

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2016-002466

Dick Dyer & Associates, Inc.,Appellant,

v.

Moore's Cars, LLCRespondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. DID THE LOWER COURT ABUSE ITS DISCRETION BY FAILING TO APPLY THE LODESTAR ANALYSIS IN AWARDING ATTORNEY'S FEES UNDER THE DEALERS ACT, A FEE-SHIFTING STATUTE?

STATEMENT OF THE CASE

This action was initiated by the filing of a summons and complaint on May 12, 2014. In its complaint, the Appellant, Dick Dyer & Associates, Inc. ("Dick Dyer"), alleged that it had agreed to sell a new Mercedes-Benz automobile to Respondent, Moore's Cars, LLC ("Moore's"), and that in connection therewith, Dick Dyer disclosed certain export policies established by Mercedes-Benz USA, LLC ("MBUSA") and Moore's agreed to indemnify it against certain charge backs by MBUSA arising out of the export of the vehicle within thirteen months of sale. Dick Dyer further alleged that MBUSA had assessed it with certain chargebacks, that demand had been made upon Moore's for indemnity, and that Moore's had failed and refused to indemnify it.

Dick Dyer set forth claims for breach of contract and for violation of the Act Regulating Manufacturers, Distributors and Dealers ("the Dealers Act"). On or about May 30, 2014, Moore's served and filed its answer. Therein, Moore's admitted that it had purchased the vehicle, agreed to indemnify Dick Dyer against the charge backs, and that MBUSA had assessed Dick Dyer with charge backs. However, Moore's denied that Dick Dyer had made a demand for payment and denied that Dick Dyer was entitled to any recovery.

On or about June 13, 2014, Dick Dyer served and filed an amended complaint in an effort to narrow the issues. On or about June 18, 2014, Moore's served and filed its amended answer. Therein, Moore's denied that it had purchased the vehicle, that it had sold the vehicle, that Dick Dyer had demanded indemnity from it, and that Dick Dyer was entitled to any recovery.

The matter came before the Honorable L. Casey Manning for a hearing on the merits on January 30, 2015. On July 2, 2015, the lower court issued an Order For Judgment, concluding that Moore's violated the Dealers Act, S.C. Code Ann. § 56-15-10, et. seq., when it breached an Export Prohibition Disclosure and Indemnity Agreement it had entered into with Dick Dyer. (R. pp. 2-17). The Court also concluded that Dick Dyer was entitled to a judgment against Moore's for double the amount of the actual damages it sustained, as well as the cost of suit, including a reasonable attorney's fee, under the Dealers Act, S.C. Code Ann. § 56-15-110(1). (R. pp. 16-17). In accordance with the lower court's order, Dick Dyer submitted an attorney's fee affidavit seeking an award of attorney's fees of \$30,882.50 and \$843.65 in costs and expenses. (R. pp. 28-66).

On September 28, 2016, the lower court issued an Order Denying Moore's Motion To Reconsider and Granting Motion for Attorney's Fees and Costs. (R. pp. 18-22). The Order found that the 112.30 hours expended by counsel for Dick Dyer prosecuting this matter was necessary, and that the rate of \$275 per hour was reasonable and customary. (R. pp. 20-21). The Court had previously indicated that it believed the case to be a complex matter involving a novel issue. (R. p. 25, lines 12-15). Nevertheless, the Court concluded that the sum of \$8,000.00 in attorney's fees, including costs, was a proper award under the circumstances. (R. pp. 21-22).

On or about October 10, 2016, Dick Dyer filed a motion to alter or amend seeking an increase in the amount of attorney's fees and costs. (R. pp. 72-75). On or about November 2, 2016, the lower court issued an order denying Dick Dyer's motion to alter or amend. (R. pp. 23-24).

On December 8, 2016, Dick Dyer filed and served notice of appeal.

