

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.

RESPONDENT'S BRIEF AND APPENDIX

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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).

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STATEMENT OF LEGAL ISSUES

1. **Did the district court abuse its discretion by awarding attorney fees and litigation costs on the evidence in the record before it, in an amount it found reasonable and necessary in order to meet the “vigorous” defense mounted by Appellant?**
2. **Is a “dollar value proportionality” test permitted by the Magnuson-Moss Warranty Act with respect to awards of attorney fees and litigation costs?**
3. **Does the Minnesota Lemon Law require a “dollar value proportionality” test with respect to awards of attorney fees and costs?**

Pursuant to Minnesota Rule of Appellate Procedure 128.02, subd. 2, Respondent objects to Appellant’s statement of the district court’s ruling because it fails to identify that the district court awarded Respondent attorney fees and litigation costs under both the Minnesota Lemon Law, Minn. Stat. § 325F.665, subd. 9, and the Magnuson-Moss Warranty Act, 15 U.S.C § 2310(d)(2). The distinction is critical because full attorney fees and costs are awardable if Respondent prevailed under either or both statutes, as was the case here.

Apposite Cases:

Hensley v. Eckerhart, 461 U.S. 424 (1983);
Nedelka v. KIA Motors of America, Inc., No. CL07-3598-01, 2009 WL 7310705, *3 (Va. Cir. Ct., Feb. 10, 2009) (unpublished);
Cannon v. William Chevrolet/GEO, Inc., 794 N.E.2d 843 (1st Dist. Ill. App. 2003);
Huffman v. Pepsi-Cola Bottling Co., No. C7-94-2404, 1995 WL 434467 (Minn. App. July 25, 1995).

Apposite Statutes:

Minn. Stat. § 325F.665;
15 U.S.C. § 2310(d)(2).

STATEMENT OF THE CASE

Pursuant to Minnesota Rule of Appellate Procedure 128.02, subd. 2, Respondent objects to Appellant’s Statement of the Case and Facts because it ignores that the district court awarded Respondent attorney’s fees and litigation costs under both the Minnesota Lemon Law, Minn. Stat. § 325F.665, subd. 9 (also “Lemon Law”), and the Magnuson-Moss Warranty Act, 15 U.S.C § 2310(d)(2) (“MMWA”).

INTRODUCTION

The center points of Appellant's argument are that the district court failed to compare the dollar value of Respondent's recovery to the amount of fees that were incurred obtaining it, and did not properly scrutinize Respondent's counsel's billing entries.¹⁵ Regarding the first contention, the record before the Court could not be clearer: the district court did consider, and rejected, the proportionality argument as improper under the controlling statutes.

In a consumer protection case, 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. Without the fee-shifting provision, it would be cost-prohibitive for attorneys to take cases where the time and money expended trying a case would be much more than the recovery. The Lemon Law statute was written with the overall public policy concern of protecting consumers and in order to ensure that these statutes are obeyed, [a] consumer must be afforded the opportunity to bring a suit against those persons or entities that fail to comply with it. Without the fee-shifting provision, it would not be economically feasible to pursue their claims.

Order dated Dec. 22, 2010, ¶ 8, A. Add. 28-29. For all of the reasons discussed *infra*, the district court was correct in considering and rejecting Appellant's assertion that attorney fees in Minnesota Lemon Law and MMWA cases should be proportional to the dollar

¹⁵ With respect to the Amicus Curiae brief submitted by Chrysler Group LLC, it offers nothing by way of legal support for a "dollar value proportionality rule" or any other support that might aid the Court in resolving the legal issues before it. Instead the entirety of the Amicus's brief is devoted to a series of unsupported and improper factual assertions. See *SCSC Corp. v. Allied Mut. Ins. Co.*, 515 N.W.2d 588, 598, n. 1 (Minn. App. 1994) (Amicus brief should not argue the facts or urge that a particular party should succeed). Here, Amicus goes well beyond arguing "the" facts, and simply offers its own unsupported factual assertions that were never before the district court in this case.

value of the recovery obtained. *See* Minn. Stat. § 325F.665, subd. 9; 15 U.S.C. § 2310(d)(2).

Second, with respect to Appellant's complaints regarding whether the district court properly scrutinized Respondent's fee petition, it is important to note that the specifics of its complaints are being made for the first time on appeal. As the district court noted in its December 22, 2010 Order, "[i]n response [to Respondent's extensive support for her attorneys' fees and litigation costs, Appellant] offered only the conclusory assertion that the billings are excessive without explaining why." A. Add. at 25. In short, Appellant would have the Court involve itself in a factual inquiry that it never properly put before the district court. Undertaking that task would be improper from the vantage point of this Court. *See Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 630 (Minn. 1988) (determining whether the tasks performed were reasonable is best left to the district court); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.").

Even if this Court would rule differently if it were sitting as a fact finder does not mean that the district court abused its discretion. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (appellate court may not usurp the "role of the district court by reweighing the evidence in finding its own facts"); *Arundel v. Arundel*, 281 N.W.2d 663, 666-67 (Minn. 1979) (although the supreme court might have reached a different

conclusion, “we are not free to substitute our judgment for that of the trial court absent a clear abuse of its discretion.”); *In re Estate of Johnson*, No. A05–2262, 2006 WL 2599750 at *2-*3 (Minn. App. Sept. 12, 2006) (appellate court will not find an abuse of discretion by discrediting respondent’s evidence and crediting appellant’s evidence) (R. App. 1); *Zander v. Zander*, 720 N.W.2d 360, 368 (Minn. App. 2006) (no abuse of discretion even if the record before the district court could support a different determination – “this court may not substitute its judgment for that of the district court”). Even if the Court does undertake the task that Appellant has placed before it, the supporting materials presented to the district court by Respondent were more than sufficient for it to reasonably conclude that the time expended on Respondent’s behalf was reasonable, as was the rate at which Respondent’s counsel billed that time.

STANDARD OF REVIEW

Appellant must clear the high hurdle of demonstrating that the district court abused its discretion in awarding Respondent’s legal fees and litigation costs. *See Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984) (defining abuse of discretion as a “clearly erroneous conclusion that is against logic and the facts on the record”). In awarding legal fees and litigation costs:

A district court has abused its discretion when it has “exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law.” *State by Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 685 (Minn.App.2000) (quotation omitted), *review denied* (Minn. Apr. 25, 2000). In determining whether the district court has abused its discretion, we review the district court’s findings to ascertain whether they are supported by the record. *Mehralian v. State*, 346 N.W.2d 363, 365 (Minn.App.1984), *review denied* (Minn. July 26, 1984). Findings are clearly erroneous only when we are left with the definite and firm conviction that a

mistake has been made. Gjovik v. Strobe, 401 N.W.2d 664, 667 (Minn.1987); see also United States v. True, 250 F.3d 410, 422 (6th Cir.2001) (defining abuse-of-discretion standard for reviewing attorney fees awarded under EAJA).

State Campaign Finance and Public Disclosure Board v. Minnesota Democratic-Farmer-Labor Party, 671 N.W.2d 894, 900 (Minn. App. 2003) (affirming district court's legal fees award). The district court's findings of fact are given great deference by an appellate court. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), review denied (Minn. June 26, 2002) ("We give the district court's factual findings great deference and do not set them aside unless clearly erroneous.").

ARGUMENT

I. Legislatures Have Altered The "American Rule" Of Attorney Fee Payment in Certain Specific and Limited Circumstances, Including Consumer Rights Claims That Involve Motor Vehicles That Do Not Fulfill Their Warranties.

A. Under the "American Rule," Each Side Pays Its Own Fees.

The "American Rule" on attorneys' fees is that each party bears its own costs. See *Alyeska Pipeline Servo Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Accordingly, American courts do not ordinarily set or review attorneys' fees. See *id.* at 247. In contrast, the "English Rule" statutorily grants discretion to courts to award attorney fees to successful plaintiffs. *Id.*

Although the American Rule has long been sharply criticized by a variety of commentators,¹ in most cases Congress and the courts have continued to adhere to the

¹ See, e.g., Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as*

fundamental presumption that the parties should bear their own costs. *Alyeska*, 421 U.S. at 247-50.

B. Legislatures Have Created Exceptions to The “American Rule.”

Congress and state legislatures, however, have exercised their powers to enact a number of fee-shifting statutes that establish exceptions to the American Rule in certain circumstances they deemed justified for public policy reasons. Indeed, congressional authority to enact fee-shifting statutes has been accepted since the first years of the federal court system. *Alyeska* 421 U.S. at 247-48; S. LAW, THE JURISDICTION & POWERS OF THE UNITED STATES, 255-82 (1852).

Historically, a diverse array of statutory exceptions have arisen in a variety of fields, abandoning the American Rule in favor of cost shifting in substantive areas ranging from civil rights,² patent,³ antitrust,⁴ securities,⁵ and environmental law.⁶ The nature of the fee-shifting arrangement varies widely from statute to statute. For instance,

an Element of Damages, 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972).

