THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CLARENDON COUNTY

In the Court of Common Pleas for the Ninth Circuit
John C. Hayes, III, Circuit Court Judge

Case No.: 2004-CP-14-135
Appellate Case No.: 2012-212843

Donald C. Austin.....Respondent,

v.

Stokes-Craven Holding Corp., d/b/a
Stokes-Craven Ford.....Appellant.

AMENDED INITIAL BRIEF OF RESPONDENT

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QUESTION PRESENTED

With two minor clarifications with which he expects the Appellant will agree, Respondent, Donald C. Austin agrees with Appellant, Stokes-Craven Ford, that "the only real question before the Court is just what did Justice Kittredge mean when he said: 'I join the well-written majority opinion of Justice Beatty save two exceptions.'" Br. of Appellant, p. 1 (quoting Justice Kittredge's opinion in the current case).

Those clarifications are, (1) technically, the question is not what the Justice actually "mean[s]" as much as it is, "what is the most reasonable interpretation of his words?" It is axiomatic that secret intentions do not count. The second clarification is that Justice Kittredge's opinion must be read in the context of the decision as a whole. His opinion is but one of three issued by the Justices in this case and is by far the shortest of the three. Its meaning can only be determined via reference to the other opinions.

OVERVIEW

SUMMARY OF ARGUMENT

Relying on language in the principal opinion such as, "we hold: (1) he is entitled to the entire amount of his request for attorney's fees and costs under the South Carolina Dealer's Act," Mr. Austin maintains that the Supreme Court held that he is entitled to the entire amount of his fees and costs. Based on language in Justice Pleicones' opinion, such as, "I disagree with the majority" on this point, the Appellant contends that Justice Pleicones wrote for a majority on the fees issue.

Mr. Austin maintains that "we hold" represents the majority holding, and "I disagree with the majority" states the dissent. Stokes-Craven Ford disagrees.

THE CONTROLLING STATUTE

As explained by the Supreme Court in its decision in this case,

> The applicable provision of the South Carolina Dealer's Act provides: In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), 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 cost of suit, *including a reasonable attorney's fee.*

Austin v. Stokes-Craven Holding Co., Op. p. 28 n.11, 387 S.C. at 56 n.11, 691 S.E.2d at 152 n.11 (quoting S.C. Code Ann. § 56-15-110(1) (2006) (emphasis is Court's).

SUMMARY OF THE UNDERLYING CASE

This case concerns the fraudulent sale of a previously-wrecked and unsafe truck. It also concerns a forgery. The case was brought by Mr. Austin under the South Carolina Dealer's Act, which provides that one who proves a violation thereof "shall recover" attorneys fees and costs. Other causes of action are also involved.

OTHER MATTER

The Supreme Court opinion, as sent by the Court to counsel and to the lower court, is in the Record on Appeal. R., pp. _-_. Page numbers have been manually added by counsel. Pinpoint references to "Op." are to the pagination in that document.

STATEMENT OF THE CASE[1]

On June 1, 2002, Mr. Donald C. Austin, the Respondent here and Plaintiff below, purchased from the Appellant-Defendant, Stokes-Craven Ford, what he thought was his dream truck. Between then and September, 2002, Mr. Austin discovered that the

[1] The Statement of the Case is drawn from the Supreme Court decision in the present case, except where indicated.

Dealership had lied about whether the vehicle had been wrecked; had lied to him about a warranty that applied to the truck; had misled him about the prior owner of the vehicle; and that the Dealership had forged his signature to a Federally mandated "as-is" form . He attempted six times to return the vehicle for a refund. Thrice he directly asked the Dealership to accept it back; thrice he was denied. Thrice he went to outside organizations (the Ford Motor Company, the South Carolina Department of Consumer Affairs, and the South Carolina Department of Motor vehicles). R. p. 468:9-13; p. 405:4-25; R. p, 470:12-471:2. None were able to assist.

Suit was filed on March 12, 2004. The complaint alleged causes of action for fraud, constructive fraud, negligence, and violations of the South Carolina Dealer's Act, S.C. Code Ann. §§ 56-15-10 to -600 (2006 & Supp. 2009), the South Carolina Unfair Trade Practices Act, and the Federal Odometer Act.[2]

Trial was held August 14–16, 2006, in the Clarendon County Courthouse, the Honorable John C. Hayes, III, presiding. The jury returned verdicts in favor of Mr. Austin on the causes of action for fraud, constructive fraud, negligence, violation of the South Carolina Dealer's Act and violation of the Federal Odometer Act. It awarded $26,371.10, the entire price of the truck, including tax and tags, as actual damages under each of these causes of action. It awarded punitive damages on more than one cause of action, including $216,600.00 on the fraud cause of action. The Court awarded $1,500.00 in damages for the violation under the Odometer Act, and $4,500.00 in fees for proving the violation.

[2] The Federal Odometer Act, specifically titled "Motor Vehicle Information and Cost Savings Act," is codified at 49 U.S.C.A. § 32701 to § 32711 (West 2009).

The Dealership noticed its appeal. Mr. Austin then filed notice of his cross-appeal. The Supreme Court, *sua sponte*, certified the case pursuant to Rule 204(b), and granted oral argument. That Court affirmed in part, reversed in part, and remanded. Because the content its decision is at issue here, fuller discussion of its content will be confined to later sections of this Brief.

The Dealership petitioned for rehearing and moved to supplement its petition. The Court granted the motion to supplement, denied the petition, and the remittitur issued.

Mr. Austin moved to have the circuit court direct the clerk to enter judgment confirming his awards for actual and punitive damages and for trial-level attorney fees and costs, and to award him his appellate and post-appellate fees. He sent a copy of the motion to Judge Hayes. Judge Hayes responded via an email to all counsel asking what would be the basis for his jurisdiction, as he was no longer resident in the circuit. After a series of letters and proposed orders from both sides, Judge Hayes granted Mr. Austin's motion to enter judgment on the actual and punitive damage awards and the trial-level attorney fees and costs, and left the remaining matters for a judge resident in the third circuit to decide.

The Defendant timely appealed.

STATEMENT OF FACTS AND PROCEDURAL FACTS

A. BACKGROUND FACTS

On June 1, 2002, Mr. Austin purchased what he thought was his dream truck from the Dealership. He was repeatedly informed that the vehicle came with a Ford warranty

on the powertrain. He specifically asked three times prior to purchase, and the Dealership informed him each time, that there was a 100,000-mile, 5-year Ford Factory warranty on the engine and powertrain. Soon thereafter, the truck developed an oil leak on a rear seal. He called another Ford dealership to bring the truck in for repair. That other dealership informed him that the warranty did not cover the powertrain. He called the Defendant dealership, which told him to call Mr. Dennis Craven, an owner of the company. Mr. Craven is also the director of the dealership. Mr. Craven called Mr. Austin back to say his staff denied ever telling Mr. Austin the vehicle came with a warranty. Mr. Craven proposed that the Dealership fix the current leak without charge, but that after that repairs were to be on Mr. Austin. Mr. Austin requested that the Dealership allow him to return the vehicle for a refund. The Dealership refused.

An appointment was set for the repair. In the interim, Mr. Austin happened to stop by the repair shop that had performed repair work for a prior wreck of the vehicle. The owner of the shop recognized the truck, informed Mr. Austin that the truck had previously been wrecked, and showed him invoices for more than $20,000.00 for repair of the vehicle. No mention of a prior wreck had been made by the Dealership's salespeople. Instead, they had led him to believe that the truck had been owned by a man who takes "immaculate" care of his vehicles.

On the date of the repair appointment, Mr. Austin brought the vehicle to the Dealership and asked it to take back the truck and return his money. By then, he knew there was no powertrain warranty; he knew the prior owner was not the man he had been led to believe but was another man, and he knew the truck had been wrecked. Mr. Craven still refused to rescind the sale.

At that meeting, Mr. Austin learned that the Dealership's "Used Car Manager [and] Sales Manager" (Tr. 547:21-24), who was the one to tell the salespersons about the vehicles newly arrived for sale (Tr. 442:18-25), knew the vehicle's previous owner, lived in the previous owner's neighborhood, and knew the truck had belonged to this man, not to the "immaculate care" man whom Mr. Austin had been led to believe was the prior owner. Asked directly whether he knew the truck had been wrecked, the Used Car - Sales Manager refused to answer. Instead, he just looked down at his hands. Tr. 225:13-22.

Mr. Craven then pulled out a document—supposedly signed by Mr. Austin—declaring that the truck had no warranty. Mr. Austin's signature had been forged. The forgery was rather obvious, in that it bore little relation to Mr. Austin's real signature. (Tr. 225:23-228:8).

When the "repairs" were finished, Mr. Austin met again with Mr. Craven and asked a third time to be allowed to return the truck. He pointed out to Mr. Craven that the signature on the as-is clause bore no similarity to Mr. Austin's actual signature on a document he had signed, the contract of sale. Mr. Craven still refused to rescind the contract. He just slid Mr. Austin's driver's license back to Mr. Austin, and told him that's not going to happen. (Tr. 497:22-498:12)

The Dealership offered to "swap out" the truck for another vehicle, but by this point Mr. Austin wanted nothing more to do with the Dealership. Mr. Austin turned for help to the Ford Motor Company, to the South Carolina Department of Motor Vehicles, and the South Carolina Department of Consumer Affairs. None were able to help him. (Tr. 229:9-13; 132:4-135:9; 166:4-25; 231:19-232.2).

Mr. Austin then engaged an attorney, John Polito, Esq., who wrote to the Dealership on February 18, 2003, offering to settle the matter if the Dealership would accept back the truck and refund Mr. Austin's money, and provide $1,500.00 in attorney fees. Pls. Pre-Trial Brief at 14; Aff. Atty. Fees, p. 2, para.6, Ex. 1 to Aff. Atty Fees [Polito letter]. The Dealership never responded to this offer.

Mr. Polito subsequently referred the matter to C. Steven Moskos, an experienced auto fraud litigator.

