THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Clarendon County
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
W. Jeffrey Young, Circuit Court Judge

Case No. 2004-CP-14-135

DONALD C. AUSTIN,

Respondent,

v.

STOKES-CRAVEN HOLDING CORP.,
d/b/a/ STOKES-CRAVEN FORD

Appellant.

APPELLANT'S MOTION TO CONSOLIDATE APPEALS AND TO CERTIFY FOR IMMEDIATE AND EXPEDITED SUPREME COURT REVIEW

*****EXPEDITED TREATMENT REQUESTED*****

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

INTRODUCTION

Two years after this Court issued its decision in this very same case, the Respondent, Donald C. Austin, filed a single motion in Clarendon County requesting trial, appellate, and post-appellate attorneys' fees. In total, the motion sought an award of attorneys' fees well over $200,000. Austin filed the motion even though this Court had, via its March 8, 2010 decision in this case, already rejected the basis for recovery of those fees (i.e., his claim under the South Carolina Dealer's Act) and, by separate order, expressly denied his motion for costs and attorneys' fees on appeal. The Court will recall that, in 2010, Austin moved for appellate fees of more than $115,000, which the Court denied.

Austin then bifurcated his motion, arguing that the trial judge, the Honorable John C. Hayes, III, should hear only the motion for trial-level fees and a judge in Clarendon County should hear the appellate and post-appellate fee issue. Even though, this Court had (by virtue of a 3 to 2 decision on the issue) already determined that Austin's claim for attorney's fees under the Dealer's Act had "die[d]," Judge Hayes nonetheless awarded Austin nearly $50,000 in trial attorney's fees under the Dealer's Act. The Appellant, Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford, appealed, and that appeal is currently pending before the Court of Appeals.

In light of Stokes-Craven's appeal, Austin then objected to a Clarendon County Judge ruling on the remainder of his own motion (i.e., that part seeking appellate and post-appellate fees), taking the position that Stokes-Craven's appeal from the award of trial fees deprived the circuit court of jurisdiction to hear the motion. The Honorable W.

Jeffrey Young agreed and entered an order to that effect, declining to rule upon the portion of Austin's motion for appellate and post-appellate fees. Out of an abundance of caution and, candidly, at a loss as to how Austin has been allowed to resurrect the issue of his entitlement to attorneys' fees under the Dealer's Act—and in such incredible amounts (he now seeks more than $100,000 in post-appellate fees—after this Court already held that such a claim was dead (and even expressly rejected, *in toto*, Austin's prior appellate-fee request), Stokes-Craven has appealed Judge Young's order, in hopes that this Court will now accept jurisdiction over the entirety of this matter, which is sorely needed in the interests of justice.

It is in this context that Stokes-Craven now moves this Honorable Court for the following relief pursuant to Rules 204(b), 214, and 263(b), SCACR, and any other applicable authority[1]:

(1) to consolidate Stokes-Craven's appeals from the orders of Judges Hayes and Young, as both appeals arise out one motion in this matter;

(2) to certify the consolidated appeal for resolution by this Court because the issue involved solely concerns the holding in this very case (which is being undermined); and

(3) to expedite this appeal for resolution as soon as is reasonably possible because this matter was already decided by this Court (long ago), with Austin waiting more than

[1] In this regard, to the extent necessary, Stokes-Craven would ask that the Court invoke its original jurisdiction or exercise its power to issue extraordinary writs to see that the interests of justice are served. To the extent that the Court may deem it necessary to invoke its original jurisdiction or to exercise its power to issue extraordinary writs to address the matters raised hereby, and that the Court may deem it necessary for Stokes-Craven to make a separate or supplemental request in this regard (or to provide a separate or supplemental filing fee), Stokes-Craven would ask that the Court advise it of the same as soon as is reasonably possible.

two years after the Court's March 8, 2010 decision to make the subject fee motion, which motion is manifestly without merit and unjust.[2] [3]

BACKGROUND

1. Austin filed this suit on March 15, 2004, alleging the used pickup truck he purchased from Stokes-Craven in June of 2002 was not as represented (more specifically, that the vehicle had undisclosed damage from a prior wreck). The case was tried before a jury on August 14-17, 2006, with Judge Hayes presiding. The jury returned a verdict against Stokes-Craven in the amount $26,371.10 actual and $216,600.00 punitive damages on his cause of action for fraud. Austin then moved for attorneys' fees in the amount of $49,936.50 pursuant to the Dealer's Act and the Federal Odometer Act. The trial court held Austin was not entitled to the actual and punitive damages under his fraud cause of action and attorneys' fees under the Dealer's Act and forced Austin to elect his remedy between that under his fraud claim and that under his Dealer's Act claim. Austin elected to recover actual and punitive damages under his fraud claim. *See* Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010).

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[2] In the interests of expediency, Stokes-Craven respectfully submits that no oral argument is necessary in this matter. The dispositive issue here is correct interpretation of this Court's holding in this very case. Under this unusual circumstance, oral argument would appear to be superfluous. Nonetheless, to the extent that the Court would require or appreciate to hear oral argument, counsel will, of course, gladly comply with the Court's instructions.

[3] Stokes-Craven realizes that the instant motion may be more properly viewed as four separate requests: one for consolidation under Rule 214; one for certification under Rule 204(b), one to expedite under Rule 263(b), and one for this Court to invoke its original jurisdiction or exercise its power to issue extraordinary writs. That said, under the circumstances, the Stokes-Craven's argument in favor of all four requests is substantially similar, and Stokes-Craven has combined its requests in this filing, which it believes to be both logical and consistent with the interests of efficiency and judicial economy. Further, to the extent that the same is required, Stokes-Craven has provided the Court with four

2. Both Austin and Stokes-Craven appealed, with Austin arguing the trial court erred in failing to award him pre-judgment interest and in forcing him to elect between his verdict and attorneys' fees under the Dealer's Act. This Court, *sua sponte*, certified the case from the Court of Appeals and, on March 8, 2010, decided the case, with the decision of the Court on the issue before it being expressed by votes of the members of the Court as set forth in three separate opinions: one authored by Justice Beatty (signed by Justice Waller); one authored by Justice Pleicones, concurring in part and dissenting in part from Justice Beatty's opinion; and one authored by Justice Kittredge (signed by Chief Justice Toal), concurring in part and dissenting in part from Justice Beatty's opinion. *See* Austin, 387 S.C. 22, 691 S.E.2d 135.

3. The current appeals result from a dispute over this Court's holding concerning the election of remedies in Austin's appeal. Justice Beatty's view (endorsed by Justice Waller) is Austin was entitled to $49,936.50 in attorneys' fees under the Dealer's Act in addition to the actual and punitive damages he was awarded under his fraud cause of action. Justice Pleicones' opinion agrees with the general proposition that a plaintiff may recover common law damages and statutory fees, but specifically declines to award these fees to Austin in this instance, reasoning (1) Austin's claim that the trial court erred in requiring him to elect his remedy was not preserved for appellate review, and (2) under *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992), Austin was required to segregate the amount of attorney time and cost attributable to the Dealer's Act claim (much like the trial court required of Austin with regard to the Odometer claim), which he failed to do. *See* Austin, 387 S.C. 22, 691 S.E.2d 135.

$25 motion-fee checks in conjunction with this filing. Further still, if the Court would

4. Central to this appeal is which opinion Justice Kittredge and Chief Justice Toal joined with regard to the election of remedies issue and whether Austin is entitled to fees under the Dealer's Act.

5. Notably, on May 6, 2010, Austin made a motion in this Court to tax costs pursuant to Rule 222 SCRAP. (Because this motion and its related filings, including those in opposition and the Court's ruling thereon, were made in this Court in this case, the Court already has them and Stokes-Craven incorporates them by reference herein. To the extent, however, that the Court would appreciate additional copies of the filings Stokes-Craven will gladly provide them.) Austin sought the costs of producing his appellate briefs and the record on appeal, filing fees, and the $1,000.00 attorney fee authorized by Rule 222. Austin further sought appellate attorneys' fees under the Dealer's Act, filed extensive briefing on his entitlement to appellate fees, and provided fee affidavits of his appellate counsel to this Court, seeking 167 hours in fees incurred by Mr. Moskos in the appeal and 300.2 hours incurred by Mr. Fudenberg. In reply to Stokes-Craven's return to this motion, Austin clearly expressed to the Court what he acknowledged to be "**THE CENTRAL DISPUTE**" as to his entitlement to the six-figure fee award the then sought: whether or not the Court held that he was entitled to fees under the Dealer's Act. (*See* Austin's Reply Support of Request for Attorney's Fees p. 1) (emphasis in original.) On July 22, 2010, this Court denied Austin's request in its entirety, seemingly deciding this central dispute against Austin.

6. Nonetheless, on May 24, 2012, over two years after this Court decided the appeal, and just shy of two years after the Court denied his motion for appellate-level

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require or appreciate separate motions, Stokes-Craven will submit the same.

attorneys' fees, Austin filed a motion for trial-level attorneys' fees as well as appellate and even post-appellate fees in the circuit court for Clarendon County. (Austin's Motion and Supporting Memorandum are attached hereto as **Exhibit A**, which are incorporated herein by reference.)[4]

7. Austin's motion sought $49,936.50 in trial fees under the Dealer's Act as well as over $235,000 in appellate and post-appellate fees under the Dealer's Act through only February 28, 2012. The motion included all of the fees incurred in Austin's own appeal (which was not successful), fees and costs associated with four motions for extensions of time and even a motion to file out-of-time, and fees incurred in responding to a subpoena in an unrelated action—all under the guise of the Dealer's Act. (*See* **Exhibit A**)

8 Judge Hayes, who presided over the jury trial, but is not a resident judge in Clarendon County, decided the motion without oral argument holding: (1) Justice Beatty's opinion is the opinion of the majority as to all issues and establishes the law that the he must follow in deciding Austin's motion for trial-level fees; and (2) he did not have jurisdiction to hear Austin's motion for appellate fees as this issue is one for a judge sitting in the third circuit. (Judge Hayes's Order is attached hereto as **Exhibit B**, which is incorporated herein by reference.)

9. Stokes-Craven appealed Judge Hayes' award of trial-level attorneys' fees under the Dealer's Act, and also challenged Judge Hayes' finding that Austin's

[4] Only Austin's motion and supporting memo are attached. Austin submitted more 400 pages of additional material. To the extent that the Court would like to view it, Stokes-Craven will gladly provide it with the same. It is omitted now, in the interest of brevity. Stokes-Craven does not believe this material to be necessary for the Court to address the matters presented hereby.

entitlement to appellate and "post-appellate" fees under the Dealer's Act must be decided by a judge sitting in the Third Circuit. While Judge Hayes likely intended only to determine his lack of jurisdiction to hear the appellate fee issue, he concluded the issue was for the third circuit. Stokes-Craven appealed, in an abundance of caution, so as to preserve its argument that the issue had already been decided by the Supreme Court; therefore, no circuit court has jurisdiction to decide to the contrary. (Stokes-Craven's Notice of Appeal from Judge Hayes's Order is attached hereto as **Exhibit C**, which is incorporated herein by reference.)

10. Stokes-Craven then sought to have Austin's motion for appellate and post-appellate fees heard by the third circuit. The motion was set to be heard by Judge Young on December 19, 2012. However, Austin objected to having his own motion heard, arguing the matter was stayed by Stokes-Craven's appeal of Judge Hayes' order and that Judge Young should "spare [his] staff the need to deal with the voluminous filings" associated with the matter. (A copy of Austin's counsel's email to Judge Young's law clerk in this regard is attached hereto as **Exhibit D**, which is incorporated herein by reference.)

