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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Judge

Case No. 2022-000162

Tammy Batten West,

Appellant,

v.

American Honda Motor Company, Inc.,

Respondent.

Appellant's Petition for Rehearing

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Petition for Rehearing

Question Presented

Did the Court Err in Affirming the Lower Court's Order on Fees, which Awarded Only 29.9% of the Requested Amount and Did Not Explain How the *Baron* Factors Result in Such A Dramatic Cut?

Appellant, Tammy West, petitions for rehearing, and will show how the panel's opinion overlooks or misapprehends her arguments.

I. The Analysis Must Be Explained.

The lower court reduced the requested award by 70.1%. (Order Granting in Part and Denying in Part Pl.'s Mot. for Atty's' Fees). The panel rejects Appellant's assertions that the lower court did so based on either its erroneous *Nix* analysis or its unstated reliance on a clearly erroneous factual representation by Respondent's counsel, but does not attempt to explain the basis on which the lower court made such a dramatic reduction, other than to say it was "animated by the circuit court's exercise of its discretion." But that it was animated by discretion is not enough. "[T]he 'discretion' standard . . . requires the analysis be explained." *Morris v. BB&T Corp.*, 438 S.C. 582, 588, 885 S.E.2d 394, 398 (2023).

To explain in more depth, the opinion does not mention Respondent's erroneous representation, and while it recognizes the *Nix* issue, it then immediately downplays the issue.

Appellant argues the circuit court inappropriately tasked her with the burden of establishing the number of hours devoted to her Lemon Law claim. We [instead] read the order, which issued an award between the amounts advocated by both sides, as being animated by the circuit court's exercise of its discretion in determining what would be a reasonable award in this case.

(Op. 2).

If, as the panel's Opinion seems to hold, the reduction was not based substantially or entirely on the erroneous grounds Appellant suggests, then what is it based on?

The lower court found Appellant entitled to fees, analyzed the *Baron* factors (*see Baron Data Systems v. Loter*, 297 S.C 382, 377 S.E.2d 296 (1989)),¹ and then came up with a number seemingly out of thin air.

The order states, “IT IS THEREFORE ORDERED, that [b]ased on this Court’s analysis of applicable law and the evidentiary record, Plaintiff’s counsel is entitled to an award of \$27,585 for attorney’s fees reasonably incurred in this matter.” (R. p. 39). But the “therefore” does not follow.

It is as if one wrote, “Premise: _____. Conclusion: _____,” or left the A out of IRAC and wrote “Issue: _____. Rule: _____. Conclusion _____.” It is not enough to state that “based on this Court’s

¹ That discussion of the *Baron* factors was (excluding “The Court finds” and the like),

i. Nature of the Case The case was “not . . . extremely complex” but did “involve[] numerous legal issues requiring Plaintiff’s counsel’s extensive preparation for litigation.” (R. p. 36) (emphasis added).

ii. Time Necessarily Devoted to the Case “Plaintiff’s counsel has the burden of providing an itemized affidavit of fees that shows the work related to the claims where statutory recovery of fees is allowed.” (R. p. 36-37).

First, there are no specific references in the timesheets to the Warranty Act cause of action, versus the other causes of action initially identified and then dismissed by counsel. It is difficult for the Court to determine the amount of time reasonably incurred in the prosecution of the Warranty Act cause of action. (R. p. 37).

Second, Plaintiff’s time sheets indicate that counsel spent approximately 37 to 42.4 hours in preparing the fee motion, affidavit, and supporting materials. This amount of time appears to be substantial considering the circumstances of this case.