B. PRE-TRIAL

After suit was filed on March 15, 2004, the Dealership maintained that it had done nothing wrong; indeed, throughout the pre-trial phase, its position was that Mr. Austin had received the truck he had bargained for. As put by the Dealership in its Answers to Interrogatories, the Dealership's position was "The Defendant [*sic*] received the vehicle that he was promised," 1st Appeal R. p. 51 (Def.'s Answers Interrog., p. 5, ¶ 20), "therefore there is no difference in value [between the vehicle bargained for and the vehicle received]," *id.*

C. TRIAL

Trial was set for October 31, 2005, but on October 28, 2005 the Dealership requested a continuance. Trial was finally held August 14–16, 2006, in the Clarendon County Courthouse, the Honorable John C. Hayes, III, presiding. The Dealership

continued to deny all wrongdoing,[3] against massive evidence to the contrary. It maintained that it did not know the truck had been wrecked. This was after the former owner of the truck testified that he had told the Dealership that the truck had been wrecked. (Tr. 73:15-17). The Dealership maintained it had given the vehicle a proper inspection prior to putting it on the sale lot, but could not explain how a proper inspection could have missed the wreck damage. (ROA 1st appeal p. 557) (Tr. p. 318).

Of particular concern at trial, the frame had been diamonded. This meant that the frame was bent from its rectangular shape into more of a diamond shape. This damage caused a tracking problem that could be "fixed" for a short period of time, only to reappear. (Tr: 561, ll. 3-6). The misshapen frame meant that if one braked suddenly—for example, on a wet night—the back of the truck could try to swing around to become the front. (Tr: 312, ll. 1-16).

The jury determined that the Dealership had defrauded Mr. Austin; had violated the Dealer's Act, which forbids deceptive practices by automobile dealers; had engaged in constructive fraud; and had been negligent. It awarded $26,371.10, the entire price of the truck, including tax and tags, as actual damages under each of these causes of action. It awarded punitive damages on more than one cause of action, including $216,600.00 for fraud.

The judge submitted to the jury the question of whether the Dealership had violated the Federal Odometer Act, reserving for himself the determination of damages if

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[3] R. on 1st appeal, p. 773:13-19:

Q: Now, it is your contingent that the dealership didn't do anything wrong in dealing with Donald, right?

A: Correct.

Q: And you haven't changed the way you all do business over at Stokes?

A: No, sir.

the jury found a violation had occurred. That Act, and its implementing regulations, require that a car dealership show the vehicle's title to the customer prior to completing the sale. Op. pp. 17-20, 387 S.C. at 45-48, 691 S.E.2d at 147-49.

The Dealership filed ten post-trial motions, which were denied. R. pp. (Motions); pp. (Order). Mr. Austin moved for pre-judgment interest, which was also denied; and for damages and fees for the Dealership's violation of the Federal Odometer Act, which were granted. Most important for present purposes, as the Dealership writes, Initial Br. of Appellant, p. 2, "[t]he trial court further held that Austin was not entitled to [both] the actual and punitive damages awarded him under the fraud verdict and attorneys' fees under the Dealer's Act and that he must elect between one or the other."

D. APPEAL AND CROSS-APPEAL

The Dealership promptly filed Notice of Appeal. Mr. Austin filed Notice of Cross-Appeal. To handle the appeals, the Dealership engaged Young Clement Rivers, one of the most highly respected firms in the State. Mr. Austin then hired Brooks R. Fudenberg, a solo practitioner with an emphasis on appellate practice, to draft the briefs on Mr. Austin's behalf.

1. The Dealership's Appeal. The Dealership challenged both the Odometer Act verdict and the fraud/Dealer's Act verdict. It had multiple supposedly independently-sufficient grounds for each of these claims.

a. State-law issues (the related verdicts for fraud, constructive fraud, negligence, and violation of the Dealer's Act). Most prominently, the Dealership argued that the

entire actual damages award should be vacated or reversed.[4] (And with it, the punitive damage award.) The Dealership presented many supposedly independently-sufficient arguments in support of this claim. Prominent among them was the Dealership's claim that under the election of remedies doctrine, one who is defrauded in the sale of goods may elect either to return the goods for a refund, or to sue for damages, but if he chooses damages he must prove the fair market value of the goods as delivered. Br. of Appellant-Resp't [Dealership], pp. 6-8; *see especially* at 6 (emphasis added),

> The law in South Carolina is clear in an action for fraud in the sale of goods, a plaintiff may elect to either return the goods and recover the consideration paid or retain the goods and sue for damages. *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983). If he retains the goods, the measure of actual damages is the difference between the amount paid for the goods less the fair market value of them if the facts had been properly represented. *Id.* The burden is on the plaintiff to prove the measure of his damages.

Thus, the Dealership's position: Mr Austin had been free to elect the remedy of return or the remedy of damages; having chosen damages, the burden was on him to prove their amount. In various ways, the Dealership argued that he had failed to meet that burden (and indeed, that he had failed to provide any competent evidence of the measure of damages). The Dealership argued he had failed to make out an essential element of his case, and therefore the verdicts must be overturned.

b. Federal issues. The Dealership similarly presented a variety of factual and legal claims regarding the verdict for violation of the Federal Odometer Act. It argued that the $1,500.00 award for violation of the Federal Odometer Act should be reversed,

[4] The Dealership also argued that the punitive damages award should be vacated or reduced for various additional reasons, and that the actual damages award should be reversed due to inconsistent verdicts, etc.

and that the $4,500.00 in attorney fees awarded for that violation be reversed. The Dealership presented two separate grounds for reversal on this issue.

Mr. Austin's Cross-Appeal. Mr. Austin raised only state-law issues: whether the trial court had erred in denying his motion for pre-judgment interest; and whether the trial court had erred in denying him the right to recover damages under the fraud cause of action and attorney fees under the Dealer's Act.

E. THE SUPREME COURT DECISION

The Supreme Court issued an exceptionally lengthy opinion. It spans forty pages as formatted in the remittitur; as published in the South Carolina Reports, it consumes 44 pages; 24 in the Southeastern, Second. Three Justices authored opinions. The principal opinion was authored by Justice Beatty, which Justice Waller joined. It is referred to by the other opinions as the majority opinion. (Kittredge, J. ("the majority opinion of Justice Beatty," Op. p. 40, 387 S.C. at 65, 691 S.E.2d at 158); Pleicones, J. dissenting in part ("I disagree with the majority," Op. p. 39, 387 S.C. at 65, 691 S.E.2d at 157; "majority's holding," Op. p.38, 387 S.C. at 64, 691 S.E.2d at 157). Justice Pleicones wrote a solo concurrence/dissent. Justice Kittredge, joined by the Chief Justice, wrote a one-paragraph concurring/dissenting opinion.

The Court unanimously held that Mr. Austin was not entitled to pre-judgment interest. Regarding the Federal Odometer Act, the Court cited to conflicting decisions among the federal circuits, and adopted the reasoning of the circuits holding that a private individual suing under the Act must show that the failure to show the customer the title prior to completion of the sale was accompanied by an intent to defraud as to mileage. Mr. Austin had conceded that the Dealership's fraudulent intent did not concern the

vehicle's mileage. The Court thus unanimously reversed the damages and associated attorneys fees awarded under the Federal Odometer Act. Op. pp. 19-29, 387 S.C. at 48-49, 691 S.E.2d at 148-19.

The Court unanimously affirmed the actual damage awards under the fraud cause of action, unanimously affirmed the entitlement to punitive damages, and affirmed, although not unanimously, the magnitude of the punitive damages award, with four Justices finding the Dealership's conduct extremely reprehensible and upholding the full award, Op. p. 25, 387 S.C. at 53, 691 S.E.2d at 151 (Beatty); Op. p. 40, 387 S.C. at 66, 691 S.E.2d at 158 (Kittredge, J., concurring in part), and one finding the Dealership's conduct only "mildly reprehensible," Op. p. 36, 387 S.C. at 62, 691 S.E.2d at 156 (Pleicones) and voting in favor of a reduced punitive damage award. The Court further held that Mr. Austin is entitled to his attorneys fees and costs, this last holding being the point of contention in the present appeal.

Of the multiple issues discussed in the decision, only three are of particular relevance here. Each opinion's discussions of these issues are summarized below. These are (1) the lack of evidence of fair market value/election of remedies issue; (2) the attorney fees/election of remedies issue; and (3) whether the failure to show titles to customers, which technically violates the Federal Odometer Act, should be considered in the punitive damages analysis, given that the Court reversed the awards under that cause of action.

1. The Principal Opinion

(a) The lack of evidence of fair market value/election of remedies issue. The principal opinion rejected the Dealership's claim that the election of remedies doctrine

required Mr. Austin to prove with precision the fair market value of the vehicle as delivered. It did so under the heading, "**B. Fair Market Value,**" Op. p. 13, 387 S.C. at 42, 691 S.E.2d at 145 (emphasis in original). It states,

> Having concluded this issue is properly before this Court, we now address the merits.
>
> This Court has stated: A plaintiff induced to enter a contract by fraud must elect between two remedies: he can elect to affirm the contract and bring an action to recover damages sustained by reason of the fraud or, alternatively, he may elect to rescind the contract and recover the consideration paid plus incidental damages which were foreseeable and were incurred . . .

Op. p. 14, 387 S.C. at 42-43, 691 S.E.2d at 145 (emphasis added). The Court reiterated, Op. p. 15, 387 S.C. at 44, 691 S.E. 2d at 146 (emphasis added),

> Turning to the merits of this issue, we find there is evidence to support the jury's award of actual damages in the amount of $26,371.10, the purchase price of the vehicle retained by Austin.
>
> Initially, we note the unique facts of the instant case. Normally, a property owner who seeks damages for a defective vehicle rescinds the contract, i.e., returns the vehicle, and files suit to recover damages. *See Sparrow v. Toyota of Florence, Inc.*, 302 S.C. 418, 421–22, 396 S.E.2d 645, 647 (Ct.App.1990) ("In an action for fraud in the sale of goods, the plaintiff may elect to return the goods and recover the consideration paid or retain the goods and sue for damages. If he retains the goods, the measure of actual damages is the difference between the value the purchaser would have received if the facts were as represented and the value the purchaser actually received.").
>
> Here, Austin repeatedly offered to return the truck to Stokes–Craven in exchange for the purchase price. Given Stokes–Craven adamantly declined Austin's offers, we do not believe Austin should be penalized or limited in his ability to recover damages due to the fact that he has retained the vehicle.

