SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003290-22

AIDA HERRERA-JEREZ,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	On Appeal from a Final Judgment And Attorneys' Fee Award in the
v.	:	Superior Court of New Jersey, Law Division, Essex County.
HYUNDAI MOTOR AMERICA A/K/A HYUNDAI USA,	:	Docket No. ESX-L-8139-20
Defendant-Respondent.	:	Sat Below: Hon. Jeffrey B. Beacham, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT, AIDA HERRERA-JEREZ

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PRELIMINARY STATEMENT

Plaintiff-appellant appeals a trial court's 93 percent reduction of counsel fees set forth in her counsel's fee application, with virtually no explanation. The fee application was submitted upon settlement, with plaintiff-appellant being the prevailing party. The sole cause of action in the lawsuit was Defendant's alleged violations of the of the Magnusson-Moss Warranty Act's ("MMWA"). The Parties further agreed that although fee shifting under the MMWA is discretionary, Defendant "will not challenge the right of the [Plaintiff] to receive attorney's fees and costs as determined by the Court." Nonetheless, Defendant breached that provision by arguing that the Court should deny fees and costs in the entirety. Defendant's counsel also presented specious and deceptive arguments to the trial court in arguing that the court had the discretion to eliminate all fees and costs so requested. Moreover, the Court did not provide any analysis of its reasons for reducing the hourly rate or time records of Plaintiff's counsel.

The trial court abused its discretion in its apparent acceptance of such arguments which violate the standards set forth in Rendine v. Pantzer, 141 N.J. 292 (1995) as well as state and federal public policy guaranteeing all citizens equal access to the courts. Accordingly, the trial court's erroneous rulings should be reversed.

COMBINED STATEMENT OF PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On November 28, 2020, David C. Ricci, Esq., counsel for plaintiff-appellant, Aida Herrera-Jerez ("plaintiff"), filed a 59 paragraph seven (7) page civil complaint with seventeen (17) attached exhibits (totaling 57 pages), in the Essex County Superior Court, Law Division, alleging that the defendant-respondent, Hyundai Motor America a/k/a Hyundai USA ("defendant"), violated the Magnusson-Moss Warranty Act ("MMWA"), 15 U.S.C. §§ 2301-2312, a federal fee-shifting statute. (Pa29; Pa53-59).[2] Counsel accepted the plaintiff's case on contingency. (Pa47). This appeal arises from the legal fees awarded by the trial court to plaintiff's counsel, based on his fee application, and following a favorable resolution and settlement to the plaintiff after three years of attorney involvement. (Pa9-21; Pa42-51; Pa53- Pa152-155).

On May 29, 2017, plaintiff purchased a new 2017 Hyundai Santa Fe, VIN #5NMZUDLB0HH011768 (hereinafter "the Santa Fe") from defendant for $32,040.68. (Pa28; Pa53-54). She paid $5,500.00 as a down payment and was obligated to make 72 monthly payments of $557.07 thereafter under a

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[1] Because the within appeal involves a trial court's ruling on a fee application submitted by the attorney for the plaintiff-appellant, the concise procedural history and concise statement of facts, pursuant to Rules 2:6-2(a)(4) and (5), are hereby combined in order to avoid unnecessary repetition and confusion.

[2]The following notation is adopted as no transcripts exist:
"Pa" denotes Plaintiff-Appellant's Appendix.

Retail Installment Sales Contract ("RISC"). Ibid.; (Pa54). The Santa Fe came with a written 5-year/60,000-mile basic warranty and a written 10-year/ 100,000-mile power train warranty. Ibid.

In 2019, with only 46,645 miles on its odometer, the Santa Fe began losing or consuming approximately 1.5 to 2 quarts of oil per week. Ibid. The vehicle underwent oil consumption tests at defendant's dealerships on January 28, February 4 and 15 and March 6, 2019. Ibid.; (Pa54-55). Defendant replaced its engine at Paramus Hyundai over a three-month period between March 20 and May 17, 2019. Ibid.; (Pa55).

Thereafter, the Santa Fe began displaying other defects including a lack of engine power, the check engine light coming on and the engine emitting odd noises. Ibid.; (Pa55-56). These defects persisted despite eight (8) additional repair attempts at Hyundai dealerships which occurred on September 20, October 9 and 28, November 12 and December 31, 2019 as well as January 15, August 12 to 13 and September 11, 2020. (Pa29; Pa42; Pa55-57).

In the November 28, 2020 Complaint, plaintiff requested, inter alia, a declaratory judgment cancelling the sales contract for the Santa Fe; an injunction requiring defendant or any holder or assignee of the RISC to pay off the loan balance and buy back the Santa Fe; a refund of plaintiff's down payment and any monthly payments made on the RISC; consequential damages; and reasonable attorney's fees and costs. (Pa58). As of that date, the

Santa Fe had been out of service 11 times for 133 days for material defects affecting its value, safety and use. (Pa42-43; Pa57).

Soon after the Complaint was filed, plaintiff's counsel attempted to settle the matter with the defendant in mid-December 2020, but these attempts were unsuccessful. (Pa43).

On January 5, 2020, defendant filed an Answer denying all liability and containing 43 separate affirmative defenses. Ibid.

Plaintiff served Interrogatories and a Demand for Production of Documents on defendant on February 17, 2020. Ibid.

While litigation was pending, four more repair attempts were made on the Santa Fe at Hyundai dealerships: on December 31, 2020, February 11, 2021, March 16, 2021 and June 29, 2021. (Pa42-43; Pa254; Pa271).[3] Plaintiff's counsel assisted plaintiff in ensuring proper records were obtained. (Pa42-43; Pa53-59; Pa74-100; Pa104-107; Pa110-117). During the June 29, 2021 repair attempt, after 16 months of attorney involvement and seven months of litigation, the Santa Fe's repair issues were resolved. (Pa42-43; Pa254; Pa271).

Meanwhile, defendant did not provide its responses to plaintiff's discovery demands until May 7, 2021. (Pa43).

[3] Plaintiff's counsel's incorrect representation in Paragraph 4 of his March 15, 2023 Certification, that the Santa Fe was successfully repaired during the March 16, 2021 repair attempt, is an inadvertent typographical error. (Pa42-43; Pa254; Pa271).

On May 28, 2021, defendant filed an Offer of Judgment ("OOJ") for a "lump aggregate sum of Eleven Thousand and 11/100 Dollars ($11,000.00) consisting of "all damages" and inclusive of attorney's fees. (Pa205-209).

On June 3, 2021, plaintiff's counsel served a frivolous litigation letter, under N.J.S.A. 2A:15-59.1 and Rule 1:4-8 on defendant's counsel. (Pa267-269). Because plaintiff was seeking equitable relief, she and her counsel asserted that the OOJ, inter alia, violated Rule 4:58-3(c) which states that "[n]o allowances shall be granted if… (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court.…" Ibid.

Plaintiff's counsel again reached out to defendant's counsel, in attempts to settle the matter, on July 6, August 2 and September 16, 2021, but the defendants refused to settle for anything more than the $11,000 set forth in their OOJ. (Pa270-271; Pa279-284).

The parties and their counsel mutually agreed to opt out of mediation in an e-mail exchange on July 16, 2021. (Pa274).

On August 27, 2021, defendants served discovery demands on plaintiff, including Interrogatories, Demands for Production of Documents, Requests for Admissions, a Request for Inspection of the Santa Fe and a Notice to Depose the Plaintiff. (Pa44). Plaintiff served her written discovery responses on defendant on December 1, 2021. Ibid.

Also on December 1, 2021, plaintiff served document subpoenas on two of the three Hyundai dealerships that serviced the Santa Fe: Sansone Hyundai in Avenel and Lynnes Hyundai in Bloomfield, New Jersey (Pa43; Pa).

On December 9, 2021, defendant moved to quash both subpoenas. (Pa43). Plaintiff's counsel opposed the motion and it was denied. (Pa43-44).

Plaintiff was deposed on December 23, 2021. (Pa44).

On February 20, 2022, defendant's expert inspected the Santa Fe and its expert report was served on plaintiff, along with supplemental discovery, on March 14, 2022. Ibid. According to the expert report, the Santa Fe had an odometer reading of 93,723 miles on the date of inspection (indicating that the 10-year/100,000-mile power train warranty was still in effect). Ibid.

A pre-trial conference was held before the Honorable Thomas R. Vena, J.S.C. on May 31, 2022 and a trial date was scheduled for July 25, 2022. Ibid.

The parties agreed to and requested non-binding arbitration on June 3, 2022 and an arbitration hearing was held on July 27, 2022. Ibid. At the hearing, the arbitrator awarded plaintiff $7,500.00 in consequential damages plus attorney's fees and costs to be decided by the Court. Ibid.

Defendant filed a request for trial de novo on August 26, 2022. (Pa45).

On August 31, 2022, defendant's counsel offered to settle the matter for $7500.00 plus reasonable attorney's fees and costs to be decided on motion. Ibid.; (Pa45). A Settlement Agreement and Release ("Settlement Agreement")

was executed and notarized on December 22, 2022. Ibid.; (Pa121-128). As consideration, defendant agreed in Paragraph 2(b) to the following condition:

> Hyundai Motor America agrees to have[4] the attorney's fees and costs of Releasor's attorneys, Law Office of David C. Ricci, LLC, to have been reasonably incurred by Releasor, to be determined by the Court upon a properly noticed motion. Notwithstanding this provision, HMA reserves all rights to challenge the reasonableness of the attorney's fees and costs requested by the Releasor. However, HMA agrees that it will not challenge the right of the Releasor to receive attorney's fees and costs as determined by the Court. Releasor's attorney will file the motion for attorney's fees within 60 days of the execution of this agreement by his client. [Pa123].

Plaintiff's Counsel's Fee Application

On March 15, 2023, plaintiff's counsel filed a 135-page Notice of Motion for Judgment Awarding Attorney's Fees and Costs, proposed Order, Letter brief and Certification with 10 supporting exhibits. (Pa22-156). The motion complied with the standards set forth in Rule 4:42-9(8) (attorney's fees may be awarded in all cases where same are permitted by statute) and Rendine v. Pantzer, 141 N.J. 295, 316-337 (1995). Ibid. Counsel presented 67.3 billable hours over a three-year period, at a billing rate of $525 per hour, for time expended, inter alia, in drafting pleadings, engaging in discovery, deposition and motion practice, engaging in court-ordered arbitration, settlement negotiations, and preparing his fee application. (Pa151-155). He presented evidence supporting the fairness and accuracy of work performed and proof of

[4] The word "have" in this sentence appears to be a typographical error and should be replaced by the word "pay."

prevailing billing rates in the area. (Pa42-150). Counsel also requested oral argument pursuant to Rule 1:6-2 if opposition to his motion was filed. (Pa23).