(*Id.*) “[T]he Court is concerned by counsel’s initial line in his affidavit, which states ‘Include I was not churning the file’” which “does suggest a more detailed look at every entry submitted by counsel.” (*Id.*) “Counsel has submitted an affidavit where he asserts spending 182.8 hours on this case[.]” (*Id.*) (This was error, as it overlooks 22.5 hours). “The affidavit and time sheets do support a finding that counsel spent 20.9 hours prior to the commencement of this lawsuit.” (*Id.*)

iii. Standing of Counsel “Plaintiff’s counsel is an experienced practitioner in consumer protection actions, including Warranty Act cases . . . [who] has received several favorable appellate rulings.” (R. p. 38).

iv. Contingency of Compensation “It appears that counsel has taken this matter upon [a contingency basis].” (*Id.*)

v. Beneficial Results Obtained “[C]ounsel provided a beneficial result in Plaintiff receiving offers for a repurchase of the vehicle prior to suit.” (R. p. 39).

vi. Customary Legal Fees for Similar Services “Plaintiff has provided two affidavits from attorneys in Horry County who state that, in this locale, \$450 is a reasonable hourly rate for this case.” (*Id.*)

The Order then goes straight to “Conclusion and Order--IT IS THEREFORE ORDERED” as stated in text above, with no attempt to connect the findings to the amount of the award. (*Id.*)

analysis, a result is reached.” Rather, “the analysis must be explained.” *Morris*. It must be explained sufficiently for the appellate court to review the reasoning. *Porter v. Lab. Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007). Gut feelings are not enough. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1116 (9th Cir. 2008). Reviewable reasoning is different from unexplained lopping off chunks of fees. *Id.* Because the order below fails to meet these standards, it should be reversed.

The panel erroneously finds it acceptable that the lower court examined the *Baron* factors and reached a conclusion, with no apparent connection between the factors and the conclusion. That is not enough.

II. The Magnitude of the Reduction Here Makes The Problem Worse.

Including the hours that the lower court overlooked, the award was reduced 70.1% from the request. In other words, the court awarded 29.9% of the request.²

One should not have to speculate about the reasons for the lower court’s ruling. But if one were to do so, the only thing the order mentions that could possibly bear the weight of the 70.1% reduction here is the erroneous argument about *Nix*. The other items the order mentions cannot do that.

Omitting the entire “37 to 42.4 hours” spent on the fee petition (R. p. 37), which is 23.19% of the request, would leave \$70,960.92, more than double what the lower court granted.³

Appellant’s counsel’s affidavit explained that he was not churning the file. (R. 780 ¶ 21).

² “Denying fees is permissible only where an attorney ‘fail[ed] to maintain reliable contemporaneous time records,’ ‘made an untimely application,’ or the like. *Id.* at 232 n.7, 785 S.E.2d at 467 n.7 (citation omitted). None of these special circumstances apply here.” (Br. of Appellant 36) (quoting *Hueble v. S.C. Dep’t of Nat. Res.*, 416 S.C. 220, 785 S.E.2d 461 (2016)). Yet we are 70% of the way there, and none of these occurred.

³ The order states the hours requested were 182.8, and that “counsel spent approximately 37 to 42.4 hours in preparing the fee motion, affidavit, and supporting materials.” (R. p. 37). 182.8 divided by 42.4 is 0.2319. The fee request was \$92,385. (Op. 2). \$92,385 times 23.19% is \$70,960.92.

He anticipated Respondent would argue that counsel was not settling the case to run up his fees to charge to Respondent. This is the exact argument Respondent made. (R. pp. 971, 980, 982, 986). His memorandum in support argued he was not churning the file. (R. 707). He repeated in his affidavit, “Include I was not churning the file.” (R. p. 754). This was obviously a directive to himself to do what he then did. A stray directive to himself to do what he did cannot justify anything like the reduction here.⁴

The beneficial results obtained cannot account for such a large reduction, as Counsel obtained for Tammy all the results the Lemon Law allows.

That leaves the *Nix* issue. Perhaps the lower court reasoned, “There were four causes of action, so I will give Tammy 25% of her fees, and even throw in another five percent or so for work that may have been common to all causes of action.” We don’t know. He does not tell us. Of course it would be erroneous to determine fees this way. But cutting fees for being unrelated is the only thing the Order mentions that could result in a reduction of even a quarter of the request.

