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.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals Err in Affirming the Lower Court's Order on Attorney's Fees, which Awarded Only 29.9% of the Requested Amount and Did Not Explain How It Arrived at Such A Dramatic Cut?

OVERVIEW

The Court of Appeals' opinion conflicts with the Court's decisions in *Morris v. BB&T Corporation* and *Horton v. Jasper County School District*. *Morris* held that "the 'discretion' standard . . . requires the analysis be explained." *Horton* applied similar reasoning to reverse a large reduction from the requested amount of a fee award.

Here, after analyzing the *Baron* factors, the lower court picked a figure seemingly out of thin air. The Court of Appeals found explanation largely in that the order is "animated by the circuit court's exercise of its discretion" and the award is "between the amounts advocated by both sides." That is not what the Court directed in *Morris* and *Horton*. The Court should grant certiorari, reverse the Court of Appeals, and send the matter back to the trial court for an order that complies with *Morris* and *Horton*.

BACKGROUND SUBSTANTIVE LAW

This is a case under the South Carolina "Lemon Law," Sections 56-28-10–110 of the South Carolina Code. The Lemon Law is a remedial statute and is to be broadly construed to achieve its goals. *S.C. Dep't of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) ("A statute remedial in nature should be liberally construed in order to accomplish the object sought."); *Inabinet v. Royal Exch. Assur. of London*, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932) (similar); *Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 577, 38 S.E. 274, 276 (1901) (similar); *Ducworth v. Neely,* 319 S.C. 158, 163 & n.3, 459 S.E.2d 896, 899 & n.3 (Ct. App. 1995) ("Because the provision affords the innocent owner a remedy not recognized previously, it

should be classified as remedial.")

The Lemon Law safeguards consumers who buy automobiles that turn out to be "lemons." It enables a consumer to demand the manufacturer buy back or replace a vehicle the manufacturer has been unable to repair. It provides for an award of reasonable attorneys' fees for a consumer who successfully sues under the act. § 56-28-50(D).[1] Any fees awarded are to be based on "actual time expended." *Id*. As a statutory fee-shifting provision, it includes fees incurred in seeking fees. *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991) (reversible error to refuse to award fees incurred in seeking an award of fees); *Layman v. State*, 376 S.C. 434, 463 & n.3, 658 S.E.2d 320, 334 & n.3 (2008) (Supreme Court directly awarding fees-about- fees).

This was also a case involving four other claims.[2] Those other claims were dismissed as part of an agreement to establish the repurchase price Respondent Honda would pay Tammy, the Petitioner. (R. p. 101:22-103:9). The law governing situations where "several causes of action

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[1] S.C. Code Ann. § 56-28-50(D) provides (emphasis added),

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

In statutes like this, where the awarding of fees against a defendant is discretionary with the court, it is only in "rare occasions" or "special circumstances" that fees may be entirely denied. *Hueble v. S.C. Dep't of Nat. Res.*, 416 S.C. 220, 232, 785 S.E.2d 461, 467 (2016) (collecting federal cases). *McDowell* (similarly interpreting S.C. Code Ann. § 15–77–300 (Supp. 1990)).

[2] These were for common law breach of warranties. and claims under South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code. Ann. §39-5-10–730; the South Carolina Regulation of Manufacturers, Distributors and Dealers Act ("Dealers Act"), S.C. Code. Ann. §§ 56-15-10–600) and the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312. (R. 46-56).

are joined" but only one is eligible for fee-shifting is set forth in *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992). To "merely estimate[]" the amount that pertains to the eligible claim "is not adequate." *Id*. at 557, 416 S.E.2d at 622.

> Th[e proper] approach requires the party asserting the right to attorney fees to produce an itemized affidavit of their fees that they believe are related to the statutory claim. *The opposing party then has the burden of showing which of the fees are clearly unrelated.*

Id. (emphasis added).

Facts

When Tammy West, the Petitioner, learned she had bought a lemon from Honda, she expected Honda to make her whole. She did everything the law required of her.