On March 23, 2023, defendant's counsel filed a 15-page combined opposing Certification and Brief, together with five (5) exhibits, in which he urged the Court to deny plaintiff's counsel's fee application in its entirety. (Pa160-243). Counsel asserted that (a) the case involved a "routine" breach of an automobile warranty; (b) plaintiff's counsel's request for an award of fees totaling $35,332.50 for 67.3 hours at $525 per hour was "incredible"; (c) the fees requested were outrageous because they were "five times" the amount of plaintiff's damages award; and (d) based on the unpublished federal court opinions of Sullivan v. Chrysler Motors Corp. and Stitsworth v. Ford Motor Co.,[5] the court's discretion was broad enough that it could either eliminate or "greatly reduce" the fee award. (Pa160-161; Pa170). See Sullivan v. Chrysler Motors Corp., No. 94-5016, 1997, U.S. Dist. LEXIS 2503 (D.N.J. Feb. 28, 1997) (Pa232-242); Stitsworth v. Ford Motor Co., No. 95-5763, 1996 U.S. Dist. LEXIS 1657 (E.D. Pa. Feb. 13, 1996); (Pa285-289).

On March 28, 2023, plaintiff's counsel filed a 41-page Reply Brief and Certification with six (6) exhibits, in which he briefed and presented evidence

[5] Under Rule 1:36-3, these unpublished opinions do not constitute precedent and are not binding upon any New Jersey court. The Rule also requires attorneys who cite to unpublished opinions "to serve the court and all other parties" with "a copy of the opinion." Defendant violates this rule with the Stitsworth opinion. (Pa160-243).

countering defendant's opposing arguments. (Pa243-284). In his Reply Brief, plaintiff's counsel made and briefed the following arguments: (a) defendant's OOJ, inter alia, violated Rule 4:58-3(c)(4) as its "allowance" was so small that it violated the fee-shifting provision of the MMWA and its underlying public policy of providing equal access to the courts; (b) defendant's argument that plaintiff's counsel's fees should be eliminated to nothing violated the parties' settlement agreement; (c) the hours expended by plaintiff's counsel were reasonable due to the complexity of the case and defendant's strategic refusals to pay plaintiff's reasonable counsel fees under the MMWA's fee shifting provision; (d) the unpublished Sullivan case is outdated, is not binding on New Jersey courts and is not based on New Jersey law; and (e) his $525 hourly rate is based on prevailing rates in Essex County and was supported by certifications of attorneys who practice in consumer protection. (Pa244-251).

Trial Court's Ruling

The trial court ignored plaintiff's counsel's request for oral argument and issued a Judgment Awarding Counsel Fees and Costs and a supporting written opinion on May 19, 2023. (Pa9-21).[6] The court cut plaintiff's counsel's fee award by 93 percent, from 67.3 hours at an hourly rate of $525 (totaling

[6] Briefs submitted to the trial court are included the plaintiff's Appendix, because their content is germane to the appeal and because the Court referred to their content in summarizing the respective positions of the parties in its written opinion. See R. 2:6-1(a)(2); (Pa9-21).

$35,332.70) to 6.2 hours at an hourly rate of $395 (totaling $2,449.00). Ibid.; cf. (Pa152-155). The court left costs of $552.20 unchanged. Ibid.

In its written opinion, the court first summarized plaintiff's counsel's arguments. (Pa11-16). The court stated counsel argued that (a) he was entitled to an award of reasonable attorney's fees because such an award was agreed to in the parties' settlement and plaintiff was the prevailing party under Rule 4:42-9(8); (b) defendant breached the parties settlement agreement by arguing, in opposing papers, that plaintiff's counsel's fee application should be denied in its entirety; (c) under the law, a plaintiff prevails if it succeeds in obtaining a result that materially alters or affects defendant's behavior towards it; (d) plaintiff's counsel complied with all standards set forth in Rendine, supra, for the proper calculation of the lodestar; (e) the lodestar calculations in counsel's fee application are presumed reasonable; (f) fee-shifting statutes penalize defendants and reward plaintiffs' counsel "for socially beneficial litigation"; (f) plaintiff's counsel is a reputable consumer fraud attorney and his $525 hourly rate is the prevailing rate among competent consumer law attorneys in his county; (g) counsel's fees were reasonable under RPC 1.5(a); and (h) fees for preparation and filing of a prevailing party's fee application are includable in his or her fee application. (Pa11-16).

In addition to the foregoing, the trial court, in its written opinion, also summarized defendant's arguments. (Pa16-21). The court stated that defendant argued (a) the court determines the reasonableness of attorney's fees; (b) fee

awards are discretionary under the MMWA; (c) plaintiff's counsel's fees were unreasonably high "under the lodestar accounting method," RPC 1.5 and the Rendine factors; (d) plaintiff achieved limited success compared to the relief sought; (e) the hourly rates were unreasonably high compared to prevailing rates in the community; (f) the fees requested were disproportionate (i.e. five times) the $7,500 awarded plaintiff; (g) the matter was a "routine breach of warranty" case; (h) counsel billed at the top rate for paraprofessional services; and (i) counsel was "resistant" to defendant's OOJ and to settlement. (Pa16-21) (emphasis in original). The court set forth examples of what defendant perceived as overbilling regarding preliminary investigation, review of service and repair records and drafting plaintiff's Complaint, given counsel's 12 years of experience in his field. (Pa17-18).

Defendant's counsel also opined that he has been an attorney for eighteen years and "has personally defended or been involved with thousands of matters..." (Pa172). Thus, the Court should award at most $250 per hour. Ibid.; (Pa172).

The court cited Sullivan and Stitsworth,[7] cases cited by defendant for the argument that plaintiff's counsel's fee award, including time spent on fee petitions, may be "drastically" reduced. (Pa16-19; Pa232-242; Pa285-289). The court then re-stated defendant's conclusion that plaintiff's counsel's

[7] Under Rule 1:36-3, with certain exceptions that are inapplicable here, "no unpublished opinion may be cited by any court."

alleged overbilling should not be "rewarded" and that his counsel fees should be reduced to, at most, 6 hours. (Pa20-21).

Statement of Reasons for Decision

The trial court provided a "Statement of Reasons" in its written opinion, in which it stated the following:

> Court finds reasonable rate in Essex County is $395 per hour.
> Drafting Complaint 2.7
> Defend Deposition of Client 2.3
> Attend Arbitration Hearing 1.2
> Expenses: $552.20
>
> Plaintiff's Counsel has 18 years of experience and has been involved in over 1,000 matters so he is not entitled to be reimbursed for research.[8] The court is awarding the reasonable fees based on the results obtained. Plaintiff is awarded $2449.00 in fees and $552.20 in costs.
> [Pa21].

On July 2, 2023, plaintiff's counsel filed a Notice of Appeal. (Pa1-3).

LEGAL ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY IGNORING LONG-STANDING LEGAL STANDARDS FOR AWARDING ATTORNEY'S FEES IN FEE-SHIFTING CASES AND BY ISSUING AN UNEXPLAINED AND INADEQUATELY LOW FEE AWARD. (Pa9-21).

The trial court abused its discretion by ignoring our Supreme Court's

[8] The Court mistakenly attributed 18 years of experience and being involved in over 1,000 matters to the experience of Plaintiff's counsel. Defendant's counsel certified to that amount of experience. (Pa172).

standards set forth in Rendine v. Pantzer, 141 N.J. at 317, 345, "that inform the exercise of discretion by trial courts called on to determine [attorney's] fees" in fee-shifting cases. Ibid. The failure to follow these standards constitutes an abuse of discretion. Ibid. Also, as Justice William J. Brennan, Jr. explained in Hensley v. Eckerhart, 461 U.S. 424 (1983), a trial court abuses its discretion in federal fee-shifting cases when it fails to "articulate a fair explanation for its fee award" and the award is "so low as to provide clearly inadequate compensation to the attorney on the case." Id. at 454-55 (Brennan, J., concurring in part and dissenting in part). The fee award here was improperly low and unexplained. (Pa21). The court inexplicably cut 67.3 hours of legal services performed over a two-and-a-half-year period to 6.2 and cut plaintiff's counsel's hourly rate to reduce the fee awarded by 93 percent. Ibid. In its purported "Statement of Reasons," the court stated only that the award was "based on the results obtained" and that no fees would be awarded for legal research. Ibid. Thus, reversal is warranted.

A. The Trial Court Abused Its Discretion By Failing To Apply The Standards For Determining The Lodestar In Fee-Shifting Cases Pursuant To Rendine And Its Progeny And By Flouting State and National Public Policy In So Doing. (Pa9-21).

In Rendine, the New Jersey Supreme Court synthesized prior federal and United States Supreme Court rulings to set standards as to how attorney's fees awarded to the prevailing party should be calculated in fee shifting cases. See 141

N.J. at 316, 322-337. Noting that the "American Rule" requires parties to pay their own attorney's fees, the Court stated that the United States Congress, in addition to state legislatures, carved out exceptions by enacting "over 100 separate federal fee shifting statutes" to ensure equal access to the courts. Id. at 322-23. The underlying rationale for these enactments was expressed by Justice O'Hern as follows:

> The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all.
> [Id. at 323 (citing Coleman v. Fiore Bros., 113 N.J. 594, 597 (1989)); see also Sponsor Statement, 42 U.S.C.A. § 1988, the Civil Rights Attorney's Fee Awards Act of 1976)].

The New Jersey Supreme Court similarly follows this long-established public policy, having stated, in the context of analyzing fee shifting under the Consumer Fraud Act, N.J.S.A. 56:8-, et seq., that

> 'the right of access to the courts is meaningless unless the injured party has the resources to launch a suit' and [] this right of access is empowered by fee-shifting, which 'provides an incentive to competent counsel to undertake high-risk cases and to represent victims of fraud who suffer relatively minor losses.'
> [Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)].

Hence, with this public policy in mind, the Court in Rendine, first stated that, historically, "federal courts developed various methodologies for determining reasonable counsel fees pursuant to fee-shifting statutes." Id. at 323. The Court first cited an early approach adopted in Johnson v. Georgia Highway Express,

Inc., 488 F.2d 714 (5th Cir. 1974), which advocated reliance on twelve subjective factors: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Rendine, 141 N.J. at 323 (citing Johnson, 488 F.2d at 717-19 (emphasis added)).

The Rendine Court next discussed the Third Circuit's adoption of an approach used in Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167-69 (1973) (Lindy I). See 141 N.J. at 322-24. The Lindy I court calculated the "lodestar" based on the hours spent on the case multiplied by the attorney's reasonable hourly rate of compensation and then adjusted that amount based on "(1) the contingent nature of the case, reflecting the likelihood that hours were invested and expenses incurred without assurance of compensation and (2) the quality of the work performed as evidenced by the work observed, the complexity of the issues and the recovery obtained." Id. at 324 (citing Lindy Bros.

Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976) (Lindy II).

The Court then discussed the United States Supreme Court's holding in Hensle, 461 U.S. at 426, in which that Court adopted a hybrid methodology, combining the lodestar approach of Lindy Brothers with the twelve-factor test endorsed in Johnson. See Rendine, 141 N.J. at 324. The Court in Rendine then adopted the holding in Hensley stating:

> [t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.
> [Ibid. (citing Hensley, 461 U.S. at 433.]

In adopting the lodestar method for calculating attorney's fees under federal and state fee shifting statutes, the Rendine Court cited with approval the United States Supreme Court's holding in Blum v. Stenson, 465 U.S. 886 (1984) that the Johnson and Lindy factors are "subsumed" in the lodestar calculation. Id. at 325-26 (citing Blum, 465 U.S. at 898-900) (emphasis added). The Court then stated that

> the trial court's determination of the lodestar amount is the most significant element in the award of a reasonable fee because the function requires the trial court to evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application.
> [Rendine, 141 N.J. at 335].