Justice Beatty's position was thus that one generally must elect between rescission and retaining a nonconforming item; one who chooses to retain an item and sue for damages must show the value of the goods as received; but one who has tried, repeatedly, to

rescind, and been refused, need not carry an overly-demanding burden of proof as to the value of the item.

(b) The attorneys fees/election of remedies issue. One of the main issues in Mr. Austin's cross-appeal was whether a plaintiff who proves both a common-law violation and a violation of the Dealer's Act could receive his common-law damages and recover his attorney fees under the Act. The Dealership argued that a victorious plaintiff in such a situation must elect one, and only one, remedy. Mr. Austin argued that the purpose of the election of remedies doctrine is to prevent an impermissible multiple recovery, such as recovering the same actual damages twice, or the same punitive damages multiple times. The doctrine had no application, he argued, where, as here, the plaintiff does not seek to receive the same actual damages twice, nor the same punitive damages twice, nor the same attorney's fees twice.

All the Justices agreed with him on this point. Justice Beatty wrote in especially pertinent part,

> Although novel in this state, we find Austin's contention is supported by case law from other jurisdictions. As we interpret these cases, they stand for the proposition that a plaintiff may recover attorney fees under a statutory claim in addition to punitive damages under a common law claim. The rationale for this position is that an award for both does not amount to double recovery for a single wrong given attorney's fees are intended to make such claims economically viable for private citizens whereas an award of punitive damages is designed to punish wrongful conduct and deter future misconduct. . . .
>
> Because costly attorney fees may deter private citizens from bringing a claim under the Dealer's Act, a decision in favor of Austin facilitates the purpose of the Act which is to provide buyers a private right of action against dealers who engage in deceptive practices. Furthermore, given the recovery of attorney's fees under the Dealer's Act is not duplicative of the award of punitive damages, we do not believe a decision in favor of Austin would violate the

> election of remedies doctrine's prevention of double redress for a single wrong. As its name states, the doctrine applies to the election of "remedies" not the election of "verdicts." Thus, an award of attorney's fees and costs would merely serve to fully compensate Austin for pursuing his statutorily-authorized private right of action under the Dealer's Act, which we believe epitomizes the definition of a remedy. *See Black's Law Dictionary* 1163 (5th ed. 1979) (defining "remedy" as "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated").

Op. pp. 28-29, 387 S.C. at 56-57, 691 S.E. 2d at 153.

As to the quantum of fees, Justice Beatty explained, "Given our conclusion that Austin can recover attorney's fees and costs under the Dealer's Act, the question becomes whether he should be awarded the entire amount of his request or should the amount be limited to the fees incurred in establishing his claim under the Dealer's Act." Op. p. 30, 387 S.C. at 57, 691 S.E. 2d at 153. He answered that question thusly: "to award Austin his claim in its entirety would be consistent with the precedent of this Court." *Id.*

The "Conclusion" reiterated the point. "In terms of Austin's cross-appeal, we hold: (1) he is entitled to the entire amount of his request for attorney's fees and costs under the South Carolina Dealer's Act." Op. p. 31, 387 S.C. at 59, 691 S.E. 2d at 154 (emphasis added).

(c) The failure to show title/punitive damages issue. The Court unanimously held for the Dealership that the damages award and the award of attorney fees pursuant to the Federal Odometer Act must be reversed.

A related question concerned whether the Dealership's failure to show the title to Mr. Austin before the sale could nevertheless figure in the punitive damages analysis. Justice Beatty also found it worth noting that "there is evidence that Stokes-Craven's mistreatment of Austin, a financially vulnerable customer, was not an isolated incident as

[the salesman] testified that he had not shown a title to a customer in his twenty-five years of experience." Op. p. 25, 387 S.C. at 53, 691 S.E. 2d at 151.

2. Justice Pleicones' Concurring/Dissenting Opinion

Justice Pleicones' opinion was fairly lengthy for a dissent/concurrence. No other Justice joined his opinion.

(a) The lack of evidence of fair market value/election of remedies issue.

Justice Pleicones did not believe that Mr. Austin's election to sue for damages rather than rescission should play any role in determining whether he had provided sufficient evidence to establish the fair market value of the vehicle in its actual condition. He wrote, Op. pp. 33-34 & n.12, 387 S.C. at 61-62 & n.12, 691 S.E.2d at 155 & n.12,

> I agree with Austin that the issue whether Stokes-Craven was entitled to a directed verdict because Austin offered no evidence of fair market value is not preserved . . . . Had the issue been properly preserved, however, I would agree that Austin failed to present any competent evidence of the truck's fair market value . . . .
>
> . . . .
>
> I do not agree, however, with the suggestion that Stokes-Craven's refusal to allow Austin's request to return the truck for a full refund permits Austin to seek rescission damages in a breach of contract suit. In my view, Stokes-Craven was under no obligation to honor Austin's request.

However, in his view, the Court need not even reach this question, nor the related question of whether there was sufficient evidence of fair market value, as the Dealership had completely failed to preserve its contention for appellate review.

He thus agreed with Justice Beatty in result, while differing in rationale. He would not even reach the merits of whether Mr. Austin had presented sufficient evidence of fair market value to send the case to the jury. However, if he were to reach the merits, he would disagree with the suggestion that the Dealership's refusal to allow Mr. Austin to

elect to rescind the sale should play any role in the analysis. More broadly, in his view, "no issue relating to the actual damage award is preserved for appellate review." Op. p. 35, 387 S.C. at 61, 691 S.E.2d at 151.

(b) The attorneys fees/election of remedies issue. Justice Pleicones agreed with the majority that a plaintiff who proves both a violation of the Dealer's Act and a common-law violation may recover statutory attorney fees pursuant to the Act in addition to actual and punitive damages under another cause of action. In his view, however, the trial court had not ruled on the matter, and thus the question was not preserved. As to the merits of the issue, he wrote:

> I agree with the majority that a plaintiff who elects to receive damages awarded under a common law theory may also be entitled to recover statutory costs and attorneys fees to which he is entitled under a separate verdict, without running afoul of the public policies underlying the doctrine of election of remedies.

Op. p. 37, 387 S.C. at 64, 691 S.E.2d at 157 (Pleicones, J.) (concurring in part) (citing *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (N.C. 1993)).

However, in his view, the trial judge had failed to rule on the matter. As he explained, an appellant must have both (1) raised that issue to the lower court, and (2) have received a ruling on that issue. If he has not received a ruling, he is required to file a Rule 59 Motion. *See, e.g., I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 421–422, 526 S.E.2d 716, 724 (2000). In Justice Pleicones' view, Mr. Austin raised the issue, but the trial court did not rule on it, and therefore Mr. Austin's failure to file a Rule 59 motion was fatal. Op. pp. 37–39, 387 S.C.at 64, 691 S.E.2d at 157.

The point on which he disagreed with the majority was <u>whether the trial court had ruled</u>. All the Justices agreed that Mr. Austin raised the issue. All at least implicitly

agreed that no Rule 59 motion was filed. All also agreed at least implicitly, that no Rule 59 need have been filed if the trial court did rule on the issue. The majority found that the trial court did rule on the matter. Op. p. 27, 387 S.C. at 64, 691 S.E.2d at 157. Justice Pleicones believed that this Court "did not rule on this issue involving an election between punitive damages and statutory fees." Op. p. 38, 387 S.C.at 64, 691 S.E.2d at 157. With no ruling and no Rule 59 motion, there would be nothing for the appellate court to review ("no issue regarding the availability of Dealers Act fees and costs is preserved for our review." *Id.*)

Although the Dealership presents Justice Pleicones as writing for a majority on the fees issue, Justice Pleicones himself emphatically disagrees. As explained in more depth in the "Argument" section of this Brief, Justice Pleicones explicitly and repeatedly recognizes that it is the position of "the majority" that "we may award all fees and costs sought on this record." ("I also disagree with the majority's holding that [one] entitled to fees under the Dealers Act need not segregate the amount of attorney time and costs attributable to that claim and recover only these sums.", Op. p.38, 387 S.C. at 64, 691 S.E.2d at 157; "I disagree with the majority that we may award all fees and costs sought on this record." Op. p. 39, 387 S.C. at 65, 691 S.E.2d at 157).

(c) The failure to show title/punitive damages issue. "Unlike the majority," Justice Pleicones found the Dealer's conduct only "mildly reprehensible." Op. p. 36, 387 S.C. at 61, 691 S.E.2d at 156. The only thing that "deeply troubled" him about the Dealership's conduct was "Stokes–Craven's misrepresentation that the truck had not been wrecked." *Id.* And he would not give any weight, in the punitive damages analysis, to the failure to show the title to the customer.

> Finally, given that we have held the trial judge should have granted a directed verdict on the Federal Odometer Act claim, I do not agree that we should rely on evidence of Stokes–Craven's practice of not showing titles to customers, evidence admitted only in an attempt to prove the Odometer Act claim, as probative of reprehensibility.

Id. He therefore would not only reverse the award of Federal Odometer Act damages and the resulting Odometer Act attorney fees, he would declare the Dealership's violation of the Act to be excluded from the punitive damages calculations.

3. Justice Kittredge's Opinion

Justice Kittredge's opinion was joined by the Chief Justice. The opinion was one paragraph. It reads,

> I concur in part and dissent in part. I join the well-written majority opinion of Justice Beatty save two exceptions. Concerning the trial court's failure to grant a directed verdict due to the lack of evidence of fair market value and the election of remedies issue, I join the dissent of Justice Pleicones. Additionally, regarding the reprehensibility prong of the punitive damages analysis, I believe Justice Pleicones is correct in rejecting any reliance on Stokes–Craven's practice of not showing titles to customers because the Federal Odometer Act claim fails as a matter of law. I nevertheless join the majority in affirming the punitive damages award. I believe there was ample evidence of Stokes–Craven's reprehensibility (which I do not view as "mild") beyond its failure to show titles to customers. I otherwise concur with the majority opinion's analysis regarding the punitive damages award.