Tammy purchased a new 2017 Honda CR-V with a 3 year/36,000 mile bumper to bumper warranty (R. p. 392) on March 2, 2017. Problems with the Collision Mitigation warning, the Road Departure warning, and the Adaptive Cruise Control indicator began on April 4, 2017. The Honda was in and out of the shop for the same problem *ten times, 73 days*—by September of the next year. She had been asking Honda verbally since June 2018 to repair or replace the vehicle, as is her right under the Lemon Law. § 56-28-40; § 56-28-50(A). She sent a certified letter. Honda closed the case. Her attempts to reopen the case resulted in nothing more than an "advise[ment]" on August 23, 2018, that "she will be called with a decision." (Br. of Appellant pp. 10-17).

On September 9, she engaged an attorney. Between September 9 and October 18, the attorney discussed the case in depth with Tammy, reviewed her extensive videos and photos documenting the problems, and Honda's statements showing her what had been done, filed for the non-binding "arbitration" Honda requires Lemon Law consumers go through, dealt with the changing dates Honda provided for that arbitration, prepared the case and the client for the arbitration, telephoned Honda to see if a settlement could be reached, and engaged in settlement

discussions. But this resulted in nothing more than an offer to buy the vehicle back, with only $1,750 for attorney's fees, whereas the attorney already had 11.1 billable hours in the case, and more to come, if the usual wrangling over the terms of the release ensued, and the time necessary to effect the handover of the vehicle. Counsel cannot make a living at that rate. (Br. of Appellant pp. 12-20).

Tammy filed suit on November 9, 2018. On December 5, *2018*, Tammy offered to settle the case on terms virtually identical to those agreed to two-and-a-half years later. (R. pp. 819). She offered on that date to accept a repurchase price of $33,910.76, with the amount of attorney's fees and costs to be determined separately, and included a release that contained no confidentiality provision. (*Id*.) Honda refused. After Tammy prevailed on liability via her motion for summary judgment (R. p. 19), and with the damages issue and the non-Lemon-Law claims on the jury roster for trial, the parties agreed in open court on May 17, *2021*, that the repurchase price would be $34,776.51 and that attorney's fees would be decided by the court. (R. pp. 99-103).

In the interim, Respondent had sent a series of releases, each requiring confidentiality, each requiring that both Tammy and her Counsel sign. Each required Tammy's attorney to violate the counsel of S.C. Bar Ethics Advisory Opinion 10-04. Each required Tammy to incur a taxable event. *See Amos v. Commissioner*, 86 T.C.M. (CCH) 663 (T.C. 2003) (agreeing to a confidentiality provision creates a tax liability). And each offer required a fixed amount of attorney's fees be set before the terms of the release were finalized, which made little sense because the fees incurred would depend in part on how hard it would be to persuade Honda not to require confidentiality. (Br. of Appellant pp. 19-24).

Summary Judgment on liability for the lemon law claim had been attained only after a motion, memorandum, response, and reply, followed by an adverse decision. (R. pp. 12-14, 227-28, 293-520). The motion for rehearing, however, resulted in Judge Seals, on March 15, 2021, "grant[ing] summary judgment as to the issue of liability only" (R. p. 18) and denying "Summary Judgment as to the issue of damages, which this Court has determined is a disputed fact among the parties." (R. pp. 19-20).

As noted on the record, the court had in chambers directed Tammy to file a fees motion and supporting affidavit. (R. p. 102, lines 9-11). Petitioner sought compensation for 205.3 hours or $92,385. (R. pp. 783, 1142-43, 1152). This included extensive communication with Tammy throughout the litigation, preparing for the mandatory nonbinding pre-suit arbitration, preparing Tammy's summary judgment motion, with its 148 pages of exhibits, in which her counsel basically set out her entire case, preparing for the hearings on that motion and on other motions, preparing for trial, extensive communications with opposing counsel over three years, and, as directed by the circuit court (R. p. 102, lines 9-11), litigating the amount of the fee award.

