoting Austin v. Stokes-Craven Holding Corp. (Austin I), 387 S.C. 22,

56, 691 S.E.2d 135, 153 (2010); Wilkins v. Peninsula Motor Cars, Inc., 266 Va. 558, 563, 587 S.E.2d 581, 584 (2003) (similar).

C. Various Types of Fee-Shifting Provisions and Their Purposes

Many fee-shifting provisions are mutual in that they treat all parties equally; others are one-sided in that they do not. The distinction between mutual and one-sided fee-shifting provisions is central to this appeal.

Mutual fee-shifting provisions where the loser pays the victor's fees change the "American Rule" under which each party bears its own attorney fees to the "English Rule" under which the victor's attorney fees are paid by the loser. See State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657, 658 (Ind. 2001) (distinguishing those "rules"); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-62, 95 S. Ct. 1612, 1616-24 (1975) (discussing development of these rules in the two countries).

In South Carolina, fee-shifting is usually by statute or contract. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) ("The general rule is that attorney's fees are not recoverable unless authorized by contract or statute"). Otherwise, South Carolina generally adheres to "the 'American Rule,' [where] the parties to a lawsuit generally bear the responsibility of paying their own attorneys' fees," Layman, 376 S.C. at 451-52, 658 S.E.2d at 329 (noting "numerous exceptions . . . , including the award of attorneys' fees pursuant to a statute").

The purposes of contractual fee-shifting provisions may vary from contract to contract, but generally, contractual "loser-pays" provisions serve to protect the benefit of the bargain for the party that was in the right, so his net benefit is not reduced by litigation expenses.

Statutory fee-shifting for mechanics' liens, S.C. Code Ann. section 29-5-20, protects the benefit of the bargain, and deters both sides from wrongful conduct, Cedar Creek Properties v. Cantelou Assocs., Inc., 320 S.C. 483, 486, 465 S.E.2d 774, 775 (Ct. App. 1995).

Fee-shifting in family law cases can be employed to equalize, at least in part, the burdens the litigation places on the parties, or to ensure that each spouse has access to legal counsel, or to penalize the party in the wrong regarding specific litigated issues or in the litigation overall. See E.D.M. v. T.A.M., 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992).[8]

Fee awards for litigation abuse are primarily intended to deter future litigation misconduct. "Under Rule 11, the primary purpose of sanctions against counsel is not to compensate the prevailing party, but to deter future litigation abuse." Kovach v. Whitley, 437 S.C. 261, 265, 878 S.E.2d 863, 865 (2022) (internal quotation marks omitted) (quoting Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002)). "The primary . . . purpose of Rule 11 is to deter future litigation abuse." Pee Dee Health Care, P.A. v. Est. of Thompson, 424 S.C. 520, 533, 818 S.E.2d 758, 765 (2018) (alteration in original) (discussing sanctions)

[8] E.D.M. v. T.A.M., 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992) (citing Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991)) held,

> In determining whether an attorney's fee should be awarded, the following factors should be considered:
>
> (1) the party's ability to pay his/her own attorney's fee;
>
> (2) beneficial results obtained by the attorney;
>
> (3) the parties' respective financial conditions;
>
> (4) effect of the attorney's fee on each party's standard of living.

Statutory authority for fee awards in family law cases is found in S.C. Code Ann. Sections 20-3-130 (H) and 63-3-530 (2 & 38).

(quoting In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990)).[9] "The intent of [Rule 30(j) sanctions] is to help eliminate conduct tending to interfere with or impede depositions." Note to 2000 Am., Rule 30, SCRCP.

None of these provisions are designed to favor one party over the other (e.g., plaintiffs over defendants). They thus have very different purposes from the fee-shifting provisions here.

D. The Provisions Here Are Different.

1. The Provisions Here Support the "Strong Public Policy" of Combatting Unfair Business Tactics.

The underlying statutes in the present case intend to reduce the problem of businesses not playing fair. Magnuson-Moss Warranty Act (manufacturers not living up to warranties); South Carolina Lemon Law (same); UTPA § 39-5-20 (unfair or deceptive acts); Dealers Act §§ 56-15-30 (same), 56-15-40 (acts that are "arbitrary, in bad faith, or unconscionable").

The Supreme Court has emphasized "the strong public policy" behind at least two of these Acts. "This Court has previously recognized the strong public policy notions behind the enactment of the SCUPTA and the Dealers Act." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30 n.7, 644 S.E.2d 663, 671 n.7 (2007) (citing deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 263, 536 S.E.2d 399, 404 (Ct. App. 2000); Young v. Century Lincoln–Mercury, Inc., 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989), aff'd in part, rev'd in part, on other grounds, 309 S.C. 263, 422 S.E.2d 103 (1992) (per curiam)) (holding arbitration clause "unconscionable" because it would negate the purposes of these Acts).

[9] Lesser purposes include "compensating the victims of the Rule 11 violation, . . . punishing present litigation abuse, streamlining court dockets and facilitating court management." Pee Dee Health Care, P.A., 424 S.C. at 533, 818 S.E.2d at 765 (alteration in original) (quoting In re Kunstler, 914 F.2d 50 at 522).

2. The Provisions Here Are Designed to Encourage Victims to Sue.

Unlike the fee-shifting provisions in section C above, which shift fees more or less equally between the two parties—Husband or Wife in family law, owner or contractor in mechanics lien cases, whichever party prevails in certain contractual cases—the provisions here shift fees only in favor of the prevailing plaintiff. If she wins, the opposing party pays her attorney fees. If she loses, she does not pay the opposing party's attorney fees.

The reasons legislatures enact these one-sided provisions were explained by an appellate court that broadly surveyed fee-shifting case law and the academic literature, Covenant Mutual Insurance Company v. Young, 179 Cal. App. 3d 318, 225 Cal. Rptr. 861 (Ct. App. 1986), as modified (Apr. 4, 1986).

