

NO. A11-0581

State of Minnesota
 In Supreme Court

Marie Delores Green,

Respondent,

vs.

BMW of North America, LLC,
 a foreign limited liability company
 qualified to do business in the State of Minnesota,

Appellant.

BRIEF AND ADDENDUM OF
 APPELLANT BMW OF NORTH AMERICA, LLC

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE AND FACTS.....	2
LEGAL ARGUMENTS	6
I. Standard of Review.....	6
II. This Court Requires Consideration of the Relationship Between the Amount of Fees Claimed and the Amount of a Claimant’s Damages When Determining “Reasonable” Attorney Fees.	7
III. The Supreme Court’s <i>Riverside v. Rivera</i> Decision Supports Consideration of the Proportionality Factor.....	14
IV. Failure to Award Attorney Fees That Are at Least Somewhat Proportional to the Amount Involved Results in Windfalls For Plaintiffs’ Counsel and <i>De Facto</i> Sanctions on Defendants.....	19
V. The Fee Award Was Grossly Disproportionate to the Amount At Issue Because the District Court Failed to Properly Consider the Other Factors Involved in its Reasonableness Determination Thereby Abusing its Discretion.	23
A. The district court abused its discretion by failing to consider the number of attorney hours reasonably expended on a \$25,000 case by experienced counsel.	23
B. The district court abused its discretion by failing to properly consider what Green’s attorneys could realistically charge paying clients in the open market when determining reasonable hourly rates.....	28
C. Recent district court decisions involving respondent’s counsel and this same appellant illustrate that lower courts need more guidance from this court in determining the amount of reasonable attorney fees in lemon-law cases.	31
CONCLUSION	35
Form and Length Certification	

TABLE OF AUTHORITIES

Cases

<i>301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass'n</i> , 783 N.W.2d 551 (Minn. App. 2010)	12
<i>Anderson v. Hunter, Keith, Marshall & Co.</i> , 417 N.W.2d 619 (Minn. 1988)	1, 8, 9, 10, 24
<i>Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany</i> , 522 F.3d 182 (2d Cir. 2007)	29
<i>Asp v. O'Brien</i> , 277 N.W.2d 382 (Minn. 1979)	9
<i>Bankey v. Phillips & Burns, LLC</i> , 2008 WL 2405773 (D. Minn. 2008)	26
<i>Blum v. Stenson</i> , 465 U.S. 886 (1984)	19
<i>Burston v. Virginia</i> , 595 F. Supp. 644 (E.D. Va. 1984)	28
<i>Chauvin v. BMW of N. America</i> , 27-CV-10-24020 (Minn. Dist. Ct. June 24, 2011)	32, 33
<i>Chavez v. City of Los Angeles</i> , 47 Cal. 4th 970 (Cal. 2010)	13
<i>Copeland v. Marshal</i> , 641 F.2d 990 (D.C. Cir. 1980)	24
<i>Darula v. BMW of North America, LLC.</i> , Case No. A11-1457	34
<i>Friend v. Gopher Co.</i> , 771 N.W.2d 33 (Minn. App. 2009)	6, 14
<i>Gumbhir v. Curators of the Univ. of Missouri</i> , 157 F.3d 1141 (8th Cir. 1998)	11, 12, 13, 18
<i>Hempel v. Hempel</i> , 225 Minn. 287, 30 N.W.2d 594 (1948)	7
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	8, 10, 12, 13, 15, 28, 29, 30, 31
<i>Hilferty v. Chevrolet Motor Div. of Gen'l Motors Corp.</i> , 1996 WL 287276 (May 30, 1996 E.D.Pa.)	26
<i>Huffman v. Pepsi-Cola Bottling Co.</i> , 1995 WL 434467 (Minn. App. July 25, 1995)	23, 24
<i>In re Continental Illinois Sec. Litigation</i> , 962 F.2d 566 (7th Cir. 1992)	30

<i>Jaquette v. Black Hawk County</i> , 710 F.2d 455 (8th Cir. 1983)	22
<i>Jorstad v. IDS Realty Trust</i> , 643 F.2d 1305 (8th Cir. 1981)	6
<i>Kassebaum v. BMW of N. America</i> , 27-CV-10-15916 (Minn. Dist. Ct. June 14, 2011)	32, 33
<i>Kern v. TXO Prod. Corp.</i> , 738 F.2d 968 (8th Cir. 1984)	7
<i>Leroy v. City of Houston</i> , 906 F.2d 1068 (5th Cir. 1990)	28
<i>Marks v. United States</i> , 430 U.S. 188 (1977)	17
<i>McKnight v. Johnson Controls, Inc.</i> , 36 F.3d 1396 (8th Cir. 1994)	7
<i>Messana v. Mercedes-Benz of N. Am., Inc.</i> , 2000 WL 988163 (N.D. Ill. 2000)	25
<i>Milner v. Farmers Ins. Exch.</i> , 748 N.W.2d 608 (Minn. 2008)	1, 6, 7, 8, 9, 11, 12, 13, 23
<i>Minneapolis Star and Tribune Co., v. U.S.</i> , 713 F. Supp. 1308 (D. Minn. 1989)	23
<i>Missouri v. Jenkins</i> , 491 U.S. 274, 109 S.Ct. 2463 (1989)	29, 30, 31
<i>Moreno v. City of Sacramento</i> , 534 F.3d 1106 (9th Cir. 2008)	12
<i>Northwest Wholesale Lumber, Inc. v. Citadel Co.</i> , 457 N.W.2d 244 (Minn. App. 1990)	9
<i>Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.</i> , 776 F.2d 646 (7th Cir. 1985)	24
<i>Pa. v. Del. Valley Citizens' Council for Clean Air</i> , 483 U.S. 711 (1987)	34
<i>Paulson v. BMW of N. America</i> , 27-CV-10-17472 (Minn. Dist. Ct. April 6, 2011)	33
<i>Pennsylvania v. Delaware Valley Citizens' Council for Clean Air</i> , 478 U.S. 546 (1986)	19
<i>Perdue v. Kenny A.</i> , 130 S. Ct. 1662 (2010)	29, 31
<i>Peter v. Jax</i> , 187 F.3d 829 (8th Cir. 1999)	22
<i>Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action</i> , 558 F.2d 861 (8th Cir. 1977)	22

<i>Riverside v. Rivera</i> , 477 U.S. 561 (1986)	5, 6, 14, 16, 17, 18
<i>Rodriguez v. United States</i> , 480 U.S. 522 (1987)	19
<i>Shepard v. St. Paul</i> , 380 N.W.2d 140 (Minn. App. 1985)	6, 19, 22
<i>Specialized Tours, Inc. v. Hagen</i> , 392 N.W.2d 520 (Minn. 1986).....	1, 8, 9, 11
<i>State v. Paulson</i> , 188 N.W.2d 424 (Minn. 1971).....	1, 7, 8, 23, 31, 33, 34
<i>United States ex rel. Thompson v. Walgreen Co.</i> , 621 F. Supp. 2d 710 (D. Minn. 2009)	26
<i>Ursic v. Bethlehem Mines</i> , 719 F.2d 670 (3d Cir. 1983)	22
<i>Vaughns v. Board of Educ.</i> , 598 F. Supp. 1262 (D. Md. 1984)	10
<i>Walsh v. Chrysler Corp.</i> , 1997 WL 732459 (E.D. Pa. 1997)	25
<i>Walters v. DaimlerChrysler Corp.</i> , No. 27-CV-07-18302 (Minn. Dist. Ct. Sept. 15, 2008).....	27
<i>Whitaker v. 3M Co.</i> , 764 N.W.2d 631 (Minn. App. 2009)	7, 18
<i>Young v. Diversified Consultants, Inc.</i> , 554 F. Supp. 2d 954 (D. Minn. 2008)	26

Statutes

Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 <i>et. seq.</i>	2
Minn. Stat. § 325F.665 <i>et. seq.</i> (2011).....	1, 2
Minn. Stat. § 325F.665, subd. 3(a) (2011).....	21
Minn. Stat. § 336.2-314.....	2
Minn. Stat. § 336.2-607.....	2
Minn. Stat. § 514.14.....	9

STATEMENT OF LEGAL ISSUES

1. Did the district court abuse its discretion in this lemon-law case by awarding attorney fees under a fee-shifting provision that were almost nine times great than the potential damages and by finding both that those fees were reasonable and that it was improper to consider the amount involved, despite this Court's directive to consider all relevant circumstances?