² Civil Rights Act of 1964, Tit. II, § 204 (b), 42 U.S.C. § 2000 11-3 (b); Tit. VII, § 706 (k), 42 U.S.C. § 2000 e-5 (k); Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

³ 35 U.S.C. § 285.

⁴ Clayton Act, § 4, 15 U.S.C. § 15.

⁵ Securities Act of 1933, 15 U.S.C. § 77k(e) (1982); Securities and Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a).

⁶ Clean Air Act, § 304 (d), 42 U.S.C. § 7604(d).

under the antitrust laws, plaintiffs who obtain treble damages receive mandatory attorneys' fee awards.⁷ In contrast, in patent litigation, "[t]he court in *exceptional* cases *may* award reasonable attorneys' fees to the prevailing party."⁸ In civil rights,⁹ securities,¹⁰ and environmental cases,¹¹ the award of attorneys' fees to a prevailing party is left to the discretion of the court. In addition to the statutory deviations from the American Rule on attorneys' fees, there are also two well-established, judicially created exceptions. These include a "bad faith" exception that allows courts to order the losing party to pay fees in instances of bad faith or disobedience of a court order,¹² and the "common fund" doctrine which allows the actor who acquires a fund for the common benefit of multiple persons to an equitable share of fees on the acquisition of that fund.¹³

⁷ 15 U.S.C. § 15 ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall therefore recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

⁸ 35 U.S.C. § 285 (emphasis added).

⁹ The Civil Rights Act of 1964, Tit. II, 42 U.S.C. § 2000g-3(b); Tit. VII, 42 U.S.C. § 2000e-5(k).

¹⁰ The Securities Act of 1933, 15 U.S.C. § 77k(e); The Securities and Exchange Act of 1934, 15 U.S.C. § 78i(e), 78(a).

¹¹ The Clean Air Act, 42 U.S.C. § 1857h.2(d).

¹² See *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962) (fees assessed because of bad faith); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 427-28 (1923) (fees assessed because of disobeying a court order).

¹³ *Trustees v. Greenough*, 105 U.S. 527 (1882). In *Greenough*, the Supreme Court held that the exercise of congressional power to determine fees did not interfere with the historic power of equity to permit a trustee to recover attorneys' fees from those who benefitted from the fund. *Id.* at 535-36. See generally Dawson, *Lawyers and Involuntary*

C. These Legislative Exceptions Include Two Relevant Consumer Laws.

As to the consumer protection laws at issue here, the Minnesota Lemon Law mandates payment of reasonable legal fees to consumers who enforce the statute, and the MMWA allows a prevailing consumer to recover legal fees and litigation costs.

The Minnesota Lemon Law provides that:

Any consumer injured by a violation of this section may bring a civil action to enforce this section and recover costs and disbursements, including reasonable attorney's fees incurred in the civil action.

Minn. Stat. § 325F.665, subd. 9 (emphasis added). Similarly, the MMWA provides that:

If a consumer finally prevails in any action brought [for the failure of a supplier, warrantor, or service contractor to comply with any obligation under the MMWA, or under a written warranty, implied warranty, or service contract], he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

15 U.S.C. § 2310(d)(2) (emphasis added).

These consumer laws allow for the recovery of reasonable fees and, under the applicable MMWA, hourly attorneys' fees for "actual time expended". In short, as a statutory exception to the American Rule, cases involving claimed "lemon law" violations for motor vehicles that have not lived up to their warranties afford Minnesota consumers a right to claim "reasonable attorney fees" in the discretion of a district court

Clients: Attorney Fees from Funds, 87 HARD. L. REV. 1597 (1974).

judge under state law and “attorneys’ fees based on actual time expended” under federal law.

II. *Hensley*, Adopted By This Court in *Specialized Tours*, Does Not Support a Dollar Value Proportionality Consideration in Determining Reasonable Attorney Fees.

A. “Dollar Value Proportionality”.

Respondent’s use of the term “dollar value proportionality” is meant to distinguish between the current status of Minnesota and federal law regarding a proportionality analysis in attorney fee motions and Appellant’s request that this Court judicially enact new law that would diverge from existing precedents and contravene the purpose and intent of the state and federal statutes at issue in this case.

Under well-established state and federal law, there is a proportionality analysis that is properly undertaken by district courts with respect to consumer protection statutes. *See Hensley v. Eckerhart*, 461 U.S. 424 (adopted by Minnesota in *Specialized Tours (below)*); *Milner v. Farmers Ins.*, 748 N.W.2d 608 (Minn. 2008) (remanded for consideration of lack of success on claims as basis for departure from the lodestar); *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520 (Minn. 1986) (remanded to district court for consideration of fee movants success on the merits of his claims). “Proportionality” under the *supra* holdings is determined by whether the prevailing movant was successful as measured either by her success in proportion to the number of claims brought, or by reference to the remedy available at law, but not by the value of the claim.

For instance, where, as in *Specialized Tours*, a party is only partially successful on his claims, the district court must weigh the attorney's efforts undertaken on the unsuccessful claims to determine if there are grounds to reduce the attorney fee based on the time spent on those claims. This analysis is, however, tempered by a consideration of whether the successful and unsuccessful claims share common facts that, notwithstanding a lack of success on some claims, still had to be developed to establish the elements of proof with respect to the successful claims. See *Gopher Oil Co., Inc. v. Union Oil Co. of California*, 757 F.Supp. 998, 1009-10 (D. Minn. 1991) (quoting and conforming the "inextricably intertwined" doctrine to the holding in *Hensley*, 461 U.S. at 434-35).

The second level of proportionality analysis regards whether the prevailing movant realized the full remedy – or in the case of settlement, a reasonable amount in light of the public policy favoring compromise – available at law. Under this well-established proportionality test, the court does not look to the value of the claim in absolute terms – i.e., the dollar value of the claim – but rather to whether there was success on the merits of the claim, whatever its value. When applying this analysis, courts look to the remedy available at law; whether it be a \$1,000 statutory remedy under the Fair Debt Collection Practices Act (15 U.S.C. § 1692), or a \$25,000 recovery for breach of warranty under the MMWA or violation of the Minnesota Lemon Law, as was the case here. If the prevailing movant reasonably accomplished what was available to her under law, then she has "prevailed", and is entitled to the reasonable attorney fees and costs expended obtaining that result. In the instant case, there were no grounds to apply any of the proportionality limitations that exist in current Minnesota and federal law.

B. *Hensley* Does Not Support a Dollar Value Proportionality Rule.

This Court adopted the United States Supreme Court's lodestar analysis found in *Hensley v. Eckerhart* for determining reasonable attorneys' fees:

We have approved the use of the lodestar method for determining reasonable attorney fees. *See Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542 (Minn.1986) (characterizing the procedure set forth by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), as "a sensible and fair approach"). The lodestar method "requires the court to determine the number of hours 'reasonably expended' on the litigation" multiplied by "a reasonable hourly rate." *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 628 (Minn.1988) (quoting *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933).

Milner, 748 N.W.2d at 620-21.

Hensley does not direct a district court to compare the amount involved to the amount of attorneys' fees incurred in determining reasonable attorneys' fees; instead, *Hensley* requires a district court to consider the amount involved and the results obtained to determine the extent of the plaintiff's success. *See Hensley*, 461 U.S. at 430. The Supreme Court held that "'the amount involved and the results obtained,' indicates that the level of a plaintiff's success is relevant to the amount of fees to be awarded." *Id.* (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). And, as in the present case, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Id.* at 435.

So, pursuant to *Hensley*, the salient inquiry that must be addressed by a district court when determining reasonable attorney fees is to what degree did the plaintiff

succeed, not is the fee disproportionate to the recovery? *Id.* at 430. Indeed, this is stated throughout *Hensley*:

- “We take this opportunity to clarify the proper relationship of the results obtained to an award of attorney’s fees.” *Id.* at 432.
- “The District Court did not properly consider the relationship between the extent of success and the amount of the attorneys’ fee award.” *Id.* at 424.
- “‘the amount involved and the results obtained,’ indicates that the level of a plaintiff’s success is relevant to the amount of fees to be awarded.” *Id.* at 430.
- “There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the ‘results obtained.’” *Id.* at 434.
- “The result is what matters.” *Id.* at 435.
- “Again, the most critical factor is the degree of success obtained.” *Id.* at 436.
- “We hold that the extent of a plaintiff’s success is a crucial factor in determining the proper amount of an award of attorney’s fees. . . .” *Id.* at 440.

In the present case, the district court properly considered the results obtained when it made its reasonable attorney fees determination:

- “On September 16, 2010, the Court issued its Findings of Fact, Conclusions of Law, and Order Rendering A Verdict For Plaintiff On All Five Counts . . .” A. Add. 24.
- “As the prevailing party, Plaintiff seeks an award of reasonable legal fees and litigation costs.” *Id.*
- “The Court finds that the time spent on this matter by Plaintiff’s counsel, and Plaintiff’s paralegal, was reasonable and necessary to secure the best possible result for Plaintiff through a trial victory on all claims she brought.” *Id.* at 25.