> In categories of cases where the Legislature wants to encourage litigation it can intervene to alter the decision-making equation by instituting unilateral fee-shifting. Then the injured person knows he will not have to absorb his own lawyer's legal fees, at least if he wins. This makes it economical to seek redress not just in the aggravated cases where the potential economic recovery is huge but in modest cases as well. It also means the probability of success does not have to be so high before it makes economic sense to file suit. Thus, as a result of the Legislature's intervention, more injured parties will be able to file more lawsuits and the public policy behind the substantive statute—whatever it may be—will be enforced more broadly and more effectively.

Id. at 325, 225 Cal. Rptr. at 865. Thus, "in literally scores of specific areas of the law [legislatures have] intentionally imposed one-sided fee-shifting as a means of advancing the public interest." Id. at 324-25, 225 Cal. Rptr. at 865.

Our Supreme Court agrees. The purpose of these fee-shifting provisions is to "**encourage[] individuals to pursue litigation."** Taylor v. Medenica, 331 S.C. 575, 579, 503 S.E.2d 458, 460 (1998) ("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."). Fee awards to successful plaintiffs are a "tool which "supports the policy objectives of the statute."[10] Id. at 578, 503 S.E.2d 460 (similar). "Requiring the unsuccessful defendant to pay the plaintiff's attorney's fees is a legitimate tool in enforcing the underlying public policy of the statute." Bradley v. Hullander, 277 S.C. 327, 330, 287 S.E.2d 140, 141 (1982).

These fee-shifting provisions exist "[b]ecause costly attorney fees may [otherwise] deter private citizens from bringing a claim." Austin I, 387 S.C. at 57, 691 S.E.2d at 153.

Other Supreme Courts interpreting similar one-sided fee-shifting statutes agree with the repeated holdings of our Supreme Court. One-sided fee-shifting provisions "allow counsel fees so as to **encourage private litigation**," Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262–63, 95 S. Ct. 1612, 1624 (1975) (citing Hawaii v. Standard Oil Co., 405 U.S. 251, 265-66, 92 S. Ct. 885, 892-93 (1972)) (emphasis added); the purpose is "to **encourage individuals . . . to seek judicial relief**," id. (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968)) (emphasis added). "The fee shifting provisions of the [Virginia Consumer Protection Act] are designed to **encourage private enforcement** of the provisions of the statute." Wilkins v. Peninsula Motor Cars, Inc., 266 Va. 558, 563, 587 S.E.2d 581, 584 (2003) (emphasis added). The "provision for attorney fees, found in [the UTPA] . . . **encourages private enforcement** in the marketplace." Marshall v. Miller, 302 N.C. 539, 549, 276 S.E.2d 397, 404 (1981) (emphasis added). "The purpose of

[10] In contrast, one-sided **contractual** fee-shifting provisions are such a powerful tool in favor of one party, such as the landlord or the supplier—"almost always . . . the party with the greater bargaining power," Covenant Mut. Ins., 179 Cal. App. 3d at 324, 225 Cal. Rptr. at 865—that legislatures in nineteen states have intervened to provide protections to the contractually disadvantaged party, Jeffrey C. Bright, Unilateral Attorney's Fees Clauses, 61 DRAKE L. REV. 89, 115-19 (2012) (collecting statutes).

attorneys fees in Chapter 75, however, is to '**encourage private enforcement**' of Chapter 75." United Lab'ys, Inc. v. Kuykendall, 335 N.C. 183, 192, 437 S.E.2d 374, 380 (1993) (quoting Marshall, 302 N.C. at 549, 276 S.E.2d at 404) (emphasis added). "The potential award of attorney's fees under the Tennessee Consumer Protection Act is intended to **make prosecution of such claims economically viable** to plaintiff." Miller v. United Automax, 166 S.W.3d 692, 697 (Tenn. 2005) (quoting Killingsworth v. Ted Russell Ford, Inc., 104 S.W.3d 530, 535 (Tenn. Ct. App. 2002)) (emphasis added). As summarized in Covenant Mut. Ins., 179 Cal. App. 3d at 327, 225 Cal. Rptr. at 866-67, "The approach that should uniformly encourage the pursuit of claims of all sorts in all situations is a one-way pro-prevailing-plaintiff rule."

This is radically different from the purposes of other fee-shifting provisions. No one would seriously argue that the main purpose of fee-shifting in family law is to create litigation that would not otherwise occur, or to encourage divorcing couples to keep litigating, or that the main purpose of fee-shifting in the mechanics lien statute is to encourage the parties to litigate. But when it comes to consumer protection statutes, and their one-sided fee shifting provisions, that is exactly the point.

3. Awards Under These Acts Need Not Relate to the Amount in the Underlying Dispute.

Perhaps as a result, awards under one-sided fee-shifting statutes properly differ from awards under other fee-shifting provisions in an important respect. A party to marital litigation who requests $50,000 in attorney fees for litigating about a $20,000 asset might properly be told, "Your request is out of proportion to the stakes. Your attorney may have put in the hours. The time she spent on each step was reasonable for the quality of work she produced. But it was too much time for the amount at stake. The fee award will be greatly reduced." It would similarly make no sense to spend $100,000 litigating a $25,000 mechanics lien—as the

Legislature recognized in limiting attorney's fees under that fee-shifting statute to the amount of the lien, S.C. Code Ann. § 29-5-20(a). By analogy, one who asks an attorney to investigate the validity of title to a real property he is considering buying for a seemingly fair market price of $10,000 would likely be outraged if the attorney charged $25,000 for the work, no matter how complicated the title analysis turned out to be. In all these examples, the fee request is (improperly) completely out of portion to the stakes. The game is not worth the candle.[11]

However, if one were to reason that fee awards in domestic law should not exceed the stakes and therefore, by analogy, fee awards under consumer-protection statutes should be similarly limited, one would err. One-sided fee-shifting provisions do most of their work where the fees are out of all proportion to the stakes. To limit fees in relation to the stakes in the underlying suit would allow wrongdoers to profit from their unlawful acts whenever the costs of proving their wrong is many times the harm—no plaintiffs' attorneys would take such cases. It would allow defendants that are repeat players in Lemon Law or similar actions to make a name for themselves by running up the hours plaintiffs' counsel spend addressing a defendant's defenses , then limiting the fee award to some lesser number of hours, so that no attorneys will take on these types of cases against it.