While the Rendine Court held that a prevailing attorney's "[h]ours are not reasonably expended if they are excessive, redundant or otherwise unnecessary[,]" it rejected the proposal that the amount of counsel fees awarded is proportional to the amount of monetary damages received. Id. at 334-336. Adopting Judge Brennan's United States Supreme Court plurality opinion in City of Riverside v. Rivera, 477 U.S. 561 (1986), the Court explained

> [i]n [Rivera], a plurality of the Supreme Court upheld a counsel-fee award of $245,456.25 in a suit alleging civil-rights violations in which the plaintiffs had been awarded compensatory and punitive damages of $33,350. The plurality opinion concluded that although damages recovered were a factor bearing on the reasonableness of counsel fee awards, federal fee-shifting statutes did not require proportionality between damage recoveries and counsel-fee award, observing that '[u]nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.'
> [Rendine, 141 N.J. at 336 (quoting Rivera, 477 U.S. at 574)].

The Rendine Court then set some limits on what constitutes a "prevailing party" stating that the lodestar fee should be reduced if "a plaintiff has achieved only partial or limited success" as "compared to the relief sought." Id. at 336. It stated that the attorney for the prevailing party should set forth his billable hours "in sufficient detail" and with "some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery [or] settlement negotiations…" to inform the trial court of "the nature of the services for which compensation is sought." Id. at 337 (quoting Lindy I, 487 F.2nd at 167). It then

stated that trial courts are to calculate "a reasonable hourly rate" in accordance with "the prevailing market rates in the relevant community." Ibid. (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990) (citations omitted)). The Court explained this process by stating

> Thus, the [trial] court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. [Ibid.]

The Court stressed that this determination "need not be unnecessarily complex or protracted." Ibid. Rather, trial courts should be satisfied "that the assigned hourly rates are fair, realistic and accurate, or should make appropriate adjustments." Ibid. Also, the hourly rates are to be "based on current rates rather than those in effect when the services were performed. Ibid. (citations omitted).

(i) The trial court failed to set forth a statement of reasons as to how it calculated the lodestar. (Pa21).

The trial court abused its discretion in failing to provide a statement of reasons that follows the standards set forth in Rendine. (Pa21). Courts are required, when calculating the lodestar, to consider a combination of the twelve factors in Johnson and the factors in Lindy to determine "the number of hours reasonably expended" multiplied by "a reasonable hourly rate." Rendine, 141 N.J. at 325-26 (citing Blum, 465 U.S. at 898-900). Its calculation and the methods on which such calculation is based, is to be clearly stated. See Khoudary v. Salem County Bd. of

Social Services, 281 N.J. Super. 571, 578 (App. Div. 1990). Only then is the court permitted to "adjust" the lodestar up or down. Rendine, 141 N.J. at 322-337.

Here, the trial court failed to issue a statement of reasons, failed to calculate the lodestar, and failed to explain how or why it's "adjustments" reduced counsel's hourly rate from $525 to $395. (Pa21). It also reduced and/or eliminated, without explanation, 67.3 hours of counsel's legal services, performed over a two-and-a-half-year period and concluded that only 6.2 hours of legal services were reasonably expended. Ibid. In support of these significant reductions, the court stated only that counsel was "not entitled" to fees for research due to his "18 years of experience" and involvement in "over 1,000 matters" and its award of "reasonable fees" was "based on the results obtained." Ibid. The trial court then cut plaintiff counsel's requested fees by 93 percent. Ibid.

This Court generally sets aside an award of attorney's fees "only because of a clear abuse of discretion." See Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 155 (App. Div. 2016) (quoting Rendine, 141 N.J. at 317). An award will be set aside "if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)).

However, in order to perform its judicial function, this Court "must be provided with adequate reasons for the trial judge's determinations." Gormley v. Gormley, 462 N.J. Super. 433, 449 (App. Div. 2019). "Trial judges are under a duty to make findings of fact and to state reasons in support of their conclusions." Romero v. Gold Star Distrib., LLC, 468 N.J. Super. 274, 304 (App. Div. 2021) (quoting Giarusso v. Giarusso, 455 N.J. Super. 42, 53 (App. Div. 2018)); see also R. 1:7-4(a) (requiring courts to "find the facts and state . . . conclusions of law thereon," either orally or in writing, "on every motion decided by a written order that is appealable as of right").

Here, in setting the fee award, the judge stated only that plaintiff's counsel was not entitled to fees for research, given his experience[9] and that the award of "reasonable fees" was "based on the results obtained." (Pa21). Under Rendine, an attorney's skill and experience is evaluated as a support for a requested fee award (including approval of counsel's hourly rates) rather than a challenge to its reasonableness. See Rendine, 141 N.J. at 323-24, 335-36. Also, in terms of the results obtained relative to the relief sought, plaintiff's counsel achieved an outstanding result for the plaintiff. In her complaint, she sought the buy-back

[9] In stating that plaintiff's counsel had "18 years of experience" and was "involved in over 1,000 matters[,]" (Pa21), the trial court actually was referring to defense counsel's description of his experience in defending his client. (Pa171-172). The trial court also ignored the fact that much of counsel's research related to defects to the Santa Fe and not to legal research.

of her 2017 Santa Fe, cancellation of the RISC, a refund on the vehicle and reasonable attorney's fees. (Pa58). In working with her counsel since March of 2020, she obtained a fully-repaired Santa Fe (for which she paid $32,040.68) after a 2019 engine replacement, and twelve additional repair attempts. (Pa42-43; Pa55-59; Pa152-155; Pa254; Pa271). She also was awarded $7500 in damages at arbitration and settled for that amount, plus attorney's fees and costs to her counsel. (Pa42-45; Pa121-128). Finally, federal fee-shifting statutes do not require "proportionality between damage recoveries and counsel-fee awards." Rivera, 477 U.S. at 574; Rendine, 141 N.J. at 336.

In any event, our Supreme Court has made it clear that "a trial court must analyze the Rendine factors in determining an award of reasonable counsel fees and then must state its reasons on the record for awarding a particular fee." Furst, 182 N.J. at 21 (citing R. 1:7-4(a)). Nothing in this record shows the trial court considered the requisite factors. (Pa21). The trial court failed to follow the Rendine standards in first setting the lodestar and then making any adjustments to same. See Rendine, 141 N.J. 322-337. It also failed to provide any explanation for his inadequately low fee award. Ibid.

A trial court's failure to make explicit findings and clear statements of reasoning "constitutes a disservice to the litigants, the attorneys, and the appellate court." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Curtis v. Finneran, 83

N.J. 563 (1980)). "Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990). Thus, reversal is warranted.

(ii) *The trial court's extremely low and inadequate fee award violates the public policy underlying fee shifting statutes that provide litigants equal access to courts. (Pa21).*

The trial court's abuse of discretion in issuing its low and inadequate fee award also violated public policy. (P21). State and federal fee-shifting statutes "share the common purpose of ensuring that plaintiffs with bona fide claims are able to find lawyers to represent them." JHC Indus. Services, LLC v. Centurion Companies, Inc., 469 N.J. Super. 306, 313 (App. Div. 2021) (quoting Coleman, 113 N.J. at 598)). "Both are designed to attract competent counsel in cases involving an infringement of statutory rights, to achieve uniformity in those statutes and to ensure justice for all citizens." Ibid. As former Senator John Tunney, the sponsor of 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Awards Act of 1976 explained:

> Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.
> [Coleman, 113 N.J. at 597 (internal citation omitted.]

The MMWA is a federal statute whose fee-shifting provision supports the foregoing public policy. Enacted in 1975, the statute responded to infuriated motor

vehicle owners complaining "automobile manufacturers and dealers were not performing in accordance with the warranties on their automobiles." Fedor v. Nissan of North America, Inc., 432 N.J. Super. 303, 311-12 (App. Div. 2013) (citations omitted). Congress intended the legislation to aid consumers by ensuring significant guarantees of quality and performance of warranty provisions for purchased consumer goods, and "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products[.]" Id. at 311-12 (quoting 15 U.S.C. § 2302(a)). The statute imposes "[f]ederal minimum standards[,]"15 U.S.C. § 2304(a)), and provides a cause of action and legal remedy for consumers harmed by a warrantor's failure to comply with its warranty obligations, 15 U.S.C. § 2310(d). Id. at 312. Thus, a prevailing consumer under the statute may apply to the court for reasonable attorney's fees and costs. Id. at 316 (citing 15 U.S.C. § 2310(d)(2).

The trial court abused its discretion in failing and/or refusing to consider the foregoing state and federal public policies undergirding the MMWA when it issued its unexplained order cutting plaintiff's counsel's request for fees (hours expended and hourly rate) by 93. (Pa21). Statutory fee-shifting provisions are necessary to ensure that litigants with bona fide claims have equal access to the courts. JHC Indus. Services, LLC, 469 N.J. Super. at 313; Coleman, 113 N.J. at 597-98. Such provisions provide such litigants with the right and the resources to do so. Ibid.

Moreover, the settlement between the parties improved on plaintiff's right to attorney's fees and costs by making the discretionary award under the MMWA be mandatory pursuant to the settlement agreement. The trial court violated these policies by depriving the plaintiff of the resources she needed to guarantee her the equal access to the courts, as promised by Congress and by the New Jersey Legislature and Supreme Court. Ibid.; (Pa11-16; Pa23-156; Pa244-284). Accordingly, reversal is warranted.

B. The Trial Court Abused Its Discretion By Its Apparent Embrace Of Defendant's Argument, In Breach Of The Parties' Settlement Agreement, That The MMWA Gave It The Discretion To Ignore The Rendine Standards And Reduce Or Eliminate To Almost Nothing The Counsel Fees Requested In Plaintiff's Counsel's Fee Application. (Pa16-21).

In opposing plaintiff's counsel's fee application, defendant argued that the trial court's discretion was broad enough under the MMWA to eliminate plaintiff's counsel's fees, if "the court in its discretion" determines that the fees requested "would be inappropriate." (Pa160-175; Pa163); 15 U.S.C. § 2310(d)(2). In so doing, defendant breached the parties' confidential settlement agreement, wherein it specifically agreed not to make that argument. (Pa11; Pa27; Pa45; Pa123). Also, defendant relied on two unpublished federal opinions, Sullivan, 1997 U.S. Dist. LEXIS 2503 at *4-*21 and Stitsworth, 1996, U.S. Dist. LEXIS 1657 at *1-*8, to support its assertion that the court had the discretion to "drastically" reduce or eliminate hours expended in a prevailing party's fee application. (Pa163-170). If

the trial court accepted such arguments, as indicated by its reference to these opinions in its written decision, and its elimination of the requested fees by 93 percent, it abused its discretion. (Pa16-21; Pa232-242; Pa285-289). Also, if the court did rely on these opinions, it had an obligation to say so explicitly, and to make findings of fact and conclusions of law to support that ruling. See Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 300-01 (App. Div. 2009). Under either and both these possible scenarios, reversal is warranted.

