STATE OF MINNESOTA
IN COURT OF APPEALS
A11-581

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.

Filed December 19, 2011
Affirmed
Bjorkman, Judge
Concurring in part, dissenting in part, Johnson, Chief Judge

Hennepin County District Court
File No. 27-CV-08-29818

Todd E. Gadtke, Daniel J. Brennan, Gadtke & Brennan, P.A., Maple Grove, Minnesota (for respondent)

Lenae M. Pederson, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota; and

Timothy V. Hoffman (pro hac vice), Sanchez Daniels Hoffman LLP, Chicago, Illinois (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant BMW of North America, LLC challenges the judgment awarding respondent-lessee Marie Delores Green a full refund of her lease payments and attorney fees and costs on her lemon-law and warranty claims. BMW argues that the district court erred in (1) concluding that Green is a "consumer" within the meaning of the lemon law, (2) finding that Green's vehicle has a defect or condition that substantially impairs its use or market value, and (3) finding that BMW breached its express and implied warranties to respondent; and that the district court abused its discretion in awarding attorney fees. We affirm.

FACTS

On May 31, 2007, Green signed a 39-month lease for a new 2007 BMW 328xi. Green paid $5,000 and agreed to monthly payments of $591.58, for a total of $27,803.04. Although Green made all of the lease payments, and was the sole lessee, she rarely drove the vehicle and did not drive it at all after the first year. Instead, she permitted her adult son Michael McDonough almost exclusive use of the vehicle. Over the course of the lease term, McDonough brought the vehicle in for service at BMW authorized dealerships at least 16 times, with two recurring problems: intermittent failure to accelerate properly from a stop or while driving in traffic and a malfunctioning sunroof.

McDonough first brought the vehicle in for service in September 2007 because the vehicle was hesitating before accelerating. He explained that the vehicle intermittently hesitated for several seconds after he depressed the accelerator. The problem was most

pronounced when accelerating from a stop but also occurred when accelerating to maneuver in traffic. McDonough returned with the same complaint in February and June 2008. The dealership repeatedly advised McDonough that the vehicle was operating properly. McDonough also reported that the sunroof was rattling in June 2008, and again the following month. When he spoke with the service manager in connection with the second service visit related to the sunroof, McDonough complained that the vehicle was a "lemon."

In August 2008, McDonough took the vehicle to a second BMW authorized dealership complaining, for the third time, about the sunroof rattle. After an unsuccessful attempt to repair the sunroof, the dealership replaced the sunroof cassette the following month. Meanwhile, McDonough continued to experience the acceleration hesitation, and brought the vehicle to the second dealership for that problem in February 2009. The service personnel submitted a written request to BMW to investigate the complaint further but did not perform any repairs. McDonough returned to the dealership in May 2009, complaining that the new sunroof intermittently opened by itself when he was trying to close it. The dealership told McDonough that it could not "duplicate" the problem and returned the vehicle to McDonough without making any repairs. McDonough returned to the dealership with the same sunroof complaint in August 2009; the dealership again performed no repairs.

Green initiated this action, asserting lemon-law and warranty claims. After a four-day bench trial, the district court found in favor of Green on all claims based on the acceleration hesitation and the various sunroof problems. The district court ordered

BMW to refund Green the lease price based on the lemon-law violations and awarded Green $221,499.50 for attorney fees and $7,565.40 for litigation costs. This appeal follows.

D E C I S I O N

I. The district court did not err in concluding that Green is a "consumer" within the meaning of the lemon law.

Minnesota's lemon law protects consumers of new motor vehicles that have defects or conditions that substantially impair their use or value. Minn. Stat. § 325F.665, subd. 3(a) (2010). The lemon law defines "consumer" as "the purchaser or lessee, other than for purposes of resale or sublease, of a new motor vehicle used for personal, family, or household purposes at least 40 percent of the time." Minn. Stat. § 325F.665, subd. 1(b) (2010).[1] BMW argues that Green is not a consumer because she did not personally use the vehicle at least 40 percent of the time and her son's usage cannot constitute her "family" use.

