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NO. COA02-120

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

BONITA SUE PARSONS  
Plaintiff

v.

Wilkes County  
No. 94 CVD 186

CHRISTOPHER RYAN MILNER  
Defendant

Appeal by defendant from judgment entered 9 October 2001 by Judge C. Preston Cornelius in Superior Court, Wilkes County. Heard in the Court of Appeals 13 November 2002.

*Dennis R. Joyce, for plaintiff-appellee.*

*Willardson, Lipscomb & Miller, L.L.P., by William F. Lipscomb for defendant-appellant.*

WYNN, Judge.

This appeal arises from the trial court's award of an attorney's fee to plaintiff's counsel under N.C. Gen. Stat. § 6-21.1 (2001) six years after obtaining a jury verdict in a personal injury action. On appeal, defendant's counsel argues that based on the delay of six years, the trial court abused its discretion by finding that plaintiff's counsel did not waive, by implication, his right to an attorney's fee. We find no abuse of discretion and, therefore, affirm the order of the trial court.

On 13 June 1995, based on a jury's verdict in favor of

plaintiff, the trial court entered judgment for \$4,600 and taxed defendant with costs, including plaintiff's attorney's fee "in an amount to be set at a later date."

On 23 August 1996, plaintiff's counsel contacted defense counsel by letter requesting a fee offer. An offer was made, several letters were exchanged, but no settlement was reached. On 19 May 1997, plaintiff's counsel requested a hearing for 5 June 1997, before Superior Court Judge C. Preston Cornelius, to resolve the fee issue. On 21 May 1997, defense counsel sent a letter to Judge Cornelius explaining his longstanding plans to take a fishing trip on the North Carolina coast on 5 June 1997. Plaintiff's counsel acquiesced, and the hearing was not held on 5 June 1997. At that time, neither plaintiff nor defense counsel requested to schedule another hearing.

Over the next three years it is unclear when, what, or if communications occurred between counsel. However, on 11 October 2000, plaintiff's counsel telephoned defense counsel stating he wanted to schedule a hearing "in the near future" because of Judge Cornelius' impending retirement. On 28 September 2001, a hearing was held before Judge Cornelius to resolve the matter. At that hearing, defendant's "primary position . . . [was] simply that there [had] been an implied waiver of the request of plaintiff's counsel for an attorney fee." The trial court, however, held that "plaintiff's attorney has not waived any right," and awarded plaintiff's attorney a fee of \$7,000. From this order, defendant appeals.

We note, at the onset, that defendant does not challenge the trial court's initial substantive findings that plaintiff's attorney was entitled to attorney's fees or the award of attorney's fees in the amount \$7,000. Rather, defendant simply argues, by five assignments of error, that plaintiff's counsel waived his right to an attorney's fee by implication, and that, consequently, the judge erred in not finding such a waiver.

"The decision to allow attorney's fees is in the discretion of the presiding judge, and is reversible by an appellate court only for abuse of discretion." *Davis v. Kelly*, 147 N.C. App. 102, 106, 554 S.E.2d 402, 405 (2001). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999) (citations omitted).<sup>1</sup>

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<sup>1</sup>"The general rule in North Carolina is that in the absence of contractual obligation or statutory authority, a successful litigant may not recover attorney's fees as damages or a part of the court costs." *Davis v. Kelly*, 147 N.C. App. 102, 105, 554 S.E.2d 402, 404 (2001). In the case *sub judice*, however, the trial court awarded attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 (2001), which provides:

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such 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

"Waiver is an affirmative defense which 'must be pled with certainty and particularity.'" *Taha v. Thompson*, 120 N.C. App. 697, 702, 463 S.E.2d 553, 556 (1995) (quoting *Duke University v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989)). "Waiver by implication is not looked upon with favor by the courts; in fact, every reasonable intendment will be indulged against the waiver of fundamental rights, the courts never presuming acquiescence in their loss." *Chemical Bank v. Belk*, 41 N.C. App. 356, 366, 255 S.E.2d 421, 428 (1979). Accordingly, "[t]o prove that a party has waived [a] right . . . the opposing party must produce evidence that there was 'an intention to relinquish a right, advantage, or benefit . . . implied from acts or conduct that naturally lead the [opposing] party to believe that the right has been intentionally given up.'" *Barclays Bank PLC v. Johnson*, 129 N.C. App. 370, 373, 499 S.E.2d 768, 770 (1998) (quoting *Klein*

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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.

Moreover, in *Robinson v. Shue*, 145 N.C. App. 60, 64, 550 S.E.2d 830, 833 (2001), we held that:

The purpose of N.C. Gen. Stat. § 6-21.1 is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

*v. Avemco Insurance Co.*, 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975)). Thus, "[w]aiver is an intentional relinquishment or abandonment of a known right or privilege." *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 10, 558 S.E.2d 199, 206 (2001).

Here, the six-year delay between judgment and award is the only evidence in the record supporting a theory that plaintiff's attorney intended to waive his right to a fee. However, the trial court concluded that this evidence was insufficient to establish an implied waiver. The trial court based this conclusion on plaintiff's counsel's attempt to negotiate a settlement on 25 September 1996, to schedule a hearing on 5 June 1997, and his scheduling of a second hearing on 28 September 2001. From this evidence, we cannot conclude that the "court's ruling [was] manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." Accordingly, the trial court did not abuse its discretion by not finding waiver by implication, and, therefore, we find no error.

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).