- “The Court finds that the claimed \$7,240.40 in litigation expenses were reasonably and necessarily incurred to prosecute this case to a successful trial victory.” *Id.* at 26.

Hensley does not support a dollar value proportionality rule. The United States Supreme Court outright rejected a dollar value proportionality rule with respect to 42 U.S.C. § 1988 because doing so was inconsistent with the purpose and intent of that statute.

C. *Rivera* Does Not Support a Dollar Value Proportionality Rule Under the MMWA or the Minnesota Lemon Law.

Appellant extensively cites to *dicta* in *City of Riverside v. Rivera*, 477 U.S. 561 (1986) for the proposition that the Court should apply a dollar value rule of proportionality in this case. Appellant’s Brief at 14-19. *Rivera* does not support Appellant’s proposition. *Rivera* rejected a rule of proportionality with respect to civil rights claims under 42 U.S.C. § 1988. It did so because “[a] rule that limits attorney’s fees in civil rights cases to a proportion of damages awarded would seriously undermine Congress’ purpose in enacting § 1988.” *Id.* at 576. In its concluding statement regarding the propriety of limiting attorney fee awards in a Section 1988 claim based upon a rule of dollar value proportionality, the *Rivera* court stated:

In the absence of any indication that Congress intended to adopt a strict rule that the attorney’s fees under § 1988 be proportionate to damages recovered, we decline to adopt such a rule ourselves.

Id. at 581 (internal footnote omitted).¹⁴ The same should be the case with respect to the Minnesota Lemon Law and the MMWA if the Court were to impose a rule of dollar value proportionality upon them.

As in every case of statutory interpretation, the *Rivera* court looked to the purpose and intent of the underlying statute (42 U.S.C. 1988), as well as Congress's expressed statements regarding it, to determine whether dollar value proportionality was consistent with the statute's purpose. *See id.* That is the Court's task here. As the Eighth Circuit noted in *Automobile Importers of America, Inc. v. State of Minnesota*, 871 F.2d 717, 725 (8th Cir. 1989), the Lemon Law was enacted as a supplement to the MMWA in order to fill the gaps left by the limitations of the MMWA in providing consumers with a means of effectively enforcing their warranty rights. The MMWA expressly requires that attorney fees be calculated "based on actual time expended". *See* 15 U.S.C. § 2310(d)(2). As a supplement to the MMWA, the same principles apply to the Minnesota Lemon Law.

¹⁴ The *Rivera* court's conclusion included a footnote in which it also observed as follows:

We note the Congress has been urged to amend § 1988 to prohibit the award of attorney's fees that are disproportionate to monetary damages recovered. *See e.g.*, The Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984); S. 1580, 99th Cong., 2d Sess. (1985). These efforts have thus far not been persuasive.

Id., n. 12. Similarly, the Minnesota Legislature took up the issue of limiting fees in fee-shifting cases during the current session, but was unable to obtain consensus with respect to its provisions, and the legislation failed to pass. Absent clear direction from the Minnesota Legislature that dollar value proportionality should apply to the provisions of the Minnesota Lemon Law, this Court should similarly refrain from altering what is a statutory framework that relies upon the same considerations as the MMWA and is intended to level the economic playing field for Minnesota consumers when enforcing their warranty rights.

III. The MMWA Expressly Prohibits a Dollar Value Proportionality Consideration in Determining Reasonable Attorney Fees.

Appellant's brief is absent of any meaningful discussion of dollar value proportionality under the applicable MMWA. The MMWA states that fees are to be awarded "based on actual time expended". 15 U.S.C. § 2310(d)(2). This Court cannot undo the express language of the unambiguous MMWA that mandates payment of attorney fees based on actual time expended, regardless of whether the necessary effort matched the dollar value returned.¹⁵ Simply put, when a statute is not ambiguous, "no construction is necessary or permitted."¹⁶ Here, the congressional directive regarding the MMWA is clear: there is to be no dollar value proportionality under the MMWA when

¹⁵ Interpretation of statutes is subject to *de novo* review. *Bol v. Cole*, 561 N.W.2d 143, 146 (Minn. 1997). "The goal of statutory construction is to ascertain and effectuate the legislature's intent." *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 116-17 (Minn. 2001). When interpreting a statute, the court must look first to the plain language of the statute. *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008). When the language of the statute is unambiguous, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit." *Id.* (citing Minn. Stat. § 645.16 (2006)). A court is to construe a statute "as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held superfluous, void, or insignificant." *In re UnitedHealth Group Inc.*, 754 N.W.2d 544, 563 (Minn. 2008) (citations omitted); *see also* Minn. Stat. § 645.16 (2008) ("Every law shall be construed, if possible, to give effect to all its provisions.").

A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Wynkoop v. Carpenter* 574 N.W.2d 422, 425 (Minn. 1998). "Words and phrases are construed * * * according to their common and approved usage." Minn. Stat. § 645.08(1) (2002). However, "[i]f the words of the statute are 'clear and free from all ambiguity,' further construction is neither necessary nor permitted." *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000).

¹⁶ *Ed Herman & Sons v. Russell*, 535 N.W.2d 803, 806 (Minn. 1995) (citing *Lenz v. Coon Creek Watershed Dist.*, 153 N.W.2d 209, 216 (1967)).

determining reasonable attorneys' fees. To be sure, Congress addressed this issue in its Senate Report regarding the MMWA:

It should be noted that an attorney's fee is to be based upon actual time expended rather than being tied to any percentage of the recovery. This requirement is designed to make it economically feasible to pursue consumer rights involving inexpensive consumer products.

Jones v. Fleetwood Motor Homes, 127 F.Supp.2d 958, 972 (N.D.Ill. 2000) (quoting S.REP. NO. 986, 1st Sess. 21, 117 CONG. REC. 39614 (1971)). As discussed *infra*, there are no jurisdictions that have judicially engrafted a dollar value proportionality consideration into the MMWA; to do so would contravene the MMWA's express language and the clear intent expressed by Congress in its Senate Report.

IV. The MMWA and the Minnesota Lemon Law Serve a Public Interest By Allowing Minnesota Consumers to Vindicate Their Rights When a Product Fails to Fulfill Its Warranty.

Appellant argues that the district court failed to make findings regarding whether the Minnesota lemon law serves a "public interest". Appellant's Brief, p. 18. That is not true. The district court recognized the Minnesota lemon law's public benefit: "The Lemon Law statute was written with the overall public policy concern of protecting consumers and in order to ensure that these statutes are obeyed, [a] consumer must be afforded the opportunity to bring suit against those persons or entities that fail to comply with it. Without the fee-shifting provision, it would not be economically feasible for consumers to pursue their claims." A. Add. 28-29.

The public interest served by lemon laws was succinctly stated by the Wisconsin Supreme Court:

Lemon laws were enacted to deal with the increasing number of disputes between manufacturers and consumers over automobile warranties. Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 Ariz.St.L.J. 589, 589. Warranty disputes were directly responsible for a considerable amount of litigation and have led to numerous legislative proposals. *Id.* The underlying reason for such legislation was clear. Harold Greenberg, *The Indiana Motor Vehicle Protection Act of 1988: The Real Thing For Sweetening the Lemon or Merely a Weak Artificial Sweetener?*, 22 Ind.L.Rev. 57, 57 (1989). For the average person, the purchase of an automobile was one of the most important of all consumer purchases in terms of significance and price. *Id.* However, for thousands of purchasers each year, this highly significant purchase became a virtual nightmare when the automobile refused to function properly, and the seller was unable, or unwilling to take action to remedy the situation. Julian B. Bell III, *Ohio's Lemon Law: Ohio Joins the Rest of the Nation in Waging War Against the Automobile Limited Warranty*, 57 U.Cin.L.Rev. 1015, 1015 (1989).

Prior to the enactment of lemon laws, the only kinds of remedial relief available to consumers were the statutory remedies of revocation of acceptance and breach of warranty under the Uniform Commercial Code. See Wis.Stat. §§ 402.602; 402.608; 402.313. Federal remedies also existed through the Magnuson–Moss Warranty Act. See 15 U.S.C. §§ 2301–2312 (1982). These state and federal remedies, however, did not adequately protect the interests of the consumer in a typical lemon vehicle claim. Clifford P. Block, *Arkansas's New Motor Vehicle Quality Assurance Act—A Branch of Hope for Lemon Owners*, 16 U.Ark.Little Rock L.J. 493, 493 (1994). Purchasers of defective cars had no recourse other than to repeatedly bring their cars in for repairs.