Whether Green is a "consumer" based on the undisputed facts regarding the vehicle's use presents a question of statutory interpretation, which we review de novo. *S.M. Hentges & Sons, Inc. v. Mensing*, 777 N.W.2d 228, 231 (Minn. 2010). The goals of statutory interpretation are to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). In doing so, we construe words and phrases according to their plain and ordinary meaning. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295

[1] The definition also includes "a person to whom the new motor vehicle is transferred for the same purposes," Minn. Stat. § 325F.665, subd. 1(b), but that provision is inapplicable here.

N.W.2d 604, 608 (Minn. 1980); *see also* Minn. Stat. § 645.08(1) (2010). When the legislature's intent is clearly discernible from a statute's plain and unambiguous language, we interpret the language according to its plain meaning without resorting to other principles of statutory construction. *Beecroft v. Deutsche Bank Nat'l Trust Co.*, 798 N.W.2d 78, 82-83 (Minn. App. 2011).

BMW argues that although Green leased the vehicle, she is not a consumer because she did not actually drive the vehicle. We disagree. The lemon law defines "consumer" in two parts. First, a person claiming the law's protection must be a purchaser or lessee of a new motor vehicle. Second, the vehicle must be "used for personal, family, or household purposes at least 40 percent of the time." Minn. Stat. § 325F.665, subd. 1(b). By its terms, the usage requirement plainly modifies the term "vehicle," not the phrase "purchaser or lessee," and therefore does not limit who may drive the vehicle, so long as that usage is for one of the specified purposes.[2] Not only does BMW's focus on actual usage by the purchaser or lessee run counter to the plain language of the statute, but it would lead to almost absurd results by excluding numerous purchasers and lessees from the protection of the lemon law—including some that BMW asserts would be covered—simply because they permitted others frequent or exclusive

[2] Implicit in this usage requirement is the fact that the lemon law does not extend to businesses. *See Jones v. Gen. Motors Corp.*, 953 P.2d 1104, 1106 (N.M. Ct. App. 1998) (stating that individual who drove his vehicle primarily for business purposes was not a "consumer" because his vehicle was not "normally used for personal, family or household purposes"); *Volkswagen of Am., Inc. v. Friedman*, 166 A.D.2d 709, 710-11 (N.Y. App. Div. 1990) (same).

use of their vehicles.[3] *See* Minn. Stat. § 645.17(1) (2010) (stating presumption that the legislature does not intend an absurd result); *Liabo v. Wayzata Nissan, LLC*, 707 N.W.2d 715, 724 (Minn. App. 2006) (stating that "[c]onsumer-protection statutes are remedial in nature and are liberally construed in favor of protecting consumers"), *review denied* (Minn. Mar. 28, 2006).

But we agree with BMW's argument that the usage requirement, as an element of the statutory definition of the term consumer, is tethered to the purchaser or lessee. While the statute does not expressly limit who may drive the vehicle, the "personal, family, or household purposes" referenced are plainly those of the purchaser or lessee. Thus, Green may be considered a consumer under the lemon law if the vehicle she leased was used at least 40 percent of the time for her personal, family, or household purposes.

BMW argues that even if the language of the usage requirement itself is broad enough to encompass usage by those other than the purchaser or lessee, such an interpretation is contrary to provisions of the lemon law that permit a vehicle manufacturer to subtract "a reasonable allowance for the consumer's use of the vehicle" from the amount to be refunded for the purchase or lease price of a vehicle proved to be a lemon. *See* Minn. Stat. § 325F.665, subd. 3 (2010) (explaining that a reasonable allowance for use is "that amount directly attributable to use by the consumer and any previous consumer during any period in which the use and market value of the motor

[3] BMW asserted at oral argument that the lemon law would protect a purchaser or lessee who permitted, for example, a college-aged child or a nanny frequent or exclusive use of the vehicle, but this contradicts BMW's argument that only the purchaser's or lessee's actual use may satisfy the usage requirement.

vehicle are not substantially impaired"). BMW asserts that use cannot be "the consumer's use" or "directly attributable to use by the consumer" unless the consumer drives the vehicle. We are not persuaded. Because subdivision 1 defines the term consumer in terms of specific types of vehicle usage, we discern the language in subdivision 3 to reference those uses, not limit them.