The Lower Court Filings re Fees

(a) Regarding *Nix*

Tammy's memorandum in support of her fees claim anticipated that Respondent would argue that fees should be reduced due to work on claims other than the Lemon Law violation. She noted that *Nix* requires parties in her position to provide an affidavit by her counsel of fees related to the statutory claim, noted she had done so, and called on Honda to identify the fees, if any, that Honda believed were unrelated to the Lemon Law claim. (R. p. 700) (quoting *Nix*) ("The opposing party then has the burden of showing which of the fees are clearly unrelated."); (R. p. 714-15) ("It is now up to Honda to show 'which of the fees are clearly unrelated.' ").

Honda responded (R. p. 981) (emphasis added),

> 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). This is particularly important when there is no actual feepaying client who will provide a check and balance to the claimed amount. Counsel filed an affidavit and time sheets with his Motion for Fees, but this affidavit presents several deficiencies in identifying what work if any, was actually related to the Warranty Act cause of action. The affidavit fails to provide the number of hours reasonably incurred on the Warranty Act cause of action, which presents significant challenges in determining any amount of reasonable attorney's fees.
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> First, the affidavit makes no reference to whether the incurred time was spent on the Warranty Act cause of action or the other causes of action that Plaintiff voluntarily dismissed prior to trial. *If Plaintiff cannot identify the portion of time directly attributable to the Warranty Act cause of action, the Court should and must proportionally decrease the amount of allowed time.*

Honda did not mention its burden under *Nix* nor did Honda point out any specific hours that it believed were clearly unrelated to the Lemon Law claim.

Tammy's Reply pointed out that "Honda has not objected to any specific fees being 'clearly unrelated' to Tammy's Lemon Law claim," as required by *Nix*. (R. p. 1135, Mem. Rep. 8).

(b) Regarding Other Matters

Honda's Opposition suggested three dates the circuit court might hold to be a cutoff date for fees: October 18, 2018 (R. p. 982); November 11, 2018 (R. p. 985-86)[3]; and August 2, 2020 (R. pp. 971, 986). Its rationale for all those dates was the same: that Tammy was not entitled to fees for the time devoted to the fees issue. For example, Honda writes (R. 982) that "Plaintiff provides no argument under South Carolina law that justifies him being awarded additional fees in preparing the papers where he claims a need for additional fees."

[3] Honda writes of "November 11, 2018, when Plaintiff filed suit." Suit was actually filed November 9, 2018.

Honda had an additional rationale for terminating fees on the last date above, that an August 2020 letter from Tammy's counsel had supposedly conceded that Tammy was "continuing this litigation solely in the attempt to obtain more attorney's fees." (R. p. 971).

Tammy pointed out that Honda had been requiring confidentiality agreements (R. pp. 708, 714, 725, 1132, 1134, 1137, 1139, 1142-31); Honda did not mention it had been demanding a confidentiality agreement.

The Circuit Court Order[4]

The Circuit Court's order, filed June 28, 2021 (R. pp. 31-40), purports to be based on the factors for determining the amount of attorney's fees awards set forth in *Baron Data Systems v. Lote*r, 297 S.C 382, 377 S.E.2d 296 (1989). It discusses each of those factors. Yet it then picks a number, $27,585, seemingly out of thin air. It makes no attempt to explain how it reasoned from its *Baron* discussion to the result. It reduced the amount requested by 70.1%.[5] It misstates the number of hours expended.[6] It does not state how many hours it compensates, or how many were cut. At the $450 rate the order mentions, it denies compensation for 144 hours of 205.3 requested, $64,800 of $92,385. Further, as discussed on pages 17-18 below, nothing it discusses would properly lead to such a large reduction.

It does not mention a cut-off date for fees. It does not mention August 25, 2020. But the amount exactly matches a cut-off on that date. As Honda had argued, Tammy's counsel had 61.3 hours of work by that date. (R. p. 986). Sixty-one-point-three hours at the $450 hourly rate equals

[4] Respondent, and the Order, refer to the Lemon Law as the "Warranty Act." The term "Warranty Act" is more frequently used for the Magnuson-Moss Warranty Act, to distinguish it from the Lemon Law. Petitioner and the Court of Appeals employ the traditional terminology.

[5] The full request was for 205.3 hours or $92,385. (R. pp. 1142-43, 1152). The award was for $27,585. $27,585 divided by $92,385 is 29.86%. The amount cut is 70.14%.

