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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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ARGUMENT AS TO FACTS

A Statement of the Case is to exclude contested matters. The "Statement of the Case" in the Initial Brief of Respondent (Nissan Br.) is full of contested matters. Appellants respond to some of those contested matters here.

A. Nissan Errs in Calling the Problems with the Car "Minor."

Nissan writes, "The complaint alleged minor nonconformities with the navigation system in a 2019 Nissan Rogue owned by Appellants." (Nissan Br. p. 2) (citing Complaint, ¶ 39). Nissan simply omits, from the sentence it partially quotes, the problems with the "electrical system." Perhaps more importantly, Nissan's sentence shows how deeply it misunderstands the statutes governing this case. Under the Lemon Law, minor problems are not actionable. S.C. Code Ann. § 56-28-10(6) states (emphasis added), "'Nonconformity' means a defect or condition that **substantially** impairs the use, value, or safety of a motor vehicle," with certain exceptions. Due to counsel's work, Nissan stipulated the Greenawalts are the prevailing party. Therefore, Nissan admitted the problems fit the statutory definition and were not minor. It should not be arguing the reverse to this Court.

Even worse, Nissan trivializes the sheer terror Mrs. Greenawalt would experience when she had to stop, turn off the car, open the door and close it in strange territory just to get the navigation system working again. The Greenawalts had purchased the vehicle specifically for the navigation system. (Aff. R. Greenwalt filed 11-08-21 ¶ 49). Yet she had to constantly take her eyes off the road to view the navigation screen when the voice commands stopped working. (Id.). It is obviously dangerous to take one's eyes off the road while driving. (Hudson Nissan of North Charleston Dep. p. 27, line 18 – p. 28, line 3). The police even noticed her leaving her lane, pulled her over, and issued her a warning ticked.

(Aff. R. Greenwalt filed 11-08-21 ¶ 15). They could not afford to buy another car until their counsel forced Nissan to buy the car back. (Aff. R. Greenawalt filed 11-08-21 ¶15 (could not afford to buy another car); (Aff. R. and J. Greenawalt filed 04-03-23 ¶6 (same)).

B. Nissan Repeatedly Errs in Minimizing the Benefits to Appellants.

Nissan's central argument in its brief relies on an omission and a misreading of its own document. Throughout its brief, including in its Statement of the Case, [1] Nissan claims the Greenawalts received the same result at the end of the case they could have received immediately after the BBB hearing. For example, Nissan claims "The settlement provided Appellants the same substantive relief ordered through the BBB arbitration process." (Nissan Br. p. 14). Yet awards of attorneys' fees **are** substantive relief. They are not procedural relief, such as a grant of a continuance or an order compelling discovery responses. Nissan admits its BBB offer did not provide for attorneys' fees. (Nissan Br. p. 10). This is a major substantive difference.

A second substantial difference between the BBB offer and the settlement results is the repurchase price of the Rogue—about $5,000 more in the Greenawalts' favor as result of the settlement reached at mediation than the BBB offer. As the Supreme Court has stated, "In our view . . . $5,100 is not an insubstantial sum." Hueble v. S.C. Dep't of Nat. Res., 416 S.C. 220, 234, 785 S.E.2d 461, 468 (2016). Nissan's insistence that the two are the same misreads the document it cites. Nissan writes, "Under the arbitration terms, repurchase of the vehicle meant that Nissan would 'refund the actual amount paid for the vehicle'" (quoting BBB Auto

[1] Nissan writes in its Statement of the Case on p. 3, of "the outcome of the case—which resulted in Appellants receiving the same substantive result provided in the Better Business Bureau ('BBB') arbitration process conducted before Appellants' filed their complaint."

Line Program Summary p. 4.). (Nissan Br. p. 20).[2] Under the BBB provisions Nissan cites, the purchase price would have been $29,974.67. [3] Nissan fails to note that the next page of the BBB document states the amount will be reduced.[4] Under its formula, one takes the number of miles attributed to the customer, divides that figure by 100,000, and multiplies that product by the purchase price. That yields the amount to be deducted from the payment to the customer. Here, the purchase price here was $31,829.37 (Buyer's Order) and mileage at the time of the arbitration was 5,827 (Reason for Decision p. 1). That results in a deduction of $1,854.70. Subtracting that figure from the $31,829.37 purchase price yields a repayment of $29,974.67. The repurchase price agreed at settlement was $35,000. The $35,000 figure includes taxes and other fees that are included in the Lemon Law's requirement in Section 56-28-40 that the manufacturer provide "the full purchase price as delivered" rather than simply the "actual amount paid for the vehicle" that Nissan keeps insisting is the same amount.

So Nissan's contention fails two ways: The Greenawalts did receive "substantial

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[2] Nissan provides no other explanation for its repeated assertion that the repurchase price from the BBB arbitration is the same as the repurchase price agreed to at mediation.

[3] The sales price on the Buyer's Order was $31,829.37. (Buyer's Order). From this, Nissan would have taken off for mileage through the time of the "arbitration" ((BBB Auto Line Program Summary p. 5). Miles at time of BBB hearing were 5,827. (Reason for Decision p. 1). Plugging that into the formula (dividing miles by 100,000 and multiplying the result by the purchase price) yields a deduction of $1,854.70. $31,829.37 - $1,854.70 = $29,974.67.

[4] Under the heading, "Deductions/Exclusions from a Repurchase or Replacement Award," the BBB Program Summary states on page 5, "The repurchase award will be reduced. . . using the following formula," which is

Use Deduction/ Payment	=	# miles attributable to the customer at the time of the arbitration hearing / 100,000	x	vehicle purchase price or gross capitalized cost

benefit" by gaining an increased repurchase price, and were not required to reduce their award by paying attorney's fees.[5]

C. Other Facts that Should Be Noted

It should also be pointed out that Nissan refused to cooperate in discovery, leading to an order compelling Nissan to do so, which Nissan then promptly violated (McCoy Order 2/28/2013; Letter from Moskos 3/6/2023); refused to cooperate in scheduling mediation until the Greenawalts moved to compel mediation (Mot. Compel Mediation and Exhibits); agreed at mediation that the Greenawalts were the prevailing party, entitling them to a fee award, and then argued they were not entitled to fees.

