

THE STATE OF SOUTH CAROLINA
In The 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 REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE AMOUNT OF THE PARTY'S MONETARY JUDGMENT IS IRRELEVANT TO THE DETERMINATION OF WHAT CONSTITUTES A "REASONABLE" AWARD OF ATTORNEY'S FEES PURSUANT TO A FEE-SHIFTING STATUTE

While the Dealers Act does not provide an exact methodology to determine what constitutes a "reasonable" award of attorney's fees, the Respondent erroneously asserts that a reasonable amount of attorney's fees should be comparable to the amount of the judgment.

The lower court found that the Appellant's breach of the Export Prohibition Disclosure and Indemnity Agreement cost Dick Dyer \$6,644.00 in charge backs, and awarded double damages under the Dealers Act. (R. pp. 16-17). Dick Dyer then submitted an attorney's fee affidavit seeking an award of \$30,882.50, and \$843.65 in costs and expenses pursuant to S.C. Code Ann. § 56-15-110(1). (R. pp. 28-66). The Respondent emphasizes that Moore's would have owed "nearly \$45,000.00 for a violation that cost the Appellant \$6,644.00" had the lower court awarded Dick Dyer the attorney's fees it actually incurred. Respondent's Initial Brief, Page 6.

South Carolina courts have consistently held that "there is no requirement that attorney's fees be less than or comparable to a party's monetary judgment." Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998). In Taylor, the Supreme Court of South Carolina affirmed an award of attorney's fees pursuant to a fee-shifting statute for \$500,000.00, and an additional \$24,068.00 in costs, after the prevailing party recovered \$108,726 in damages under the Unfair Trade Practices Act. 331 S.C. at 580-581, 503 S.E.2d at 460-461. The Supreme Court has also affirmed an award of attorney's fees of \$26,000.00 after the jury returned a verdict for just \$16,631.00 in actual damages.

Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989). In doing so, the Supreme Court noted that “courts in other jurisdictions have awarded attorney fees which exceeded the verdict obtained” as well. 297 S.C. at 385, 377 S.E.2d at 297.

Finally, in Williamson v. Middleton, the Court of Appeals found that an award of attorney’s fees of \$35,000.00 was reasonable when the action resulted in a \$902.62 verdict. 374 S.C. 419, 649 S.E.2d 57 (Ct. App. 2007)(reversed on other grounds). The amount of the actual damages and the award of attorney’s fees in Middleton bear a striking resemblance to the actual damages awarded and the attorney’s fees incurred in the present matter. Thus, the fact that Dick Dyer incurred attorney’s fees in an amount greater than it recovered in damages at trial is entirely irrelevant, and does not constitute a basis for sustaining the inadequate award of attorney’s fees awarded Dick Dyer by the lower court.

II. THE ISSUE OF THE TIME AND LABOR EXPENDED, AS WELL AS THE CONTINGENCY OF COMPENSATION, WERE NOT PROPERLY PRESERVED BY THE RESPONDENT FOR THIS COURT’S REVIEW

After Dick Dyer prevailed on its claim against the Respondent under the Dealers Act, the lower court found that Dick Dyer was entitled to a “reasonable” award of attorney’s fees pursuant to S.C. Code Ann. § 56-15-110(1). (R. pp. 16-17). 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).

To determine a reasonable award of attorney’s fees, South Carolina courts have traditionally considered six factors, including (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee

customarily charged for similar services; and (6) the beneficial results obtained. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). The Respondent filed a Motion to Reconsider pursuant to Rule 59(e), SCRPC subsequent to Dick Dyer's submission of the attorney's fee affidavit in which it addressed the first prong of the Jackson test, arguing that the case was not particularly complex or difficult, and partially addressed the second prong, making specific, line-item challenges to 18.9 hours of the 112.3 hours expended by Dick Dyer's counsel. (R. pp. 67-71).

The lower court subsequently issued an Order denying the Respondent's motion to reconsider, and granting Dick Dyer's motion for attorney's fees and costs. (R. pp. 18-22). In its Order, the lower court adopted the Jackson test in calculating the amount of attorney's fees awarded, and addressed the Respondent's arguments concerning the first and second prongs of the test. The court found that the case was difficult, and that the 112.3 hours expended by Dick Dyer's counsel prosecuting the matter were necessary. (R. pp. 19-20). The Respondent has not appealed those findings of fact.

"Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) citing Rule 208(b)(1)(B), SCACR. There is no Statement of Issues on Appeal in the Respondent's Brief, and the Respondent was free to make a statement of the issues if "dissatisfied with the statement of the issues...by the appellant." Rule 208(b)(2). Dick Dyer's Statement of the Issue on Appeal limits the scope of review solely to whether the lower court abused its discretion by failing to apply the lodestar analysis. The Respondent improperly seeks to significantly increase the scope of review by raising unrelated issues in its argument in chief that were not previously litigated.

“An issue must be raised to and ruled upon by the circuit court to be preserved.” Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. See generally Holy Loch Distributions, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000). It is “axiomatic that an issue cannot be raised for the first time on appeal.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, the party must “bring into focus the *precise* nature of the alleged error so that it can be reasonably understood by the judge” (emphasis added). Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

In the Respondent’s Initial Brief, it contests the the time expended by Dick Dyer’s counsel prosecuting the matter, the difficulty of the case, and the contingency of compensation. The contingency of the compensation was never challenged by the Respondent at the trial level, and the Respondent only previously contested the validity of 18.9 hours expended by Dick Dyer’s counsel. The Respondent now seeks to open Pandora’s box by broadly challenging the entire 112.3 hours Dick Dyer’s counsel spent prosecuting the matter, 93.4 hours of which it has never previously disputed.

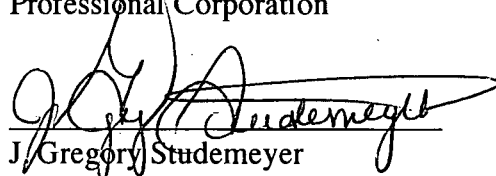
Dick Dyer’s attorney’s fee affidavit demonstrates that Respondent created the expense of which it now complains by violating the export agreement, refusing to reimburse the Appellant upon demand, refusing Appellant’s demand for arbitration, and raising meritless defenses. Furthermore, the Respondent’s brief sets forth no discernable basis for challenging any of the time that Dick Dyer’s counsel spent on the case. “Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see

the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

Accordingly, the Respondent should be barred from raising the issue of the contingency of compensation for the first time, and should not be permitted to attack the legitimacy of time expended by Dick Dyer's counsel.

Respectfully submitted,

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March 27, 2017

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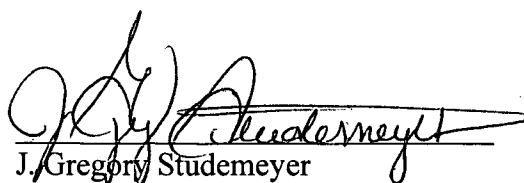
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CERTIFICATE OF COUNSEL

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

March 28, 2017



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