[6] The order states Petitioner requested 182.8 hours. (R. p. 37). It overlooks the 22.5 hours requested in a second fee affidavit (R. pp. 1142-43).

$27,585, the amount awarded. Unfortunately, if this is what the court was doing, it did not say so.

The order mentions the November 2018 cutoff date Honda suggested—"The affidavit and time sheets do support a finding that counsel spent 20.9 hours prior to the commencement of this lawsuit" in November 2018 (R. p. 37)—but it does not award the resulting amount. (At the $450 an hour rate the order mentions, the award would be $9,360.00 if the lower court had accepted that cutoff date.) It "finds that Honda first offered a repurchase consistent with the statute to the Plaintiff in October 2018" (R. p. 34-35), but again does not award the resulting amount ($5,265.00 at the 11.7 hours incurred by then (R. p. 982)). It repeats Honda's erroneous *Nix* analysis, but does not appear to act on that, either. It states (R. pp. 36-37),

> 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).
>
> . . .
>
> 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]

It simply ignored the burden on Respondent.[7]

The Order also found that the "approximately 37 to 42.4 hours" in litigating the fee award "appears to be substantial," all things considered.

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[7] Its footnote 2 erroneously added,

> The South Carolina Supreme Court has affirmed decisions by the trial court reducing claims for attorney's fees under similar circumstances. *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016) (affirming a reduction of attorneys' fees asserted to claims where statutory recovery of fees was not permitted).

(*Id.*) After Tammy's opening brief explained that *Maybank* did no such thing (Br. of Appellant p. 33), Respondent's brief made no attempt to support the order's employment of *Maybank*.

Tammy's Appeal

In her briefs to the Court of Appeals, Tammy argued the seventy-point-one (70.1%) percent reduction from the fees requested was based on one of the above two erroneous bases: the mistaken approach to *Nix*, or the misrepresentation about the August 25, 2020 letter. Given there were five causes of action, and Honda's call for fees to be reduced "proportionally" (R. p. 981) (without meeting its *Nix* burden), the lower court might erroneously have reduced the award by up to 80%. As Tammy's counsel had provided an affidavit of fees he believed were related to the statutory Lemon Law claim, and Respondent had not challenged any entry as unrelated to that claim, Tammy argued it would be improper to have denied substantial time as unrelated to the statutory claim—or indeed, to have denied any time under *Nix*. Additionally, such a division would be unreasonable, because the claims all stemmed from a single transaction, with most of the work going simultaneously to all the causes of action. It would also be unreasonable because the other claims were dropped in order to get the Lemon Law claim resolved. (R. p. 101:25-102:9). Tammy also pointed out it would be error to hold that fees-about-fees are not compensable, and that the August 2020 cutoff rested on an unsupported factual conclusion.

Further, holding that fees-about-fees are uncompensable, if that is what the order meant, errs as a matter of law, *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991) (reversible error to refuse to award fees incurred in seeking an award of fees); *Layman v. State*, 376 S.C. 434, 463 & n.3, 658 S.E.2d 320, 334 & n.3 (2008), and the specific date chosen rested on an unsupported factual conclusion, specifically, a misrepresentation by Respondent. (Br. of Appellant pp. 38-40; Reply Br. pp. 1-3, 5-6, 15, 17). Respondent had represented to the lower court that in an August 25, 2020, letter to Respondent's counsel, Petitioner's counsel had conceded Respondent had made fair settlement offers, and "he

[Plaintiff's counsel] was continuing this litigation solely in the attempt to obtain more attorney's fees." (Mem. Opp. 2, 17) (R. pp. 971, 986).

But the representation by defense counsel was wrong. The August 2020 letter said no such thing. Rather, it stated (R. p. 1101) (emphasis added),

> First, while American Honda *may* have offered a full repurchase amount to Ms. West for the repurchase of her car, it has not agreed to compensate her fully for her attorney's fees as required under the Lemon Law statute. Furthermore, *American Honda has continually demanded that confidentiality be a part of any settlement.* It is not entitled to this under any law of which I am aware. As I have explained, *such a provision is not fair to my client who has a right to express herself if she so chooses.* Additionally, American Honda is trying to foist *a taxable event* on Ms. West. Ms. West chooses not to have to pay taxes on her silence.[8]

This letter simply does not say that the only matter remaining is fees.

