NO. COA01-533

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

BRENDA HOUSE,
Plaintiff-Appellant,

v. Johnston County
No. 99 CVS 1591

LEVI STONE,
Defendant-Appellee.

Appeal by plaintiff from order entered 8 January 2001 by Judge Jack A. Thompson in Superior Court, Johnston County. Heard in the Court of Appeals 23 January 2002.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiff-appellant.

Law Office of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellee.

McGEE, Judge.

Brenda House (plaintiff) filed a complaint on 9 July 1999 seeking recovery for her payment of medical bills for injuries suffered by her minor daughter, LaShay House, in an automobile collision on 15 July 1996. In the complaint, a claim was also filed for LaShay House by her guardian ad litem, Luther D. Starling, Jr., which was later voluntarily dismissed without prejudice. Levi Stone (defendant) and Maggie Miller Corprew filed an answer denying liability. Plaintiff later dismissed her claim against Maggie Miller Corprew.

Defendant filed an offer of judgment on 25 July 2000, pursuant to N.C. Gen. Stat. § 1A-1, Rule 68, in the amount of $1,264.00 which was "inclusive of all damages [and] attorney's fees taxable as costs[.]" Following a jury trial on 13 November 2000, the jury found defendant negligent and awarded plaintiff $2,348.00.

Plaintiff filed a motion on 21 November 2000 for costs, pursuant to N.C. Gen. Stat. § 6-20, and for reasonable attorney's fees, pursuant to N.C. Gen. Stat. § 6-21.1. An affidavit of L. Lamar Armstrong, Jr., plaintiff's counsel, was filed in support of the motion. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 52, plaintiff also requested "specific findings of fact and conclusions of law with respect to the [trial court's] ruling on plaintiff's motion to tax reasonable attorney's fees" in a motion dated 4 January 2001.

In an order filed 8 January 2001, the trial court denied plaintiff's motion for attorney's fees but granted plaintiff's request for costs in the amount of $1,692.80. From this order plaintiff appeals.

By her first assignment of error, plaintiff contends the trial court failed to make sufficient findings of fact and conclusions of law as required by our Court in *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999), to support its order denying plaintiff's request for attorney's fees.

As a general rule, attorney's fees are not recoverable by the successful party at trial as a part of court costs. *Id.* at 349, 513 S.E.2d at 333. However, an award of attorney's fees is permitted pursuant to N.C. Gen. Stat. § 6-21.1 (1999), which

provides that

> [i]n any personal injury or property damage suit, . . . instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

When determining whether to award an attorney's fee, our Court stated in *Washington* that

> pursuant to N.C. Gen. Stat. § 6-21.1 . . . the trial court is to consider the entire record in properly exercising its discretion, including but not limited to the following factors: (1) settlement offers made prior to the institution of the action . . . (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers . . . (3) whether defendant unjustly exercised "superior bargaining power" . . . (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose" . . . (5) the timing of settlement offers . . . (6) the amounts of the settlement offers as compared to the jury verdict; and the whole record[.]

Washington, 132 N.C. App. at 351, 513 S.E.2d at 334-35 (citations omitted). A "[m]ere recitation by the trial court that it has considered all *Washington* factors without additional findings of fact would be inadequate and would not allow for meaningful appellate review." *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 572-73, 551 S.E.2d 852, 857 (2001). However, the trial court is not required to make detailed findings of fact as to each factor. *Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001).

Plaintiff argues that the order of the trial court "does not

reflect findings on all of the required issues." We agree. In its order, the trial court stated that it considered *Washington* and made twelve findings of fact. As to factor two of the *Washington* factors, the trial court failed to properly consider whether the "judgment finally obtained" was more favorable than defendant's offer of judgment pursuant to Rule 68. *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334 (1999) (citing *Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996)).

In its order, the trial court found that "plaintiff has incurred costs in the sum of $1,692.80," that "defendant served a lump sum offer of judgment to [plaintiff] in the amount of $1,264.00 on July 24, 2000" in response to plaintiff's demands, and that the jury awarded plaintiff judgment in the amount of $2,348.00. However, there is no finding of the "judgment finally obtained" as required by *Washington* and whether this judgment is more favorable than defendant's offer of judgment pursuant to Rule 68.

Our Supreme Court in *Poole v. Miller* stated that "within the confines of Rule 68, 'judgment finally obtained' means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury's verdict." *Poole*, 342 N.C. at 353, 464 S.E.2d at 411. Thus, we remand the order of the trial court for additional findings showing that the trial court properly utilized

the "judgment finally obtained" in consideration of the second *Washington* factor, and in its determination as to whether to award attorney's fees in this case.