That would be error. As held in Layman, it is "both illogical and erroneous" to conflate fee-shifting "based on the hourly fee of plaintiffs' counsel" with fee-shifting based on the amount "of the prevailing party's recovery." 376 S.C. at 455, 658 S.E.2d at 331. Thus, "there is no requirement that an attorney's fee be less than or comparable to a party's monetary

[11] "What we would get from this undertaking is not worth the effort we would have to put into it. The saying alludes to a game of cards in which the stakes are smaller than the cost of burning a candle for light by which to play." https://www.dictionary.com/browse/the-game-is-not-worth-the-candle.

judgment." Taylor v. Medenica, 331 S.C. at 582, 503 S.E.2d at 462. Taylor affirmed attorney fees of $500,000.00, roughly five times the amount of trebled damages and fourteen times the actual damages.

Other Supreme Courts again agree with the Supreme Court of South Carolina. "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, 106 S. Ct. 2686, 2696 (1986) (plurality) (emphasis added); id. at 586, 106 S. Ct. 2686, 2700 (Powell, J., concurring) (same). "The **obvious purpose** of this statute is to provide **relief for** a person who has sustained injury or property **damage in an amount so small** that, if he must pay his attorney out of his recovery, he may well conclude that **it is not economically feasible to bring suit**." Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973) (analogous statute) (emphasis added). One-sided fee-shifting provisions under unfair trade practices acts are designed **so that "business interests could not proceed with impunity**, secure in the knowledge that the dimensions of their transgression would not merit" effective legal action, **"[g]iven the small dollar amounts often involved in such suits."** Marshall v. Miller, 302 N.C. 539, 549, 276 S.E.2d 397, 404 (1981) (emphasis added).

Because these statutes are designed at least in part to encourage lawsuits where the expected fees are many times the expected damage award, it would be foolish to evaluate the fees in comparison to the actual damages.

It typically makes no sense to spend $20,000 litigating a $5,000 injury. Thus, courts typically discourage that by reducing the fees. Under these statutes, the approach is different.

These statutes are designed to make the game worth the candle to the injured party, because it is worth the candle to society to deter the acts targeted by these statutes.

D. The Statutes Intend Full Compensation to Quality Attorneys.

These provisions are intended to "fully compensate"—not partially compensate—for the burden of bringing and winning such lawsuits. Austin I, 387 S.C. at 57, 691 S.E.2d at 153 (an award of fees and costs should "serve to fully compensate Austin for pursuing his statutorily-authorized private right of action").[12] This is again different from family law. In family law, even where the amount requested is appropriate in relation to the stakes, a judge might properly order one spouse to pay half, or a quarter, or any other portion of the fees the other spouse incurred. The goal is to be fair between the interests of both parties. Not so here—these provisions are one-sided, they favor one party over the other, and properly so.

E. The Fee-Shifting Provisions Here Apply to All Stages of a Case.

The general rule, applicable here, is that fee-shifting provisions apply to all stages of a case (unless the text explicitly limits the provision to a certain stage or stages). They mandate fees for later stages if fees were proper for earlier stages. Austin II, 406 S.C. at, 201, 750 S.E.2d at 85 (directing that post-trial fees be awarded under the Dealer's Act); Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (reversible error to decline to award post-trial fees under fee-shifting statute); McDowell v. S.C. Dep't of Soc. Servs., 304

[12] Again, other courts agree with the Supreme Court of South Carolina. "[P]ublic policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions." In re MetLife Demutualization Litig., 689 F. Supp. 2d 297, 363 (E.D.N.Y. 2010) (alteration in original) (quoting Ressler v. Jacobson, 149 F.R.D. 651, 657 (M.D. Fla. 1992)). "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).

S.C. 539, 543, 405 S.E.2d 830, 833 (1991) (same); Layman, 376 S.C. at 463-64 & n.3, 658 S.E.2d at 336 & n.3 (Supreme Court directly awarding $588,873.13 in fees ($471,098.50 after 1.25 multiplier) for stages of litigation after determination of underlying award).[13]

III. The Provisions Here Are Remedial. They Are to Be Fully Applied to Attain Their Purposes.

A. The Acts at Issue Here Are Remedial.

"Because the provision affords the innocent owner a remedy not recognized previously, it should be classified as remedial." Ducworth v. Neely, 319 S.C. 158, 163 & n.3, 459 S.E.2d 896, 899 & n.3 (Ct. App. 1995). The Acts at issue here—the two warranty acts, the UTPA, and the Dealers Act—each provide the consumer a remedy not previously recognized.[14] They are thus remedial.

In more common-sense terms, the UTPA was obviously enacted to remedy the problem of too many entities acting deceptively in commerce. The Dealers Act was obviously intended to remedy the problem of too many acting unfairly and/or deceptively in the automotive field. The two warranty acts were obviously enacted to remedy the problem of too many automotive

[13] Other courts hold similarly to the Supreme Court of South Carolina. E.g., Renaissance Enters. v. Ocean Resorts, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) (finding "no reason" such fees would be excluded under a contractual fee-shifting provision) rev'd in part on other grounds, 334 S.C. 324, 513 S.E.2d 617 (1999); Balark v. Curtin, 655 F.2d 798 (7th Cir. 1981) (disallowing fees for subsequent work 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).

[14] The warranty acts enable the consumer to require the manufacturer to repurchase or replace the automobile if it remains out of compliance with the warranty after too many repair opportunities and too much time. 15 U.S.C. § 2310; S.C. Code Ann. §§ 56-28-40, -50, -70. The UTPA allows the victim to sue over unfair or deceptive acts. S.C. Code Ann. §§ 39-5-20, 39-5-140. The Dealers Act provides the entitlement to sue, § 56-15-110, over acts in the automotive field that are "unfair or deceptive," § 56-15-30, or are "arbitrary, in bad faith, or unconscionable," § 56-15-40.

manufacturers providing warranties but unfairly and/or deceptively not living up to them. They are again remedial.

