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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Court Judge

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

Rita R. Greenawalt, and
James M. Greenawalt,

Appellants,

v.

Nissan North America, Inc.,

Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW 4

ARGUMENT 5

I. THE TRIAL COURT’S APPROPRIATE EXERCISE OF DISCRETION IN AWARDING ATTORNEY’S FEES SHOULD BE AFFIRMED..... 5

 A. The Fee Shifting Statutes Expressly Give the Trial Court Discretion to Award Reasonable Attorney’s Fees. 5

 B. The Trial Court’s Determination of Reasonable Attorney’s Fees Should Be Affirmed. 8

 C. Appellants Offer No Credible Argument to Demonstrate that the Trial Court’s Award Was an Abuse of Discretion. 11

 D. Other Competent Evidence in the Record Also Supports Affirmance of the Trial Court’s Decision. 19

II. THE TRIAL COURT PROPERLY DENIED APPELLANTS’ RULE 59(E) MOTION..... 22

 A. The Trial Court Did Not Err by Failing to Increase the Attorney’s Fee Award by the Amount Sought in Appellants’ Rule 59(e) Motion. 22

 B. The Trial Court Did Not Err in Citing Federal Case Law in the Order Denying Appellants’ Rule 59(e) Motion. 23

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’t Control</i> , 424 S.C. 80, 817 S.E.2d 633 (Ct. App. 2018)	23
<i>Austin v. Stokes-Craven Holding Corp.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010)	12
<i>Baron Data Sys., Inc. v. Loter</i> , 297 S.C. 382, 377 S.E.2d 296 (1989)	9, 19, 21
<i>Blumberg v. Nealco, Inc.</i> , 310 S.C. 492, 427 S.E.2d 659 (1993)	9
<i>Burton v. York Cty. Sheriff’s Dep’t</i> , 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004)	9
<i>Cosby v. S.C. Crim. Just. Acad.</i> , No. 2020-000849, 2022 WL 2452413 (S.C. Ct. App. July 6, 2022)	23
<i>Elam v. S.C. Dep’t of Transp.</i> , 361 S.C. 9, 602 S.E.2d 772 (2004)	24
<i>Farmers and Merchants Bank v. Fagnoli</i> , 274 S.C. 23, 260 S.E.2d 185 (1979)	21
<i>Fox v. Vice</i> , 563 U.S. 826, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011)	22
<i>Gimarc v. Neal</i> , 417 F. Supp. 129 (D.S.C. 1976)	11
<i>Glasscock v. Glasscock</i> , 304 S.C. 158, 403 S.E.2d 313 (1991)	10
<i>Hansel v. Nat’l States Ins. Co.</i> , 313 S.C. 266, 437 S.E.2d 159 (Ct. App. 1993)	24
<i>Hardaway Concrete Co. v. Hall Contracting Corp.</i> , 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007)	19
<i>Horton v. Jasper Cnty. Sch. Dist.</i> , 423 S.C. 325, 815 S.E.2d 442 (2018)	9, 12
<i>I’On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	20

<i>Jackson v. Speed</i> , 326 S.C. 289, 486 S.E.2d 750 (1997)	Passim
<i>Kiriakides v. Sch. Dist. of Greenville Cnty.</i> , 382 S.C. 8, 675 S.E.2d 439 (2009)	4, 13
<i>Laser Supply and Services, Inc. v. Orchard Park Associates</i> , 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009)	20
<i>Layman v. State</i> , 376 S.C. 434, 658 S.E.2d 320 (2008)	7, 8, 15
<i>Seabrook Island Prop. Owners' Ass'n v. Berger</i> , 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005)	20
<i>Sims v. Amisub of S.C., Inc.</i> , 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014)	20
<i>Smith v. Fedor</i> , 422 S.C. 118, 809 S.E.2d 612 (Ct. App. 2017)	4
<i>Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP</i> , 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007)	5
<i>Williamson v. Middleton</i> , 374 S.C. 419, 649 S.E.2d 57 (Ct. App. 2007)	19
<u>Statutes</u>	
15 U.S.C. § 2310(d)(2)	6
15 U.S.C.A. § 2301	2
S.C. Code Ann. § 39-5-10	2
S.C. Code Ann. § 39-5-140(a)	6
S.C. Code Ann. § 56-15-10	2
S.C. Code Ann. § 56-15-110(1)	7
S.C. Code Ann. § 56-28-10	2
S.C. Code Ann. § 56-28-20	13
S.C. Code Ann. § 56-28-50(D)	6

Rules

Fed. R. Civ. P. 59 23, 24

Rule 43(k), SCRCP 2, 14

Rule 52, SCRCP 4, 16

Rule 59(e), SCRCP 2, 4, 16, 22, 23

Rule 220(c), SCACR 20, 25

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court act within the scope of its discretionary authority in its order awarding Appellants reasonable attorney's fees pursuant to the applicable Fee-Shifting Statutes?
2. Did the trial court properly deny Appellants' Rule 52 and 59(e) motion seeking an increase of the attorney's fee award?

STATEMENT OF THE CASE

This is an appeal from two orders issued by the trial court. The first is the trial court's June 12, 2023, order awarding Appellants Rita R. Greenawalt and James M. Greenawalt ("Appellants" or the "Greenawalts") \$75,000 in attorney's fees pursuant to applicable fee-shifting statutes ("Order on Plaintiffs' Motion for Attorney's Fees"). (Order on Pls.' Mot. for Att'y's Fees p. 15; R. p. 20.) The second is the trial court's July 25, 2023, order denying Appellants' Rule 59(e), SCRCF, motion which argued for an increase in the attorney's fee award. (*See generally* Order Den. Rule 59(e) Mot.; R. pp. 22-23.)