Following a bench trial on respondent Marie Green's lemon-law claims, the district court found that she was entitled to \$25,157.05 in damages. Green's counsel sought reimbursement under the statute for more than 600 attorney hours billed at hourly rates of \$375 and \$350 for a total of more than \$221,000 and another \$7,500 in costs. Despite appellant's opposition, the district court awarded Green all of her requested fees and costs, determining that it was "improper" to consider whether the sought-after fees were proportional, or otherwise reasonably related, to the amount involved. Appellant appealed and the Minnesota Court of Appeals affirmed, reaching the same conclusion. Chief Judge Matthew Johnson dissented.

Apposite Cases:

Milner v. Farmers Ins. Exch., 748 N.W.2d 608 (Minn. 2008);
Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988);
Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986); and
State v. Paulson, 188 N.W.2d 424 (Minn. 1971)

Apposite Statutes:

Minn. Stat. § 325F.665 *et. seq.* (2011)

STATEMENT OF THE CASE AND FACTS¹

This case asks whether it could ever be reasonable for attorneys to bill more than 600 hours at rates of \$375 and \$350 and then recover under a fee-shifting statute more than \$221,000 in fees in a lemon-law case that had from the beginning an upward value of approximately \$25,000.00.

In December 2008, respondent Marie Delores Green served a five-count complaint in connection with her lease of a 2007 BMW 328xi. Specifically, Green alleged that appellant BMW of North America, LLC, violated Minnesota's Lemon Law, Minn. Stat. 325F.665 *et. seq.* (Counts I-II); violated the federal Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et. seq.* (Count III); and breached its express and implied warranties pursuant to Minn. Stat. §§ 336.2-607 and 336.2-314 (Counts IV-V) (App.66-67).

Green's total lease cost was \$27,803.04. (App.68). Under Minnesota's Lemon Law, the maximum damage award possible for a successful litigant involving a leased vehicle is a full refund of the lease price, minus a "reasonable use" allowance of 10 percent. Minn. Stat. 325F.665, Subds. 3(a) and 4 (2011). Nearly 20,000 miles were put on the vehicle during the first year of the lease. (Tr. I, 138-139; App.20). As such, her experienced lemon-law attorneys knew early on that the maximum potential recovery in this case was limited to approximately \$25,000.00. (\$27,803.04 lease price minus 10% reasonable use allowance equals approximately \$25,047.04 in damages) (Add.32-33;

¹ Most references throughout this brief are cited as "App._" or "Add._". Pleadings and other written submissions by the parties not included in the Addendum or Appendix are referred to by their commonly accepted abbreviations – *e.g.* "Pl.'s Mot. for Atty.'s Fees at p. _".

App.111-112).²

Green rarely drove the vehicle and instead permitted her 54-year-old non-resident son, Michael McDonough, to drive it for his own personal use. (App.67-68; 70). The vehicle's alleged problems involved an intermittent failure to accelerate properly and a malfunctioning sunroof. (Add.2). McDonough described the acceleration as "dangerous and/or unsafe" and claimed that it happened "on a daily basis." (Add.10-11; App.75). He characterized the sunroof concern as an inconvenience because he was occasionally delayed while waiting for the sunroof to properly close. (App.92; Tr. I, 104,152). In spite of these concerns, three weeks prior to trial, he had already driven the vehicle over 47,000 miles during the course of approximately two-and-a-half years. (App.21).³

After a four-day bench trial in the Fourth Judicial District Court, the Honorable Ann Leslie Alton presiding, the court took the matter under advisement and issued its Findings of Fact, Conclusions of Law, and Order in favor of Green on all five counts. (Add.3; App.65). The district court awarded Green a full refund of the vehicle's lease price (\$27,803.04) minus a 10% statutory allowance for "reasonable use." (Add.3-4; App.105; 111).

Green then moved for fees and costs under Minnesota's Lemon Law, which allows for the recovery of "reasonable attorney's fees incurred." Minn. Stat. 325F.665,

² Appellant highlights this fact to correct the appellate court's various assertions that the value of the case was "approximately \$27,000" and/or "\$28,000." (Add.16; 18).

³ Appellant sets out these facts only to illustrate appellant's good-faith basis in defending these claims to counter the district court's assertion that because appellant "vigorously defended" this case, its \$221,499.50 fee award was reasonable. (Add.15; 25).

Subd. 9 (2011). Green sought reimbursement for 605.8 attorney-hours at hourly rates of \$375 and \$350 and 10.4 paralegal-hours at \$165 per hour. (*See* Pl.'s Mot. for Atty.'s Fees). Appellant opposed the fee motion, arguing that Green's counsel failed to exercise "billing judgment" in light of the sheer enormity of the hours billed and that the rates charged were more than what Green's counsel could command in the "marketplace" from actual *paying* clients for similar services. (*See* BMW's Resp. to Mot. for Atty.'s Fees).

The district court issued its order on December 22, 2010, awarding \$221,499.50 in attorneys' fees and \$7,565.40 in costs to Green's counsel. (Add.23; 30). The district court refused to reduce either the hours billed or the rates charged, noting that the matter "was vigorously defended," and it thus "cannot conclude that the amount of time spent on the described tasks was unreasonable." (Add.25). The court also rejected any consideration of the disproportionate relationship between the \$221,000.00 in legal fees awarded and the \$25,000.00 damage award, finding that "where there is a fee shifting provision, it is improper to compare the amount of reasonable legal fees to the amount of a recovery in determining the proper fee award because the purpose of the fee-shifting provision is to provide an incentive for attorneys to take these types of cases." (Add.28).

Appellant appealed the district court's Findings of Fact, Conclusions of Law and Order, as well as the attorney's fees order. (Add.28). The Minnesota Court of Appeals unanimously affirmed the judgment, awarding Green the refund of her lease payments, but the panel was split as to the question of attorney's fees. (Add.1-22). The majority concluded that while "the number of hours counsel spent on this case is quite high," there was nothing in the record sufficient to support a finding that the district court "clearly

err[ed]” in finding the hours were “reasonable and necessary” to successfully prosecute the case. (Add.15-16). The majority also held that while reasonable hourly rates must be awarded based on “market standards,” there was “no clear error” because Green’s counsels’ affidavits and prior fee orders were sufficient to support their requested hourly rates. (Add.16). Finally, the majority held that “[w]hile reasonableness implies a certain degree of proportionality,” they disagreed “that a district court should consider the *amount involved* in the litigation when awarding attorney fees” because that would “undermine the purpose of the fee-shifting provision, which recognizes that the amount involved may be minimal compared to the effort required to succeed on the claim.” (Add.16-17) (emphasis in the original). In support, the majority viewed the Supreme Court decision of *Riverside v. Rivera*, 477 U.S. 561, 578 (1986), as having “specifically rejected application of a proportionality rule” in fee-shifting contexts. (Add.16-17).