Similarly, Nissan agreed at mediation to pay the Greenawalts for and accept possession of the Rogue. Yet Nissan then refused to cooperate in transferring the car back to Nissan, so the Greenawalts were left paying insurance and taxes on a vehicle they were not driving for four months between the settlement and the Greenawalts' motion to compel settlement (Mot. Compel Settlement pp. 2-3), despite seven unresponded-to emails from the Greenawalts' counsel, and one telephone call with a non-lawyer which yielded nothing other

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[5] Nissan's Statement of the Case also contains disputed and misleading material in stating that the fee request "almost doubled" while the fee motion was under advisement (p. 3). It claims the fee request was $101,821.73 before the hearing and $196,830.00 after. That leaves a $95,000 difference. But Nissan's first figure is wrong. The actual pre-hearing request was $110,610.00 (R. p. _). And Nissan compares its too-low unmultiplied "before" figure with the multiplied post-hearing amount. The unmultiplied request on the later date Nissan refers to was $131,220 (R. p._), making a difference of $20,610.00, not the $95,000 Nissan implies. Nissan does not note that it is comparing apples to oranges. Those twenty thousand dollars cannot possibly justify the size of the reduction here.

Those twenty-thousand dollars include preparing for the hearing, travelling to and attending the hearing, working on the proposed order required by the judge, research into Nissan's surprise argument that a prevailing party must have obtained a verdict or judgment in order to be awarded fees and the other arguments raised by Nissan's filing in opposition to an award of attorney fees, preparing time records, repeatedly contacting Nissan to attempt to get it to complete the purchase of the automobile, and others.

than a statement that the non-lawyer "is going to look into" it." (Ex. 1 to Mot. Compel; Reply Supp. Rule 59 Mot. p. 11).

The motion to compel settlement was filed on May 23, 2023, the same day as the Greenawalts' reply in support of their Rule 59 motion. Obviously, Nissan's refusal to effect the transfer of the Rogue continued beyond that date.

After agreeing at mediation that the Greenawalts were the prevailing party, which means they are entitled to an award of attorney fees under the statutes (Nissan Br. p. __), Nissan surprised the Greenawalts by filing, the day before the hearing, its response claiming the Greenawalts were not entitled to any attorney fees.

REGARDING THE STANDARD OF REVIEW

If the Court agrees with Appellants that the circuit court sought to award the amount needed to deter Nissan, then under both sides' analysis, the review is de novo. (App. Br. pp. _; Nissan Br. pp. 7-8). If the Court agrees with Appellants that the circuit court failed to apply its factual findings, that is an error of law and again a de novo standard is correct. If the Court concludes instead that the circuit court did not consider the need to deter Nissan in deciding on the amount of its award, and followed its findings on the Jackson factors, then Respondent would be correct that an abuse of discretion standard is proper.

ARGUMENT

I. Nissan's Arguments Fail Because Nissan Does Not and Cannot Claim this Case Meets the Criteria for a Large Departure from the Lodestar Amount.

Appellants' opening brief (App. Br.) extensively argued the importance of the lodestar. (E.g., pp. 2, 7, 8, 14, 29, 31-35, 37). It argued there is a **strong** presumption the

lodestar amount is the proper amount, and that a significant departure from the lodestar is proper only in **rare** circumstances not applicable here. (Id. pp. 32-33).[6]

Respondent's brief never addresses this argument. It makes no attempt to argue that this is the rare case where a marked departure from the lodestar is within the lower court's discretion. Nor could it credibly do so. Because Respondent does not and cannot rebut this key point, its arguments that—if one ignores this key point—perhaps the lower court did not err, are of no avail.

II. Nissan's Arguments Fail in Their Own Right.

The parties agree that the lower court's findings on the six Jackson factors properly determine the amount of the award. All these findings were in favor of Appellants. Nissan does not argue that these factors are in its favor, with one almost-exception. It does not argue that the case was not difficult, too many hours were worked, Appellants' counsel do not have good professional standing, the contingency of compensation, or the rate. It simply asserts that counsel provided no benefit to Appellants. Its argument requires acceptance of both its provably-false claim that the less-than-$30,000 offer to repurchase the Appellants' vehicle

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[6] On page 32, Appellants argued (emphasis in original),

> 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]

Appellants' footnote 19 cited a Fourth Circuit case holding similarly. On page 33, Appellants argued that the lower court erred by departing so greatly from the strong presumption in favor of the lodestar amount.

was "the same result" as the $35,000 repurchase price counsel negotiated, and its legally-incorrect argument that awards of attorneys' fees do not benefit clients. It should be rejected.

Additionally, Nissan simply ignores the dramatic extent of the 54% reduction here. [7]

A. Nissan Attacks an Argument of Its Own Creation.

Perhaps because Nissan refuses to address the arguments Appellants' brief makes, Nissan instead attacks an argument of its own creation—that lower courts must always award all the fees a prevailing plaintiff seeks—which is not Appellants' argument.[8]

Respondent usually does so without explaining why this argument should be attributed to Appellants. For example, Respondent writes that Appellants "point to no law requiring the trial court to award every dollar of attorney's fees sought" (Nissan Br. p. 5), without explanation as to why Respondent attributes that position to Appellants. In the few places that Nissan attempts to justify its attribution of that proposition to Appellants, it quotes only partially from sentences, omitting material that destroy Nissan's point.