The Court of Appeals' Opinion

The Court of Appeals affirmed in an unpublished per curiam opinion filed May 28, 2025, without oral argument. Op. No. 2022-000162, 2025 WL 1514479. The opinion implicitly rejects Petitioner's contentions that the lower court erroneously rested its fees decision on *Nix* or the misrepresentation by Respondent. Instead, it emphasizes the lower court's discretion. It states, "We 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. Accordingly, we affirm . . . ." It cites two cases, *Brawley v. Richland County*, 445 S.C. 80, 94, 911 S.E.2d 156, 163 (Ct. App. 2025); and *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008), for the proposition that the amount of a fee award is usually a matter of the lower court's discretion,[9] and cites *Layman* and section 56-28-

[8] As noted above, *Amos v. Commissioner*, 86 T.C.M. (CCH) 663 (T.C. 2003) holds that agreeing to a confidentiality provision creates a tax liability.

[9] It states,

50(D) for the similar proposition that fee awards must be "reasonable."

However, the only explanation it explicitly provides for how that discretion led to the 70% reduction here is, or why that reduction is reasonable, are quotations from *Hensley v. Eckerhart*, 461 U.S. 424, 434, 436–37 (1983). It first quotes *Hensley* as holding that "excessive, redundant, or otherwise unnecessary" hours should not be included, and then quotes *Hensley* as stating, "There is no precise rule or formula for making [fee] determinations. The [trial] court may attempt to identify *specific hours* that should be eliminated, or it may simply reduce the award to account for the *limited success,"* but the opinion neither points to "specific hours" nor explains how obtaining a full repurchase might be "the limited success."

The opinion did require an award of costs.

Tammy's petition for rehearing, filed June 12, 2025, was denied on July 11, 2025.

ARGUMENT

"[The] 'discretion' standard . . . requires the analysis be explained."

—*Morris v. BB&T Corp.*, 438 S.C. 582, 588, 885 S.E.2d 394, 398 (2023)

I. STANDARD OF REVIEW

The standard of review is abuse of discretion. But that begins, and does not end, the analysis.

The opinion, quoting *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), states that abuses of discretion occur "when the conclusions of the trial court are either controlled by an error

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The determination of a reasonable fee award "generally rests within the circuit court's discretion, and we will not disturb an award absent an abuse of discretion." *Brawley v. Richland County*, 445 S.C. 80, 94, 911 S.E.2d 156, 163 (Ct. App. 2025); *see also Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) ("[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.").

of law or are based on unsupported factual conclusions." Petitioner agrees. However, there is more to it than that.[10] Discretion is not boundless. *See Rish v. Rish*, 296 S.C. 14; 370 S.E.2d 102 (Ct. App. 1998). "Discretion is not whim . . . ." *Jordan v. Hartford Financial Group, Inc.*, 435 S.C. 501, 505, 868 S.E.2d 400, 402 (Ct. App. 2021). Nor is it inclination. "[A] *'motion to [a court's] discretion is . . . not to its inclination*, *but to its judgment*; and its judgment is to be *guided by sound legal principles*.' " *Morris*, 438 S.C. at 587, 885 S.E.2d at 397 (second alteration in original) (emphasis added) (quoting *Jordan*).

Morris extensively explains this aspect of the discretion standard. The discussion begins, "The exercise of discretion is not to simply make a decision. The *exercise* of discretion requires first that the trial court recognize it has the responsibility of discretion." *Id*. at 587, 885 S.E.2d at 397 (emphasis in original). The Court continues,

> The exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances.

Id. at 587, 885 S.E.2d at 397 (citing *Jordan*).

"*This 'thought process' requires analysis, and the 'discretion' standard* we employ for reviewing the commission's analysis *requires the analysis be explained.*" *Id.* at 588, 885 S.E.2d at 398 (emphasis added).[11]

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[10] As an initial matter, it is not enough for a factual conclusion to have *some* support, it must have reasonable support. *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000) (emphasis added) ("The term 'abuse of discretion' has no opprobrious implication and may be found if the conclusions reached by the lower court are *without reasonable factual support.*").