Hughes v. Chrysler Motors Corp., 542 N.W.2d 148, 150 (Wis. 1996); see also *Bittner v. Tri-County Toyota*, 569 N.E.2d 464, 466 (Ohio 1991) (“In addition to addressing an individual wrong, pursuing a claim under the [Ohio Consumer Sales] Act may produce a benefit to the community generally. A judgment for the consumer in such a case may discourage violations of the Act by others.”); *Cooper v. Great Mileage Rides, Inc.*, No. 105,184, 2012 WL 1072758, *3 (Kan. App. Mar. 23, 2012) (MMWA provides “incentives for lawyers to bring and actively litigate those claims[, which] tend[s] to

cause business entities to comply with the Act, serving a broad public good.”) (unpublished), R. App. 6. The MMWA and the Minnesota Lemon Law serve valid public interests and the same was recognized by the district court.

V. Imposing a Dollar Value Proportionality Rule Onto the Determination of Reasonable Attorney Fees Would Eviscerate Consumer Protection Statutes’ Purpose of Leveling the Playing Field for Consumers.

The MMWA was enacted with its attorney fee provision “to make it economically feasible to pursue consumer rights involving inexpensive consumer products.” *Skelton v. General Motors Corp.*, 860 F.2d 250, 256 n.7 (7th Cir. 1988). The Minnesota Lemon Law was enacted to bolster consumer rights in supplement to the rights afforded by the MMWA. *See Automobile Importers of America*, 871 F.2d at 725 (the Minnesota lemon law was intended to operate with the MMWA in a mutually supplementary manner). This Court has long recognized the same purpose of fee-shifting statutes. *See Church of the Nativity v. Watpro*, 491 N.W.2d 1, 8 (Minn. 1992), *overruled on other grounds by Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000) (the purposes of fee-shifting statutes are to “eliminate financial barriers to the vindication of a plaintiff’s rights . . . and to provide incentive for counsel to act as private attorney general.”). In other words, the purpose of the fee-shifting MMWA and the Minnesota Lemon Law is to level the playing field for consumers in cases against major manufacturers.¹⁷

¹⁷ Appellant’s reliance, at page 9 of its brief, on *Northwest Wholesale Lumber, Inc. v. Citadel Co.*, 457 N.W.2d 244, 251 (Minn. 1979) is misplaced. *Cf.*, *TSM Development, Inc. v. Tappe Construction Co.*, No. A03-1059, 2004 WL 1152543, *3 (Minn. App. May 25, 2004) (fees are not disproportionate merely because they exceed the amount of the mechanic’s lien. “Limiting fees in such a manner would discourage small lienholders from pursuing valid claims through the legal system.”) (quoting *Kirkwold Constr. Co. v.*

Under the lodestar method followed by this Court, the United States Supreme Court and virtually every other jurisdiction, in determining reasonable attorney fees, the comparatively small dollar amount of a settlement or judgment does not dictate a reduced fee award if the plaintiff has obtained full legal relief on her or his consumer rights claim, as Respondent did in this case. See *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1041-42 (3rd Cir. 1996); *Lyle v. Food Lion, Inc.*, 954 F.2d 984, 988 (4th Cir. 1992).

The Seventh Circuit further explained in a case under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692:

M.G.A. Constr., Inc., 498 N.W.2d 465, 470 (Minn. App. 1993), aff'd, 513 N.W.2d 241 (Minn. Mar. 11, 1994)). While it is true that the *Citadel* court did require consideration of whether the attorney fee in a mechanics lien case was proportionate to the value of the lien, that is not the issue before the Court.

Here, the question is, given the purpose and intent of the Minnesota Lemon Law, should this Court impose a dollar value rule of proportionality upon it? The mechanic's lien statute (Minn. Stat. § 514.14) is not a consumer protection statute. It does not, therefore, serve the broad public benefit of the Lemon Law. It is a business protection statute and, as such, is not in the class of remedial consumer protection statutes that courts have recognized as being in a class with constitutional and environmental claims that provide a public benefit beyond the individual monetary damages awarded. See *Tolentino v. Friedman*, 46 F.3d 645, 652-53 (7th Cir. 1995) ("Congress provided fee shifting to enhance enforcement of important civil rights, consumer-protection, and environmental policies . . . and hence increase the likelihood that the congressional policy of redressing public interest claims will be vindicated." (emphasis added)).

Here, the public interest is to deter the warranty abuse that was rampant prior to their enactments. It is a public rather than strictly a private interest because the benefits extend beyond the individual bringing the claim to the entire class of automobile purchasers whose rights to repair or replacement of their vehicles are also vindicated through vigorous prosecution of the individual litigant's claim.

Congress provided fee shifting to enhance enforcement of important civil rights, consumer-protection, and environmental policies. By providing competitive rates we assure that attorneys will take such cases, and hence increase the likelihood that the congressional policy of redressing public interest claims will be vindicated.

Tolentino, 46 F.3d at 652-53. The Fourth Circuit took a similar view in awarding fees under the Fair Credit Reporting Act. *See* 15 U.S.C. § 1681 *et seq.*; *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 974 (4th Cir. 1987) (“Since there will rarely be extensive damages in a FCRA action, requiring that attorney’s fees be proportionate to the amount recovered would discourage vigorous enforcement of the Act”).

The same considerations apply here. The MMWA applies to “any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes” 15 U.S.C. § 2301(1). Consumer protection litigation under the MMWA could therefore involve compensatory damages of \$200 for a defective iPod, to \$800 for a defective iPad, to \$400,000 for a defective yacht. The Minnesota Lemon Law applies to new or used vehicles that are repeatedly repaired under a warranty. *See* Minn. Stat. § 325F.665, subd. 1(b). Consumer protection litigation under the Minnesota Lemon Law could therefore involve compensatory damages of \$8,000 for a defective used Kia, to \$25,000 for a defective leased BMW, to \$120,000 for a defective Maserati.

The vast majority of Minnesota consumers cannot afford to purchase \$400,000 yachts or \$120,000 Maseratis, however. The reality is that, although an automobile is usually the largest expenditure a Minnesota consumer makes next to a house, there will

rarely be extensive damages in a MMWA or lemon law action when compared to common commercial litigation.¹⁸ Just as in other consumer protection cases discussed directly above, “requiring that attorney’s fees be proportionate to the amount recovered would discourage vigorous enforcement of [the MMWA and the Minnesota Lemon Law]”. *Yohay*, 827 F.2d at 974. Indeed, the fee-shifting statutes’ purpose of leveling the playing field would be eviscerated if a dollar value proportionality rule were engrafted onto them.

If such a rule were engrafted onto consumer protection statutes, Minnesota consumers seeking to vindicate their rights relative to a \$2,000 computer, or a lower-priced automobile, would no longer be able to play on a level field against a major manufacturer. In fact, such consumers would barely make it out of the locker room and onto the field, let alone be able to play out the match. An owner of an \$8,000 Kia would not be entitled to the same degree of representation as the owner of an \$80,000 Mercedes-Benz; and, the owner of an \$80,000 Mercedes-Benz would not be entitled to the same degree of representation as the owner of a custom \$350,000 Holiday Rambler motor home. This is contrary to the express language of the MMWA, as well as the purpose of the MMWA and the Minnesota Lemon Law.

¹⁸ The position that \$25,000 is somehow a small stake for a Minnesota consumer belies reality. It may be “small potatoes” to Appellant; it is not, however, to Respondent or the great majority of Minnesota citizens. Since a car is usually the second largest acquisition made by a consumer, most consumers have a large interest in protecting it, if necessary, in a court of law. Most consumers cannot afford to hire an attorney to protect this costly acquisition. Therefore, the lemon law was enacted with an attorney fee provision.

Appellant argues that Respondent's attorneys would receive a "windfall", as in some sort of ill-gotten gain, if the district court's decision were affirmed. There is no support for this position. Respondent was awarded attorney fees based upon time expended on this case. The district court found as fact, as discussed *infra*, that the time spent on the case was reasonable and necessary, "especially . . . [as] the case was vigorously defended." A. Add. 25. The district court also found as fact that Respondent's attorneys' hourly rates were reasonable and supported by the record. *Id.* at 26-27. There is no wrongful windfall for being compensated for reasonable and necessary time at a reasonable hourly rate.

A dollar value proportionality rule as urged by Appellant is unnecessary to curb any potential windfall to consumer rights attorneys. Considering the results obtained by the plaintiff when determining reasonable attorney fees, as directed by *Hensley*, this Court, and as carried out by the district court, ensures that counsel do not receive a wrongful windfall. The United States Supreme Court agrees:

We agree with petitioners that Congress intended that statutory fee awards be "adequate to attract competent counsel, but ... not produce windfalls to attorneys." Senate Report, at 6, U.S.Code Cong. & Admin.News 1976, p. 5913. However, we find no evidence that Congress intended that, in order to avoid "windfalls to attorneys," attorney's fees be proportionate to the amount of damages a civil rights plaintiff might recover. Rather, there already exists a wide range of safeguards designed to protect civil rights defendants against the possibility of excessive fee awards. Both the House and Senate Reports identify standards for courts to follow in awarding and calculating attorney's fees, see *ibid.*; House Report, at 8; these standards are designed to ensure that attorneys are compensated only for time *reasonably expended* on a case. The district court has the discretion to deny fees to prevailing plaintiffs under special circumstances, see *Hensley*, 461 U.S., at 429, 103 S.Ct., at 1937 (citing Senate Report, at 4), and to award attorney's fees against plaintiffs who litigate frivolous or vexatious claims.