The court should be instructed on remand to ignore any argument urged by the defendant that deviates from the settlement terms. (Pa11; Pa27; Pa45; Pa123). "An agreement to settle a lawsuit is a contract which, like all other contracts, may be freely entered into and which a court, absent a demonstration of 'fraud or other compelling circumstances,' should honor and enforce as it does other contracts." Hannigan v. Township of Old Bridge, 288 N.J. Super. 313, 319 (App. Div. 1996) (quoting Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div.), certif. denied, 94 N.J. 600 (1983)). Such an agreement "will be enforced as long as the agreement addresses as the agreement addresses the principal terms required to resolve the dispute." See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 421 N.J. Super. 445, 453 (App. Div. 2011), aff'd, 215 N.J. 242 (2013); Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (holding if parties agree on

essential terms and agree to be bound by those terms, an enforceable contract is created).

Moreover, the arguments defendant presented to the trial court are specious, deceptive and strategically designed to obfuscate the issues and confuse the court. (Pa160-175). Defendant urged the trial court to ignore the Rendine standards in setting the lodestar and the two-step process involved (i.e. setting the lodestar and then making adjustments upward or downward pursuant to RPC 1.5(a). Ibid.; cf. Rendine, 141 N.J. at 323-337. Instead, defendant argued that only the RPC 1.5a reasonableness factors are controlling, under the MMWA, Sullivan and Stitsworth, to convince the trial court that it had the discretion to "drastically reduce" or even eliminate the fees requested in plaintiff's fee application. (Pa16-21; Pa160-175).

Significantly, both the Sullivan and Stitsworth opinions are anomalous, inapposite, distinguishable and contrary to New Jersey law. Cf. (Pa16-21; Pa163-175; Pa164; Pa169); Sullivan, 1997 U.S. Dist. LEXIS 2503 at *4-*21; Stitsworth, 1996, U.S. Dist. LEXIS 1657 at *1-*8. (Pa232-242; Pa285-289). Indeed, Sullivan, in particular, involved claims brought by the plaintiff under New Jersey's Lemon Law, N.J.S.A. 56:12, et seq. Sullivan, 1997 U.S. Dist. LEXIS 2503 at *1; (Pa233). The case was removed to federal court based on the diversity of the parties. Ibid.

In its opinion, the Sullivan court quoted N.J.S.A. 56:12-42, as follows:

> In any action by a consumer against a manufacturer brought in Superior Court or in the division pursuant to the provisions of this act, a

> prevailing consumer shall be awarded reasonable attorneys fees, fees for expert witnesses and costs.
> [Ibid.]

However, despite the plain language and meaning of this statutory provision, and the plaintiff having prevailed at trial, the court reduced the fees and hourly rate in her counsel's fee application from "nearly $20,000 in counsel fees for 130 hours of work and over $400 in out-of-pocket costs" to $7037 in counsel fees and $265.47 in costs, including a denial of expert fees. Id. at *1, *19; (Pa233; Pa240). Although the case was decided two years after Rendine, there is no mention of this seminal New Jersey case anywhere in the opinion. Id. at *1-*23; (Pa.232-242). Also, the court cited numerous published and unpublished federal cases involving the law of other federal circuit and district courts as well as other states, such as New York, Pennsylvania (citing Stitsworth) and Mississippi, to support its drastic reduction or elimination of the counsel fees and costs submitted in plaintiff's counsel's fee application. Id. at *10-*23 (Pa238-242; Pa285-289).

The main reason for the distinguishable anomalies in Sullivan is the federal district court's inexplicable failure to apply the Erie[10] doctrine, a fundamental doctrine of federal civil procedure, to its analysis. See id. at *1-*23; (Pa.232-242). Since 1938, federal courts have implemented the doctrine for determining when state law applies in federal diversity actions. In re Appeal of Certain Sections of

[10] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)

Uniform Administrative Procedural Rules, 90 N.J. 85, 98, n. 5 (1982) (citing Erie, 304 U.S. at 58)). The doctrine provides that federal courts sitting in diversity are to apply state "substantive" law and federal "procedural" law. Ibid. (citing Hanna v. Plumer, 380 U.S. 460, 465 (1965)). Hence, in considering issues of "substantive law" such courts are bound by state court decisions as well as state statutes. See Hanna, 380 U.S. at 465; Erie, 304 U.S. at 64 (emphasis added). The doctrine's two main objectives are (1) to discourage forum shopping among litigants; and (2) to avoid inequitable administration of the laws. Erie, 304 U.S. at 74-80.

The court's failure to apply the Erie doctrine in Sullivan created exactly what the doctrine was designed to prevent, i.e. inequity in the administration of the laws. See Sullivan, 1997 U.S. Dist. LEXIS 2503 at *4-*23; (Pa232-242); cf. Rendine, 141 N.J. at 323-337. The court in Sullivan was bound to apply the plain language and meaning of N.J.S.A. 56:12-42 to the plaintiff's fee application, set the lodestar in accordance with the Rendine factors and consider awarding a fee enhancement if the plaintiff's counsel had taken the case on contingency. Ibid.; see also Erie, 304 U.S. 58-64. Thus, the Sullivan opinion is inapplicable and should have been disregarded by the trial court as it is fatally flawed for failure to apply the substantive laws of New Jersey to its analysis and rulings. See JHC Indus. Services, LLC, 469 N.J. Super. at 312 (holding fee determinations that are based on "a clear error of law" cannot stand) (internal citations omitted).

In this case, defendant's inclusion and incorporation of the incorrect and inapplicable rulings and analyses in Sullivan and in Stitsworth (a case involving Pennsylvania law) to its opposing papers was specious and deceptive. (Pa160-170). The federal court in Sullivan failed to apply New Jersey law and, thus, unlawfully reduced and/or eliminated New Jersey's statutorily mandated attorney's fees. (Pa232-242; Pa285-289). Defendant's strategy employed here was create the false impression that plaintiff's counsel fees were outrageous and mislead the court into believing it, too, possessed the discretion to eliminate with impunity, any and all fees requested in plaintiff's counsel's fee application. Ibid.

Moreover, defendant's urging the trial court to accept the holdings in two unpublished federal cases as binding precedent, see ibid., is improper and contrary to New Jersey law. Rule 1:36-3 provides

> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in New Jersey Tax Court Reports or an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.
> [Ibid.; (emphasis added)].

New Jersey courts cite with approval the rule that no unpublished opinion "shall constitute precedent or be binding upon any court." See, e.g., Mount Holly

Tp. Bd. v. Mount Holly, 199 N.J. 319, 332 n. 2 (2009) (reaffirming the dictate of the rule); Sciarotta v. Global Spectrum, 194 N.J. 345, 353 n. 5 (2008) (declining to address an argument based on an unpublished Appellate Division opinion); Matter of Belleville Ed Ass'n, 455 N.J. Super. 387, 407 (App. Div. 2018) (citing and relying on unpublished opinion violated R. 1:36-3). Similarly, because a trial court is not bound by an unpublished opinion of the New Jersey appellate court, it is obvious that it is not bound by an unpublished opinion in another jurisdiction. See In re Bacharach, 344 N.J. Super. 126, 133 (App. Div. 2001).

However, "[t]he frequency with which practitioners cite unpublished opinions in briefs and oral arguments has grown considerably, suggesting that some are improvidently relying on them to the exclusion of reported decisions." Pressler & Verniero, Current N.J. Court Rules, R. 1:36-3, comment 2 (Gann 2024). The problem has become so prevalent that "[t]he judiciary has registered its concern with this practice, which should be avoided." Ibid. (citation omitted). It is readily apparent that defendant attempted to misrepresent the unpublished opinions in Sullivan and Stitsworth as having value as binding precedent when they had none. See R. 1:36-3; cf. (Pa160-175). Hence, to the extent that the trial court relied on Sullivan and Stitsworth in rendering its opinion, reversal is warranted.

C. The Trial Court Abused Its Discretion To The Extent It Embraced Defendant's Arguments That An Award Of Counsel Fees Under The MMWA Was Governed, Not By The Rendine Standards, But By Defense Counsel's Subjective Beliefs. (Pa9-10; Pa16-21); (Pa160-175).

The trial court abused its discretion in accepting, to the extent it did so, defense counsel's remaining arguments. Said arguments similarly contravene New Jersey law, the Rendine standards, and state and federal public policy undergirding fee shifting statutes, such as the MMWA. Ibid.; cf. Coleman, 113 N.J. at 597-98 (federal and state fee shifting statutes provide equal access to the courts by providing litigants with bona fide claims both the right and the resources to sue); Rendine, 141 N.J. at 317, 345 (court abuses its discretion if it fails to follow the standards articulated therein when making a counsel fee determination). Most importantly, "[i]n statutory fee-shifting cases "in which the fee requested is disproportionate to the damages recovered," our Supreme Court "has instructed trial judges to 'evaluate not only the damages prospectively recoverable and actually recovered, but also the interest to be vindicated in the context of the statutory objectives." JHC Indus. Services, LLC, 469 N.J. Super. at 313 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 366 (1995)). The statutory objectives to be protected here are equal access to the courts and ensuring that this plaintiff had both the right and the resources to access same. Ibid.; Coleman, 113 N.J. at 597-98.

Under the foregoing applicable statutes and legal precedent, New Jersey courts are powerless to eliminate fees in a prevailing party's fee petition, if based on anything other than the Rendine standards. See Rendine, 141 N.J. at 317-337, 345; cf. (Pa9-21). Instead, defendant urged the trial court to accept its purely subjective and groundless arguments that plaintiff's counsel (a) resisted settlement by refusing to accept the May 28, 2021 $11,000 OOJ; (b) "dragged" litigation on after the filing of the OOJ specifically in order to increase his counsel fee award; (c) was not a "prevailing party" based on the results obtained; (d) made an unreasonable request for $35,332.50 for 67.3 hours of work over a period of three years, because plaintiff received a monetary award of $7500, and "could have" accepted the OOJ in May 2021; and (e) presented an hourly fee that was unreasonably high because defendant's counsel has more experience and only receives $250 per hour for his legal services. (Pa160-175). The trial court abused its discretion to the extent that it accepted and relied on any of these specious and deceptive arguments. (Pa9-10; Pa16-21)

In addition, defendant's filing of an Offer of Judgment on May 28, 2021 for only $11,000 inclusive of counsel fees was improper, as was its use of same later to falsely claim that plaintiff's counsel resisted settlement. (Pa165-170; Pa173-175; Pa205-209). Plaintiff's counsel correctly objected to defendant's filing of the OOJ in his June 3, 2021 frivolous litigation letter to defense counsel under Rule 1:4-8

and N.J.S.A. 2A:15-59.1. (Pa268-269). Plaintiff's counsel asserted that plaintiff's demand for declaratory and injunctive relief precluded the filing of an OOJ under Rule 4:58-1(a) ("[t]he [OOJ] shall not be effective unless, at the time the offer is extended, the relief sought. . .is exclusively monetary in nature"). (Pa268). Counsel next asserted further that the filing of the OOJ for a global settlement of $11,000 violated Rule 4:58-3(b) as said rule requires the calculation of the OOJ's offer exclude "allowable prejudgment interest and counsel fees." (Pa268-269). Lastly, counsel asserted that the filing of the OOJ violated Rule 4:58-3(c) which states that "[n]o allowances shall be granted if… (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court…" (Pa269).