Appellants were awarded attorney's fees pursuant to a settlement of four statutory claims raised in the complaint filed by Appellants November 13, 2020. (*See generally* Compl.; R. pp. 25-36.) The complaint alleged minor nonconformities with the navigation system in a 2019 Nissan Rogue owned by Appellants. (*Id.* ¶ 39; R. p. 30) The complaint alleged that Respondent Nissan North America, Inc. ("Nissan") failed to remedy these nonconformities in violation of four statutes: (1) the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C.A. § 2301 *et. seq.*; (2) the South Carolina Enforcement of Motor Vehicle Express Warranties Act (the "South Carolina Lemon Law"), S.C. Code Ann. § 56-28-10 *et. seq.*; (3) the South Carolina Unfair Trade Practices Act ("SCUTPA"), 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.* (*Id.* ¶¶ 51-79; R. pp. 31-35.)¹

The parties settled the case's merits at mediation on March 8, 2023. (Order on Pls.' Mot. for Att'y's Fees p. 1; R. p. 6.) Pursuant to Rule 43(k), SCRCF, the stipulated settlement terms were formally entered into the record in open court on April 5, 2023. (*Id.* pp. 1-2; R. pp. 6-7.) As part

¹ Nissan refers to these statutes collectively as the Fee Shifting Statutes in this brief.

of the settlement, the parties also stipulated that the Greenawalts were the prevailing parties in the litigation, entitling them to an award of attorney's fees pursuant to the Fee Shifting Statutes in an amount to be determined by the trial court. (*Id.* p. 2; R. p. 7.)

On March 10, 2023, Appellants filed their motion for attorney's fees ("Motion for Attorney Fees"). (*See generally* Pl. Mot. for Att'y Fees; R. p. 361.) On April 2, 2023, Appellants filed the affidavit of their attorney C. Steven Moskos, in support of their request for an award of attorney's fees ("Moskos Affidavit"), which asserted that Appellants had incurred \$101,821.73 in attorney's fees and costs through March 31, 2023. (Moskos Aff. ¶ 136; R. p. 385.) On April 4, 2023, Appellants filed a memorandum in support ("Memorandum in Support") of their Motion for Attorney's Fees. (*See generally* Memo in Supp. of Pls.' Mot. for Att'y Fees; R. pp. 609-632.) On April 5, 2023, Nissan filed a response in opposition to Appellants' motion contesting the reasonableness of Appellants' requested attorney's fee award in light 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. (Def. Resp. in Opp'n to Pls.' Mot. for Att'y Fees; R. pp. 659-667.) Circuit Court Judge Roger M. Young, Sr., heard the Motion for Attorney's Fees on April 5, 2023.

After the Motion for Attorney's Fees hearing, the trial court took the matter under advisement. (Pls' Mot. for Att'y Fee Hearing Tr. p. 45:1-9; R. p. 101 lines 1-10.) While the motion was under advisement, Appellants filed three supplemental affidavits from Mr. Moskos for additional attorney's fees incurred between April 1, 2023, and May 23, 2023, which almost doubled the amount of attorney's fees Appellants sought from \$101,821.73 to \$196,830.00. (*See* Moskos Affidavits; R. pp. 657-658, 722-724, 732-735.)

The trial court issued its Order on Plaintiffs' Motion for Attorney's Fees on June 12, 2023, awarding Appellants \$75,000.00 in attorney's fees. (Order on Pls.' Mot. for Att'y's Fees; R. pp. 6-20.)

Appellants filed a motion to alter or amend judgment ("Motion to Alter or Amend") pursuant to Rule 52 and 59(e), SCRCP, on June 22, 2023. (Pls' Mot. to Alter or Amend; R. pp. 743-750.) Nissan filed a response in opposition to this motion on July 11, 2023, (*see generally* Def. Opp'n to Pls' Mot. to Alter or Am.; R. pp. 756-764), and Appellants filed a reply in support of the motion on June 19, 2023, (Pls.' Reply in Supp. of its Mot. to Alter or Am.; R. pp. 767-783.). On July 25, 2023, the trial court issued an order denying Appellants' motion to alter or amend the judgment.

Both parties timely served and filed notices of appeal. Nissan withdrew its appeal on December 8, 2023.

STANDARD OF REVIEW

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "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." *Id.* (citation omitted). "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." *Id.*

A trial court's decision whether to grant relief from judgment pursuant to Rules 52(b) or 59(e), SCRCP, is also reviewed in an abuse of discretion standard. *See Smith v. Fedor*, 422 S.C. 118, 124, 809 S.E.2d 612, 615 (Ct. App. 2017) ("The decision to grant or deny a motion for relief

from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.”) (quoting *Stearns Bank Nat’l Ass’n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007)).

ARGUMENT

I. THE TRIAL COURT’S APPROPRIATE EXERCISE OF DISCRETION IN AWARDING ATTORNEY’S FEES SHOULD BE AFFIRMED.

Appellants argue the trial court erred by failing to award all of the attorney’s fees sought. However, they point to no law requiring the trial court to award every dollar of attorney’s fees sought, and the statutes at issue do not require the trial court to award the full amount of attorney’s fees requested. Rather, the trial court was required to award attorney’s fees “reasonably incurred” or “reasonable attorney’s fees.” The trial court did just that, explaining its rationale for the award in a written order, which included a thorough analysis of the factors endorsed by the South Carolina Supreme Court. Other than their general displeasure with the amount of the attorney’s fee award, Appellants offer no compelling arguments on appeal for why the trial court’s determination of a reasonable attorney’s fee award should be disturbed on appeal. Accordingly, Nissan respectfully urges this Court to affirm the trial court’s Attorney’s Fee Order.