11. Judge Young declined to hear Austin's motion stating that it was stayed. Stokes-Craven immediately noticed its appeal of Judge Young's order, filed its initial brief and designation of matters on appeal, and the instant motions. (Copies of Judge Young's Order along with Stokes-Craven's appeal therefrom are attached hereto as **Exhibits E** and **F**, which are incorporated herein by reference.)

12. Stokes-Craven argues in both appeals that a three-Justice majority of Pleicones, Kittredge, and the Chief Justice held Austin failed to preserve for appellate

review the issue of attorneys' fees (trial, appellate, and post-appellate) under the Dealer's Act and that Austin's fee requests "dies with" his claims under the Odometer Act. Stokes-Craven further argues in both appeals that Austin cannot ask the circuit court to award him what this Court has denied.

MOTION FOR CONSOLIDATION

13. Rule 214 provides that the Court may consolidate appeals when there is more than one appeal from the same order or where the same question is involved in two or more appeals, which is the case here.

14. In the interest of judicial economy, Stokes-Craven's appeal from Judge Hayes' order and its appeal from Judge Young's order should be consolidated. Both appeals arise out of Austin's single motion for attorneys' fees under the Dealer's Act. The issues in both appeals are nearly identical, as are the record in each appeal and the briefing in each appeal.

15. Most importantly, Austin filed but one motion that sought trial, appellate, and post-appellate fees. It is only because Austin sought to have the issues bifurcated before two different judges and then sought to prevent the motion as to appellate and post-appellate fees from being decided in the Third Circuit, that there are two separate orders.

MOTION TO CERTIFY FOR IMMEDIATE AND EXPEDITED SUPREME COURT REVIEW

16. Rule 204(b) provides that, in any case pending before the Court of Appeals, this Court may, in its discretion, certify the case for review before it has been determined by the Court of Appeals. Rule 204(b) explains that "[c]ertification is normally appropriate where the case involves an issue of significant public interest or a

legal principle of major importance." This case presents an unusual circumstance as what is in issue is what the Supreme Court intended in this very case. This is not an issue of the precedent of a Supreme Court opinion, and as such, only the Supreme Court can decide what it intended. Moreover, this is a case of public importance, because the supremacy of this Court—which is essential to the proper functioning of our unified judicial system—is being undermined by lower court action inconsistent with its ruling.

17. Rule 263(b) provides that the Court may shorten the time prescribed by the South Carolina Appellate Court Rules for performing any act. Rule 263(b) has been interpreted as allowing for expedited appellate consideration. *See* George v. Municipal Election Comm'n, 335 S.C. 182, 183, 516 S.E.2d 206, 207, n. 1 (1999); Jean Hoefer Toal et al., Appellate Practice in South Carolina 263 (2002) ("Parties may request that an appeal be expedited under Rule 234(b), SCACR [which is now Rule 263(b)].").

18. Here, compelling reasons exist for both certification of this matter to this Court and expedited consideration and disposition thereof.

19. The parties agree that this Court's ruling dated March 10, 2010 is binding not only as Supreme Court precedent, but also as the law of the case. However, the parties dispute which of the separate opinions combine to form a majority on the issue of Austin's entitlement to fees. Stokes-Craven argues Justice Kittredge and Chief Justice Toal join with Justice Pleicones to form the majority on this issue, which they decided against Austin.

20. As Chief Justice Toal, Justice Beatty, Justice Kittredge, and Justice Pleicones, remain on the Court, Stokes-Craven respectfully requests that it be this Court, and not a circuit court or the Court of Appeals, that decides this appeal.

21. Austin argues that he is entitled to file a similar brief, making an almost identical argument for appellate fees as he previously made before this Court in May of 2010 and have this decided by the circuit court two years later. Indeed, the only major difference in Austin's argument is that he now seeks "post-appellate fees" as well as appellate fees, raising his claim from just over $100,000 in fees to over $235,000. In his brief in the present appeal, Austin argues he is entitled to even more "fees about fees" as his $235,000 requests was only current though February 28, 2012.

22. Stokes-Craven argues that this Court has already denied Austin's request by order dated July 22, 2010 and further that, to borrow a phrase from Justice Pleicones, Austin's claim for appellate and post-appellate fees "dies with" his claim for trial fees. That is, the death of his claim under the Dealer's Act is the death of all his attorneys-fee claim, be they for trial fees, appellate fees, post-appellate fees, "fees about fees," or otherwise. Again, Stokes-Craven respectfully urges that only this Court, rather than a circuit court or the Court of appeals should interpret its prior holdings in this very case.

23. The parties to this case have been in litigation for over eight years. The case was decided by this Court in March of 2010 and Austin's appellate fee request was denied in July of 2010, yet Austin's fee request, previously denied, has somehow been resurrected. Respectfully, the disposition of this appeal should be as swift as reasonably possible.

WHEREFORE, Stokes-Craven prays this Court consolidate these appeals and certify them for immediate and expedited review, which is needed in the interests of justice. Stokes-Craven further requests that the case be remanded with instructions to consider Stokes-Craven's attorneys' fees in having to defend against Austin's abusive and continuing fee requests (to the extent that this Court is not inclined to consider the matter of a fee award to Stokes-Craven directly).

Respectfully submitted,

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By: _____

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Dated: 2/12/13

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Clarendon County
Court of Common Pleas

The Honorable John C. Hayes, III
The Honorable W. Jeffery Young

Case No. 2004-CP-14- 135

DONALD C. AUSTIN,

Respondent,

v.

STOKES-CRAVEN HOLDING CORP.,
d/b/a/ STOKES-CRAVEN FORD

Appellant.

PROOF OF SERVICE

I, Michelle N. Endemann, do hereby certify that a copy of the **Appellant's Motion to Consolidate and Certify Appeal for Immediate and Expedited Supreme Court Review** in the above-captioned matter was served on the Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on January 24, 2013, addressed as follows to their attorneys of record:

Brooks R. Fudenberg, Esquire 1004 Anna Knapp Blvd., Second Floor Mount Pleasant, SC 29464	C. Steven Moskos, Esquire 535 Stinson Drive Charleston, SC 29407

I further certify that a copy of the **Appellant's Motion to Consolidate and to Certify Appeal for Immediate and Expedited Supreme Court Review** was this date filed with the South Carolina Court of Appeals via United States Mail.

ANDREW K. EPTING, JR., LLC

By: _____

Charleston, South Carolina

Dated: 2/12/13

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT CASE NO. 04-CP-14-135
Donald C. Austin, Plaintiff, vs. **Stokes-Craven Holding Corp., d/b/a Stokes Craven Ford,** Defendant.	**Memorandum of Law in Support of Motion to Direct the Clerk of Court to Enter Judgment Consistent with the Remittitur and Motion for Attorneys' Fees**

This case concerns the fraudulent sale of a previously-wrecked, irreparable, and unsafe truck. It was tried to a jury in the Clarendon County Courthouse August 14–16, 2006, the Honorable John C. Hayes, III, presiding. For the Plaintiff was C. Steven Moskos; for the Defendant, Scott L. Robinson, Esq. On appeal, the Supreme Court held that Mr. Austin's recovery of actual and punitive damages for common-law fraud is no barrier to his recovery of fees and costs pursuant to the South Carolina Dealer's Act. and remanded for proceedings consistent with its opinion.

South Carolina law provides that statutory attorney fees include appellate and post-appellate fees. South Carolina law further provides that in awarding statutory fees, a court is to consider the nature of the statute, evaluate six common-law factors in establishing a lodestar amount, and in an appropriate case, enhance that lodestar award to ensure proper compensation. This is a proper case for an enhanced award. Accordingly, Mr. Austin respectfully moves the Court to instruct the Clarendon County Clerk of Court to enter judgment, including the trial-level fees ordered by the Supreme Court, against the Defendant per the remand, and to award attorney fees for the appellate and post-appellate work by Mr. Austin's counsel.

Organization

Pinpoint citations to the Supreme Court opinion are to the pagination as sent to counsel by the Clerk of that Court. That opinion, page numbers manually added by counsel, is attached as Tab 1.

The Statutory Text

The South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealer's Act") is codified at S.C. Code Ann. Sections 56-15-10 to -600 (2006 & Supp. 2009). Section 56-15-110 provides:

> (1) 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.

I. PROCEDURAL HISTORY

A. Trial-Level

Background facts. Mr. Austin purchased the vehicle from the Defendant Dealership on June 1, 2002. He then discovered the truck had previously been wrecked; that it had no warranty on the drive-train; and that the Dealership had forged his signature to an as-is clause. After asking the Dealership three times to accept the truck and refund his money, he asked the Ford Motor Company, the South Carolina Department of Motor Vehicles, and the South Carolina Department of Consumer Affairs to assist in obtaining a refund. He then engaged John Polito,

Esq., who wrote to the Dealership on February 18, 2003, offering to settle the matter if the Dealership would refund the purchase price and provide $1,500.00 in attorney fees. The Dealership neither accepted nor counter-offered. Mr. Polito subsequently referred the matter to C. Steven Moskos, an experienced vehicular sales litigator.

The Lawsuit. Mr. Moskos filed suit on March 12, 2004. Between that date and the date of trial, activity was minimal. The Dealership served no discovery requests, engaged no experts, noticed no depositions. Nor did it make any offer to settle. Its answers to interrogatories stated that it had done nothing wrong and that Mr. Austin received what he paid for. The trial was largely a relatively straightforward credibility contest. It pitted Mr. Austin, his girlfriend, the former owner of the truck, and two expert witnesses against the Dealership's agents, who continued to deny all wrongdoing. The jury determined that the Dealership had defrauded Mr. Austin. It similarly determined the Dealership had violated the Dealer's Act, which forbids deceptive practices by automobile dealers. It also returned verdicts against the Defendant for constructive fraud and negligence. It awarded $26,371.10, the entire price of the truck, including tax and tags, as actual damages under each of these. It awarded punitive damages on more than one cause of action, including $216,600.00 for fraud.

The only complicated issue concerned an alleged violation of the federal odometer act in the Dealership's failure to show Mr. Austin the vehicle's title. It was resolved by sending to the jury the question of liability, but not asking it to determine damages. The jury found a violation.

Verdicts were returned on August 17.

This Court's Orders. Post-trial, the Dealership filed a single two-page document listing ten grounds for JNOV, new trial, and/or new trial *nisi remittitur*, dated August 24. The Court denied those motions via Orders signed August 30. The Dealership subsequently filed an

extensive memorandum in support of those motions, dated September 10. Mr. Austin filed no response to either the motion or the memorandum. He did file a memorandum in support of punitive damages, requests for prejudgment interest and attorney fees, and a memorandum regarding the election of remedies. On September 14, the Court (a) denied Mr. Austin's request for pre-judgment interest, (b) awarded $1,500.00 in damages and $4,500.00 in fees for what the Court considered a merely technical violation of the odometer act, ruling that Mr. Austin may recover those amounts in addition to an award under any other verdict, and (c) otherwise denied Mr. Austin's requests to recover damages under more than one cause of action or, alternatively, to recover fees and costs pursuant to the Dealer's Act in addition to damages under another cause of action. Mr. Austin elected the fraud verdict.

B. The Appeals

The Dealership filed a Notice of Appeal. Mr. Austin cross-appealed. The Dealership engaged Young Clement Rivers, LLP (Stephen L. Brown, Edward D. Buckley, Jr., and Russell G. Hines, Esquires) as additional counsel. Mr. Moskos then recruited Brooks R. Fudenberg to draft the briefs for Mr. Austin.