In her November 28, 2020 Complaint, plaintiff sought relief that included a declaratory judgment canceling the sales contract and the RISC for her purchase of the Santa Fe, return to the manufacturer of the vehicle and issuing either a refund or loan payoff for the defective vehicle. Ibid.; (Pa53-59; Pa58). As of May 28, 2021, when the OOJ was filed, plaintiff's Santa Fe was still exhibiting defects, and thereby showing strong signs of warranty failure, after a 2019 engine replacement and eleven more repair attempts. (Pa42-43); Pa53-59). Also, at that time, plaintiff's counsel had been working with plaintiff for fifteen (15) months and litigation had been ongoing for six months. (Pa42-43; Pa53-59; Pa152-155). Thus, a monetary award to the plaintiff, as set forth in the OOJ was completely inappropriate.

It was only after the repair attempt beginning June 29, 2021, during which the Santa Fe was repaired successfully and plaintiff's asset, for which she paid $32,040.68, was preserved, that a monetary settlement could be reasonably discussed. (Pa42-43; Pa254; Pa271). Indeed, plaintiff's counsel attempted to settle the matter three times thereafter, in July, August and September of 2021. (Pa270-271; Pa279-284). However, defendant refused to offer a settlement amount that included payment to plaintiff's counsel of reasonable attorney's fees and costs. Ibid. Hence, it was the defendant, not plaintiff's counsel, who "dragged" litigation on for another eighteen (18) months. Ibid.

The trial court's acceptance of and reliance on the foregoing arguments of defense counsel, to the extent it did so, violated state and federal law and public policy. See Rendine, 141 N.J. at 322-337. Courts simply are not permitted, under the Rendine standards, to reduce and/or eliminate reasonable attorney's fees requested in a counsel fee application by 93 percent – in effect – to almost nothing. (Pa9-21). As our Supreme Court has stated:

> No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance has agreed to pay for his services, regardless of success.
> [Rendine, 141 N.J. at 338 (quoting Cherner v. Transitron Elec. Corp., 221 F. Supp. 55, 61 (D. Mass. 1963)].

In light of the foregoing, the trial court's reduction and elimination of fees requested in plaintiff's fee application should be reversed. The assertions made in defense counsel's opposition to plaintiff's fee application have no bases in fact or law. (Pa160-175; Pa169); cf. Balducci v. Cige, 240 N.J. 574, 599 (2020) (it is well-settled that "[a] reasonable attorney's fee may exceed the value of the recovery by the plaintiff" in a statutory fee-shifting case); Rendine, 141 N.J. at 322-337, 345. A defendant's counsel is not entitled to dictate the amount of an adverse counsel's fee award under the MMWA based on its own subjective and self-serving beliefs. New Jersey law requires that the Rendine standards be followed in evaluating fee applications under federal and state statutes. See Rendine, 141 N.J. at 322-337, 345. Most importantly, the underlying objectives of fee-shifting statutes must be preserved, i.e. ensuring equal access to the courts by providing citizens with both the right and the resources to access same. JHC Indus. Services, LLC, 469 N.J. Super. at 313; Coleman, 113 N.J. at 597-98. Accordingly, reversal is required.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING AND/OR REFUSING TO HOLD ORAL ARGUMENT, DESPITE PLAINTIFF'S COUNSEL'S REQUEST FOR SAME. (Pa9-21; Pa23).

The trial court abused its discretion in refusing to hear oral argument on plaintiff's counsel's fee application, and failing to place its reasons for so doing on the record. (Pa9-21; Pa23). In its March 15, 2023 motion for an award of attorney's

fees and costs, plaintiff's counsel requested oral argument if the defendant filed opposing papers. (Pa23). Defendant filed its opposing papers on March 23, 2023. (Pa157-243). Because plaintiff's motion was substantive rather than procedural, the court erred in denying oral argument, and in failing to address its denial in its written decision. See Raspantini v. Arocho, 364 N.J. Super. 528, 531-32 (App. Div. 2003) (while a request for oral argument respecting a substantive motion may be denied, the reason for the denial of the request, in that circumstance, should itself be set forth on the record).

Moreover, the court's failure to set forth its reasons for denying oral argument, despite plaintiff's counsel's request for same, was reversible error. In accordance with Rule 1:6-2(d), "[w]here ... the trial [judge] decides the motion on the papers despite a request for oral argument, the trial [judge] should set forth in its opinion its reasons for disposing of the motion ... on the papers in its opinion." LVNV Funding, L.L.C. v. Colvell, 421 N.J. Super. 1, 5 (App. Div. 2011); see also Great Atl. & Pac. Tea Co., Inc. v. Checchio, 335 N.J. Super. 495, 497-98 (App. Div. 2000) (reversing summary judgment where the trial court did not conduct oral argument, which was requested by the moving party, because the court found no basis for relaxing the rule and the judge provided no basis for denial in the record). Thus, where, as here, a request for oral argument on a substantive motion is properly made, denial of argument—absent articulation of specific reasons on the

record—constitutes reversible error. Raspantini, 364 N.J. Super. at 533. Therefore, reversal is warranted.

CONCLUSION

For the foregoing reasons, plaintiff's counsel respectfully requests that the judgment below be reversed and the matter remanded for a determination of a reasonable fee award consistent with state and federal public policy guaranteeing equal access to courts, together with the legal precedent and principles governing this determination, and a clear articulation of factual findings correlated to the relevant legal principles.

Respectfully submitted,
Appellate Section
Attorney for Plaintiff-Appellant,
Aida Herrera-Jerez

Dated: February 21, 2024

By: *David C. Ricci*.
DAVID C. RICCI, ESQ.

AIDA HERRERA-JEREZ,	:	SUPERIOR COURT OF
	:	NEW JERSEY
Plaintiff-Appellant,	:	APPELLATE DIVISION
	:	
vs.	:	DOCKET NO.: A-003290-22
	:	
	:	**CIVIL ACTION**
HYUNDAI MOTOR AMERICA a/k/a HYUNDAI USA,	:	
	:	
Defendant-Appellee.	:	

BRIEF OF DEFENDANT-APPELLEE HYUNDAI MOTOR AMERICA

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PRELIMINARY STATEMENT

This appeal is based upon Plaintiff's counsel's subjective dissatisfaction with the trial court's award of reasonable attorney's fees in this matter. Importantly, the determination of reasonable attorney's fees was not made after a verdict in favor of Plaintiff and did not come after any protracted litigation. Instead, this fee motion was made in the context of a settlement agreement that Plaintiff agreed to. Moreover, the amount of reasonable attorney's fees to be paid to Plaintiff under the settlement was put to the trial court because informal negotiations proved unsuccessful, given Plaintiff's counsel's belief that the unnecessary overlitigation of this simple action should result in recovery of every penny he put into the file.

Upon consideration of the motion, the trial court ultimately disagreed with Plaintiff's counsel as to the reasonableness of fees incurred in this matter. The trial court exercised its discretion (afforded to it under the law and the parties' settlement agreement) and entered its decision awarding reasonable fees and costs to Plaintiff. Rather than accepting the trial court's decision, and even though Plaintiff agreed to have the issue decided by the trial court, Plaintiff now attempts (albeit unsuccessfully) to convince this Court that the trial court reached the wrong result. Notwithstanding Plaintiff's subjective disagreement

with the trial court's conclusion, Plaintiff has fallen well short of demonstrating that the trial court committed a "clear abuse of discretion" warranting reversal.

In their brief, Plaintiff argues several contradictory positions. On the one hand, Plaintiff argues that the trial court's decision was so devoid of substance that it should be reversed as improper. Specifically, Plaintiff argues that the trial court failed to articulate a sufficient "statement of reasons" in reaching its decision and instead, merely recited the parties' arguments leaving this court to guess how the trial court reached its decision. On the other hand, Plaintiff argues that based the reading of the *same* trial court decision, the trial court's reasoning was materially flawed because, according to Plaintiff, the trial court was influenced by Defendant's arguments in limiting the recovery of attorneys' fees in this matter. Plaintiff cannot have it both ways -- either the trial court failed to set forth its reasons in its decision or, the trial court's stated reasoning was flawed.

Plaintiff is, however, wrong on both counts. Specifically, as set forth more fully below, the trial court conducted a sufficiently thorough analysis of the parties' positions, carefully reviewed the record and then issued a detailed "Statement of Reasons" in which it set forth its analysis. In addition, the trial court specifically articulated its conclusion in terms of the reasonable hourly

rate, the reasonable hours incurred and in consideration of the appropriate relevant factors. In sum, the trial court's decision should not be disturbed.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff-Appellant ("Plaintiff") filed a complaint on November 28, 2020 asserting a single claim for breach of warranty under the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301, *et seq.*, based on allegations that her 2017 Hyundai Santa Fe, VIN: 5NMZUDLB0HH011768 (the "Vehicle"), contained certain defects that were not timely repaired. *See* Complaint, P053a-P109a. In connection with the action, Plaintiff sought cancellation of the sales contract, injunctive relief, a buyback of the vehicle and payoff of the loan, refund of down payment and monthly payments, recovery of interest and other relief. *Id.* at P058a. The total sale price of the vehicle due under the loan was $45,609.04. *See* P066a.

Almost immediately after this action was filed, Defendant attempted in good faith to resolve this matter. *See* Opposition to Motion by Defendant, P162a. When Plaintiff's counsel appeared unwilling to informally resolve this matter, on May 28, 2021, HMA served an Offer of Judgment, pursuant to R. 4:58-1, for the total amount of $11,000.00. *Id.* By letter dated June 3, 2021, Plaintiff's counsel rejected Defendant's offer and provided no counteroffer. *Id.*

In November and December of 2021, Plaintiff then served unnecessary subpoenas on two nonparty dealerships, seeking all service documents concerning the Vehicle. *See* Opposition to Motion by Defendant, P162a. Plaintiff clearly had all of these documents, having attached the relevant records to the Complaint. *See* P074a – P107a. On December 23, 2021, the parties completed a deposition of Plaintiff, the only deposition conducted in this action. *Id*.

This matter then proceeded to arbitration on July 7, 2022, following which Plaintiff was awarded $7,500.00, with attorney's fees to be decided by the Court. *Id.* Ultimately, the parties reached a settlement in December 2022 providing for compensation to Plaintiff in the amount of just $7,500.00 and reasonable attorney's fees and costs to Plaintiff's counsel to be decided by the Court upon motion. *See* Settlement Agreement, P121a -P128a.

The Settlement Agreement and Release required Plaintiff to file the Motion for Attorney's Fees within 60 days of the execution of the Settlement Agreement and Release. *Id*. Although the Settlement Agreement and Release was fully executed on December 22, 2022 (*see* P128a), Plaintiff failed to timely file the motion for attorney's fees and costs, waiting until March 15, 2023 to make the motion.

The parties fully briefed the matter, including a lengthy reply filed by Plaintiff. On May 19, 2023, the trial court issued a lengthy decision and order, granting the motion in part and awarding a total of $2,449.00 in attorney's fees and $552.20 in costs.

LEGAL ARGUMENT

I. STANDARD ON APPEAL

It is well-settled that "fee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a ***clear abuse of discretion***." *Rendine v. Pantzer,* 141 N.J. 292, 317 (1995) (emphasis added). This Court, therefore, should apply this "deferential standard of review" in this case. *See Packard-Bamberger & Co.,* 167 N.J. 427 (2001). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *Flagg v. Essex County Prosecutor,* 171 N.J. 561, 571 (2002).