Chief Judge Matthew Johnson dissented, concluding that Green’s attorneys failed to exercise “billing judgment” because “no reasonable attorney with a contingent fee would have invested more than 600 hours into a case that was so limited in value” and “[i]n the absence of a fee-shifting statute, Green’s attorneys surely would not have charged her \$221,000 in hourly fees given the limited value of the case.” (Add.18-19). The dissent also concluded that *Rivera* does not preclude consideration of the amount at issue, noting that the question reviewed in *Rivera* was much narrower and that the case’s holding was limited to civil-rights cases that “vindicate important civil and constitutional rights that cannot be valued solely in monetary terms,” unlike cases brought to recover compensatory damages under Minnesota’s lemon-law statute. (Add.20).

The dissent likewise pointed out that even if *Rivera* were applicable in the lemon-law context, *Rivera's* plurality opinion actually held that “[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorneys’ fees to be awarded under §1988.” (Add.20) (emphasis in the original). Finally, the dissent argued that this Court’s existing statutory fee-shifting precedent was already broad enough to include consideration of the relationship between the amount of attorney’s fees claimed and the amount of the claimant’s damages when fixing a “reasonable” fee, citing *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608 (Minn. 2008). (Add19).⁴

Although appellant petitioned this Court for review of the entire court of appeals’ decision, this Court only accepted review of the attorney-fee issue.

LEGAL ARGUMENTS

I. Standard of Review.

The standard of review on appeal of an award of attorney’s fees is “whether the district court’s findings were clearly erroneous as to the factual basis for the award, or whether it committed abuse as to the discretionary margin involved in its allowance.” *Shepard v. St. Paul*, 380 N.W.2d 140, 143 (Minn. App. 1985) (quoting *Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1312 (8th Cir. 1981)). *Friend v. Gopher Co.*, 771 N.W.2d 33, 41 (Minn. App. 2009) (failure “to properly apply the lodestar analysis adopted by the Minnesota courts for determining appropriate fee awards” is reversible error).

⁴ Of note, subsequent to the appellate court’s decision, Green’s counsel submitted an additional fee request for attorneys’ fees incurred on appeal, totaling \$45,305.00 for 124.4 attorney-hours billed for drafting their response brief and preparing for oral argument. (App.113-121). Thus, Green’s legal fees stand in excess of \$266,000 and the meter is still running.

To say something is “discretionary,” however, does not mean “the district court may do whatever it pleases.” *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1403 (8th Cir. 1994) (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968 (8th Cir. 1984)). Rather, it means “the court has a range of choice” that will remain undisturbed “as long as it says within that range and is not influenced by any mistake of law.” *McKnight*, 36 F.3d at 1403. In other words, a court abuses that choice when it “relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them.” *Whitaker v. 3M Co.*, 764 N.W.2d 631, 636 (Minn. App. 2009) (citations omitted).

Here, the district court abused its discretion by failing to follow this Court’s directive to consider “all relevant circumstances,” including the amount at issue, when determining the amount of reasonable attorney fees awarded pursuant to a fee-shifting statute.

II. This Court Requires Consideration of the Relationship Between the Amount of Fees Claimed and the Amount of a Claimant’s Damages When Determining “Reasonable” Attorney Fees.

For more than 60 years, this Court has held that the amount at issue in a particular case is a relevant factor in the determination of reasonable attorney fees. *See State v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971) (citing *Hempel v. Hempel*, 225 Minn. 287, 293, 30 N.W.2d 594, 598 (1948)). More recently, and in the context of a statutory fee-shifting case, this Court reaffirmed that courts must consider “*all relevant circumstances*,” including the amount involved. *Milner v. Farmers Ins.*, 748 N.W.2d 608, 620-21 (Minn. 2008) (quoting *Paulson*, 290 Minn. at 373, 188 N.W.2d at 426).

Nevertheless, the court of appeals here affirmed as reasonable an attorney fee award that was nearly nine times the amount of compensatory damages awarded, finding that “[w]hile reasonableness implies a certain degree of proportionality, we disagree that a district court should consider the amount involved in the litigation when awarding attorney fees.” (Add. 16-17). The majority opinion acknowledged, though, that this Court has on numerous occasions approved the use of the federal “lodestar” method for determining “reasonable” attorney’s fees as set forth in the seminal case of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). (Add. 16) (citing *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520 (Minn. 1986); *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619 (Minn. 1988); and *Milner v. Farmers Ins.*, 748 N.W.2d 608 (Minn. 2008)). Under this method, courts determine the lodestar amount by “multiplying the ‘number of hours reasonably expended on the litigation . . . by a reasonable hourly rate.’” *Milner v. Farmers Ins.*, 748 N.W.2d 608, 620-21 (Minn. 2008) (quoting *Hensley*, 461 U.S. at 433).

But the lodestar method is just “the starting point in determining a reasonable fee.” *Specialized Tours*, 392 N.W.2d at 542 (citing *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939). To arrive at a conclusion that the fee awarded is reasonable, courts must also consider “*all relevant circumstances*,” including “the time and labor required; the nature and difficulty of the responsibility assumed; *the amount involved* and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client.” *Milner*, 748 N.W.2d at 621 (quoting *Paulson*, 188 N.W.2d at 426 (emphasis added)). The phrases “all relevant circumstances” and “the amount involved” are unambiguous

and need no interpretation or parsing. As the dissent noted in this case, “[t]his [language] is broad enough to allow a court to consider the relationship between the amount of attorney fees claimed and the amount of the claimant’s damages.” (Add. 19).

The appellate court majority, nevertheless, concluded that requiring courts to consider the amount involved in litigation when awarding fees would “undermine the purpose of the fee-shifting provision, which recognizes that the amount involved may be minimal compared to the effort required to succeed on the claim.” (Add. 17). Yet this Court on numerous occasions has required consideration of “all relevant circumstances,” including “the amount involved,” in a wide variety of fee-shifting statutes regardless of the amount at issue. *See, e.g., Milner*, 748 N.W.2d at 620 (fee dispute involving the Minnesota Fair Labor Standards Act); *Anderson*, 417 N.W.2d at 628 (fee dispute involving the Minnesota Human Rights Act); *Specialized Tours*, 392 N.W.2d at 542 (fee dispute involving the Minnesota Securities Act). Thus, for example, in actions to foreclose a mechanic’s lien, which permit recovery of attorney’s fees pursuant to Minn. Stat. § 514.14, this Court has directed that the fee award “should be in *reasonable relation* to the amount of the judgment secured.” *Northwest Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 251 (Minn. App. 1990) (citing *Asp v. O’Brien*, 277 N.W.2d 382, 385 (Minn. 1979) (emphasis added)). The same is required for fee awards under Minnesota’s Lemon Law as there is nothing unique from a public-policy perspective justifying the majority’s departure from this Court’s directive to consider “all relevant circumstances,” including the amount involved.

Indeed, that directive is consistent with the Court instruction that lower courts must “scrutinize” statutory fee requests to ensure counsel exercised “billing judgment” just as they would do in the absence of a fee-shifting statute:

‘In the private sector, billing judgment is an important component in fee setting. It is no less important here. Hours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.’

Anderson, 417 N.W.2d at 629 n. 10 (quoting *Hensley*, 461 U.S. at 434). While Minnesota courts have never elaborated on what the term “billing judgment” means, it is apparent from its context in *Hensley* that courts must “consider [among other factors] the conduct of the litigation as a whole *from the point of view of a cost-conscious client.*” *Vaughns v. Board of Educ.*, 598 F. Supp. 1262, 1277 (D. Md. 1984) (citing *Hensley* at 432-437) (emphasis added).