A. The Fee Shifting Statutes Expressly Give the Trial Court Discretion to Award Reasonable Attorney’s Fees.

The Fee Shifting Statutes at issue in this appeal permit Appellants to recover attorney’s fees as the prevailing party in the case below. Contrary to Appellants’ characterizations of the Fee Shifting Statutes, however, none “mandate”² an amount of attorney’s fees which the trial court

² Appellants contend on appeal that the lower court erred because the award of attorney’s fees was less than these statutes “mandate.” [Appellants’ Br. p. 35 (“Nissan should not get to pay less than the remedial statutes mandate . . .”).]. However, as discussed, *infra*, neither the plain language of these statutes nor the cases interpreting them support an argument that the Fee Shifting Statutes mandate an amount of fees a prevailing party is entitled to.

was required to award or require the trial court to award all the attorney's fees sought. Further, the trial court's determination of reasonable attorney's fees under the Fee Shifting Statutes should be reviewed under an abuse of discretion, not *de novo* standard.

1. The Fee Shifting Statutes Require Only That an Award of Attorney's Fees Be Reasonable.

All four of the Fee Shifting Statutes instruct that an award of attorney's fees must be reasonable. The relevant provisions of the federal MMWA and the South Carolina Lemon Law include nearly identical language regarding the recoverability of attorney's fees. Under the MMWA:

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

15 U.S.C. §2310(d)(2) (emphasis added). Under the South Carolina Lemon Law:

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

S.C. Code Ann. § 56-28-50(D). By their plain language, both statutes provide a trial court with discretion to determine: 1) whether attorney's fees should be recovered at all; and 2) if attorney's fees are warranted, what amount of attorney's fees were reasonably incurred by the plaintiff.

The SCUTPA provides that, “[u]pon 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.**” S.C. Code Ann. § 39-5-140(a) (emphasis added).

Similarly, the Dealers Act provides in relevant part:

[A]ny 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**.

S.C. Code Ann. § 56-15-110(1) (emphasis added). As with the MMWA and the South Carolina Lemon Law, the plain language of the SCUTPA and the Dealers Act does not mandate the amount of attorney's fees which the court must award. Rather, they provide that a prevailing plaintiff is entitled to recover reasonable attorney's fees.

2. An Award of Attorney's Fees Under the Fee Shifting Statutes Is Reviewed for Abuse of Discretion.

The Fee Shifting Statutes in question permit an award of reasonable attorney's fees, which South Carolina law clearly holds is left to the trial court's determination and is not to be disturbed on appeal absent a clear abuse of discretion. "[T]he 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." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (citing *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997)). Appellants, arguing for *de novo* review, repeatedly suggest that the trial court failed to comply with the plain language of these statutes and binding precedent. These arguments misconstrue and overstate South Carolina law.

In support of their argument for *de novo* review, Appellants cite the South Carolina Supreme Court's decision in *Layman*, suggesting *Layman* requires this Court to apply a *de novo* standard of review under the circumstances. [Appellants' Br. p. 28]. This reliance is misplaced because the issue presented in *Layman* differs markedly from the instant case. *De novo* review was required in *Layman* because the trial court erred in not just the amount of the attorney's fee award (normally analyzed under an abuse of discretion standard), but in its interpretation of the state

action statute's requirements for the methodology used to calculate the award. *Layman*, 376 S.C. at 457, 658 S.E.2d at 332 (holding that a lodestar analysis, rather than a percentage-of-recovery calculation, was the appropriate method of assessing reasonable attorney's fees under the state action statute).

Unlike *Layman*, here 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. *See Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997) (setting forth the "six common law factors of reasonableness"). Nissan makes no contention on appeal that Appellants were not entitled to an award of attorney's fees under the Fee Shifting Statutes, and Nissan agrees with Appellants that the Fee Shifting Statutes are not ambiguous or in need of any statutory interpretation by the Court. [Appellants' Br. p. 31, n.17]. As such, the issues requiring *de novo* review in *Layman* are not present in this appeal, and this Court should therefore apply the abuse of discretion standard of review in considering the propriety of the trial court's attorney's fee award.

B. The Trial Court's Determination of Reasonable Attorney's Fees Should Be Affirmed.

The statutes at issue in this appeal delegate to trial courts the discretion to determine what amount of attorney's fees are reasonable. The trial court did just that in this case, in a detailed 15-page order. (Order on Pls.' Mot. for Att'y's Fees p. 15; R. p. 20.) Appellants have not produced evidence of an abuse of discretion by the trial court sufficient to overturn its award of attorney's fees. Moreover, there is ample evidence in the record to demonstrate that the attorney's fee award was reasonable. Accordingly, the Court should affirm the trial court's decision.

On June 12, 2023, the trial court entered its Order on Plaintiffs' Motion for Attorney's Fees. The order awarded Appellants \$75,000 in attorney's fees, which the court found was "reasonable and necessary to achieve the outcome" in the case. (*Id.*; R. p. 20.) The order included

a detailed explanation of the trial court’s analysis in determining the reasonableness of the award, and was consistent with the requirements of South Carolina law. As such, the trial court’s attorney’s fee award should be affirmed. “Decisions as to the amount of attorneys’ fees should ordinarily be made by trial courts. When a trial court’s decision is made on a sound evidentiary basis and is adequately explained with specific findings—as the law requires—we defer to the trial court’s discretion.” *Horton v. Jasper Cnty. Sch. Dist.*, 423 S.C. 325, 331, 815 S.E.2d 442, 445 (2018).

The South Carolina Supreme Court has endorsed the following six factors when determining a reasonable attorney’s fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson*, 326 S.C. at 308 (citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)). The Supreme Court has held “that a court should consider all six factors in making its decision, and [has] explained ‘none of these six factors is controlling.’” *Horton*, 423 S.C. at 330, 815 S.E.2d at 444–45 (2018) (quoting *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989)). 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)). The trial court’s order satisfied these requirements.

The trial court issued a thorough 15-page Order on Plaintiffs’ Motion for Attorney’s Fees which articulated the basis for its award of attorney’s fees. (*See generally* Order on Pls.’ Mot. for Att’y’s Fees; R. pp. 6-20.) The order first explained the trial court’s determination that Appellants were the prevailing party and were thus entitled to an award of attorney’s fees. (*Id.* p. 2; R. p. 7.)