ARGUMENT

- I. THE LOWER COURT'S FAILURE TO APPLY A LODESTAR ANALYSIS IN AWARDING ATTORNEY'S FEES UNDER THE DEALERS ACT, A FEE-SHIFTING STATUTE, WAS AN ERROR OF LAW, CONSTITUTING AN ABUSE OF DISCRETION. THEREFORE, THE LOWER COURT'S AWARD SHOULD BE VACATED AND A REASONABLE AWARD OF ATTORNEY'S FEES SHOULD BE CALCULATED APPLYING THE LODESTAR METHOD.

Dick Dyer, the prevailing party, sought an award of attorney's fees of \$30,882.50 and costs of \$843.65 under the Dealers Act, based upon an attorney's fee affidavit incorporating its attorney's billing records reflecting 112.3 hours spent at a rate of \$275 per hour. In addition to the time necessarily devoted to the case and the customary legal fees for similar services, the attorney's fee affidavit also addressed the other factors to be considered in an award of attorney's fees, none of which were challenged by Moore's.

In its order dated September 28, 2016, the lower court found that the time set forth in the attorney's fee affidavit was necessarily devoted to the case and that the rates set forth in the attorney's fee affidavit were reasonable and customary. Nonetheless, the lower court awarded only \$8,000.00 in attorney's fees and costs without providing any basis for the discrepancy between the fees actually incurred, as a product of the time and rate set forth in the attorney's fee affidavit, and the final amount awarded.

A claim for statutory attorney's fees is an action at law resting within the sound discretion of the trial court and may not be disturbed on appeal absent an abuse of discretion. Historic Charleston Holdings v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009). "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." Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) and Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008).

S.C. Code Ann. § 56-15-110(1) provides in pertinent part:

Any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and *shall* recover double the actual damages by him sustained, and the costs of suit, including a reasonable attorney's fee. (emphasis added).

The Dealers Act mandates that a prevailing party is entitled to an award of reasonable attorney's fees and costs. The award of attorney's fees is made to the party, not his lawyer. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990).

A statutory award of attorneys' fees is typically authorized under what is known as a fee-shifting statute, which permits a prevailing party to recover attorneys' fees from the losing party. Layman, supra. In Layman, our state Supreme Court determined that a lodestar analysis is the proper method for determining an award of attorney's fees pursuant to a fee-shifting statute, particularly where the issue of the amount awarded hinges solely on the Court's interpretation of what constitutes a "reasonable" attorney's fee. Id. The lodestar analysis dictates that a reasonable attorney's fee should reflect the reasonable time and effort involved in litigating a case, and is "calculated by multiplying a reasonable hourly rate by the reasonable time expended." Id., 376 S.C. at 457, 658 S.E.2d at 332.

Our state Supreme Court has since declined to follow Layman only where the language of the statute itself specifically informs the court how it should otherwise calculate a reasonable attorney's fee. In the matter of South Carolina Dept. of Transportation vs. Revels, 411 S.C. 1, 766 S.E.2d 700 (2014), the Court interpreted S.C. Code Ann. § 28-2-510, which authorizes landowners who prevail in an eminent domain

action to recover litigation expenses. Id. The Revels Court noted that the very text of § 28-2-510 contained a “constellation of factors” prescribed by the legislature for the purpose of determining a reasonable award of attorney’s fees. Id. The Revels decision does not overrule Layman, but instead stands for the proposition that a court must calculate a “reasonable” attorney’s fee by using the means prescribed by the legislature on the face of the statute, where applicable. In contrast, neither the state action statute interpreted in Layman, nor the Dealers Act, address the means by which the Court should determine the amount of a reasonable attorney’s fee on its face. See S.C. Code Ann. § 15-77-300, S.C. Code Ann. § 56-15-110(1).

