

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-132

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

HELENE BARRY,
Plaintiff-Appellee,

v.

Iredell County
No. 99 CVD 01408

ALAN CARPENTER, Administrator
of the Estate of MINNIE SOBIECK,
deceased, Iredell County File
No. 99 E 229,
Defendant-Appellant.

Appeal by defendant from judgment entered 31 August 2001 by Judge Samuel A. Cathey in District Court, Iredell County. Heard in the Court of Appeals 26 August 2002.

Pressly, Thomas & Conley, P.A., by Edwin A. Pressly, for plaintiff-appellee.

Helms, Henderson & Porter, P.A., by Ronnie F. Craig and Christian R. Troy, for defendant-appellant.

McGEE, Judge.

A jury awarded plaintiff \$139.90 for personal injuries sustained in an automobile collision with defendant on 1 May 1998. Plaintiff moved for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 (1999). After hearing from the parties, the trial court entered findings of fact summarizing the course of the litigation as follows: Plaintiff made an initial settlement demand of \$10,500 on 3 February 1999. Defendant responded with an offer of \$3,200 on

2 March 1999. Plaintiff reduced her demand to \$6,000, and defendant increased his offer to \$4,200 in April, 1999. Plaintiff filed her complaint in May 1999. No further settlement offers were made by either party. Defendant never filed an offer of judgment. See N.C.R. Civ. P. 68.

The matter was submitted to an arbitrator, who entered a ruling in favor of plaintiff in the amount of \$9,000 on 18 November 1999. Plaintiff offered to accept this amount without seeking attorney's fees. Defendant exercised his right to a jury trial *de novo*, which was held on 21 May 2001, resulting in the \$139.90 verdict.

The trial court found that plaintiff "acted in good faith in presenting [her] medical expenses and bills in the amount of \$3,332.00 to the jury." In light of plaintiff's medical expenses, her physical injuries, and the results of arbitration, the trial court further found that plaintiff did not act unreasonably in refusing defendant's settlement offers. Instead, the trial court found that defendant acted unreasonably in failing to increase his settlement offer in response to the arbitrator's ruling.

The trial court concluded that plaintiff was entitled to recover a reasonable attorney's fee under N.C. Gen. Stat. § 6-21.1. The fact that the jury's verdict was less than the amount of defendant's settlement offer before plaintiff filed her complaint was deemed not "determinative of the attorney fee issue." Based on the affidavit of plaintiff's counsel, the trial court further determined that \$6,847.50 was a reasonable fee. Defendant appeals

the attorney's fee award.

Defendant argues that the trial court abused its discretion in awarding attorney's fees under N.C. Gen. Stat. § 6-21.1 without considering all of the relevant factors enumerated in *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999). Defendant further claims the trial court improperly based the amount of the fee on the hours billed by plaintiff's counsel without determining whether counsel's representation was based upon a contingent fee contract. Finally, defendant contends the trial court erred in considering the amount of the arbitration award when ruling on the attorney's fee request.

A trial court's award of attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 is reviewed for abuse of discretion and will be reversed only when it is completely arbitrary or "'manifestly unsupported by reason[.]'" See *Davis v. Kelly*, 147 N.C. App. 102, 106, 554 S.E.2d 402, 405 (quoting *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999)). In exercising its discretion, however, the trial court shall enter findings of fact as to the following factors, based on the entire record:

(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[.]

Washington, 132 N.C. App. at 351, 513 S.E.2d at 334-35 (citations

omitted). Detailed findings as to each factor are not necessary. See *Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001). A trial court's findings of fact are binding on appeal if supported by competent evidence. See *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000).

We find the trial court acted within its discretion in awarding attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1. Consistent with *Washington*, the trial court's findings of fact detailed the entire course of the parties' settlement negotiations. The court noted defendant's failure to make an offer of judgment under Rule 68, or to make any additional settlement offers after the complaint was filed or after the arbitrator's award of \$9,000 to plaintiff. While recognizing that the jury's verdict was less than defendant's pre-litigation settlement offers, the trial court found that plaintiff's claim against defendant was meritorious, her medical expenses were presented to the jury in good faith, and her failure to accept defendant's offers was not unreasonable. By contrast, the trial court found that defendant's failure to adjust his settlement position following arbitration was unreasonable. These findings reflect a thorough consideration of the *Washington* factors based on the entire record, including the evidence at trial.

Defendant observes that the trial court's findings of fact are not "numbered[,] " but merely "recite[] the chronology of the demands and offers." There is no requirement that the trial court number its written findings to correspond to the *Washington*

factors. Moreover, the trial court's chronology of the parties' conduct reflects a full consideration of the timing and amount of their settlement offers as contemplated by *Washington*.

Defendant argues that the trial court failed to address whether he exercised unfair bargaining power. He deems this omission significant, because the record lacks evidence of any such misconduct. However, the trial court's failure to make a finding as to defendant's exercise of unfair bargaining power is not grounds for reversal. See *Tew*, 143 N.C. App. at 537, 546 S.E.2d at 185 (upholding fee award where the court's findings "did not mention that defendant may have unjustly exercised superior bargaining power").

Defendant also challenges the amount of the fee award, noting that the trial court failed to consider whether plaintiff's counsel had a contingent fee contract. The trial court found that the time billed by counsel in the affidavit was "reasonable for the work performed in this case" and that counsel's hourly rate was "reasonable considering the attorney's experience and as compared to likely situated attorneys in this area." Defendant does not challenge these findings but asserts, "[c]ontingent fees are customary in personal injury cases such as this, and prior to an award of a fee based upon an hourly rate, the court should consider what the contractual arrangement is[.]"

Defendant's unsupported speculation about the existence of a contingent fee contract between plaintiff and her counsel provides no basis for relief. "This Court has . . . held . . . that a

contingent fee contract does not control the trial court's determination and, when a statute provides for a 'reasonable' fee, the amount of the fee should be based upon the actual work performed by the attorney." *Epps v. Ewers*, 90 N.C. App. 597, 600, 369 S.E.2d 104, 105 (1988); *In re Estate of Tucci*, 104 N.C. App. 142, 155-56, 408 S.E.2d 859, 868 (1991), *disc. review improvidently allowed*, 331 N.C. 749, 417 S.E.2d 236 (1992).

"[T]o determine if an award of counsel fees is reasonable, 'the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney' based on competent evidence." *Brockwood Unit Ownership Assn. v. Delon*, 124 N.C. App. 446, 449-50, 477 S.E.2d 225, 227 (1996) (quoting *West v. Tilley*, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995)). The affidavit of plaintiff's counsel details the work performed in plaintiff's case between 8 May 1999 and 22 May 2001. Counsel devoted 41.05 hours to the case at a billing rate of \$165 per hour. Counsel represented that the "hourly rate is at or below what similarly situated attorneys charge in this area." The trial court's fee award tracks the total fee reflected on the affidavit and is, therefore, supported by competent evidence. Defendant offered no conflicting evidence of the customary fee in such a case, the reasonableness of the hours devoted to the case by plaintiff's counsel, or the reasonableness of counsel's hourly rate.

In his remaining assignment of error, defendant argues the trial court erred in considering the outcome of the arbitration

proceeding in ruling on plaintiff's attorney's fee request. Defendant did not object to this evidence in the trial court and has not preserved the issue for appellate review. See *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979).

We affirm the trial court's judgment.

Affirmed.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).