See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-417, 98 S.Ct. 694, 697-698, 54 L.Ed.2d 648 (1978); *Hughes v. Rowe*, 449 U.S. 5, 14-16, 101 S.Ct. 173, 178-179, 66 L.Ed.2d 163 (1980) (*per curiam*); House Report, at 6-7. Furthermore, we have held that a civil rights defendant is not liable for attorney's fees incurred after a pretrial settlement offer, where the judgment recovered by the plaintiff is less than the offer. *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). We believe that these safeguards adequately protect against the possibility that § 1988 might produce a "windfall" to civil rights attorneys.

Rivera, 477 U.S. at 580-581 (internal footnote and page references omitted). All of these same safeguards are available to a defendant in a lemon law or MMWA case.

A dollar value proportionality rule would have the effect of undermining the purpose of consumer rights statutes by tying one arm of consumers' attorneys behind their backs while allowing defense attorneys to fight unbound, thereby shifting the equities away from Minnesota consumers – for whom these laws were enacted to protect, and back in favor of manufacturers – who these laws were enacted to check. This is perhaps why a dollar value proportionality rule is not countenanced by the plain language of the MMWA, the purpose or intent of the Minnesota Lemon Law, the United States Supreme Court, or any case cited by Appellant. To be perfectly clear, not one case cited by Appellant has upheld application of a dollar value proportionality test with respect to the claims before the Court.

VI. Respondent has Found No Court that has Analyzed the Question of Dollar Value Proportionality Under a State Lemon Law, or Other State Consumer Protection Statute, That has Not Rejected It as Inconsistent With the Purpose and Intent of Those Statutes.

First, the most analogous reported Minnesota case to address dollar value proportionality prior to the Court of Appeals in this case was *Huffman v. Pepsi-Cola Bottling Co.*, No. C7-94-2404, 1995 WL 434467 (Minn. App. July 25, 1995), (A. App. 23), which is a case relied upon by Appellant. The *Huffman* court noted that the legislature carved out an exception to the traditional percentage of recovery-based fee arrangements in discrimination cases – just as the state and federal legislatures did with respect to the Minnesota Lemon Law and the MMWA – by including a fee-shifting provision “to encourage attorneys to take harassment and discrimination claims where the projected recovery might be low, and without the ability to be granted a fee over and above the client’s claim, some worthy claims might not come into court.” *Id.* at *8. In fee-shifting cases where the final damages are relatively low when compared to the amounts necessary to pursue them, such as the present case, the Court of Appeals held that it is important to compensate counsel according to the hours expended; if that is not done, counsel will simply refuse to take such cases in direct contravention of the purpose of fee-shifting statutes:

If the expected final outcome of a case is below, say \$50,000, you might find law firms trained in this area would avoid taking those cases on a contingency basis. Thus, on the smaller cases, reasonable fees over and above the verdict have their place, but the traditional method of rewarding plaintiffs’ attorneys with fees measured as a percentage of the client’s verdict works well when the recovery is several hundred thousand dollars, as here.

Id. at *9. The instant case fits neatly within the limitation the *Huffman* court identified for not applying a dollar value proportionality rule in “smaller cases.” Here, the fact that the case at bar was tried to the Bench, with the attendant additional post trial work that it entailed, accounts for what Respondent acknowledges was the exception to the rule with respect to the amount of fees required to prevail against Appellant. That amount, given the requirements of the litigation, was found by the district court to be reasonable and necessary to Respondent’s success on all five counts of her complaint. Under *Huffman*, there are no grounds to alter the district court’s award with respect to the Minnesota Lemon Law, and there is no basis in law or fact to do so with respect to Respondent’s success on her MMWA claims.

Second, Respondent has found no reported case in the United States in which dollar value proportionality has been adopted in a case under a state lemon law. In the four cases Respondent has located where a rule of dollar value proportionality has been addressed in the context of a state lemon law, it has been rejected. *See, Jordan v. Transnational Motors*, 537 N.W.2d 471, 474 (Mich. App. 1995); *Nedelka v. KIA Motors of America, Inc.*, No. CL07–3598–01, 2009 WL 7310705, *3 (Va. Cir. Ct. Feb. 10, 2009) (unpublished) (R. App. 11); *Andreasen v. Hyundai Motor America, Inc.*, No. H027597, 2005 WL 2885621, *3 (Cal. Ap. 6 Dist. Nov. 3, 2005) (unpublished) (R. App. 15); *Gill v. Safari Motor Coaches, Inc.*, No. CV 97 01 1013, 2000 WL 33964087, *1 (Ohio Com.Pl. Jul. 26, 2000) (unpublished) (R. App. 18).

Nedelka involved claims under Virginia’s Motor Vehicle Warranty Enforcement Act, Virginia Code §§ 59.1-207.9 *et seq.* (“Virginia Lemon Law”). *Nedelka*, 2009 WL

7310705 at *1. The plaintiff was successful at trial, where the defendant admitted the existence of the claimed vehicle defect. *Id.* Upon the plaintiff's motion for an award of attorney fees and litigation costs, the defendant requested, as Appellant does here, that the fees sought by the plaintiff be reduced in proportion to the value of the plaintiff's recovery, which was \$33,380.04. *Id.* On appeal, the *Nedelka* court observed that:

It should be obvious that Virginia Code § 59.1-207.14 is a remedial statute enacted as a necessary incident to ensuring that aggrieved plaintiffs are not barred from the courthouse by inability to pay attorney's fees in these types of cases. For the mass of the citizenry, the purchase of an automobile is one of the major investments of the family. It is not purchasing a luxury; the automobile in this region is a necessity. Fees charged by competent litigators often exceed the value of an automobile. If the attorney's fees awarded in such cases were limited to a proportion of the verdict, few plaintiffs could afford to seek vindication of the right granted by Virginia's "Lemon Law."

Id. at *2. Noting that while there was no Virginia precedent on the question of the dollar value proportionality sought by the defendant, the *Nedelka* court cited to a Michigan holding, *Jordan*, 537 N.W.2d at 474, in which the Michigan Court of Appeals addressed the identical question and concluded that applying a rule of dollar value proportionality was not permitted under Michigan's lemon law and/or the MMWA. The Michigan Court of Appeals reversed and remanded the case for reconsideration of the award of attorney's fees and costs. The *Nedelka* court found its explanation "most persuasive":

In [a] consumer protection [case] as this, the monetary value of the case is typically low. If courts focus only on the dollar value and the result of the case when awarding attorney fees, the remedial purposes of the statutes in question will be thwarted. Simply put, if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford

the litigation expenses involved. Such a situation would indeed be ironic: it is but precisely those with ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial statutes are intended.

Nedelka at *3 (quoting *Jordan* at 474). For the same or similar reasons expressed by the Michigan court, the *Nedelka* court held that:

The Court is not therefore persuaded by the Defendant's implied suggestion that the attorney's fee award should be, in some measure, proportional to the verdict. Nor does the Court accept the Plaintiffs' implication that the fee request itself is dispositive of the requirement that the attorney's fee award must be for reasonable and necessary services.

Id. Respondent takes no exception to either of the *Nedelka* court's conclusions. It is within a district court's discretion to determine whether all, or a portion, or none of a plaintiff's claimed fees were reasonably incurred on behalf of a prevailing consumer plaintiff; just as the district court did in this case.¹⁹

What a district cannot do - and not run afoul of the plain language of the MMWA and the congressional directive concerning it, as well as undermining the purpose and intent of the Minnesota Lemon Law - is to arbitrarily impose an artificial percentage to an award of attorney fees. This is so because, in the case of the MMWA, the statute expressly provides for the recovery of "actual fees and litigation costs" while, in the case

¹⁹ For instance, in *Chauvin v. BMW of North America, LLC*, the fee order that was presented to the Court by Appellant (A. App. at 31), Judge Reilly determined that the amount of fees claimed by the plaintiff were unreasonable, and cut the amount by approximately one half. While that decision was not to either the plaintiff's or her counsel's liking, it was not appealed, and for good reason: the decision was committed to the discretion of the district court in that case and the exercise of that discretion, short of outright abuse, was proper. Here, the district court's thorough and thoughtful findings and conclusions, which were supported by the record before it, leave no doubt that its discretion was properly exercised.

of the Minnesota Lemon Law, a successful litigant, such as Respondent, is entitled to fees and costs limited only by the district court's determination that they were not reasonably incurred. *See* 15 U.S.C. § 2310(d)(2); S.Rep. No. 93-151, 1st Sess. at pp. 23-24 (1973); Minn. Stat. § 325F.665, subd. 9.