Op. p. 40, 387 S.C. at 65-66, 691 S.E.2d at 158 (emphasis added).

F. REMAND AND REMITTITUR

Early in its opinion, the Court wrote, "We affirm in part, reverse in part, and remand for entry of judgment consistent with our decision." Op. p. 2, 387 S.C. at 31-32, 691 S.E.2d at 140. The Court reiterated at the end of its "Conclusion" section,

> In terms of Austin's cross-appeal, we hold: (1) he is entitled to the entire amount of his request for attorney's fees and costs under

the South Carolina Dealer's Act; and (2) he is not entitled to prejudgment interest.

Accordingly, we remand this case to the circuit court for entry of judgment consistent with our decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Op. pp. 31-32, 387 S.C. at 59, 691 S.E.2d at 154 (emphasis in original).

The Dealership filed a 44-page petition for rehearing, followed by a supplemental petition for rehearing. The Court granted the motion to supplement, denied the petitions and sent the remittitur to the lower court.

G. PROCEEDINGS ON REMAND

Mr. Austin subsequently filed with the Clarendon County Clerk of Court and served on opposing counsel his Motion to Direct the Clerk of Court to Enter Judgment Consistent with the Remittitur and Motion for Attorneys' Fees. In that motion, and the supporting memorandum of law filed the same day, he asked that Court to:

a) direct the clerk to enter judgment for the damage awards affirmed by the Supreme Court;

b) direct the clerk to enter judgment for the trial-level attorney fees ordered by the Supreme Court;

c) award Mr. Austin appellate attorney fees pursuant to the remand and to the South Carolina Dealer's Act, SC Code Ann. Section 56-15-110(1); and

d) award Mr. Austin appellate attorney fees pursuant to the remand and to the Dealer's Act.

Mr. Austin sent a copy of the motions and memorandum to Judge Hayes, who had presided over the trial, requesting that he schedule a hearing.

Judge Hayes replied via email to all counsel, asking what the basis would be for

him to have jurisdiction to hear the motions, as he was no longer resident in the circuit. After researching the question, Mr. Austin responded that it appeared Judge Hayes had jurisdiction to decide any matter previously raised to him and which required no additional hearing, but that matters that had not specifically been raised to him before the appeal, or matters requiring a hearing, would need to be determined by a judge resident in the circuit. Letter from Mr. Fudenberg to Judge Hayes of June 13, 2012 (citing *Shillito v. City of Spartanburg*, 215 S.C. 83, 54 S.E.2d 521 (1949); and *Coker v. Pilot Life Ins. Co.*, 265 S.C. 260, 217 S.E. 2d 784 (1975)). Mr. Austin suggested the matter be bifurcated, with Judge Hayes deciding the first two questions and that the remaining questions, on which a hearing might be necessary, be sent to a resident judge.

A series of letters and proposed orders ensued from both parties. Judge Hayes issued an order directing the Clerk of Court to enter judgment for Mr. Austin on his awards for damages and trial level fees, and stating that bifurcation as suggested by Mr. Austin was proper. Order dated July 11, 2012 (filed July 16), p.2. He denied Defendant's motion to reconsider via Order filed August 16, 2012. Appellant raised two issues below. Only one is renewed in the present appeal.[5] As it is the focus of the current appeal, it is discussed in the "Argument" section of this Brief.

THE PRESENT APPEAL[6]

The Dealership timely filed its notice of appeal on August 21, 2012.

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[5] Defendant's other argument below was that Mr. Austin's motion was untimely under Rule 60, SCRP.

[6] Although the Appellant here, Defendant below, phrases its arguments in terms of jurisdiction, it is actually requesting a decision on the merits of its underlying position. It maintains, in effect, that the circuit court is without jurisdiction to hear the matter because the Plaintiff's request is lacking on the merits. In the interest of clarity, Mr. Austin points out that the Dealership does not challenge Judge Hayes' decision that it is the circuit rather than himself which has jurisdiction; the Dealership's claim is that neither Judge Hayes nor the circuit has jurisdiction.

ARGUMENT

The Dealership's position is at war with all the opinions in the present case and with the background law of fee-shifting statutes.

> **[W]e hold:** (1) he [Mr. Austin] is entitled to the entire amount of his request for attorney's fees and costs

Op. pp. 31-32, 387 S.C. at 59, 691 S.E.2d at 154 (emphasis in original).

> **I disagree with the majority** that we may award all fees and costs sought on this record

Op. p. 39, 387 S.C. at 65, 691 S.E.2d at 157 (emphasis added).

The question before the Court is, which of the above is the holding? (Or, as Appellant puts it, to the same effect although with different emphasis, "what did Justice Kittredge mean"—to whom did Justice Kittredge give the majority?)

Mr. Austin agrees with the Dealership that this is the question. Below, he explores the question further: to determine what Justice Kittredge meant, there are three sub-questions: what is the most reasonable reading of Justice Kittredge's opinion in light of the context in which it occurs, i.e., the decision of the Court as a whole?; what is the most reasonable reading of Justice Pleicones' opinion?; and, what is the most reasonable reading of Justice Beatty's opinion?

And, although the Court need not reach this question, were the Court to agree with the Dealership on the inter-related questions above, it would have to reach another question. That question is thorny and extremely difficult. It concerns what to do when a majority thinks and explicitly writes that the holding is one thing, but there was,

unbeknownst to the Court, a majority for the opposite position.[7] For that is exactly the position for which the Dealership argues.

The Dealership maintains that "I disagree with the majority" is the holding. Mr. Austin maintains that what comes after "We hold" is the holding.

A. Preliminary Matter

As a preliminary matter, Respondent is not as sure as is Appellant that Judge Hayes did in fact rule on the question of whether the third circuit has jurisdiction. In Mr. Austin's view, Judge Hayes post-remand Order filed July 16 addressed solely the matters over which he thought that he, as the judge who had presided over the trial, retained jurisdiction. His order would have sent the remaining matters to the third circuit in toto, including any question as to whether that circuit had jurisdiction, in light of the Dealership's arguments to the contrary.

However, the Dealership then filed a Motion to Reconsider pursuant to Rule 59, and, simultaneously, provided His Honor with the Dealership's proposed Order denying its own motion. Judge Hayes signed the Order as proposed by the Dealership. Taken together, these arguably constitute a ruling on the matter.[8] Respondent reads Defendant-Appellant's Motion to Reconsider together with Defendant-Appellant's proposed Order

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[7] If the Dealership had been correct in its reading of the opinion–the Dealership is not correct, but if it were –then Justice Pleicones, on behalf of a majority, would be stating "I disagree with the majority." How can a majority disagree with the majority? This has shades of the famous Barber Paradox in logical analysis. *See e.g.*, http://en.wikipedia.org/wiki/Barber_paradox (discussing the paradox); http://plus.maths.org/content/mathematical-mysteries-barbers-paradox ("Mathematical mysteries: The Barber's Paradox"). A decision for the Dealership would necessitate reaching these matters. The Dealership's argument leads to places that a court may choose not to enter.

[8] Defendant's Motion to Reconsider read, in part, "This motion is made on the following grounds: 3) Plaintiffs motion for appellate attorneys' fees is barred as it has already been denied by previous Orders of the Supreme Court." R. p. _. The Order denying that Motion, proposed by the Appellant-Defendant and signed by the trial judge, states, "2. The remaining grounds of Stokes-Craven's Motion to Reconsider are denied." R. p. __.

denying that motion as an attempt to place before this Court the question of whether the Third Circuit has jurisdiction to hear the remaining matters, in order to speed resolution of the case as a whole. The question of Third Circuit jurisdiction would likely have to be addressed by the appellate court in any case, for if the matter were to be decided by the Third Circuit in the first instance, the party whose view was rejected would likely appeal. Thus, in the interest of judicial economy, Respondent has no objection to this Court determining the question of Third Circuit jurisdiction at the present time.

B. Background Law And Its Application To The Facts: The Dealer's Act, Like Similar Statutes, Is To Be Vigorously Enforced To Achieve Its Purpose Of Encouraging Litigation Against Deceptive Dealerships. To Deny Fees Relevant To Achieving That Purpose Would Defeat The Purpose.

A fuller understanding of the question presented here may be gathered by reviewing the special role of provisions that shift fees only in favor of successful plaintiffs in consumer protection statutes, and of the role of attorneys fees on remand.

1. The Dealer's Act Is Remedial In Nature And Designed To Encourage Deceived Customers To Sue The Dealership That Cheated Them.

The fee-shifting provision of the Dealer's Act was enacted because automobile and truck dealers were making it too expensive for deceived customers to successfully bring suit. South Carolina recognizes the sensible proposition that when the legislature shifts fees, it has a purpose in doing so, *see e.g., Layman v. State,* 376 S.C. 434, 442–58, 658 S.E.2d 320. 324–33 (2008); Op. p. 29, 387 S.C. at 57, 691 S.E.2d at 153, and the equally sensible proposition that a statute's language must be read consistently with its purpose, *e.g., Georgia-Carolina Bail Bonds, Inc. v. County of Aiken,* 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003). As the Supreme Court recognized in the first appeal of this matter, "the purpose of the Act [is] to provide buyers a private right of action against

dealers who engage in deceptive practices." Op. p. 29, 387 S.C. at 57, 691 S.E.2d at 153. Fee shifting was necessary to prevent "costly attorney fees" in such cases from "deter[ing]" such suits. *Id.* ("Because costly attorney fees may deter private citizens from bringing a claim under the Dealer's Act, a decision in favor of Austin facilitates the purpose of the Act which is to provide buyers a private right of action against dealers who engage in deceptive practices."). The fee-shifting provision, then, is designed to encourage litigation.