Nissan does this on page 12 of its Brief and note 4 thereon, discussing one of Appellants' many references in their opening brief to Austin v. Stokes-Craven Holding Corp. (Austin I), 387 S.C. 22, 691 S.E.2d 135 (2010). As to the particular issue Respondent seizes on, Appellants' opening brief states on page 25, "These provisions are intended to 'fully compensate'—not partially compensate—**for the burden of bringing and winning such lawsuits.** Austin I (an award of fees and costs should 'serve to fully compensate Austin for pursuing his statutorily-authorized private right of action')." (App. Br. p. 25) (emphasis

[7] As detailed in Appellants' opening brief, the lower court reduced the award by 41% from the hours it calculated, 43% from the hours it should have calculated in the original order, and 54.44% from the total, including the work after the first order issued.

[8] In fact, Nissan begins the text under its Part "I" by making and attacking this straw man argument, and then begins its argument in Section "A" the same way.

added) (citation omitted)). Appellants state again, on page 27 (emphasis added, citation omitted),

> 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.").

Appellants again cite Austin I on page 29 of their brief, stating, "'The purpose is not to partially compensate plaintiffs for pursuing their statutorily-authorized claims. It is to **fully** compensate.'" (App. Br. p. 29). Nissan cites only this last reference, and then complains, "Austin I cannot reasonably be understood to require the trial court to award the full amount of fees sought in every case." (Resp. Br. 12 & n.4). But that is not Appellants' argument.

Its only other attempt to justify its false attribution to Appellants again quotes only part of the sentence it quotes, and omits portions that disprove Nissan's point. Nissan writes on page 5, "Contrary to Appellants' characterizations of the Fee Shifting Statutes, however, none 'mandate'[2] an amount of attorney's fees which the trial court was required to award or require the trial court to award all the attorney's fees sought." Appellants agree that no statute mandates an amount or requires trial courts to award all fees sought. Nissan's attempted justification for calling this "Appellants' characterization" is in its footnote, where Nissan partially quotes a sentence from Appellants' brief. Appellants' full sentence is, "Nissan should not get to pay less than the remedial statutes mandate because Nissan also committed litigation abuse." This cannot reasonably be read the way Respondent reads it.[9]

[9] The Brief of Respondent repeatedly omits important material from sources it cites, despite Respondent having been called to account for doing so below. Nissan's central argument at the fees hearing omitted crucial information from its own BBB document. "Nissan relies on

B. The Parties Agree the Six Jackson Factors and the Findings thereon Are Determinative.

Citing Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997), Respondent writes (p. 8), "there is no dispute that reasonable attorney's fees under the fee shifting statutes are determined pursuant to the six factors set specified by the Supreme Court." Appellants agree. So yes, those six factors determine the reasonable attorney fee. The lower court did not follow them. It should be reversed.

Respondent writes (p. 9), "Further, '[t]he trial court should make specific findings of fact on the record for each of these factors." Horton, 423 S.C. at 330, 815 S.E.2d at 445 (quoting Burton v. York Cty. Sheriff's Dep't, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004)). Appellants agree. Respondent writes (p. 12 n.4), "the Supreme Court has directed that when determining reasonable attorney's fees courts should conduct a fact- and case- specific analysis of the factors set forth in Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997)". Obviously, the circuit should base its conclusion on these "specific findings of fact" for "each of these factors." When the Supreme Court and this Court directed lower courts to make findings on each factor, the appellate courts did not mean "make findings on each factor, then throw these findings away, and give us a gut figure."[10] They meant that the

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part of a sentence in the correspondence for this position. The actual sentence, however, reads, . . ." (Order pp. 11-12) (quoting the full sentence and finding Nissan's resulting argument to be "without merit"). Similarly, Nissan represented at the fees hearing that the settlement had not been placed in writing in part because, according to Defense counsel, Plaintiff's counsel did not want it signed (Tr. Hr'g 04-04-2023 p. 2, line 9-p. 7, line 2), ignoring the four emails Plaintiffs' counsel had sent asking for written confirmation of the oral agreement (email chain) (Ex. 53 to 04-04-23 filing).

[10] For example, when—as Respondent quotes on page 19 of its brief—the Court wrote in Williamson v. Middleton, 374 S.C. 419, 431, 649 S.E.2d 57, 64 (Ct. App. 2007), "Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence," it obviously assumed that the conclusions made from those findings of fact would conform to those

fee award is to be determined by those factors. (Respondent appears to recognize this in its section I.A.2 (p. 8): "here there is no dispute that reasonable attorney's fees under the fee shifting statutes are determined pursuant to the six factors").

C. The Parties Agree the Lower Court Made Clear, Well-Supported Findings.

Respondent writes that the trial court conducted "a thorough analysis of the factors endorsed by the South Carolina Supreme Court" (p. 6), "thoroughly discussed all six of the Jackson factors" (p. 9) and made "clear, well-supported findings" (p. 11).

D. The Lower Court Erred in Not Following Its Factual Findings under the Jackson Factors.

The lower court's findings on **all** the factors, not just some factors, not just most factors, were against Respondent.[11] Yet it cut the award by 54.44% from what those factors indicate is a reasonable fee. This was improper. Horton, 423 S.C. 325, 332, 815 S.E.2d at 445 ("We find the circuit court abused its discretion by reducing the [award dramatically] without basing its decision on any evidence.") Where "every finding the circuit court made appears to support" plaintiff, it is reversible error to drastically reduce the award from the requested

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findings. Similarly re Respondent's quotation from Horton v. Jasper Cnty. Sch. Dist., 423 S.C. 325, 331, 815 S.E.2d 442, 445 (2018) on page 9 of its brief.

[11] "This factor weighs in Plaintiffs' favor." (Order p. 8) (First factor).

"This factor weighs in Plaintiffs' favor." (Id.) (Second factor).

"This factor weighs in favor of Plaintiffs." (Id. p. 10) (Third factor).