[11] *Morris* adds, "The court of appeals affirmed in an unpublished opinion"; and "We publish this decision to clarify that no court is entitled to the deference associated with the discretion standard of review until that court has earned deference by fulfilling the responsibility of exercising its discretion according to law." *Id.* at 585-86, 885 S.E.2d at 396.

To be clear, there is no blanket requirement for lower courts to set forth separate explanations on all of their rulings. However, for more important rulings, there must be enough to enable proper appellate review, and this includes determining whether the factual findings have been properly applied, *see, e.g., Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C.,* 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998).

Here, where a fee request is cut by more than 70%, the analysis must be explained. In *Horton*, the reductions were less, in both absolute and percentage terms than the reduction here.[12] The Court reversed the reduction. "The circuit court gave no explanation for why it chose $100 per hour as opposed to the [$295 and $250] hourly rates Campbell presented in her affidavit." 423 S.C at 328-29, 815 S.E.2d at 443-44. Noting that "[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," and that "the circuit court has discretion in deciding the "specific amount of ... reasonable attorneys' fees," the Supreme Court reversed the reduction because it was not "adequately explained with specific findings—as the law requires." *Id.* at 330-31, 815 S.E.2d at 444-45 (omission in original). *See also Johnson v. Johnson*, 296 S.C. 289, 293, 304, 372 S.E.2d 107, 109, 115 (Ct. App. 1988) (even "an unusually detailed order" is insufficient if it does not properly explain why it "refused to award full fees."); "A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion."

[12] The reductions there totaled $22,081.50 or 62.0 percent. ($13,530 awarded, 423 S.C. at 329, 815 S.E.2d at 444; of $35,611.50 incurred, *id.* at 328, 815 S.E.2d at 444).

II. THE COURT OF APPEALS' OPINION CONTRADICTS THE HOLDINGS OF *MORRIS* AND *HORTON* THAT REQUIRE THE ANALYSIS BE EXPLAINED.

If there is a "discernible" reason for the amount of the award, it is that the opinion erroneously relied on the misrepresentation by Respondent and concluded no fees were proper for work after August 25, 2020. The panel implicitly rejects that explanation, and the *Nix* error, which could have ended up in the same ballpark. But that leaves the analysis unexplained.

A. Referring to Discretion Does Not Meet the *Morris* Standard.

The Court of Appeals repeatedly refers to the unchallenged point that the amount of a fee award is usually a matter of the lower court's discretion. But the discretion still requires analysis and explanation. *Morris; Horton*. Discretion is neither whim nor inclination. *Jordan*; *Morris*.

B. The *Hensley* Quotations Cannot Explain the Result Here.

The opinion twice quotes *Hensley v. Eckerhart*, 461 U.S. 424, 434, 436–37 (1983), first as stating that "excessive, redundant, or otherwise unnecessary" hours should not be included and then as stating, "There is no precise rule or formula for making [fee] determinations. The [trial] court may attempt to identify *specific hours* that should be eliminated, or it may simply reduce the award to account for the *limited success.* The court necessarily has discretion in making this equitable judgment." (Emphasis added). But the Court of Appeals points to no specific hours that should have been eliminated, and the only thing in the order that could remotely fit within the "specific hours" rubric is its reference to "37 to 42.4 hours in preparing the fee motion, affidavit, and supporting materials" (R. p. 7). Eliminating *all* those hours would not come close the hours eliminated here. It would still leave unexplained the elimination of 101.6 hours of the 144 hours eliminated.

The order below did not mention *Hensley*, and the panel's *sua sponte* raising of Hensley's "limited success" rationale actually requires even more explanation. The panel does not say what it means by "limited success." Here, counsel obtained all the success the statute allows. Is it saying receiving 100% recovery in Lemon Law cases for low- and mid-priced vehicles are always limited success—that one must own a $200,000 luxury car to make for plain old "success"? If so, this would be a major rewrite of the statute, contrary to numerous decisions of the Supreme Court requiring remedial statutes to be read broadly to accomplish their goals. E.g., *Hanna, Inabinet, Allen*. If the opinion means the award was or could have been reduced for "limited success," much more explanation is needed.