B. The Fee-Shifting Provisions Within Those Acts Are Doubly Remedial.

While the broader Acts seek to create new causes of action for consumers, the new rights to sue would often be merely theoretical without fee-shifting. Given the small dollar amounts at stake in the dispute, the costs of attorney time would dwarf the potential recovery, making bringing a lawsuit unfeasible.

The fee-shifting provisions here are doubly remedial. They are remedial provisions designed to effectuate remedial statutes. They are remedies-within-remedies. They "epitomize[] the definition of a remedy." Austin I, 387 S.C. at 57, 691 S.E.2d at 153 ("Thus, an award of attorney's fees and costs would merely serve to fully compensate Austin for pursuing his statutorily-authorized private right of action under the [relevant] Act, which we believe epitomizes the definition of a remedy.").

C. These Doubly-Remedial Provisions Are to Be Construed and Applied Broadly to Achieve Their Purposes.

"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) (emphasis added) (quoting Endlich on Int. Stat., sec. 107). "A remedial statute should be liberally construed in order to effectuate its purpose." S.C. Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978). "A statute remedial in nature should be liberally construed in order to accomplish the object sought." Inabinet v. Royal Exch. Assur. of London, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932) (citing numerous authorities).

Because remedial statutes should be given the fullest meaning, Allen; Hanna; Inabinet; and the fee-shifting provisions here epitomize the definition of a remedy, Austin I; they are to be fully applied to fulfill their purpose of "fully compensat[ing]" those who successfully sue under the associated acts.

Application

IV. The Reduction in the Fee Award Is Contrary to the Purposes of These Remedial Statutes.

The Standard of Review is De Novo.

A failure to follow the purpose of a fee-shifting statute is an error of law, and is reviewed de novo. Layman, 376 S.C. at 443-44, 658 S.E.2d at 325 ("The interpretation of a statute is a question of law, which this Court reviews de novo.").[15] Regardless of the exact name of the standard, it is reversible error to fail to follow the purpose of a fee-shifting statute. Id. passim (vacating award that failed to follow the purposes of the fee-shifting statute at issue and replacing that award with award that follows the provision's purpose); id. at 453, 658

[15] While awards of attorney fees are generally subject to an abuse of discretion standard, the failure to follow the purpose of a fee-shifting provision is an error of law which amounts to an abuse of discretion, and that error of law is reviewed de novo. As further explained in Layman, 376 S.C. at 444, 658 S.E.2d at 325 (citations omitted),

> An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. In this case, however, the issue of the amount of attorneys' fees awarded hinges on the Court's interpretation of "reasonable" attorneys' fees as contained in the state action statute. The interpretation of a statute is a question of law, which this Court reviews de novo.

See also Carson v. CSX Transp., Inc., 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012) ("An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions").

S.E.2d at 330 (it is "both illogical and erroneous" to make an award that fails to follow the purposes of a fee-shifting statute).

Discussion

In reducing the fees awarded by 54% from an hours times rate calculation, the Orders are contrary to the "strong public policy purposes behind these acts." Simpson, 373 S.C. at 30, 644 S.E.2d at 671. Even reducing the award by 41%, as in the first Order (excluding the overlooked fees), does not serve "to fully compensate [the Greenawalts] for pursuing [their] statutorily-authorized private right[s] of action." See Austin I, 387 S.C. at 57, 691 S.E.2d at 153. A rule of "you only get paid if you win," and then only "a lot less" than the lodestar, will not ensure that competent attorneys will take on these cases. It will make such cases economically unviable for private citizens. This is contrary to all the case law. "[A]ttorney's fees are intended to make such claims economically viable for private citizens." Austin I, 387 S.C. at 56, 691 S.E.2d at 153. "[A] decision in favor of Austin facilitates the purpose of the Act which is to provide buyers a private right of action against dealers who engage in deceptive practices." Id. at 57, 691 S.E.2d at 153. Taylor v. Medenica, 331 at 578, 503 S.E.2d at 460 (similar); Bradley, 277 S.C. at 330, 287 S.E.2d at 141 (similar); Marshall, 302 N.C. at 549, 276 S.E.2d at 404 (similar), United Automax, 166 S.W.3d at 697 (similar); Wilkins, 266 Va. at 563, 587 S.E.2d at 584 (similar).

The purpose is not to partially compensate plaintiffs for pursuing their statutorily-authorized claims. It is "to **fully** compensate." Austin I, 387 S.C. at 57, 691 S.E.2d at 153 (emphasis added).

Because the reduction is contrary to these purposes, it should be reversed.

V. The First Order's Reduction in the Fee Award Is Contrary to the Plain Language of Two Statutes.

The Standard of Review is De Novo.

Failure to follow the plain language of a statute is an error of law, and as detailed in Section IV above, these are reviewed de novo. Layman, 376 S.C. at 443-44, 658 S.E.2d at 325; Carson, 400 S.C. at 229, 734 S.E.2d at 152.

Discussion

Two statutes here—the Magnuson-Moss Warranty Act and the South Carolina Lemon Law—explicitly state that fee awards are to be based on the **actual time expended** (not on the amount needed to deter wrongful litigation conduct).[16] 15 U.S.C. § 2310(d)(2) ("attorneys' fees based on actual time expended"); §56-28-50(D) (same). Each statute is to be applied according to its plain meaning. "[I]t means what it says." State v. Carrigan, 284 S.C. 610, 616, 328 S.E.2d 119, 122 (Ct. App. 1985) (emphasis added); Odom v. Town of McBee Election Comm'n, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019) (similar); S.C. Dep't of Transp. v. Revels, 411 S.C. 1, 10, 766 S.E.2d 700, 704–05 (2014) ("Fee-shifting statutes are interpreted according to their own terms.")