"This factor weighs in favor of Plaintiffs." (Id.) (Fourth factor).

"This factor weighs in favor of Plaintiffs." (Id. p. 11) (Fifth factor).

"This factor weighs in favor of Plaintiffs." (Id.) (Sixth factor).

amount. Id. at 331, 815 S.E.2d at 445 (2018).[12] So too here. By finding for the Greenawalts and then finding less is reasonable, the lower court based its decision on something other than the evidence, violating Horton.)

Nissan repeatedly confuses factual "findings" with "conclusions." A "finding" is, for example, "The record is devoid of any evidence that Nissan offered to repurchase Plaintiffs' car per the Lemon Law formula and pay all Plaintiffs' attorney's fees incurred to that point." (Order p. 8). "Nissan's offer of $33,500 was to cover all claims including attorney's fees and costs. Since Nissan admits that the damages were at least $35,000, its $33,500 total offer was clearly insufficient as it contained insufficient amounts for damages and no amount for the statutorily-mandated fees and costs." (Id. p. 9). "Nissan has not provided any proof that it offered a full repurchase price along with fees and costs to the date of the offer that might warrant reducing a fee award." (Id.) (emphasis added). "Mr. and Ms. Greenawalt have received very beneficial results caused by employing Mr. Moskos." (Order p. 11). A "conclusion," in contrast, is "Therefore, the Court awards X dollars," or "Therefore the Court increases/decreases the award by Y percent or Z dollars." To state what may be obvious, the conclusions should stem from the factual findings. If the amount of the award was a "finding," the Supreme Court's holding in Horton, that it is reversible error to drastically reduce the award where "every finding the circuit court made appears to support" plaintiff would be non-sensical.

[12] Appellants' opening brief quoted and discussed Horton on pages 36-37 and 43. Respondent's brief provides four quotations from Horton yet never addresses its holding.

E. The Lower Court's Explanation Does Not Suffice.

1. What a Proper Explanation Looks Like

The Supreme Court takes care to explain when it departs by even three percent from the Jackson factors (or the lodestar, which is itself determined by those factors). "**Only in an abundance of caution**, however, do we reduce the number of total hours expended by three percent (3%), rounded down to the nearest tenth, **in order to account for any time devoted solely to the Working Retirees' claim**s[.]" Layman v. State, 376 S.C. 434, 460, 658 S.E.2d 320, 333-34 (2008) (emphasis added). The Supreme Court provided another example. It cited another opinion as properly explaining it was "performing a lodestar analysis and adjusting the time devoted to litigating the underlying case by two to three percent in order **to account for** the fact that 'some hours may not be properly compensable.'" Layman, 376 S.C. at 460, 658 S.E.2d at 334 (2008) (citing Edmonds v. United States, 658 F. Supp. 1126, 1135 n.18, 1147 n.4 (D.S.C. 1987)).

To state what may be obvious, a dramatic reduction, like the reduction here, should properly have more explanation than is proper for a two to three percent reduction.

2. The Lower Court's Explanation Here Is Nothing Like a Proper Explanation.

The parties disagree about what the lower court's explanation consists of. Appellants read the circuit court's repeated references to Nissan's litigation conduct as indicating the award was the amount the circuit court deemed necessary to deter that conduct. Nissan vigorously disagrees.

But if one were to agree with Respondent and omit from the order's explanation on pages 14-15 (R. pp.) the statements that "There is no doubt, at least to this Court, that Defendant was playing whack-a-mole," and that the award is intended "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," "and should send a message to auto dealers to resolve these cases sooner rather than later," all that remains is that "$126,000 multiplied by 1.5 multiplier" "seems 'too much', all things considered," and—with ellipses standing in for material about Nissan's conduct—

> This Court finds that a fee of $75,000 is reasonable and necessary to achieve the outcome . . . 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. . .

This is simply a statement that the lower court—for unexplained reasons—thinks the amount is "reasonable," "necessary," and "generous." Why is this amount "reasonable," "necessary," or "generous"? The lower court does not say. As is implicit in the above, the days are gone, if they ever existed, when a circuit court could simply say, "$X seems about right to me," "seems generous to me," or the like. Such gut-level conclusions have been replaced with a duty to follow the Jackson factors, as Respondent repeatedly points out. This simply is not an amount "pursuant to the six factors set specified by the Supreme Court." Because there is no reasoning as to why the lower court finds in favor of the Greenawalts on all six factors and then reduces the lodestar by over 50%, the reduction should be reversed. [13]

[13] It is clear from the lower court's identification of the parties that its conclusion strayed from the facts it correctly found. The lower court stated "that 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." This sentence makes four errors. First, the court does not identify the "outcome" to be achieved. Second, fee shifting statutes are to make claims viable for people by making it affordable to bring a case and by encouraging attorneys to take such cases by making them economically viable, not to deter bad conduct. Third, this case involves a car manufacturer not an automotive dealer. Fourth, the case involves one manufacturer, not multiple ones. The conclusion is based on facts not in the record, that Respondent is a car dealer, or an error of law by trying to punish a manufacturer for not settling. A correct analysis is based on concluding that a car manufacturer has the right to defend itself, but if it

F. Re Nissan's "I"

Nissan's Argument Section I is entitled, "The Trial Court's Appropriate Exercise of Discretion in Awarding Attorney's Fees Should Be Affirmed." But as noted above, the parties agree that the lower court's discretion is cabined by the Jackson factors. It should also be pointed out that the lower court here was not a "trial court." There was no trial. Judge Young's involvement with the case was limited to the hearing and filings re the fees issue after the case settled. He was not involved in the discovery disputes or anything else.

Nissan's "A" Is Tangential at Best.