Statutes that shift fees only in favor of successful plaintiffs have a special role. The goal is to advance the public interest, first, by reimbursing an individual customer for the expenses in successfully prosecuting his case, and second and perhaps more importantly, to encourage private individuals to act in effect as private attorney generals on behalf of the larger public. *Taylor v. Medenica*, 331 S.C. 575, 579, 503 S.E.2d 458, 460 (1998) (similar statute) ("Allowing plaintiffs who successfully pursue an action under the UTPA to recover their attorney's fees encourages individuals to pursue litigation to protect the public interest."). *See also Riverside v. Rivera*, 477 U.S. 561, 579–80 (1986) (plurality) (one-sided fee shifting provisions in favor of successful plaintiffs are enacted only when the legislature believes that pre-existing fee arrangements fail to attract sufficient numbers of quality attorneys to pursue the suits to completion); *id.* at 586 (Powell, J., concurring) (same).

The Dealer's Act, and other such statues, thus differ from fee-shifting in other contexts, such as contractual fee-shifting and domestic-case fee-shifting, which are designed to compensate for litigation that would already occur. (Indeed, contractual fee-

shifting may be designed to discourage litigation—exactly the opposite of the purpose of fee-shifting in consumer protection statutes).

To achieve its legislative purpose, the Dealers Act, like other such statutes, requires full compensation for such suits. It is highly remedial. This is evident on the face of the Act.[9] This was recognized by the Supreme Court in the first appeal of the present case. The Act requires the Defendant "to fully compensate Austin for pursuing his statutorily-authorized private right of action under the Dealer's Act, which we believe epitomizes the definition of a remedy." Op. p. 29, 387 S.C. at 57, 691 S.E.2d at 153 (quoting *Black's Law Dictionary* 1163 (5th ed. 1979)). *See also Taylor v. Medenica*, 331 S.C. 575, 503 S.E.2d 458 (affirming award of $500,000 in fees and $24,068 in costs incurred in obtaining an actual damages award of $36,242); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 363 (E.D.N.Y. 2010) (collecting cases) ("'generous fee awards in cases such as this serve the dual purpose of encouraging plaintiffs' attorneys to act as private attorneys general and discouraging wrongdoing'"); *In re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 750–51 (S.D.N.Y. 1985) (collecting additional cases) ("'generous'" awards are appropriate under such statues).

The Dealer's Act is remedial. Its fee-shifting "epitomizes the definition of a remedy." Remedial acts are to be broadly construed to achieve their purposes. "This is a remedial statute, and as such should receive . . . a construction 'giving the words the largest, the fullest, the most extensive meaning of which they are susceptible.'" *Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 577, 38 S.E. 274, 276 (1901) (quoting *Endlich on Int. Stat.*, sec. 107); *South Carolina Dep't of Mental Health v. Hanna*, 270 S.C. 210, 213, 241

[9] Statutory construction is unneeded when the intent of an act is apparent on its face. *Cf. Kennedy v. South Carolina Retirement System*, 345 S.C. 339, 348,549 S.E.2d 243, 247 (2001).

S.E.2d 563, 564 (1978) (similar); *Inabinet v. Royal Exchange Assurance Of London*, 165 S.C. 33, 36; 162 S.E. 599, 600 (1932) ("A statute remedial in nature should be liberally construed in order to accomplish the object sought."); *Ducworth v. Neely*, 31.9 S.C. 158, 163,459 S.E.2d 896, 899 (Ct. App. 1995) (holding that "Because the provision affords the innocent owner a remedy not recognized previously, it should be classified as remedial. Remedial statutes are to be construed liberally in order to effectuate their purpose.").

The Supreme Court decision here is entirely in line with this sensible precedent. The Court vigorously enforced the fee-shifting provision in order to fulfill the goals of the statute. The Court held (a) that the Act and its fee-shifting provision are highly remedial, "epitomiz[ing] the definition of a remedy"; (b) that the fee-shifting provision of the Dealer's Act escapes the doctrine of election of remedies, and thus allows a plaintiff to recover his statutorily-mandated fees and costs even when electing to recover his damages under another cause of action; (c) that the statute requires "full[] compensat[ion]"; and (d) that Mr. Austin was entitled to "his entire request," all of it.

2. The Remedial Nature And Purpose Of The Dealer's Act Would Be Thwarted Were Appellate And Other Fees Excluded.

Courts are to consider the purpose of a fee-shifting provision in determining the proper measure of fees and costs. *See Layman v. State*, 376 S.C. 434, 457–58, 658 S.E.2d 320, 332 (the measure of compensation under a fee shifting statute should "embrace[] the theory of fee shifting embodied in [the] statute"). Here, the legislature's theory was that it was often too expensive to pursue Dealers' Act suits to successful completion even where the Plaintiff could prove the Defendant had violated the statute, and the remedy was to place the entire financial burden of the litigation on the Defendant if the Plaintiff proved his case.

Like other states, South Carolina recognizes the sensible proposition that fee-shifting provisions include all fees reasonably necessary to prosecute the case to completion in the absence of explicit language to the contrary. It recognizes the sensible proposition that the term "attorneys' fees" includes appellate and other fees. *Parker v. Shecut,* 359 S.C. 143, 152, 597 S.E.2d 793, 799 (2004) (appellate fees properly awarded under a statute that did not explicitly mandate recovery of such fees); *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 544, 405 S.E.2d 830, 833 (1991) (reversible error to refuse to award such fees under statute that did not explicitly mandate appellate fees). This is so even under a contractual fee-provision. *Renaissance Enters. v. Ocean Resorts*, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) (under a contractual fee-shifting provision, there is "no reason" that such a fee would be excluded), *rev'd in part on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999).

These fees include post-appellate fees. *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 438 S.E.2d 248 (1993) (emphasis added) (it was reversible error to decline to award "appellate and post-appellate" fees under such a statute). These fees include fees incurred in litigating the entitlement to fees. *McDowell,* 304 S.C. 539, 405 S.E.2d 830 (reversing trial court which had refused to award fees incurred in seeking fees); *Layman,* 376 S.C. at 463–65 & n.3, 658 S.E.2d at 335–37 &n.3 (2008)) (wherein the Supreme Court first awarded $352,402.00 in combined fees for the entire litigation on the merits and one stage of litigation concerning the fee award; awarded an additional $471,098.50 in fees for a second stage of litigation that concerned solely the proper measure and amount of attorney fees; and increased each of these awards by 25% to ensure full compensation). It would make no sense to provide fees to compensate

attorneys for their work, on the one hand, only to then require them to work without compensation to obtain those fees, on the other.[10]

Mr. Austin is, if anything, more entitled than were the plaintiffs in *McDowell, Muller, Parker,* and *Layman* to recover appellate and post-appellate fees, due to the mandatory language of the provision here (the plaintiff "shall recover" under this statute, whereas whether to award fees was left to the court's discretion under the other statutes).

3. Attorney Fees For Appellate And Post-Appellate Work Are To Be Awarded By The Lower Court On Remand.

Attorney fees, including trial-level fees, appellate fees, and post-appellate fees, are to be awarded by the lower court on remand. It is reversible error to refuse to award them. *Parker v. Shecut,* 359 S.C. 143, 152, 597 S.E.2d 793, 799 (2004) (citation and footnote omitted) (the master properly awarded appellate fees on remand; "When the Supreme Court remits a case to the circuit court, the circuit court 'acquires jurisdiction to enforce the judgment and take any action consistent with the Supreme Court ruling.' Additionally, whether respondents are entitled to appellate attorney's fees pursuant to a statute is a determination for the circuit court."); *Taylor v. Medenica*, 332 S.C. 324, 325, 504 S .E.2d 590, 591 (1998),

> Whether respondents are entitled to appellate attorneys' fees pursuant to this statute and if so, in what amount, are questions to be determined by the circuit court. Accordingly, respondents' request for modification of the attorneys' fees set forth in Rule 222 is denied without prejudice to their right to seek additional attorneys' fees pursuant to Section 39-5-140(a) in the circuit court.

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[10] Other jurisdictions also follow this sensible rule. *E.g., Parker v. I&F Insulation Co.*, 730 N.E.2d 972, 975 (Ohio 2000) (quotation marks omitted) ("The work of the attorney on appeal is part of the legal process of achieving and maintaining the judgment for the consumer. Disallowing attorney fees for appellate work undermines the purpose of the Act."). This is especially so under a fee-shifting provision designed to "transfer the costs of litigation" to those who violate the statute. *Balark v. Curtin*, 655 F.2d 798, 803 (7th Cir. 1981) (quotation marks omitted) (explaining that to deny such fees would "undermine[]" the statute).

McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 543-44, 405 S.E.2d 830, 833 (1991) (footnote omitted) (reversing trial court which had refused to award such fees),

> Third, the trial judge held appellant was entitled only to $750 for the appeal under Supreme Court Rule 38. Rule 38, however, does not preempt an award of attorney's fees to which one is otherwise entitled. We reverse the trial judge's ruling and hold appellant is entitled to attorney's fees under § 15-77-300 for fees incurred on appeal.
>
> Finally, appellant is entitled to attorney's fees under § 15-77-300 for this litigation and appeal seeking to secure such fees. We remand to the circuit court for a final determination of the total amount of the fee to be awarded according to the guidelines set forth herein.

Brackenbrook North Charleston, LP v. County of Charleston, 366 S.C. 503, 508, 623 S.E.2d 91, 92 (2005),

> The circuit court erred in finding it lacked jurisdiction to consider Appellants' statutory attorneys' fees request. Jurisdiction over the case vests in the circuit court upon receipt of the remittitur from the appellate court. *See e.g. Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 559 S.E.2d 348 (Ct. App. 2001) (jurisdiction of the circuit court to hear matters related to case after the issuance of remittitur is well-established).

Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 385, 559 S.E.2d 348, 352-53 (Ct. App. 2001) (emphasis added),

> The jurisdiction of the circuit court to hear matters after issuance of the remittitur is well established. For instance, once the remittitur is issued from an appellate court, the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling. *See Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 414-15, 438 S.E.2d 248, 250 (1993). In *Moore v. North American Van Lines*, 319 S.C. 446, 462 S.E.2d 275 (1995), the South Carolina Supreme Court held that despite the issuance of the remittitur and the fact that the case was not expressly "remanded" to the circuit court, the circuit court was still vested with jurisdiction to hear the appellant's motion for restitution. *Moore, 319 S.C. at 448, 462 S.E.2d at 276.* Further, circuit courts are vested

with jurisdiction to hear motions for statutory attorney fees and trial costs after the remittitur has been issued.

Martin, id. at 384, 559 S.E.2d at 351 ("Although Rule 222(d) provides that a party seeking costs must file a motion with the appellate court within fifteen days of the issuance of the remittitur, recovery under the rule is clearly limited to costs incurred in pursuing the appeal, such as the filing fee, the cost of obtaining the transcript, the cost of printing the Record on Appeal and final briefs, and limited attorney fees.")

The law in South Carolina is clear: even without a remand of any sort, the circuit has jurisdiction on remand to award appellate and post-appellate attorney fees and costs. Even more so when the appellate court expressly remands the case.

4. Application Of The Law To The Facts: The Present Case Epitomizes the Situation For Which The Dealer's Act Was Designed.

Mr. Austin is not the sort to sue at the drop of a hat. Even after catching the Dealership red-handed forging his name to a federally mandated "as-is" form, after discovering the Dealership had lied to him three times about whether the truck had a warranty, after discovering the Dealership had misled him as to who previously owned the truck, and after discovering the truck had been wrecked, he asked the Dealership simply to take back the truck and give back his money.

Three times he asked; three times he was refused.

Still Mr. Austin did not sue. He contacted three organizations he hoped would be able to convince the Dealership to undo the sale: The Ford Motor Co., the South Carolina Department of Consumer Affairs; and the South Carolina Department of Motor Vehicles. None was able to rectify the matter.

After trying six different ways to resolve the matter without getting lawyers involved, Mr. Austin finally engaged an attorney. John Polito, Esq. wrote the Dealership, laying out the case against the Dealership in detail, and offering to settle the entire matter if the Dealership would simply undo the sale and pay $1,500.00 in attorney fees and $100.00 in expert witness fees.

Still the Dealership would not settle. The case was referred to Mr. Moskos, an experienced auto fraud litigator. He filed suit. Still the Dealership neither settled nor offered to settle. Rather, its discovery responses insisted that it had done nothing wrong. Indeed, it claimed that Mr. Austin had received what he had paid for. At trial, despite overwhelming evidence to the contrary, the Dealership continued to deny that it had done anything wrong.[11] It insisted it had not known the truck had been wrecked.[12] It refused to admit the obvious forgery.

After the jury reached its verdicts, the Dealership still refused to accept responsibility. It should not have to pay a dime, it argued, appealing the verdicts, the evidence, the experts, the amounts, etc.

After the Supreme Court affirmed the jury's award, including punitive damages, the Dealership still maintained that it should not pay a dime, filing a 44-page Petition for Rehearing, and then a Supplemental Petition.

But, it now says, forget all that. It should not have to pay for fees Mr. Austin incurred in the post-trial processes. Its position is that a recalcitrant defendant may defeat

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[11] R. on 1st appeal, p. 773:13-19:

[12] The Dealership maintained at trial that it did not know the truck had been wrecked. It swore on the stand that it had thoroughly inspected the truck prior to putting it on the sales lot, although the jury could see for itself from photographs provided to it that any competent inspection would have revealed the prior wreck. *The former owner of the truck testified that he told the Dealership the truck had been wrecked.*

the Act's purpose of compensating for attorney fees simply by continuing the fight after a jury finds it liable for violating the Act.

This is exactly the sort of Defendant, exactly the sort of Plaintiff, exactly the sort of facts, for which the Dealer's Act was designed, and exactly the sort of extensive defense, requiring extensive time on behalf of plaintiff's attorneys, for which the fee provision was designed. Against this backdrop, all the Justices declared that the statute mandates fees be awarded to one who proves a Dealer's Act violation, even if he decides to recover his damages under another cause of action.

C. The Dealership's Position Is Directly At Odds With The Supreme Court's.

The opinions of the Justices are presented in part E of the Statement of Procedural Facts section above. Mr. Austin incorporates by reference the exposition there..

1. Preliminary Matter: Other Authorities Read the Opinion Directly Opposite to the Dealership.

If the Court wishes to consider the reading of independent observers and analysts as evidence of how a reasonable person would read the opinion, all the independent authorities of which Mr. Austin is aware support Mr. Austin's reading of the case. None support the Dealership's. These authorities include South Carolina publications such as the South Carolina Bar E-Blast and the South Carolina Lawyers Weekly, and national analysts such as LEXIS and Westlaw. They are collected in the Record, pp. __.

The sole outlier was Westlaw. But no longer. Westlaw's initial report of the case was similar to the Dealership's. After Mr. Austin's counsel emailed a letter to Westlaw pointing out the flaws in that analysis, Westlaw reversed its analysis. The letter, the relevant pages from the former and current Westlaw pages, and the relevant pages from

the other authorities may be found at pages __ -__ of the Record.

2. The Dealership's Reading Conflicts with Justice Beatty's Opinion.

As noted above, Justice Beatty wrote, "we hold: (1) he [Mr. Austin] is entitled to the entire amount of his request for attorney's fees and costs . . . . ." Op. p. 31, 387 S.C. at 59, 691 S.E. 2d at 154 (emphasis added).

If more were needed—Mr. Austin does not think more is needed, but if it were—additional language from the principal opinion includes the following: "Given our conclusion that Austin can recover attorney's fees and costs under the Dealer's Act, the question becomes whether he should be awarded the entire amount of his request or should the amount be limited to the fees incurred in establishing his claim under the Dealer's Act." Op. p. 30, 387 S.C. at 57, 691 S.E. 2d at 153 (emphasis added).

3. The Dealership's Reading Conflicts with Justice Pleicones' Opinion.

Although the Dealership presents Justice Pleicones as writing for a majority on the fees issue, Justice Pleicones himself emphatically disagrees. "I do not believe this [attorney fees] issue is preserved for our consideration.", Op. p. 37, 387 S.C. at 64, 691 S.E. 2d at 157 (Pleicones, J., dissenting in part) (emphasis added); "In my view, his claim for attorneys' fees and costs dies," Op. p. 38, 387 S.C. at 64, 691 S.E. 2d at 157; "In my view, this issue is not preserved.," *id*; "I also disagree with the majority's holding that [one] entitled to fees under the Dealers Act need not segregate the amount of attorney time and costs attributable to that claim and recover only these sums.", *id.*; "I disagree with the majority that we may award all fees and costs sought on this record." Op. p. 39, 387 S.C. at 65, 691 S.E. 2d at 157.

Thus, Justice Pleicones explicitly recognizes that it is the position of "the majority" that "we may award all fees and costs sought on this record." He similarly recognizes that "the majority" have concluded "that we may award all fees and costs sought on this record." By employing the first-person singular, he further recognizes he is in dissent on this question. *Compare* Justice Pleicones' repeated and consistent use of the first-person singular in discussing the fees issues *with* the principal opinion's repeated and consistent use of the first-person plural in discussing the same issues. Pleicones writes, "I do not believe . . . ."; "In my view, ...,"; "In my view," (repeating the phrase); "I disagree with the majority," on this issue; "I also disagree with the majority's holding . . . .," *id.* p. 38. Contrast the foregoing with "our conclusion;" "we find;"[13] and "we hold", as stated in the majority opinion.

4. The Dealership Contradicts Itself As It Addresses Justice Kittredge's Opinion.

The conflict between the Dealership's position, on the one hand, and the principal opinion's "we hold" and Justice Pleicones' recognition that he is in dissent, on the other hand, would suffice to resolve the matter even had the Dealership established any genuine ambiguity as to Justice Kittredge's opinion. But it cannot do so.

The lack of evidence of fair market value/election of remedies is the issue Justice Kittredge was discussing when he wrote,

> I join the well-written majority opinion of Justice Beatty save two exceptions. [1] Concerning the trial court's failure to grant a directed verdict due to the lack of evidence of fair market value and the election of remedies issue, I join the dissent of Justice Pleicones.

[13] Op. p. 30, 387 S.C. at 57, 691 S.E. 2d at 153 (emphasis added),

> Under the specific facts of this case, we find 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.

> [2] Additionally, regarding the reprehensibility prong of the punitive damages analysis, I believe Justice Pleicones is correct . . . .

Op. p. 39, 387 S.C. at 65-66, 691 S.E.2d at 158 (Kittredge, J., concurring in part and dissenting in part).

As an initial observation, Justice Kittredge placed the election of remedies issues about which he wrote squarely in the context of the fair market value issue.

Justice Kittredge's opinion never references attorney fees. Never—not once.

Two exceptions. Justice Kittredge joins Justice Beatty "save two exceptions" – not save one exception, not save three exceptions. The Dealership cannot meet this initial step of presenting a reading that allows two exceptions, no more, no less.

The Dealership's initial argument to Judge Hayes would have erroneously read this as three exceptions: (1) "the trial court's failure to grant a directed verdict due to the lack of evidence of fair market value;" (2) "the election of remedies issue;" and (3) "the reprehensibility prong of the punitive damages analysis."

The Dealership argues here, as it argued below, that the "election of remedies" matter mentioned by Justice Kittredge must be the attorney fees/election of remedies matter because, in the Dealership's view, Justice Pleicones' opinion does not discuss "election of remedies" in the context of the fair market value matter. *See* Br. of Appellant at 5-6 (arguing that "Justice Pleicones' opinion does not discuss election of remedies with regard to fair market value."). This is not accurate nor sufficient.

As noted above, Justice Pleicones wrote, Op., pp. 33–34 & n.12, 387 S.C. at 61-62 & n.12, 691 S.E.2d at 155 & n.12,

> I agree with Austin that the issue whether Stokes-Craven was entitled to a directed verdict because Austin offered no evidence of fair market value is not preserved . . . . Had the issue been properly

> preserved, however, I would agree that Austin failed to present any competent evidence of the truck's fair market value . . . .
>
> . . . .
>
> I do not agree, however, with the suggestion that Stokes-Craven's refusal to allow Austin's request to return the truck for a full refund permits Austin to seek rescission damages in a breach of contract suit. In my view, Stokes-Craven was under no obligation to honor Austin's request.