As set forth more fully below, this trial court did not abuse its discretion in reaching its decision on Plaintiff's motion for attorney's fees. Therefore, the order of the trial should not be disturbed.

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II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AS IT PROPERLY CONSIDERED ALL APPROPRIATE FACTORS IN REACHING ITS DECISION

Plaintiff's appeal is based primarily on the argument that the trial court abused its discretion by ignoring the appropriate standard on the motion for attorney's fees set forth by the New Jersey Supreme Court in *Rendine v. Pantzer* (141 N.J. 292 [1995]) and subsequent cases. Even a cursory review of the trial court's decision and order demonstrates that Plaintiff's argument is baseless given the extensive citations made by the trial court to *Rendine* and subsequent cases.

Furthermore, although Plaintiff takes issue with the trial court's analysis, Plaintiff fails to articulate in their brief what are the "factors" that the trial court should have considered. As outlined in the Statement of Reasons, the trial court understood that it was to perform a four-step process in its determination of Plaintiff's motion for attorney's fees, as follows:

(1) Determine the reasonableness of the proposed hourly rates;

(2) Determine the reasonableness of the number of hours expended;

(3) Decrease the lodestar if plaintiff's success was limited relative to the relief sought; and

(4) Determine whether a contingent fee enhancement is appropriate (if any only if representation of the prevailing party was under a contingent-fee arrangement).

See Statement of Reasons, P017a.

Although the trial court's Statement of Reasons largely cited *Rendine, supra* and *Furst v. Einstein Moomjy, Inc.* (182 N.J. 1 [2004]), the New Jersey Supreme Court, in *Hansen v. Rite Aid Corp.* (253 N.J. 191 [2023]), recently confirmed the four-step process outlined in the Statement of Reasons by the trial court. Moreover, the overall theme of the trial court's decision was the "reasonableness" of the attorney's fees incurred in this matter. This is consistent with all of the case law cited by both parties. In addition, the parties' settlement agreement limited the recovery of any attorney's fees to those "reasonably incurred" (*see* Settlement Agreement and Release, Pa123). Further, under the only statute upon which Plaintiff could recover fees, the MMWA (15 U.S.C. § 2301 *et seq.*), an award of attorney's fees was likewise limited to only those that which was "reasonably incurred." *See* 15 U.S.C. § 2310(d)(2).

As set forth in the Statement of Reasons, the trial court understood the appropriate process it was to follow on the motion and correctly followed the process to reach its decision. Further, although Plaintiff appears to suggest that the trial court did nothing more than summarize the parties' positions, but it is

clear that the trial court weaved its commentary and analysis within the Statement of Reasons. (For example, in the section analyzing Defendant's arguments on the reduction of time spent, the court in certain areas makes reference to "Defendant argues …" but in other circumstances, leaves off that reference, confirming that the court was inserting its own analysis.) *See* Statement of Reasons, at p. 10, P018a. Even if the Court's decision is limited solely to final section of the Statement of Reasons, the trial court *did* reach a conclusion regarding the reasonable fee award which was consistent with a lodestar analysis.

Plaintiff's argument that the court failed to articulate its reasoning for reducing the total award, is without merit. Even a cursory review of the trial court's 13-page decision shows that the trial court took careful consideration of the arguments raised by *both* parties and that the trial court understood those arguments along with the appropriate standard. Unfortunately for Plaintiff, the trial court agreed with certain of Defendant's arguments and reasoning and reduced the award of attorney's fees accordingly. Plaintiff's disagreement with the trial court's conclusion is not grounds for reversal.

A. The Trial Court's Statement of Reasons Makes Clear that it Followed the Appropriate Analysis.

Contrary to Plaintiff's argument, the trial court both articulated the correct standard for its determination of Plaintiff's motion or attorney's fees and

correctly applied that standard in its decision. Plaintiff's initial argument, that the trial court failed to set forth a "statement of reasons as to how it calculated the lodestar," may be flatly rejected. Apparently, Plaintiff ignored the trial court's 10-page decision, titled "**Statement of Reasons**" in which it articulated its reasoning.

Similarly, in arguing that the trial court did not explain how it calculated the lodestar, Plaintiff ignores the separately labeled section "**Statement of Reasons**" in which the trial court effectively "shows its work" in reaching its determination of reasonable attorney's fee. *See* P011a – P021a. Contrary to Plaintiff's claims, the trial court sufficiently articulated its calculation of the lodestar.

First, the trial court concluded that the reasonable hourly rate in Essex County is $395.00 per hour.[1] *See* Statement of Reasons at p. 13, P021a. Under *Rendine,* the trial court has the discretion to "make appropriate adjustments" to the requested hourly rates based upon "the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Rendine,* 141 N.J. at 337. Although Plaintiff submitted declarations

[1] Defendant expressly does not agree that the hourly rate of $395 was "reasonable" in this action or similar actions. Defendant argued that the hourly rate should be $250/ hour. *See* Waldorf Declaration, P171a – P172a. Nevertheless, Defendant notes that the Court exercised its discretion and allowed a higher hourly rate than suggested by Defendant.

of other counsel reflecting a rate higher than awarded by the trial court, Defendant aptly pointed out that these rates were not for MMWA actions like here but were for class actions. Instead, Defendant argued that the hourly rate, based upon Defendant's counsel's own experience in the specific subject area, should be $250/hour. S*ee* Statement of Reasons at p. 11, P019a. Therefore, the trial court properly exercised its discretion here, considering the arguments of the parties regarding the hourly rates and ultimately using a rate between the rates requested by the parties.

Second, the trial court outlined specifically what it deemed to be the reasonable number of hours expended in this action. *See* Statement of Reasons at p. 13, P021a. Once again, the trial court was afforded discretion to determine the amount of reasonable fees in this matter and exercised that discretion. *See Hansen,* 253 N.J. at 217.

Furthermore, regarding the third and fourth factors, the trial court stated that it was "awarding the reasonable fees based upon the result obtained." *See* Statement of Reasons at p. 13, P021a. In conducting an analysis of the "reasonableness" of fees based upon the result obtained by Plaintiff and reducing the lodestar accordingly, the trial court acted well within its discretion. *See Hansen,* 253 N.J. at 222 ("We hold that the trial court properly exercised its

discretion when it reduced the lodestar by twenty percent because of plaintiff's limited success in comparison with the relief that he sought in this action.").

Plaintiff argues that under *Rendine*, the trial court was prohibited from reducing the fee award below a certain percentage of the fees demanded. This argument is simply not supported by the holding in *Rendine*. Instead, *Rendine* expressly allows the trial court to use its discretion and reduce a fee award to an amount the trial court concludes is reasonable. *See Rendine*, 141 N.J.at 336 ("[A] trial court should reduce the lodestar fee if the level of success achieved in the litigation is limited as compared to the relief sought." [emphasis added]). The court placed no limits on the amount of the reduction that a court may impose within its discretion. Otherwise, a plaintiff's attorney seeking fees may simply run up the bill with unnecessary tasks such that they could guarantee recovery of some minimum percentage of those fees regardless of the reasonableness.

Finally, although Plaintiff argues that there was an improper "proportionality" analysis conducted by the trial court, the Statement of Reasons does not support Plaintiff's conclusion. Specifically, the trial court set forth the specific hourly rate it deemed reasonable and the number of hours it deemed reasonable. *See* Statement of Reasons, P021a. The trial court *did not* make any

comparison to the actual dollar amount recovered by Plaintiff but instead, reduced the total amount recovered "based upon the result obtained" (*id.*).

In sum, the trial court: (1) articulated the appropriate factors and process it was to follow; (2) considered those factors and followed the process; and (3) explained in detail its conclusions in a separately labeled statement of reasons. *See* Statement of Reasons at p. 13, P021a. Plaintiff's argument that the Court's decision was not proper is baseless. At the very least, Plaintiff has fallen well short of demonstrating that the trial court's decision was the product of a "clear abuse of discretion." Therefore, the trial court's decision should not be disturbed.

B. The Trial Court's Decision Was Supported by the Record.

Contrary to Plaintiff's suggestion, the trial court conducted a thorough analysis of the issue of the "reasonableness" of the attorney's fees incurred in this matter. The Statement of Reasons includes a lengthy and detailed summary of the parties' positions and the conclusion reached by the Court was supported by the record.

Indeed, starting almost immediately after this action was filed, Defendant made numerous efforts to resolve this matter, including an Offer of Judgment in the amount of $11,000 inclusive of attorney's fees while the action was in its infancy. *See* P162a. After limited discovery, the matter was arbitrated, resulting

in an award to Plaintiff of $7,500 plus reasonable attorney's fees to be decided by the court. *Id.* Shortly thereafter, the parties agreed to settle the matter for the same amount. *Id.*

Having considered the procedural history of this matter (even outlining this procedural history in its Statement of Reasons), the trial court's lodestar analysis properly considered the "reasonableness" of the hours incurred and excluded those hours for tasks the trial court deemed unreasonable. Moreover, the trial court properly determined the reasonableness of the fees incurred in light of the "result obtained." *See* Statement of Reasons, P0121a.

As Plaintiff admits, the "result" obtained in this matter (a cash settlement reflecting a fraction of the purchase price) was a far cry from what Plaintiff demanded in the Complaint (cancelation of the sales contract, a buyback of the vehicle, injunctive relief, interest and "other relief"). *See* Complaint, at WHEREFORE clause, P058a. Additionally, it is undisputed that the trial court *could consider* the results obtained by Plaintiff in the settlement as part of its determination of attorney's fees. *See* Plaintiff's Brief at p. 15 (wherein Plaintiff agrees that results obtained may be an appropriate factor to be considered by the court). Therefore, based on the admittedly limited results, the trial court did not clearly abuse its discretion in awarding Plaintiff less in fees than demanded.

C. The Trial Court's Order Reflects a Proper Conclusion Regarding Reasonable Attorney's Fees in this Matter and "Public Policy" does not Require a Different Result.

In their brief, Plaintiff argues that the trial court's order should be reversed as it "violated public policy." *See* Plaintiff's Brief at p. 22. Plaintiff's argument is without merit.

Notably, Plaintiff did not raise any "public policy" argument in the trial court. Therefore, he cannot raise this argument on appeal. *See Alloco v. Ocean Beach & Bay Club,* 456 N.J.Super. 124, 145 (App.Div. 2018).

More importantly, Plaintiff's argument that an award of full fees to Plaintiff's counsel promotes the public policy in New Jersey is misguided. As the New Jersey Supreme Court declared in *N. Bergen Rex Transp. v. Trailer Leasing Co.* (158 N.J. 561 [1999]), "***New Jersey has a strong policy disfavoring shifting of attorney's fees***" (emphasis added). Furthermore, where like here, "attorney-fee shifting is controlled by contractual provisions, court will strictly construe that provision in light of the general policy disfavoring the award of attorney's fees." *Id.* citing *McGuire v. City of Jersey City,* 125 N.J. 310, 326 (1991).