We, therefore, turn to the issue of whether McDonough's use of the vehicle constitutes use for Green's "personal, family, or household purposes." *See* Minn. Stat. § 325F.665, subd. 1(b). The lemon law does not define the term family, but a family is generally considered to include, at a minimum, parents and children. *See The American Heritage Dictionary* 638 (4th ed. 2006) (defining family as "[a] fundamental social group in society typically consisting of one or two parents and their children"). BMW asserts that McDonough does not fall within the "family" category because he is an adult and no longer resides in Green's household as her dependent. We disagree. Although family and household are considered equivalent in some circumstances,[4] the legislature plainly distinguished between the two in the lemon law by separating the terms with the disjunctive "or." *See Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (stating that the conjunction "or" normally is interpreted as disjunctive and that statutory terms separated by "or" "should not be confused" with each other). The definition of "family" may overlap with but cannot be subsumed by the term "household," as BMW

[4] The supreme court has observed that the term family "has frequently been defined as synonymous with household" but is a word "of great flexibility" with many different meanings that depend on the context in which it is used. *See Tomlyanovich v. Tomlyanovich*, 239 Minn. 250, 265, 58 N.W.2d 855, 863-64 (1953) (quotation omitted) (addressing the concepts of family and household in insurance-coverage case).

argues. Because the plain meaning of the term family includes McDonough, the fact that he no longer resides in Green's household does not preclude consideration of his use of the vehicle in evaluating Green's lemon-law claim.

In sum, we conclude that Green is a consumer, entitled to invoke the protections of the lemon law, because she is the undisputed lessee of the vehicle, which was driven for her personal and family purposes at least 40 percent of the time.

II. The district court did not clearly err in finding that Green's vehicle has a defect that substantially impairs its use or market value after a reasonable number of repair attempts.

Minnesota's lemon law provides remedies for consumers when a manufacturer is unable to repair or correct "any defect or condition which substantially impairs the use or market value of the motor vehicle to the consumer after a reasonable number of attempts." Minn. Stat. § 325F.665, subd. 3(a). In the case of a lessee, the remedy is a refund of the lease price, less a reasonable-use allowance. *Id.*, subd. 4 (2010).

BMW challenges the district court's finding that Green's vehicle has exhibited an acceleration defect and interrelated sunroof defects that individually and together substantially impair the use or market value of the vehicle.[5] A district court's factual findings, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. In applying this rule,

[5] BMW does not challenge the district court's finding that BMW failed to correct the acceleration hesitation and the sunroof problems in a presumptively reasonable number of repair attempts. *See* Minn. Stat. § 325F.665, subd. 3(b) (stating presumption that a "reasonable number" of repair attempts have been made if a defect has been "subject to repair four or more times" but the defect continues to exist).

we view the record "in the light most favorable to the judgment" and will not disturb the district court's findings if there is "reasonable evidence" to support them. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

A. Existence of a defect

We first consider the district court's findings with respect to the acceleration hesitation. The district court heard direct testimony from four witnesses—Green, McDonough, a friend of McDonough, and a non-BMW mechanic[6]—who drove the vehicle and experienced hesitation when trying to accelerate. These witnesses described the condition, how they responded to it, and how often it occurred. And McDonough testified that the condition persisted at the time of trial.

The district court also considered several BMW documents as evidence that BMW verified the acceleration hesitation but did not repair it. BMW argues that the district court erred in relying on these documents and that without that evidence the record does not support a finding that the vehicle has an acceleration hesitation. We disagree. First, the district court's finding that the vehicle has an acceleration hesitation finds adequate support in the testimony of the four witnesses who personally experienced the condition. Second, our review of the BMW documents confirms that they are reasonably susceptible to the interpretation the district court gave them. In particular, we note that the record of the follow-up investigation initiated by the second dealership in February 2009 amply supports the finding that the dealership—and, therefore, BMW—verified the acceleration

[6] Green retained the mechanic as an expert witness. The district court found him credible as a fact witness but did not give his expert opinion about the condition of the vehicle "much weight," largely because he did not have access to BMW diagnostic technology.

hesitation. On this record, we conclude that the district court did not clearly err in finding that Green's vehicle has an acceleration hesitation.