Whether he used the exact name of the doctrine is irrelevant, as he clearly responded to the issue.[14]

The Dealership's argument would be insufficient even had it had been accurate. The Dealership retains the problem that it reads Justice Kittredge's opinion as having three exceptions, rather than two; and it does nothing to resolve the conflict between the Dealership's reading, on the one hand, and Justice Pleicones' and Justice Beatty's opinions, which recognize Beatty's as the majority opinion on this issue, on the other.

In the current appeal, the Dealership attempts to resolve the former problem via an argument that it did not raise to Judge Hayes. Mr. Austin would maintain that the argument therefore should not be considered, pursuant to *Home Med. Sys. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)) (emphasis is the Home Med. Court's) (error preservation rules are "'meant to enable the lower court to rule properly after it has considered **all** relevant facts, law, and arguments.'")

The Dealership's argument is that concurrences in result do not count as "exceptions."[15] Mr. Austin disagrees that a Justice who concurs in another jurist's

[14] Justice Beatty had written that the Dealership's refusal to allow Mr. Austin to elect the remedy of rescission should play a role the analysis of the question of the sufficiency of the evidence presented to establish the fair market value of the vehicle. *See* pages __, above.

opinion "in result only" has therefore joined the opinion. There is another problem with the Dealership's argument. If one assumes, for the sake of argument, that concurrences in result do not count as "exceptions," one ends up with Justice Kittredge having only one exception, not two exceptions. On the fair market value issue, the Court was unanimous in result. There was a difference in analysis: Beatty, joined by Waller, held against the Dealership on grounds that the Dealership's argument was lacking on the merits, as Mr. Austin had presented sufficient evidence of the fair market value of the truck. Pleicones, joined by Kittredge and Toal, held against the Dealership on grounds that the Dealership's fair market value argument was not preserved.

Thus, to accept the Dealership's claim that only differences in result count as exceptions would be to leave Kittredge with only one exception. On both the fair market value issue and on the punitive damages issue, Kittredge agreed with Beatty in result. That would leave only an election of remedies matter as the sole exception: yet Kittredge said he had two exceptions.

No matter how the Dealership tries to work it, its argument collapses. If concurrences in result count as "exceptions," the Dealership's reading makes Kittredge have three exceptions. If concurrences in result do not count as "exceptions," the Dealership leaves Justice Kittredge with only one exception.

The Dealership's argument collapses internally. And that is even without considering that Beatty, Waller, and Pleicones quite clearly say that it is Beatty who commanded a majority on the issue.

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[15] As put by the Dealership, Appellant's Br. at 5, Justice Kittredge "specifically states that he joins the majority with regard to punitive damages." *See also id.* (quoting Justice Kittredge's opinion) ("Justice Kittredge does not join Justice Pleicones' opinion with regard to punitive damages. Justice Kittredge specifically states, 'I nevertheless join the majority in affirming the punitive damages award.'")

5. Reading the three opinions as a whole.

The Dealership would make an absurdity of every opinion issued in this case. The Dealership had Justice Kittredge joining Beatty save three exceptions, and now has Justice Kittredge joining Justice Beatty save one exception, whereas Justice Kittredge wrote, "two exceptions." The Dealership presents Justice Pleicones as authoring the majority opinion on fees, whereas Justice Pleicones wrote that he was disagreeing with the majority opinion on fees. It presents Justice Beatty's "we hold" as the minority position.

It is more reasonable to conclude that the Justices mean what they wrote: Justice Kittredge's "two exceptions" means "two exceptions," not "three exceptions" nor "one exception;" Justice Pleicones' "I disagree with the majority" means he disagrees with the majority, not "I have a majority for the opposite view;" Justice Beatty's "we hold" means "we hold," not "I dissent."

The Dealership's position is at its core a claim that no one at the Supreme Court bothered to count the votes. The position is without merit.[16]

[16] It is understandable that the Dealership initially thought it had an issue here. The opinion is lengthy indeed. Justice Beatty's attorney fees/election of remedies discussion comes far later than his fair market value/election of remedies discussion; by the time a depleted reader reaches the end, he may have forgotten about the election-between-rescission-and-damages issue discussed by Justice Beatty. Thus, it is easily understandable that one might think at first, "Justice Beatty says he has a majority; Pleicones says he dissents; but by my math, Justice Pleicones has the majority. How can this be?" Or, "It's an impossible dilemma. Justice Pleicones, on behalf of the majority, 'disagree[s] with the majority.'" However, once one recalls that there was another election of remedies issue in the case, the dilemma vanishes.

This was demonstrated by Westlaw, which initially reported the case in line with the Dealership's analysis. Once the matter was more thoroughly analyzed via the letter Mr. Austin's counsel sent to Westlaw, Westlaw changed its position to accurately reflect that the holding is what the Court said it is. R. p. __. One wishes the Dealership had done the same.

D. Additional Considerations

(1) Even Were Appellant Correct as to Trial-level Fees and Costs, That Would Not Affect Mr. Austin's Right to Appellate and Post-appellate Fees. The Dealership's position is that Justice Pleicones wrote for a majority on the issue of fees and costs. Justice Pleicones' position is that plaintiffs such as Mr. Austin are entitled to such fees and costs, but that Mr. Austin failed to obtain a ruling on his request for trial-level fees and costs. Assuming, strictly for the purposes of argument, that Appellant is correct in stating that Justice Pleicones commanded a majority regarding fees–Appellant is not correct, Justice Pleicones did not command a majority on any fees issue–but if Justice Pleicones did have a majority on the issue, the holding of the Supreme Court would be that Mr. Austin is not to receive his trial-level fees and costs because he did not receive a ruling on them. More precisely, the holding would be that Mr. Austin is not to receive his fees because he did not receive a ruling on them via filing a Rule 59 motion back in 2006 when the circuit judge failed to rule on his request.

Obviously, his failure to ask or to re-ask for trial level fees and costs has no bearing on his present request for his appellate and post-appellate fees. On remand, Mr. Austin has quite clearly asked for his appellate and post-appellate fees. He has obtained an order from Judge Hayes referring the matter to the Third Circuit. And were the Third Circuit judge to deny those fees without a clear ruling on the request, Mr. Austin would file a Rule 59 request.

In such a situation, Mr. Austin would be entitled to his appellate and post-appellate fees both (A) under the plain language of the statute, and the case law cited above concerning appellate and post-appellate fees; and (B) under the unanimous opinion

of the Supreme Court that plaintiffs such as Mr. Austin are entitled to their fees and costs, if only they properly ask for them and receive a ruling thereon.

(2) The Supreme Court Did Not Rule that Mr. Austin Is Unentitled to His Appellate Fees, and Even If It Had, That Would Not Bar Post-Appellate Fees. The Dealership errs in arguing that the Supreme Court ruled that Mr. Austin is not entitled to his appellate fees by denying his Rule 222 application. The Supreme Court rarely grants Rule 222 fees and costs where, as here, each party wins on half the appealed issues and loses on half of the appealed issues.[17] Here, Mr. Austin was successful in retaining the damages awards on the related fraud/Dealer's Act/Constructive Fraud/Negligence causes of action and on his request for fees pursuant to the Dealer's Act; the Dealership was successful on its Federal Odometer Act issue and on Mr. Austin's pre-judgment interest issue.[18] The Court thus denied Mr. Austin's request. Mr. Austin also asked the Supreme Court to declare the present case a "most extraordinary" situation so as to allow additional costs, and to interpret "additional costs" as including fees, rather than "costs" as more tightly defined to mean expenses and the like. As stated in Rule 222(b),

> **(b) Costs Allowed.** The party entitled to recover costs under this rule may, to the extent the party actually incurred these costs, recover the following: (1) the filing fee paid under Rule 203(d); (2) the cost of the court reporter's transcript; (3) premiums paid for costs of supersedeas bonds or other bonds obtained to preserve rights pending appeal; (4) the cost of printing the Record on Appeal under Rule 209; and (5) the cost of printing the party's final brief(s) under Rule 210. In addition, the party shall be entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court [currently,

[17] Having denied the request for the standard Rule 222 cost of $1,000.00, the Supreme Court was obviously not going to award fees in excess of that amount.

[18] Put another way, the Dealership prevailed on one of the two causes of action it challenged on appeal (Odometer Act) and was unsuccessful on the other (fraud); Mr. Austin similarly prevailed on one of the two issues he raised in his appeal (Dealer's Act fees) and was unsuccessful on the other (pre-judgment interest).

> $1,000.00]. The allowance of additional costs will generally not be allowed except in the most extraordinary of circumstances.

Rule 222(b), SCACR (footnote omitted). The Dealership interprets the Court's standard one-sentence order ("Respondent/Appellant's Motion for Costs and Attorney's Fees is denied") as ruling that Mr. Austin may not receive any appellate fees. This is error. Defendant/Appellant advances the position that a motion for Rule 222 costs, followed by a *pro forma* denial, amounts to a ruling that one is not entitled to statutory attorney fees. Plaintiff's motion was via the standard form the Supreme Court has created for costs, Form SCACRIIFORM17 (available at http://www.judicial.state.sc.us/courtReg/Part2AppendixC.cfm). The motion states, "The Appellate Court is requested to tax the following costs against Stokes-Craven Holding Corp. d/b/a Stokes Craven Ford." The denial simply means the appellate fees are not taxable as *costs* via the appellate court. It says nothing about whether the appellate fees are awardable by the lower court pursuant to the statute. *See, e.g., Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 384, 559 S.E.2d 348, 351 (Ct. App. 2001),

> Although Rule 222(d) provides that a party seeking costs must file a motion with the appellate court within fifteen days of the issuance of the remittitur, recovery under the rule is clearly limited to costs incurred in pursuing the appeal, such as the filing fee, the cost of obtaining the transcript, the cost of printing the Record on Appeal and final briefs, and limited attorney fees.