As in the instant case, *Andreasen* also involved claims under both a state lemon law (the "Song-Beverly Warranty Act" or "California Lemon Law") and the MMWA. *Andreasen*, 2005 WL 2885621 at *1. There, the district court drastically reduced the plaintiff's fee request of \$18,028.20 to \$2,666.66, which amounted to one-third of the settlement amount paid to the plaintiff of \$8,000. *Id.* On appeal, the identical argument that Appellant makes here - that the award of fees must be proportionate to the value of the underlying Lemon Law and MMWA claims - was considered and rejected.

In arriving at the amount of the plaintiff's fee award, the district court in *Andreasen* reasoned:

Lemon law cases have become to [sic] personal injury cases of the current millennium, and so personal injury fee will be allowed. Plaintiff may recover 1/3 of the \$8,000 settlement or the sum of \$2,666.66, plus any costs recognized by the Code of Civil Procedure.

Id. The *Andreasen* court noted that "[a]lthough both the Song-Beverly [and] Magnuson-Moss Acts grant the trial court discretion in setting fees, they do not provide that the court may set fees arbitrarily in an amount proportionate to the settlement." *Id.* After noting that the district court had made findings that were within its discretion to make regarding what it found to be an unreasonable number of hours claimed on behalf of the plaintiff, it found that rather than relying upon those findings as its grounds for reducing

the plaintiff's fee award, the district court had instead rested its fee reduction upon an arbitrary and unsupported application of one possible contingent fee arrangement, i.e., one-third of the value of the plaintiff's underlying recovery. *Id.* This, the *Andreasen* court properly concluded, was not countenanced by the California Lemon Law or the MMWA.

The problem here is that while the court made numerous findings to support a reduction of fees, it did not base the reduction on its findings, and did not set an amount of fees that it believed were reasonably incurred by plaintiff. Rather, the court determined that the case was not worth the amount requested, that "lemon law cases are becoming the PI cases of the second millennium," and reduced the fees to a proportionate amount of the settlement. This was not a proper exercise of the court's discretion.

Id.

As in *Andreasen*, there is no support in the Minnesota Lemon Law for anything but awarding fees based upon the fees reasonably incurred in the action. Similarly, the MMWA's requirement that fees be awarded "based on actual time expended" leaves no room to impose a dollar value proportionality rule upon its plain and unambiguous terms. *See* 15 U.S.C. § 2310(d)(2); *Jones v. Fleetwood Motor Homes*, 127 F.Supp.2d 958, 972 (N.D.Ill. 2000) (quoting S.Rep. No. 986, 1st Sess. 21, 117 Cong. Rec. 39614 (1971) (prohibiting dollar value proportionality under the MMWA)).

Similarly, in *Gill*, which resolved an appeal from an attorney fee award under the Ohio Lemon Law (Ohio Rev.Code § 1345.71-78), the court rejected the identical argument made here by Appellant. In so doing, it correctly identified the underlying

problem with a rule of dollar value proportionality: the disparate economic power of ordinary consumers when compared to large product manufacturers.

The major issue in Plaintiff's application for fees arises out of the fact that the request for fees amounts to far more than the amount of the original judgment, while in contingent fee cases fees are based on a percentage of the recovery. The Lemon Law, however, is a creature of the Legislature designed to give special protection to consumers who may have a valid claim, but cannot afford to pay counsel for the disproportionate time and effort that may be required to prevail.

Id. at *5. The court went on to note that Ohio's rejection of a rule of proportionality with respect to lemon law claims arose out of an Ohio Consumer Sales Practices Act case, *Bittner v. Tri-County Toyota, Inc.*, 569 N.E.2d 464, 466 (Ohio 1991), where, again, the amount sought in fees was significantly greater than the value of the underlying claims.

The *Bittner* court had assessed the impropriety of applying a rule of dollar value proportionality with respect to consumer claims.

In order for private citizens to obtain redress under the [Ohio Consumer Sales Practices Act], they first must be able to obtain adequate legal representation. Private attorneys may be unwilling to accept consumer protection cases if the dollar amount they are permitted to bill their adversary is limited by the dollar amount of the recovery, especially since monetary damages in many instances under the Act are limited to \$200. An attorney may expend inordinately large amounts of time and energy pursuing a claim that reaps relatively small monetary benefits for a prevailing plaintiff. We agree with the observation of the United States Supreme Court when it said: "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious * * * claims but relatively small potential damages to obtain redress from the courts." *Riverside v. Rivera* (1986), 477 U.S. 561, 578, 106 S.Ct. 2686, 2696, 91 L.Ed.2d 466.

In addition to addressing an individual wrong, pursuing a claim under the Act may produce a benefit to the community generally. A judgment for the consumer in such a case may discourage violations of the Act by others. Prohibiting private attorneys from recovering for the time they expend on a

consumer protection case undermines both the purpose and deterrent effect of the Act.

Id. at 466; *see also Killingsworth v. Ted Russell Ford, Inc.*, 104 S.W.3d 530, 535-36 (Tenn. App. 2003) (Tennessee Consumer Protection Act case in which court held – relying on *Rivera*, 477 U.S. at 564-65 – that a rule of dollar value proportionality would contravene purpose and intent of statute in case involving purchase of automobile).

Only one state has incorporated proportionality into the text of its lemon law, but did so legislatively. The Wisconsin legislature recently enacted Wis. Stat. § 814.045(2)(a), which requires its courts to “presume that reasonable attorney fees do not exceed 3 times the amount of compensatory damages” pursuant to, *inter alia*, its lemon law. This presumption can, however, be overcome if, in the circuit/district court’s discretion, it determines, after considering the relevant factors set forth in subdivision (1) of Section 814.045, that a greater amount is reasonable. *See* Wis. Stat. § 814.045 (2011). No case has yet been reported that defines the contours of this recent enactment.

At its core, however, even Wisconsin’s lone legislative excursion down the path of proportionality preserves the essential component of the district court’s discretion to diverge from the presumption, so long as it finds that the statutory elements support doing so. *Id.* Wisconsin’s enactment of Section 814.045 is, of course, the very definition of an “outlier”. No other state has ventured down the same path, and for good reason; the path leads to a dead end that contravenes the purpose and intent of the statute for all the reasons discussed in Section V, *supra*.

Nor do Appellant's Minnesota cases support its request that this Court impose a rule of dollar value proportionality with respect to Respondent's Lemon Law claims. First, it must be noted that neither *State v. Paulson*, 188 N.W.2d 424 (Minn. 1971) or *Hempel v. Hempel*, 30 N.W.2d 594 (Minn. 1948) establishes or endorses anything like a dollar value rule of proportionality with respect to statutory fee awards. In fact, one of the principles at the heart of fee awards in consumer protection cases is wholly embraced by the court in *Hempel*, although in a different context: divorce spousal support proceedings. After observing that among the considerations addressed by the district court in making its award was the amount in controversy - about which the appellant objected because the amount of fees awarded was, in his view, disproportionate to the value of the matters at issue - the *Hempel* court observed as follows:

It should be remembered, too, that the possession of wealth provides the possessor with the "sinews of war." A man of wealth can hire able counsel and enlist the support of other allies. The allowance to the wife's attorneys should be in such amount as to enable her also to hire able counsel, and, so far as possible, make the legal contest one on even terms.

Hempel at 598. It is exactly this principle that lies at the root of the fee shifting provisions of the Minnesota Lemon Law and the MMWA: to level the economic playing field on which the parties involved will compete.

Similarly, the cases cited by Appellant that post-date the 1982 enactment of the Minnesota Lemon Law, offer no support for its position that the dollar value of the case should be a controlling consideration of the district court when considering Lemon Law fee awards.

For instance, Appellant also cites *Gumbhir*, 157 F.3d at 1146, at pages 11-13 of its brief, as a case where attorney fees were greatly reduced because of a comparison between the amount of damages awarded and the amount of the attorney fees requested. Once again, Appellant cites a case for a holding that does not exist or, at the very least, Appellant tells only half the story.