This section lists at some length the arguments raised on appeal. Ordinarily, Mr. Austin would devote only a sentence or two to such issues, as these would be basically the same issues previously argued to the trial court. That is not the present case.[1]

As shown in the attached Briefs (Tabs 2–7), the Dealership argued that it should have been granted a directed verdict, judgment NOV, or new trial, on grounds (A) that Mr. Austin had failed to provide any evidence of fair market value. (1) Any evidence presented, the Dealership maintained, concerned not the "market value," but the "retail value," which the Dealership

[1] This is Mr. Austin's view. The Dealership disagrees.

maintained had never been recognized as a proper measure by South Carolina courts. (2) All testimony regarding value was inadmissible, as the Dealership had objected throughout the testimony of each of the two witnesses who so testified. (3) The evidence presented was insufficient to establish either "market" or "retail" value, as it concerned solely the value to one person. Mr. Austin had testified only to the value to himself, the Dealership urged, while the other witness, the expert Ray Morris, had estimated the "retail" value based on Mr. Austin's testimony. (4) To the extent, if any, that Mr. Morris's testimony regarding value went beyond the foundation of Mr. Austin's impermissible testimony, it was further inappropriate as it was based on the testimony of Mr. Austin's other expert, John Disher, that the vehicle was unsafe, which was independently improper because Mr. Disher had not been deemed qualified by the trial court to speak to safety issues, but only to auto body repair, and he was in fact unqualified to speak to safety issues, and his testimony had been objected to on those grounds. Moreover, the Dealership maintained, even if admissible, Mr. Disher's testimony had been insufficient to establish that a safety issue existed. (5) The entirety of Mr. Morris' testimony, as well as the entirety of Mr. Disher's testimony, should never have been admitted, as the Court should have refused to qualify either witness. The Dealership further argued (6) that the value assigned to the vehicle by both Mr. Austin and his expert of zero dollars was incoherent and in conflict with the evidence, given Mr. Austin's testimony that he had been driving the truck for a year, and the expert's testimony that the vehicle was probably worth something to somebody. It based all the above on the point (7) that a customer defrauded in the purchase of goods must either elect the remedy of return-and-rescission or the remedy of damages, but if he chooses damages, he must prove the measure of those damages. It additionally argued (8) that a new trial on all the issues was required due to the Court's error in sending the odometer act question to the jury (this

alleged error is discussed as "E" below). The jury's erroneous conclusion that federal law had been violated, the Dealership maintained, had tainted the other deliberations.

The Dealership further argued that a new trial, JNOV, or directed verdict should have been granted (B) due to the erroneous qualification of Mr. Morris and the further erroneous decision to allow him to testify to value, which not only failed to help establish value, as described above, but was so improper it constituted independently sufficient grounds for reversal and a new trial. (C) The admission of Mr. Disher's testimony required a new trial for reasons in addition to his erroneous qualification as an expert, and the further erroneous decision to qualify him to testify to safety issues, and the necessary role of that testimony in the erroneous establishment of the market value. His testimony about safety, even if otherwise admissible, (1) failed to establish that a safety problem existed. Allowing the jury to erroneously believe a safety problem existed had been incredibly prejudicial, and required reversal independently of its role in the market value issue. Moreover, (2) the erroneous belief that a potentially deadly safety problem existed was the only possible explanation for what it urged was the extraordinary punitive damage award (argument E below), which must therefore be reduced. (3) The trial court further erred, the Dealership argued, in allowing Mr. Disher to testify to how easy it would be for a competent inspection by the Dealership to have revealed the wreck damage.

It argued (D) that a new trial should have been granted due to inconsistent verdicts, and (E) that the odometer act award should be reversed on grounds that (1) the vehicle was not titled in the Dealership's name and (2) there was no intent to defraud specifically as to mileage in the failure to show title to the customer, and that each were required to make out a violation under the statute, as interpreted via its implementing regulations, as in turn interpreted by case law. As noted above, the Dealership further argued that, because the jury had been allowed to

erroneously conclude that federal law had been violated, the entirety of the deliberations were tainted and a new trial was required as to all causes of action. Moreover, (3) at a minimum, as the jury may have based its punitive damages award, at least in part, on its erroneous belief that federal law had been violated, the punitive damages award should be reduced.

The Dealership argued (F) that the punitive damages award should be reversed or vacated on grounds that the award was (1) exorbitant and extraordinary, and unconstitutionally excessive, especially given the unusually high 8.21 ratio of punitive to compensatory damages, which was erroneous for numerous reasons, including the above-mentioned problem of the inherent incredibility of the zero dollar valuation which, even if it passed muster for an actual damages award, was too uncertain to meet the heightened standard for punitive damages, and because it rested on a safety issue which did not exist, as discussed above, and which, even if it existed, the Dealership had not known about and should not be punished for, and (2) that the jury's award and this Court's affirmation were each based on Mr. Austin's closing argument, which the Dealership maintained to be both impermissible "testimony" and inaccurate. As this was the only evidence in the Record of the Dealership's ability to pay, the Dealership maintained, the award must be reversed for failure to provide any evidence of an essential element of any punitive damages award. The Dealership presented other arguments as well.

Mr. Austin responded to the great majority of these arguments (G) on preservation grounds, stating that a careful examination of the Record does not reveal where these grounds had been raised to the trial court; that although many objections were indeed raised by the Dealership and many arguments made, none were on grounds remotely similar to those raised on appeal. He further argued (H) that some of the Dealership's points, even had they been preserved and otherwise meritorious, would not establish that the supposed errors had prejudiced

the result. As to the underlying, pre-litigation facts and the trial testimony, (I) he presented a rendition dramatically different from the Dealership's. Finally, and most prominently, (J) he argued the merits of each issue.

In its Reply, the Dealership engaged more fully on the preservation aspects, and addressed Mr. Austin's arguments regarding the merits.

In his own appeal, Mr. Austin argued (K) that pre-judgment interest was proper, as the complete lack of retail value of the truck was capable of ascertainment without a trial.

He also argued (L)(1) that he should have been awarded fees and costs pursuant to the Dealer's Act, as the Supreme Court had indicated, in *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992), a preference that fees under a fee-shifting statute be the maximum allowable; (2) if there were a concern as to whether counsel's affidavits were sufficiently detailed to enable a determination as to which services, if any, were completely unrelated to the Dealer's Act claim, the Court should remand to enable the trial court to develop that record; (3) that the Dealer's Act is a remedial statute, enacted because too many car dealers were not playing fair with their customers; that the fee-shifting provision is especially remedial, as it is designed to enable deceived buyers of vehicles to engage attorneys when recovery for a proven violation might not justify the attorney time or expenses; and that as a remedial measure it should be read broadly, while even under a straightforward reading Mr. Austin would be entitled to his fees and costs; (4) the doctrine of election of remedies is to be narrowly confined and not lightly extended; and (5) the core of the election of remedies doctrine under South Carolina law is to prevent a duplicative recovery of the same class of award, such as a double recovery of the same actual damages, whereas recovering actual damages, punitive damages, and attorney fees is not a "double recovery." He extensively examined the law of other states on this final point.

The Dealership defended on grounds (M) that the value of the truck as provided to Mr. Austin had not been sufficiently certain to allow for prejudgment interest. As to fees and costs, it argued (N)(1) that the question of Dealer's Act fees in addition to common-law damages was not preserved, as this Court had not ruled on it; (2) that *Taylor v. Nix, supra*, did not evince a preference for large awards; rather, that case mandated that the hours and expenses incurred in litigating any claims other than the Dealer's Act claim must be excluded; (3) that Mr. Austin had forfeited his argument that the Dealer's Act is remedial by the failure of his Brief to cite any authority declaring that Act remedial; and he had similarly failed to provide any legislative history to support the proposition that the statute was enacted because too many car dealers were not playing fair; (4) that South Carolina case law clearly establishes that fee-shifting statutes must be strictly construed, as they are in derogation of the common law; and (5) on the merits, that the doctrine of election of remedies required Mr. Austin to choose only one cause of action on which to recover.

In his Reply, Mr. Austin addressed many of the Dealership's concerns.

After the briefs were filed, the Supreme Court, *sua sponte*, certified the case from the Court of Appeals. It did so pursuant to Rule 204(b), SCACR, which provides that certification is normally appropriate "where the case involves an issue of significant public interest or a legal principle of major importance."

C. The Remand

The Supreme Court issued an opinion notable for the number of issues addressed and their wide range of subject matter. Professor F. Patrick Hubbard of the University of South Carolina School of Law attests in the attached affidavit, Tab 8, ¶ 6, that he found no South Carolina torts case published that year addressing more issues than *Austin*.

The wide range of subject matter includes federal constitutional, regulatory, and statutory law; myriad South Carolina law questions—substantive, evidentiary, statutory construal, civil procedural; the law of various states regarding election of remedies; and, more narrowly, numerous questions concerning the content of the Record and the inferences to be made therefrom, and questions of appellate procedure, issue preservation, and prejudice.

Perhaps a result, the opinion is also notable for the sheer quantity of analysis. It spans forty (40) pages as sent by the Supreme Court to counsel. It is also notable for the rare 2-1-2 division among the Justices. Notable, too, is that the divisions almost exclusively concerned rationales. On only two issues did the Court divide as to results, and each was by a vote of four to one.

The Supreme Court (A) affirmed this Court's orders approving the jury's verdicts and awards; (B) reversed its award for violation of the federal odometer act; (C) affirmed this Court's denial of Mr. Austin's request for prejudgment interest; and (D) held Mr. Austin was entitled to his attorney fees and costs. Op. p. 31.

As to the facts, the Supreme Court conducted its own review of the Record and found the Dealership's conduct highly reprehensible. "Stokes-Craven's conduct can only be construed as exhibiting an extremely high degree of reprehensibility." Op. p. 25. *See also id.* p. 40 (Kittredge, J., concurring in part) (similar).

The holdings are too numerous to list. Three are especially notable: (1) It upheld punitive damages in a ratio of 8.21 times the actual damages. (2) It resolved a novel question of South Carolina's interpretation of federal law. (3) It resolved a novel question of South Carolina law, whether one may recover fees and costs pursuant to a statute that awards fees and costs for proving a violation of that statute, while recovering damages under a different cause of action

based on the same facts. In so doing. it addressed the basic conflict between the scope of the election of remedies doctrine as stated in the case law and the underlying purpose of that doctrine. Many cases have held that the doctrine prevents recovery under more than one cause of action based on the same facts. *E.g.. Williams v. Reidman*, 339 S.C. 251, 257, 529 S.E.2d 28, 40 (Ct. App. 2000) ("When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both, however, the plaintiff may not recover both."). Yet many decisions hold that the purpose is to prevent a double recovery. These two propositions are often stated in the same decision. *E.g., Williams, id.* As the two conflicted, the Court limited the scope to the purpose. As recovery of both attorney fees and damages is not a "double recovery," there is no bar to recovering both under alternative causes of action. the Court held.[2]

More narrowly, regarding the Dealer's Act and its fee-shifting provision, the Court issued several holdings. Most conspicuously, it held (a) That provision is highly remedial. It "epitomizes the definition of a remedy." Op. p. 30. (b) Its purpose is to prevent "costly attorney fees" from "deter[ring]" deceived customers from bringing suit against "dealers who engage in deceptive practices." *Id.*, p. 29. (c) Accordingly, it requires "full[] compensat[ion]." *Id.* In so holding. the Court resolved the meaning of *Taylor v. Nix* favorably to Mr. Austin. "[T]o award Austin his claim in its entirety would be consistent with the precedent of this Court." Op. p. 30 (citing *Taylor v. Nix, supra*).

As to Mr. Austin specifically, (d) he was entitled to recover fees and costs; (e) he was entitled to "full compensat[ion]" for those fees and costs; (f) full compensation included compensation for fees and costs involved in the lawsuit as a whole, including time devoted to

[2] It so held unanimously. Op. p. 31 (majority); Op. p. 37 (Pleicones, J.) (concurring in part) ("I agree with the majority" on this point).

other causes of action involved in the lawsuit. *Id.* pp. 29-30. Summarizing its conclusions as to Mr. Austin's entitlement to attorneys' fees and costs, the Court reiterated, *id.*, p. 31, "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 . . . . ."