C. October 2018 as a Potential Termination Date for Fees Does Not Explain the Amount of the Award.

The panel writes, "Respondent offered a full repurchase of the nonconforming vehicle as early as October 2018. After Appellant agreed to the repurchase several years later . . . . " This does not state that Tammy is to blame for delay from October 2018 to the May 2021 agreement, but might be read that way. It would be erroneous to blame Tammy, for reasons discussed on page 4 above. But perhaps more important here, it does not work. The 18.0 hours incurred from the start of the representation through the end of October total $8,190 at the $450 hourly rate the order mentions, yet the award is 337% of that amount. When a result is off by more than 100%, there is something wrong. The lower court obviously thought there was work done after October 2018 that should be compensated.

One might speculate that order awards $8,190 through the end of October 2018, and throws in another $19,395.00 on a whim, but that doesn't work either. *Jordan* ("Discretion is not whim"). We cannot know if that is what the lower court was doing, nor, if it was doing so, why that amount. This is far from "a thought process that begins with the trial court's clear

understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law," *Morris.* The analysis must be explained. Tammy is entitled to articulated reasons she can accept or ask an appellate court to review.

D. A Word About *Nix*

The lower court erred in presenting *Nix* as if it contained no burden on the party opposing fees. The closest the opinion comes to mentioning *Nix* is that "Appellant argues the circuit court inappropriately tasked her with the burden of establishing the number of hours devoted to her Lemon Law claim."[13] If the panel means to affirm the lower court's *Nix* discussion, which ignores the burden on the party opposing fees, it errs. If it means that any error of law in applying *Nix* was within the lower court's discretion, it errs.[14] If it means that the lower court could *properly* have eliminated most of the request under *Nix*, it errs because the majority of the work went to the case as a whole, and all the other claims "related" to the Lemon Law claim because they were traded for agreement on the Lemon Law claim, and because if the lower court had meant to eliminate the majority of the work as being unrelated to the Lemon Law claim, it should have said so.

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[13] To be clear, the panel's statement misconceives Tammy's argument, which was simply that since Tammy had presented the required affidavit of fees related to the statutory claim, the burden was then on Honda to show which if any fees were unrelated to that claim, and that Honda had not done so.

[14] The opinion ends its fees discussion,

> Appellant argues the circuit court inappropriately tasked her with the burden of establishing the number of hours devoted to her Lemon Law claim. We 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. Accordingly, we affirm the award of $27,585 in fees.

In an abundance of caution, Tammy points out that any inference that being animated by discretion would cure the error of law would be erroneous.

The opinion mentions nothing else, and so leaves the analysis unexplained.

E. The Opinion Implicitly Recognizes the Lower Court Overlooked Hours, but Does Not Address the Mistake.

The panel implicitly recognizes that the lower court overlooked 22.5 hours, but does not explain how an award can be "based on actual time expended," S.C. Code Ann. § 56-28-50(D) when it has not considered all the time actually expended. *Compare* the Opinion (recognizing a request of $92,385 (*205.3* hours at the $450 rate the Order mentions)) *with* the Order (R. p. 37) (emphasis added) ("Counsel has submitted an affidavit where he asserts spending *182.8* hours"). If it means the overlooked time is irrelevant because it would have been cut under the (erroneous) August 2020 cutoff, it should say so. There should be some explanation for why the 15% of time that was overlooked is irrelevant.

F. The Circuit Court Order Does Not Explain Its Result.

The Circuit Order does not state that it is employing an August 2020 cutoff, nor if it did so, why it did so. It does not state that it is eliminating any hours under *Nix*. It did not state any hours "are clearly unrelated." It does not explain how it reasoned from any findings to any result. If one were to try to piece together its findings in hope of constructing a rationale, one would fail.

The Order purports to base its award on its *Baron* findings. But nothing in those findings supports the magnitude of the reduction here.