See also McDowell, 304 S.C. at 533 &n. 2, 405 S.E.2d at 833 & n.2, and other cases cited in the discussion of background law above (pp. _-_).

The Supreme Court obviously did not believe that the fairly common occurrence that the case was prosecuted pursuant to a statute allowing fees constituted a "most extraordinary circumstance." As explained above, pp. _ -_, the literal language of the statute, the law of other jurisdictions, and the law of South Carolina all require appellate

and post-appellate fees under a statute that provides generally for fees, and even more so under a statute such as the present statute that says fees "shall" be awarded, rather than that fees may be awarded in the discretion of the court. The Dealership asks this Court to conclude that the Supreme Court issued an order in conflict with the law of South Carolina and of other jurisdictions.[19]

The Dealership asks this Court to conclude that the Supreme Court issued an order in conflict with its own published decision in the very same case. Here, the Supreme Court explained that "costly attorney fees may deter private citizens from bringing a claim under the Dealer's Act;" "the purpose of the Act [is] to provide buyers a private right of action."; and the purpose of the fee-shifting is to prevent costly fees from deterring suits. Op. p. 29, 387 S.C. at 56-57, 691 S.E.2d at 153. It further explained that "to fully compensate Austin for pursuing his statutorily-authorized private right of action under the Dealer's Act . . . epitomizes the definition of a remedy." Op. p. 29, 387 S.C. at 57, 691 S.E.2d at 153 (emphasis added). It further held that although the attorney's timesheets had not separated time spent on the Dealer's Act claim from time spent on other claims, he was entitled to the entire amount of his request, as it would be difficult to separate the hours. Moreover, "to award Austin his claim in its entirety would be consistent with the precedent of this Court. *Id.* (citing *Taylor v. Nix*, 307 S.C. 551, 557,

[19] Judge Lee awarded Mr. Moskos his statutory appellate fees in similar circumstances. *Wright v. Craft*, 03-CP-40-5556, Order filed May 16, 2009 (*Enclosure* 7). There, Mr. Moskos had prevailed on a cause of action under a statute containing an attorney fees provision similar to the Dealer's Act (the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140). He then requested that the appellate court award him $24,832.21 in appellate fees and costs. The Court of Appeals, by order dated April 9, 2007 (*Enclosure 8*) largely denied his request, awarding only $1,602.91. That amount represented the $1,000.00 in Rule 222 fees, and $602.91 in expenses. It, thus, denied $23,229.30 of the $24,832.21 requested. Judge Lee had no problem following the statute and awarding Mr. Moskos his remaining appellate fees pursuant to the statute.

416 S.E.2d 619, 622 (1992)).[20] In sum, the Supreme Court held that the Dealer's Act is a remedial statute—epitomizing the definition of a remedy—designed to make such actions more affordable and to "fully compensate" for bringing the action. The Dealership asks this Court to conclude that the Supreme Court took all that back with its single-sentence order on the Rule 222 motion. Why would the Supreme Court do such a thing?[21] The Dealership offers no reason, other than its already-discussed hypothesis that no one at the Supreme Court bothered to count the votes.

The circuit has its directions in the remittitur from the Supreme Court. That is to fully compensate—not partially compensate—Mr. Austin for bringing his statutorily-authorized private right of action under the Dealer's Act. Were there any doubt, the remedial nature of the Act would require the same. Judge Hayes did not err in sending the case on for a resident judge to determine the quantity of appellate fees to award.

Even if the Supreme Court had denied Mr. Austin appellate fees in denying his

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[20] The Supreme Court remanded this case to the circuit court for entry of judgment consistent with its decision. "We affirm in part, reverse in part, and remand for entry of judgment *consistent with our decision.*" *Austin*, 387 S.C., at 31-32, 691 S.E.2d, at 140 (emphasis added). "Accordingly, we remand this case to the circuit court *for entry of judgment consistent with our decision.*" *Id.*, at 59, 691 S.E.2d, at 154 (emphasis added). (The Court further stated, **"AFFIRMED IN PART, REVERSED IN PART, AND REMANDED."** *Id.* (emphasis in original)).

[21] At the most, the Dealership suggests a conflict between the directions of the remittitur and the Dealership's reading of the order on fees. If there were such a conflict, the remittitur takes precedence. The remittitur is "'the official mode of communicating the judgment of appellate court to lower court . . . .'" *Brackenbrook N. Charleston, LP v. County of Charleston*, 366 S.C. 503, 508-09, 623 S.E.2d 91, 93 (2005) (quoting BLACK'S LAW DICTIONARY 867 (5th Ed. 1978)).

The July order is not part of the remittitur.

The remittitur was addressed to the lower court. The parties were merely sent a copy. The order on Rule 222 fees, in contrast, was sent to the attorneys. The lower court was not even sent a copy. Were there any doubt as to which to follow, the lower court should follow the Supreme Court's direct command, rather than the supposed implications of a document not even directed to it, and enter judgment consistent with the Supreme Court's decision.

Moreover, the plain language of the statute comports with the remittitur, and not with the Dealership's reading of the Rule 222 order.

Rule 222 motion, it did not rule on his later request for post-appellate fees.[22] The Dealership does not claim that the Supreme Court denied Mr. Austin post-appellate fees. Perhaps the Dealership assumes that without appellate-level fees Mr. Austin cannot obtain post-appellate fees. The Dealership errs. Since the Supreme Court did not and could not have denied Mr. Austin's request for post-appellate fees, and since consistent case law, and even the Court's writings in the present case, demand post-appellate fees, Mr. Austin is entitled to those fees.

These post-appellate fees in large part concern responding to the Dealership's argument that Justice Pleicones' opinion was the opinion of the Court on fees issues,[23] and interactions with the Dealership's current counsel at his request, regarding the Dealership's case against its trial attorney, as well as responding to subpoenas in that case. It also involves responding to the Dealership's claim that because Mr. Austin at the Dealership's request, held off on moving forward to collect his judgments, he had waived his right to receive any funds at all.

(3) The Dealership's argument regarding *Taylor v. Nix* is multiply flawed. First, the Dealership errs in maintaining that Justice Pleicones commanded a majority for his view regarding the application of *Taylor v. Nix,* 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992). The Dealership bases its argument here on its argument elsewhere, that

[22] The Dealership's brief misleading lumps together the appellate and post-appellate fees into a single figure, which it erroneously labels "appellate attorney fees." The appellate and post-appellate stages were distinct stages in this litigation, with distinct problems and tasks. As explained in depth in Mr. Austin's memorandum filed with the lower court, the fees are amply justified. At any rate, the question of the quantum of fees was not raised as an Issue in this this appeal. The Court should allow the circuit court to make that initial determination.

[23] Lest the Dealership complain that fees-about-fees are not recoverable, *see Layman v. State,* 376 S.C. 434, 463–65 & n.3, 658 S.E.2d 320, 335–37 &n.3 (2008) (awarding $352,402.00 in fees for a stage of litigation that in part concerned attorney fees, and awarding $471,098.50 in fees for a stage of litigation that concerned "only . . . the litigation of attorneys' fees"; then increasing each award by 25% to ensure full compensation); *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 544, 405 S.E.2d 830, 833 (1991) (reversible error to refuse to award such fees).

Justice Pleicones commanded a majority on fees issues. As discussed above at some length, Justice Pleicones did not command a majority on any aspect of the attorneys fees issue.

Second, the Dealership misunderstands *Taylor v. Nix*, and misunderstands the record. The Dealership claims that Mr. Austin's entire motion for appellate fees should be denied due to what the Dealership claims is a failure to comply with the requirement in *Taylor v. Nix* that the parties "produce an itemized affidavit of their fees that they believe are related to the statutory claim." Mr. Austin's counsel did provide itemized affidavits, and specifically stated that the hours listed were limited to those that they believe are related to the statutory claim. Fudenberg Aff., Fudenberg Appellate Timesheets, p.1; Fudenberg post-appellate time-sheets, p.1.; Moskos Aff., Moskos appell. timesheets, Moskos post-app. timesheets. The Dealership complains that Mr. Austin sought fees for his work on the attorney fees/election of remedies issue. This issue involved attorney fees pursuant to the statute and its fee-shifting provision. This is related to the statutory claim.

Mr. Austin maintains he provided sufficient evidence of work related to the statutory claim.

Similarly, the Dealership misunderstands the remedy if a *Taylor v. Nix* violation had occurred. The remedy is not to dismiss the claim but to remand with instructions to develop the record regarding fees so as to enable a determination of the proper amount to be awarded. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993); *Rowell v. Whisnant*, 360 S.C. 181, 186, 600 S.E.2d 96, 99 (Ct. App. 2004); *Griffith v. Griffith*, 332

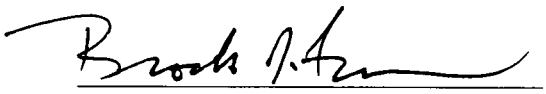
S.C. 630, 646, 506 S.E.2d 526, 535 (Ct. App. 1998).[24]

Conclusion

The Dealer's Act fee-shifting provision "epitomizes the definition of a remedy." It is to be vigorously applied. Granting Mr. Austin compensation for the entirety of his attorneys' work is not atypical; it is both mandated by the Supreme Court's remand in the present case and consistent with precedent. For the reasons stated above, and such other reasons as may be apparent to the Court, Mr. Austin asks the Court to affirm Judge Hayes' order, and return the case to the third circuit for a determination of the fees.

[24] Even Justice Pleicones recognized this. In the midst of his discussion of what he sees as the failure to comply with *Taylor v. Nix,* he writes, "Overlooking for the moment that the issue is not preserved, I disagree with the majority that we may award *all* fees and costs sought on this record, given the applicable law." Op. p. 39, 387 S.C. at 65, 691 S.E.2d at 157 (emphasis added). Justice Pleicones did not write that the fee application should be denied even if the issue was preserved; he wrote that the Court should not be awarding "the entire amount of his request."

Respectfully Submitted,



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