It remanded for entry of judgment consistent with its opinion. *Id.*

II. THE ENTITLEMENT TO FEES

Mr. Austin is entitled to his trial-level fees and costs, for the Supreme Court explicitly so held.

He is also entitled to his appellate and post-appellate fees. South Carolina law provides that where appellate and later fees are not inconsistent with the purposes of a fee-shifting statute, a trial court has the power and the duty on remand to award such fees. These specifically include fees incurred in seeking a fee award. "[A]ppellant is entitled to attorney's fees under § 15-77-300 for this litigation and appeal seeking to secure such fees." *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 544, 405 S.E.2d 830, 833 (1991) (reversing trial court which had refused to award such fees). *See also Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (Circuit Court erred in "holding that, absent a directive of the Supreme Court, it was without jurisdiction to act" on requests for "appellate and post-appellate" fees under a fee-shifting statute; these fees should properly have been awarded); *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."); *Layman v. State*, 376 S.C. 434, 463–64, 658 S.E.2d 320, 335–37 (2008) (under a fee-shifting statute, awarding fees incurred in litigating the issue of the fee award; these fees, although larger than the fees incurred in the underlying action, would be multiplied by 1.25 to ensure proper compensation).

Mr. Austin seeks recovery of fees incurred in defending against the Dealership's appeal and pursuing his own appeal, and his fees incurred post-appeal in seeking his fees. He is entitled to these fees under the above authorities. He is, if anything, more entitled than were the plaintiffs in *McDowell, Muller, Parker,* and *Layman*, due to (a) 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); (b) the remedial nature of the statute, Op. p. 29; and (c) its purposes of encouraging Dealer's Act suits and removing the deterrent effect of costly attorney fees. *id.*

III. THE AMOUNT OF THE AWARD

The concern here is exclusively with the appellate and post-appellate fees, as the award for Mr. Austin's trial-level fees, including his immediate post-trial work, has been set by the Supreme Court at $49,360.00, the entire amount requested. Op. p. 31. The overarching analysis under a fee-shifting statute was explained in *Layman v. State,* 376 S.C. 434, 442–58, 658 S.E.2d 320, 324–33 (2008). A court is to determine the nature and purpose of the fee-shifting provision and its theory. *See especially id.* at 457–58, 658 S.E.2d at 332 (applying a method of calculating fees that "embraces the theory of fee shifting embodied in the [relevant] statute"). Within that framework, a court is to establish a lodestar figure, and determine the appropriate magnitude, if any, of a multiplier. *Id.*

A. The Theory, Nature and Purpose of the Fee-Shifting Provision

The Supreme Court's opinion explains the theory, purpose and nature of the Dealer's Act fee-shifting provision. Op. pp. 29–30. Its theory is that "costly attorney fees" required for such cases "may deter" plaintiffs from prosecuting their claims. Its purposes are to make such clams more economically viable, and to encourage private enforcement of the Dealer's Act. Its nature is remedial; it is the epitome of such a measure.

More generally, the scholarly literature concerning fee-shifting provisions was gathered in *Covenant Mutual Ins. Co. v. Young,* 179 Cal. App. 3d 318, 324–328, 225 Cal. Rptr. 861, 864–68 (Cal. App. 1986), which concludes, not surprisingly, that statutes shifting fees only in favor of successful plaintiffs "are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy," *id.* at 324, 225 Cal. Rptr. at 865. "[W]here the Legislature wants to encourage litigation it can intervene to alter the decision-making equation by instituting unilateral fee-shifting. Then the injured person knows he will not have to absorb his own lawyer's legal fees, at least if he wins." *Id.* at 325, 225 Cal. Rptr. at 865. It has similarly been said by the United States Supreme Court that such a statute is enacted only where the legislature deems standard fee agreements to provide insufficient compensation. It reasons that the legislature would not enact such a provision if it believed standard contingency contracts were sufficient to attract the needed numbers of quality counsel to vigorously litigate the cases. *Riverside v. Rivera*, 477 U.S. 561, 579–80 (1986) (plurality); *id.* at 586 (Powell, J., concurring) (same).

Such statutes are vigorously enforced to ensure adequate compensation. *In re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 750–51 (S.D.N.Y. 1985) (collecting cases) ("'generous'" awards are appropriate under such statues); *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 363 (E.D.N.Y. 2010) (collecting additional 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'"). The vigorous enforcement of the statutes is often linked to their remedial nature, *e.g.*, *Warner*, 618 F. Supp. at 750 ("The federal securities laws are remedial in nature and, in order to effectuate their statutory purpose of protecting investors and consumers, private lawsuits should be encouraged.").

South Carolina decisions generally, and the remand here specifically, accord with these sound principles. As to the theory and purposes, *see, e.g., Taylor v. Medenica*, 331 S.C. 575, 578, 503 S.E.2d 458, 460 (1998) (quoting *Bradley v. Hullander*, 277 S.C. 327, 287 S.E.2d 140 (1982) ("'requiring the unsuccessful defendant to pay the plaintiff's attorney's fees is a legitimate tool in enforcing the underlying public policy of the [securities] statute.'"); *id.* at 579, 503 S.E.2d at 460 ("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."); Op., p. 29 (the statute was enacted because "costly" attorney fees "may deter" such lawsuits). As to the vigorous enforcement of such statutes, *see, e.g.*, Op. p. 31 (awarding approximately $50,000 in trial-level fees in dispute over $25,000 truck); *id.* p. 29 (statute's purposes are facilitated by recovering fees and costs in addition to common-law damages); *id.* p. 30 (precedent supports rejection of argument that would limit the award) (citing *Taylor v. Nix*, *supra*); *Taylor v. Medenica*, *supra* (affirming award of $500,000 in fees and $24,068 in costs incurred in obtaining an actual damages award of $36,242.00).

More broadly, South Carolina law holds that remedial statutes are to be vigorously enforced. "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 S.E.2d 563, 564 (1978) (similar).

B. The Lodestar

A lodestar figure is reached by multiplying a reasonable number of hours by a reasonable hourly rate. In determining the reasonable hours and rate, one looks to six common-law factors, "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services." *Layman*, 376 SC at 457–58, 658 S.E.2d at 333.

Mr. Austin requests an appellate-stage lodestar award of $115,450.00, consisting of 300.2 hours for Mr. Fudenberg and 165.6 hours for Mr. Moskos at $250 per hour. He requests a post-appellate award of $225.78 in itemized costs, and lodestar fees of $121,825.00. The hours are detailed in counsel's timesheets attached to their affidavits. Tabs 9–10. The Dealership's claim that the fees are unreasonable because they are multiples of the fees incurred at the circuit court level, and the Dealership's own ten-fold increase in fees at the appellate stage, are discussed in Part IV.

(1) The nature, extent and difficulty of the appellate and post-appellate cases were exceptional. As directly detailed in the timesheets, and as apparent in the Opinion, the six Briefs and two Petitions, the extent and difficulty of the appellate and post-appellate stages were exceptional. The 1,108-page Record included 800 pages of transcript and 300 pages of other materials.

The Supreme Court opinion speaks for itself. It is exceptional in length, in the number of issues discussed, and in their range of subject matter and their difficulty. The opinion spans forty

pages as formatted in the remittitur; as published in the South Carolina Reports, it consumes 44 pages, 24 in the Southeastern, Second. These are exceptional for a South Carolina Supreme Court decision. The Supreme Court obviously found the case to be exceptional in the number of issues requiring explicit analysis. The difficulty and complexity of the case are apparent in the content of the discussions, and again in the length—the Court does not generally require 40 pages to discuss easy issues, no matter how great their number, nor to discuss numerous issues, no matter how great their difficulty.

The difficulty is also apparent in the unusual 2-1-2 division among the Justices—a division that goes to rationales, not results. On only two issues were there disagreements as to results. Yet the Court repeatedly divided on the rationale by which to reject the Dealership's various claims for relief. The multitude of rationales reflects the complexity of the issues and the great number of decision-points.

The Chief Justice has described the work of Professor Hubbard as "the most significant authority on tort law in South Carolina." Jean H. Toal, "BOOK REVIEW: The South Carolina Law of Torts," 50 S.C. L. Rev. 261, 261 (Fall, 1998). His *curriculum vita* is attached. Ex. 1 to Tab 8. As noted above, he attests that he could find no reported South Carolina torts decision of 2010 with more issues than *Austin*. Tab 8 (Aff. F. Patrick Hubbard), ¶¶ 4–6. *See also id.* ¶¶ 5–6 ("so many issues," "so many legal points."). Prof. Hubbard speaks of the substantive issues that concern his work as a torts scholar; yet the opinion actually has many more issues still, for it also addresses an unusually large number of questions regarding error preservation and prejudice. Prof. Hubbard further notes the complexity of the case, and concludes that the Court's unusual division was both created by and added to the complexity. Hubbard Aff. ¶ 8. *See also* Aff. John

S. Nichols, Esq. (Tab 11) ("the difficulty of the issues [is] evidenced by the three (3) separate opinions," *id.* ¶ 14.)

The breadth of subject matters is also exceptional: federal constitutional law, in the punitive damages issues; federal regulatory and statutory law, in the Odometer Act issues; a survey of the law of various states concerning a mixed statutory- and common-law question, the recovery of statutory fees in addition to common-law damages, which further required deep and detailed analysis of the election of remedies doctrine under South Carolina law; and numerous and diverse questions under South Carolina law, including questions of substantive law, e.g., whether "retail" value is "market value," and whether fraud and violating the UTPA are so similar that one may not properly receive an award for fraud in the sale of goods while being denied recovery under the UTPA; of statutory construction, e.g., whether the Dealer's Act is remedial, and whether under South Carolina law a remedial fee-shifting statute is broadly or narrowly construed; of evidence, e.g., the qualification of experts, the scope of their testimony, the quantum of evidence required for valuation when the defendant has refused multiple requests to return the item; as well as numerous questions about the content of the Record and the inferences to be made there from: and many, many others. Additional issues were raised in the Dealership's 44-page Petition for Rehearing (Tab 12) and its Supplemental Petition for Rehearing (Tab 13). Not mere rehashes of prior arguments, each relied on new cases decided by the South Carolina Supreme Court subsequent to the decision in *Austin*. Additionally, the Dealership skillfully, if ultimately unsuccessfully, exploited the 2-1-2 division to argue for rehearing on the fair market value issues.

The Dealership again exploited that division to argue against any award of fees, and has raised additional objections, as discussed in the closing sections of this memorandum. The

parties are still arguing over the meaning of the Supreme Court decision. Issues on which Mr. Austin prevailed before the Supreme Court have now reappeared in new variants, such as the plain language of the statute. Or they appear under a new lens, such as the question of whether one who proves a Dealer's Act claim and related claims must segregate his fees and costs by type of claim. On appeal of the present case, this was largely a question of the proper interpretation of the Supreme Court's decision in *Taylor v. Nix*. It has now become a question of the proper interpretation of the Supreme Court's discussion in the present case of its decision in *Taylor v. Nix*. Other questions are entirely new, such as the Dealership's argument that appellate fees may not be much greater than trial-level fees.

Finally, as to the nature of the case: the nature is cross-appeals on novel and complex issues and subsequent disputes regarding fees. As with the extent and difficulty, the nature is evident in the timesheets, the Opinion, and the filings; *see also* Nichols Aff. ¶ 14 ("cross-appeals on novel and complex issues"). The case as a whole is a torts action, involving three affirmative misrepresentations, evidence of forgery, an unsafe vehicle, and fraud which had to be proven by clear and convincing evidence. It was brought pursuant to a statute designed to provide customers deceived by an automobile dealership the right to sue, and contains a fee-shifting provision designed to transfer the costs of the litigation to the deceptive dealership. The case was thus unusual in nature, as well as exceptional in difficulty and extent.