The dissent below agreed, noting that “no reasonable attorney with a contingent fee would have invested more than 600 hours into a case that was so limited in value.” (Add. 19). In other words, “[i]n the absence of a fee-shifting statute,” Green’s counsel would have exercised billing judgment and “surely would not have charge her \$221,000 in hourly fees given the limited value of the case [approximately \$28,000].” (Add. 18-19). Simply put, the dissent determined that an attorney cannot exercise “billing judgment” without consideration of the case’s value.

The court of appeals majority, though, held that district courts must instead look only at whether the fee requests are proportional to the “results obtained” and that because Green’s attorneys were successful in obtaining approximately \$25,000 under the

lemon law, they were entitled to more than \$221,000 in attorney fees and approximately \$7,500 in costs. (Add. 17) (citing *Specialized Tours*, 392 N.W.2d at 542-43; *Milner*, 748 N.W.2d at 622 & n.11). The majority, however, never explains how the \$25,000 award is “proportional” to the more than \$228,000 in fees and costs. More importantly, the majority fails to clarify how Green’s counsel exercised “billing judgment” by investing more than 600 hours in a case that had at the outset a finite value *to Green* of approximately \$25,000.

When faced with this issue, the Eighth Circuit Court of Appeals, like the dissent here, has held that billing judgment must include consideration of the amount involved:

[The district court] *overlooked another aspect of reasonableness* – the question whether the requested fee award when based upon hours allegedly expended *exceeds the amount that could ever be reasonable for a case of this nature*. This question is relevant because attorneys *should not be permitted to run up bills that are greatly disproportionate to the ultimate benefits that may be reasonably attainable*.

Gumbhir v. Curators of the Univ. of Missouri, 157 F.3d 1141, 1146 (8th Cir. 1998) (internal citations omitted) (emphasis added). In *Gumbhir*, for example, plaintiff sought \$458,263.57 in attorney’s fees and \$46,576.98 in costs following an \$8,864.40 damage award in a Title VII retaliation claim. *Gumbhir*, 157 F.3d at 1146. The district court instead awarded \$110,000 in “reasonable” fees and \$15,000 in costs, and both sides appealed. *Id.* at 1146. The Eighth Circuit further reduced the fees to \$46,750 and costs to \$15,000, noting that because plaintiff’s counsel “knew from the outset that this case involved only a relatively modest claim for compensatory damages, perhaps \$50,000 to

\$75,000 at most,” it was not reasonable for that attorney “to run up a bill of \$450,000 to \$500,000 to litigate this type of damage claim.” *Id.*

The same is true here. This case was “a lawsuit concerning a defective car” that by its very nature is valued “solely in monetary terms” and that had a finite upward limit of approximately \$25,000. Like the attorneys in *Gumbhir*, Green’s counsel failed to exercise “billing judgment” when their “hours allegedly expended exceed[ed] the amount that could ever be reasonable for a case of this nature.” *Gumbhir* at 1146. *See also Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) (“The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client”) (citing *Hensley*, 461 U.S. at 434) (emphasis added). And it is because of this demonstrated lack of billing judgment that the ultimate fee request was so disproportionate to the finite amount at issue.

The court of appeals’ conclusion that Minnesota law does not permit consideration of the amount involved likewise overlooks the fact that Minnesota courts are permitted to adjust fee awards based on case-specific “exceptional contingencies.” *See, e.g., 301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass'n*, 783 N.W.2d 551, 569 n. 10 (Minn. App. 2010) (“fees may be adjusted by the district court to reflect the degree of success that the party obtained or other *exceptional contingencies*”) (citing *Milner*, 748 N.W.2d at 623) (emphasis added). The facts here constitute an “exceptional contingency” that would not only allow for, but also seem to require, a downward adjustment if the statutory objective is to award only *reasonable* attorney fees. As the

dissent noted, the fee amount was “unprecedented for a lemon-law case” nationwide, with no reported award “even half as large as the award in this case.” (Add. 19). Under these facts, the lower courts erred by not giving any consideration to the relationship between the amount of attorneys’ fees claimed and the amount of Green’s damages when determining the reasonableness of the fee award. *See Clifton*, 783 N.W.2d at 569 n. 10; *Milner*, 748 N.W.2d at 623; *Hensley*, 461 U.S. at 429-30, 436 (noting that “there is no precise rule or formula for making these determinations,” the amount of the fee award “must be determined on the facts of each case”). *See also Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 990 (Cal. 2010) (“A fee request that appears unreasonably inflated *is a special circumstance* permitting the trial court to reduce the award”) (emphasis added).

In summary, one must presume this Court meant what it has explicitly stated all along — when determining “reasonable” attorneys’ fees in the statutory fee-shifting context, courts must consider “*all relevant circumstances*,” including “*the amount involved*” in the underlying litigation. *Milner* at 621. To hold otherwise would allow counsel for prevailing parties to ignore their responsibility to exercise “billing judgment” by incurring fees that “exceed the amount that could ever be reasonable” under the circumstances, *Gumbhir* at 1146, and it would strip lower courts of the power to consider “exceptional contingencies” in cases where the lodestar amount does not reflect a “reasonable” fee award given the unique facts of any particular case. *Clifton* at 569 n. 10. Accordingly, the lower courts erred by not following this Court’s ample precedent that demands consideration of all relevant circumstances, including the amount involved, when determining whether the requested fees under a statutory fee-shifting scheme are

reasonable pursuant to the lodestar analysis. *Friend*, 771 N.W.2d at 41 (failure “to properly apply the lodestar analysis adopted by the Minnesota courts for determining appropriate fee awards” is reversible error).

III. The Supreme Court’s *Riverside v. Rivera* Decision Supports Consideration of the Proportionality Factor.

To support its holding that district courts need only consider whether the requested attorney fees are proportional to the results obtained, excluding consideration of the amount at issue, the majority declared that the United States Supreme Court has “specifically rejected application of a proportionality rule.” (Add. 17) (citing *City of Riverside v. Rivera*, 477 U.S. 561, 578, 106 S.Ct. 2686, 2696 (1986)). As analyzed by dissent, though, the facts do not back up this declaration. Putting aside the fact that Minnesota state courts “have not previously adopted or even cited *Rivera*,” [Add. 19], a plain reading of *Rivera*’s plurality opinion supports a finding by this Court that the relationship between the amount of attorney’s fees claimed and the amount of a claimant’s damages is indeed a factor for courts to consider when determining “reasonable” fees, particularly in non-civil rights cases like this one.

To begin with, *Rivera* did not preclude district courts from considering whether the fees sought are in proportion to the amount involved. Rather, the narrow issue in *Rivera* was to “whether an award of attorney’s fees *under 42 U. S. C. § 1988* is *per se* ‘unreasonable’ within the meaning of the statute if it exceeds the amount of damages recovered by the plaintiff in the underlying civil rights action.” *Rivera*, 477 U.S. at 564

(emphasis added). This limited question sharply divided the Court and produced an indecisive 4-1-4 decision.