The Order states,

To recover attorney’s fees when a statute authorizes the permissive or mandatory recovery of fees, Plaintiff’s counsel has the burden of providing an itemized affidavit of fees that shows the work related to the claims where statutory recovery of fees is allowed. *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 623 (1992).

(R. pp. 36-37). It then states,

First, there are no specific references in the timesheets to the Warranty Act cause of action, versus the other causes of action initially identified and then dismissed by counsel. It is difficult for the Court to determine the amount of time reasonably incurred in the prosecution of the Warranty Act cause of action.²

⁴ And the only import the order suggests the stray comment might have—that it “suggest[s] a more detailed look at every entry” (R. p. 37)—is nowhere apparent. The order does not provide a look, detailed or not, at any entry.

(Order 7) (R. p. 37) (emphasis in original).

As Appellant has maintained throughout this litigation, *Nix* does not allow lower courts to freely jettison time entries because the entry might relate to some other claim, and not to the statutory claim. (See Reply Br. 6-7 & n.2 (gathering places where Appellants raised the point to the lower court), Br. of Appellant 1, 5, 7-10, 26, 31-34, 43; Reply Br. 1-2, 6-11, 21-23). Rather, as argued in the pages just cited, once plaintiffs present an affidavit of time they believe relate to the statutory claim, *Nix* requires defendants to show which of the fees are clearly unrelated, and Respondent made no effort to show any entry was unrelated.

As Appellant has also maintained, the lower court's complaint about the "difficulty" of "determin[ing] the amount of time" going to the Lemon Law ("Warranty Act") claim rather than to other claims misses the point entirely. (Br. of Appellant 32-33). The difficulty is because "The conduct [underlying the other claim] was the same conduct which was deemed to be a violation of the statute," *Nix*, 307 S.C. at 557, 416 S.E.2d at 622 (1992); "it would be difficult to dissect Austin's counsel's fee affidavit to ascertain how much time was spent on this particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud," *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010). *Of course* it is difficult, if not impossible, to separate claims that all arose out of the same transaction and occurrence. That may be why *Nix* and *Austin* require defendants to show what is "clearly unrelated" if they think separating the fees is worthwhile.

III. The Unstated Reason

The Opinion does not mention what appears to be the actual, unstated, reasoning of the lower court, that no fees were allowed for work after August 25, 2020, on the erroneous ground that Appellant's counsel supposedly "acknowledged in August 2020 that Honda made settlement offers which would fully repurchase the Subject Vehicle, but that he was continuing this litigation

solely in the attempt to obtain more attorney’s fees.” (Br. of Respondent 3). As detailed in Appellant’s briefs, this was erroneous; Appellant’s counsel did not so acknowledge, the supposed source of the allegation directly contradicts the supposed acknowledgment, and would be erroneous even if factually accurate, because it was not stated in the order as the rationale, and if it had been, it would still err, as fees are properly awarded for time necessary to seek fees (as well as for getting Defendant to put a price on its offer and to withdraw a demand for a confidentiality agreement). (Br. of Appellant 25, 39-4; Reply Br. 1-3, 5-6, 15-17).

IV. Additional Errors in the Panel’s Analysis

The panel writes (Op. 1-2), “Respondent offered a full repurchase of the nonconforming vehicle as early as October 2018,” overlooking the fact that Respondent did not state the “full repurchase price.” It’s like a defendant saying, “We’ll settle the case for full value, but we won’t tell you what we will pay until you settle.”

“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,” the panel writes (Op. 2), but it overlooks that the order here was based either on an error of law—the inaccurate *Nix* analysis—or an unsupported factual conclusion, i.e., Respondent’s attorney’s statement, which is not evidence, that Appellant’s attorney’s letter of August 2020 says something it clearly does not say, and the reduction is otherwise unexplained, which is also error.