(2) The time devoted to the case was a direct result of its extent and difficulty. *See* the timesheets attached to counsel's affidavits, Tabs 9–10. The reasonableness of the hours is also evidenced by the quality of the six Briefs filed in this case, three by Mr. Austin and three to which he had to respond.

In view of the extent and difficulty, John S. Nichols, Esq., attests, Tab 11, ¶ 15, "It is my opinion that the various activities claimed on the time records as well as the time stated for that activity is reasonable and expected in light of the nature and difficulty of this case." The experienced appellate practitioner analyzed the timesheets of Mr. Austin's counsel, and reviewed the opinion, the Record, the Briefs, and other documents. *Id.*, ¶ 12. As detailed in his affidavit, he has served as a clerk to three judges on the South Carolina Court of Appeals, and as Chief Staff Attorney for that Court. *Id.* ¶ 8. In private practice over the last fifteen years, he has worked on more than 100 appellate matters in the South Carolina and federal courts. *id.* ¶ 10, and is the author of the South Carolina Bar's annual Case Law Update, which summarizes every appellate case published by the South Carolina courts, *id.*. ¶ 7.

(3) Mr. Austin's counsel are well-qualified. Each receives numerous cases brought to him by other practitioners due to his reputation for quality work in his area of concentration. Mr. Fudenberg, who was graduated from Yale Law School 20 years ago, and has published in nationally prominent lay and scholarly periodicals, focuses his practice on appellate and similar matters. Mr. Moskos, who was graduated from law school in 1986, and has published on warranty law in the *South Carolina Bar Journal* and in a national paralegal magazine, focuses his practice on vehicular sales litigation. He selected Mr. Fudenberg for the appeal only after the Dealership had selected Young Clement Rivers, LLP, and Mr. Moskos realized that greater appellate skill would be necessary. He collaborated closely with Mr. Fudenberg in addressing questions regarding the events surrounding the trial, the intricacies of South Carolina automobile titling law, the implementation of titling in practice, and the ins and outs of the operations of automobile dealerships, and more generally in developing the theory of the case, which

necessarily rested on the above. *See also* the attached affidavits of counsel, Tabs 9–10 (noting additional credentials).

(4) The compensation was contingent. Both attorneys worked on contingency bases. Moreover, Mr. Austin, who works in a paper mill, would be unable to afford to hire his attorneys on an hourly basis for the amount of work required here.

(5) The results were highly beneficial. The actual damages award of the entire price of the truck was completely defended, as was the jury's award of significant punitive damages. In addition, attorney fees and costs were awarded—again, in the entire amount requested. New law was set for cases under the Dealer's Act and other fee-shifting statutes.

The public interest is served by the successful defense of the award of punitive damages, and with it, the jury's strong message to car dealerships about defrauding customers. The public interest will be further served by the Supreme Court's award of fees, and with it, the Supreme Court's strong message to deceived customers and their potential attorneys that they should not hesitate to vigorously pursue Dealer's Act claims when they have solid facts, as the costly fees involved will be borne by the defendant if they prove their case—provided that the Court resists the Dealership's enticements to counteract that message. The Dealership would prefer that this Court send a message at war with the Supreme Court's. It would prefer a message that even if one prevails at trial and is awarded trial-level fees and costs, those fees can be consumed by the more costly appeal, for which there will be little or no compensation, and/or by the difficulty in extracting fees from an unwilling defendant. The Court should instead follow the reasoning of the Supreme Court, vigorously enforce the Act to maximize its remedial purposes, and send a message allied with the Supreme Court's. The public interest will thereby be further served.

(6) The customary fees for similar services are greater than those requested here. Mr.

Austin's counsel request a baseline hourly rate of $250, well within the customary rates for appellate work in South Carolina. Aff. John S. Nichols (Tab 11) ¶ 14 (the rates requested are "well within" the customary range); Exs. 2 &3 to Tab 10 (orders of other courts awarding Mr. Moskos $250 to $300 an hour); *Layman*, 376 S.C. at 457, 658 S.E.2d at 332 (approving hourly rates from $200 for junior counsel to $600 for senior counsel, pre-multiplier).

Thus the baseline request is fully justified, and the Court should consider an enhancement.

C. Enhancement of the Award

A court may increase a fee award beyond a straight hours-times-customary rate calculation by either of two methods. It may do so because of a special import of any of the six common-law factors. Alternatively, it may include other factors as well to determine a "multiplier." As the multiplier approach is more comprehensive, it is discussed first.

1. The Multiplier

> A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended. Using this as a starting point for reasonableness, a court may consider other factors justifying an enhancement of the lodestar figure with a "multiplier" before arriving at a final amount.

Layman, 376 S.C. at 457, 658 S.E.2d at 332 (citation omitted). There, the Supreme Court awarded $588,873.13 in fees for a stage of litigation that concerned solely the issue of fees. The award represented a 25% increase over the lodestar amount. It was greater than the award for litigating the merits, which had also been increased by 25%. The Court approved pre-multiplier hourly rates of $350–$600 for senior counsel and $200–$250 for junior counsel. The $250 rate was for counsel two years out of law school. *Id.* at 464, 658 S.E.2d at 336 (approving $250 per hour, pre-multiplier, for work beginning in June 2006 by Graham Newman, Esq., who was graduated in 2004, Tab 14 (official Member Profile from the South Carolina Bar)). The Court

also awarded $41,602.01 in related costs. It awarded those costs and multiplied those fees under a statute whose discretionary language (the court "may allow" fees) is weaker than the mandatory language of the Dealer's Act ("shall recover" fees and costs).

The Court chose the multiplier based on four factors: "[1] the expedited litigation timeline imposed by the Court, [2] the wholly successful recovery for the entire class of TERI participants, [3] the extraordinary sum of money returned to the TERI participants and ultimately saved by the TERI participants, and [4] the termination of governmental acts constituting a breach of contract." *Id.* at 461, 658 S.E.2d at 334. Here, [1] there was no expedited timeline; however, there were [2] a wholly successful recovery of the actual damages claimed; [3] an extraordinary sum of money returned to Mr. Austin; and [4] a strong disincentive to dealerships' acts constituting fraud in the sale of vehicles. Moreover, here:

[5] Mr. Austin not only recovered the entire price of the truck, he was allowed to keep the truck, over Defendant's strong objection on appeal that retaining the truck invalidated the damage award. *See* Justice Pleicones' dissent on the same point, Op. p. 33. [6] Here, unlike in *Layman*, counsel obtained an award of punitive damages on behalf of the client. [7] Here, unlike in *Layman*, new and wide-ranging substantive law was created. [8] Success in the present case required mastery of a wide range of issues, success in *Layman* comparatively few.

[9] While both *Layman* and the present case were brought on contingency bases, there is an important difference. As explained in *Edmonds v. United States*, 658 F. Supp. 1126 (D.S.C. 1987), a case on which *Layman* relies throughout, an important criterion in determining the proper multiplier in a contingency case is the degree of "risk of non-recovery of a reasonable fee," *id.* at 1140. Comparing the apparent degree of risk at various stages of that litigation, *id.*, the court applied a larger multiplier for work undertaken when the risk of non-recovery was

great, *id.* at 1148. For work performed as the risk of non-recovery was reduced to zero, the risk element of the multiplier was reduced or eliminated. *Id.*

The *Layman* defense "had no reasonable basis in law or in fact." *Id.* at 449, 658 S.E.2d at 328. It was "not substantially justified." *Id. See also id.* at 445, 658 S.E.2d at 325 (it was not justified "to a degree that could satisfy a reasonable person."). Where, as in *Layman*, the defense has no reasonable basis, and the defendant is the State, the risk of non-recovery is slight. Here, on the other hand, the risk of non-recovery of a reasonable fee appeared great when Mr. Moskos entered the case, and the risk appeared greater for Mr. Fudenberg when he began his work, as to recover more than a token fee the team would need both to overcome the arguments of the Dealership that the verdict should be reversed or vacated, and to convince the Court to set new law regarding the election of remedies doctrine. A high multiplier is appropriate for that work. The risk of non-recovery was less for work undertaken after the Supreme Court issued its decision.

[10] "The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work." *In re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) (citations omitted) (citing numerous cases to similar effect). "Defendants in this action were represented [by] highly prestigious law firms . . . . Plaintiffs were thus confronted in this litigation by some of the most skilled and respected firms" in the jurisdiction. *Id. See also In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010) (similar) (finding it important that counsel were required "to respond to complex legal and factual defenses raised by highly qualified defense counsel.") (citing additional cases).

So too here. Plaintiff's attorneys were confronted by one of the most skilled and respected firms in the jurisdiction, Young Clement Rivers, LLP. As explained on its website, Young

Clement Rivers is a member of "[a]n international association of elite law firms." http://www.ycrlaw.com. It provides "superior legal work." www.ycrlaw.com/practice-groups. Three attorneys from the firm, including two partners, were among the four attorneys representing the Dealership on the cross-appeals. Its Commercial Litigation and Appeals Practice Group, whose chair, Mr. Brown, was a member of the defense team, has successfully engaged in "hundreds" of appeals, not only for "the firm's own clients." as it "is regularly sought out to initiate actions in the original jurisdiction of the South Carolina Supreme Court, and to prepare briefs as amicus curiae," "handling numerous appeals from cases originating outside of the firm" on matters "referred by other attorneys." www.ycrlaw.com/practice-groups/commercial-litigation-and-appeals. "At the cutting edge of Charleston's legal community," where it is "constantly setting new standards," the firm is "recognized internationally." *Id.* The relevant webpages are assembled in Tab 15.

In contrast, in *Layman*, defense counsel had—whatever the quality of their work as a general matter—produced a defense with "no reasonable basis in law or in fact."

The exceptional quality of the opposition here necessitates an exceptional multiplier. "Plaintiffs' attorneys [have] been up against established and skillful defense lawyers, and should be compensated accordingly." *In re Equity Funding Corp. Sec. Litigation*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). So too here.

[11] It was not mere chance that the defense in *Layman* lacked a reasonable basis. It was inherent in the theory of fee shifting embodied in the statute. The operative statute there, S.C. Code Ann. § 15-77-300 (2005), applies only where the defense lacks rationality. *Layman*, 376 S.C. at 444–52, 658 S.E.2d at 325–29 (explaining and applying § 15-77-300). That statute is not designed to encourage litigation, but merely to manage litigation already underway. It is like

sanctions under the Rules of Civil Procedure. Such rules are strictly construed. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001) (collecting those rules) (further holding that those rules are strictly construed).

In contrast, the fee-shifting provision here has the purpose of increasing the willingness of plaintiffs to litigate. It "facilitates" suits "against dealers who engage in deceptive practices." Op. p. 29. Such fee-shifting provisions warrant the most substantial awards. *See, e.g.*, *Taylor v. Medenica*, 331 S.C. 575, 503 S.E.2d 458 (1998) (affirming fee award of $500,000 on actual damages of less than $36,500); *In re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 750–51 (S.D.N.Y. 1985) ("'generous'" awards are appropriate under similar statutes) (collecting similar cases); *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 363 (E.D.N.Y. 2010) (collecting additional cases) ("'generous fee awards in cases such as this [are appropriate]'").

The Court should follow *Layman* in "embrac[ing] the theory of fee-shifting embodied in [the relevant statutes]," *id.* at 458, and the Opinion in the present case, and conclude that the Dealer's Act, a statute designed to encourage litigation to protect consumers, is more conducive to a substantial multiplier than is a statute that applies only where the defense that must be overcome lacks a rational basis.