We disagree with plaintiff's argument that the trial court failed to make sufficient findings as to the remaining *Washington* factors. As to factor one of the *Washington* factors, the trial court found that "[n]o attempt was made by [plaintiff] prior to the institution of litigation to negotiate a settlement with the defendant's liability insurance carrier[.]" There is no evidence in the record that plaintiff made any settlement demand prior to commencement of this action. The trial court did not make findings as to factor three. Nevertheless, "'the absence of such a finding does not require reversal when the trial court made adequate findings on the whole record to support'" its decision on attorney's fees. *Davis v. Kelly* 147 N.C. App. 102, 108, 554 S.E.2d 402, 406 (2001) (quoting *Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 573-74 (2001)).

Because the present action was not brought by an insured or a beneficiary against an insurance company defendant, factor four is inapplicable and the trial court was not required to make a finding as to this factor. *See Washington*, 132 N.C. App. at 350, 513 S.E.2d at 334. The trial court found in considering factor five that:

> 7. By letter dated July 17, 2000, counsel for plaintiff indicated that the value of Brenda and LaShay House's claims were arguably more than the total of the applicable liability and underinsured policies, which total[]ed $75,000.00, and suggested that the

> LaShay House claim would be voluntarily dismissed without prejudice, and that Brenda House would try her claim for $6,500.00 of medical bills.
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> 8. In response to [plaintiff's] demands, the defendant served a lump sum offer of judgment to Brenda House in the amount of $1,264.00 on July 24, 2000.
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> . . .
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> 11. Mediation was conducted and impassed on October 20, 2000. The defendant's last offer at mediation was $1,788.00, and the plaintiff's settlement demand was $4,741.00.

The trial court found as to factor six that plaintiff indicated she "would try her claim for $6,500.00 of medical bills." "In response to [this] demand[]," defendant made an offer of judgment for $1,264.00. At mediation, defendant's last offer was $1,788.00, compared to plaintiff's settlement demand of $4,741.00. Finally, the trial court found that the jury returned a verdict for plaintiff in the amount of $2,348.00. We find the trial court made sufficient findings on the remaining factors to support its statement in the order that it had considered the *Washington* factors.

Plaintiff further argues that the trial court made irrelevant findings of fact in its order. We disagree. The findings of fact reflect that the trial court properly considered the entire record in determining whether to award an attorney fee, as *Washington* requires. Following a hearing on 12 December 2000, the trial court stated in its order that it "reviewed the court file, heard arguments from counsel, the Affidavit of L. Lamar Armstrong, Jr., and . . . received, reviewed, and considered relevant case law,

including [*Washington*] . . . and the factors for consideration outlined therein[.]" Thus, the trial court properly considered the appropriate factors enumerated in *Washington,* as well as the entire record, in its order.

Plaintiff also contends that the trial court failed to make findings as required by Rule 52. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (1999) states that "[f]indings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party[.]" Upon such request, compliance by the trial court is mandatory and the findings and conclusions must be sufficiently detailed to allow meaningful review. *Andrews v. Peters*, 75 N.C. App. 252, 258, 330 S.E.2d 638, 642 (1985).

In this case, the record shows that plaintiff made a request pursuant to N.C. Gen. Stat. § 1A-1, Rule 52, for the trial court to make "specific findings of fact and conclusions of law with respect to the [trial court's] ruling on plaintiff's motion to tax reasonable attorney's fees pursuant to G.S. § 6-21.1." Because we have determined that the trial court failed to properly assess the second *Washington* factor, we agree that the trial court failed to make sufficient findings pursuant to plaintiff's Rule 52 request.

By her second assignment of error, plaintiff argues that the trial court's findings of fact numbers three, five, six and seven are not supported by competent evidence. Plaintiff withdraws her objection to findings of fact numbers ten and eleven.

Plaintiff argues the competent evidence before the trial court upon which the court could have based its findings of fact is the

court file, evidence presented at trial, and the affidavit by plaintiff's counsel. According to plaintiff, the oral argument by defendant's counsel at the motion hearing is not competent evidence and cannot be the basis upon which findings of fact are made. However, plaintiff cites no case law or statutory authority in her brief to support her argument that an attorney, in opposing an award of an attorney's fees, is required to give sworn testimony or a written affidavit for the information in the attorney's argument to be considered by the trial court. N.C.R. App. P. 28(b)(5) requires that an appellant's argument "contain citations of the authorities upon which appellant relies."

Further, although plaintiff contends that because an argument is not under oath and thus opposing counsel is not afforded the opportunity to cross-examine inaccurate or incomplete "facts" injected by way of argument by counsel, the trial court's order does not show that plaintiff objected to oral statements of opposing counsel. As defendant points out, our Court in *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999), noted that the trial court had considered the arguments of counsel in exercising its discretion to deny a request for attorney's fees. *See also Stilwell v. Gust*, ___ N.C. App. ___, 557 S.E.2d 627 (2001) (trial court reviewed entire record, including arguments of counsel, in awarding attorney fees). This assignment of error is overruled.

Having determined that the trial court failed to make sufficient findings for our review under *Washington*, we need not

address plaintiff's third assignment of error that the trial court abused its discretion in failing to award attorney's fees.

Reversed and remanded for additional findings consistent with this opinion.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).