The order next articulated the logic and purpose behind the award; outlining the purpose of the fee shifting statutes at issue and general guidelines set forth in case law for determining a reasonable attorney's fee award. (*Id.* p. 6; R. p. 11.) The order also thoroughly discussed all six of the *Jackson* factors. (*Id.* pp. 7-11; R. pp. 12-16.) After setting forth a detailed explanation of the considerations weighed by the trial court in arriving at the attorney's fee award, the order concluded by finding "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" and although "\$75,000 is a lot less than the amount Plaintiffs claim, . . . it is still reasonable and generous and should send a message to auto dealers to resolve these cases sooner rather than later." (*Id.* p. 15; R. p. 20.)

The trial court's determination that an award of \$75,000 is "reasonable and necessary to achieve the outcome" realized by Appellants in the case is consistent with factor (5) of the *Jackson* analysis, the "beneficial results obtained." The South Carolina Supreme Court has stated that this factor "aids in determining whether an award is appropriate when considering whether the services of a lawyer facilitated a favorable result." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). Here, the trial court conducted a thorough analysis of the beneficial results obtained by Appellants. The trial court acknowledged that prior to filing suit, Appellants participated in the BBB arbitration, and "the BBB arbitrator awarded a repurchase but did not award attorney's fees." (Order on Pls.' Mot. for Att'y's Fees p. 12; R. p. 17.) 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. 16.) The trial court determined this was a beneficial result, (*id.* p. 11; R. p. 16.), and determined that an award of \$75,000 in attorney's fees was "reasonable *and necessary to achieve the outcome*," (*id.* p. 15; R. p. 20.). There is no credible argument that the trial court's order fell

short of the Supreme Court's mandate for attorney's fee awards. Most of the law cited in the trial court's order to justify its findings was adopted directly from Appellants' Memorandum in Support of its Motion for Attorney Fees. Indeed, but for the Court's ultimate determination of the attorney's fee award, Appellants say the order is "rock solid." [Appellants' Br. p. 35].

In their Memorandum in Support of the Motion for Attorney Fees, Appellants urged the trial court to "view the case *as a whole* and award fees commensurate with the service provided . . ." (Mem. Supp. of Mot. for Att'y's Fees p. 5; R. p. 613) (emphasis added) (citing *Gimarc v. Neal*, 417 F. Supp. 129 (D.S.C. 1976)).³ The trial court did just 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 rather a mechanistic rubber stamp of whatever timesheets they submitted to the trial court. The record clearly demonstrates, however, that the trial court complied with the requirements of the Fee Shifting Statutes and the South Carolina Supreme Court's directives and issued a thorough order with clear, well-supported findings demonstrating the reasonableness of the attorney's fee award.

C. Appellants Offer No Credible Argument to Demonstrate that the Trial Court's Award Was an Abuse of Discretion.

In seeking to overturn the award, Appellants allege the Attorney's Fee Order was an abuse of the trial court's discretion for two primary reasons. First, Appellants appear to argue that the only permissible attorney's fee award is what Appellants consider "full" compensation. That is, anything less than an award for every 0.1 hours of billable time submitted by Appellants' attorney is an abuse of discretion. [Appellants' Br. p. 2-3 (arguing that because the *Jackson* factors favored

³ The *Gimarc* decision also acknowledges that while needlessly parsimonious fee awards "discourage good lawyers . . . overly generous attorneys' fees might be productive of otherwise unworthy litigation." *Gimarc*, 417 F. Supp. at 132.

Appellants, “a full award—not a reduced award—was proper”)]. This is an untenable position, as neither the case law nor the Fee Shifting Statutes endorse this rigid view of the requirements for an attorney’s fee award.

Appellants argue the South Carolina Supreme Court’s decision in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (“*Austin I*”) requires an award of fees and costs to “fully compensate” a prevailing plaintiff. [Appellants’ Br. p. 29]. Not so. In fact, the discussion in *Austin I* cited by Appellants says nothing about the *amount* of attorney’s fees that should be awarded. Instead, the Supreme Court held that a plaintiff should not be forced to elect one of several remedies and thereby forego a statutory right to attorney’s fees as the prevailing party in a lawsuit. *Id.*, 387 S.C. at 56–57, 691 S.E.2d at 153 (holding that plaintiff was not prohibited from recovering punitive damages under fraud claim and attorney’s fees under Dealers Act claim, even though election of remedies doctrine barred double recovery of actual damages under these claims).⁴

Likewise, all four Fee Shifting Statutes make it clear that in any award of attorney’s fees Appellants were entitled only to *reasonable* attorney’s fees as determined by the trial court in its discretion. And the South Carolina Supreme Court has repeatedly held that “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.” *Horton*, 423

⁴ Although the Supreme Court in *Austin I* found that the plaintiff was entitled to the full amount of attorney’s fees sought, it only did so “[u]nder the specific facts of this case.” *Austin I*, 387 S.C. at 57, 691 S.E.2d at 153. *Austin I* cannot reasonably be understood to require the trial court to award the full amount of fees sought in every case, particularly because 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).

S.C. at 330, 815 S.E.2d at 444 (quoting *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009)).

Prior to filing their complaint against Nissan, Appellants submitted a request for arbitration through the BBB on June 19, 2020, as required by the Magnuson-Moss Warranty Act and S.C. Code Ann. § 56-28-20. (BBB Auto Line Customer Claim Form, Ex. 2 to Apr. 2, 2023 Aff. of C. Steven Moskos; R. pp. 389-390.) The BBB arbitrator determined that the vehicle was eligible for repurchase in a decision dated November 12, 2020. (Arb. Decision, Ex. 6 to Apr. 2, 2023 Aff. of C. Steven Moskos; R. pp. 408-410.) 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. (*Id.*; R. pp. 408-410.) However, under the terms of the BBB arbitration process, any resolution providing for the repurchase of the vehicle would be exclusive of an award of Appellants' attorneys' fees. (Compl. ¶ 48; R. p. 31.)