The case was filed by “eight Chicano individuals” against the City of Riverside and 31 individual police officers, alleging that the officers acted without a warrant, used unnecessary force, and arrested four persons without probable cause while breaking up a party. The jury returned 37 verdicts against the city and five individual officers and awarded the plaintiffs \$33,350 in compensatory and punitive damages and \$245,456 in attorneys’ fees, which the Ninth Circuit upheld. *Rivera*, 477 U.S. at 564-565. The Supreme Court vacated the fee award and remanded the case for reconsideration in light of *Hensley*. On remand, the district court made detailed findings of fact, determining once again that \$245,456 in attorney fees was reasonable. Significantly, the district court also found that the defendants’ unlawful acts were “motivated by a general hostility to the Chicano community” that “pervaded a very broad segment of police officers in the department” and, thus, that the “litigation served the public interest [because] the institutional behavior involved . . . had to be stopped and nothing short of having a lawsuit like this would have stopped it.” *Id.* at 574-575.

Against this backdrop, a four-justice plurality rejected a strict proportionality rule in civil-rights cases. Instead, they recognized the exceptional nature of the underlying facts of the case, and in particular, emphasized the “public benefit” of the suit, noting that “a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms [and] often secures important social benefits that are not reflected in nominal or relatively small damages awards.” *Id.* at p. 574. The

plurality also discussed the unique statutory history and purpose of § 1988 claims and fee awards, holding that a strict proportionality rule “would seriously undermine Congress’s purpose in enacting Section 1988” because it would “make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts.” *Id.* at 576, 578. The plurality did recognize, however, that “[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorney’s fees to be awarded under § 1988.” Proportionality, though, was just “one of many factors that a court should consider in calculating an award of attorney’s fees.” *Id.* at 474.

Justice Powell concurred, but his opinion displayed his discomfort with the results, noting that “on its face, the fee award seems unreasonable.” *Id.* at 581. He nevertheless joined in the judgment because he was satisfied that affirmance was required in light of “the district court’s detailed findings of fact” that the costly pursuit of the case was essential to break down a pattern of police maltreatment of the Chicano community in the city. *Id.* at 581, 586-587. More importantly, he stated that it would be “*the rare case* in which an award of private damages can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case.” *Id.* at 586 n. 3 (emphasis added). In other words, in the majority of civil-rights cases where “private damages” are the principal benefit, “primary consideration” should be given to the actual size of the damage award. *Id.*

When viewed in its entirety, *Rivera* offers several considerations for this case. First, *Rivera* did not “specifically reject application of a proportionality rule” in all fee-

shifting contexts, addressing instead the narrow per se issue before it. (Add. 17). Second, the plurality acknowledged that “[t]he amount of damages a plaintiff recovers *is certainly relevant to the amount of attorney’s fees to be awarded under § 1988*, noting though that it is, “only one of many factors that a court should consider in calculating an award of attorney’s fees.” *Rivera*, 477 U.S. at 574 (emphasis added). Thus, as the dissent here noted, while *Rivera* may forbid an arbitrary limit on an award of attorney fees, . . . it does not foreclose all consideration of the amount of damages sought or recovered” particularly in non-civil-rights cases. (Add. 20).

Third, Justice Powell’s concurrence, like the plurality opinion, distinguished between cases, like the one at issue here, in which “recovery of private damages is the purpose” of the litigation and those cases for which “the court may consider the vindication of constitutional rights in addition to the amount of damages recovered.” *Rivera*, 477 U.S. at 585. This observation, along with his comment that a disparity between the amount of private damages and the subsequent attorney fee award should be permitted in only the “rare case” where justified by the “public interest,” supports the conclusion that proportionality should be a consideration in all other fee-shifting cases. *Id.* at 586 n. 3.⁵

This case does not fall within the rare category that Justice Powell described. Instead, and as the dissent observed, the instant case was simply a “lawsuit concerning a

⁵ Justice Powell’s concurrence is important because, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotations omitted).

defective car,” not one involving “important civil and constitutional rights that cannot be valued solely in monetary terms.” (Add. 21). *See also Gumbhir*, 157 F.3d at 1146 (noting that because the case before it did not involve “broad civil rights implications” but rather “a damage action for injury suffered from a rancorous employment dispute that degenerated into unlawful racial or ethnic retaliation,” attorney fees ten times the potential award were not reasonable).

Finally, assuming *arguendo* Minnesota’s Lemon Law serves potential “public interests” beyond the mere recovery of “private damages,” and assuming those interests are somehow comparable to those promulgated via civil-rights litigation, the district court never made any findings as to the specific “public interest” served via this litigation. *See Rivera*, 477 U.S. at 581, 586 (“For me affirmance — quite simply — is required by the District Court’s *detailed findings of fact* * * * that the ‘public interest’ had been served by the jury’s verdict”) (Powell, J., concurring) (emphasis added).

In short, as even the appellate court majority recognizes, “reasonableness implies a certain degree of proportionality” when awarding attorney’s fees pursuant to statutory authority. (Add. 16-17). This Court’s directive to consider “all relevant circumstances” and to exercise “billing judgment,” as well as the Supreme Court’s pronouncements in *Rivera*, all recognize this fact. The “relevant circumstances” in this case demonstrate Green’s counsel failed to exercise “billing judgment” by investing 600 hours in case that resulted in \$221,000 in attorneys’ fees to secure a judgment that from the beginning was limited to roughly \$25,000. The lower courts’ rejection of this consideration warrants reversal and a remand for consideration of the proportionality factor. *Whitaker*, 764

N.W.2d at 636 (a court abuses its discretion when it “omits consideration of a factor entitled to substantial weight”).

IV. Failure to Award Attorney Fees That Are at Least Somewhat Proportional to the Amount Involved Results in Windfalls For Plaintiffs’ Counsel and *De Facto* Sanctions on Defendants.

The district court determined that it would have been “improper to compare the amount of reasonable legal fees to the amount of a recovery in determining the proper fee award because the purpose of the fee-shifting provision is to provide an incentive for attorneys to take these types of cases.” (Add. 28). The court of appeals similarly determined that consideration of the amount at issue in the litigation would “undermine the purpose of the fee-shifting statute.” (Add. 17). But “no legislation pursues its purposes *at all costs*.” *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (emphasis added). Indeed, “it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.” *Id.*

In any event, the legislative goal in a statutory fee-shifting case is “to provide a reasonable fee . . . that is adequate to attract competent counsel *without producing a windfall to attorneys*.” *Shepard v. St. Paul*, 380 N.W.2d 140, 143 (Minn. App. 1985) (citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (emphasis added)). This is because fee-shifting statutes “were not designed as a form of economic relief to improve the financial lot of attorneys.” *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986). Thus, if litigants “find it possible to engage a lawyer based on the

statutory assurance that he will be paid a ‘reasonable fee,’ the purpose behind the fee-shifting statute has been satisfied.” *Delaware Valley*, 478 U.S. at 565.

Here, the lower courts’ automatically assumed that to provide the necessary incentive to the bar to represent litigants in lemon-law actions, fees must be assessed without consideration of whether they are at least somewhat proportional to the amount involved. No doubt fees that are almost nine times the amount at issue would be incentivizing to many attorneys. But this rationale fails to take into account whether the statute’s intent can nonetheless be furthered — and conversely whether windfalls can be avoided — if the awarded fees are more proportional to the amount at issue. Every fee-shifting statute has a stopping point beyond which attorney’s fees are no longer “reasonable” and instead become “windfalls” for the prevailing party. This Court should, thus, reaffirm its directive that *all* relevant circumstances must be considered in awarding statutory attorney fees, including — and perhaps even especially — the amount at issue.