In *Gumbhir*, the attorney fee request was reduced because of the plaintiff's limited success on his claims, not because the attorney fee request was disproportionate to the damages awarded. *Id.* at 1146. In fact, six of the plaintiff's nine claims were dismissed on summary judgment. *Id.* And, on the remaining claims, the plaintiff was awarded only 42% of the compensatory damages that he sought, and was awarded nothing on his emotional distress claim. *Id.*

Even in reducing the plaintiff's fee award based upon the limited success, the court recognized the impropriety of reducing a fee award based only upon a comparison between the dollar amount of the recovery and the amount of the attorney fees sought. The *Gumbhir* court only awarded fees based on what it found to be reasonable, if not "generous", in light of the total lack of success the plaintiff had on the majority of his claims coupled with his limited success on his remaining claims. *Id.*

Again, and as discussed with respect to the Supreme Court's holding in *Rivera*, it is giving effect to the purpose and intent of the legislature upon which any statutory interpretation rests. *Gumbhir* did not involve the Minnesota Lemon Law or the MMWA. The holding in *Gumbhir*, then, offers no support for establishing a dollar value rule of proportionality with respect to Lemon Law or MMWA claims because doing so would

contravene the purpose and intent of the state and federal legislatures when enacting them.

VII. Every Court to Analyze the Question of Dollar Value Proportionality Under the MMWA has Rejected it as Inconsistent With Its Plain Language, Purpose and Intent, as well as the Express Congressional Directive on the Question.

Respondent has found no reported case that supports Appellant's request that the Court judicially enact a rule of dollar value proportionality with respect to the MMWA. To the contrary, every reported case analyzing a claim that such a rule should apply to the MMWA has rejected it as contravening the plain language of the MMWA, congressional directives on the subject, and/or as contrary to the MMWA's purpose and intent. *See Cannon v. William Chevrolet/GEO, Inc.*, 794 N.E.2d 843 (1st Dist. Ill. App. 2003) (discussed below); *Fleetwood Motor Homes of Pennsylvania, Inc. v. McGehee*, 355 S.E.2d 73 (Ga. App. 1987) (rejecting request by appellant manufacturer to apply proportionality rule, "which would require the district court to use the result or success of the litigation as measured by the amount of damages awarded[] in determining attorney fees under 15 U.S.C. § 2310(d)(2)."); *Cooper v. Great Mileage Rides, Inc.*, 2012 WL 1072758 (discussed below); *Tempest v. Chrysler Corporation Inc.*, No. 198223, 198346, 1998 WL 1988916 (Mich. App., Nov. 10, 1998)(unpublished) (R. App. 22); *Patton v. McHone*, No. 01-A-01-9207-CH-00286, 1993 WL 82405, *6-*7 (Tenn. App., Mar. 24, 1993) (unpublished) (MMWA case in which court held that awarding fees that were "some five times the amount of compensatory damages does not affect the validity of plaintiff's claim for reasonable attorney's fees) (R. App. 28).

In *Cannon*, the court concisely stated why a dollar value proportionality rule cannot apply to an award of attorney fees under the MMWA.

We further reject defendants' argument that the award is excessive because it is not commensurate with the damages awarded. They have cited no authority and we have found none to suggest that an award of attorney fees must be proportionate to the damages awarded. Nor was this a case where *Cannon* recovered only nominal damages. Here, *Cannon* recovered a substantial portion of the damages she requested. Furthermore, we note that under section 2310(d)(2) of the Magnuson-Moss Act (15 U.S.C. § 2310(d)(2) (2000)), attorney fees are not related to the damages awarded. "Damages are designed to compensate a plaintiff for his loss and injury, whereas the purpose of awarding attorney fees under [the Act] is to provide potential litigants with access to legal assistance so that they might pursue a remedy for their injuries or loss." *Vieweg [v. Friedman]*, 173 Ill.App.3d [471,] 476, 122 Ill.Dec. 105, 526 N.E.2d [364,] 368 [(Ill. App. 1988)].

The statute specifically refers to attorney fees "based on actual time expended." In addressing this phrase, Congress has explained that "an attorney's fee is to be based upon actual time expended rather than being tied to any percentage of the recovery. This requirement is designed to make the pursuit of consumers rights involving inexpensive consumer products economically feasible." S.Rep. No. 93-151, 1st Sess. at pp. 23-24 (1973). Thus, the award of attorney fees does not depend upon a plaintiff's recovery of substantial monetary damages nor does it need to be proportionate to an award of money damages. See *Berlak v. Villa Scalabirni Home for the Aged, Inc.*, 284 Ill.App.3d 231, 237-38, 219 Ill.Dec. 601, 671 N.E.2d 768, 772 (1996). It is for the district court to determine a reasonable fee, if any, in light of the particular facts and circumstances of each case. We will not substitute our judgment for that of the district court, especially here, where we have no transcript of the district court's findings.

Cannon at 852-53.

These same concerns identified by the *Cannon* court have been echoed by every court addressing requests to apply dollar value proportionality to MMWA claims.

In *Cooper*, the court similarly rejected the request that dollar value proportionality be used to limit the actual reasonable amount of fees incurred to successfully litigate a MMWA claim finding in part that:

Congress included attorney fees as a remedy under the Act to encourage lawyers to litigate precisely these sorts of warranty claims—claims that would otherwise likely go unredressed because they entail too little economic harm to the individual consumer to warrant hiring a lawyer on an hourly rate or to attract counsel on a contingent fee basis. But incentives for lawyers to bring and actively litigate those claims tend to cause business entities to comply with the Act, servicing a broad public good. The district court, therefore, erred in not applying the lodestar method for determining the amount of attorney fees to be awarded.

Cooper at *3 (emphasis added).

Based upon the plain language of the MMWA, the congressional directive regarding attorney fee awards under the MMWA, and the case law interpreting the MMWA, there can be no dollar value proportionality applied to an attorney fee award under the MMWA.

VIII. Respondent's Fee Award Must Be Affirmed When the Trial Record Supports the District Court's Factual Findings of Reasonableness.

A. The District Court Did Not Abuse Its Discretion in Awarding Respondent's Counsel's Hourly Rates When the Award was Based Upon the Overwhelming Evidence Before the District Court, Including a Detailed Attorney Fee Survey.

In support of the requested hourly rates, Respondent submitted affidavits of counsel of record, affidavits of other local consumer protection lawyers, numerous local attorney fee orders, and a detailed attorney fee survey. Appellant's Add. 24-27. In response, Appellant submitted one affidavit of one of its attorneys. *Id.* at 26. In its Findings relative to the hourly rates awarded, the district court explained that it

considered the evidence submitted by Respondent along with Respondent's counsels' experience, reputation and ability in consumer protection cases. *Id.* at 26-27.

The district court also considered Appellant's single affidavit of one of its lawyers that it offered in response to the considerable support offered by Respondent. *Id.* at 26. The district court did not "disregard" the affidavit as stated by Appellant. *See* Appellant's Brief, p. 29. The district court ruled that Appellant's single affidavit "in no manner comports with the objective orders and the fee survey submitted by [Respondent]. The Court finds [Appellant's] affidavit unreliable." Appellant's Add. 26.

This Court has held that there was no abuse of discretion where a district court's hourly rates findings were based solely upon "a detailed study". *Milner v. Farmers Insurance Exchange*, 748 N.W.2d 608, 621-22 (Minn. 2008). In the present case, the district court's hourly rates findings were based upon, not only a detailed attorney fee study as in *Milner*, but also affidavits of counsel of record, affidavits of other local lawyers, and numerous local attorney fee orders. Appellant's Add. 24-27. *See Perdue v. Kenny A.*, 130 S. Ct. 1662, 1670 (2010) (attorney hourly rates of up to \$495 per hour awarded based upon affidavits that the rates were within the range of prevailing market rates for legal services in the relevant market).

Appellant requests the Court to remand this case with a direction to the district court to review the requested hourly rates based on what a paying client would pay in a comparable case. Appellant's Brief, p. 31. The relevant inquiry, however, is accurately stated as: What is the prevailing hourly rate within the community? As stated by the United States Supreme Court, "in accordance with our understanding of the aim of fee-

shifting statutes, the lodestar looks to ‘the prevailing market rates in the relevant community.’” *Perdue*, 130 S. Ct. 1662, 1672 (2010) (quoting *Blum v. Stenson*, 445 U.S. 886, 895 (1984)).

That was the inquiry properly addressed by the district court, and it was based upon the best evidence available. This Court may take judicial notice that law firms do not publicize their lawyers’ hourly rates. The best evidence, then, regarding the prevailing market rates in the community comes from other court orders regarding consumer protection attorneys’ hourly rates, attorney fee surveys, affidavits from local attorneys, and affidavits of counsel of record. All of this was provided to the district court by Respondent, and relied upon by it to make an informed decision regarding the prevailing market rates within our community. There was no abuse of discretion and there is no need for a remand in this regard. *See Milner*, 748 N.W.2d at 621-22 (no abuse of discretion by district court in awarding hourly rates based solely upon “a detailed study”).

B. The District Court Properly Scrutinized the Hours Spent on the Case, Addressed Each of Appellant’s Arguments Regarding the Same, and Issued Detailed Findings.

Appellant argues that the district court abused its discretion by awarding the hours requested by Respondent, suggesting that the district court did not appropriately analyze the submissions. Appellant’s Brief, pp. 23-28. That argument is belied by the record and unsupported by the case law cited by Appellant.