Appellants apparently did not have to think very long or very hard about whether to accept the award.⁵ The day after the arbitration award was issued, Appellants sent a notice rejecting the arbitration decision. (Arb. Acceptance or Rejection of Decision Form, Ex. 7 to Apr. 2, 2023 Aff. of C. Steven Moskos; R. p. 411.) The same day, Appellants filed their complaint in the Berkeley County Court of Common Pleas. (*See generally* Compl.; R. pp. 25-36.) In doing so, Appellants triggered the potential for recovery of attorney's fees under the Fee Shifting Statutes. Here, however, Appellants believed they would not have to come out of pocket for their strategic decisions in this litigation or those of their counsel. Rather, armed with the attorney's fee

⁵ Indeed, Appellants' counsel's time sheets submitted in support of the attorney's fee award indicate that the complaint was prepared on November 8, 2020, before Appellants even received the AAA arbitration decision on November 12, 2020. (*See* Mar. 31, 2023 Time Records for C. Steven Moskos; R. p. 553.)

provisions of the Fee Shifting Statutes, 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 to repurchase their vehicle two years later. The only thing to have changed meaningfully during that period was their attorney’s legal fees.

Almost two and a half years later, the parties agreed to resolve the case’s merits. (Order on Pls’ Mot. for Att’y’s Fees pp. 1-2; R. pp. 6-7.) Pursuant to Rule 43(k), SCRCF, the stipulated settlement terms were formally entered into the record in open court on April 5, 2023. (*Id.*; R. pp. 6-7.) 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. As part of the settlement agreement, the parties also stipulated that the Greenawalts were the prevailing parties in the litigation, entitling them to an award of attorney’s fees pursuant to the Fee Shifting Statutes in an amount to be determined by the trial court. (*Id.*; R. pp. 6-7.)

As recounted in Nissan’s Statement of the Case, on April 2, 2023, Appellants filed the Moskos Affidavit in support of their request for an award of attorney’s fees, which asserted that Appellants had incurred \$101,821.73 in attorney’s fees and costs through March 31, 2023. (Moskos Aff. ¶ 136; R. p. 385.) Appellants’ requested attorney’s fees rose dramatically from there.

On April 5, 2023, Appellants filed their first supplemental affidavit from Mr. Moskos (“First Supplemental Moskos Affidavit”), asserting an additional 30.4 hours of attorney’s fees incurred between March 30 and April 4, bringing the requested attorney’s fee award to \$110,610.00. (First Suppl. Moskos Aff. pp. 1-2; R. pp. 657-658.) These fees represent time billed

by Mr. Moskos for preparing the Motion for Attorney fees, the Moskos Affidavit, and the Memorandum in Support. (*Id.*; R. pp. 657-658.)

While the motion for attorney’s fees was under advisement, Appellants filed their second supplemental affidavit from Mr. Moskos (“Second Supplemental Moskos Affidavit”) on May 1, 2023, which asserted an additional 35.9 hours of attorney’s fees incurred between April 5 and April 30, bringing the requested attorney’s fee award to \$126,765.00. (Second Suppl. Moskos Aff. p. 3; R. p. 724.)

On May 23, 2023, with the Motion for Attorney Fees still under advisement with the trial court, Appellants filed their third supplemental affidavit from Mr. Moskos (“Third Supplemental Moskos Affidavit”) which asserted an additional 9.9 hours of attorney’s fees incurred between April 30 and May 23, bringing the requested attorney’s fee award to \$131,220.00 based on Mr. Moskos’ hourly rate of \$450 per hour. (Third Suppl. Moskos Aff. p. 3; R. p. 734.) In his affidavit, Mr. Moskos also argued that the trial court should award additional fees due to alleged dilatory conduct by Nissan in the settlement process. (*Id.* pp. 1-2; R. p. 732-733.) With this request, Mr. Moskos also asked the trial court for the first time to apply a 1.5x multiplier to the award for a total of \$196,830.00 “based on the complexity and difficulty of this case and upon any factors the Court deems proper”⁶ (*Id.* p. 3; R. p. 734.)

The trial court issued its Order on Plaintiffs’ Motion for Attorney’s Fees on June 12, 2023, awarding Appellants’ attorney’s fees concerning the underlying litigations. (Order on Pls.’ Mot. for Att’y’s Fees p.15; R. p. 20.) The order set forth the trial court's reasoning supporting the award

⁶ Although South Carolina courts have endorsed the application of a “multiplier” for attorney’s fee awards in cases involving exceptional circumstances, there was no finding to support such an enhanced award in this case. *See Layman*, 376 S.C. at 460, 658 S.E.2d at 334 (finding “exceptional circumstances” in the case justified application of multiplier to attorney’s fee award).

of attorney's fees, including an analysis of the six factors outlined in *Jackson v. Speed*. (*Id.* p.5; R. p. 20.) In its review of the evidence provided by both parties in their briefs and at the hearing, the trial court acknowledged that Appellants were entitled to attorney fees under the applicable statutes. (*Id.*; R. p. 20.) The trial court found “the Plaintiff’s total attorney’s fee requests comes in at around \$195,000. (\$126,000 multiplied by a 1.5 multiplier). This seems ‘too much,’ all things considered.” (*Id.* p. 15; R. p. 20.) The trial court awarded the Greenawalts \$75,000 in attorney’s fees, concluding 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 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 is still reasonable and generous and should send a message to auto dealers to resolve these cases sooner rather than later.

(*Id.*; R. p. 20.)