Nissan's Section I.A, which is entitled, "The Fee Shifting Statutes Expressly Give the Trial Court Discretion to Award Reasonable Attorney's Fees," and its subheading 1, entitled, "The Fee Shifting Statutes Require Only That an Award of Attorney's Fees Be Reasonable" argue a tangential point of little relevance.[14] Regardless of what the statutes do or not state beyond a requirement to "be reasonable," our Supreme Court has directed trial courts to determine the amount of the award via findings on the six factors.[15] It is plainly not reasonable to cut an award by more than 50% with no explanation other than "this is reasonable."

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does, it runs the risk of having to pay the consumer's legal fees because it caused the consumer's lawyer to spend extra time proving the consumer's case.

[14] Respondent's I.A.2 argues the standard of review, which is addressed on page 1 of this Reply.

[15] It is also not entirely true that the statutes require "only" that an award be reasonable. Two of the statues specify that awards be based on based on actual time expended. Nissan's argument is also misleading, as courts regularly interpret similar language in fee-shifting statues to mandate fees except in "special circumstances" that are "very narrowly limited." Hueble v. S.C. Dep't of Nat. Res., 416 S.C. 220, 232, 785 S.E.2d 461, 467 (2016) (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964 (1968) and Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933 (1983)); McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 541-43, 405 S.E.2d 830, 833 (1991).

Nissan's "B" Ties Itself in a Knot.

Nissan begins its Section "B" begins by repeating its argument from "A" that the statutes "delegate to trial courts the discretion to determine what amount of attorney's fees are reasonable. It presents case law holding that trial courts should follow the Jackson factors, "should make specific findings of fact on the record for each of these factors," and that trial court orders are entitled to deference [only] if they are "adequately explained with specific findings." It argues that the trial court "thoroughly discussed all six of the Jackson factors" and made "clear, well-supported findings." It repeatedly tries to pass off the lower court's conclusion that the reduced award is "reasonable" and "generous" as factual findings, directly opposite to the Supreme Court's explanation in Horton. But it makes only one, half-hearted, attempt to actually explain the discrepancy between that court's thorough discussion and specific findings and its conclusion that the award should be reduced by half. It argues on page 10 that the reduction "is consistent with factor (5) of the Jackson analysis, the 'beneficial results obtained.'" It adds that "the trial court conducted a thorough analysis of the beneficial results obtained by Appellants." This makes no sense, because that "thorough analysis" produced a finding that the results were "very beneficial." "Mr. and Ms. Greenawalt have received very beneficial results caused by employing Mr. Moskos." (Order p. 11) (emphasis added)). Thus, "This factor weighs in favor of Plaintiffs." (Id. p. 11) (Fifth factor).

The little explanation Nissan offers as to why the reduction is consistent with the fifth factor only digs its hole deeper. Nissan writes, also on page 10,

> The trial court found that after nearly three years of litigation, "[w]ith counsel's help, Nissan has now agreed to repurchase the car . . . and to put the issue of attorney's fees before the court for resolution." (Id. p. 11; R. __.) The trial court determined this was a beneficial result[.]

Obtaining a beneficial result after nearly three years of litigation is not a valid justification for reducing the award by half.[16]

Nissan's "C" Exudes a Hostility to Court-Awarded Attorneys' Fees Directly Opposite to Supreme Court Precedent.

Nissan's "C" begins with a page and a half attempting to mischaracterize Appellants' position as to "require the trial court to award the full amount of fees sought in every case," but the thrust of Nissan's "C" appears to be an attempt to persuade the reader that there is something inherently suspect about making defendants pay statutory fees, perhaps especially when those fees concern not the underlying merits but rather litigation about fee awards. Its position is directly contrary to Supreme Court precedent, the circuit court's findings, and the fee statutes. It also necessarily relies on a factual misrepresentation.

Throughout, Nissan relies on assertions that the purchase price agreed to at settlement was the same price Nissan agreed to back at the BBB arbitration. Nissan's factual assertion is categorically incorrect, as detailed on pages _ to _ of this Reply.[17] Even if the purchase

[16] Nissan's "B" also resorts to Nissan's pattern of presenting misleading partial quotations. Nissan writes on page 11 that Appellants asked the lower court to view the case as a whole (emphasis is Respondent's) and claims that, "Now on appeal, Appellants clarify that what they actually sought was not a dispassionate, holistic assessment of the attorney's fee issue by a neutral jurist[.]" But, contrary to Respondent's assertion, Appellants never asked for a "holistic" assessment unattached to the Jackson factors. The sentence Nissan partially quotes actually states, "Furthermore, attorney's fees should not be restricted to the smallest amount possible. Instead, the Court should view the case as a whole and award fees commensurate with the service provided so that competent first class attorneys will be willing to handle these types of cases." (Mem. Supp. of Mot. for Att'y's Fees p. 5) (emphasis added).

[17] For some examples, Nissan writes (page 13), "Under the BBB arbitration process terms, if Appellants accepted the arbitration decision, Nissan was required to repurchase the vehicle for the actual amount Appellants paid for the vehicle"; pages 13-14,

> Appellants were willing to forego the certainty of a full value vehicle buy-back in November 2020 for the time and expense of two years in litigation to end up exactly where they were at the beginning of the case—with an offer from Nissan

$35,000 purchase price obtained through settlement had been the same as the $29,974.67 Nissan's BBB analysis would provide, Nissan's repeated statements that the Greenawalts received "the same" result from the BBB process overlooks that the BBB process did not allow for awards of attorneys' fees. [18] Nissan's claim that no substantive difference exists between the more than $100,00 the Greenawalts' attorney procured for them and the less than $30,000 stemming from the BBB process is wrong.

Nissan repeatedly refers to the "substantive relief," as if awards of attorneys' fees are mere procedural relief. Nissan hopes to convince the Court to exclude attorney fees from its evaluation of the relief obtained and to adopt Nissan's view that awards of attorneys' fees do not much benefit plaintiffs. (Nissan states its view more explicitly in the next section, where it states (Nissan Br. p. 20), "the actual benefit Appellants obtained through those fees—which was not much"). The Supreme Court takes the opposite view.