BMW also argues that any acceleration hesitation is not a defect requiring repair but a normal part of how the vehicle operates in "economy" or automatic mode, as demonstrated by the fact that the hesitation does not occur when the vehicle is driven in "sport" or manual mode. The great weight of the evidence indicates otherwise. While at least one witness for BMW testified that some hesitation is to be expected when the vehicle operates in the default economy mode, almost all of the evidence presented to the district court also indicated that such a condition is a problem. This is particularly apparent in the records from the second dealership because, as the district court found, it is "highly unlikely that upon finding nothing wrong with the Vehicle's acceleration, [the technician] would take what he himself described as a search for 'corrective action' by engaging [BMW]'s engineers to resolve a nonexistent problem." We conclude that the district court did not err by finding that the vehicle's acceleration hesitation is a defect.

B. Substantial impairment

Having concluded that the acceleration hesitation constitutes a defect, we turn to the district court's finding that the defect substantially impairs the vehicle's use or market value.[7] Our review of the record reveals ample evidentiary support for that finding. Green and McDonough testified that the acceleration hesitation occurs often

[7] The parties dispute whether "substantial impairment" is a question of law or fact. Although there is no Minnesota caselaw directly addressing this issue in the context of the lemon law, the supreme court's consideration of "substantial impairment" as a fact issue in the context of warranty claims, *e.g.*, *Jacobs v. Rosemount Dodge-Winnebago S.*, 310 N.W.2d 71, 76 (Minn. 1981), persuades us that the same standard should apply here.

("intermittently" and "on a daily basis") and affects the vehicle's operation. Green testified that she feels unsafe in the vehicle because of the hesitation and refused to drive it after the first year of the lease. McDonough testified that he continues to drive the vehicle but feels unsafe because the vehicle is "seriously unreliable in acceleration." He explained that the acceleration hesitation prevents him from pulling out in traffic as he normally would because he does not know if the vehicle will accelerate properly or if it will hesitate, leaving him vulnerable to getting hit.

BMW asserts that the district court could not reasonably find substantial impairment of the vehicle's use because McDonough drove the vehicle thousands of miles, which demonstrates that the hesitation did not interfere with the operation of the vehicle. *See Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 354 (Minn. 1977) (stating, in the context of a warranty claim, that substantial impairment means "substantially interfer[ing] with the operation of the vehicle or a purpose for which it was purchased"). We disagree. The district court evaluated the credibility of the witnesses, and its findings indicate that it considered how often McDonough drove the vehicle. And while high mileage on a vehicle could support a finding that a defect *does not* substantially impair the vehicle's use, it does not necessarily undermine a finding that a defect *does* substantially impair the vehicle's use. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (stating "[t]hat the record might support findings other than those made by the [district] court does not show that the court's findings are defective"). The statute does not require total impairment of the vehicle's use or value. The fact that McDonough continued to drive a vehicle that he considers unsafe—and that

others, including Green, refuse to drive—is not determinative of substantial impairment. Green presented significant evidence that the vehicle exhibits an intermittent but recurring hesitation in acceleration, that the hesitation generally lasts several seconds but occasionally persists for much longer, and that the problem occurs both from a stop and as the vehicle is maneuvered in traffic. On this record, we conclude that the district court's finding that the acceleration hesitation substantially impairs the use of the vehicle is not clearly erroneous.

Finally, we observe that the lemon law requires proof of only a single unrepaired defect so long as that defect substantially impairs the use or market value of the vehicle. Because we conclude that the district court's extensive and well-supported findings regarding the persistent and unrepaired acceleration hesitation satisfy that standard, we decline to separately address the sunroof defect other than to note that the district court's findings in that regard further support the district court's determination that Green prevailed on her lemon-law claim.[8]

III. The district court did not clearly err in finding that BMW breached its warranties.

BMW also argues that the district court erred in finding that BMW breached its express and implied warranties to Green. Although the district court did not award damages on Green's warranty claims because they would duplicate the damages awarded

[8] The record contains ample support for the district court's findings with respect to the sunroof defect, including but not limited to McDonough's testimony regarding the sunroof problems, the documentary evidence as to the second dealership's confirmation of the sunroof's failure to close properly, and the significant cost associated with the unsuccessful repair of the sunroof.

on the lemon-law claim, we briefly consider this argument insofar as it bears on the district court's finding in support of its attorney-fee award that Green was successful on all of her claims.