In sum, Mr. Austin's counsel navigated a highly extensive case involving an exceptionally broad range of issues against exceptionally skilled opponents and obtained exceptional results. Their fees are to be awarded pursuant to a provision that epitomizes the definition of a remedy. An exceptional multiplier is in order.

2. Alternative Grounds for an Increased Award

Courts are also authorized to increase awards due to the special import of any of the six common law factors. *Layman* authorizes consideration of factors beyond the traditional six, not

instead of the traditional six. Each common-law factor independently supports an increased award; they do so cumulatively as well. The Court should increase the award based on:

- The highly beneficial results obtained (factor 5). *See, e.g., Connolly v. National Sch. Bus Serv.*, 177 F.3d 593, 597 (7th Cir. 1999) (setting forth a three-part test for determining the degree of success, "the difference between the judgment recovered and the recovery sought, the significance of the legal issues on which the plaintiff prevailed and, finally, the public purpose served by the litigation."). Mr. Austin scores at the top of this test, with a complete recovery, resolution of a novel issue, and public purposes well served.
- The unusual complexity and difficulty of the appellate and post-appellate case (factor 1). *E.g., Metlife, supra*, 689 F. Supp. 2d at 357 (in awarding fees, courts "should consider factors such as the novelty and difficulty of the questions presented [and] the skill requisite to perform the legal services properly").
- The large investment of time without contemporary compensation (factor 2).
- The special competence of counsel (factor 3), especially as compared to the customary rates for similar work (factor 6). This small team was very well qualified to represent Mr. Austin in this matter. "Given the complexity [and] the presence of numerous contested issues . . . only well-qualified counsel could have litigated this case and achieved the [results obtained]." *Metlife*, 689 F. Supp. 2d at 362. So too here. It is doubtful that a team lacking Plaintiff's attorneys' knowledge of automotive issues and appellate skill would have produced a similar result. Yet Mr. Austin's counsel, more than 15 years out of law school when they began to work on this case, and highly respected in their fields, requested baseline rates identical to those the Supreme Court approved, pre-multiplier, for counsel two years out of law school.
- The highly contingent nature of the compensation (factor 4).

The Court can, and should, enhance the award even before reaching the additional factors that should be considered pursuant to *Layman*.

IV. THE DEALERSHIP'S ARGUMENTS RE: THE ENTITLEMENT TO FEES

The Dealership maintains that Mr. Austin is not entitled to any fees—not trial-level, not appellate, not post-appellate. Mr. Austin addresses these arguments here. It further argues that

an award, if any, must be severely restricted.[3] Mr. Austin addresses those arguments in Part V. Each is fatally flawed. As the substance of the Dealership's objections would apply equally to fees incurred in seeking fee awards, such reasoning is also addressed here by implication.

A. The Dealership Errs in Arguing that the Statute Prohibits Appellate Fees

The Dealership claims that the statute's provision that anyone wrongfully "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" limits fees to those incurred in the court of common pleas. It errs for numerous reasons. Mr. Austin incorporates by reference his arguments and authorities under the heading, "The Entitlement to Fees," establishing that appellate and post-appellate fees are properly awarded, and that the mandatory language of the statute here makes fees and costs even more appropriate than in many cases wherein the Supreme Court held that fee-shifting statutes require the award of such fees.

It suffices to resolve the issue to note the remedial nature of the statute and of its fee-shifting provision, and the rule that remedial measures are broadly construed, *see, e.g.*, *South Carolina Dep't of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) (remedial measures are broadly construed); Op. p. 20 (the provision here is remedial). Thus, even if the Dealership's reading made sense—which it does not—it would be trumped by the

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[3] As background, the Dealership presented its objections in its return to Mr. Austin's motion for appellate fees before the Supreme Court. Mr. Austin had noted that controlling case law declared that appellate fees pursuant to a fee-shifting statute are ordinarily a matter for the trial court on remand, but in an abundance of caution, asked the Supreme Court to award such fees nonetheless. The Dealership argued that the Supreme Court should not reach the matter of appellate fees under the statute, which it maintained were a matter for the trial court on remand, and cited additional authority. Nevertheless, were the Supreme Court to reach that question, the Dealership presented numerous arguments why it believed appellate fees should be denied or minimized. The Supreme Court denied the motion via form order, stating simply, "Motion Denied." The relevance here is the arguments that the Dealership raised to the effect that if the Supreme Court were to address the question of statutory fees, such fees should be denied or limited.

rule that remedial statutes are to be broadly construed, coupled with the observation that the Dealership's reading would not be the only plausible reading.

Further, the Dealership's reading does not make sense. The phrase on which the Dealership relies does not so limit the fees. The phrase "may sue therefor in the court of common pleas" is meant to indicate where the suit is to originate, and not to define "reasonable attorney fee." The plain language does not support the Dealership's position.

Instead, the plain language refutes the Dealership's reading, which is unreasonable and illogical. "[A] reasonable attorney's fee" necessarily implies all work that is reasonable; it would not be "reasonable" to deny payment for work reasonably necessary. *E.g., Renaissance Enters. v. Ocean Resorts*, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) (contractual provision) (finding "no reason" that such a fee would be excluded) (not needing to reach the governing rules of construction), *rev'd in part on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999). The Dealership's position thus fails, even without reaching the principles of construction.

Work reasonably necessary includes work required to secure the damages award and to secure a proper fee award, such as prosecuting and/or defending against an appeal, and, if a proper award be still resisted by the losing party, taking the steps necessary to secure such an award.

The Dealership's reading is contradicted by well-established principles of statutory construction in addition to the rule that remedial statutes are broadly construed. South Carolina recognizes the sensible proposition that when the legislature shifts fees, it has a purpose in doing so, *see e.g., Layman*, 376 S.C. at 442–58, 658 S.E.2d at 324–33; Op. p. 29; 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). To deny the later fees would clash with the statute's requirement for the Dealership "to fully compensate Austin" for his fees and costs, Op. p. 29. It would create the type of deterrent the statute is designed to prevent, *id.* In this case, due to the much greater complexity of the later stages of the case and the resulting increase in fees, it would create an even greater disincentive. To hold that a dealership that lost at trial may quadruple the number of its attorneys for the appeal, engage an internationally recognized law firm, Tab 15, increase its own appellate fees ten-fold over its trial-level fees, Tabs 16–17, and that the plaintiff may not recover the resulting appellate fees, would eviscerate the statute.

More generally, the Dealership's reading conflicts with the underlying theory of fee-shifting statutes generally, and especially of statutes that shift fees only in favor of prevailing plaintiffs. 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. *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).

In sum, the Dealership's position is illogical on its face, at war with theories of statutory fee-shifting, and, even if it had passed those tests, would be trumped by the remedial nature of this provision.

B. The Dealership Errs in Reading the Supreme Court Opinion as Holding that Mr. Austin Is Not Entitled to Any Fees or Costs

One might have thought the matter non-controversial: The Opinion of the Supreme Court states, p. 31 (emphasis added), "In terms of Austin's cross-appeal, *we hold:* (1) *he is entitled* to . . . attorney's fees and costs under the South Carolina Dealer's Act." When the Supreme Court issues an opinion explicitly stating, "we hold," that would seem to end debate.

The Dealership disagrees. The Dealership maintains the Court actually held Mr. Austin is not entitled to any fees or costs. It points to the concurring in part, dissenting in part, opinion of Justice Pleicones. Justice Pleicones stated that he "agree[d] with the majority" that a plaintiff who proves violations of both common and statutory law may recover both common law damages and statutory fees. Op. p. 37 (Pleicones. J.) (concurring in part) (citing *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (N.C. 1993)). However, he believed the trial court "did not rule" on the issue, and therefore, because Mr. Austin failed to file a Rule 59 motion, the issue was not preserved for appellate review. *Id.* p. 38 (Pleicones, J.) (dissenting in part).

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 (Pleicones, J., dissenting in part) (emphasis added); "In *my* view, his claim for attorneys' fees and costs dies," *id.*, p. 38; "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*," *id.*, p. 39.

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." By repeatedly and consistently employing the first-person singular, he further recognizes he is in dissent on this question.

The Dealership fails to recognize that there are two (2) election of remedies discussions in the principal opinion. Thus, when Justice Kittredge writes, "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," Op. p. 40, the Dealership erroneously assumes that Kittredge means the election of remedies matter discussed on pages 29–31 of the principal opinion, rather than the election of remedies matter discussed on pages 14–15.

With the Chief Justice joining Justice Kittredge, and Kittredge joining Pleicones, the Dealership argues, a majority of three Justices voted for the position that Mr. Austin is not entitled to fees. But Kittredge and Toal did not join Pleicones and part ways with Beatty and Waller on the attorney fees/election of remedies matter; they did so on the fair market value/election of remedies matter.

The conflict between the Dealership's position, on the one hand, and on the other hand, the principal opinion's "we hold" and Justice Pleicones' recognition that he is in dissent would suffice to resolve any ambiguity as to Justice Kittredge's opinion. But there is more. The Dealership's reading also conflicts with Justice Kittredge's opinion. First, Justice Kittredge placed the election of remedies issues about which he wrote squarely in the context of the fair market value issue. His opinion does not mention attorney fees. Second, and more importantly, the single sentence on which the Dealership focuses must be read in the context of Justice Kittredge's opinion as a whole. Immediately after declaring, "I join the well-written majority opinion of Justice Beatty save two exceptions," he explained (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," and (2) "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 . . . ." Op. p. 40. The Dealership erroneously reads 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."

In sum, the Dealership's position conflicts with every opinion in this case. It presents Justice Kittredge as joining Beatty save three exceptions, whereas Kittredge wrote, "two exceptions." It 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 knew what they were writing: Justice Kittredge's "two exceptions" means "two exceptions," not "three exceptions"; 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."

C. The Dealership Doubly Errs in Arguing That Justice Pleicones' Opinion Would Forbid Appellate Fees

As discussed above, the Dealership errs in contending that Justice Pleicones wrote for a majority on the fees issues. The Dealership's argument regarding appellate fees places error atop error. Mr. Austin would be entitled to his appellate fees and costs even if Justice Pleicones wrote for a majority on the fees issues.

The Dealership misreads Justice Pleicones' opinion. He "agree[d] with the majority" that a plaintiff who proves a Dealer's Act violation "may" be entitled to fees and costs in addition to

damages for a common-law violation. Op. p. 37. To turn that "may" into an "is" on appeal, as he explained, the 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 Court did not rule on it, and therefore Mr. Austin's failure to file a Rule 59 motion was fatal. Op. pp. 37–39.

The point on which he contended with the majority was whether this Court had ruled. All agree that Mr. Austin raised the issue; all at least implicitly agree that no Rule 59 motion was filed. All agree, at least implicitly, that no Rule 59 need have been filed if this Court did rule on the issue. The majority found that this Court did rule on the matter. Op. p. 27. Justice Pleicones believed that this Court "did not rule on this issue involving an election between punitive damages and statutory fees." Op. p. 38. 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," Op. p. 38).

Mr. Austin believes that this Court did rule, and that the Supreme Court held that this Court ruled. Nevertheless, and assuming, strictly for purposes of argument, that Justice Pleicones did, as the Dealership maintains, command a majority for his position that this Court did not rule on Mr. Austin's 2006 request for trial-level fees, that would have no bearing on Mr. Austin's present request for appellate and post-appellate fees.

He is entitled to those fees and costs pursuant to Section 56-15-110(1) and *McDowell, Layman,* and other authorities previously cited, regardless of whether he filed or did not file, should have filed or did not need to file, a Rule 59 motion to follow up on his earlier request.