General Rule of Practice 119 requires that counsel, as officers of the court, analyze the billing statement and exclude any unnecessary and redundant time entries before

submitting the same to the district court. Gen. R. Prac. 119.02. As such, it is within the discretion of the district court to find that the claimed hours were reasonably expended on the matter when counsel first complies with Rule 119.02 as Respondent's counsel did here.

In support of its argument that the district court failed to properly analyze Respondent's fee submission, Appellant relies in part on *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619 (Minn. 1988). The facts of the present case, however, are unlike the facts in *Anderson*. In *Anderson*, the defendant opposed the plaintiff's fee request by arguing that the hours expended were excessive. *Id.* at 629.

Unlike the present case, the district court in *Anderson* did not include in its Findings or attached memorandum language to support "any conclusion that the district court had specifically scrutinized the 'hours expended' claim to determine the reasonableness of that item". *Id.* The district court in *Anderson* did not include in its findings any language to show that it considered whether the hours expended were excessive or otherwise reasonable. *Id.* For this reason, the *Anderson* court remanded to the district court for it to provide factual findings relative to the hours expended. *Id.* at 630.

Appellant ignores the detailed Findings of the district court in the present case regarding the hours expended, which show that the district court weighed the needs of the case against the hours expended in concluding that the documented hours were reasonable. Here, and unlike *Anderson*, the district court considered Respondent's counsels' affidavits regarding the hours expended. A. Add. at 24-25. There was no such consideration in *Anderson*. Additionally, the district court considered the affidavits of

other local, experienced consumer rights lawyers who opined that the hours expended were reasonable. *Id.* Again, no such evidence was put before the court in *Anderson* and no such consideration was given. Also, and again unlike *Anderson*, the district court received and considered “the multitude of fee orders from other cases” that demonstrated to it “[t]he reasonableness of the time spent by Plaintiff’s counsel”, “especially . . . [as] the case was vigorously defended.” *Id.* at 25.

With respect to the fee invoice submitted by Respondent, the district court found that it:

- “describe[d] in more than sufficient detail each of the tasks performed”;
- “describe[d] who performed each task”;
- “carefully describe[d] the amount of time spent on each particular task”;
- “and record[ed] the amount of time spent on each task in 6-minute increments (which the [district court] recognize[d] as the industry standard).”

Id.

Also, and again unlike in *Anderson*, the district court considered and addressed Appellant’s argument regarding the hours expended and found that “[Appellant] offered only the conclusory assertion that the billings are excessive without explaining why.” *Id.*

Finally, the district court explained that it:

[H]as carefully reviewed [the billing statement], and the other materials submitted, and cannot conclude that the amount of time spent on the described tasks was unreasonable. The [district court] finds that the time spent on this matter by [Respondent’s] counsel, and [Respondent’s]

paralegal, was reasonable and necessary to secure the best possible result for [Respondent] through a trial victory on all claims she brought.

Id.

It is difficult to imagine how the district court reasonably could have made more detailed Findings and how it abused its discretion when the Findings were based upon the abundance of the evidence before it. This is especially true where, as here, “[Appellant] offered only the conclusory assertion that the billings are excessive without explaining why.”²⁰ *Id.* at 25.

Appellant now, for the first time on appeal, raises specific objections to a few tasks performed by Respondent’s counsel. *See* Appellant’s Brief, p. 27. For instance, Appellant argues that it is unreasonable for lawyers to bill for tasks such as analyzing a judicial assignment, reviewing subpoenas, and reviewing deposition notices. *Id.* Whether it was unreasonable as a matter of fact for Respondent’s counsel to bill for such tasks is a question properly committed to the district court. *See Anderson*, 417 N.W.2d at 630 (determining whether the tasks performed were reasonable is best left to the district

²⁰ Appellant argues that the district court abused its discretion by failing to specifically address each of the relevant factors in determining the reasonableness of attorneys’ fees. Appellant’s Brief, p. 23. The district court’s detailed findings do address all relevant factors; however, even if the detailed findings did not specifically address every potential factor, there was no abuse of discretion given the detailed evidentiary record before the district court and its detailed findings based thereon. *See Hensley*, 461 U.S. 434 n. 9 (the district court may consider all relevant factors in determining the reasonableness of attorneys’ fees but “many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate”); *Automated Bldg. Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 831 (Minn. App. 1998) (absence of specific findings on all possible factors is not an abuse of discretion where the record contained detailed time reports and explanatory affidavits); *TSM Development, Inc. v. Tappe Const. Co.*, 2004 WL 1152543 *3 (Minn App. May 25, 2004) (same), R. App. 35.

court); *Hensley*, 461 U.S. at 437 (“We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court’s superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.”).

Even if this Court would rule differently if it were sitting as a fact finder does not mean that the district court abused its discretion. See *Sefkow*, 427 N.W.2d at 210 (appellate court may not usurp the “role of the district court by reweighing the evidence in finding its own facts”); *Arundel*, 281 N.W.2d at 666-67 (although the supreme court might have reached a different conclusion, “we are not free to substitute our judgment for that of the district court absent a clear abuse of its discretion.”); *In re Estate of Johnson*, 2006 WL 2599750 at *2-*3 (appellate court will not find an abuse of discretion by discrediting respondent’s evidence and crediting appellant’s evidence) (R. App. 1); *Zander v. Zander*, 720 N.W.2d at 368 (no abuse of discretion even if the record before the district court could support a different determination – “this court may not substitute its judgment for that of the district court”).

Analyzing a judicial assignment, when a litigant has a legal right to remove, is a quintessential attorney task. Likewise, reviewing subpoenas, which carry the power of the court to compel Minnesota citizens to do something they have not independently chosen to do or go somewhere they have not chosen to go, is a task properly committed to an attorney as an officer of the court. Similarly, reviewing deposition notices to ensure that the proper witness is being compelled to testify and/or the proper documentation is being requested, is likewise an attorney task. As such, there was no abuse of discretion in

the district court awarding fees for those tasks, especially where Appellant made no such objection at the district court level as was the case here.²¹

When one places a multitude of evidence from Respondent on one side of the scale and merely “conclusory” allegations on Appellant’s side, the district court’s detailed findings here are well within the purview of reasonable factual determinations that readily surpass the “clearly erroneous” or “abuse of discretion” standard of review. Given the district court’s detailed Findings in the present case, *Anderson* shows that the district court’s Findings regarding the hours expended should not be disturbed on appeal. Indeed, even in the face of the paucity of findings supporting the fee award in *Anderson*, this Court held:

[F]rom our vantage point we cannot determine the reasonableness of those “time reasonably expended” claims. From its vantage point, the district court, being completely familiar with all aspects of the action from its inception through post trial motions, is in a much better position to make those evaluations. . . . We do not hold that the fee allowed by the district court was unreasonable

²¹ Through two levels of appeal, and prior to that before the district court, these three items constitute the entirety of Appellant’s specific objections to Respondent’s billings in this case. Even setting aside the impropriety of raising these factual complaints for the first time on appeal, none of Appellant’s specific objections have merit, as discussed *supra*. What is left are Appellant’s generalized complaint that the “bill is too big” without ever telling the Court, let alone the district court, what was actually improper with any specific item in Respondent’s billing. As such, Appellant failed – now through three levels of review – to satisfy its burden to specifically identify what in Respondent’s billings it believed were excessive. *See Continental Cas. Co. v. Knowlton*, 232 N.W.2d 789, 796 (Minn. 1975) (“[t]he burden of proving that a fee charged by an attorney is unconscionable or unreasonable rests upon the party asserting it.”). As the district court properly observed in this regard, Appellant has offered nothing but “conclusory” complaints in response to Respondent’s extensive support for the district court’s award of attorney fees and costs.

Id. at 630. There is no evidence of an abuse of discretion by the district court here. The district court's detailed Findings should not be disturbed. *See id.*

CONCLUSION

The Minnesota Lemon Law and the MMWA exact overall reasonableness as a factor in allowing a prevailing consumer to recover their attorney fees, and the latter expressly declares that it is "time actually expended" without regard to the amount recovered that sets the measure of the reasonableness of fees. No statutory language exists to support the imposition of a dollar value proportionality rule for determining the reasonableness of attorney fees in consumer protection litigation. Such a rule would in fact eviscerate the purpose of these consumer protection statutes.

In the present case, highly detailed factual findings of reasonableness were made by the district court from a very extensive record before it. Abuse of discretion is the standard of review. The absence of anything more than bald accusations of "unreasonableness" by Appellant therefore means that those determinations were not clearly erroneous or an abuse of discretion. The district court's attorney fee award must be affirmed.

Date: May 1, 2012

Respectfully submitted,

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CERTIFICATION OF FORM AND BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a Times New Roman proportional 13-point font. The length of this brief is 13,516 words. This brief was prepared using Word 2007.

Date: 5 / 1 / 12

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