By failing to follow the statutory directives, the lower court erred. A prevailing plaintiff under these acts is entitled to compensation for all the hours his attorney "actual[ly] expended,"

[16] Two other statutes explicitly mandate that attorney fees be awarded to the Greenawalts. UTPA § 39-5-140(a) (emphasis added) ("Upon the finding by the court of a violation of this article, the court **shall** award to the person bringing such action under this section reasonable attorney's fees and costs."); Dealers Act § 56-15-110(1) (a successful plaintiff "shall recover" attorney's fees). "The term 'shall' in a statute means that the action is mandatory." Henderson, 405 S.C. at 453, 748 S.E.2d at 228 (cleaned). If there are not to be multiple fee awards, so that each statute is complied with, the single award must comply with all four statutes.

not limited to hours devoted to countering litigation misconduct by the opposing party, nor to those hours for which payment by the defendant is needed to discourage litigation misconduct.

Because the reduction is based on reasoning contrary to the plain language of the statutes, it should be reversed. This Court should reverse the lower court's decision, and either award the Greenawalts the lodestar amount or direct the lower court to do so.

VI. The First Order's Reduction in the Fee Award Is Contrary to Settled Case Law re the Other Two Statutes.

The Standard of Review is De Novo.

Failure to follow settled precedent is an error of law and as detailed in Section IV above, these are reviewed de novo. Layman, 376 S.C. at 443-44, 658 S.E.2d at 325; Carson, 400 S.C. at 229, 734 S.E.2d at 152.

Discussion

The Dealers Act and the UTPA mandate fees for successful plaintiffs. They each state a prevailing plaintiff "shall" recover attorney fees. UTPA § 39-5-140(a) (emphasis added) ("[T]he court **shall** award to the [successful plaintiff] attorney's fees and costs."); Dealers Act § 56-15-110(1) (a successful plaintiff "shall recover" attorney's fees).[17]

Historically, South Carolina courts have looked to six factors in determining the amount of a fee award. Layman, 376 S.C. at 458, 658 S.E.2d at 333 (citing Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997)). These factors are then used to determine "the

[17] The Greenawalts believe the plain language of these statutes—that the prevailing plaintiff "shall" be awarded fees—is clear, and therefore statutory construction is not needed; but if there were any doubt, the Supreme Court has repeatedly stated that the word "shall" in a statute means that the action is mandatory. Henderson v. Summerville Ford-Mercury Inc., 405 S.C. 440, 453, 748 S.E.2d 221, 228 (2013) (citing cases).

reasonable time expended and a reasonable hourly rate." Id. Multiplying the reasonable hours by the reasonable rate yields a "lodestar." Id. at 457, 658 S.E.2d at 332.[18]

The six factors that go into the determination of reasonable time expended and reasonable hourly rate —and thus into the lodestar—are "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services." Id. at 458, 658 S.E.2d at 333 (citing Jackson, 326 S.C. at 308, 486 S.E.2d at 760). See also Maybank v. BB&T Corp., 416 S.C. 541, 581, 787 S.E.2d 498, 518-19 (2016) ("In determining the reasonable time and hourly rate for attorneys' fees, the Court looks to the factors set forth in Jackson v. Speed").

The lodestar result is strongly presumed to be the correct amount of the award. There is a "**strong presumption** that the lodestar" is the proper amount under "the intended purpose" of most fee-shifting statutes. Layman, 376 S.C. at 458, 658 S.E.2d at 332 (emphasis added) (cleaned). Other courts agree. Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 554, 130 S. Ct. 1662, 1673 (2010) ("[T]here is a 'strong presumption' that the lodestar figure is reasonable.") (cleaned). A court may properly depart from the lodestar amount only in "rare circumstances." (Id.) (departure from lodestar only proper "in those **rare circumstances** in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." Id. (emphasis added).[19]

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[18] "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." Layman v. State, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008) (citing Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 652 (4th Cir. 2002)).

[19] See also McAfee v. Boczar, 738 F.3d 81, 88–89 (4th Cir. 2013), as amended (Jan. 23, 2014) (similar).

This does not mean a lower court must blindly accept the amount a plaintiff requests for her attorney fees. There are times when a judge may reduce an award from the requested amount. If a plaintiff claimed he had been deceptively overcharged by $1,000, but the jury found he had been overcharged by only a dollar, a judge could reduce the award significantly below the request. If a defendant offered to settle for $1,000 before the plaintiff hired an attorney and the verdict came in at $900, a court could reduce, arguably even deny, the award for lack of a benefit procured by the attorney's services. If the request is $800 per hour for a recent law school graduate's work, the judge might reduce the award to reflect a reasonable rate. An attorney who utterly fails to provide evidence that his requested rate is reasonable might face a substantially reduced award. An attorney who secures a 100 million dollar judgment might request a 40 percent fee award, but she might be relegated to the lodestar rate. Fees might be reduced below the request if the details of the attorney's time records were accidentally destroyed, leaving only the hours per day for work on the case. But all these reasons to reduce the award are incorporated into the lodestar by settled case law. E.g., Layman, 376 S.C. at 458, 658 S.E.2d at 333; Maybank v. BB&T Corp., 416 S.C. 541, 581, 787 S.E.2d 498, 518–19 (2016).[20] They are incorporated into the lodestar either directly, or indirectly via the Jackson factors, which the lower court found to all be in favor of the Greenawalts.

Here, there was no reason to depart from the "strong presumption" in favor of an award of the lodestar amount. (It was especially erroneous to depart so greatly, as a 43% reduction from the lodestar is not "generous.")

[20] See also Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 543, 130 S. Ct. 1662, 1673 (2010) ("the lodestar includes most, if not all, of the relevant factors" that determine "a 'reasonable' attorney's fee") (cleaned).

Because there was no valid reason to depart from the lodestar, the departure should be reversed and the lower court instructed to award the lodestar amount.

VII. The First Order Erroneously Conflated the Purposes of These Statutes with the Purpose of Other Provisions.

The Standard of Review Is De Novo.

The employment of an improper standard is an error of law and as detailed in Section IV above, these are reviewed de novo. Layman, 376 S.C. at 443-44, 658 S.E.2d at 325; Carson, 400 S.C. at 229, 734 S.E.2d at 152.