Nissan seems perhaps especially concerned with fees incurred in litigating about fees. But even on that sub-issue, the Supreme Court's view is entirely the opposite of Nissan's. Layman v. State, 376 S.C. 434, 463-64, 658 S.E.2d 320, 336 (2008). There, the Supreme Court first awarded $352,402.00 in fees for stages of the case that included work on fees. It then awarded more—$471,098.50—for additional attorney work solely about the size of the

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> to repurchase their vehicle two years later. The only thing to have changed meaningfully during that period was their attorney's legal fees.

and, "The settlement provided Appellants the same substantive relief ordered through the BBB arbitration process in November 2020—namely, that Nissan would repurchase the vehicle from the Greenawalts for their purchase price."

Those statements are false. Appellants received significantly more from the settlement, both in purchase price and in fees.

[18] Nissan also overlooks that there would have been no repurchase had the Greenawalts not engaged an attorney. "Mr. and Ms. Greenawalt tried unsuccessfully to get Nissan to repurchase their car pursuant to the Lemon Law. Nissan refused." (Order p. 11).

fee award.[19] Id. & n.3. It then increased these awards via a 1.25 multiplier. Id.[20]

The Supreme Court also held directly opposite to Nissan's view in McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991). There, the Supreme Court reversed a lower court for failure to award fees incurred in efforts to obtain fees. Nissan's argument that fees incurred in litigating about fees should not be awarded, or should be awarded at half the normal rate, or are somehow generally suspect, is at odds with the Supreme Court.

Nissan's position would hollow out the statutes. The statutes contain no exception for fees incurred in making defendants pay fees. Nor would it make any sense to design a statute to compensate plaintiffs for their attorneys' work, only to decline to compensate them for the work to obtain that compensation when defendants refuse to compensate consumers per a fee shifting statute. Fees about fees are essential if the statutes here are not to be undermined by judicial gloss. (App. Br. pp. 19-25).

Nissan seems to blame Appellants for not accepting its BBB offer, and its later offers, which it misrepresents, but its argument runs headlong into the lower court's factual findings, which properly blamed Nissan. (Order p. 9) ("Nissan has not provided any proof that it offered a full repurchase price along with fees and costs to the date of the offer that might

[19] Referring to the June 1, 2006 date of its first award, the Court wrote (emphasis added), "[T]he additional time expended by counsel after June 1, 2006 logically reflects only those hours spent on the litigation of attorneys' fees[.]" Id. n.3.

[20] The parties are unaware of any other case where the Supreme Court Itself awarded statutory fees, as distinct from adjusting a lower court award—and its holding is entirely opposite to Nissan's view.

warrant reducing a fee award.")[21] Moreover, it was entirely proper to blame Nissan.[22]

Nissan has two more contentions in "C" that should be addressed. On page 18 of its brief, Nissan mistakenly chides Appellants for supposedly failing to cite to the Record to support the point that the lower court found litigation misconduct on the part of Respondent. But Appellants did cite to the Record, twice. (App Br. p. 7 (quoting Ord. p. 14); App. Br. p. 2 (similar)).[23]

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[21] Had Nissan offered a reasonable purchase price for the vehicle and a reasonable amount for attorney fees at any time, the case would have been over and the fees would have stopped accruing. Instead, Nissan refused to repurchase the car until the Greenawalts engaged an attorney, and then repeatedly refused to pay their reasonable fees. (Order p. 11) "Defendant was playing whack-a-mole when it came to settling this case and its position on attorney's fees." (Id. p. 14). "Nissan's offer of $33,500 was to cover all claims including attorney's fees and costs. Since Nissan admits that the damages were at least $35,000, its $33,500 total offer was clearly insufficient as it contained insufficient amounts for damages and no amount for the statutorily-mandated fees and costs." (Id. p. 13). Nissan kept trying to limit fees to amounts so small they amount to no fees at all. "To say $4,000 would be reasonable would be tantamount to saying no attorney's fees were awarded." (Id. pp. 14-15). "Nissan then says since Plaintiffs did not accept those insufficient offers, Plaintiffs' counsel's fees should be limited to the time when those offers were made. These arguments put Plaintiffs in an unwinnable bind where they would lose no matter what they chose to do." (Id. p. 9).

[22] Nissan maintains it should not have to pay the consumers' attorney fees for the "994 days" (Nissan Br. p. _), "almost three years" (id. p. _) that Nissan play[ed] whack-a-mole" (Order p. _), contesting summary judgment (Pl's Mot. For Summ. J.,) refusing to cooperate in discovery, both before and after Judge McCoy ordered Nissan to do so (McCoy Order 2/28/2013; Letter from Moskos 3/6/2023); making insufficient settlement offers (Fees Order pp. 8-12, 14-15), and refusing to mediate the case (Mot. Compel Mediation and Exhibits), and, even after settlement was reached at mediation, refusing to put the agreement in writing (email thread asking Nissan to confirm) until the Greenawalts' counsel forced Nissan in front of Judge Young to agree that these were the terms. (Tr. Hr'g 04-04-2023, p. 2, line 9-p. 7, line 2). Nissan's repeated suggestion that the fees incurred in efforts to obtain fees were somehow Appellants' fault contradicts the circuit court's repeated findings to the contrary. Nissan simply ignores these findings. Nissan provides no explicit rebuttal, and its argument that fee awards do not benefit the awardee, if taken as an implicit challenge to these finding, is clearly erroneous.

[23] Appellants had not thought it necessary in their opening brief to detail Nissan's litigation misconduct. Their point was simply that the judge appears to have based his award on the amount needed to deter this misconduct (Order p. 15).