Plaintiff fails to identify any applicable case law which would warrant the reversal of an attorney fee award under the MMWA for public policy reasons where the fees are deemed "low and inadequate" by Plaintiff's counsel. Instead,

an award of attorney's fees under the MMWA (the only statute that could potentially entitle Plaintiff to fees in this matter) is *discretionary*. *See* 15 U.S.C. § 2310(d)(2) ("If a consumer finally prevails . . . he *may be allowed* by the court to recover . . . cost[s] and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff . . . unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate." [emphasis added]). It follows, therefore, that where the statute provides the trial court with discretion to award or decline to award fees, a court's decision to award fees, even if not in the amount Plaintiff's counsel deems to be "adequate," cannot violate public policy. The trial court's decision should not be disturbed.

II. THE TRIAL COURT'S DETERMINATION OF PLAINTIFF'S MOTION WITHOUT ORAL ARGUMENT WAS NOT A CLEAR ABUSE OF DISCRETION SUFFICIENT TO REVERSE THE TRIAL COURT'S DECISION

Plaintiff argues that the trial court's order committed "reversible error" in failing to hold oral argument on Plaintiff's motion for attorney's fees. Plaintiff's argument is without merit. Specifically, the failure to hold oral argument on a motion, even if a substantive motion, is not automatically reversible error as Plaintiff suggests. *See Palombi v. Palombi,* 414 N.J.Super. 274 (App.Div. 2010) ("A review of the issues presented and the circumstances in each of the motions

here shows that the trial court did not abuse its discretion in deciding the motions without oral argument.").

Furthermore, as a practical matter, Plaintiff did not expressly request oral argument. Plaintiff's own motion papers contained the following reference: "REQUEST FOR ORAL ARGUMENT: **No**, unless opposition is filed." *See* Plaintiff's Notice of Motion [emphasis added] P023a. Moreover, Plaintiff made no request for oral argument in his reply papers even though opposition had been filed. *See* Plaintiff's Reply, P244a-P251a. Importantly, when the trial court issued its order, Plaintiff did not seek reconsideration and oral argument at that time, choosing instead to file this appeal.

Furthermore, the Statement of Reasons by the trial court shows a clear understanding by the trial court of the arguments presented by counsel. Importantly, the trial court spent 5.5 pages of its Statement of Reasons outlining Plaintiff's position on the motion in great detail. Thus, given the length of the papers filed, and the length of the court's Statement of Reasons, the decision to hold oral argument would have been a waste of judicial resources. Plaintiff fails to demonstrate that oral argument would have changed the result.

Additionally, the cases relied upon by Plaintiff are distinguishable. Notably, all three cases involved motions for summary judgment, and in all three cases, the trial court failed to adequately set forth findings of fact and

conclusions of law as required under the specific rules governing summary judgment. In *Raspantini v. Arocho* (364 N.J.Super. 528 [App.Div. 2003]), the motion at issue was for summary judgment, not a peripheral motion involving attorney's fees. *Id.* Furthermore, this Court held that the failure to include any findings of fact or conclusions of law required the reversal, noting that "we might, under different circumstances, find that the judge's refusal to entertain oral argument was insufficient to require reversal." *Id.*

Similarly, in *Great Atl. & Pac. Tea Co., Inc. v. Checchio* (335 N.J. Super. 495 [App.Div. 2000]), the trial court was faced with a motion for summary judgment and a complete lack of findings of fact and conclusions of law. Therein, this Court noted that this failure was in violation of R. 4:46-2 relating to the requirements of trial courts on motions for summary judgment.

In *LNVN Funding, L.L.C. v. Colvell* (42 N.J. Super. 1, 5 [App.Div. 2011]), the court was again considering the trial court's determination of a motion for summary judgment. Importantly, this Court held that "[w]e need not consider whether the denial of oral argument in itself warrants reversal, given that we find a reversal is required on other grounds." *Id.*

In sum, the record contains no explicit request for oral argument by Plaintiff and the cases relied upon by Plaintiff are inapposite. The trial court's decision to not hold oral argument is not reversible error.

III. THE TRIAL COURT'S CONSIDERATION OF DEFENDANT'S ARGUMENTS WAS NOT REVERSIBLE ERROR.

Plaintiff devotes a considerable portion of their brief outlining *Defendant's* arguments and suggesting that the trial court's decision should be reversed because it "apparent[ly] embrace[d]" these arguments. On its face, this contention is speculative and should be disregarded.

Plaintiff fails to point to any conclusion of law by the Court that was in error. Instead, Plaintiff suggests that the trial court should have specifically rejected Defendant's arguments that: (1) fees under the MMWA are discretionary; (2) the Offer of Judgment rejected by Plaintiff should be considered by the trial court in determining reasonable attorney's fees; and (3) based upon Defendant's counsel's experience Plaintiff's counsel's fee request was unreasonable. All of Plaintiff's arguments are without merit.

Plaintiff's argument that Defendant "breached" the settlement agreement by even raising the concept that fees are discretionary under the MMWA is wildly baseless. Quite simply, as outlined above, fees *are* discretionary under the MMWA. *See* 15 U.S.C. § 2310(d)(2).

More importantly, the settlement agreement required Plaintiff to file the motion for fees within 60 days of the execution of the release, a requirement Plaintiff undisputedly failed to meet. Therefore, to the extent this Court considers whether a party is in "breach" of the settlement agreement, it should

conclude that Plaintiff breached the agreement by failing to file the motion for attorney's fees within the time allowed under the settlement agreement.

Plaintiff next suggests that Defendant's argument that Plaintiff was not entitled to any attorney's fees is grounds to vacate the trial court's order. Not only is it baseless to argue that a trial court's decision should be overturned based upon a *party's argument* (to which Plaintiff had a sufficient opportunity to address in his reply filed with the trial court), Plaintiff certainly confuses the argument raised by Defendant in the trial court. Indeed, Defendant did not argue that Plaintiff was barred from making a motion for attorney's fees but instead argued that after consideration by the court of the issue of reasonableness, the court should award Plaintiff nothing in fees as no fees were reasonable. *See* Defendant's Opposition, P163a.

Plaintiff's inflammatory argument that the trial court improperly considered "Defendant's improper and frivolous request to deny fees," coupled with the accusation that Defendant made a "misrepresentation to the court" is likewise unavailing. The settlement agreement was annexed to Plaintiff's counsel's declaration filed with the trial court and the court was certainly free to make its own interpretations of the relevant provision.

Nevertheless, the terms of the agreement concerning attorney's fees only precluded Defendant from arguing that Plaintiff had no "right" to file the motion

to recover attorney's fees, which Defendant did not do. Instead, Defendant properly argued, within the scope of the agreement, that when considering the "reasonableness" of the attorney's fees awarded, under the relevant statute (MMWA), the court could exercise its discretion and find little to no fees were reasonable. Plaintiff is therefore confusing the issue of whether he could petition the court for an award of attorney's fees versus what the court could ultimately award.

Even if the trial court interpreted Defendant's argument to be that Plaintiff had no right in the first instance to file the motion and seek attorney's fees, it wholly rejected this argument by both considering the motion and awarding fees to Plaintiff. Accordingly, Plaintiff fails to show that the trial court's order should be vacated on these grounds.

Similarly, Plaintiff's half-hearted argument that the trial court should be reversed because it "may have considered" Defendant's Offer of Judgment is equally baseless. Indeed, the issue of whether Defendant was entitled to costs based upon Plaintiff's failure to accept the Offer of Judgment was not before the trial court and therefore, the validity of the Offer of Judgment was not at issue. As a practical matter, the trial court's award of attorney's fees included fees incurred *after* the Offer of Judgment was served in May 2021 (including the time spent at the deposition of Plaintiff in December 2021 and the arbitration

proceeding in July 2022). Therefore, to the extent the trial court considered Defendant's argument that Plaintiff was barred from seeking fees incurred following this Order, the trial court clearly disagreed.

Finally, Plaintiff places considerable weight into the declaration submitted by Defendant's counsel and the possible confusion by the trial court between Plaintiff's counsel's 12-years of experience and Defense counsel's 18-years of experience. This is, however, a slight immaterial distinction that does not warrant reversing the trial court. More importantly, the trial court considered the arguments of Plaintiff's counsel for the requested hourly rate ($525) and the argument made by Defendant in opposition to that rate ($250) and it then used its discretion to award an hourly rate of $395.

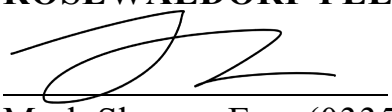
Finally, Plaintiff's argument that Defendant's citations to unpublished decisions in its moving papers constitutes grounds for reversing the trial court is equally baseless. Plaintiff fails to demonstrate that the trial court relied upon these out of state decisions to reach its conclusions and that it was material to the trial court's determination. *See Hansen,* 253 N.J. at 220.

CONCLUSION

As set forth above, and as demonstrated in the record before this Court, the trial court did not clearly abuse its discretion in reaching its determination of Plaintiff's motion for attorney's fees. The manner in which the Court considered the motion and rendered its decision was not improper and there is no basis for a reversal of the trial court's order. This Court should affirm the trial court and award such other and further relief to Defendant that this Court deems just and proper.

Dated: May 10, 2024

ROSEWALDORF PLLC



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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003290-22

AIDA HERRERA-JEREZ,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	On Appeal from a Final Judgment And Attorneys' Fee Award in the
v.	:	Superior Court of New Jersey, Law Division, Essex County.
HYUNDAI MOTOR AMERICA A/K/A HYUNDAI USA,	:	Docket No. ESX-L-8139-20
Defendant-Respondent.	:	Sat Below: Hon. Jeffrey B. Beacham, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT, AIDA HERRERA-JEREZ

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PRELIMINARY STATEMENT

The reasoning of a judicial opinion is not meant to be found in the reading of tea leaves. Here, the trial court had the straightforward obligation to explain its reasoning in determining an award of fees. This is particularly so because Plaintiff requested oral argument if Defendant filed an opposition and the trial court failed to conduct the hearing. Instead, Plaintiff, Defendant, and this Court are left to guess at was motivating the trial court to issue its fee award. The trial court's conduct constitutes reversible error for the multiple reasons set forth in Plaintiff's moving brief.

The little information that the trial court provided was conclusory: a grant of a $395.00 hourly rate; 2.7 hours for drafting the Complaint; 2.3 hours to defend Defendant's deposition of Plaintiff; and 1.2 hours to attend the arbitration, totaling a mere 6.2 hours of attorney time.[1]

Left unexplained was the trial court's reasoning in reducing Plaintiff counsel' current $525.00 hourly rate, despite certifications from three different attorneys attesting that counsel's $475.00 hourly in 2022, and in 2020 were reasonable. Indeed, the 2020 certification was for a case in the Essex County vicinage.

[1] The Trial Court granted the full request for Expenses.

Also left unexplained is the trial court's failure to allow any time whatsoever for the client intake and investigation of the claims, preliminary factual research on defects to Plaintiff's model vehicle and the model engine; addressing Defendant's improper Offer of Judgment; communications with opposing counsel and the court; communications with the client and servicing dealerships for the continuing defects and four additional repair attempts that took place ***after*** the lawsuit was filed; drafting discovery requests; reviewing discovery responses; successfully opposing Defendant's motion to quash Plaintiff's subpoenas; responding to Defendant's discovery requests; coordinating Defendant's vehicle inspection; preparing Plaintiff for her deposition; drafting Plaintiff's Court arbitration briefing and preparing for the hearing; settlement negotiations after Defendant's *de novo* filing after losing the Court arbitration; and Plaintiff's fee motion when Plaintiff and Defendant (collectively the "Parties") were unable to settle on an award of fees and costs pursuant to their settlement agreement.