The Supreme Court of the United States has previously recognized a strong presumption that the lodestar approach is the most accurate determination of a “reasonable” attorneys’ fee in light of the intended purpose of the usual fee-shifting statute. Layman vs. State, 376 S.C. 434, 658 S.E.2d 320 (2008) citing Pennsylvania vs. Del. Valley Citizens’ Council, 478 U.S. 546, 106 S.Ct. 3088 (1986). The “lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case,” and “is calculated by multiplying a reasonable hourly rate by the reasonable time expended.” Layman, 376 S.C. at 457, 658 S.E.2d at 332; See also Dennis vs. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 652 (4th Cir. 2002). Where the prevailing party “has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is *presumed* to be the reasonable fee” to which counsel is entitled. Blum v. Stenson, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548 (1984). “The figure resulting from this calculation is more than a mere ‘rough guess’ or initial approximation of the

final award to be made.” Pennsylvania vs. Del. Valley Citizens’ Council, 478 U.S. 564, 106 S.Ct. 3098 (1986).

Exceptional circumstances allow a court to “consider other factors justifying an enhancement of the lodestar figure,” or a reduction, before arriving at a final amount. Layman, 376 S.C. at 457, 658 S.E.2d at 332, citing Edmonds vs. United States, 658 F. Supp. 1126 (D.S.C. 1987)(emphasis added). In Layman, the Court reduced the lodestar figure by just three percent to account for “some hours that may not be compensable.” 376 S.C. at 460, 658 S.E.2d at 334.

To determine the reasonable time expended and a reasonable hourly rate for purposes of calculating an award of reasonable attorney’s fees, “South Carolina courts have historically relied on six common law factors of reasonableness: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services.” Layman vs. State, 376 S.C. 434, 658 S.E.2d 320 (2008) citing Jackson vs. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).

The lower court made several findings of fact in this regard. Specifically, it found that the case was difficult, that counsel for Dick Dyer necessarily devoted 112.30 hours to prosecute the matter, that counsel enjoyed excellent professional standing, that counsel’s fees were billed on an hourly basis, that beneficial results were obtained, and that counsel’s rate of \$275 per hour was reasonable and customary. (R. pp. 19-21). Nevertheless, the lower court concluded that \$8,000.00 in attorneys fees, including costs, was a proper award under the circumstances.

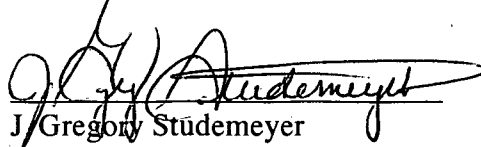
The lower court did not find an exceptional circumstance that justified a reduction to an amount constituting a mere fraction of the fees actually incurred by Dick Dyer, which represented the reasonable hourly rate multiplied by the hours necessarily expended prosecuting the matter. Under the lodestar analysis, and without the necessity to account for exceptional circumstances, the Plaintiff is entitled to an award of \$30,882.50 in attorney's fees.

Under the circumstances, using a lodestar approach to determine a reasonable award of attorney's fees under the Dealers Act fee-shifting statute, should have required nothing more than simple multiplication of time and rate. Dick Dyer was not seeking an enhancement of the lodestar figure with a multiplier. Rather, Dick Dyer sought only to recover what it had expended in attorney's fees and costs. The award of only \$8,000.00 in attorney's fees and costs by the lower court, in light of its finding that both the time spent and the rate requested by Dick Dyer were reasonable, suggests a disregard of both the purpose of the Dealers Act and the lodestar analysis, and constitutes an error of law.

Based upon the foregoing, Dick Dyer submits that the lower court's award of attorney's fees and costs should be modified, or remanded to the lower court for further consideration in accordance with Layman, supra.

Respectfully submitted,

J. GREGORY STUDEMAYER
Professional Corporation

A handwritten signature in black ink, appearing to read "J. Gregory Studemeyer", is written over a horizontal line.

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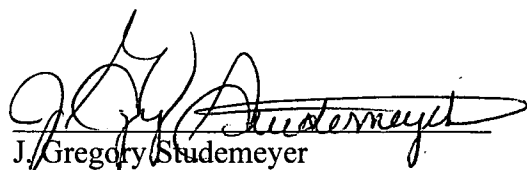
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CERTIFICATE OF COUNSEL

I certify that this Final Brief of Appellant complies with Rule 211(b), SCACR.

March 28, 2017



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