BMW primarily challenges the district court's finding that BMW breached its warranties to Green by failing to repair defects in the vehicle within a reasonable time, substantially reiterating its challenges to the district court's lemon-law findings. Having previously concluded that the district court did not clearly err in finding that the vehicle has an acceleration defect that substantially impaired the use of the vehicle and which BMW failed to correct after reasonable opportunity to do so, we likewise conclude that the district court did not clearly err by finding that these facts establish a breach of BMW's warranties.

BMW also argues that the district court erred in finding that Green established damages. BMW argues that Green failed to prove the difference between "the value of the goods accepted and the value they would have had if they had been as warranted" because she did not provide evidence of the value of the vehicle in its defective condition. *See* Minn. Stat. § 336.2-714(2) (2010) (providing measure of damages for breach of warranty). We disagree. Damages need not be proved with certainty but only to a reasonable probability. *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 920 (Minn. 1990). In addressing breach-of-warranty damages, the district court expressly incorporated its lemon-law findings regarding substantial impairment. In particular, the district court found that the sunroof replacement in September 2008, which failed to make the sunroof function properly, cost $1,323.38, and that diagnosis and

repair of the acceleration defect would cost $2,500 to $3,000.[9] We conclude that those findings and the underlying evidence as to the lease price of the vehicle support the district court's determination that Green successfully proved a diminution in the value of the vehicle.

IV. The district court did not abuse its discretion in awarding attorney fees.

A consumer who prevails under the lemon law is entitled to "recover costs and disbursements, including reasonable attorney's fees incurred in the civil action." Minn. Stat. § 325F.665, subd. 9 (2010). We review the district court's grant of attorney fees for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). The district court is most "familiar with all aspects of the action from its inception through post trial motions" and, therefore, is in the best position to evaluate the reasonableness of requested attorney fees. *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 629 (Minn. 1988). "The reasonableness of the hours expended and the fees imposed raise questions of fact, and the district court's findings will be reversed only if they are clearly erroneous." *City of Maple Grove v. Marketline Constr. Capital, LLC*, 802 N.W.2d 809, 819-20 (Minn. App. 2011) (citing *Amerman v. Lakeland Dev. Corp.*, 295 Minn. 536, 537, 203 N.W.2d 400, 400-01 (1973)).

[9] The district court credited a repair estimate from Green's expert. BMW argues that the district court could not accept this estimate after declining to consider the expert's opinions as to the condition of the vehicle. We disagree. A fact-finder is free to accept certain parts and reject other parts of a witness's testimony. *See Roy Matson Truck Lines, Inc. v. Michelin Tire Corp.*, 277 N.W.2d 361, 362 (Minn. 1979). And while the district court did not rely on Green's expert's opinions regarding the condition of the vehicle, the expert had experience diagnosing vehicle defects. We discern no error in the district court's acceptance of this estimate.

BMW argues that the district court abused its discretion by awarding Green almost all of her requested fees, challenging the reasonableness of the hours expended by Green's counsel, the reasonableness of the hourly rate, and the district court's refusal to consider the value of the underlying claim in awarding attorney fees. We address each argument in turn.

BMW first challenges the reasonableness of the hours expended. Billing records submitted by Green's counsel detail two years' work on Green's case, totaling 605.8 attorney hours (between two attorneys) and 10.4 paralegal hours. Green also offered the affidavits of her attorneys, supporting affidavits from two other local experienced consumer-rights attorneys, and numerous fee orders from other consumer-rights cases. BMW argued that the hours expended were excessive, particularly criticizing the amount of time spent on preparation and review of proposed findings of fact. The district court disagreed, finding that "the time spent on this matter by [Green]'s counsel, and [Green]'s paralegal, was reasonable and necessary to secure the best possible result for [Green] through a trial victory on all claims she brought," particularly after BMW "vigorously defended" the case.