Unsatisfied with the amount of attorney’s fees awarded by the trial court, Appellants filed their Motion to Alter or Amend pursuant to Rule 52 and 59(e), SCRCP, on June 22, 2023. (Pl. Mot. to Alter or Am.; R. p. 743.) Undeterred by trial court’s ruling, Appellants filed their fourth supplemental affidavit from Mr. Moskos (“Fourth Supplemental Moskos Affidavit”), which asserted an additional 9.5 hours of attorney’s fees incurred between May 24 and July 5, 2023, bringing the requested attorney’s fee award to \$135,495.00 based on Mr. Moskos’ hourly rate of \$450 per hour, or \$203,242.50 with the 50 percent premium requested by Mr. Moskos. (Fourth Suppl. Moskos Aff. p. 3; R. p. 753.) In this fourth affidavit, Mr. Moskos’ efforts shifted. Based on his affidavit, at most 0.2 hours of the 9.5 hours incurred pertained to the underlying litigation. In other words, 9.3 of the 9.5 hours, 98 percent of the attorney’s fees, pertained to time spent to increase Appellants’ attorneys fee award. (*Id.*; R. p. 753.).

In the exact same pattern, on July 19, 2023, Appellants filed their fifth supplemental affidavit from Mr. Moskos (“Fifth Supplemental Moskos Affidavit”) which asserted an additional 51.6 hours of attorney’s fees incurred between July 5 and July 18, 2023, bringing the requested attorney’s fee award to \$158,715.00 based on Mr. Moskos’ hourly rate of \$450 per hour, or \$238,072.50 with the 50 percent premium requested by Mr. Moskos. (Fifth Suppl. Moskos Aff. p. 4; R. p. 824.) As with the fourth affidavit, Mr. Moskos’ time records indicate that at most 1.1 hours (2.1 percent) of the 51.6 hours incurred over the 13 days between July 5 and July 18, 2023, pertained to the underlying litigation. (*Id.*; R. p. 824.) The rest of the time was again incurred in support of Appellants’ efforts to increase their attorney’s fees award.

Even more gallingly, on July 19, 2023, attorney Brooks R. Fudenberg, who has his own firm and does not work in Mr. Moskos’ practice, submitted an affidavit for an additional \$5,895.00 in attorney’s fees apparently incurred between April 25, 2023, and July 19, 2023 despite the fact that Mr. Fudenberg did not appear in the case until *July 19, 2023*—months after the merits of the case had been resolved. (Fudenberg Aff.; R. p. 810.)

As with Mr. Moskos’ Fourth and Fifth Supplemental Affidavits, Mr. Fudenberg’s fees appear to have been incurred purely in pursuit of Appellants’ attorney’s fee award and their subsequent efforts to have the court increase the \$75,000 in attorney’s fees awarded. Unsurprisingly, these affidavits show that Appellants’ counsel’s efforts to increase the attorney’s fee award result in more fees, which require the submission of additional affidavits, which beget more fees and require the submission of even more affidavits. This has resulted in a legal billing ouroboros, a seemingly never-ending cycle of ever-increasing legal fees, all built on the assumption that Nissan should be made to pay all of it.

Appellants secured all the substantive relief to which they were entitled—repurchase of their vehicle—as of March 5, 2023, when the parties reached settlement terms at mediation.⁷ In the settlement agreed to between the parties on March 5, 2023, Nissan agreed to repurchase the vehicle—just as it would have been obligated to do if Appellants accepted the arbitration award in November 2020. Nissan also agreed to submit the attorney’s fee issue to the lower court for determination and agreed that Appellants were the “prevailing party”—notwithstanding the fact that their case did not materially improve through this litigation, apart from the substantial growth of their attorney’s fees.

Appellants also argue the Order on Plaintiffs’ Motion for Attorney’s Fees should be overturned because it was improperly intended to punish Nissan for “litigation misconduct” and “litigation abuse,” claims which are repeated, without basis, throughout the brief. [Appellants’ Br. pp. 2, 13, 30, 31, 34-35, 38, 44]. This is, at best, a mischaracterization of the trial court’s reasoning and, at worst, a deliberate tactic to undermine Nissan’s credibility with the Court.

Appellants offer no citation to the record supporting their contention that the trial court found Nissan engaged in litigation misconduct or abuse and awarded attorney’s fees as punishment for such misconduct. That is because the trial court made no such finding. Rather, this unbecoming argument appears to be based on the lower court’s determination “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” and although “\$75,000 is a lot less than the amount Plaintiffs claim, . . . it is still reasonable and generous and should send a message to auto dealers to resolve these cases sooner rather than later.” (Order on Pls.’ Mot. for Att’y’s Fees p. 15; R. p. 20.) Appellants claim

⁷ Earlier in the litigation, on September 3, 2021, Nissan also served Appellants with an offer of judgment of \$39,000—more than the amount agreed to in the settlement. (R. p. 695.)

this language reflects the trial court's desire to punish Nissan for misconduct while ignoring the trial court's findings *in the same sentence* that the award is "reasonable and necessary to achieve the outcome" realized by Appellants.⁸ Appellants also fail to explain how awarding them *less* in attorney's fees than they sought, and claim they are entitled to, serves to "punish" Nissan or deter its future conduct.

Appellants have failed to demonstrate that anything beyond the \$75,000 awarded by the trial court constitutes "reasonable" attorney's fees in this case. Accordingly, the trial court's Order on Plaintiffs' Motion for Attorney's Fees should be affirmed.

D. Other Competent Evidence in the Record Also Supports Affirmance of the Trial Court's Decision.

Not only have Appellants failed to produce sufficient evidence to demonstrate the trial court abused its discretion in the Order on Plaintiffs' Motion for Attorney's Fees, but other competent evidence in the record demonstrates that the trial court's award was reasonable, if not generous.