He is entitled to appellate fees entirely independently of anything in the remand to that effect. It suffices that he proved a Dealer's Act violation, and on appeal successfully defended the determination that a violation had occurred, thus preserving the entitlement to fees. The Supreme Court's multiple determinations in his favor regarding fees and costs are *sufficient* to award appellate and subsequent fees and costs—more than sufficient, they are controlling, compelling reasons—but not *necessary* in order to award those fees and costs. Multiple, independently sufficient lines of analysis lead to that conclusion.

Therefore, in the unlikely event the Court were to agree with the Dealership that Justice Pleicones wrote for a majority regarding the entitlement to fees and costs, Mr. Austin requests appellate and subsequent fees directly pursuant to the statute. He incorporates by reference his arguments and authorities under the heading, "The Entitlement to Fees." (As to his *a fortiori* claims there based on the Act being remedial and its fee-shifting provision intending to encourage Dealer's Act suits, he substitutes the plain language of the statute as authority for those propositions in place of the Opinion.) His request here is almost certainly academic, as Justice Pleicones clearly did not command a majority for any part of his position regarding fees; it is raised solely in an abundance of caution.

V. THE DEALERSHIP'S ARGUMENTS RE: THE AMOUNT OF AWARD

A. The Argument that Fees Are to be Awarded Only for Time Narrowly Attributable to the Dealer's Act Claim Misreads the Opinion in Ways Addressed Above

The Dealership has another version of its view regarding Justice Pleicones' opinion. Even if Justice Pleicones did not command a majority for his view that Mr. Austin's request was not ruled on by the circuit court, Justice Pleicones must at least have commanded a majority, the Dealership maintains, for his view that a plaintiff who proves a Dealer's Act violation must segregate the hours and costs attributable to the Dealer's Act claim and recover only those sums.

This too is erroneous, as Justice Pleicones commanded no majority on any aspect of the fees issue. Justice Pleicones was quite clear that the majority holding on this issue was the opposite of his view. He recognized, and disagreed with, what he explicitly refers to as "*the majority's holding* that, pursuant to *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992), a plaintiff 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 (Pleicones, J., dissenting) (emphasis added). He similarly recognized that "the majority" have concluded "that we may award all fees and costs sought on this record." *Id.*, p. 39.

Similarly, the majority explicitly addressed the question, held in Mr. Austin's favor, and explained its rationale. "[T]he question becomes . . . should the amount be limited to the fees incurred in establishing his claim under the Dealer's Act." Op. p. 30. "[H]e is entitled to the *entire amount of his request* for attorney's fees and costs." *Id.*, p. 31 (emphasis added). "[T]o award Austin his claim in its entirety," the Court explained, "would be consistent with the precedent of this Court. *Cf. Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992)." It thus rejected the view that precedent requires a restrictive approach to Dealer's Act fee awards.

B. The Dealership's Argument that Later Fees Are Greater than Trial-Level Fees Cuts Against the Dealership

The Dealership complains that Mr. Austin's appellate fees are 2.3 times his trial-level fees. It may similarly complain that his post-appellate fees are 2.4 times his trial-level fees. Yet the Dealership's own appellate fees are ten times its trial-level fees. Tabs 16–17. Mr. Austin would be happy to agree with the Dealership that the proper measure for appellate fees is the ratio of those fees to trial-level fees, and that the proper lodestar award for Mr. Austin is therefore ten times his trial-level fees. He is unable, however, to represent to the Court that the Dealership's position accurately states the law. Nevertheless, when a party, such as the Dealership here,

engages a firm that advertises it is "dedicated to improving the quality and depth of legal services," www.yrc.com (Tab 15), it should not be heard to complain that the firm did what it advertises, and that opposing counsel's work became correspondingly more difficult and expensive. The dramatic increase in the Dealership's fees is yet more evidence that the appellate case was of much greater extent and difficulty than was the trial-level case. If anything, the Dealership's ten-fold increase indicates that Mr. Austin's increase was too low. When a party engages an international-class law firm, quadruples the number of its own counsel, and increases its own fees ten-fold, it cannot credibly complain that the hours required of opposing counsel multiplied.

In contrast, other than the time spent in trial, the time demands at trial level were remarkably small. Pre-trial, the Dealership served no discovery requests, engaged no experts, noticed no depositions. For strategic reasons, neither did Mr. Austin notice any depositions.[4] Mr. Austin's counsel thus had little to do except to straightforwardly prepare his own case. The trial itself was largely a straightforward credibility contest, pitting the customer and supporting witnesses against the Dealership's agents. The parties did engage during trial on a complicated odometer act issue, but Mr. Austin's counsel had previously researched and briefed that issue to what he considered sufficient depth for trial purposes. Thus, even that issue required relatively little time of Mr. Austin's counsel.

Post-trial, the relatively complicated issues of elections of remedies, attorneys fees, and pre-judgment interest were issues Mr. Austin's counsel had similarly researched and briefed sufficiently for post-trial motions, and thus again, the time commitment was minimized. Nor did

[4] The lack of discovery requests and deposition notices by the Dealership was part of a deliberate strategy, according to the Dealership's trial counsel, to avoid spurring Mr. Moskos to move to compel the Dealership to respond to his discovery requests. Tab 18.

Mr. Austin's counsel feel compelled to respond either to the Dealership's post-trial motions or to its extensive memorandum in support of those motions. Rightly or wrongly, he considered the former too skeletal to warrant a response and the latter untimely.

With no pre-trial demands from opposing counsel, the heftier legal issues previously briefed, and no need to respond to any post-trial filings, the time required and thus the fees were minimized. On appeal, in contrast, the Dealership presented issues with sufficient clarity and force, and sufficient insistence that they had been raised to this Court, to mandate detailed responses. More generally, whether due to the inherent nature of the case, or to the quality of the Dealership's briefing, the appellate case was one of such importance that the Supreme Court certified it, the Justices reached the vast majority of questions the parties raised, and issued an exceptionally lengthy opinion detailing an exceptional number of issues. It simply became a much more extensive case.

C. There Is No Merit to the Dealership's Claim that Mr. Austin's Fees Are Otherwise Excessive / Final Considerations

For reasons sketched above, the appellate and later fees are entirely reasonable in the context of the six factors, and in comparison to the trial-level fees in light of those factors. Some final observations relate to the Dealership's claim that the fees are excessive in relation to some undefined standard.

As noted above, the Dealer's Act is a consumer-protection statute with a fee-shifting provision exclusively in favor of successful plaintiffs; these provisions often lead to large awards. The theory of fee-shifting negates any limitation of awards to a percentage of the amount awarded, nor even to the entirety of the amount awarded. "[T]here is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment." *Taylor v. Medenica*, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998) (affirming fee award of $500,000 on

actual damages of less than $36,500). Such a limitation would conflict with the theory of fee-shifting statutes enacted because the costly fees involved make a fee limited to the amount at stake inadequate to attract quality counsel in sufficient numbers.

Nor is recovery limited to charges incurred due to wrongful litigation conduct. Fees and costs awarded as sanctions, such as those awarded under the Rules of Civil Procedure, are limited to those incurred in responding to a party's wrongful litigation conduct. No such limitation exists under the Dealer's Act or similar statutes. The only conduct at issue is the tortfeasors' underlying wrongful conduct, and the choice to put the plaintiffs to their proof. Plaintiffs are entitled to recover for time spent responding to the most meritorious defense and to the most unreasonable defense.

Finally, as the Supreme Court explained in *Taylor v. Medenica*, 331 S.C. at 581, 503 S.E.2d at 460, in affirming an award of a half-million dollars in fees and $24,068 in costs incurred in obtaining an actual damage award of $36,242.00, a larger fee was appropriate where the defendant "vigorously contested" the plaintiff's claims. It is not technically a matter of fault. The more vigorous defense may be vigorous precisely because the claims have some merit. However, there is an extra measure of justice in awarding larger fees against wrongdoers who vigorously defend against making good their wrong.

The Dealership kept doubling down. It could have returned Mr. Austin's money and taken back the truck when he first told them he knew it had been wrecked. It could have settled when Mr. Austin's first attorney, John Polito, wrote to the Dealership, and it became aware Mr. Austin had engaged counsel. It could have settled after suit was filed. It could have satisfied the award after this Court issued its Orders, and spared Mr. Austin's counsel a great deal of work. It could have paid after the Supreme Court decision. It just kept doubling down.

This is precisely the sort of case for which the Dealer's Act is designed.

Conclusion

The Dealer's Act fee-shifting provision "epitomizes the definition of a remedy." For the reasons stated above, and such other reasons as may be apparent to the Court, Mr. Austin asks the Court to vigorously apply the Dealer's Act attorney fee provision, grant Mr. Austin's full lodestar requests, and apply a substantial multiplier. He further asks the Court to direct the clerk of court to enter on the judgment rolls that Mr. Austin is awarded $26,371.10 in actual damages and $216,600.00 in punitive damages for fraud and $49,360.00 for trial level attorneys fees to make the judgment consistent with the Supreme Court's Order.

Respectfully Submitted,

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Mt. Pleasant, SC
May 21, 2012

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	C.A. No. 04-CP-14-135
	)	
Donald C. Austin,	)	
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
Stokes-Craven Holding Corp., d/b/a Stokes Craven Ford,	)	
	)	
Defendant.	)	
	)	

Before the Court is "Plaintiff's Motion to Direct the Clerk of Court to Enter Judgment Consistent with the Remittur and Motion for Attorneys' Fee." The Motion follows The Supreme Court's issuance of its Opinion on cross appeals of various rulings by the undersigned at the trial level. This Opinion is reported as Austin v. Stokes-Craven, 387 S.C. 22, 691 S.E.2d 135 (S.C. 2010).

Wading through the morass of paperwork which has inundated the Court relative to the motion, and numerous readings of the Opinion, recall to the Court the words of the then presiding Bishop of the Episcopal Church, USA. Bishop Allin said in a speech "being head of the church is like putting together a jigsaw puzzle while riding on a roller coaster."

In our small four man law firm, we used to, on most mornings, gather around a small kitchen table, and drink coffee and talk. Often we would discuss at length legal issues one or more of us were trying to wrestle to the ground. Our wisest partner would sit and quietly listen for fifteen or twenty minutes as two or three of us square off on the topic under debate.

After listening for fifteen or twenty minutes, the wise partner would lean in and say, "Isn't this the real issue" and "isn't this the solution." In practically every instance he was right.

He had the gift of taking all of the jumbled bundle of issues and arguments and reducing them to what I call the least common denominator.

In addressing the issues here extant, I have tried, and hopefully succeeded in reducing the jigsaw puzzle presented by The Supreme Court's Opinion and counsels' submissions to the least common denominator which I address herein below.

The next to the last salvo in this tug-of-war, a July 2, 2012 letter from Plaintiff's counsel, appears to modify the noted motion and requests that the Court:

> Accept jurisdiction over the issues previously litigated before [the undersigned], and issue an Order directing the Clarendon County Clerk of Court to enter judgment consistent with the remittur on these issues. We will then request that judge in the Third Circuit hear the motion for Appellate and subsequent attorneys' fees.

This modification appears reasonable as the posture of this case has the undersigned very confused as to whether or not I have any jurisdiction as to the issues raised by the motion, particularly the issue of Appellate and "subsequent" fees.[1] The Supreme Court remanded this case with this directive:

> "[W]e remand this case to the Circuit Court for entry of judgment consistent with our decision." (387 S.C. at p. 59).

While it appears the modification suggested by Plaintiff set forth above is a "kick the can down the road" approach, the Court finds it is the appropriate resolution of the issues the initial motion presented.