Nothing in our review of the voluminous materials submitted in support of the fee request reveals that this finding is clearly erroneous. Although we observe that the number of hours counsel spent on this case is quite high, a significant amount of time went into addressing the unique demands of a bench trial. By awarding fees in an amount significantly larger than those indicated in several of the fee orders submitted from cases involving settlement or jury trials, the district court did not, as BMW asserts,

"merely accept[] at face value the 'hours expended' representation" of Green's attorneys but recognized the unique circumstances of this case. *See Anderson*, 417 N.W.2d at 628. On this record, we conclude that the district court did not clearly err in finding the hours billed were reasonable and necessary to establish all of Green's claims successfully.

BMW next argues that the district court clearly erred in accepting the $350 and $375 hourly rates billed by Green's attorneys. We disagree. The district court considered the experience of the attorneys, the affidavit testimony of other attorneys in the community as to a reasonable hourly rate for the work performed, and attorney-fee orders in other Minnesota consumer-rights cases, all of which indicate attorney fees of $350 to $375 are within the range of market rates. *See Hensley v. Eckerhart*, 461 U.S. 424, 447, 103 S. Ct. 1933, 1946-47 (1983) (requiring that fees be based on "market standards" so that "attorneys are paid the full value that their efforts would receive on the open market in non-civil-rights cases," not less because the interests they represent are nonpecuniary). Because the record supports the district court's determination that Green's counsels' hourly rates are reasonable, we discern no clear error.

Finally, BMW argues that the district court erred by refusing to consider the extent of the attorney fees in relation to the "amount involved"—the approximately $27,000 that Green stood to recover. We are not persuaded. It is well-established in Minnesota law that reasonable attorney fees are determined by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *See Anderson*, 417 N.W.2d at 628-29 (following *Hensley*); *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542 (Minn. 1986) (same). While 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. Such an approach 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.

Rather, a district court should consider whether the attorney fees requested are proportional to the *results obtained* in the litigation. *See Specialized Tours*, 392 N.W.2d at 542-43 (holding that attorney fees should be evaluated in light of "the results obtained," meaning the degree of the plaintiff's success on the asserted claims); *see also Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 622 & n.11 (Minn. 2008) (noting that the "results obtained" should be considered in determining the lodestar amount, not as a basis for modifying that amount). "Where a plaintiff has obtained excellent results," such as success on every claim asserted in the lawsuit, the plaintiff's attorney "should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940. Moreover, the Supreme Court has specifically rejected application of a proportionality rule. *City of Riverside v. Rivera*, 477 U.S. 561, 578, 106 S. Ct. 2686, 2696 (1986). We conclude that the district court did not abuse its discretion by declining to reduce the award for fees reasonably and necessarily incurred in successfully establishing Green's claims solely because the amount involved was relatively small.

Affirmed.

JOHNSON, Chief Judge (concurring in part and dissenting in part)

I concur in parts I, II, and III of the opinion of the court but respectfully dissent from part IV, which affirms the district court's award of attorney fees in the amount of approximately $221,000, which is more than eight times the award of compensatory damages of approximately $27,000.

When considering a petition for attorney fees, a district court first must "determine the number of hours 'reasonably expended' on the litigation." *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 628 (Minn. 1988) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1939 (1983)). A plaintiff's attorney has a corresponding obligation to be reasonable when preparing and submitting a fee petition:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "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, 103 S. Ct. at 1939-40).

In this case, Green's attorneys did not exercise "billing judgment." The value of Green's lemon-law claim was, from the beginning, limited to approximately $28,000, the total amount paid during the three-year lease. Green was successful in obtaining most of that amount in damages, but she incurred an excessive amount of attorney fees in the process. In 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. And if they had sent her such a bill, she almost certainly would not have paid it. Likewise, no reasonable attorney with a contingent fee would have invested more than 600 hours into a case that was so limited in value. The fee award in this case appears to be unprecedented for a lemon-law case. I am unable to find any other lemon-law case, in any state, with a fee award that is even half as large as the award in this case. *See Beach v. Kelly Auto. Grp., Inc.*, 757 N.W.2d 868, 869 (Mich. 2008) ($107,467.45). In my view, the number of hours for which fees are claimed is unreasonable in light of the nature and limited value of the case.