In fact, the failure to do so here amounted to an unwarranted *de facto* punitive sanction on the appellant for simply defending this suit on its merits. A review of the procedural history and Green’s counsels’ own billing records demonstrate that appellant exercised a commendable level of cost-efficient restraint in defending this matter. There were no discovery disputes that required Green to bring a motion to compel or otherwise seek court intervention. (*See generally* the case’s procedural history and App.1-19). Moreover, appellant consistently sought to defer depositions until after court-mandated mediation. (App.3-5). Once mediation occurred and the parties could not reach a

settlement, appellant again showed restraint by only deposing two witnesses: Green and her son. (App.6-7). Appellant chose not to depose Green's expert witness, and instead waited until trial during cross-examination to elicit information. (App.1-19; 65-66). Conversely, Green deposed appellant's expert and ten other dealership personnel, even though she called *two of the ten* dealership witnesses at trial. (App.65-66). Finally, appellant did not bring any dispositive motions.

In any event, the district court's comment that the exorbitant fees here were reasonable because appellant "vigorously defended" itself smacks of retribution. Essentially, the district court implies that appellant was wrong to litigate the matter to begin with and that it must now pay the consequences. But the mere fact that appellant was ultimately unsuccessful at trial says nothing as to its motives in defending the suit. While not attempting to re-litigate the facts, it is undisputed that a mere two weeks before trial, Green and her son had already driven the subject vehicle 46,589 miles over a two-and-a-half year period despite of their subjective concerns over its allegedly dangerous condition. (App.21). This evidence strongly supported appellant's statutory affirmative defense that "an alleged nonconformity does not substantially impair the [vehicle's] use or market value." Minn. Stat. § 325F.665, subd. 3(a) (2011). Although the district court as trier-of-fact ultimately disagreed with appellant, the fact that appellant litigated the matter through trial does not warrant a *de facto* sanction for doing so.

As the Eighth Circuit Court of Appeals aptly noted "an award of attorney's fees is compensatory, not punitive, and we will not allow a threat of paying the opposing party's unreasonable legal fees to chill the assertion or defense of seemingly meritorious claims."

Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861, 871 (8th Cir. 1977) (emphasis added). See also *Jaquette v. Black Hawk County*, 710 F.2d 455, 463 (8th Cir. 1983) (fee awards “should not serve as a vehicle to charge exorbitant fees and such excessive fees should not act to chill good faith defenses to claims”); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983)(warning that a fee award so out of proportion to the severity of the defendant’s violation amounts to a “punitive sanction” and noting that the legislature did not intend “to have lawyers run up unchecked fees bearing no relationship to the severity of the defendant's underlying offense”).

In short, Minnesota’s Lemon Law was meant to protect consumers by giving access to competent legal representation without producing windfalls to their attorneys. *Shepard*, 380 N.W.2d at 143. It was not meant to “needlessly accumulate exorbitant legal fees with the expectation that the losing party will be called upon to pick up the entire tab.” *Peter v. Jax*, 187 F.3d 829, 838 (8th Cir. 1999) (citing *Planned Parenthood*, 558 F.2d at 871). Without a clear statement from this Court that the fees awarded must be relatively proportional to the amount involved, this case and others like it will cause the “chilling effect” that the Eighth Circuit warned of — i.e., that defendants will no longer be able to risk the consequences of asserting good-faith defenses in lemon-law or other statutory fee-shifting actions. Accordingly, appellant seeks a remand from this Court accompanied with a specific directive to the district court to consider all relevant circumstances, including the amount involved, so that awards under fee-shifting statutes are more proportional, and therefore, more fair and just.

V. The Fee Award Was Grossly Disproportionate to the Amount At Issue Because the District Court Failed to Properly Consider the Other Factors Involved in its Reasonableness Determination Thereby Abusing its Discretion.

The fees that the district court awarded here were so disproportionate to the amount at issue because not only did the district court fail to consider that factor when determining reasonableness, but it also failed to properly apply the other factors that this Court has held must be considered when determining the reasonableness of the hours billed and the reasonableness of the hourly rates. *See Milner*, 748 N.W.2d at 620-21 (holding that “[f]actors considered in determining reasonableness include: the time and labor required, the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement between counsel and the client”) (quoting *Paulson*, 188 N.W.2d at 426). In doing so, the district court abused its discretion.

A. The district court abused its discretion by failing to consider the number of attorney hours reasonably expended on a \$25,000 case by experienced counsel.

Admittedly, determining the number of attorney hours “reasonably expended” on a case is by its nature, “something less than an exact science.” *Huffman v. Pepsi-Cola Bottling Co.*, 1995 WL 434467, *7 (Minn. App. July 25, 1995) (quoting *Minneapolis Star and Tribune Co., v. U.S.*, 713 F. Supp. 1308, 1312 (D. Minn. 1989) (App.28). One thing is certain, though: “*the number of hours actually worked rarely equals the number of hours reasonably expended*, so the court must disallow hours devoted to unrelated,

unsuccessful claims and hours which the attorneys would not bill to their clients.” *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 651 (7th Cir. 1985) (emphasis added). *See also Copeland v. Marshal*, 641 F.2d 990, 991-92 (D.C. Cir. 1980) (In the fee-shifting context, “[i]t does not follow that the amount of time actually expended is the amount of time reasonably expended”).

Minnesota courts also recognize the pitfalls of equating “the number of hours actually worked” with “the number of hours reasonably expended:”

It needs to be noted that basing reasonable plaintiff's attorney fees *strictly on the hours run up on the meter* has the invidious invisible effect of giving the plaintiff's attorney a dual agenda. One agenda is representing the client. *The submerged second agenda is running up hours on behalf of the firm.*

Huffman, 1995 WL 434467 at *9 (emphasis added) (App. 29). In the instant case, the district court allowed Green’s counsel to carry out this “dual agenda” by failing to reduce *any* of the 605.8 attorney hours and 10.4 paralegal hours billed for a case that had a \$25,000 value (Add. 23-31). Indeed, the district court was unable to find *a single hour* billed that was “excessive, redundant, or otherwise unnecessary.” *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 629-30 (Minn. 1988).

The failure to reduce even a single hour is especially egregious given that Green’s counsel acknowledged they are exclusive or near-exclusive lemon-law practitioners that have handled literally “thousands” of lemon law cases throughout their twenty-seven collective years of practice. (*See Respondent’s counsels’ affidavits included with Pl.’s Mot. for Atty.’s Fees; see also App.53*). Yet the district court never once mentioned or otherwise considered counsels’ expertise when judging the “reasonableness” of their

hours billed in this case. (Add.23-31). Though when justifying counsels' requested hourly rates of \$375 and \$350, the first thing the court noted was counsels' "25 years of experience in lemon law related litigation." (Add.26). As one district court aptly noted when reviewing bills from this same firm in another lemon-law case, "[respondent's] counsel charged a premium commensurate with their experience but did not regulate their hours with the efficiency they would have used if they were billing their own client." *Kassebaum v. BMW of N. America*, 27-CV-10-15916 (Minn. Dist. Ct. June 14, 2011) (App. 44).

Nor did the district court here take into account that because Green's counsel specializes in this particular practice area, it is "reasonable to expect that the hours expended on routine matters — such as pleadings, requests for discovery, and motions for attorneys' fees — would reflect the benefits of standardization." *Messana v. Mercedes-Benz of N. Am., Inc.*, 2000 WL 988163 *3 (N.D. Ill. 2000). *See also Walsh v. Chrysler Corp.*, 1997 WL 732459 *3 (E.D. Pa. 1997) ("The volume of 'lemon law' litigation in this district has resulted in 'significant standardization that eases representation . . . that should result in lower fees'") (quotation omitted). Thus, given the thousands of lemon-law cases counsel here have collectively handled, they presumably have drafted thousands of complaints, drafted thousands of written discovery requests, and likely drafted hundreds of fee petitions. The reality is that there are only so many ways one can draft these documents in the lemon-law and warranty context, and by now, counsel should have significantly streamlined its case preparation and handling. As such,

district courts must consider the benefits of standardization in cases like this and reduce the requested hours accordingly.