"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." *Williamson v. Middleton*, 374 S.C. 419, 431, 649 S.E.2d 57, 64 (Ct. App. 2007) (quoting *Baron Data Sys., Inc.*, 297 S.C. at 384, 377 S.E.2d at 296), *aff'd in part, rev'd in part*, 383 S.C. 490, 681 S.E.2d 867 (2009); *see also Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 232, 647 S.E.2d

⁸ It also should be noted that Appellants, through the affidavit of Mr. Moskos, introduced the idea that there was a basis to make the attorney's fee award punitive. In Mr. Moskos' Third, Fourth, and Fifth attorney's fee affidavits, he includes the same boilerplate statements that Nissan and its counsel were not communicating with him, that this was consistent with Nissan's conduct during the litigation, and that the court should deter this behavior by awarding the attorney's fees with the 1.5x multiplier he requested. (Third Supp. Moskos Aff. p. 2; Fourth Supp. Moskos Aff. p. 2; Fifth Supp. Moskos Aff. p. 2; R. p. 773, 752, 822.)

488, 496 (Ct. App. 2007) (“[W]e can glean evidence from the record on these two factors that would support the master’s award.”); *Laser Supply and Services, Inc. v. Orchard Park Associates*, 382 S.C. 326, 340-41, 676 S.E.2d 139, 147 (Ct. App. 2009); *Seabrook Island Prop. Owners’ Ass’n v. Berger*, 365 S.C. 234, 240, 616 S.E.2d 431, 435 (Ct. App. 2005) (“On appeal an award of attorney’s fees will be affirmed so long as sufficient evidence in the record supports each factor.”). “A respondent ‘may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.’” *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 214–15, 758 S.E.2d 187, 194 (Ct. App. 2014), *aff’d*, 414 S.C. 109, 777 S.E.2d 379 (2015) (quoting *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 4189, 526 S.E.2d 716, 723 (2000)); *see also* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record.”).

Appellants seek either an award of “all fees requested” or a remand with direction to the trial court to do the same. [Appellants’ Br. p. 44]. There is ample evidence in the record demonstrating that the attorney’s fee award was reasonable, particularly in light of the actual benefit Appellants obtained through those fees—which was not much.

On June 19, 2020, before filing suit, Appellants initiated the BBB Auto Line arbitration process. (BBB Auto Line Customer Claim Form, Ex. 2 to Apr. 2, 2023 Aff. of C. Steven Moskos; R. pp. 389-390.) On November 12, 2020, the arbitrator issued his decision, finding that Nissan must repurchase the vehicle. Under the arbitration terms, repurchase of the vehicle meant that Nissan would “refund the actual amount paid for the vehicle.” (BBB Auto Line Program Summary p. 4, Ex. 2 to Apr. 2, 2023 Aff. of C. Steven Moskos; R. pp. 391-400.) Importantly, the arbitration award was binding on Nissan—only Appellants could choose to reject it. Appellants rejected the BBB arbitration decision at the outset of the case because it did not include an award of attorney’s

fees. (Order on Pls.’ Mot. for Att’y’s Fees p. 12; R. p. 12.) When the BBB arbitration decision was issued, Appellants had incurred 23.8 hours of attorney’s fees according to the time records submitted to the trial court by Appellants’ counsel. (Mar. 31, 2023 Time Records for C. Steven Moskos pp. 1-4; R. pp. 550-553.) At counsel’s stated hourly rate of \$450/hour, those fees totaled \$10,710. Some 994 days later, on March 10, 2023, Appellants filed their Motion for Attorney Fees with the trial court. (Pls.’ Mot. for Att’y Fees; R. p. 361.) In support of the motion, Appellants’ counsel provided the trial court with time records through March 2023 totaling 215.4 hours, for which Appellants’ counsel sought a fee award of \$101,821.73. (Moskos Aff. ¶ 136; Mar. 31, 2023 Time Records for C. Steven Moskos; R. p. 385, pp. 550-567.) Subsequent to that submission, Appellants’ counsel filed six additional fee requests for work performed following settlement of the case between April 2023 and July 2023. In total, these requests sought more than \$240,000 in attorney’s fees for more than 365 hours of work by Appellants’ counsel—more than 15 times the hours and 22 times the fees Appellants purportedly had incurred on November 20, 2020.

An award of attorney’s fees, under the Fee Shifting Statutes and under the common law, is driven by reasonableness. The South Carolina Supreme Court has recognized that “[t]he amount of attorney’s fees to be awarded in a particular case is within the discretion of the trial judge provided the award is reasonable.” *Baron Data Sys., Inc.*, 297 S.C. at 385–86, 377 S.E.2d at 298 (citing *Farmers and Merchants Bank v. Fagnoli*, 274 S.C. 23, 260 S.E.2d 185 (1979)). Similarly, the United States Supreme Court has stated,

[T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney’s time. And appellate courts must give substantial deference to these determinations, in light of the district court’s superior understanding of the litigation. We can hardly think of a sphere of judicial decision making in which appellate micromanagement has less to recommend it.

Fox v. Vice, 563 U.S. 826, 838, 131 S. Ct. 2205, 2216, 180 L. Ed. 2d 45 (2011) (internal citations and quotations omitted). Here, the trial court's award was plainly reasonable and should be affirmed on appeal.

II. THE TRIAL COURT PROPERLY DENIED APPELLANTS' RULE 59(E) MOTION.

In the main, Appellants argue that the trial court abused its discretion in denying the Motion to Alter or Amend because the Order on Plaintiffs' Motion for Attorney's Fees failed to consider all facts presented by Appellants in their Motion for Attorney's Fees and cited the wrong legal standard. However, neither of these arguments are availing, and the trial court's denial of Appellants' Motion to Alter or Amend should be affirmed.

A. The Trial Court Did Not Err by Failing to Increase the Attorney's Fee Award by the Amount Sought in Appellants' Rule 59(e) Motion.