The opinion of the court reasons that BMW may not challenge the fee award by referring to the amount of damages on the ground that a proportionality test is disfavored by federal caselaw interpreting 42 U.S.C. § 1988. *See supra* at 17 (citing *City of Riverside v. Rivera*, 477 U.S. 561, 578, 106 S. Ct. 2686, 2696 (1986) (plurality opinion)). I respectfully disagree, for four reasons. First, the Minnesota appellate courts have not previously adopted or even cited *Rivera*. Second, Minnesota law requires district courts to consider "all relevant circumstances" when determining the reasonableness of the number of hours for which fees are claimed. *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 621 (Minn. 2008) (quoting *State by Head v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971)). This general rule 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.

Third, *Rivera* does not preclude a district court from considering whether the number of hours worked is reasonable in light of what is at stake. The issue in *Rivera* was "whether an award of attorney's fees under 42 U.S.C. § 1988 is *per se* 'unreasonable' . . . if it exceeds the amount of damages recovered by the plaintiff in the underlying civil rights action." *Rivera*, 477 U.S. at 564, 106 S. Ct. at 2689 (plurality opinion). The *Rivera* Court rejected the argument that an award of attorney fees should be deemed unreasonable if it "exceed[s] the amount of damages recovered" and the argument that "fee awards in damages cases should be modeled upon the contingent-fee arrangements commonly used in personal injury litigation." *Id.* at 573, 106 S. Ct. at 2693-94 (plurality opinion). In the course of its reasoning, the Court stated: "*The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees* to be awarded under § 1988. It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees." *Id.* at 574, 106 S. Ct. at 2694 (plurality opinion) (emphasis added; citation omitted). In short, *Rivera* may forbid an arbitrary limit on an award of attorney fees, but it does not foreclose all consideration of the amount of damages sought or recovered. *See United Auto. Workers Local 259 v. Metro Auto Ctr.*, 501 F.3d 283, 296 (3d Cir. 2007) (stating that "district court can consider the damages sought and obtained" and that *Rivera* "holds that reasonable fees can, at least in certain circumstances, be disproportionate with the amount of underlying relief").

Fourth, the holding of *Rivera* is limited to civil rights cases and does not extend to consumer-protection cases. The *Rivera* Court rejected a proportionality argument on the

grounds that successful civil rights lawsuits "vindicate important civil and constitutional rights that cannot be valued solely in monetary terms," that "the public as a whole has an interest in the vindication of the rights conferred by" federal civil rights statutes, and that a successful civil rights plaintiff "often secures important social benefits that are not reflected in nominal or relatively small damages awards." 477 U.S. at 574, 106 S. Ct. at 2694 (plurality opinion) (quotation and citation omitted); *see also id.* at 585, 106 S. Ct. at 2700 (Powell, J., concurring) (noting district court's "explicit finding" that "'public interest' had been served by the jury's verdict").

These reasons for not considering proportionality do not apply to a lawsuit concerning a defective car. Minnesota's Lemon Law is, in essence, a statutory mechanism to bolster a consumer's means of enforcing a manufacturer's express warranty. *See* Minn. Stat. § 325F.665, subds. 2, 3(a) (2010) (conferring certain rights on plaintiff "[i]f a new motor vehicle does not conform to all applicable express warranties" and if defendant is "unable to conform the new motor vehicle to any applicable express warranty"). Lemon-law claims do not involve "important civil and constitutional rights that cannot be valued solely in monetary terms." *Rivera*, 477 U.S. at 574, 106 S. Ct. at 2694 (plurality opinion). In fact, it appears that lemon-law claims are valued solely in monetary terms because there is no Minnesota caselaw stating that a plaintiff in a lemon-law case may obtain damages for non-financial injuries. As noted by Justice Powell, who provided the fifth vote for affirmance in *Rivera*, a disproportional fee award may be unreasonable if a plaintiff seeks private damages but does not seek to vindicate constitutional rights. *Id.* at 586 n.3, 106 S. Ct. at 2700 n.3 (Powell, J., concurring). Thus,

Rivera's holding does not apply to a lemon-law case. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977); *Cowan v. Prudential Ins. Co.*, 935 F.2d 522, 527 (2d Cir. 1991) (stating that *Rivera* should be limited to "its very narrow holding").

For these reasons, I would conclude that the district court erred when determining the amount of the award of attorney fees.