Respondent also contends that it is "galling" to make defendants pay for such fees incurred by plaintiffs.[24]

Given its title, "Appellants Offer No Credible Argument to Demonstrate that the Trial Court's Award Was an Abuse of Discretion" (emphasis added), one might have expected that Nissan's Section "C" would, at long last, grapple with Appellants' arguments. But nowhere in "C" nor in the rest of Respondent's brief is any mention of the strong presumption in favor of the lodestar, which Appellants' opening brief argues extensively. Nor does it mention the size of the reduction, which Appellants also argued extensively.

Appellants quoted the lower court stating, "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." (App Br. p. 7 (quoting Ord. p. 14); App. Br. p. 2 (similar)). Playing whack-a-mole is litigation misconduct and abuse.

The lower court also found, on page 5 of its Order (R. p. _) (emphasis added),

> During mediation, Nissan agreed to put the issue of attorney's fees before the Court for determination. It was not until the day of the hearing that Nissan informed Plaintiffs it would claim that, since there is no jury verdict, Plaintiffs were not entitled to fees. This is a classic "gotcha" moment that the Court will not suffer.

The circuit court also extensively took Nissan to task for its false claim that its BBB "arbitration" allowed for attorney fees, noting that its entire argument rested on omitting a crucial phrase from its own document. (Order pages 11-12). The Court added that "Nissan's argument is without merit" (id. p. 12) (citing another document); and that "it is clear" Nissan's position is wrong (id.). See also id. p. 9 ("find[ing]" another argument "without merit."). Findings that a party advanced a "clear[ly]" wrong argument "without merit," based on omitting clearly contrary language from the source it cites, "play[ed] whack-a-mole," while engaging in a "gotcha" scheme, establish litigation misconduct.

[24] "Even more gallingly," Nissan writes, Brooks R. Fudenberg appeared in the case "months after the merits of the case had been resolved." Thus Nissan admits—or boasts—that it finds paying such fees galling.

As to the "even more gallingly" aspect, Mr. Fudenberg had worked only three hours before July 12. Mr. Fudenberg keeps track of his hours, but does not bill unless they amount to more than that. That should not be even more galling. Additionally, if Respondent had not tried its "gotcha" move against Mr. Moskos (Order p. 14), there would have been no need for Mr. Fudenberg to appear.

Nissan's "D" Purports to Be about "Competent Evidence," but Presents None.

Given the title of Nissan's Section "D," "Other Competent Evidence in the Record Also Supports Affirmance of the Trial Court's Decision," one might expect it to present evidence not addressed in the order below. It does not do that. One might expect it to at least accurately present some evidence. It does not do that, either. Instead, it restates Nissan's view that awards of attorneys fees do not much benefit plaintiffs. It argues the reduction is proper "in light of the actual benefit Appellants obtained through those fees—which was not much" (Nissan Br. p. 20), thereby contradicting the Supreme Court and the specific factual findings on the beneficial results, as discussed above.

Nissan then proceeds by misrepresenting its own document, the BBB Auto Line Program Summary. Nissan claims that under the terms of that document, "Nissan would 'refund the actual amount paid for the vehicle.'" That is false, as explained on pages _ - - above. Nissan then argues that Appellants should have accepted that offer—which did not include a fair repurchase price nor any amount for fees incurred to that date. **Nowhere**—not in Section D, and not in the rest of the brief—**does Nissan provide one word of explanation for why it did not make a fair offer of fees**, after the BBB process, or ever.

Nissan again misstates the record and Appellants' position below when it writes on page 20, "Appellants rejected the BBB arbitration decision at the outset of the case because it did not include an award of attorney's fees." That is simply not true. There would have been nothing wrong had the Greenawalts rejected the offer solely because it did not compensate them for the attorney "they were forced to hire" (Order p. 10) to make Nissan comply with the law. Nor was Nissan's refusal to reimburse them for their attorney fees the only reason they rejected the offer: they also rejected it because Nissan refused to state how much it

would pay for the vehicle, and Nissan's implicit calculations would have left them insufficient payment for that, in addition to leaving them to pay their attorney fees out of their own pocket.

Nissan next complains that the Greenawalts' attorney's hours went up 15 times over the next "994 days."[25] (Nissan Br. p. 21). If only the Greenawalts had accepted their BBB offer, Nissan writes, all this could have been avoided. Their fees were only $10,710 back then, Nissan complains. But Nissan never explains why it refused to pay those reasonable fees back then. Nissan's argument in "D" is not about "other evidence" that did not make it into the lower court's order. It is about evidentiary claims Nissan made below that the circuit court investigated and properly found against Nissan. Nissan never "offered a full repurchase price along with fees and costs to the date of the offer that might warrant reducing a fee award." (Order p. 9). This is the sort of factual finding that should not be reversed if any evidence supports it, and very strong evidence supports this finding.

Nissan has not presented any "other competent evidence"—i.e., evidence other than evidence already ruled on by the lower court. Nor has it presented any "evidence," competent or not, ruled on by the lower court or ignored by it, that would justify any reduction. Nissan's

[25] Nissan's 994 days are through until March 10, 2023. But Nissan then extends the time frame it addresses through the July 19, 2023 date of Appellant's final substantive filing below, thus making a total of 1,125 days. During those 1,125 days, Nissan was playing whack-a-mole with its "offers," violating discovery rules, violating the order demanding it comply with the discovery rules, refusing to mediate until the Greenawalts' counsel filed a motion to compel mediation, refusing to confirm the settlement in writing, surprising the Greenawalts by stating the settlement did not entitle them to any fees at all, filing an extensive opposition to awarding fees, and fighting the Greenawalts' reasonable requests in their Rule 59 motion for the circuit court to consider the overlooked hours and explain, in ways that would enable appellate review, its reasons for reducing the award. Nissan complains that over those 1,125 days, the Greenawalts' counsel spent 15 times the hours Mr. Moskos had spent in obtaining the inadequate "BBB" offer. Nissan, however, never provides any "evidence" that its BBB offer was sufficient requiring acceptance or that any of its other offers made the Greenawalts whole requiring acceptance.