Discussion

The Order followed the purposes of the statutes almost until the very end—when it suddenly veered to explain its award in light of the purpose of deterrence. Clearly, the court believed Nissan had created needless work in the case. If the court wanted to award fees as sanctions, that should have been in addition to the lodestar fees. But the Greenawalts did not ask for additional fees as sanctions and do not ask for them now. Deterring litigation conduct is simply not one of the six factors the Supreme Court has approved for determining the amounts of fee awards under fee-shifting statutes. Jackson, 326 S.C. at 308, 486 S.E.2d at 760 (listing six factors); Baron Data Systems v. Loter, 297 S.C. 382, 384–85, 377 S.E.2d 296, 297 (1989) (same).

Deterrence is a consideration in punitive damages; Mitchell, Jr. v. Fortis Ins. Co., 385 S.C. 570, 586, 686 S.E.2d 176, 184 (2009) (similar); Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (1991) (similar); Kennedy v. Richland Cnty. Sch. Dist. Two, 428 S.C. 98, 120, 833 S.E.2d 414, 426 (Ct. App. 2019); and is the predominant factor in awards of sanctions, Pee Dee Health Care, P.A. v. Est. of Thompson, 424 S.C. 520, 533, 818 S.E.2d 758, 765 (2018); Kovach v. Whitley, 437 S.C. 261, 265, 878 S.E.2d 863, 865 (2022); but not for awards

under fee-shifting provisions of consumer-protection statutes; Jackson; Baron; Austin II, 406 S.C. at 192, 750 S.E.2d at 80.[21]

It is "both illogical and erroneous to calculate fees" under one source of fee-shifting authority based on the purposes of another. Layman, 376 S.C. at 453, 658 S.E.2d at 330 (vacating attorney fee award made under a misunderstanding of a statute's purpose, and awarding fees under the proper standard).[22]

Nissan should not get to pay less than the remedial statutes mandate because Nissan also committed litigation abuse. If anything, Nissan should have been compelled to pay more.

Because the Order is rock-solid[23] until it departs from the purpose of the statutes and controlling precedent, the Court should excise the error and direct that the full amount requested be awarded.

Summation as to Errors of Law in the June 12, 2023 Order

The June 13, 2023 Order follows the purpose of the remedial statutes and controlling precedent almost to the very end—when it suddenly departs from the purpose of the statutes, the plain language, the case law, and the lodestar, and cuts the award in half. Because—except for overlooking 9.9 hours—the order is rock-solid until it departs from the texts of the statutes and controlling precedent, the Court should excise the error and direct that the full amount requested be awarded.

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[21] See also Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.4, 88 S. Ct. 964, 966 n.4 (1968) (If the goal of a fee-shifting provision had been to sanction defendants for improper litigation practices, "no new statutory provision would have been necessary," for courts had long been able to award attorney fees to successful plaintiffs for such acts by defendants).

[22] See also Austin I, 387 S.C. at 57, 691 S.E.2d at 153 (statute intends to "fully compensate" for bringing the "statutorily-authorized" right of action).

[23] Other than in overlooking 9.9 hours, which is discussed in the next section of this Brief.

VIII. Alternatively, the Reduction in the Award of June 12 Should Be Reversed as an Abuse of Discretion.

The Standard of Review Is Abuse of Discretion.

"Overly simplified . . . . [w]hen an appellate court is in agreement with a discretionary ruling or is only mildly in disagreement, it says that the trial judge did not abuse his discretion. . . . [W]hen the appellate court is in substantial . . . disagreement, it says that there has been an abuse of discretion." Rish v. Rish By & Through Barry, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988) (reversing failure to award adequate fee) ("[W]e hold that the trial judge abused his discretion in failing to allow a more adequate fee to counsel"). "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." State v. Corey D., 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000).

Discussion

Horton v. Jasper County School District, 423 S.C. 325, 815 S.E.2d 442 (2018) is on all fours with this case. Here, as there, "every finding the circuit court made appears to support the affidavit of [Plaintiffs'] counsel." Id. at 331, 815 S.E.2d at 445. Here, as there, the lower court improperly reduced the award by about half, without adequate explanation.

There,

> Nevertheless, the circuit court awarded attorneys' fees at a rate of $100 per hour, rather than the hourly rate presented by Horton—$295 for Twombley and $250 for Campbell. The court provided no explanation and cited no evidence in the record to support its conclusion that $100 per hour was reasonable.

Id.

Reversing the Court of Appeals, which had affirmed the result, the Supreme Court explained, "Although the circuit court has discretion in deciding the "specific amount of . . .

reasonable attorneys' fees," Kiriakides, 382 S.C. at 20, 675 S.E.2d at 445, its decision must not be "based on unsupported factual conclusions," Sloan, 393 S.C. at 156, 711 S.E.2d at 897." Id. (alteration in original).

A remand is improper where the lower court provided no explanation and cited no evidence in the record to support its conclusion that the award should be substantially reduced from a straight hours-times-rate calculation. Id. ("[W]e find a remand unnecessary"). "We find the circuit court abused its discretion by reducing the rate to $100 per hour without basing its decision on any evidence. We **REVERSE** the court's decision, and award Horton $35,611.50 in attorneys' fees and $1,096.56 in costs." Id.

So too here. Every finding the circuit court made supports the affidavit of Plaintiffs' counsel. (June 13 Order). The circuit court provided no explanation for its reduction (other than its belief that the awarded amount would deter future litigation misconduct by Nissan). It "cited no evidence in the record to support its conclusion" that halving the award was reasonable. This Court should reverse the lower court's decision, and either award the Greenawalts the lodestar amount or direct the lower court to do so.

IX. The Error in the Math Should be Corrected.

The Standard of Review Is Abuse of Discretion.

The standard of review for the error in the math is abuse of discretion. An abuse of discretion is found where there is an "unsupported factual conclusion," Layman, 376 S.C. at 444, 658 S.E.2d at 325; Carson, 400 S.C. at 229, 734 S.E.2d at 152 (similar); or "[W]hen the appellate court is in substantial . . . disagreement" with the lower court, Rish, 296 S.C. at 15-16, 370 S.E.2d at 103. The phrase "has no opprobrious implication," Corey D., 339 S.C. at 118, 529 S.E.2d at 26.