Those findings are:

Factor 1. Nature of the Case. (R. p. 36). "[T]his case was not of extremely complex nature." How does one reason from the case not being "extremely complex" to a 70% cut? One cannot—especially as the circuit court continued, the case "involved numerous legal issues requiring Plaintiff's counsel's extensive preparation for litigation." *(Id.*)

Factor 2. Time Necessarily Devoted to the Case. (R. pp. 36-37). The only finding under this factor not already discussed is its observation that Petitioner's counsel left in his affidavit a note to himself to be sure to include that he was not churning the file. This sort of clerical error is not unusual. The lower court made a similar clerical error when it left the word "Proposed" in the filed order denying reconsideration (R. p. 41). Counsel's affidavit and his memorandum in support of his motion each mentioned he was not churning the file (R. pp. 707, 780 ¶ 21), so it would be an abuse of discretion to eliminate a majority of his request for this clerical error.

The other topics the order discusses under this factor are the erroneous *Nix* analysis discussed on page 7 above, that the 37 to 42.4 hours spent in litigating fees was "substantial"—and which could be entirely eliminated and still leave the vast majority of the 144-hour reduction unexplained, and the 20.9 hours incurred prior to commencement of suit in November 2018, discussed above on page eight. A November 2018 cutoff fails to explain the order for reasons like those the October 2018 cutoff date mentioned by the Court of Appeals fails.

Factors 3 & 4. Standing of Counsel and Contingency of Compensation. (R. p. 38). For the third and fourth factors, the order finds only that "Plaintiff's counsel is an experienced practitioner in consumer protection actions, including Warranty Act cases, in cases in South Carolina courts . . . [and] has received several favorable appellate rulings . . ." and that the case was taken on a contingency basis.

Factors 5 & 6. Beneficial Results and Customary Fees (R. p. 39). The order again finds a beneficial result "prior to suit" on November 9, 2018 and that affidavits indicate that $450 is a reasonable hourly rate. It makes no other findings.

The opinion and the order, combined, leave the analysis unexplained.

To recapitulate, Respondent suggested to the lower court three dates to hold fees stopped accruing. All erred, as matter of law, because they were based on the proposition that fees incurred in arguing about fees are improper. Those dates were (a) October 18, 2018, (b) November 11, 2018, and (c) August 25, 2020. Honda pointed out that the hours incurred through those dates were (a) 11.7, (b) 20.9, and (c) 61.3. At the $450 rate the order mentions, these would make the award (a) $5,265.00, (b) $9,360.00, or (c) $27,585. It seems clear that if the lower court based its award on any of these proposed cutoff dates, it could only have been (c). It seems likely that what pushed (c) over the top—why it was accepted when the other proposed dates were not—is that (c) was backed by the false representation that "Plaintiff's counsel even acknowledged in August 2020 that . . . he was continuing this litigation solely in the attempt to obtain more attorney's fees."

Strangely, the lower court's order mentions the *dates* of (a) and (b) in ways that may imply it is going to adopt each of those cutoffs, but appears to accept and act on (c), without mentioning that date or that there was any cutoff at all.

Conclusion

The opinion never mentions the lower court's *Nix* error. Nor does it mention Respondent's misrepresentation about a supposed August 2020 concession. The *Nix* error could explain why the lower court, erroneously, eliminated a majority of the request. The other, which fits like a glove, would exactly explain why the lower court, again erroneously, reached the result it did. Without these explanations of why the lower court erroneously reached the result it did, there is no explanation at all. The matter should be remanded to the trial court to further explain its reasoning.

There is simply nothing in the order, even after the Court of Appeals' opinion, which explains the dramatic 70% reduction.

The lower court erred, as a matter of law, in its discussion of *Nix*. That was an abuse of discretion. It erred in overlooking 22.5 hours actually expended. It erred in relying on an unsupported factual conclusion. That too was an abuse of discretion. The panel presents no valid explanation for the magnitude of the reduction.

Tammy deserves an order that "begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law." The order here begins with a misunderstanding of *Nix*, continues by overlooking hours actually expended, and ends with an unexplained result. This case is an opportunity for the Court to show it meant what it wrote when it explained the discretion standard in *Morris*. The standard "requires the analysis be explained," with "sound judgment," not "inclination."

Respectfully submitted,

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