LEGAL ARGUMENT

The substance of Defendant's opposition closely matches its trial court opposition, to which Plaintiff has responded in her initial brief. Rather than rehashing Plaintiff's earlier arguments, this reply will focus on rebutting

Defendant's faulty legal argument that the trial court did not abuse its discretion and commit reversable error.

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO EXPLAIN OR JUSTIFY ITS DECISION TO REDUCE PLAINTIFF'S HOURLY RATE TO $395.00 PER HOUR.

The only section of the trial court's order that clearly sets forth any determinations or the trial court's reasoning is the Statement of Reasons in the Opinion. (Pa21). There the Opinion states the "Court finds reasonable rate in Essex County is $395.00 per hour." Ibid. The trial court gives no explanation as to why it chose that particular hourly rate or an analysis of how the trial court concluded that $395.00 was the proper hourly rate. Plaintiff, Defendant, and this Court are left to guess at the trial court's reasoning.

However, in his fee certification, Plaintiff's Counsel presented his history of hourly rate and fee awards over almost a decade. Most of cases listed, including Defazio v. Quality Auto Exchange Corp. and Mina Abaid, Docket No. UNN-L-3942-19 were in Northern New Jersey vicinages and individual actions. See Ricci Certification, ¶¶35-38 (Pa49-50). Furthermore, Plaintiff also submitted three certifications that Counsel's hourly rate ($475.00/hr. at those times) was reasonable. Id., ¶39-41, Exs F-H (Pa50, 132-150).

On the other hand, Defendant Counsel's self-serving rebuttal was merely that a "reasonable hourly rate is likely between $250.00 and $350 per hour," with

no documentation or evidence to support his contention (Pa171). In its appellate opposition, Defendant fudges its position by stating that Defendant argued that the hourly rates should be $250/hr. Opp. Brief, pages 12-13, fn1. Defendant is clearly attempting to make it seem as though the trial court split the difference between the proposed hourly rates.

The trial court abused its discretion by reducing Plaintiff Counsel's hourly rate without any explanation of how it determined that $395.00 was appropriate.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO EXPLAIN OR JUSTIFY ITS DECISION TO DRASTICALLY REDUCE PLAINTIFF'S HOURS FROM 67.30 TO 6.20 HOURS AND REFUSE TO INCLUDE TIME FOR TIME COUNSEL WAS OBLIGATED TO INCUR.

As described in Plaintiff's initial brief, the trial court was supposed to evaluate Plaintiff's fee application for the reasonableness of the hours spent. In reducing Counsel's time from 67.30 hours to 6.20 hours, the only explanation the trial court gave was that Plaintiff was not entitled to time spent on research and that the court allowed 6.20 hours "based on the result obtained." (Pa21).

However, the trial court never explained what it thought of the result of the case. Perhaps the trial court failed to consider that there is no requirement of proportionality between the Plaintiff's award and the fees sought. Rendine v. Pantzer, 141 N.J. 295, 336 (1995). Or perhaps it was hoodwinked by Defendant's improper Offer of Judgment.

When Plaintiff filed her Complaint on November 28, 2020, her vehicle (the "Santa Fe") had already had the engine replaced, but had still had defects requiring seven more repair attempts and being out of service for 75 days. See Complaint ¶¶22-34, Exs.9-17 (Pa55-57). Because Defendant was unable to repair the vehicle, Plaintiff sought declaratory, equitable, and injunctive relief canceling the transaction and requiring Defendant to buy back the vehicle, cancel the Retail Installment Sale Contract, pay off the loan balance to the holder of the installment contract, and return her payments. Id., ¶¶58-59 and Prayer for Relief. (Pa58).

The Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. §§ 2301-2312, provides for "damage and other legal and equitable relief." 15 U.S.C. § 2310(d)(1). Since the vehicle came with only a limited warranty, Plaintiff could be entitled to this relief only if the limited warranty "failed of its essential purpose." GM Acceptance Corp. v. Jankowitz, 216 N.J. Super. 313, 329 (App.Div.1987). As the Appellate Division stated in Jankowitz,

> if circumstances cause the limited warranty to fail in its essential purpose or operate to deprive a buyer of the substantial value of the bargain, the limitation of warranty clause may not be invoked. In that event, a buyer, such as Jankowitz, may seek remedy under the provisions of the UCC. One of those remedies is the right of a buyer to revoke acceptance of the goods or property. Under 15 U.S.C.A. § 2310(d)(1) a consumer who is damaged by a breach of a written or implied warranty or service contract may bring suit for

> damages and other legal and equitable relief, including attorneys[’] fees. [Ibid., internal citations omitted.]

Here, Plaintiff was entitled to such equitable relief at the time of the complaint filing. As set forth in Plaintiff’s initial brief at page 4, while litigation was pending, four more repair attempts were made on the Santa Fe at Hyundai dealerships. (Pa42-43; Pa254; Pa271). During the June 29, 2021 repair attempt, after 16 months of attorney involvement and seven months of litigation, the Santa Fe’s repair issues were permanently resolved. Ibid.

Once the defects were permanently fixed, the relief afforded by Defendant’s limited warranty became only monetary. The Santa Fe’s unit price was $29,800. See Motor Vehicle Retail Order (Pa61). The settlement provided $7,500.00 for Plaintiff herself, more than 25% of the original unit price. See Settlement Agreement, ¶2 (Pa123). Moreover, unlike Defendant’s improper Offer of Judgment, counsel’s fee award would be separate from Plaintiff’s monetary relief.

Under these changed circumstances, the trial court should consider $7,500.00 for Plaintiff, ***plus*** attorney’s fees and costs a very good outcome indeed. However, without any real explanation of the trial court’s reasoning or oral argument for counsel to point out that the Offer of Judgment and the Settlement is an apples to oranges comparison, it is impossible to know

whether the trial court missed the changed circumstances or decided that the continued litigation produced an insufficiently better result.

The trial court's failure to explain its reasoning leaves this Court guessing as well.

A. The Trial Court Abused Its Discretion By Deleting Time that Plaintiff's Counsel Was Obligated to Incur.

Notwithstanding the trial court's refusal to allow any time whatsoever for the multiple different tasks Plaintiff's Counsel performed, it also refused to include time for tasks counsel was required to perform in order to competently represent the client. These include, but are not limited to, successfully opposing Defendant's Motion to Quash Plaintiff's subpoenas of its dealers who serviced the Santa Fe, preparing Plaintiff for her deposition, coordinating Defendant's vehicle inspection, engaging with the court-appointed mediator, preparing Plaintiff's arbitration statement, negotiating and finalizing the settlement, settlement negotiations throughout the litigation, preparing the motion for fees, researching the defects to Plaintiff's model vehicle, communicating with Defendant's counsel, drafting discovery requests, evaluating discovery produced, preparing discovery responses, etc.

Counsel was obligated to perform the above tasks to competently represent Plaintiff. While it is within the discretion of the trial court to reduce unnecessary or

excessive time incurred, it is an abuse of discretion to delete them entirely with no explanation. Therefore, this Court should reverse and remand.

III. DEFENDANT'S OPPOSITION RELIES ON SPECIOUS, MISGUIDED, AND FAULTY LOGIC SO THE COURT SHOULD DISREGARD AND GRANT PLAINTIFF'S APPEAL.

Try as it might, Defendant has no more insight to the trial court's reasoning than Plaintiff or this Court. Nonetheless, Defendant relies on argument that is transparently specious, misguided, and faulty. This Court should not give credence to Defendant's red herrings.

For example, Defendant argues that since Plaintiff did not raise any public policy argument in the trial court and can therefore not raise the argument on appeal. Def's. Brief, page 17. This is false. First, the federal and New Jersey consumer protection statutes contain fee-shifting provisions because they are ***remedial*** statutes. By their very nature, the MMWA and other consumer protection statutes provide for fee-shifting so that plaintiffs with relatively small value claims can find competent attorneys to seek relief in court, which is a based on the public policy to provide access to the courts and even the playing field for consumers. Second, in Plaintiff's motion for fees, counsel ***did*** raise the issue of the public policy in awarding fees under fee-shifting statutes. (Pa32; Pa34-35).

Defendant is also misguided in arguing that because the settlement resulted in Plaintiff making a separate motion for fees, the court should "strictly construe

that provision in light of the general policy disfavoring the award of attorney's fees." Def's Brief, page 17. The fact that the settlement bifurcated Plaintiff's relief and the fee award does not change the fact that the claim in the case was based on the MMWA, a remedial statute.

Next, Defendant makes the fanciful argument that Plaintiff did not request oral argument based on the request "No, unless opposition is filed." Id., page 19. Once Defendant opposed the motion, the condition subsequent was met, which meant that Plaintiff sought oral argument. Equally fanciful is Defendant's argument that the fact that Plaintiff did not file a motion for reconsideration is important. Ibid.

Additionally, Defendant opines that Plaintiff argued that Defendant "breached the settlement agreement by even raising the concept that fees are discretionary under the MMWA." Def's. Brief, page 21. In fact, Plaintiff argued that Defendant breached the settlement agreement because they asked the trial court to deny any fees at all, which ***did*** breach the settlement agreement. See Pa123 ("HMA agrees that it will not challenge the right of the Releasor to receive attorney's fees and cost as determined by the Court."). In fact, Plaintiff's brief points out that the settlement agreement improved on the MMWA by prohibiting Defendant from arguing that the trial court should award no fees.

Next, Defendant opines that the settlement agreement "only precluded Defendant from arguing that Plaintiff had no 'right' to file the motion to recover attorney's fees." Def's Brief, pages 22-23. This is plainly wrong—the settlement agreement speaks for itself.

Defendant also argues that because Plaintiff cannot demonstrate that: (1) oral argument would not have changed the result (Id., page 19); (2) the trial court performed an improper "proportionality" analysis (Id., pages 14-15); (3) the trial court relied on Plaintiff's failure to accept the improper offer of judgment (Id., pages 23-24); or (4) the trial court relied on out-of-state, unpublished decisions (Id., page 24), there is no reversible error. This logic is faulty. Indeed, because the trial court's reasoning cannot be discerned, this Court should find that the trial court abused its discretion and committed reversible error.

Last, Defendant's argument that Plaintiff failed to file her motion for fees within 60 days of the signing of the settlement agreement should not be considered by this Court because it was not raised by Defendant with the trial court. Id., pages 23-24. See Alloco v. Ocean Beach & Bay Club, 456 N.J.Super. 124, 145 (App.Div. 2018).

CONCLUSION

For the foregoing reasons, plaintiff's counsel respectfully requests that the judgment below be reversed and the matter remanded for a determination of

a reasonable fee award consistent with state and federal public policy guaranteeing equal access to courts, together with the legal precedent and principles governing this determination, and a clear articulation of factual findings correlated to the relevant legal principles.

Respectfully submitted,
Appellate Section
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Dated: June 20, 2024

By: *David C. Ricci* .
DAVID C. RICCI, ESQ.