Discussion

Finding the hours expended were 281.7 when they were really 291.6 is an unsupported factual conclusion, and therefore an abuse of discretion, and should be reversed. Layman; Carson; Rish. It is also clearly erroneous. It should therefore be reversed under any standard. It also conflicts with the Lemon Law and the Magnuson-Moss Act, which each direct that attorney fees are to be based on "actual time expended," not "some of the time expended." As stated, there is no need to return the issue to the trial court. This Court should award the fees earned in the amount of $4,455.

X. The Denial of Fees for Work on the Rule 59 Motion Should Be Reversed.[24]

The Standard of Review is De Novo.

The Greenawalts maintain the lower court erred, as a matter of law, in rejecting their motion to alter or amend and its related fee requests based on the lower court's interpretation of Rule 59, SCRCP. The interpretation of a rule is reviewed de novo. Ex parte Travelers Home & Marine Ins. Co. v. Stringfellow, 427 S.C. 238, 241, 830 S.E.2d 718, 720 (Ct. App. 2019).

Discussion

The lower court's Order Regarding Plaintiffs' Motion for Attorney Fees, issued June 12, 2023, reduced the award from an hours times rate calculation, reasoning that the lower amount sufficed to deter litigation misconduct. (Order p. 15). (Order p. 15). Neither party had advocated that position. They were entitled to file a Rule 59 motion challenging that holding. Elam, passim.

[24] Including the 9.9 hours missing from the first order, and the denial of the request for fees incurred in connection with the Rule 59 motion, the reduction from an award based on the hours actually incurred is 54%. A cut of 54% is improper.

The Greenawalts were not only entitled to file a Rule 59 motion under the Supreme Court's decision in Elam, they were required to do so to preserve the issue for appeal under holdings of this Court. "[W]here theory of relief was first raised in lower court's order, appellant must challenge this theory with a Rule 59, SCRCP motion" In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998); Ness v. Eckerd Corp., 350 S.C. 399, 403-04, 566 S.E.2d 193, 196 (Ct. App. 2002) (similar); Godfrey v. Heller, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (similar). Had the Greenawalts not filed the motion, and nevertheless appealed, Nissan would likely be arguing to this Court that the issue is not preserved.

The June 12 Order also misstated the number of hours expended. The Greenawalts were again allowed, and arguably required, to bring this error to the lower court's attention. Elam, 361 S.C. at 24, 602 S.E.2d at 780 ("A party may wish to file such a motion when she believes the court has . . . perhaps failed to rule on an argument or issue" and "must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review" (citing authorities).

The Greenawalts reasonably believed the lower court had erred in these holdings. Accordingly, the Greenawalts moved under Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the judgment and asked for additional fees under the fee-shifting statutes here for their attorneys' work in doing so. (Mot., Br. in Supp., and Reply). The lower court denied their requests. (Order Denying Pl's Rule 59 Mot. To Alter or Amend). Citing federal cases opining on the "highly unusual circumstances" under which motions are proper under the federal Rule 59, the lower court held the Greenawalts' requests were improper. (Order Den. Rule 59 Mot. Pp. 1-2). This was error.

The Supreme Court of South Carolina holds, "The wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (cleaned). The Rule 59 Order disagrees. It holds, "Nor does a party's mere disagreement with the court's ruling warrant a Rule 59(e) motion." (Order Den. Rule 59 Mot. P. 2) (cleaned). The Supreme Court of South Carolina says it is "doubly important" that such motions be "freely allowed." 361 S.C. at 25, 602 S.E.2d at 780. The Rule 59 Order disagrees. It says only in three "highly unusual circumstances" should courts grant rule 59 relief. (Order p. 1).

The Supreme Court of South Carolina says,

> it is proper to view a Rule 59(e) motion . . . as a vehicle to seek "reconsideration" of issues and arguments . . . . even if it means rehashing all or part of an argument previously presented. . . . There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.

361 S.C. at 21-22, 602 S.E.2d at 778-79. The Rule 59 Order disagrees: "Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues." (Order p. 1).

A State Supreme Court is the ultimate arbiter of the state's law. Johnson v. Fankell, 520 U.S. 911, 916, 117 S. Ct. 1800, 1803–04 (1997) (citing numerous authorities); Rule 244, SCACR (opinions of the South Carolina Supreme Court "control[]" matters of State law). No matter what federal cases do or do not hold about the federal rule,[25] the South Carolina

[25] The Order denying the Rule 59 motion may disagree with the South Carolina Supreme Court as to what federal law allows. Elam quotes a federal Seventh Circuit case for the proposition that motions should be freely allowed under Rule 59, 361 S.C. at 22, 602 S.E.2d at 779, while the Order cites other federal cases from other jurisdictions to opposite effect (Rule 59 Order pp. 1-2). In sum, the Order and the South Carolina Supreme Court disagree as to which federal cases best inform South Carolina law.

Supreme Court is the ultimate arbiter of South Carolina law.[26] Its holding about the state rule governs here, and is the opposite of what the lower court holds.

The Rule 59 Order also repeatedly states that a "party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." (Order p. 2; see also id. p. 1 (similar)). If the Order is read to mean it was improper for Nissan to present the numerous newly asserted cases in its reply, the Greenawalts have no objection. However, if the Order is read to mean the Greenawalts were forbidden to argue the merits of the lower court's sua sponte holding, the Order errs. It makes no sense to hold that a court's sua sponte error may be addressed only on appeal. Appellate courts already have enough to do. The wisdom of giving lower courts the opportunity to correct their own errors is especially pronounced where the error concerns an issue not already litigated by the parties. See Elam, 361 S.C. at 22, 602 S.E.2d at 779. Moreover, this Court has repeatedly held that where an order sua sponte raises a new issue, a litigant should address the error with a Rule 59 motion. Timmerman, 331 S.C. at 460, 502 S.E.2d at 922; Ness, 350 S.C. at 403-04, 566 S.E.2d at 196; Godfrey, 311 S.C. at 520, 429 S.E.2d at 862. It was similarly proper for the Greenawalts to request correction of the total hours expended. Timmerman, 331 S.C. at 460, 502 S.E.2d at 922. Nor was there any way the Greenawalts could have presented to the lower court their attorneys' timesheets for their work on correcting the court's error until the court made that error—i.e., until the time of the judgment they sought to correct.