Section "D" opening sentence states it is going to show that the reduction "was reasonable." Its final sentence states it has shown it has shown the reduction "was plainly reasonable." But nowhere in Section "D" does it acknowledge the extent of the reduction it claims was reasonable. Nor does Nissan do so anywhere in its brief. That is because Nissan, too, realizes the extent of the reduction was too much.

Summation as to Errors in the June 12, 2023 Order

The lower court departed from the strongly-presumed-correct lodestar and its own findings by approximately 50%, with no explanation other than a conclusion that for unknown reasons it considered the reduced award "generous." This was error that should be reversed. Horton; Layman.

G. Nissan's "II" Does Not Dispute that It Was Reasonable for Appellants to File a Rule 59 Motion, Nor that Attorney Fees Should Be Awarded for Reasonable Work. Accordingly, Fees Should Be Awarded for Work on that Motion.

Appellants' opening brief argued that it was reasonable to seek reconsideration by the lower court, and that fees should be awarded for this reasonable work. (App. Br. 39, 41-42) Respondent does not deny that it was reasonable to file a Rule 59 motion nor that fees should be awarded under the fee-shifting statutes for reasonable work. Nor could it credibly do so. Accordingly, this Court should reverse the lower court's failure to award fees for that work.

And while it may not matter, in light of Respondent's decision not to challenge the assertions that it was reasonable to file the Rule 59 motion and that fees should be awarded for that work, Respondent's argument that the lower court cited one set of standards for Rule 59 motions and employed a conflicting set is specious. As detailed in Appellants' main brief, every claim made in Appellants' Rule 59 motion was held to be inappropriate by the lower court—although each was proper under the holdings of the South Carolina Supreme Court.

(App. Br. pp. 1, 14, 38-41). The lower court's conclusion, "After considering the issues raised in Plaintiffs' motion, this Court hereby DENIES Plaintiffs' Motion to Alter or Amend the Court's June 12, 2023 Order," can most plausibly be read as, "After considering the issues raised in Plaintiff's motion under the standards this Court has articulated above, this Court hereby DENIES Plaintiffs' Motion." Respondent's suggestion that it in effect be read as, "After ignoring all the standards the Court articulated above, and applying entirely different standards" is plainly implausible.

In fact, the Order on the Rule 59 Motion consists almost entirely of the "Standard of Review," i.e., its recitation of federal law stating that the requests in the motion were improper.

Additionally, Respondent appears to mischaracterize Appellants' argument about the Rule 59 order.[26]

In sum, Respondent has not rebutted Appellants' argument that it was reasonable for them to file a Rule 59 motion and therefore attorneys' fees should be awarded for that work,

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[26] Respondent writes, "Appellants contend the trial court took too narrow a view of the standard for a motion to alter or amend judgment under Rule 59(e), SCRCP, by **citing** to the [wrong] standard." (Resp. Br. p. 23) (emphasis added). Respondent adds, "**C**i**ting** the incorrect legal standard does not constitute reversible error under the circumstances." (Id.) (emphasis added). Its Part II.B is entitled, "The Trial Court Did Not Err in **C**i**ting** Federal Case Law in the Order Denying Appellants' Rule 59(e) Motion.") (emphasis added).

To state what may be obvious, Appellants' concern about the lower court's expansive recitation of the wrong standards regarding what may and what may not be considered in evaluating a Rule 59 motion is not so much about the lower court **citing** the wrong standards as much as it was about the lower court apparently **following** the wrong standards.

Additionally, while Respondent asserts that "Appellants significantly overstate the difference between the South Carolina standard and the federal standard for Rule 59(e) motions" because the **texts** of the two rules are similar, it is clear from Appellants' opening brief that Appellants were concerned with the differing **interpretations** of those rules by the South Carolina Supreme Court and the lower court, not with any supposed difference in the language of the two rules. Appellants repeatedly recognized the similarities in language. (E.g., App. Br. pp. 13, 40 n.25, 41 n.26).

under both Jackson's direction to consider the time expended and the Lemon Law's and MMWA's directive to base awards on the time reasonably expended on the case.

Conclusion

The parties agree that "there is no dispute that reasonable attorney's fees under the fee shifting statutes are determined pursuant to the six factors set specified by the Supreme Court." Yet the lower court reduced the fee award from the lodestar by 54.44 percent with no reasoning other than a conclusion that that was all that was needed deter Respondent from its irresponsible litigation conduct, like a sanction, or a gut feeling that half was the right amount. Normally, a remand might be the proper remedy. But here, Appellants have already asked the lower court to explain its reasoning and been denied; Respondent argues no remand is necessary; so the Court should simply undo the reduction in the award. All the factors were found against Respondent. Most, perhaps all, of the arguments Respondent makes here were already considered and rejected by the circuit court. The court should simply set the attorneys' fees based on the lodestar. Alternatively, the Court might remand with instructions to issue an award that corresponds to the lower court's factual findings on the six factors, consider the overlooked hours, and direct that attorney fees be awarded for the work undertaken on Appellants' behalf through the Rule 59 motion.

Respectfully submitted,	
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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,

Appellants,

v.

Nissan North America, Inc.,

Respondent.

Proof of Service

I certify that I served James and Rita Greenwalt's Initial Reply Brief on Nissan North America, Inc., the Respondent in this matter, via email to its counsel of record, Sarah Eibling, Esq. at sarah.eibling@nelsonmullins.com.

A copy of the email is attached.

April 22, 2024

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Attachments: Init. Reply Brief.pdf

Please find attached the Greenawalts' Initial Reply Brief.

Thank you.

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