This Court can look for guidance from Minnesota's federal district courts, which when faced with an attorney's boast of substantial expertise have held that, "[said] expertise should enable them to efficiently litigate claims and [courts should] keep this expertise in mind when determining the number of hours reasonably expended." *Young v. Diversified Consultants, Inc.*, 554 F. Supp. 2d 954, 957 (D. Minn. 2008). See also *Bankey v. Phillips & Burns, LLC*, 2008 WL 2405773 *3 (D. Minn. 2008) ("[Defendant] argues generally that the expertise of [plaintiff's counsel] in FDCPA litigation should allow them to efficiently and effectively litigate such cases, reducing the amount of time expended. This Court agrees . . . "); *United States ex rel. Thompson v. Walgreen Co.*, 621 F. Supp. 2d 710, 715-716 (D. Minn. 2009) ("considering the level of experience of the attorneys involved, counsel could have exercised better billing judgment by streamlining some tasks or discounting time"). Appellant respectfully asserts it should be no different in Minnesota state courts.

Moreover, the record here established that Green's counsel under-utilized paralegal services and other support staff thereby increasing the number of hours billed at attorney rates. Indeed, out of the 616.2 hours billed, a mere 10.4 were paralegal hours. (App. 1-19). In the Pennsylvania case of *Hilferty v. Chevrolet Motor Div. of Gen'l Motors Corp.*, which was also a fee-dispute case involving a lemon-law specialty firm, the court made the interesting observation that the reluctance to turn routine work over to paralegals profit is motivated:

“[Defendant’s expert witness regarding standard billing practices] believed that a paralegal could be trained to perform [routine tasks] for one-third the hourly rate that [plaintiff’s lead attorney] charges. [*Said expert*] perceptively observed that [Plaintiff’s law firm] would not delegate such authority because they have ‘no incentive to staff and operate efficiently . . . because of the circumstance that the firm’s compensation comes *exclusively from court-awarded counsel fees* under the applicable legislation.’”

1996 WL 287276, *5 (May 30, 1996 E.D. Pa.) (emphasis added). Green’s counsel has encountered this criticism in the past. As far back as 2007, a district court was “compelled” to reduce this same counsel’s requested fees, noting that respondent’s counsel “does all work himself, rather than delegating more menial tasks to a paralegal or legal secretary.” *Walters v. DaimlerChrysler Corp.*, No. 27-CV-07-18302 (Minn. Dist. Ct. Sept. 15, 2008) (App.107).

Finally, Green’s counsels’ inflated billing entries are also the result of time billed for *de minimus* tasks, including “analyze notice of judicial assignment,” “review defendant’s motion for pro hac vice admission,” “analyze letter from mediator to court re unsuccessful mediation,” “analyze subpoenas and notice of taking depositions,” “analyze letter from mediator re incorrect billing statement,” *etc.* (App. 1-19). No actual *paying client* would countenance such billing practices, yet the district court awarded the billed time for these tasks in full.

This Court should therefore remand this case with a direction to the lower court to consider the holdings above as *the starting point* when determining the number of hours “reasonably expended” in any given case. In other words, courts should begin with the presumption that only in “rare” cases will the “actual hours worked” equal the amount of hours “reasonably expended” under a lodestar analysis. At the very least, if a district

court concludes, as in this case, that all of the “actual hours worked” were reasonable, it should do so with the benefit of documentation indicating what, if any, hours the attorney *actually excluded* from the initial bill to better inform the court that the attorney exercised billing judgment. See e.g. *Burston v. Virginia*, 595 F. Supp. 644, 651 (E.D. Va. 1984) (criticizing counsel for “submit[ing] hours for most, if not every, hour spent for which they may have any colorable claim for some compensation”); *Leroy v. City of Houston*, 906 F.2d 1068, 1078 (5th Cir. 1990) (same).

B. The district court abused its discretion by failing to properly consider what Green’s attorneys could realistically charge paying clients in the open market when determining reasonable hourly rates.

For purposes of determining the lodestar’s “reasonable hourly rate,” *Hensley* commands that courts must consider the market value of the legal services provided:

[*Market standards*] are the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims. This means that judges awarding fees *must make certain* that attorneys are paid the full value that their efforts would receive *on the open market in non-civil-rights cases*.

Hensley, 461 U.S. at 447 (emphasis added). Applying *Hensley* here means that in lemon-law cases, “judges awarding fees *must make certain* that attorneys are paid the full value that their efforts would receive *on the open market in [non-lemon law] cases*.” *Id.*

Conversely, the district court looked *exclusively* at what Green’s counsel and other statutorily compensated attorneys *charge* when it determined that rates of \$375 and \$350 per hour were reasonable. (Add.26-27). But looking to the rates charged by other attorneys who successfully convinced other district courts in fee-shifting cases to award their inflated hourly rates is hardly good data in determining what these attorneys “would

actually receive in the open market in [non-lemon law] cases.” *Hensley* at 447. As one district court astutely noted when addressing these same counsels’ rates, “since no individual client *actually pays the fees*, it makes no difference to the client whether the hourly fee *charged* is \$150 or \$450.” (App. 108) (emphasis added). The district court’s error here was compounded by the fact that it disregarded an affidavit submitted by appellant establishing that the market rate for attorneys in Minnesota for a case with the small value at issue here would be no more than \$200 per hour. (Add. 26; App. 122).

Moreover, several post-*Hensley* Supreme Court and lower federal court decisions make clear that the lodestar’s “reasonable hourly rate” is based on what the attorney would receive in the open market from an actual or hypothetical *paying client*. Indeed, the Supreme Court in *Missouri v. Jenkins* held that a reasonable attorney’s fee . . . means a fee that would have been deemed reasonable *if billed to affluent plaintiffs by their own attorneys.*” 491 U.S. 274, 286, 109 S.Ct. 2463 (1989) (emphasis added). Most recently, in 2010, the Supreme Court held that “in accordance with our understanding of the aim of fee-shifting statutes . . . the lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received *if he or she had been representing a paying client who was billed by the hour in a comparable case.*” *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1672 (2010) (citations omitted) (emphasis added). *See also Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cnty. of Albany*, 522 F.3d 182, 190 (2d Cir. 2007) (A reasonable hourly rate is the rate a “paying client would be willing to pay,” bearing in mind that a “reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively”); and *In re Continental Illinois Sec. Litigation*,

962 F.2d 566, 568 (7th Cir. 1992) (a reasonable hourly rate is “what the lawyer would receive if he were selling his services in the market rather than being paid by court order”) (citing *Jenkins*, , 491 U.S. at 285-286).

The holdings from these post-*Hensley* cases also make sense from a public-policy perspective. If the “open market” is what determines an attorney’s reasonable hourly rate, then it makes sense to view it through the lens of an actual or hypothetical “paying client” because attorneys who receive their compensation via statutory fee awards *are immune* from market forces and competition. They have no “paying clients” because unsuccessful defendants pick up the tab.