The trial court did not abuse its discretion when it chose not to increase the attorney's fee award in response to Appellants' Rule 59(e) Motion to Alter or Amend. In Appellants' motion, they contend 9.9 hours were not accurately accounted for by the trial court in its attorney's fee award. (Pls.' Mot. to Alter or Am. p. 4; R. p. 746.) This represents the time incurred and submitted in Mr. Moskos's Third Supplemental Affidavit. (Third Suppl. Moskos Aff. p. 3; R. p. 734.) However, a careful review of the trial court's Order on Plaintiffs' Motion for Attorney's Fees demonstrates that the trial court a) was aware of this affidavit and fees requested in it; and b) the trial court's decision not to increase the attorney's fee award by this amount was consistent with its decision finding that less than the full fee award was reasonable in this case.

In the Order on Plaintiffs' Motion for Attorney's Fees, the trial court stated that, in total, Appellants sought an award of approximately \$195,000, representing approximately \$126,000 in fees with a 1.5 times multiplier—the amount stated in Mr. Moskos' Third Supplemental Affidavit.

(Order on Pls.’ Mot. for Att’y’s Fees p. 15; R. p. 20.) Plainly, the trial court was aware of the full amount of Appellants’ fee request but determined that amount was not reasonable. As stated above, the trial court determined that an attorney’s fee award of \$75,000 was reasonable under the circumstances of the case. In doing so, it implicitly rejected Appellants’ request for a higher amount of attorney’s fees, which the trial court calculated as \$126,765.

More broadly, Appellants’ argument that the trial court erred in denying the Motion to Alter or Amend is based on the erroneous premise that the trial court was required to award every dollar of attorney’s fees sought. As discussed above, however, that simply is not the law. The trial court found an award of \$75,000 for attorney’s fees was reasonable under the circumstances of the case. Its denial of the Motion to Alter or Amend was entirely consistent with that finding and should be affirmed on appeal.

B. The Trial Court Did Not Err in Citing Federal Case Law in the Order Denying Appellants’ Rule 59(e) Motion.

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), SCRCF, by citing to the standard endorsed by the federal Fourth Circuit Court of Appeals for Rule 59, FRCP. Citing the incorrect legal standard does not constitute reversible error under the circumstances. *See Cosby v. S.C. Crim. Just. Acad.*, No. 2020-000849, 2022 WL 2452413, at *1 (S.C. Ct. App. July 6, 2022)⁹ (“As to whether the Academy applied the wrong legal standard for willfulness when it found that Cosby engaged in misconduct, we find no reversible error.”); *Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’t Control*, 424 S.C. 80, 104, 817 S.E.2d 633, 646 (Ct. App. 2018) (“Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.”). Moreover, Appellants

⁹ Nissan acknowledges that this opinion is not precedent. It is cited solely as an example of persuasive reasoning.

significantly overstate the difference between the South Carolina standard and the federal standard for Rule 59(e) motions. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (“Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.”).

Although the trial court’s Order Denying Plaintiff’s Rule 59 Motion to Alter or Amend cited federal law, there is no indication that it applied an improper legal standard in denying Appellants’ motion. Moreover, the Appellants made three requests in their motion under Rule 59.

First, they asked the court to consider the time submitted in Mr. Moskos’ Third Supplemental Affidavit. Nissan has demonstrated the trial court did consider this time, as evidenced by the fact that the Order on Plaintiffs’ Motion for Attorney’s Fees referenced the full amount sought by Appellants as calculated in Mr. Moskos’ Third Supplemental Affidavit.

Second, the Appellants made several arguments as to why the court should award the full amount of fees requested. However, in the Order on Plaintiffs’ Motion for Attorney’s Fees the trial court clearly articulated why it determined the full amount requested by Appellants was not reasonable. As such, there was nothing to reconsider that had not already been presented to the trial court and ruled upon in Appellants’ Motion for Attorney Fees.

Finally, Appellants asked the court to expand on its reasoning for why it awarded \$75,000 in attorney’s fees. However, there is no requirement for the court to do so under South Carolina law, and the trial court’s order clearly stating that it was denying the Motion to Alter or Amend after having considered the issues raised in the motion is not reversible error. *Hansel v. Nat’l States Ins. Co.*, 313 S.C. 266, 272, 437 S.E.2d 159, 162 (Ct. App. 1993) (“The trial judge’s brevity in stating his findings does not invalidate his review or his conclusion” and is not grounds for reversal). Moreover, even if the trial court’s order did not adequately articulate a basis to deny the

Motion to Alter or Amend, Nissan has demonstrated that there is ample evidence in the record supporting the trial court's decision. Accordingly, the Court should affirm the lower court's ruling pursuant to Rule 220(c), SCACR which states that "[t]he appellate court may affirm any ruling, order, decision[,] or judgment upon any ground(s) appearing in the Record on Appeal." Accordingly, this Court should affirm the lower court's denial of Appellants' Motion to Alter or Amend.

CONCLUSION

For the reasons stated herein, the trial court acted within its authority in issuing the attorney's fee award in the Order on Plaintiffs' Motion for Attorney's Fees and did not err in denying Appellants' Motion to Alter or Amend. This Court should affirm the trial court's orders.

Respectfully submitted,

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June 12, 2024

RECEIVED

Jun 12 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Court Judge

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

Rita R. Greenawalt, and
James M. Greenawalt,

Appellants,

v.

Nissan North America, Inc.,

Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Nissan North America, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04.

Pleading(s): Final Brief of Respondent

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Eileen Hindman

Eileen Hindman
Administrative Assistant

June 12, 2024

Eileen Hindman

From: Eileen Hindman
Sent: Wednesday, June 12, 2024 10:45 AM
To: steve@moskoslawfirm.com; brooks.r.fudenberg@fudenberglaw.com; Blake Williams; Chris Genovese; Patrick Quinn; Sarah Eibling; Meredith Keane
Subject: Rita R. Greenawalt v. Nissan North America, Inc. - Appellate Case No. 2023-001124
Attachments: 2024.06.12 Greenawalt - Respondent Nissan's Final Brief.pdf; 2024.06.12 Greenawalt - Proof of Service.pdf

Good morning.

Attached for service upon you in the above matter is the Final Brief of Respondent with Proof of Service.

Thank you,



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