Ordinarily, a judge in our system of rotation of judges, duly assigned and empowered to hold court in another circuit, must exercise his judicial powers while within the territorial boundaries of such circuit. Shillito v. City of Spartanburg, 215 S.C. 83, 88, 54 S.E.2d 521, 522

[1] In addition to what is written herein, Rule 205 SCRAP, which provides that upon service of notice of an appeal, the Appellate Court shall have exclusive jurisdiction over the appeal (emphasis added) gives me pause as to the court's jurisdiction as to Appellate attorneys' fees.

(1949). Further, a judge assigned to hold court in a circuit in which he is not a resident must generally exercise judicial duties relating to the circuit during the period of the assignment. Id. These limitations, however, are subject to several exceptions. One of these exceptions is that the judge may issue an order regarding matters which were submitted to the judge while presiding in the circuit. Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 58, 512 S.E.2d 498, 500 (2010); *citing* Barnett v. Piedmont Shirt Corp., 230 S.C. 34, 94 S.E.2d 1 (1956); *citing* Shillito v. City of Spartanburg, *supra.* Another exception is that a judge retains jurisdiction to consider timely post-trial motions even though no longer assigned to the circuit.

Finally, in Cox v. Fleetwood Homes of Georgia, Inc., *supra*, the South Carolina Supreme Court held that "[W]here a case is remanded on appeal to make more specific factual findings or conclusions of law which do not require any additional hearing, the judge who issued the original order has the authority to issue an amended order even though the judge is not a resident of or then assigned to hold court in the judicial circuit where the case arose." As trial judge in the above-referenced case, the undersigned has jurisdiction to issue an order in this matter as to the trial issue of attorneys' fees under the South Carolina Motor Vehicle Dealers Act. (The Dealers Act).

Supporting this conclusion is The Supreme Court's opinion in American Sur. Co. v. Hamrick Mills, 194 S.C. 221, 9 S.E.2d 433 (S.C. 1940). Therein the Court states the following:

> In the tenth paragraph, counsel takes the position that the judgment of The Supreme Court cannot be altered, modified or enlarged upon by the Circuit Court and that the Circuit Court is powerless to do other than is specifically directed by the mandate of the Appellate Court. This appears to be a statement of sound law ... 9 S.E.2d at 437.

So, sound law is what the Court herein intends to apply.

First, as to the web of opinions, concurrences and dissents, the Court finds Justice Beaty's opinion is the opinion of the majority and establishes the law that the undersigned must follow in deciding Plaintiff's motion as modified.

As to the issue of attorneys' fees under The Dealer's Act, Justice Pleicones did not address same as he found the issue was not preserved, but found that the law as to this issue as applied by Justice Beaty, writing for the majority, is the correct legal disposition of the underlying issue. Justice Pleicones 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. *See, e.g., United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993). As explained below, however I do not believe this issue is preserved for our consideration. 387 S.C. at p. 64.

The discussion by Justice Pleicones of the Dealer fee issue, presented after the statement that it is not preserved for review can only, in the undersigned's opinion, be considered obiter dictum.[2] Justice Kittredge, with concurrence by Chief Justice Toal, joins in Justice Beaty's "well written opinion," except as to two issues neither of which address the issue of The Dealers Act attorneys' fees.

Therefore, the opinion of The Supreme Court and its remand place the issue of The Dealers Act attorneys fees squarely before this Court for consideration. The Supreme Court has appeared at one point to frame the sole issue for the undersigned as "whether [Plaintiff] should be awarded the entire amount of his request or should the amount be limited to the fees incurred in establishing his claims under The Dealers Act." 387 at p. 57.

[2] A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). Black's Law Dictionary, 7th Ed. p. 1100.

However, the majority opinion held that Austin "is entitled to the entire amount of his request for attorneys fees and costs under the South Carolina Dealers Act." 387 S.C. at 58. Thus, The Supreme Court has remanded[3] the case to this Court for the simple task of directing the Clerk of Court to enter judgment and to confirm the award of attorneys fees sought by Plaintiff under The Dealers Act. The Supreme Court's ruling, while making no particularized analysis as this Court would be required to do, made an award of The Dealer Act attorneys fees without use of the analysis required by Taylor v. Nix, 307 S.C. 551, 416 S.C.2d 619 (S.C. 1992) at 307 S.C. p. 557 or that set forth in Blumberg v. Nealco, 310 S.C. 492, 427 S.E.2d 654 (S.C. 1993) in the amount of $49,936.50

It therefore appears that this Court's sole authority and sole responsibility is to direct the Court to enter judgment in favor of Plaintiff for the amounts of the verdicts, as upheld by The Supreme Court, to wit: $26,371.10 actual damages; $216,600.00 punitive damages; and trial level attorneys' fees and costs of $49,936.50.

Therefore, it is Ordered that the Clerk of Court for Clarendon County shall enter judgment in favor of Plaintiff against Defendant in the following amount:

1. Actual Damages: $26,371.10
2. Punitive Damages: $216,600.00
3. Trial level Attorneys' Fees and Costs: $49,936.50.

[3] Remand, to send (a case or akin) back to the court or tribunal from which it came for some further action. Blacks Law Dictionary, 7th Ed. p. 1292.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

July 11th, 2012
York, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON)	CASE NO. 04-CP-14-135
DONALD C. AUSTIN,)	
)	
Plaintiff)	
vs.)	ORDER
)	
STOKES-CRAVEN HOLDING CORP)	
d/b/a STOKES-CRAVEN FORD)	
)	
Defendant.)	

THIS MATTER came before me on Defendant Stokes-Craven Holding Corp., d/b/a/ Stokes-Craven Ford's ("Stokes-Craven's") motion to reconsider, alter, or amend pursuant to Rule 59(e) SCRCP this Court's Order of July 11, 2012 granting Plaintiff's "Motion to Direct the Clerk of Court to Enter Judgment Consistent with the Remittur and Motion for Attorneys' Fees." I make the following findings:

1. Per my request, counsel for both parties submitted information and authority regarding my jurisdiction to hear Plaintiff's motion filed on or about May 24, 2012. The information was submitted in letter form, and the letters of counsel and enclosures were considered by me in entering the July 11, 2012 Order. Therefore, these letters with enclosures, attached hereto as Exhibit A, form part of the official record;
2. The remaining grounds of Stokes-Craven's Motion to Reconsider are denied.

IT IS SO ORDERED.

The Honorable John C. Hayes, III

On this 15th day of August 2012

York, SC

EXHIBIT C

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

Donald C. Austin, ...Plaintiff, Respondent

v.

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

NOTICE OF APPEAL

Defendant Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford ("Stokes-Craven") appeals the Judgment of the Honorable John C. Hayes, III dated July 1, 2012 and filed on July 16, 2012 (Exhibit A) along with the Order denying Defendants' Motion to Reconsider dated August 1, 2012 and filed on August 16, 2012 (Exhibit B), which enter judgment against Stokes-Craven and hold that Plaintiff, Donald C. Austin is entitled to trial level attorney's fees and that the Court of Common Pleas for the Third Circuit has jurisdiction to hear Plaintiff's request for appellate level attorney's fees.

August 21, 2012

ANDREW K. EPTING, JR., LLC

By _____
Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
46A State Street, Charleston, SC 29401
843-377-1871; Fax: 843-377-1310
Attorneys for Appellant Stokes-Craven

Counsel of Record for Respondents:
Brooks R. Fudenberg, Esquire
C. Steven Moskos, Esquire

EXHIBIT D

Michelle Endemann

From: Brooks R Fudenberg [BRF@Fudenberglaw.com]
Sent: Monday, December 10, 2012 10:46 AM
To: wyounglc@sccourts.org
Cc: Andrew K. Epting; csmoskos; Alexa Long (Steve Moskos); Michelle Endemann
Subject: Austin v. Stokes-Craven; Case No. 04-CP-14-135

Dear Mr. Mallory,

It would be appreciated if you would pass the attached on to His Honor.

Thank you.

Dear Judge Young,

I, along with Steven Moskos, represent Donald Austin, the plaintiff in Austin v. Stokes-Craven Holding Corp., case number 2004CP1400135. The case is currently on the motions roster to be heard by you on Wednesday, December 19.

The case was originally heard by the Hon. John Hayes back in 2006 when he was temporarily in Manning. It has now been remanded by the Supreme Court. In response to post-remand motions we made, Judge Hayes decided some issues and left others for a Third Circuit judge, reasoning that jurisdiction over the remaining issues resided in the Third Circuit.

The Defendant has appealed certain aspects of Judge Hayes's order. Most particularly, the Defendant/Appellant's second issue in its Brief to the Court of Appeals challenges the Circuit's jurisdiction to hear the matter. The Defendant/Appellant's second issue on appeal is,

> b) Whether it was error for Judge Hayes to hold he was without jurisdiction to hear Respondent's motion as this was a decision for the third circuit when neither he nor the third circuit have jurisdiction to rule on Respondent's motion as the South Carolina Supreme Court has already denied Respondent's motion for appellate fees?

Defendant subsequently asked the Clerk to set a date for a hearing on our motions.

Mr. Austin believes that the motion presently before Your Honor is automatically stayed pursuant to Rule 241, SCACR (generally, "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal . . . .").

Mr. Austin does not see how the a Third Circuit court may currently hear the matter, as its jurisdiction to do so is currently under appeal.

If the matter is not automatically stayed, Mr. Austin believes that Your Honor may prefer to postpone hearing the motion until the Court of Appeals rules on whether the Third Circuit has jurisdiction hear

it. This is especially so because of the voluminous filings associated with the matter, more than 500 pages.

We would ask that you hold that this matter is stayed pursuant to the appellate rules, or in the alternative, on basic judicial economy grounds, and postpone the hearing until after the Court of Appeals rules. That would spare the Court the need to decide issues that may be mooted by the appellate court decision in this case; would spare your staff the need to deal with the voluminous filings that are otherwise coming its way (which Judge Hayes referred to in his order of 7-16-2012 as a "morass of paperwork"); and would spare us the need to travel to Manning to learn the matter has been postponed, as all the attorneys are based in the Charleston area.

We have spoken with opposing counsel regarding this matter, and he continues to prefer the matter be heard now.

If you do wish to go forward, we will have the documents to you by the end of the week. If there is a preferred address, please let us know.

Mr. Austin would prefer the matter be stayed pursuant to Rule 241, rather than have a continuance attributed to him, but does believe it makes sense to wait on the appellate decision.

Thank you.

Sincerely,

Brooks R. Fudenberg

Brooks R. Fudenberg
1004 Anna Knapp Blvd., Suite 3
Mount Pleasant, SC 29464
Tel: (843) 416-2558
eFax: (910) 401-1242
BRF@Fudenberglaw.com

EXHIBIT E

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2004 CP-14-135

Donald C. Austin
PLAINTIFF(S)

Stokes-Craven Holding Corp.
DEFENDANT(S)

Submitted by: C. Steven Moskos
535 Stinson Dr.
Charleston, SC 29407

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion for Appellate Level and Post Appellate Attorneys' Fees is stayed by the appeal of Judge Hayes' July 11, 2012 Order and the motion is removed from the December 19, 2012 roster.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

2156 15 Jan 2013

Circuit Court Judge | Judge Code | Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

EXHIBIT F

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
In the Court of Common Pleas for the Ninth Circuit

W. Jeffrey Young, Circuit Court Judge

Case No.: 2004-CP-14-135

Donald C. Austin, ...Plaintiff, Respondent

v.

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

NOTICE OF APPEAL

Defendant Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford appeals the Judgment of the Honorable W. Jeffrey Young dated January 15, 2013 and filed on January 22, 2013 (Exhibit A).

January 30, 2013

ANDREW K. EPTING, JR., LLC

By _____
Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street, Charleston, SC 29401
843-377-1871; Fax: 843-377-1310
Attorneys For Appellant Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford

Counsel of Record for Respondents:
Brooks R. Fudenberg, Esquire
C. Steven Moskos, Esquire