Conversely, non-fee-shifting attorneys are absolutely *not immune* from “the effect of market forces and competition.” Given the dismal “market” realities of the last few years, legal business is down, firms are laying-off attorneys and imposing hiring freezes, attorney compensation is stagnant or shrinking, and most importantly, paying clients are increasingly cost-conscious and demand *increased* billing efficiency and *lower* hourly rates. Thus, the same market forces demanding increased billing efficiency and lower hourly rates for defense attorneys should be equally applied to plaintiffs’ attorneys in the fee-shifting context. Ultimately, attorneys who receive court awarded fees face no *downward pressure* on their hourly rates because, with each passing year, as they gain more experience, this in turn perpetuates a never-ending spiral *upward* regarding their claimed hourly rates based on said experience. For the concept of “reasonable hourly rates” to have any connection to the real world, courts cannot continue to determine fee awards within the statutory fee-shifting vacuum.

In short, given this Court's numerous endorsements of *Hensley's* "lodestar" analysis, it should continue following the post-*Hensley* trajectory outlined above and remand this case with a direction to the lower court to review the requested hourly rates based on what "the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue*, 130 S. Ct. at 1672; *Jenkins*, 491 U.S. at 286 (same).

C. Recent district court decisions involving respondent's counsel and this same appellant illustrate that lower courts need more guidance from this court in determining the amount of reasonable attorney fees in lemon-law cases.

While this Court has adopted *Hensley's* "lodestar" method for determining "reasonable" attorney's fees decades ago, there is still significant disparity among district courts on how to apply those factors, particularly in these small value cases, as demonstrated by four recent district court decisions that were all filed within a three-and-a-half month period and all involved essentially the same vehicles and complaints. *See State v. Paulson*, 188 N.W.2d 424, 426 (Minn. 1971). (App.31-64). Each of these lemon-law cases likewise involved the same counsel from this case, as well as fee requests that were disproportionate to the relatively small damage amounts at issue. (*Id.*). Moreover, all four cases involved the same discovery and billing practices, and all were mediated before the same mediator within a one-month period. (*Id.*). Following mediation, the cases settled, but the parties were unable to reach an agreement as to attorneys' fees. (*Id.*)

Given the identical facts, procedural histories, time period, attorneys and billing practices in all four cases, one could reasonably assume that the district courts would

reach relatively similar conclusions as to their respective fee awards. *That was absolutely not the case.* For example, after “scour[ing] the publicly accessible court records in other similar cases brought by [respondent’s] counsel” [App. 33], the *Chauvin* court was “shocked” at the “wildly excessive” hours billed for “repeatedly serv[ing] and fil[ing] nearly identical complaints, discovery requests, discovery responses and fee petitions with courts throughout this state.” (App.34-35). *Chauvin v. BMW of N. America*, 27-CV-10-24020 (Minn. Dist. Ct. June 24, 2011). The court held that “[i]t would be unethical for [respondent’s] counsel to collect fees . . . for the excessive hours claimed for ‘drafting’ [these documents] when the bulk of those documents were copied and pasted from previously existing documents.” (App. 37). The court therefore reduced counsels’ claimed hours by nearly 40%. (App. 41).

Regarding counsels’ requested hourly rates, the *Chauvin* court acknowledged the current economic climate of the legal profession, noting that “in the past few years, as is well known to the Court and to all members of the bar, the market for attorneys’ services has stalled dramatically resulting in increased downward pressure on attorney’s billing practices.” (App.39). The court therefore concluded an attorney rate of \$275 per hour was a more “reasonable” reflection of current market realities rather than the \$375 hourly rate requested. (*Id.*). Out of the \$28,768.50 in attorneys’ fees initially sought, the court awarded \$12,677.50 — a 56% reduction. (App. 41).

While the *Kassebaum* court was not quite as “shocked” by counsels’ billing practices as in *Chauvin*, it still acknowledged that “the billing decisions attorneys must make are very different if they know their bill is going to the opposing party,” and as

such, “[respondent’s] counsel charged a premium commensurate with their experience but did not regulate their hours with the efficiency they would have used if they were billing their own client.” *Kassebaum v. BMW of N. America*, 27-CV-10-15916 (Minn. Dist. Ct. June 14, 2011) (App. 44). Of the 95.3 hours that respondent’s counsel requested in that case, the court awarded 60 hours at a blended attorney rate of \$360 per hour and 10 hours at a paralegal rate of \$165 per hour. (*Id.*). Of the \$33,249.00 in fees initially requested, the court awarded \$23,250.00 — a 30% reduction. (*Id.*).

Conversely, in *Paulson*, which involved the same materials, billing practices, and arguments by the parties as raised in *Chauvin* and *Kassebaum*, the court there concluded that “[respondent’s] counsel carefully and effectively litigated this action.” *Paulson v. BMW of N. America*, 27-CV-10-17472 (Minn. Dist. Ct. April 6, 2011) (App.49). Of particular note, in stark contrast to *Chauvin*, the *Paulson* court examined the written submissions (which the *Chauvin* court also examined for purposes of comparison) and found “nothing unreasonable with the number of hours billed by counsel for the preparation of pleadings and other court documents.” (App. 51). Regarding respondent’s counsels’ hourly rates, the *Paulson* court, relying on contingency-fee considerations, awarded counsel their requested rates of \$375 and \$350 respectively because, “it is reasonable for [respondent’s] counsel to charge a higher rate to compensate for the risks inherent in contingency fee cases.” (App.51-52). The court did reduce counsels’ paralegal rate to \$110 per hour, but it refused to cut any of counsels’ 134 hours billed and awarded a total of \$46,719.50 in “reasonable” attorneys’ fees. (App.49; 52).

Finally, in *Darula*, the district court again considered the same materials, billing practices, and arguments as the other courts but declined to reduce any of respondent's counsels' 152.8 hours billed or hourly rates requested, save for the reduction of 1.5 hours for counsels' initial consultation with their client that was advertised as "free," 2.0 hours for mediation preparation that counsel admitted was a billing "mistake," and a .1 reduction in attorney hours that the court felt was more appropriately billed at paralegal rates. *Darula v. BMW of N. American*, 27-CV-10-20562 (Minn. Dist. Ct. June 25, 2011) (App.55-64). Like *Paulson*, the *Darula* court also relied on contingency factors as "a reasonable basis for an increased hourly rate." (App. 58). Of the \$56,631.00 in attorneys' fees initially requested in *Darula*, the court awarded \$55,612.50 — a mere 1.7% reduction. (App. 64).⁶

The Supreme Court's admonition is particularly apt here: "to be 'reasonable,' the method for calculating a fee award must be not merely justifiable in theory but also objective and nonarbitrary in practice." *Pa. v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 732 (1987) (O'Connor, J., concurring). It is apparent, however, that "in practice," lower courts are often far from "objective and nonarbitrary" in their lodestar analyses. The instant case provides this Court the opportunity to provide further guidance to district court here and to other lower courts to better alleviate the confusing, arbitrary and disparate outcomes in the fee-shifting context that create as chilling effect on good-faith defenses and produce, at times, a windfall for plaintiff's counsel.

⁶ Appellant subsequently appealed the *Darula* decision and the matter was fully briefed and argued and the parties are awaiting the appellate court's decision. *See Darula v. BMW of North America, LLC.*, Case No. A11-1457.

CONCLUSION

In summary, this Court's precedent requiring lower courts to consider "all relevant circumstances" including "the amount involved" in the underlying litigation when determining a "reasonable" fee award is unambiguous and needs no interpretation or parsing. The district court abused its discretion in failing to consider this factor when it awarded fees that were nearly nine times the amount at issue. Moreover, the district court failed to properly apply the various factors in its initial lodestar calculation, which contributed to the disproportionate \$221,499.50 fee award. Appellant, thus, respectfully requests that this Court remand the matter to the district court for a re-determination of counsels' "reasonable" fees and costs in accordance with the principles and case law presented above, or for any other relief this Court deems necessary and just.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

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