[26] Any implication that the federal interpretation would trump at least where rules are practically identical rather than merely similar would also be reversible error. Compare Rule 59 Order p. 1 n.1 ("Rule 59 is substantially the same as the Federal Rule. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 779 (2004) ('Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical'.)") with Johnson, 520 U.S. at 916, 117 S. Ct. at 1803–04 ("Even if [the] statutes contained identical language," the state Supreme Court's interpretation would trump).

It simply makes no sense to hold that requests for fees incurred after a judgment must be requested before that judgment—if that is what the lower court held.

There was nothing improper in the Greenawalts asking the lower court to correct its own alleged errors. Nor was there anything improper in asking the lower court to amend the judgment to award fees for time incurred after the original Order was filed—this time could not have been requested before that Order issued. It matters not, for the time incurred in connection with the motion, whether this Court holds for the Greenawalts regarding the reduction in the prior fee award or the failure to include the 9.9 hours; all that matters is that it was reasonable for the Greenawalts to seek correction of an apparent error.[27] See Layman v. State, 376 S.C. 434, 464, 658 S.E.2d 320, 336 (2008) (awarding $471,098.50 in attorney's fees for stages of the litigation concerning solely the dispute about fees, and applying a 25% multiplier to those fees-about-fees for an award of $588,873.13).

Because of the multiple errors of law in denying the Greenawalts their attorneys' fees for time their counsel spent seeking to have the original award corrected, the Court should hold the Greenawalts are entitled to the requested fees, and either award them or direct the lower court to do so.

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[27] As the prevailing parties on the underlying case, the Greenawalts were entitled to an award for these fees. S.C. Code Ann. § 39-5-140(a) (emphasis added) ("Upon the finding by the court of a violation of [the UTPA], the court shall award to the person bringing such action under this section reasonable attorney's fees and costs"); § 56-15-110(1) (plaintiffs who prove a claim under the Dealers Act "shall recover . . . a reasonable attorney's fee"); see also § 56-28-50(D) (attorney's fee awards under the Lemon Law shall be "based on actual time expended"); 15 U.S.C. § 2310(d)(2) (attorney's fee awards under the Magnuson-Moss Warranty Act shall be "based on actual time expended"); Austin II, 406 S.C. at, 201, 750 S.E.2d at 85 (post-trial fees are proper under the Dealer's Act); Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (similar); McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991) (same); Renaissance Enters., 326 S.C. at 469, 483 S.E.2d at 801 (Ct. App. 1997) ("no reason" such fees should be excluded).

XI. The Overall Amount of the Award Is Also Improper.

The Standard of Review Is Abuse of Discretion.

The standard of review for a challenge to a fee award that is not based on an error of law is abuse of discretion. Layman, 376 S.C. at 444, 658 S.E.2d at 325; Rish, 296 S.C. at 15, 370 S.E.2d at 103. "Overly simplified . . . . [w]hen an appellate court is in agreement with a discretionary ruling or is only mildly in disagreement, it says that the trial judge did not abuse his discretion. . . . Here our disagreement is sufficiently substantial to necessitate relief." Id. at 15-16, 370 S.E.2d at 103. See also Corey D., 339 S.C. at 118, 529 S.E.2d at 26 ("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.").

Discussion

Were the Court to disagree with any or all of the above arguments, it remains true that the lower court erred. The award is a 54% reduction of the fees requested. This consists of the reduction of the fees by the lower court; the failure to count 9.9 hours; and the denial of the request for fees for work on the motion to reconsider. The lower court recognized this is "a lot less" than the standard even overlooking 9.5 hours and not including the time expended in seeking reconsideration. The lower court abused its discretion in failing to order a more adequate fee. The lower court thus erred in stating that "$75,000 is reasonable and necessary to achieve the outcome and to deter" and similarly that the amount "is still reasonable and generous and should send a message." A 54% cut is neither reasonable nor generous. In Rish, this Court held that an inadequate attorney fee award amounts to an abuse of discretion. The "trial judge abused his discretion in failing to allow a more adequate fee." 296 S.C. at 16, 370 S.E.2d at 104. So too here. See also McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 543,

405 S.E.2d 830, 833 (1991) ("the trial judge abused his discretion in denying appellant's petition" for attorney fees); Horton (lower court abused its discretion in failing to award sufficient attorney fees). Nissan even relied below on a case that says exactly that. (Resp. Rule 59 Mot. p. 4) (citing Merola v. Atlantic Richfield Co.). Merola v. Atlantic Richfield Co., 515 F.2d 165, 169, 172 (3rd Cir. 1975), actually holds that "the court abused its discretion" because it did not award fees "computed on the basis of a reasonable hourly rate for the time expended."

The decision is clear and the Court should award all fees requested.

Conclusion

The fee-shifting statutes here are designed to remedy the problem of car manufacturers not playing fair with customers, to encourage consumers to bring claims by making them economically viable, and to encourage attorneys to bring these cases, in hopes of eliminating, or at least greatly reducing, improper real-world conduct. They are not designed simply to deter unfair litigation conduct. As the epitome of remedies, they are to be forcefully interpreted to achieve their purpose.

The errors above are all prejudicial, because they resulted in the Greenawalts receiving a fee award that does not fully compensate them for the fees they incurred. There is considerable overlap between the errors, and the Greenawalts do not request that they receive their fees four times, once under each act. They do request that a full fee award be made, as required by law. Sending the case back down is a waste of the court's and the Parties' resources, and will increase the fees. The decision is clear and this Court should award all fees requested or direct the lower court to enter a supplemental award for $89,610.00.

Respectfully submitted,	
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