The opinion quotes *Hensley v. Eckerhart*, 461 U.S. 424, 436–37 (1983) (first alteration in original), as stating, “There is no precise rule or formula for making [fee] determinations. The [trial] court may [1] attempt to identify specific hours that should be eliminated, or [2] it may simply reduce the award to account for the limited success,” but here the lower court did neither [1] nor [2].

To the extent, if any, that the panel affirms Respondent’s contention that attorney fees are second-class or unimportant, it errs, *see, e.g., Layman*; *see also* discussion on pages 18-19 of the Reply Brief. Respondent’s position is akin to a defendant saying, “ignore the car wreck victim’s pain and suffering damages because we offered to pay all his medical bills”.

While the panel recognizes that Appellant requested \$92,385 (Op. 2), it overlooks that this works out to 205.3 attorney hours at the rate the Order mentions (R. p. 39), while the Order recognizes only 182.8 hours (R. p. 37). Because the lower court overlooked 22.5 hours of attorney time, the award cannot be “based on actual time expended,” as the Lemon Law requires (R. p. 35) (fees order) (quoting S.C. Code Ann. § 56-28- 50(D)).

The panel overlooks that as soon as Respondent finally stated an amount it would pay, and dropped its insistence on a confidentiality clause, the parties agreed on the sales price, effectively resolving the case, except for the issue of attorney fees that they agreed would be presented to the lower court. (Br. of Appellant 26).

Finally, the panel overlooks or fails to fully appreciate the history of this case and the way its holding eviscerates the Lemon Law. It holds that manufacturers may attempt to trick a consumer into thinking she has no right to compel repurchase; when the manufacturer finds out there is a lawyer involved, it says, “Oh, ok, we’ll do what we should have done before a lawyer got involved,” that is, repurchase the vehicle—but it still will not tell the consumer what price it will pay, nor will it offer any fees for the attorney who had to be hired only because of the manufacturer’s intransigence. And when the consumer, who has had the aggravation of repeatedly bringing her car in for unsuccessful “repairs,” dealing with the manufacturer and being turned away, and is to be charged for mileage she put on when the car was not performing right, does not want to be paid less than she is entitled to, or be out-of-pocket for her attorney fees, the

manufacturer offers a little more towards those fees, and then a little more, never offering a fair amount, while requiring the consumer and the Attorney to sign confidentiality agreements (with content that violates the Rules of Professional Conduct) (Br. of Appellant 21-22), and then says since plaintiff 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.

To then affirm an award amounting to less than thirty percent of the fees incurred, with no explanation other than that 22% of the time was spent on the issue of fees, and that the attorney included "Include I was not churning" in a document which stated "I have not 'churned the file'" (R. p. 780, ¶ 121), will cause consumers to hesitate to enforce their rights under the lemon law. Those who do not retain attorneys will be ill-treated—and so will those who retain attorneys. Certainly something more than what the order here offers is required.

Conclusion

The panel erroneously finds it acceptable that the lower court examined the *Baron* factors and reached a conclusion, with no apparent connection between the factors and the conclusion. That is not enough. "[T]he 'discretion' standard . . . requires the analysis be explained." *Morris*. The Court should rehear, reverse, and either direct that the amount cut be stored or that the lower court connect his reduction of the award to the *Baron* factors in a way that will enable this court to properly review his explanation.

Respectfully submitted,

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Proof of Service

I certify that Appellant's Petition for Rehearing was served today on Respondent by serving Respondent's Counsel of Record, Patrick J. Cleary, via email addressed to:

patrick.cleary@bowmanandbrooke.com.

A copy of the email serving Respondent is attached.

June 12, 2025

s/ Brooks R. Fudenberg

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Attachments: [Petition for Rehearing.pdf](#)

Please find attached Appellant's Petition for Rehearing, which I hereby serve upon your client.

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